

MIFID II: a passport to new opportunities

Non-EU market players enter new landscape following transposition of MiFID II in Greece

On 25 January 2018 the Greek Parliament passed the law implementing Directive 2014/65/EU (“MiFID II”) in Greece while MiFID II has become effective as of 3 January across Europe.

MiFID II and Regulation (EU) No. 600/2014 (“MiFIR” and, together with MiFID II, “MiFID II Rules”) change the landscape of financial markets by introducing new rules on transaction reporting, pre and post-trade transparency, high-frequency trading, commodity derivatives, product governance. Among reforms brought by the new framework, the MiFID II Rules create a new, harmonised regime in Europe for non- EU institutions. The new regime is expected to facilitate the provision of investment services by non-EU banks and investment firms and shed light into a series of technical and legal questions that were dealt with differently by competent authorities across the member-states.

Under the MiFID II Rules, non – EU investment firms may, under conditions, benefit from a new “passport” regime allowing them to provide investment services across Europe either on a cross – border basis or through the establishment of a branch in an EU member-state.

In Greece, the new “passport” regime is implemented by reference to the client categorisation as follows:

Retail clients and retail clients that request to be treated as professionals

Greece made use of the discretion provided by MiFID II to impose the requirement of establishing a branch on non-EU institutions wishing to provide services to retail clients and retail clients that request to be treated as professionals in Greece (elective professional clients).

Article 39 of the new law transposing the respective provisions of Article 39 of MiFID II sets out the conditions under which the Hellenic Capital Markets Commission (HCMC) or the Bank of Greece (BoG) may grant authorisation to non- EU investment firms or credit institutions respectively to establish a branch in Greece as follows:

- the provision of the relevant services should be subject to licensing and regulatory supervision in the third country, where the non-EU entity is established and the non-EU entity should be properly licensed in the third country;
- compliance by the competent authority of the third country with FATF recommendations;

- cooperation arrangements are in place between the competent authorities of the third country and the HCMC or the Bank of Greece, including provisions for the exchange of information;
- the branch has sufficient initial capital; specific thresholds are set by the law depending on the type of institution establishing the branch;
- tax treaties exist between Greece and the third country in accordance with the OECD Model Tax Convention on Income and on Capital for the effective exchange of information in tax matters;
- the non-EU entity belongs to an investor-compensation scheme authorised or recognized in accordance with Greek legislation implementing Directive 97/9/EC or Directive 2014/49/EU;

Per se Professional Clients and Eligible Counterparties

Under MiFID II Rules non-EU entities are entitled to provide investment services to per se professional clients (as opposed to elective professional clients) and other eligible counterparties on a cross-border basis in all EU member states, including Greece, provided that the non-EU entities are registered with ESMA. Registration with ESMA requires that:

- the European Commission has adopted an equivalence decision with respect to the third country;
- the non-EU entity is duly licensed in the third country to provide investment services and is subject to effective supervision and monitoring;
- cooperation agreements exist between ESMA and the competent authorities of the third country.

The registration with ESMA is subject to withdrawal if, at any time, ESMA has well-founded reasons to believe, based on documented evidence, that the non-EU entity does not comply with the aforementioned conditions. There is currently no third country institution registered in the ESMA registry.

The license of a third country entity's Greek branch to provide investment to retail and elective professional clients confers to such branch the "passport" rights to provide investment services to professional investors and eligible counterparties to all other EU member-states. Accordingly, duly licensed branches of non-EU entities established in other EU member-states will have "passport" rights to provide investment services to professional investors and eligible counterparties in Greece.

Reverse Solicitation

EU legislation was silent up until now on the reverse solicitation argument. MiFID II Rules now provide an explicit exemption from local licensing or ESMA registration requirement when services are provided on the client's own initiative.

What constitutes "client initiative" is a matter of interpretation by the Greek competent authorities on an ad hoc basis.

The reverse solicitation exemption applies to all types of clients, including retail clients, but is available only for services or products that a client has specifically requested and does not entitle

the non-EU entity to market other services or products than those requested at the exclusive initiative of the client.

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