

BVI's¹ opinion on the possible revision of the wholesale third-country regime under MiFIR

EU professional clients, including fund and asset management companies, need to have proper and unobstructed access to third country providers and their services under MiFIR. Fund managers offering funds which invest on a global scale or in selected non-EU markets must be able to appoint specialised management teams outside the EU or to take avail of investment advice from providers with local expertise. In addition, such funds often need to trade their assets on exchanges and other trading facilities outside the EU either because the relevant securities are not listed/traded on an EU marketplace or due to poor liquidity and pricing conditions available in the EU as compared to the principal exchange in a third country. Often, also OTC-transactions can be executed on most favourable terms with non-EU counterparties. Unhindered access to investment services from outside the EU is thus key to maintaining the high quality and diversity of services provided by EU fund and asset managers to EU investors at competitive prices. The importance of such access will significantly increase in the event of Brexit when large parts of the European asset management sector and nearly all multilateral trading venues will become third-country entities as explained in more detail below.

Against this background, the further debate on this subject should be guided by the following considerations:

- **Third-country regime for investment firms post-Brexit should be thoroughly redesigned:** We understand that specific amendments of MiFIR provisions concerning services and activities by third-country firms are currently being discussed in the Council in the context of the IFR/IFD negotiations. It seems that the tabled proposals entail major changes to the current regime for the provision of third-country investment services to EU professional investors. Still, as explained above, unhampered access to third-country investment services is crucial for maintaining the competitiveness of the EU fund and asset management companies. Decisions on modifying or even restricting the possibility of EU professional investors to receive services from outside the EU should thus be thoroughly considered and their political dimension weighted out against the practical implications for the EU financial services industry and the end-investors. In principle, we support the Commission's approach to amending Article 47 (1) MiFIR in order to ensure that the equivalence assessment for services and activities which are likely to be of systemic importance for the Union should be detailed and granular in order to protect EU market participants as well as end-investors. Apart from that, we strongly advise against taking rushed decisions on amending the third-country regime under MiFIR at the final stage of the IFR/IFD negotiations. The Council's position on a topic with potentially such far-reaching consequences needs to be properly prepared, also by means of an impact assessment, and in view of the pending Brexit negotiations, must be ultimately consistent with the general direction of the EU27/UK relationship on financial services.

¹ BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Fund companies act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's over 100 members manage assets of more than 3 trillion euros for private investors, insurance companies, pension and retirement schemes, banks, churches and foundations. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.



- **Reverse solicitation of third-country services by EU professional clients must not be constrained:** Professional clients under MiFID II comprise financial entities like banks, investment firms, fund management companies, but also large undertakings, national or regional governments and international organisations. Other clients can elect to be treated as professional investors if they can prove that they have sufficient knowledge and experience of the relevant financial markets. Hence, in general, professional clients under MiFID II are capable of making investment decisions and understanding the risk involved. On this basis, they should be considered equally qualified for making a proper selection of service providers, including those from third countries. Therefore, we see the case for differentiating the understanding and scope of reverse solicitation acceptable towards either retail or institutional clients.

In any case, relationships between financial counterparties proficient in the area of financial services should not be impeded in order to preserve the competitiveness and quality of services provided to the EU end-investors. Thus, at the very least, we urge the EU legislator not to constrain the ability of regulated or authorised market participants in the EU to request for third-country services by means of reverse solicitation.²

In addition, one should bear in mind that the need for investment services provided by third-country entities to EU financial market participants is to some extent triggered by the clearing obligation and the trading obligation under MiFIR. Both are based on the market infrastructure existing in EU28, but not in EU27. Considering the political pressure from the commitments of G-20, one can understand the push for subjecting financial instruments to a clearing and trading obligation. However, the current gaps in a EU27 market infrastructure must be bridged by third country entities' financial services if the clearing and trading obligations are to be effectively fulfilled. Pre-Brexit, it should therefore be evaluated whether or not obligations like the clearing or trading obligation must be temporarily suspended in order to avoid situations where professional clients and eligible counterparties have to rely on services of (future) third country entities that may not be available straightaway post-Brexit depending on the conditions for market access to be agreed in the pending negotiations. Such suspension should be communicated sufficiently in advance to the EU market participants.

² Such regulated or authorised entities could be distinguished with reference to Annex II section I. (1) MiFID II which lists "entities which are required to be authorised or regulated to operate in the financial markets" for the definition of professional clients.