

PUBLIC STATEMENT

Reminder to firms of the MiFID II rules on ‘reverse solicitation’ in the context of the recent end of the UK transition period

The European Securities and Markets Authority (ESMA) is issuing this statement to remind firms of the MiFID II¹ requirements on the provision of investment services to retail or professional clients by firms not established or situated in the European Union.

According to Article 42 of MiFID II, where a retail client or professional client, within the meaning of Section II of Annex II, established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, the third country firm is not subject to the requirements under Article 39 of MiFID II (Establishment of a branch)².

ESMA has already provided guidance to firms on the application of the MiFID II requirements on the provision of investment services and activities by third country firms³, including how the notion of a client initiating “*at its own exclusive initiative the provision of an investment service or activity by a third-country firm*” included in Article 42 of MiFID II should be understood and applied.⁴

With the end of the UK transition period on 31 December 2020, some questionable practices by firms around reverse solicitation have emerged. For example, some firms appear to be trying to circumvent MiFID II requirements by including general clauses in their Terms of Business or through the use of online pop-up “I agree” boxes whereby clients state that any transaction is executed on the exclusive initiative of the client.

¹ Markets in Financial Instruments Directive – Directive 2014/65/EU of the European Parliament and of the Council

² According to Article 39 of MiFID II, a “*Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State.*”

³ ESMA35-43-349 Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics

⁴ See Q&A 13.1 of ESMA35-43-349

ESMA reminds firms that as provided in recital 111 of MiFID II “*where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client*”. This is true “*regardless of any contractual clause or disclaimer purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client*”.⁵

As for the means of such solicitations, ESMA reminds firms that every communication means used, such as press releases, advertising on internet, brochures, phone calls or face-to-face meetings should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm’s investment services or activities or on financial instruments. ESMA also reminds firms that such a solicitation, promotion or advertising should be considered regardless of the person through whom it is issued: the third country firm itself, an entity acting on its behalf or having close links with such third country firm or any other person acting on behalf of such entity.

ESMA would like to recall that:

- the provision of investment services in the EU without proper authorisation in accordance with the EU and the national law applicable in Member States exposes service providers to the risk of administrative or criminal proceedings, for the application of relevant sanctions,
- when using the services of investment service providers which are not properly authorised in accordance with EU and Member States’ law, investors may lose protections granted to them under EU relevant rules, including coverage under the investor compensation schemes in accordance with Directive 97/9/EC.

⁵ See Q&A 13.1 of ESMA35-43-349