

Supervisory briefing

On Triangular Passporting



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1 Executive Summary

This supervisory briefing has been developed to promote common supervisory approaches and practices across National Competent Authorities (NCAs) for Triangular Passporting under the Directive on markets in financial instruments (Directive 2014/65/EU, “MiFID II”). Triangular Passporting is the practice of authorised investment firms using a branch or tied agent established through the freedom of establishment (Article 35 MiFID II) in a host Member State (Member State B) to provide investment services in accordance with the freedom to provide investment services and activities (Article 34 MiFID II) in another host Member State (Member State C).

Triangular Passporting can present challenges and require attention in the perspective of NCAs’ supervisory work, firms’ compliance with the relevant MiFID II requirements and investor protection.

This supervisory briefing aims at providing clarifications, enhance certainty and supervisory consistency and improve cooperation between NCAs, by setting out ESMA’s supervisory expectations for firms and NCAs.

The intended outcome of this briefing is to foster supervisory convergence to support both effective supervision and investor protection. The briefing does not create new legal obligations and is not subject to a “comply or explain” mechanism, while it provides practical guidance for firms and NCAs.

2 Introduction and background

2.1 Overview

1. Under the Markets in Financial Instruments Directive (Directive 2014/65/2014, hereafter MiFID II)¹, investment firms (hereafter firms) that are authorised in one EU Member State and supervised in that Member State can provide investment services or perform investment activities in another EU Member State under the freedom to provide services (Article 34) or the freedom of establishment (Article 35) and thereby using the EU passport².
2. In their supervisory work, NCAs have observed the so called “Triangular Passporting” among the business practices of investment firms. Triangular Passporting can be described as follows: an entity authorised as an investment firm uses a branch or tied agent established through the freedom of establishment (in accordance with Article 35 MiFID II) in a host Member State (Member State B) to provide investment services in accordance with the freedom to provide investment services and activities (in accordance with Article 34 MiFID II) in another host Member State (Member State C). Triangular Passporting could give rise to potential challenges and risks for NCAs’ supervisory work, the protection of investors and firms’ compliance with applicable requirements.
3. Therefore, ESMA believes that it is important to identify the supervisory expectations for firms relying on Triangular Passporting and the NCAs (in charge of their supervision) to ensure convergence across the Union. To this end, this supervisory briefing addresses key aspects of firms’ Triangular Passporting practices and their supervision by the competent NCAs.

2.2 Scope

4. This supervisory briefing sets out ESMA’s and NCAs’³ common understanding on the supervision of firms providing investment services via Triangular Passporting under MiFID II (see paragraph 3 for an explanation of Triangular Passporting).
5. This supervisory briefing covers the following supervisory expectations:
 - firms’ responsibilities;
 - supervisory competences;
 - general information to clients;
 - client access to alternative dispute resolution mechanisms and compensation schemes.

¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)

² For credit institutions in accordance with Directive 2013/36/EU.

³ Within the meaning of Article 4(26) of Directive 2014/65/EU.

6. In this supervisory briefing:

- “firms” means investment firms including credit institutions providing investment services or performing investment activities;
- “investment services” means investment services and/or the performance of investment activities as well as ancillary services.

2.3 Status of this document

7. ESMA is mandated to play an active role in building a common supervisory culture by promoting common supervisory approaches and practices. In particular, Article 29(2) of the ESMA Regulation⁴ stipulates that ESMA may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices.
8. The content of this supervisory briefing is not subject to any ‘comply or explain’ mechanism for NCAs and is non-binding.

2.4 Background

Triangular Passporting

9. ESMA and NCAs have been observing Triangular Passporting being practised multiple times (see also the description in paragraph 2). For example, a firm licensed in Member State A could establish a branch or tied agent in Member State B to serve clients in Member State C to benefit inter alia from:
- geographic, cultural or linguistic proximity;
 - brand building, by increasing a firm’s regional presence through moving from a local branch to another Member State, or brand differentiation, as a licensed entity can use different brands in different Member States;
 - processes streamlining, for example, by centralizing in a local branch ancillary services to be provided in another Member State;
 - easier access to cross-border markets.
10. MiFID II does not explicitly cover, nor prohibit the practice of Triangular Passporting where a firm uses its passporting rights under Article 34 of MiFID II, even though the cross-border services in host Member State C are provided via a branch or tied agent established in host Member State B.
11. ESMA acknowledges that relying on Triangular Passporting to provide investment services on a cross-border basis may enhance clients’ access to financial services, foster

⁴ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC as amended by Regulation (EU) 2019/2175

competition between firms and result in improved organisational efficiency and service quality. Nevertheless, Triangular Passporting may also raise concerns, for example, regarding investor protection and the allocation of supervisory responsibilities.

12. This supervisory briefing sets out ESMA's and NCAs' common understanding and expectations under the MiFID II framework.

Previous work related to Triangular Passporting

13. Certain aspects related to Triangular Passporting have already been addressed through previous work by ESMA and the European Commission (hereafter Commission) and the Committee of European Securities Regulators (CESR) (i.e., ESMA's predecessor). This includes a Commission services paper⁵ on the supervision of branches under MiFID I, as embedded in the CESR Protocol on the supervision of branches under MiFID. The documents clarify in particular that "*any cross-border operation through a branch outside the territory of the Member State in which this branch is located is a provision of services by the investment firm and not by the branch as a separate legal entity*"⁶.
14. While the principle quoted was established under MiFID I, it is still largely relevant today, since the same principle and logic underpins freedom to provide services under MiFID I and MiFID II. As this supervisory briefing focuses on MiFID II, the abovementioned principle is a relevant basis which will be complemented in light of the objectives of the supervisory briefing and to reflect the more detailed MiFID II requirements.
15. Moreover, the MiFID II framework includes the Commission Delegated Regulation (EU) 2017/586⁷ specifying the exchange of information between NCAs when cooperating in inter alia supervisory activities and by Commission Implementing Regulation (EU) 2017/980⁸ setting out the standard forms, templates and procedures to be used for that cooperation.

Recent supervisory convergence work and observed potential issues related to Triangular Passporting

16. Based on NCAs' experience, it emerged that Triangular Passporting may give rise to challenges and risks for NCAs' supervisory work, firms' compliance with the relevant requirements and investor protection, which include:

⁵ Ref: MARKT/G/3/MV D/18.6.2007

⁶ Ref: CESR/07-672

⁷ Commission Delegated Regulation (EU) 2017/586 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the exchange of information between NCAs when cooperating in supervisory activities, on-the-spot verifications and investigations, OJ L 87, 31.3.2017, pp. 382–386.

⁸ Commission Implementing Regulation (EU) 2017/980 of 7 June 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between NCAs in accordance with Directive 2014/65/EU of the European Parliament and of the Council

- compliance complexities for firms: branches must comply with the conduct of business rules of their host Member State (according to Article 35 of MiFID II) but must also apply the conduct of business rules of their home Member State when providing investment services cross-border into Member State C (according to Article 34 MiFID II) while also taking into account any applicable requirements of Member State C;
- investor protection risks: the clients receiving financial services through Triangular Passporting in Member State C may be exposed to certain unclarity and risks. For example, it may be unclear for clients whether they should direct their complaints to the branch in Member State B or the head office in the home Member State. It may also be unclear for clients, which dispute resolution mechanism is competent to settle their complaints.

Approach taken in this supervisory briefing

17. This supervisory briefing supports the Commission's objective of simplification and burden reduction by clarifying the principles governing Triangular Passporting and setting clear expectations for firms. This increased clarity makes the MiFID II framework easier to understand and apply, while preserving the key objective of, inter alia, investor protection, supervisory convergence and market stability.
18. As a result, the present supervisory briefing provides the common understanding of ESMA and NCAs about the supervision of firms relying on Triangular Passporting to provide investment services and activities on a cross-border basis and aims at contributing to the development of a convergent supervisory culture across the Union⁹.
19. The content of this supervisory briefing is not exhaustive, does not constitute new policy, and does not promote any particular way of supervising the rules. NCAs are expected to apply the supervisory briefing within a reasonable timeframe. Moreover, NCAs may apply the supervisory expectations set out in this briefing in a manner proportionate to the size, risk profile, nature, scale and complexity of firms' Triangular Passporting practices.

3 Supervisory briefing on Triangular Passporting

3.1 Supervisory expectations for firms

Principles underpinning Triangular Passporting

20. Where a firm provides cross-border services in host Member State C via a branch established in host Member State B, the firm holds the MiFID II licence for providing the

⁹ The European Banking Authority (EBA) also addressed this topic in the context of its supervisory convergence work and in January 2023, published a Q&A entitled "Triangular passport" clarifying this practice is permissible under the Second Payment Services Directive: https://www.eba.europa.eu/single-rule-book-qa/qna/view/publicId/2021_5726

cross-border services in Member State C. The firm also uses its passporting rights, as the branch has no separate legal personality and no separate licence and thus no separate passporting rights. A similar principle applies where investment services are provided on a cross-border basis by a tied agent established in Member State B to clients in Member State C¹⁰. This is because, although the tied agent has a separate legal personality, it acts under the full and unconditional responsibility of only one firm on whose behalf it acts and therefore under the umbrella of the MiFID II licence of this firm¹¹.

21. As a tied agent has a separate legal personality from the firm, the agreement between the firm and the tied agent is expected to explicitly authorise the tied agent to provide cross-border services on behalf of the firm. This is because the cross-border provision of services by the tied agent from host Member State B into Member State C creates regulatory and compliance implications for the firm, that must therefore retain control over the geographical scope of tied agents' activities.
22. In their passporting notification to the NCA of the home Member State, firms willing to rely on Triangular Passporting are expected to specify that they intend to use a branch or tied agent established in Member State B to provide services and activities in Member State C. To this end, firms should use the relevant templates related to the freedom to provide services (Article 34 MiFID II) set out by the Annexes of the Commission Implementing Regulation (EU) 2017/2382¹². More specifically, firms may add a cover letter to Annex I of the Commission Implementing Regulation to indicate the tied agent or branch located in Member State B¹³. Additionally, the home NCA may add information to the draft communication text included in Annex II to highlight that the cross-border service provision is part of Triangular Passporting.
23. Firms should also specify in their notifications any authorised services and activities they intend to provide cross-border into Member State C and any changes in their service provision through passporting¹⁴. Where a firm changes its operational organisation and intends to rely on Triangular Passporting to provide cross-border services for which a notification has already been submitted, the firm should notify the home NCA of its revised

¹⁰ According to Article 35 (2) of MiFID II, "Where an investment firm uses a tied agent established in a Member State outside its home Member State, such tied agent shall be assimilated to the branch, where one is established, and shall in any event be subject to the provisions of this Directive relating to branches".

¹¹ For more detailed information on the supervisory expectations when firms appoint tied agents and use them in their ongoing activities, see the [ESMA supervisory briefing on supervisory expectations in relation to firms using tied agents in the MiFID II framework \(ESMA35-43-2900\)](#)

¹² Commission Implementing Regulation (EU) 2017/2382 of 14 December 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for the transmission of information in accordance with Directive 2014/65/EU of the European Parliament and of the Council

¹³ Such a cover letter added to Annex I may include an indication that the branch or tied agent located in Member State B provides a more limited range of investment services than the firm's notification to the home NCA for the provision of cross-border services (from Member State A to C), if applicable.

¹⁴ For example, firms which intend to change their current provision of investment services from the home Member State to Member State C, to newly provide services cross-border from a branch or tied agent in Member State B into Member State C via Triangular Passporting, should update the passporting notification to the NCA of the home Member State accordingly.

organisational arrangements and its intention to rely on Triangular Passporting by submitting an updated notification using Annex I.

24. ESMA expects firms intending to rely on Triangular Passporting to conduct, and regularly review, if necessary, an internal assessment of risks arising from this specific cross-border model. Risks may relate, for example, to investor protection, anti-money laundering and terrorist financing, responsibilities in the event of outsourcing of services, and third-party risks. These risks increase when a firm's internal processes must be governed under more than two jurisdictions, as in a triangular scheme.
25. When appointing tied agents, firms shall conduct an appropriate assessment and shall monitor their activities to ensure continued compliance with any relevant requirements¹⁵.
26. Firms should not use Triangular Passporting to circumvent supervisory competences or to select regulatory practices (e.g. through so called “forum shopping”). Establishing a branch or tied agent in Member State B solely to passport services to Member State C could be considered not in line with Article 35 MiFID II. Firms should also ensure to effectively retain control over the services provided and comply with their obligations under MiFID II.
27. ESMA expects firms to have their branch or tied agent established and being fully operational in Member State B in accordance with Article 35 MiFID II, and within the timeframes set out therein, before providing investment services cross-border from Member State B to C, in compliance with Article 34 MiFID II¹⁶. Furthermore, services provided by the branch or tied agent cross-border from Member State B to Member State C should be within the scope of the firms’ passporting notifications to the NCA of their home Member State, both under Article 34 and Article 35 of MiFID II. So, in case of differences between these notifications and the range of services provided by the branch or tied agent cross-border from Member State B to C, firms should update these notifications.

General information to clients

28. Firms are expected to clearly inform their clients in Member State C that the service is provided by the firm through a branch or tied agent established in Member State B¹⁷.
29. Moreover, where the firm’s services are provided through a branch or tied agent established in a Member State B, ESMA expects the firm to clearly inform its clients that the NCA of the home Member State is responsible for supervising the services provided to

¹⁵ According to Article 29(6) of MiFID II, Member States may adopt provisions that are more stringent than those laid down in MiFID II.

¹⁶ To streamline the notification procedure, firms may submit to their home NCA simultaneously the notifications for (i) establishing their branch or tied agent in Member State B (in accordance with Article 35 MiFID II) and for (ii) providing investment services cross-border from Member State B to C (according to Article 34 MiFID II). However, the provision of investment services from the branch or tied agent into Member State C may only commence upon expiry of the time period applicable under Article 35 MiFID II.

¹⁷ As usual, the firm remains fully responsible for the investment services provided to the client by the tied agent or branch.

the client through the branch or tied agent in Member State B (and not the host NCA of the Member State in which the branch or tied agent is located).

30. The decision to provide investment services leveraging on an existing branch or tied agent in Member State B should not hamper or harm investors' rights, nor cause confusion or uncertainty regarding the allocation of responsibilities within the firm. Any information addressed by the firm to a client should be fair, clear, and not misleading.

Client access to alternative dispute resolution mechanisms and the investor compensation scheme

31. Article 75(1) of MiFID II requires Member States to, inter alia, ensure that all firms adhere to one or more extra-judicial mechanism for consumers complaints. So, firms are expected to inform their clients in a clear and non-misleading manner about their access to complaints and redress procedures, where, as a result of Triangular Passporting, such clients are provided with investment services in a Member State C outside the territory of the Member State where the licensed entity, branch or tied agent is located. Similarly, clients should be informed about any relevant and applicable investor compensation scheme.
32. In this respect, ESMA notes that alternative dispute resolution (ADR) mechanisms, relevant for the cross-border provision of investment services can be affiliated with the EU Financial Dispute Resolution Network (FIN-NET)¹⁸ to facilitate access for clients in Member State C¹⁹.
33. ESMA expects that the branch or tied agent (located in Member State B) provides to its clients in another Member State (Member State C) an easy access to all relevant information to enable such clients to file a complaint about the services provided by the firm either in Member State B or the home Member State of the firm (Member State A).

Complaints handling

34. On the basis of a firm's general obligation to act honestly, fairly and professionally in accordance with the best interests of its clients, it is expected that clients should be able to submit complaints in any language used by the firm in its marketing communications or contractual documents provided to them.
35. Firms are expected to accept that clients in the Member State C submit their complaints to the head office in Member State A or to the branch or tied agent in Member State B. Firms

¹⁸ List of ADRs that are members of FIN-NET by country: https://finance.ec.europa.eu/consumer-finance-and-payments/retail-financial-services/financial-dispute-resolution-network-fin-net/members-fin-net-country_en

¹⁹ Further information on the FIN-NET's Guidelines for the procedure in the complaints network for out-of-court settlement of cross-border disputes, see the Memorandum of Understanding on a Cross-Border Out-of-Court Complaints Network for Financial Services: https://finance.ec.europa.eu/document/download/7b30f574-0413-4620-a970-f7bf67813b9c_en?filename=memorandum-of-understanding_en.pdf

are also expected to include such complaints in their complaints handling procedure established under Article 26 of the MiFID II Delegated Regulation. This means, *inter alia*, that the firm: *i*) includes the complaints by clients and potential clients of Member State C into its record of complaints received and the measures taken for their resolution; *ii*) enables clients and potential clients to submit complaints free of charge.

3.2 Supervisory expectations for NCAs

Passporting notifications

36. Where a firm intends to rely on Triangular Passporting, the passport notification should be sent by the NCA of the home Member State to the NCA of host Member State C, where the freedom to provide services will be exercised, specifying that services will be provided by the branch or tied agent established in Member State B.
37. In addition, the NCA of the home Member State is expected to send a copy of the passporting notification to the NCA of Member State B where the branch or tied agent is established, with the relevant information that the passport notification is provided, so the NCA of Member State B is aware that the branch or tied agent established in its jurisdiction will provide services on a cross-border basis in Member State C²⁰.

Supervisory responsibilities

38. In accordance with the supervisory responsibilities allocated to home and host NCAs under Articles 34 and 35 of MiFID II:
- the home NCA is responsible for supervising the organisational requirements of the firm, including the branch or tied agent located in Member State B;
 - the host NCA in Member State B is responsible for supervising the branch's or tied agent's conduct of business requirements where they provide services in Member State B;
 - the home NCA is responsible for supervising the provision of all cross-border services by the firm, whether such services are provided from the home Member State or from a branch or tied agent established in another Member State. Accordingly, the home NCA is responsible for supervising both the organisational requirements and the conduct-of-business requirements for services provided in Member State C under a Triangular Passporting arrangement²¹. This is because a branch or tied agent do not possess passporting rights themselves; such rights are granted exclusively to the licensed entity, under the home supervision.

²⁰ In light of the obligation of NCAs to cooperate with each other where necessary for the purpose of carrying out their duties under MiFID II (Article 79(1) MiFID II).

²¹ Including that the firm clearly informs its clients that the NCA of the home Member State is responsible for supervising the services provided to the client through the branch or tied agent in Member State B.

39. In light of Article 29(2) of MiFID II²², the firm is also fully and unconditionally responsible for actions or omissions related to its appointed tied agent's cross-border provision of investment services into Member State C, and the home NCA remains responsible for carrying out its supervisory duties. Nonetheless, as a tied agent has a separate legal personality from the investment firm and may be subject to national legislation pursuant to Article 29(6) of MiFID II, coordination between the home NCA of the firm and the NCA of the Member State in which the tied agent is registered is crucial to avoid supervisory blind spots²³.
40. ESMA acknowledges that in some cases the allocation of supervisory responsibilities may be challenging in practice without smooth cooperation from all NCAs involved. For instance, to supervise the services provided on a cross-border basis by the firm in Member State C from a branch or tied agent established in Member State B, the home NCA may need to carry out an on-site inspection of the branch or tied agent in Member State B. In such case, cooperation of the host NCA in Member State B may be essential although, according to the MiFID II principles of supervisory responsibilities in case of cross-border provision of services, such host NCA is not competent and is not responsible for the services provided cross-border in other host Member States.
41. Moreover, ESMA expects NCAs to cooperate as needed, either internally or with the relevant competent authority of their jurisdiction, in supervising credit institutions providing investment services via Triangular Passporting. Accordingly, NCAs should take into account that for certain aspects of Triangular Passporting (e.g. the freedom to provide services or the notification process) the requirements of Directive 2013/36/EU apply.
42. MiFID II Commission Delegated Regulation (EU) 2017/586 and Commission Implementing Regulation (EU) 2017/980 require NCAs to cooperate with each other whenever necessary for the purpose of carrying out their duties. They also require NCAs to render assistance to NCAs of other Member States; they should exchange information and cooperate in any cross-border supervisory activities²⁴.
43. According to Article 86 of MiFID II, where the interests of investors or the orderly functioning of markets in the host Member State is at risk of prejudice, precautionary measures may be taken by the host NCA if those taken by the home NCA are insufficient or inadequate.
44. The competent NCA is expected to proactively monitor relevant documentation without prejudice to the proportionality principle and the need to tailor supervisory efforts according to the level of risks identified on firms' cross-border activities, even if written in language

²² Article 29(2) of MiFID II stipulates, inter alia, that where a firm "decides to appoint a tied agent it remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the investment firm."

²³ For example, strong coordination is needed where an infringement falls under the tied agent's own personal responsibility and lies outside the scope of responsibility of the licensed firm.

²⁴ For example, the home NCA is expected to share information relating to the withdrawal, suspension, or restriction of the authorisation of the licensed entity with the NCAs of the Member States in which services have been provided to clients.

other than the native language of the NCA. Considering that under a Triangular Passporting scheme the home NCA is responsible for supervising the provision of services in the Member State C, it may need to address language barriers to fulfil its supervisory duties.