EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Brussels, 13 July 2020
REV1 - Replaces the notice dated 8 February 2018

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF MARKETS IN FINANCIAL INSTRUMENTS

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a "third country".[1] The Withdrawal Agreement[2] provides for a transition period ending on 31 December 2020. Until that date, EU law in its entirety applies to and in the United Kingdom.[3]

During the transition period, the EU and the United Kingdom will negotiate an agreement on a new partnership. However, it is not certain whether such an agreement will be concluded and will enter into force at the end of the transition period. In any event, such an agreement would create a relationship which will be very different from the United Kingdom's participation in the internal market.[4]

Moreover, after the end of the transition period the United Kingdom will be a third country as regards the implementation and application of EU law in the EU Member States.

Therefore, all interested parties, and especially economic and financial operators, are reminded of the legal situation and practical implications that the end of the transition period will have on their activities.

Advice to stakeholders:

Investment firms are advised to carefully assess the consequences of the end of the transition period and take appropriate action, such as ensuring that the necessary

1 A third country is a country not member of the EU.

2 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L29, 31.1.2020, p. 7 ("Withdrawal Agreement").

3 Subject to certain exceptions provided for in Article 127 of the Withdrawal Agreement, none of which is relevant in the context of this notice.

4 In particular, a free trade agreement does not provide for internal market concepts (in the area of goods and services) such as mutual recognition.

authorisations are in place, and that the necessary actions for any relocation, corporate reorganisation or contractual adaptations have been taken.

Investment firms should also duly inform their clients and counterparts on the implications of the end of the transition period on their business and contractual relationships and on any impact of related measures that a firm has taken or intends to take (such as the loss of passporting rights, implications of any corporate reorganisation, changes to contractual terms or contractual and statutory rights of clients or counterparties, including the right to modify the contractual terms or cancel the contracts and any right of recourse).

Business adaptations and investment strategies for investment firms and underlying clients should be ready for no equivalence being in place by the end of the transition period.[5] A high level of preparation by investment firms will mitigate firms' and their clients' individual exposure to any impacts at the end of the transition period. Investment firms are therefore strongly encouraged to take advantage of the time until 31 December 2020 to ensure that they have taken all the necessary actions to prepare for the UK's withdrawal and the end of the transition period.

Please note: This notice does not address

- EU rules on conflict of laws and jurisdictions ("judicial cooperation in civil and commercial matters");
- EU company law;
- EU rules on personal data protection.

For these aspects, other notices are in preparation or have been published.[6]

After the end of the transition period the EU rules of the MiFID framework for investment services and activities[7] no longer apply to the United Kingdom. This has in particular the following consequences:

1. AUTHORISATIONS

- At the end of the transition period, entities established and authorised by United Kingdom competent authorities (hereafter "UK investment firms") will no longer

[5] Articles 23, 28, 47 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12.6.2014, p. 84 (MiFIR)

[6] https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period_en.

[7] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12.6.2014, p. 349 (MiFID II), and MiFIR.

benefit from the MiFID authorisation[8] to provide MiFID investment services and activities in the Union[9] (they will lose the so-called "EU passport") and will become third-country firms. This means that those investment firms will no longer be allowed to provide services in the EU on the basis of their current authorisations.[10]

- EU subsidiaries (legally independent companies established in the EU and controlled by or affiliated to firms established or authorised in the United Kingdom) can continue to operate as EU investment firms if they have obtained a MiFID authorisation in one of the EU Member States. These firms, like any other authorised EU MiFID firm, have to comply with MiFID requirements amongst others in terms of substance requirements (including governance, outsourcing or the use of branches in a third-country to provide services back in the EU).[11] Such firm's business model and structure (including links with non-EU entities) will be part of the assessment of the relevant MiFID competent authorities (e.g. qualifying shareholders, the group business model/structure, the potential (prudential) consolidated supervision or lack thereof, etc.).

- Branches in the EU of UK investment firms will become branches of third-country investment firms and will need to comply with national requirements applicable in the Member State where the branch is established or with the regime set in Article 39-41 MiFID II where applicable. The provision of services/activities is limited to that Member State's territory.

- UK market operators/investment firms operating a trading venue or execution venue will no longer benefit from the MiFID authorisation/licence[12]. UK based regulated

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8 Article 5 MiFID II. Credit institutions authorised under Directive 2013/36/EU may also provide investment services and activities. Before granting an authorisation under Directive 2013/36/EU, relevant competent authorities should verify that they comply with relevant MiFID provisions

9 Annex I to MiFID II provides a list of services and activities and financial instruments covered by the MiFID framework.

10 The benefit of the MiFID passport will therefore be limited to investment firms established in the EU having obtained a MiFID authorisation in accordance with the authorisation and substance requirements set out in the MiFID framework. See also ESMA Opinion - General Principles to support supervisory convergence in the context of the UK withdrawing from the EU (https://www.esma.europa.eu/sites/default/files/library/esma42-110-433_general_principles_to_support_supervisory_convergence_in_the_context_of_the_uk_withdrawing_from_the_eu.pdf), ESMA Opinion to support supervisory convergence in the area of investment firms in the context of the United Kingdom withdrawing from the European Union (https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-firms-in-context-united-kingdom).

11 See also above ESMA opinions and specific clarifications on these matters, in particular on the risks of letter-box entities which may arise from the use of outsourcing arrangements or from the use of non-EU branches for the performance of functions/services with respect to EU clients. The use of non-EU branches needs to be based on objective reasons linked to the services provided in the non-EU jurisdiction and does not result in a situation where such non-EU branches perform material functions or provide services back into the EU.

12 See Articles 5, 44 MiFID. Also see ESMA Opinion in the area of secondary markets in the context of the UK withdrawing from the EU (https://www.esma.europa.eu/sites/default/files/library/esma70-154-270_opinion_to_support_supervisory_convergence_in_the_area_of_secondary_markets_in_the_context_of_the_united_kingdom_withdrawing_from_the_european_union.pdf).

markets (RMs), multilateral trading facilities (MTFs) or systematic internalisers (SI) will thus cease to be eligible venues for trading shares subject to the MiFIR share trading obligation; EU counterparts can no longer undertake trades in shares subject to the share trading obligation on such platforms.[13] Similarly, UK based RMs, MTFs or organised trading facilities (OTFs) will cease to be eligible venues for the purposes of the MiFIR derivatives trading obligation[14] and EU counterparts will no longer be able to undertake trades on these platforms. The Commission is empowered to declare third country trading venues equivalent for the purposes of the EU share and derivatives trading obligations[15]. While the assessment of the UK's equivalence in these areas is ongoing, the assessment has not been finalised. All stakeholders thus have to be informed and ready for a scenario where shares and derivatives subject to the EU trading obligations can no longer be traded in the UK trading venues. In both cases, EU counterparts need to reassess their trading arrangements to ensure continued compliance with their obligations under the MiFID framework.

- The end of the transition period will also have an impact on the exemption set out in Section C(6) of Annex I of MiFID II (the "MiFID II REMIT- carve-out"). In order not to be considered as a financial instrument, a derivative contract must meet three conditions i) it must qualify as a wholesale energy product (ii) it must be traded on an Organised Trading Facility (OTF) and iii) it must be physically settled. The end of the transition period will have an impact on the first two conditions. In particular, where a wholesale energy product would not be traded on an EU OTF, it would cease to be eligible to the C(6) carve-out under MiFID II.[16]

- Where previously applicable, UK based trading venues and central counterparties (CCPs)[17] will no longer benefit from the open and non-discriminatory access to EU trading venues and EU CCPs and to EU benchmarks respectively.

2. CONTRACTS

- The loss of MiFID authorisations may also impact relationships with EU clients/counterparts and may affect the ability of UK established firms to continue performing certain obligations and activities deriving from existing contracts.[18] Under MiFID[19] firms are required to take measures to ensure continuity in the performance of investment services and activities. To this end, firms should assess

13 See Article 23 MiFIR on trading obligations.

14 Cf. Article 28 MiFIR. Derivatives subject to the trading obligation comprise of euro, dollar and pound interest rate swaps in the most common benchmark tenors, as well as index-based CDS (Commission Delegated Regulation (EU) 2017/2417).

15 See Articles 23 and 28 MiFIR.

16 See also ESMA Public Statement on the impact of Brexit on MiFID II/MiFIR and the Benchmark Regulation (BMR), https://www.esma.europa.eu/sites/default/files/library/esma70-155-7253_public_statement_mifidii_bmr_provisions_under_a_no_deal_brexit.pdf

17 Articles 35, 36, 37, 38 MiFIR.

18 Also considering applicable national rules.

19 Article 16(4) MiFID II.

the impact of the end of the transition period on their operations and identify and mitigate compliance risks.

For instance, clients can no longer have direct electronic access to EU established trading venues via UK established firms. Further, UK established UCITS will become non-EU AIFs and EU established investment firms may be no longer able to distribute them to their clients, unless the relevant AIFMD provisions are complied with.

3. OTHER ASPECTS

- The outsourcing of certain operational functions to UK providers may be undertaken only when in compliance with relevant MiFID requirements.[20] In particular, the outsourcing of functions related to portfolio management to UK entities will only be permitted where the conditions under Article 32 of the MiFID Delegated Regulation 2017/565 are met, including the requirement that cooperation arrangements between National Competent Authorities and UK competent authorities are in place. Moreover, the European Securities and Markets Authority (ESMA) has issued opinions with specific clarifications on these matters, in particular on the risks of letter-box entities which may arise from the use of outsourcing arrangements or from the use of non-EU branches for the performance of functions/services with respect to EU clients.[21]

- In light of MiFID obligations on disclosure of information to clients, firms providing investment services are required to provide clients or potential clients with accurate disclosure, in good time and in any case before clients are bound by any contract, on the impact on the provision of services and investors' rights that may emerge from the end of the transition period including the upcoming loss by the firm of its MiFID authorisation.[22] Firms providing investment services are also required to notify clients in good time about any material change to the information already provided, including if any material changes occurs to the situation of the firm and any resulting consequences for contracts.[23]

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20 Cf. Article 16(5) MiFID II as further detailed in Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive ("MiFID Delegated Regulation 2017/565"), OJ L 87, 31.3.2017, p. 1.

21 ESMA Opinion - General Principles to support supervisory convergence in the context of the UK withdrawing from the EU (31 May 2017) (https://www.esma.europa.eu/sites/default/files/library/esma42-110-433_general_principles_to_support_supervisory_convergence_in_the_context_of_the_uk_withdrawing_from_the_eu.pdf), ESMA Opinion to support supervisory convergence in the area of investment firms in the context of the United Kingdom withdrawing from the European Union (13 July 2017) (https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-firms-in-context-united-kingdom).

22 Articles 44 and 46 of MiFID Delegated Regulation 2017/565.

23 Article 46 MiFID Delegated Regulation 2017/565.

- According to Article 59 MiFID II, the provision of data reporting services[24] requires an authorisation by the home Member State competent authority. UK based data reporting service providers which have not obtained a MiFID authorisation by a competent authority established in the EU will have to cease to serve EU markets.

The website of the Commission on Financial Markets https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets_en provides for general information concerning the MiFID framework for investment services and activities. These pages will be updated with further information, where necessary.

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[24] See Annex I, Section D, to MiFID II.