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Brexit: Esma ups standards for non-EU firms

By Robert Van Egghen 3 February 2020

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Europe's markets watchdog has fleshed out the regime for non-EU investment firms servicing EU investors under Mifid II, including an increase in reporting requirements, as the UK leaves the bloc.

The European Securities and Markets Authority has put forward a number of draft technical standards on the provision of investment services and activities in the EU by third-country firms.

The industry consultation comes as the UK officially left the EU on Friday night, although businesses will benefit from a transition period until December 31.

EU policymakers are concerned that the integrated nature of the UK and the EU's financial markets, combined with the perfunctory nature of the current equivalence framework, could make it difficult to supervise cross-border financial activity after Brexit.

Under the equivalence framework, a third country is recognised as being equivalent by the EU, which means it can access the bloc's financial market.

However, the third country does not necessarily have to accept EU jurisdiction or copy EU laws in order to remain equivalent.

The draft standards would greatly increase reporting obligations for third-country firms with an EU branch servicing retail or professional investors in the EU.

Esma says firms would have to submit a range of information to it on an annual basis, including "the scale and scope of the services and activities carried out by the branch" and "the risk management policy and arrangements applied by the branch" for those services.

Firms would also need to provide "a detailed description of the investor protection arrangements available to the clients of the branch".

Esma would also have the power to conduct on-site inspections of a firm's EU branch and temporarily block that firm from servicing EU investors if its reporting is inadequate.



Alexandra Green, senior counsel at law firm Macfarlanes, says the draft standards indicate that UK firms will face “a high bar” to secure access to EU investors after Brexit.

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Ms Green says the proposals reflect “the expanded remit of Esma” following the recent review into the European supervisory authorities and demonstrate its desire to “ensure a level playing field” in the supervision of third-country firms across the bloc.

UK firms will have to register with Esma after Brexit in order to service EU investors, provided the UK's regulatory regime has been recognised as equivalent by the EU.

Attilio Veneziano, a regulatory lawyer and author of *Deepening the Single Market in Europe*, says the proposals would ensure “strict alignment between the set of information that a third-country firm will have to provide when it first requests registration and the information it provides going forward”.

“This will help streamline the process of registration and the ongoing supervision of registered entities,” he says.

Mr Veneziano says the proposals are a step on the road to “defining a clear and robust framework” for third-country firms with EU investors, which could simplify the equivalence process.

“This bodes well for the UK should there be no different trade agreement with the EU,” he adds.

However, Ms Green cautions that should trade talks between the EU and the UK turn sour over the coming months an equivalence judgment may not be forthcoming.

“You cannot assume that equivalence will necessarily be granted if the process becomes politicised,” she says.

The EU has indicated a willingness to deploy equivalence as a political tool in recent months, removing the judgment from Switzerland after failed negotiations on a new trading arrangement.