

Impact of extension of scope of trading activities requiring authorisation under MiFID II/R on third country firms

With the application of DIRECTIVE No 2014/65/EU (revised Markets in Financial Instruments Directive (MiFID II)) and REGULATION No 600/2014/EU (the associated Markets in Financial Instruments Regulation (MiFIR)) on 3 January 2018, the scope of trading activities requiring authorisation as investment firm will be extended. This may affect Eurex and Frankfurt Stock Exchange (FSE, incl. Börse Frankfurt Zertifikate AG) participants that are “third country firms” (TCF)¹. This information note summarizes the impact of MiFID II / MiFIR on TCFs in this regard.

Extension of scope of trading activities requiring authorization and impact on TCFs

The impact of MiFID II / MiFIR on TCFs is dependent on the scope and scale of their activities. In this respect, it is important to understand that MiFID II extends the scope of trading activities requiring authorisation as investment firm. According to article 2.1 (d) of MiFID II, the authorization scope has broadened to firms dealing on own account in financial instruments, if they are market makers, members of or participants in a regulated market or a MTF, apply a high frequency algorithm trading technique or deal on own account when executing client orders. The authorization scope has also been extended to indirect participants of a regulated market or an MTF, if they have direct electronic access as defined in Art. 4.1 (41) MiFID II to a trading venue.

Depending on the kind of business a TCF is conducting in the European Economic Area (EEA), MiFID II / MiFIR may provide for an equivalence regime and transitional periods, which waive the requirement of authorization as an investment firm and the establishment of an EEA branch. Details regarding the equivalence / transitional period regime and their applicability are further outlined below.

In order to clarify whether with the application of MiFID II / MiFIR their activities will be subject to any authorization requirement and / or could be subject to the equivalence and transitional period regime, we recommend that TCFs should seek legal advice.

Which access provisions do apply depends on the nature of clients towards whom investment services / activities are provided.

I. MiFIR equivalence regime for TCFs providing investment services to eligible counterparties and professional clients

To date, access by TCFs to European regulated markets is governed by national regimes. This will change with the application of MiFID II and MiFIR. MiFIR introduces an equivalence regime for TCFs who provide investment services / activities to eligible counterparties and professional clients within the meaning of Section I of Annex II of MiFID II, if the regulatory standards of the third country in which the TCFs are incorporated, are deemed to be equivalent to the MiFID II / MiFIR provisions by the European Commission.

If the European Commission has made a positive equivalence determination regarding a particular third country, firms incorporated in this country may provide investment services / activities to eligible counterparties and professional clients throughout the EEA

¹ Article 4.1 (57) of MiFID II defines ‘third-country firm’ as “a firm that would be a credit institution providing investment services or performing investment activities or an investment firm if its head office or registered office were located within the Union”.

without the establishment of a branch, provided they are registered in the register of third country firms kept by ESMA in accordance with Art. 47 MiFIR.

Establishment of a branch may only be required when investment services are offered to EEA retail clients or to professional clients. Further details are outlined below.

II. MiFID II access regime for TCFs providing investment services to retail clients and professional clients

In addition to the MiFIR regime, MiFID II introduces a new regime for TCFs who provide investment services / activities in respect of retail clients and professional clients. Art. 39 MiFID II provides member states the option to require TCFs to establish a branch in the member state, if the TCF intends to offer investment services also to retail clients and professional clients. In Germany, TCFs who offer investment services / activities also to retail clients have to establish a branch. The MiFID II regime for TCFs, which are required by national competent authorities in the EEA to establish a branch, does not provide for a MiFID II passport. Hence, investment services / activities can only be performed within the member state in which the branch is located.

III. Transitional Period

If TCFs decide to follow the MiFIR regime, arrangements are required for the time after MiFID II / MiFIR comes into effect (3 January 2018) and the date the European Commission comes up with an equivalence determination for a particular jurisdiction (no pre-defined timeline). Art. 54 MiFIR foresees that TCFs who intend to operate under the MiFIR equivalence regime can continue doing business in the EEA up to three years after the European Commission has decided about the equivalence of the jurisdiction a particular TCF is incorporated in, subject to national laws of the EEA member states in which the firm intends to do business.

This is of particular relevance for TCFs dealing on own account on regulated markets or MTFs and who were not subject to authorization requirements under MiFID but who will become subject to authorization requirements under MiFID II. For those TCFs a transitional period is implemented in Germany via the 2nd FinanzG² (published on 24 June 2017).

§64v (8) KWG³ establishes the transitional period for TCFs dealing on own account. §64v (8) KWG sets out that the exemption in accordance with §2 (5) KWG will be temporarily granted for a TCF dealing on own account by 3 January 2018, if this firm submits a complete application for exemption to BaFin latest by 2 July 2018. Completeness will be determined by BaFin. The exemption will last until ESMA has decided about registering the TCF in ESMA's register for third country firms and allows firms to continue their business activities within Germany beyond the application of MiFID II / MiFIR. This decision can only be made after the European Commission has made an equivalence determination regarding the jurisdiction in which the TCF is located and the firm has applied for this registration.

² Second Law for the Amendment of Financial Market Regulations Based on European Legislative Acts (transition of MiFID II into national law).

³ KWG = Kreditwesengesetz (German Banking Act)

Eurex and FSE are currently in close alignment with BaFin to clearly define which information is required for the above mentioned application for exemption. Once this is clarified, further information will be published.

Based on the different authorization alternatives, we encourage affected members to conduct a careful strategic review of their organizational set-up together with the requirements of their intended authorization path. We would very much appreciate an open dialogue about the different implementation ideas and are happy to engage in bilateral discussions with our members outside the EEA and to facilitate any clarification requirements with German local authorities, to ensure a smooth realization of the authorization requirements under MiFID II / MiFIR.

Contact details MiFID II / MiFIR - Eurex and FSE:
customer.readiness@deutsche-boerse.com