Comments on ESMA's Consultation Paper for a review of the technical standards under Article 34 of MiFID II published on 17 November 2022 (ESMA35-36-2640)

Introduction

As stated in recital 1 of the ESMA Consultation Paper for the review of the technical standards under Article 34 of MiFID II (ESMA35-36-2640) the freedom to provide services (FPS) concept is a key element of the single market of financial services established in the European Union (EU). The opportunity to provide services in additional markets by establishing a branch (*freedom of establishment*) or cross-border activities (*freedom to provide services*) expands the range of services available for consumers, increases competition and leads potentially to better service offerings as well as lower prices for customers. As stated in recital 4 the recent increase in cross-border activities is a positive development and serves the goal of developing one single market for financial services in the EU.

The results of the ESMA peer review on supervision of cross-border activities of investment firms (ESMA42-111-5534) published in March 2022 show, that the number of investment firms with cross-border activities is already significant and with regard to the passporting notifications the responsible home authorities fully meet expectations to inform the host authorities in time. Overall the institution understands from the ESMA peer review that the existing process of passporting notification works well.

The suggested enhancement of information to be provided as part of passporting notifications is in our view an unnecessary increase in bureaucracy and not backed by the results of the ESMA peer review. This step is a first step to undermine the EU passporting process and to remove the distinction between freedom to provide services (which is mainly governed by the home NCA) and the freedom of establishment (which is also governed by requirements of the host NCA). In our point of view this additional burden on the investment firms (and the supervisory authorities of both the home and host member states) can not be justified and endangers the well-established and efficient processes for processing passporting notifications. In addition, the necessary resources on both sides lead to overall higher costs for supervision and compliance of the institutions with the (regulatory) requirements which ultimately have to be borne by EU citizens and customers.

Given the fact that in some countries the supervisory authorities already request information about passporting activities by using an ESMA template as part of an annual information request ("*ESMA Reporting template for entities with cross-border activity (freedom to provide investment services and activities)*"), which could potentially be shared with the host authorities, we do not see a necessity to provide the additional information as part of the passporting notification, and ongoing on an ad-hoc basis (as suggested by this ESMA Consultation Paper). An annual data request based on a standardised template would be sufficient to understand the size and nature of the cross-border activities and would provide reasonably up-to-date information.

Comments to ESMA questions

Q1: Do you believe that newly added point (c) of Article 3 of the RTS and Part 3 (Overview) of Annex I of the ITS are missing any information?

This new requirement complicates the passporting notification process and leads to bureaucratic burden for both the supervised entities and the authorities. We consider the provision of information on the exact date the investment firm will start to actively target clients difficult to provide at the stage of notification as this is largely depending on various factors in the go-live process for a country. We suggest deleting this point as due to the mentioned uncertainties it does not provide additional value. In case this is not an option for ESMA, we recommend changing it to make also in Annex I of the ITS clear that this requirement can only include an "intended date" (as indicated in Article 3 (c) of the RTS) in the "From" column. Overall we are of the opinion that this point does not provide added value for the involved parties in the way it is currently framed and the existing notification requirement of the intention to passport services to a certain country is already sufficient.

Q2: Do you agree that investment firms should notify their home NCA in case of any change to the list of home Member States where they actively target clients as well as the ones where they actively target retail clients and/or professional clients under Annex II of MiFID II?

We disagree for the following reasons:

- The requirement of an ad-hoc notification in case an investment firm starts to actively target clients in new markets would be expected to be part of the reporting requirements of the home country rather than the ESMA notification requirements for passporting.
- This additional reporting requirement is (i) an unnecessary burden on top of the already conducted annual information request of the home NCAs (in Germany) and (ii) misplaced as part of this regulation and (iii) increases the effort for both the supervisory authorities and the investment firms to keep track of reporting and notification requirements.

Possible solutions would be adding a notification requirement to the supervisory law or to include the table from Annex I of the ITS in the annual data request of the home NCAs.

Q3: Do you believe that newly added point (d) of Article 3 of the RTS and Part 4 (Marketing means) of Annex I of the ITS are missing any information?

We suggest deleting this point because of the following reasons:

As of now, there is no obligation to report marketing means to our home NCA and hence there should not be any additional reporting obligations for entities using the FPS passporting regime towards the host NCAs either. This contradicts the fundamental principle of Art 34 MiFID II that there should not be additional requirements for matters covered by MiFID II in certain member states (which are not covered in the home member state).

In addition, the means of marketing usually change over time and it is therefore neither (i) valuable, nor (ii) practical to be provided at a stage of the passporting notification. Furthermore, this information was already part of the annual information request of our home NCAs for the passporting countries and would be sufficiently covered there already.

Notwithstanding the above, the level of detail as requested by the draft ITS is not proportional to any benefit and goes beyond marketing (e.g. features of the mobile app).

Q4: Do you believe that newly added point (e) of Article 3 of the RTS and Part 5 (Complaints) of Annex I of the ITS are missing any information?

We suggest deleting this point, as we consider this information to be redundant as investment firms need to have necessary arrangements to deal with complaints from clients in various countries anyway. This should be part of the Compliance checks, internal and external audits, and part of the ongoing supervision and is sufficiently covered there already. This (and respective changes) could also be sufficiently covered as part of the regular information request of the home NCA.

Please note: An investment firm needs to make the available language transparent to the clients in the host state, however the language can be chosen by the investment firm and does not necessarily be equal to the official language of the host member state. We observe that some entities therefore choose English as the language to provide their services in some countries. Any requirement which strictly refers to the official language of the host state would also contradict the freedom for provision of services (see Art. 51 TFEU).

Q5: Do you believe that newly added point (f) of Article 3 of the RTS and Part 6 (Internal organisation in relation to the cross-border activities of the investment firm) of Annex I of the ITS are missing any information?

We suggest deleting this point, as this additional information would be very extensive and seems to pursue the goal to align information requirements for cross-border activities (*freedom to provide services*) with the information requirements for setting up a local branch (*freedom of establishment*). While in the setup for providing cross-border services the existing organisation in the home country needs to be further enhanced and strengthened which is governed by the home NCA, the branch setup requires much more additional local resources and justifies a more extensive data requirement at the initial stage. We consider these new requirements to be exuberant.

Q6: Do you agree that investment firms should notify their home NCA in case of any change to the internal organisation of the investment firm in relation to cross-border Activities?

We strongly disagree. While we agree with the necessity of having an adequately structured and organised investment firm when providing cross-border activities, we are of the opinion that keeping this information up-to-date puts an additional burden on the investment firms and the supervisory authorities, and does not provide additional value for both involved parties in this process.

Providing information in case of each change of the internal organisation (in relation to the cross-border activities) is in our point of view a requirement that is not in place in the home country supervisory law (no necessity to inform about every change in the organisation to the home NCA). Therefore this also contradicts the fundamental principle of MiFID II that there should not be additional requirements in the host member states (in case passporting activities are conducted).

Q7: Do you believe that any other information should be requested within the scope of the RTS/ITS?

No.

Q8: Do you have any comments on the changes made to Article 4 of the RTS and Annex III of the ITS?

We suggest making no changes to Article 3, hence the changes to Article 4 are not required. Further, please see our answers to Q2 and Q6 above.

Q9: Do you have any other comment or input on the draft RTS and/or ITS?

See the "introduction" section above for all general comments.

Q10: What level of resources (financial and other) would be required to implement and comply with the amendments made to the RTS and ITS? When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.

Implementing the suggested amendments by ESMA on an ongoing basis would require at least 1 to 2 additional FTE per member state where services have been passported to, based on the FPS regime.[1] Assuming a truly pan-European business registered in one member state and providing services to the 26 other member states in the 23 other official languages of the EU this would result in at least 30 additional FTE for a medium-size investment firm. Based on a fully-loaded cost of relevant expert personnel of approx. 100,000 EUR the additional cost translates into more than 3 million EUR per year. On top of that there is implementation and training cost as well as additional cost for internal and external audit and counsel on processes introduced by the suggested amendments. Such cost would be completely disproportionate to the information gain to home and host NCAs; especially given the information provided already through the annual data request (as conducted in Germany).

Munich, 17 February 2023

[1] This is based on the assumption that for each country complaints have to be handled in the official language.