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Response to ESMA CP on draft technical standards on the provision of investment services and activities in the EU by third-country firms under MiFID II and MiFIR

Bloomberg welcomes the opportunity to respond to ESMA's Consultation Paper: Draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR (the "**Consultation Paper**").

Bloomberg's response relates to:

> (i) the list of information to be requested by ESMA from applicant third country firms (established in jurisdictions determined to be equivalent by the European Commission) for registration with ESMA to provide cross-border services; and
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> (ii) the list of information that such third country firms providing cross-border investment services in the EU (in accordance with Article 46(a) of MiFIR) should report to ESMA on an annual basis,

as stated in the draft regulatory technical standards in the Consultation Paper ("**Draft RTS**").

Bloomberg supports ESMA's efforts to clarify the information requirements on third country firms. However, the amount and granularity of information (both at point of registration and on an annual basis) that ESMA proposes to collate raises significant concerns.

> Section 1 below addresses Bloomberg's key concern that ESMA's proposals in the Draft RTS are not adequately aligned with the objectives behind the MiFIR equivalence regime.
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> Section 2 highlights that the proposals in the Draft RTS are out of kilter with other regulators' similar equivalence-like frameworks.
>
> Section 3 provides some practical examples of information requirements which support the concerns described in section 1 and which present significant practical issues (not an exhaustive list) for third country firms.

EXECUTIVE SUMMARY

ESMA's proposals do not appear aligned to the policy objectives behind the MiFIR equivalence framework

> MiFIR and the European Commission emphasise that the equivalence framework is designed to facilitate reliance on a third country's rules, where such third country's supervisory and regulatory framework achieves similar outcomes (to MiFID II / MiFIR).
>
> The amount, nature and granularity of information that ESMA proposes to collate from third country firms, based in jurisdictions determined as equivalent by the European Commission do not allow for sufficient reliance on a third country's regulatory framework and are comparable to a full authorisation regime.

ESMA is taking on a supervisory role, contrary to the mandate in MiFIR

ESMA's role in the equivalence framework, as set out in MiFIR, is focused on monitoring relevant developments in equivalent jurisdictions, as opposed to taking on a supervisory role vis-a-vis third country firms based in such jurisdictions.

The granular information ESMA seeks to collate, for example on a firm's global operations and strategy, including on an annual basis, is the remit of national supervisors and suggests that ESMA is extending its mandate to a more supervisory role.

The proposed approach is divergent from that of peer regulators

Key national regulators operate equivalence-type frameworks similar to the EU. Several such regulators' approaches indicate that, once a third country firm is appropriately recognised for purposes of providing services into their jurisdiction, there are no further / limited information requirements or additional conditions placed on such firms. It is also an objective of the EU equivalence framework to maintain cooperation with key third country regulators, and ESMA's proposals may act as a hindrance to such objectives.

The proposed approach may discourage use of the equivalence regime, undermining key EU objectives

Equivalence is key to further the European Commission's policy objective of engaging with third countries in financial services and avoiding fragmentation of EU market. The framework was introduced in order to harmonise the diverging EU member state rules on access.

ESMA's proposals may prove so onerous as to render it less practicable for third country firms to utilise the equivalence regime, than to carry on relying on each EU member state's rules on access.

ESMA's proposed information requirements are not practicable and are disproportionate

Certain information requirements will be impracticable, and at times impossible, for non-EU firms to fulfil. This is as a result of the differing organisational structures of third country firms, many of which do not have key functions (such as compliance and risk) dedicated to overseeing regional operations, but rather operate at a legal entity level. Struggling to comply with certain requirements without incurring significant costs may further force third country firms to avoid utilising the equivalence regime.

SECTION 1. The Draft RTS are not aligned with the MiFIR equivalence framework

A. Reliance on a third-country's rules is key to the MiFIR equivalence regime

Once a jurisdiction has been determined equivalent by the European Commission, pursuant to Article 47 MiFIR, third country firms established in such jurisdiction may seek to provide cross-border services into the EU following registration with ESMA, the process for which is set out in Article 46 MiFIR.

The process provides ESMA with information gathering powers at the point of registration (Article 46(4) MiFIR: "*all information necessary for its registration*") and on an annual basis (Article 46(6a): information listed in Article 46(6a)(a)-(h), which includes "*any other information necessary to enable ESMA or the competent authorities to carry out their tasks in accordance with [MiFIR].*"

The amount, type and granularity of information to be provided under both Articles 46(4) and 46(6a) (point of registration and annually) must be considered in the context of the objectives behind the MiFIR equivalence framework. To this end:

- Recital (41) MiFIR states that: "[…] *The equivalence assessment should be outcome-based; it should assess to what extent the respective third-country regulatory and supervisory framework achieves similar and adequate regulatory effects and to what extent it meets the same objectives as Union law* [...]". [Emphasis added]
- The European Commission stipulates that: "*The main EU approach, referred to as equivalence, involves a positive assessment of the third-country framework, which enables reliance on third-country rules and the work of the third-country supervisor*[1]."[Emphasis added]

ESMA's approach, in seeking to impose unduly onerous information requirements on third country firms (at point of registration and on an annual basis), is contrary to the key policy objective of relying on a third country's regulatory and supervisory framework.

Reliance on a third country's regulatory and supervisory framework would render the amount and type of information that the Draft RTS proposes, in the context of provision of cross-border services to sophisticated market participants (i.e., per se professional clients and eligible counterparties (as defined in MiFID II)), disproportionate.

Bloomberg believes that the granularity of information ESMA proposes to collate in respect of a firm's EU and global operations undermines the European Commission's determination that a third country's regulatory and supervisory framework achieves equivalent outcomes.

B. ESMA's proposals assume a supervisory role, reserved for national regulators under MiFIR

Recital (42) MiFIR further clarifies that: "*Under this Regulation, the provision of services without branches […] should be subject to registration by ESMA and to supervision in the third country. Proper cooperation arrangements should be in place between ESMA and the competent authorities in the third country*." [Emphasis added by Bloomberg].

ESMA's mandated role in the equivalence regime, in particular under MiFIR Article 47(5) (as amended by the Investment Firms Regulation), is to identify trends and relevant developments in third countries regarding, in particular, their supervisory, regulatory enforcement frameworks. This work is required to complement the European Commission's equivalence determinations. However, MiFIR does not provide ESMA with powers to monitor such trends at individual third country firms and to take on the supervisory role reserved for third country regulators.

Bloomberg considers that the granular information ESMA seeks to collate, for example on a firm's global operations and strategy, including on an annual basis, is the remit of national supervisors.

Any additional information that ESMA may require for continued compliance with Article 47 MiFIR can be obtained through cooperation agreements with third countries, which are a cornerstone of the equivalence framework.

C. ESMA's proposals may discourage use of the equivalence regime

[1] Communication from the European Commission on equivalence in the area of financial services, July 2019.

Equivalence is key to furthering the European Commission's policy objective of engaging with third countries in financial services and avoiding fragmentation of the EU single market[2]. The framework was introduced in order to harmonise the diverging EU member state rules on access.

Recital (41) of MiFIR in particular highlights this: "*The provision of services by third-country firms in the Union is subject to national regimes and requirements. Those regimes are highly differentiated and the firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. It is appropriate to introduce a common regulatory framework at Union level*."

Bloomberg considers that imposing disproportionately burdensome information and annual reporting requirements on third country firms may discourage firms from utilising the equivalence regime per Article 46 MiFIR. Instead, firms may opt to continue relying on the patchwork of different member states' licensing regimes. This will result in further fragmentation of the EU single market.

SECTION 2. ESMA's requirements are out of kilter with third country regulators

The European Commission stated in its July 2019 communication on this subject that equivalence fosters coherence and mutual compatibility between the relevant parts of the EU framework and the corresponding rules in third countries. As a result, the EU equivalence is: *"[…] a major trigger for establishing or upgrading supervisory cooperation with the relevant third-country partners*."[3]

A number of key third country regulators (and potential third country partners for ESMA), which operate similar equivalence-type regimes, do not require the level and nature of information that ESMA is proposing to collate from third country firms from equivalent jurisdictions.

Indeed, ESMA's proposed requirements, if imposed on third country firms, may act as a hindrance to the supervisory cooperation between the EU and key third country partners.

SECTION 3. Examples of burdensome and practically challenging information requirements

The concerns raised above are based on some of the following information requirements in the Draft RTS, which Bloomberg believes are disproportionately burdensome in the context of provision of cross-border services by third country firms under an equivalence framework.

A. The following type of information is more appropriately required by the third country firm's national supervisor (not an exhaustive list):

- **Information on how the activities of the third country firm in the EU will contribute to the strategy of the third country firm or, where relevant, that of its group**. It is not clear how this detailed information is relevant to ESMA's role under Article 47 MiFIR. The lack of clarity around this requirement, and the relative burden of collating such information in a narrative format, may act as a hindrance for firms seeking to utilise the equivalence framework.
- **Detailed descriptions of the governance arrangements of the third country firm**. Whilst Article 46a MiFIR calls for annual reporting on governance arrangements, the level of granularity ESMA suggests to collate, for example, on all key function holders and members of the management body of the third country firm, including details of reporting

[2] Communication from the European Commission on equivalence in the area of financial services, July 2019.
[3] As above.

lines, is disproportionate given its mandate under MiFIR and the objectives listed above. This type of information gathering is the remit of national supervisors.

- **Activities/services provided by third-country firms, number of clients/counterparties and net turnover (globally)**: It is not appropriate for global information (with respect to clients, counterparties and net turnover) to be adduced for these purposes. This information may be confidential and is the remit of the firm's third country supervisor.
- **Detailed descriptions of the investor protection arrangements of the third country firm.** Much of the investor protection information, including information on "customer complaints" is not relevant or proportionate for firms seeking to provide cross border services to professional clients and eligible counterparties (as defined in MiFID II). In addition, such data is likely to be firm-specific and not easily comparable. It is not clear how certain firms, such as operators of trading venues, are to comply with this in practice.
- **Detailed description of a firm's marketing strategy in the EU**. The information requirement is vague and may be unduly costly to collate in narrative form. It is not clear how this is to be fulfilled by operators of trading venues, for example. Bloomberg suggests that this, and similar information requirements, ought to be further clarified and calibrated for different types of investment services and activities.

B. The following types of information give rise to significant practical challenges (not an exhaustive list):

- **Summary of the structure of the internal audit / risk /compliance functions (or equivalent) of the third-country firm as well as how such function monitors EU operations and how possible risks of failures by the third-country firm or its staff are discovered at an early stage**. This does not take account of how non-EU firms are organised and managed. It is uncommon for internal functions to be clearly split across regional lines for purposes of supervision. Many firms will not distinguish between EU and non-EU operations in this way, as their risk and compliance arrangements are set at an entity level. This type of information can prove overly burdensome, and even impossible to collate, given the diverging organisational structures of certain third country firms.

- **Information on the investment services, investment activities and ancillary services to be provided in the EU, together with the expected number of clients and counterparties and total net turnover**. The number of clients/counterparties that third country firms provide to ESMA may be impossible to specify given the multi-jurisdictional nature of clients / counterparties operations. Furthermore, for trading venues specifically, the requirement to capture "expected number of clients / counterparties" is not clear and may prove impracticable.