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Fédération Européenne des Conseils et Intermédiaires Financiers

FECIF response to ESMA - Draft technical standards on the provision of investment services and activities in the Union by third-country firms under MIF2 and MIFIR

The financial crisis has revealed weaknesses in the functioning and transparency of financial markets. Developments in financial markets have highlighted the need to strengthen the framework for the regulation of markets in financial instruments, in particular where transactions on these markets are conducted over-the-counter, in order to increase transparency and to improve the efficiency of financial markets.

The financial markets are globalized, it was therefore quite opportune to provide a framework for foreign professionals.

Thus, the new EU Regulation 2019/2033 on Investment Firms (IFR) and Directive 2019/2034 (DFI) have introduced amendments to the MiFIR Regulation and MiFID II regimes for the provision of investment services and activities in the EU by third country firms. These modifications include new requirements for reporting to ESMA by third country firms on an annual basis in accordance with Article 46 of MiFIR, and also confer to ESMA the power to ask the third country firms recorded in its register, to provide data relating to all orders and transactions in the EU, whether on own account or on behalf of a client, for a period of five years.

Q1: Do you agree with the list of information to be requested by ESMA from applicant third country firms for registration in the ESMA register? If no, which items should be added or deleted and for which reasons? Please provide detailed answers.

All applicants' third-country firms are compelled to provide ESMA with specific information necessary for their registration. As a reminder, here are a list of information that applicants should provide to ESMA in order to be registered:

- full name of the firm, including its legal name and any other trading name to be used by the firm;
- contact details of the firm, including the head office address, telephone number and email address;
- contact details of the person in charge of the application, including telephone number and email address;
- website, where available;
- national identification number of the firm, where available;
- legal entity identifier (LEI) of the firm, where available;

- Business Identifier Code (BIC) of the firm, where available;
- name and address of the competent authority of the third country that is responsible for the supervision of the firm; where more than one authority is responsible for supervision, the details of the respective areas of competence shall be provided;
- the link to the register of each competent authority of the third country, where available;
- information on which investment services, activities, and ancillary services it is authorized to provide in the country where the firm is established;
- the investment services to be provided and activities to be performed in the Union, together with any ancillary services.

Although it is clear that the listed information is necessary to establish the reliability of third-country applicant firms, it seems important that applicant firms also provide information regarding the potential criminal behaviours their head managers or the declared contact person could have been involved in within the third-country or elsewhere. An examination of the honourability/legal capacity of all members of the management body of the third-country firm might be relevant.

The criminal record aspect is an item that should be added to the list of information.

It is understandable that the list of information covers very basic information (such as name of the firm, contact details, identification codes and information on its authorization status) which applicants from third-country firms will be able to provide to ESMA without any significant impact in terms of costs. Nevertheless, the cost of criminal record information is not disproportionately high with regards to the purpose of providing ESMA a clear view of the firm's head management honourability/legal capacity. Moreover, criminal record information is usually required by the competent authority of the third country. It is an information that firms usually have to provide for any kind of registration.

If we take a closer look at the draft concerning the information for registration of third-country firms (Delegated Regulation EU 2016/2022 article 2-1 r), it is mentioned that third-country firms should provide to ESMA information about complaints they received in the Union. Is that information that third-country firms will provide based solely on a voluntary basis? A criminal record might be more trustworthy and thus clearly a core peace of information.

The information that companies are required to provide is essentially administrative information.

It is important, in this context of globalization, to strengthen information regarding the head manager/management. For example, information of a tax nature may be emphasized; the authority could ask for tax clearance certificates, in order to ensure transparency and regularity of the party involved.

Moreover, the authority may be faced with a practical difficulty: *the risk of regulatory divergence.*

In fact, it's also important to underline the fact that the document which is requested by the European Authority may not legally exist in the third country wishing to provide the information.

The authority will have to deal with equivalence issues.

Thus, the third country must, for example, provide a sworn statement that the document requested does not legally exist in that state, or the third country may have recourse to a notary or certificated information to enforce the information.

The list also omits all the GDPR and Anti Money Laundering aspects.

Q2: Taking into account the list of information in Article 46(6a) of MiFIR, as amended by the IFR, do you agree with the list of information that third-country firms providing investment services and investment activities in the Union in accordance with Article 46 of MiFIR should report to ESMA on an annual basis? If no, which items should be added or deleted and for which reasons? Please provide detailed answers.

We agree that third-country firms should report to ESMA on an annual basis the list of information as detailed in Article 46(6a) of MiFIR. However, we are wondering about the means and techniques that can be used by ESMA so as to attempt to align as much as possible the information provided at the registration stage with the information provided on an annual basis.

It is also necessary to take into account fiscal or business calendar differences between third-country firms in determining annual basis communication requirements. Some third-country firms might gather some of the information listed with a delay. The data relating to all orders and all transactions made by third country firms might be available with a delay.

For instance, the turnover and the aggregated value of the assets corresponding to the services and activities provided by third-country firms should be aligned with the annual period defined by ESMA.

Consequently, more information should be provided regarding items used to establish the annual basis requirements (annual reporting obligations).

The list also, once again, overlooks all the GDPR and Anti Money Laundering aspects.

Q3: Do you have any comments about the format details provided in the draft implementing technical standards under Article 46(8) of MiFIR? If no, what would you add, delete or amend and for which reasons? Please provide detailed answers.

The technical standards under Article 46(8) of MiFIR are satisfying. The format for reporting information to ESMA does not raise any issues.

We have no further comments on this topic.

Q4: Do you agree with the additional details provided in the draft implementing technical standards under Article 41(5) of MiFID II? If no, what would you add, delete or amend and for which reasons? Please provide detailed answers.

We agree with the additional details provided in the draft implementing technical standards under Article 41(5) of MiFID II. The draft should include and give more responsibility to the

competent authorities of the host Member State to supervise the activities of third-country firms. We have no further comments on this topic.

Q5: Do you agree with the cost benefit analysis as it has been described in Annex II?

The benefits linked to the draft Article 46 RTS and draft Article 46 ITS and the avoided costs that ESMA might offer to third-country firms are well established. A harmonized regime will prevent firms interested in providing cross-border investment services from supporting costs related to national third-country regimes' assessments and arrangements.

We all agree that the draft Article 46 RTS and the draft Article 46 ITS as described in Annex II provide the most cost-efficient solution to achieving ESMA's general objectives.

Q6: Are there any additional comments that you would like to raise and/or information that you would like to provide?

It is quite important to raise awareness regarding third-country firms that provide investment services in more than one Member State. According to Annex II, if this is the case, the third-country firm should repeat and provide information to ESMA for each country.

Since the cooperation between Member states will be strengthened with regards to cross-border supervision and exchange of information, we are skeptical about the reciprocity of information that third-country firms might benefit from, in host countries in which they practice their activities. The burden of providing the required information every year might be unbearable for some firms.

In conclusion, the European financial market's attractiveness requires a careful balance between the opening up of the market to financial intermediaries and entities from third countries, which could drain local capital, and the security of the market, which calls for a number of controls.

About FECIF

The **European Federation of Financial Advisers and Financial Intermediaries** (FECIF) was chartered in June 1999 for the defense and promotion of the role of financial advisers and intermediaries in Europe.

FECIF is an independent and non-profit-making organization exclusively at the service of its financial adviser and intermediary members, who are from the 27 European Union member states, plus United Kingdom and Switzerland; it is the only European body representing European financial advisers and intermediaries. FECIF is based in Brussels, at the heart of Europe.

The European financial adviser and intermediary community is made up of approximately 500,000 private individuals exercising this profession as a main occupation (representing approximately 26,000 legal entities including 45 networks), about 280,000 are members of national professional associations (51 at today's count).