



Brussels, 8 February 2018

## **NOTICE TO STAKEHOLDERS**

### **WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF MARKETS IN FINANCIAL INSTRUMENTS**

The United Kingdom submitted on 29 March 2017 the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. This means that, unless a ratified withdrawal agreement<sup>1</sup> establishes another date, all Union primary and secondary law will cease to apply to the United Kingdom from 30 March 2019, 00:00h (CET) ('the withdrawal date').<sup>2</sup> The United Kingdom will then become a 'third country'.<sup>3</sup>

Preparing for the withdrawal is not just a matter for EU and national authorities but also for private parties.

In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, stakeholders are reminded of legal repercussions which need to be considered when the United Kingdom becomes a third country.

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of MiFID investment services and activities<sup>4</sup> no longer apply to the United Kingdom. This has in particular the following consequences:<sup>5</sup>

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<sup>1</sup> Negotiations are ongoing with the United Kingdom with a view to reaching a withdrawal agreement.

<sup>2</sup> Furthermore, in accordance with Article 50(3) of the Treaty on European Union, the European Council, in agreement with the United Kingdom, may unanimously decide that the Treaties cease to apply at a later date.

<sup>3</sup> A third country is a country not member of the EU.

<sup>4</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12.6.2014, p. 349 (MiFID II), and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12.6.2014, p. 84 (MiFIR).

<sup>5</sup> See also the "Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of asset management" ([https://ec.europa.eu/info/brexit/brexit-preparedness\\_en](https://ec.europa.eu/info/brexit/brexit-preparedness_en)).

## 1. AUTHORISATIONS

- UK investment firms will no longer benefit from the MiFID authorisation<sup>6</sup> to provide MiFID investment services and activities in the Union<sup>7</sup> (they will lose the so-called "EU passport") and will be third-country firms. This means that those investment firms will no longer be allowed to provide services in the EU on the basis of their current authorisations.<sup>8</sup>
- EU-27 subsidiaries (legally independent companies established in EU-27 and controlled by or affiliated to investment firms established in the United Kingdom) can continue to operate as EU investment firms if they have a MiFID authorisation in one of the EU Member States. These firms, like any other MiFID firm, will comply with MiFID requirements amongst others in terms of substance requirements (including governance, outsourcing or the use of branches in a third-country to provide services back in the EU).<sup>9</sup> Such firm's business model and structure (including links with non-EU entities) will be part of MiFID competent authorities' assessment (e.g. qualifying shareholders, the group business model/structure, the potential (prudential) consolidated supervision or lack thereof, etc.).
- Branches in the EU-27 of UK established investment firms will be branches of third-country investment firms and will need to comply with national requirements applicable in the Member State where the branch is established or with the regime set in Article 39-41 MiFID II where applicable. The provision of services/activities is limited to that Member State's territory.

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<sup>6</sup> Article 5 MiFID II. Credit institutions authorised under Directive 2013/36/EU may also provide investment services and activities. Before granting an authorisation under Directive 2013/36/EU, relevant competent authorities should verify that they comply with relevant MiFID provisions. See Notice to stakeholders on the withdrawal of the United Kingdom and EU rules in the field of banking and payment services.

<sup>7</sup> Annex I to MiFID II provides a list of services and activities and financial instruments covered by the MiFID framework.

<sup>8</sup> The benefit of the MiFID passport will therefore be limited to investment firms established in the EU having obtained a MiFID authorisation in accordance with the authorisation and substance requirements set out in the MiFID framework. See also ESMA Opinion - General Principles to support supervisory convergence in the context of the UK withdrawing from the EU ([https://www.esma.europa.eu/sites/default/files/library/esma42-110-433\\_general\\_principles\\_to\\_support\\_supervisory\\_convergence\\_in\\_the\\_context\\_of\\_the\\_uk\\_withdrawin\\_g\\_from\\_the\\_eu.pdf](https://www.esma.europa.eu/sites/default/files/library/esma42-110-433_general_principles_to_support_supervisory_convergence_in_the_context_of_the_uk_withdrawin_g_from_the_eu.pdf)), ESMA Opinion to support supervisory convergence in the area of investment firms in the context of the United Kingdom withdrawing from the European Union (<https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-firms-in-context-united-kingdom>).

<sup>9</sup> See also above ESMA opinions and specific clarifications on these matters, in particular on the risks of letter-box entities which may arise from the use of outsourcing arrangements or from the use of non-EU branches for the performance of functions/services with respect to EU clients. The use of non-EU branches needs to be based on objective reasons linked to the services provided in the non-EU jurisdiction and does not result in a situation where such non-EU branches perform material functions or provide services back into the EU.

- UK market operators/investment firms operating a trading venue or execution venue will no longer benefit from the MiFID authorisation/licence<sup>10</sup>. UK based regulated markets (RMs), multilateral trading facilities (MTFs) or systematic internalisers (SI) will thus cease to be eligible venues for trading shares subject to the MiFIR share trading obligation; EU counterparts can no longer undertake trades in shares subject to the trading obligation on such platforms.<sup>11</sup> Similarly, UK based RMs, MTFs or organised trading facilities (OTFs) will cease to be eligible venues for the purposes of the MiFIR derivatives trading obligation<sup>12</sup> and EU counterparts will no longer be able to undertake trades on these platforms. In both cases, EU counterparts would need to reassess their trading arrangements to ensure continued compliance with their obligations under the MiFID framework.

Where previously available, UK based trading venues and CCPs<sup>13</sup> will no longer benefit from the open and non-discriminatory access to EU trading venues and EU central counterparties (CCPs) and to EU benchmarks respectively.

## 2. CONTRACTS

- The loss of MiFID authorisations may also impact relationships with EU clients/counterparts and may affect the ability of UK established firms to continue performing certain obligations and activities deriving from existing contracts.<sup>14</sup> Under MiFID<sup>15</sup> firms are required to take measures to ensure continuity in the performance of investment services and activities. To this end, firms should assess the impact of the withdrawal of the United Kingdom from the EU on their operations and identify and mitigate compliance risks.

For instance, EU established firms dealing in financial instruments subject to the MiFID trading obligation would no longer be able to use certain UK established firms/venues. Also, clients can no longer have direct electronic access to EU established trading venues via UK established firms. Further, UK established UCITS will become non-EU AIFs and EU established investment firms may be no longer

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<sup>10</sup> See Articles 5, 44 MiFID. Also see ESMA Opinion in the area of secondary markets in the context of the UK withdrawing from the EU ([https://www.esma.europa.eu/sites/default/files/library/esma70-154-270\\_opinion\\_to\\_support\\_supervisory\\_convergence\\_in\\_the\\_area\\_of\\_secondary\\_markets\\_in\\_the\\_context\\_of\\_the\\_united\\_kingdom\\_withdrawing\\_from\\_the\\_european\\_union.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-154-270_opinion_to_support_supervisory_convergence_in_the_area_of_secondary_markets_in_the_context_of_the_united_kingdom_withdrawing_from_the_european_union.pdf)).

<sup>11</sup> See Article 23 MiFIR on trading obligations. The EU trading obligation applies to shares listed on both exchanges in the recognised countries and in the EU ("dual listings"), on condition that trading in the EU constitutes a significant percentage of the share's global trading volume.

<sup>12</sup> Cf. Article 28 MiFIR. Derivatives subject to the trading obligation comprise of euro, dollar and pound interest rate swaps in the most common benchmark tenors, as well as index-based CDS (Commission Delegated Regulation (EU) 2017/2417).

<sup>13</sup> Articles 35, 36, 37, 38 MiFIR.

<sup>14</sup> Also considering applicable national rules.

<sup>15</sup> Article 16(4) MiFID II.

able to distribute them to their clients, unless the relevant AIFMD provisions are complied with.

### 3. OTHER ASPECTS

- The outsourcing of certain operational functions to UK providers may be undertaken only when in compliance with relevant MiFID requirements.<sup>16</sup> In particular, the outsourcing of functions related to portfolio management to UK entities will only be permitted where the conditions under Article 32 of the MiFID Delegated Regulation 2017/565 are met, including the requirement that cooperation arrangements between National Competent Authorities and UK competent authorities are in place. Moreover, the European Securities and Markets Authority (ESMA) has issued opinions with specific clarifications on these matters, in particular on the risks of letter-box entities which may arise from the use of outsourcing arrangements or from the use of non-EU branches for the performance of functions/services with respect to EU clients.<sup>17</sup>
- In light of MiFID obligations on disclosure of information to clients, firms providing investment services are required to provide clients or potential clients with accurate disclosure, in good time and in any case before clients are bound by any contract, on the impact on the provision of services and investors' rights that may emerge from the withdrawal of the United Kingdom from the EU including the upcoming loss by the firm of its MiFID authorisation.<sup>18</sup> Firms providing investment services are also required to notify clients in good time about any material change to the information already provided, including if any material changes occurs to the situation of the firm and any resulting consequences for contracts.<sup>19</sup>
- According to Article 59 MiFID II, the provision of data reporting services<sup>20</sup> requires an authorisation by the home Member State competent authority. UK based data

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<sup>16</sup> Cf. Article 16(5) MiFID II as further detailed in Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive ('MiFID Delegated Regulation 2017/565'), OJ L 87, 31.3.2017, p. 1. As part of the review of the European Supervisory Authorities ("ESAs") adopted on 20 September 2017, the Commission has proposed a coordination by ESAs in relation to delegation and outsourcing of activities as well as of risk transfers (COM(2017)536 final).

<sup>17</sup> ESMA Opinion - General Principles to support supervisory convergence in the context of the UK withdrawing from the EU (31 May 2017) ([https://www.esma.europa.eu/sites/default/files/library/esma42-110-433\\_general\\_principles\\_to\\_support\\_supervisory\\_convergence\\_in\\_the\\_context\\_of\\_the\\_uk\\_withdrawing\\_from\\_the\\_eu.pdf](https://www.esma.europa.eu/sites/default/files/library/esma42-110-433_general_principles_to_support_supervisory_convergence_in_the_context_of_the_uk_withdrawing_from_the_eu.pdf)), ESMA Opinion to support supervisory convergence in the area of investment firms in the context of the United Kingdom withdrawing from the European Union (13 July 2017) (<https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-firms-in-context-united-kingdom>).

<sup>18</sup> Articles 44, 46 MiFID Delegated Regulation 2017/565.

<sup>19</sup> Article 46 MiFID Delegated Regulation 2017/565.

<sup>20</sup> See Annex I, Section D, to MiFID II.

reporting service providers which have not obtained a MiFID authorisation by a competent authority established in the EU will have to cease to serve EU markets.<sup>21</sup>

This notice is without prejudice to any equivalence decisions that may be adopted by the EU.<sup>22</sup>

The website of the Commission on Financial Markets [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets_en) provides for general information concerning MiFID Investment services and activities. These pages will be updated with further information, where necessary.

European Commission  
Directorate-General for Financial Stability, Financial Services and Capital Markets  
Union

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<sup>21</sup> It should be noted that there is no equivalence process provided for these services.

<sup>22</sup> Articles 23, 28, 47 MiFIR.