

PROVISION OF MIFID INVESTMENT SERVICES IN ROMANIA – IS THE ESTABLISHMENT OF A BRANCH REQUIRED?

As part of the process for the implementation of the MiFID II framework in Romania, the Financial Supervisory Authority (the "FSA") issued Regulation no. 5/2019 (the "**Regulation**") on certain requirements related to the provision of investment services and activities under the Romanian law implementing Directive 2014/65/EU on markets in financial instruments ("**MiFID II**"), *i.e.* Law no. 126/2018 on markets in financial instruments.

The Regulation deals, *inter alia*, with cross-border operations performed by investment firms and credit institutions from EU member states or from third countries providing specific criteria, which trigger the requirement for notification under article 34 (*freedom to provide services*), article 35 (*freedom of establishment*) or authorisation under article 39 (*branch authorization for third country firms*) of MiFID II.

ACTIVITIES THAT COULD TRIGGER THE REQUIREMENT TO ESTABLISH A BRANCH FOR BOTH EU AND THIRD COUNTRY FIRMS

The activities that trigger the requirement to establish a branch are set out in article 140 of the Regulation and they apply differently depending on whether they are performed by investment firms and credit institutions from EU member states or similar entities from third countries. Such activities are as follows:

- a) promoting/advertising investment services and activities and ancillary services on Romanian territory;
- b) conducting promotion campaigns with the purpose of attracting Romanian clients;
- c) the use of a website in Romanian language;
- d) contacting on own initiative, through any means, Romanian persons for the purpose of performing investment services and activities and/or ancillary services;

Takeaways

- The FSA issued new rules on promotion, reach-out and fly-in type of activities by EU/third country firms.
- Use of a Romanian phone number for promoting services/contracting potential clients and physical presence in Romania would trigger the establishment of a branch in case of EU and third country firms, including authorization for the latter.
- Certain reach-out activities (except through the use of a Romanian telephone) and promotion type of activities would trigger establishment and authorization of a branch in case of third country firms and notification under the freedom to provide services or establishment of a branch in case of EU firms.

- e) using a Romanian telephone number for promoting services/contacting potential clients;
- f) physical presence of the relevant entity on the Romanian territory.

Applicability to third country firms

The text of the Regulation implies that third country firms (such as UK firms in case of a no-deal Brexit) performing any of the activities set out above shall be required to establish a branch in Romania and consequently go through the corresponding authorisation process.

There is no distinction as to the type of client targeted and therefore the aforementioned requirement would apply irrespectively whether the third country firm targets retail, professional or eligible clients. However, from the reading of the descriptions of activities under (a) to (e), the reverse solicitation exemption set out in article 42 of MiFID II (as implemented under article 125 of Law no. 126/2018) would still apply.

Applicability to investment firms and credit institutions from EU member states

While it is not uncommon for a national competent authority such as the FSA to set out circumstances when the establishment of a branch is required for third country firms, the provisions of the Regulation seem to impose limitations beyond the scope of MiFID II with respect to cross border investment services and activities provided by EU investment firms and credit institutions from EU member states.

Option between freedom to provide services and freedom of establishment?

The Regulation seems to strike a difference between the consequences of performing the activities under items (a) to (d) above, on one side and the activities under items (e) and (f), on the other.

As such, as per the Regulation, investment firms and credit institutions from EU member states that perform any of the activities mentioned under items (a) to (d) above would be required, as the case may be, to either follow the notification procedure under article 109 (*freedom to provide services*) or to establish a branch and follow the notification under article 113 (*freedom of establishment*) of Law no. 126/2018.

It is questionable whether the Regulation provides for an option for the relevant entities to choose between the process related to freedom to provide services or the process of establishing a branch or it would be the FSA deciding the route to be followed. The latter would imply the imposition of stricter rules than at EU level and would still leave us with the question as to which would be the activities triggering the requirement to establish a branch.

Branch establishment required?

On the other hand, any activity which implies a physical connection with Romania (*i.e.* using a Romanian telephone number for promoting services/contacting potential clients and the physical presence of the relevant entity on the Romanian territory) appears to trigger for the relevant EU investment firms and credit institutions the requirement to establish a branch and follow the notification under article 113 (*freedom of establishment*) of Law no. 126/2018.

While the condition related to the phone number appears straightforward the physical presence related one, not so much and it is questionable which activity would trigger the application of the provisions in the said paragraph without regard, for example, to whether such activity is solicited by the client.

CONCLUSIONS

The newly enacted rules raise a series of questions as to the way they are to be applied and how EU investment firms and credit institutions/third country firms will reconsider their approach. In absence of any FSA guidance, with respect to EU firms at least, we believe that the interpretation of article 140 of the Regulation, should be made on the basis of previous guidance given by the European Commission and the EU supervisory authorities regarding the provision of cross-border activities by means of the free movement of services (freedom to provide services) or through the establishment of a branch by means of the freedom of establishment.

Nevertheless, further guidance from the FSA on this topic would be recommendable to shed light on the way the provisions of article 140 of the Regulation should apply.

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