

## Briefing note

### *ESMA Q&A updates on MiFID II/R data reporting, investor protection and intermediaries topics*

(25 May 2018)

ESMA has issued on 25 May 2018 Q&A updates with regard to [MiFIR data reporting](#), and [investor protection and intermediaries topics](#) under the Market in Financial Instruments Directive (MiFID II) and Regulation (MiFIR). Topics addressed in the Q&As include:

#### MiFIR data reporting:

- (i) **Complex trades:** Characteristics, definition, scope and technical reporting requirements for transaction reporting purposes and of financial instrument reference data, under MiFIR and the Market Abuse Regulation (MAR).
- (ii) **Transaction reporting:** Representation of **national client identifiers for natural persons**, ie Czech ID, the Liechtensteinian ID, and the Romanian ID, for reporting purposes.

#### Investor protection and intermediaries topics:

- (iii) **Best execution requirements: Definition of “other liquidity providers”** (ie dealing on own account, providing liquidity as part of normal business on an ongoing basis, with or without formal agreements, both on venue and OTC, assessed on the basis of all trades).
- (iv) **Client categorization:** Assessment by investment firms whether a private individual investor may be treated as a professional client; assessment of leveraged financial instruments in clients’ financial instrument portfolio.
- (v) **Provision of investment services and activities by third country firms:** Interpretation of client’s “own exclusive initiative regarding the provision of an investment service or activity by a third-country firm”; interpretation of “new categories of investment products or investment services”.
- (vi) Other issues: **Supervisory responsibilities of competent authorities** in host Member States when a UCITS management company or an alternative investment fund manager provides investment services through a branch established in the host Member State.

Detailed information on each topic is provided below.

## I. ESMA Q&A update on MiFIR data reporting

### Section 15 Complex trades:

1) Does a complex trade as defined under Article 12 of RTS 22 need to have a single price available for the transaction? [Question 1 a)]

- Yes, as stated in 5.35.9 of the Guidelines, a transaction should **only** be considered to involve two or more financial instruments **when there is one single transaction in multiple financial instruments simultaneously for one single price.**

2) If there are prices available for the components of a complex trade does it mean that it is not a complex trade? [Question 1 b)]

- No, there may be a price because the components may be traded separately. **If there is a single price available for a single transaction in multiple financial instruments then it is a complex trade.**

3) How should the trading venue transaction identification code (TVTIC) (field 3 of RTS 22) be populated in transaction reports of a complex trade? [Question 1 c)]

- The **same TVTIC** should be reported in the report **for each financial instrument** that makes up the transaction of the complex trade.

4) How should a complex trade be transaction reported under article 26 of MiFIR where the components contain reportable and non-reportable financial instruments? [Question 1 d)]

(i) **Only the legs for the components of a complex trade that are financial instruments that are reportable under article 26(2) should be transaction reported.**

(ii) The **components to be reported include** not only financial instruments that are admitted to trading or trading on a trading venue (reportable instruments under article 26(2)(a)), but **also instruments that are not admitted to trading or traded on a trading venue** but are financial instruments that are reportable under article 26(2)(b) or (c), **for example a future on an equity** where the future is not admitted to trading or traded on a trading venue but the underlying equity is admitted to trading on a trading venue.

(iii) Even where only one of the components is a reportable financial instrument, field 40 of RTS 22 should be populated with a complex trade ID since this indicates that the transaction in the reportable financial instrument is part of a complex trade and explains why the price reported may deviate from the price of the transaction in the reportable financial instrument itself.

5) If a component instrument or a complex trade (e.g. strategy) has an ISIN, does it make it reportable under article 26 of MiFIR? [Question 1 e)]

#### RTS 22 – Article 12

##### *Reporting of an execution for a combination of financial instruments*

Where an investment firm executes a transaction involving two or more financial instruments, the investment firm shall report the transaction for each financial instrument separately and shall link those reports by an identifier that is unique at the level of the firm to the group of transaction reports related to that execution as specified in field 40 of Table 2 of Annex I.

#### MiFIR – Article 26 (2)

##### *Obligation to report transactions*

2. The obligation laid down in paragraph 1 shall apply to:

- (a) financial instruments which are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made;
- (b) financial instruments where the underlying is a financial instrument traded on a trading venue; and
- (c) financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue;

The obligation shall apply to transactions in financial instruments referred to in points (a) to (c) irrespective of whether or not such transactions are carried out on the trading venue.

- (i) **No. Just because an instrument or a complex trade (e.g. a strategy) has an ISIN it does not mean that it is a reportable financial instrument.** Some instruments and complex trades may have ISINs but are not financial instruments under MIFID II.
  - (ii) For example commodities such as **gold may have an ISIN but are not financial instruments** under Section C of Annex I of MIFID II.
  - (iii) **Other instruments may be financial instruments but not a reportable instrument** under article 26(2). **For example an interest rate derivative** is a financial instrument under Section C of Annex I of MiFID II but unless the instrument is admitted to trading or traded on a trading venue it is not a reportable financial instrument under 26(2) regardless of whether it has an ISIN.
- 6) **How should a complex trade (e.g. a strategy or other instrument where a transaction in the instrument is a complex trade) be reported in the instrument reference data under article 27 of MiFIR and article 4 of MAR?** [Question 1 f)]
- (i) Rather than the instrument reference data for the complex trade (e.g. strategy or other instrument where a transaction in the instrument is a complex trade) being reported, **the instrument reference data for the components that make up the strategy should be reported** under article 27 of [MiFIR](#) [Obligation to supply financial instrument reference data] and article 4 of [MAR](#) [Notifications and list of financial instruments].
  - (ii) This is because **the strategy is not a financial instrument itself**. This is the case even if the strategy happens to have an ISIN. **Each component should be reported as a separate record** and in the same way as if it was not part of a strategy - all of the instrument reference data fields should be populated with the instrument reference data for the component.
- 7) **For an instrument where a transaction is a complex trade (for example a strategy) should a component of the instrument be reported in the instrument reference data under article 27 of MiFIR and article 4 of MAR if it is not admitted to trading or traded on a trading venue?** [Question 1 g)]
- **No, only the components that are admitted to trading or traded on a trading venue should be reported** in the instrument reference data.

Section 16 Transaction reporting:

- 8) **How are different national identifiers specified in Annex II of RTS 22 represented?** [Question 2]
- (i) The amendments to the existing Q&A on national client identifiers for natural persons further clarify how the following three national identifiers specified in Annex II of RTS 22 should be represented: **The Czech ID, the Liechtensteinian ID, and the Romanian ID.**
  - (ii) For further details, see pages 26-32 in the [Q&A document](#).

## II. ESMA Q&A update on MiFID II/R investor protection and intermediaries topics

Section 1 Best Execution:

- 1) **What constitutes ‘other liquidity provider’ under Recital 7 of RTS 27?** [Question 18]
- (i) Recital 7 of RTS 27 sets out a broad definition for ‘other liquidity provider’. It says: “other liquidity providers should include firms that hold themselves out as **being willing to deal on own account**, and which **provide liquidity as part of their normal business** activity, whether or not they have formal agreements in place or commit to providing liquidity on a continuous basis”.
  - (ii) The definition under Recital 7 indicates that other liquidity providers include **firms that act similarly to market makers** whereby they deal on own account and provide liquidity to other market

participants **on an on-going basis**, however **do not necessarily have formal agreements in place** for this activity. Accordingly, a liquidity provider may not commit to providing prices in an instrument under all market conditions.

- (iii) The **definition gives flexibility for ESMA and national competent authorities** to determine when a firm is considered to provide liquidity as part of their normal business activity. In general, **ESMA considers that a firm that regularly and consistently provides liquidity** in an instrument would meet the definition of “other liquidity provider” under RTS 27. Accordingly, liquidity provision will be central to the firm’s business model or trading activity.
- (iv) **For instance, ESMA considers that a CFD provider that deals on own account, and regularly quotes two-way pricing for an instrument would meet the definition of “other liquidity provider” under RTS 27.** However, as set out previously, there is no expectation that a firm will need to be continuously willing to enter into transactions to buy and sell financial instruments at all times to be considered a liquidity provider.
- (v) ESMA would also like to point out that the **definition of other liquidity provider can include both firms who provide liquidity on venue and over the counter.** In addition, **a firm will be classified as a liquidity provider on the basis of all their trades** rather than on a trade by trade basis.
- (vi) It is also worth noting that, as stated in Recital 6, other liquidity providers are only required to include in their [RTS 27](#) reports data on orders executed or the price quoted for their clients in instruments not subject to the trading obligation.

#### Section 11 Client categorisation:

- 2) **When should an investment firm assess whether a private individual investor may be treated as a professional client under Section II of Annex II of MiFID II?** [Question 2]
  - (i) Pursuant to Section II [clients who may be treated as professionals on request] of Annex II of [MiFID II](#), a private individual investor may be allowed to waive some of the protections afforded by the conduct of business rules set in MiFID II by requesting to be treated as a professional client.
  - (ii) This **request must be made by the client in writing and at its own initiative.** This written statement shall indicate whether the client asks to be treated as a professional client generally (i.e. for all future transactions and investment services) or in respect of a particular investment service or transaction, or type of transaction or product.
  - (iii) This written statement should be **in a separate form from contracts or other terms of business.** As further discussed in question 2 below, investment firms must perform the assessment and follow the procedure set in Section II of Annex II of MiFID II prior to deciding whether it considers it appropriate to accept such a request.
  - (iv) **Investment firms should strictly refrain from implementing any form of practice that aims at incentivising, inducing or pressuring a private individual investor to request to be treated as professional client.**
- 3) **How should an investment firm assess whether a private individual investor may be treated, on request, as a professional client under Section II of Annex II of MiFID II?** [Question 3]
  - (i) As Section II of Annex II of MiFID II allows some of the protections afforded to retail clients by the conduct of business rules to be waived, such provisions are expected to be relied upon in a reasonable and carefully considered manner that is also consistent with an investment firm’s overarching duty to act in the best interest of its clients.
  - (ii) As a reminder, in accordance with the third paragraph of Section II.1, **private individual investors may be treated as professional clients only if an adequate assessment of their expertise, experience and knowledge gives reasonable assurance**, in light of the nature of the transactions

or services envisaged, **that the client is capable of making investment decisions and understanding the risks involved.**

- (iii) For instance, the fulfilment by a private individual investor of two of the criteria provided in the fifth paragraph of Sub-Section II.1 is an indication that such client may be treated as a professional client. However, such test may not be sufficient to justify the acceptance of a request for waiver received under Sub-Section II.2. Depending on the circumstances (e.g. the category of products the client intends to trade), a more thorough analysis of the client's expertise, experience and knowledge may be required.
- (iv) Therefore, **retail clients that do not meet at least two of the criteria set out in the fifth paragraph of Section II.1 shall not be treated as professional clients.** Still, investment firms should not automatically accept to treat as professional clients those who do meet two or more of these criteria.
- (v) In addition, in accordance with the second paragraph of Section II.2, **investment firms are expected to take all reasonable steps to ensure that a retail client that requested to be treated as a professional client meets the requirements of Section II.1.** Whilst investment firms should use their discretion to determine the reasonable steps needed, they should avoid relying solely on self-certification by the client and should consider obtaining further evidence to support assertions that the client meets the identification criteria at that point in time, notably when they consider that the documents or statements received from the clients are not sufficiently conclusive.
- (vi) For instance, when assessing whether a client meets the criteria set out under the third limb of the fifth paragraph of Section II.1 of Annex II, investment firms must ensure that the position was professional in nature and held in a field that allowed the client to acquire knowledge of transactions or services that have comparable features and a comparable level of complexity to the transactions or services envisaged. Consequently, **knowledge gathered in relation to simple products may not be relied upon where a private individual investor requests to be treated as a professional client in respect of more complex products** (e.g. knowledge related to vanilla government bonds should not be relevant with respect to envisaged transactions in complex derivatives).
- (vii) The assessment conducted by the investment firm of the expertise, experience and knowledge of the client shall give the investment firm reasonable assurance that the client is capable of making investment decisions in, and understanding the risks involved with respect to, each type of transactions and services envisaged.
- (viii) **Investment firms shall also maintain adequate recording and retention arrangements** in order to demonstrate compliance with the procedure under Section II.2 of Annex II of MiFID II to their national competent authorities.

**4) How should leveraged financial instruments be taken into account in order to assess the size of a client's financial instrument portfolio in accordance with the second limb of the fifth paragraph of Section II.1 of Annex II of MiFID II? [Question 6]**

- (i) The size of a client's financial instrument portfolio should **exceed the threshold of EUR 500,000** in order to fulfil the requirement in the second limb of the fifth paragraph of Section II.1 of Annex II of MiFID II.
- (ii) If an investment portfolio contains leveraged positions, or financial instruments for which a margin is deposited, **the net equity of the specific position or positions** (i.e. the margin deposited or paid for the financial instrument plus any unrealised profits or unrealised losses due to changes in the value of the underlying) **should be used in order to determine the size of the financial instrument as part of the portfolio. An investment firm should not use the notional value of the financial instruments**, as this value does not reflect the actual size of the portfolio of the client.

Section 13 Provision of investment services and activities by third country firms:

5) **Article 42 of MiFID II regulates the provision of services by third country firms at the exclusive initiative of the client. How should “initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm” be understood in Article 42 of MiFID II?** [Question 1] – **Changes are highlighted in red.**

- (i) 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.
- (ii) As provided in recital 111, in order to qualify for Article 42 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”.
- (iii) ESMA is of the view 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 ~~firm~~**entity**.
- (iv) As for the means of such solicitations, ESMA is of the view 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.
- (v) Firms are reminded that such clarification is without prejudice to any provisions attached to the marketing of such products.
- (vi) The client’s own exclusive initiative shall be assessed in concreto on a case by case basis for each investment service or activity provided, 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.

**(vii) Such approach should be used for the purpose of Article 46 of MiFIR as well.**

6) **How should «new categories of investment products or investment services» within the meaning of Article 42 of MiFID II and Article 46 of MiFIR be understood?** [Question 2]

- (i) To determine the categories of investment services for the purpose of Article 42 of MiFID II and Article 46 of MiFIR, ESMA is of the view that **a third-country firm provides a new investment service or investment activity** as defined in Section A of Annex I of MiFID II **where this service or activity is added to the existing services or activities after 3 January 2018.**
- (ii) Investment products include financial instruments set out in Section C of Annex I of MiFID II and structured deposits as defined in Article 4(1) point 43) of MiFID II. ESMA is of the view that **any investment product which is the subject of the investment service or activity provided by a third-country firm to a client after 3 January 2018 is a new investment product.**
- (iii) Under the reverse solicitation regime, **a third-country firm cannot market new categories of investment products to the client.** Whether a third-country firm markets a new category of an investment product needs to be assessed on a case-by-case basis, taking into account elements such as (i) the type of the financial instrument which is offered; (ii) the distinction between complex and non-complex products as referred to in Article 25(4) of MiFID II; (iii) the riskiness of the product.
- (iv) For example, **a subordinated bond does not belong to the same category as a plain-vanilla debt instrument.** In addition, categories of investment products should be granular enough to ensure

that the reverse solicitation is not used as a way of circumventing a national regime of a Member State governing the provision of investment services by a third-country firm.

- (v) As an example, if a third-country firm has been providing investment advice to a client prior to January 2018 under the national regime of a Member State governing the provision of investment services by third-country firms, the third-country firm will not be entitled to continue providing investment advice - without complying with Article 39 of MiFID II and 46 of MiFIR – in relation to an investment product other than those that belong to the same category on which the investment advice was provided prior to 3 January 2018 [new products].
- (vi) This is without prejudice to any more restrictive approach adopted at national level regarding the transition to the MiFID II third-country regime. Reverse solicitation should not be assumed. **Third-country firms should be able to provide records tracking the relationship with the client and in particular whether the client has taken the initiative to receive investment advice with respect to a new product.**

#### Section 15 Other issues:

- 7) **What are the supervisory responsibilities of competent authorities in host Member States when a UCITS management company or an alternative investment fund manager provides investment services through a branch established in the host Member State?** [Question 2]
- (i) Under both the UCITS and the AIFM Directives, **supervisory powers of competent authorities** in relation to branches of UCITS management companies or alternative investment fund managers (AIFMs) established in a Member State that is not the home Member State **are shared**.
  - (ii) The competent authority of the Member State in which the branch is located (**host Member State**) **is responsible for the supervision of the branch's compliance with conduct rules** referred to in Article 17(5) of the UCITS Directive and Article 45(2) of the AIFMD and the competent authority of the Member State in which the UCITS management company or the alternative investment fund manager is established (**home Member State**) **is responsible for the supervision of the other requirements** provided under the relevant applicable framework.
  - (iii) **Neither the UCITS Directive nor the AIFMD provides for an explicit framework for the allocation of supervisory responsibilities and powers** for those cases where UCITS management companies or AIFMs are authorised to carry out investment services set out in Article 6(3) of the UCITS Directive and Article 6(4) of the AIFMD and have branches providing those services in other Member States.
  - (iv) **ESMA is of the view that responsibilities of home and host Member States should be identified similarly to, and consistently with, the general framework** established for the provision of activities pursued by UCITS management companies and AIFMs through branches as well as with the MiFID II framework regulating the supervision on the provision of investment services across the EU.
  - (v) **This approach is in line with the division of responsibilities provided under the MiFID II framework.** In accordance with Article 35(8) of MiFID II, the competent authority of the host Member State has the responsibility for ensuring that the services provided by the branch of an investment firm or a credit institution in its territory comply with the MiFID II requirements under Articles 24 (“General principles and information to clients”) and 25 (“Assessment of suitability and appropriateness and reporting to clients”) of MiFID II, which also apply to UCITS management companies and AIFMs providing investment services.

## Relevant articles referred to in the ESMA Q&A:

### Point II.5 and II.6

#### *MiFIR – Article 42*

#### **Product intervention by competent authorities**

1. A competent authority may prohibit or restrict the following in or from that Member State:
  - (a) the marketing, distribution or sale of certain financial instruments or structured deposits or financial instruments or structured deposits with certain specified features; or
  - (b) a type of financial activity or practice.
2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that:
  - (a) either
    - (i) a financial instrument, structured deposit or activity or practice gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of whole or part of the financial system within at least one Member State; or
    - (ii) a derivative has a detrimental effect on the price formation mechanism in the underlying market;
  - (b) existing regulatory requirements under Union law applicable to the financial instrument, structured deposit or activity or practice do not sufficiently address the risks referred to in point (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;
  - (c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument, structured deposit or activity or practice;
  - (d) the competent authority has properly consulted competent authorities in other Member States that may be significantly affected by the action;
  - (e) the action does not have a discriminatory effect on services or activities provided from another Member State; and
  - (f) it has properly consulted public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, where a financial instrument or activity or practice poses a serious threat to the orderly functioning and integrity of the physical agricultural market.

Where the conditions set out in the first subparagraph are fulfilled, the competent authority may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a financial instrument or structured deposit has been marketed, distributed or sold to clients.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority.

3. The competent authority shall not impose a prohibition or restriction under this Article unless, not less than one month before the measure is intended to take effect, it has notified all other competent authorities and ESMA in writing or through another medium agreed between the authorities the details of:
  - (a) the financial instrument or activity or practice to which the proposed action relates;
  - (b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and
  - (c) the evidence upon which it has based its decision and upon which it is satisfied that each of the conditions in paragraph 2 are met.
4. In exceptional cases where the competent authority deems it necessary to take urgent action under this Article in order to prevent detriment arising from the financial instruments, structured deposits, practices or activities referred to in paragraph 1, the competent authority may take action on a provisional basis with no less than 24 hours' written notice, before the measure is intended to take effect, to all other competent authorities and ESMA or, for structured deposits, EBA, provided that all the criteria in this Article are met and that, in addition, it is clearly established that a one month notification period

would not adequately address the specific concern or threat. The competent authority shall not take action on a provisional basis for a period exceeding three months.

5. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 2 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice.
6. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 2 no longer apply.
7. The Commission shall adopt delegated acts in accordance with Article 50 specifying criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the of the financial system within at least one Member State referred to in paragraph 2(a).

Those criteria and factors shall include:

- (a) the degree of complexity of a financial instrument or structured deposit and the relation to the type of client to whom it is marketed, distributed and sold;
- (b) the degree of innovation of a financial instrument or structured deposit, an activity or a practice;
- (c) the leverage a financial instrument or structured deposit or practice provides;
- (d) in relation to the orderly functioning and integrity of financial markets or commodity markets, the size or the notional value of an issuance of financial instruments or structured deposits.

#### *MiFIR – Article 46*

##### **General provisions**

1. A third-country firm may provide investment services or perform investment activities with or without any ancillary services to eligible counterparties and to professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU established throughout the Union without the establishment of a branch where it is registered in the register of third-country firms kept by ESMA in accordance with Article 47.
2. ESMA shall register a third-country firm that has applied for the provision of investment services or performance of activities throughout the Union in accordance with paragraph 1 only where the following conditions are met:
  - (a) the Commission has adopted a decision in accordance with Article 47(1);
  - (b) the firm is authorised in the jurisdiction where its head office is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country;
  - (c) cooperation arrangements have been established pursuant to Article 47(2).
3. Where a third-country firm is registered in accordance with this Article, Member States shall not impose any additional requirements on the third-country firm in respect of matters covered by this Regulation or by Directive 2014/65/EU and shall not treat third-country firms more favourably than Union firms.
4. The third-country firm referred to in paragraph 1 shall submit its application to ESMA after the adoption by the Commission of the decision referred to in Article 47 determining that the legal and supervisory framework of the third country in which the third-country firm is authorised is equivalent to the requirements described in Article 47(1).

The applicant third-country firm shall provide ESMA with all information necessary for its registration. Within 30 working days of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant third-country firm is to provide additional information.

The registration decision shall be based on the conditions set out in paragraph 2.

Within 180 working days of the submission of a complete application, ESMA shall inform the applicant third-country firm in writing with a fully reasoned explanation whether the registration has been granted or refused.

Member States may allow third-country firms to provide investment services or perform investment activities together with ancillary services to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in their territories in accordance with national regimes in the absence of the Commission decision in accordance with Article 47(1) or where such decision is no longer in effect.

5. Third-country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country.

The information in the first subparagraph shall be provided in writing and in a prominent way.

Member States shall ensure that where an eligible counterparty or professional client within the meaning of Section I of Annex II to Directive 2014/65/EU 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, this Article does not apply to the provision of that service or activity by the third-country firm to that person including a relationship specifically related to the provision of that service or activity. An initiative by such clients shall not entitle the third-country firm to market new categories of investment product or investment service to that individual.

6. Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State.
7. ESMA shall develop draft regulatory technical standards to specify the information that the applicant third-country firm shall provide to ESMA in its application for registration in accordance with paragraph 4 and the format of information to be provided in accordance with paragraph 5.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

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