

Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (Text with EEA relevance)

PART NINE

TRANSITIONAL PROVISIONS, REPORTS, REVIEWS AND AMENDMENTS

TITLE III

AMENDMENTS TO OTHER REGULATIONS

Article 63

Amendments to Regulation (EU) No 600/2014

Regulation (EU) No 600/2014 is amended as follows:

- (1) in Article 1, the following paragraph is inserted:
 - 4a. Chapter 1 of Title VII of this Regulation also applies to third#country firms providing investment services or performing investment activities within the Union.;
- (2) in Title III, the title is replaced by the following:

TRANSPARENCY FOR SYSTEMATIC INTERNALISERS AND INVESTMENT FIRMS TRADING OTC AND TICK SIZE REGIME FOR SYSTEMATIC INTERNALISERS;
- (3) the following article is inserted:

Article 17a

Tick sizes

Systematic internalisers' quotes, price improvements on those quotes and execution prices shall comply with tick sizes set in accordance with Article 49 of Directive 2014/65/EU.

Application of tick sizes shall not prevent systematic internalisers matching orders large in scale at mid#point within the current bid and offer prices.;

- (4) Article 46 is amended as follows:
 - (a) in paragraph 2, the following point is added:
 - (d) the firm has established the necessary arrangements and procedures to report the information set out in paragraph 6a.;
 - (b) in paragraph 4, the fifth subparagraph is replaced by the following:

Member States may allow third#country firms to provide investment services to, or to perform investment activities together with ancillary services for, eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in their territories in accordance with national regimes where no Commission decision in accordance with Article 47(1) has been adopted or where such a decision has been adopted but either is no longer in effect or does not cover the services or activities concerned.;

- (c) in paragraph 5, the third subparagraph is replaced by the following:

Member States shall ensure that where an eligible counterparty or professional client within the meaning of Section I of Annex II to Directive 2014/65/EU established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third#country firm, this Article does not apply to the provision of that service or activity by the third#country firm to that person, including a relationship specifically related to the provision of that service or activity. Without prejudice to intragroup relationships, where a third#country firm, including through an entity acting on its behalf or having close links with such third#country firm or any other person acting on behalf of such entity, solicits clients or potential clients in the Union, it shall not be deemed to be a service provided at the own exclusive initiative of the client. An initiative by such clients shall not entitle the third#country firm to market new categories of investment products or investment services to that individual.;

- (d) the following paragraphs are inserted:

- 6a. Third#country firms providing services or performing activities in accordance with this Article shall, on an annual basis, inform ESMA of the following:
- (a) the scale and scope of the services and activities carried out by the firms in the Union, including the geographical distribution across Member States;
 - (b) for firms performing the activity referred to in point (3) of Section A of Annex I to Directive 2014/65/EU, their monthly minimum, average and maximum exposure to EU counterparties;
 - (c) for firms providing services referred to in point (6) of Section A of Annex I to Directive 2014/65/EU, the total value of financial instruments originating from EU counterparties underwritten or placed on a firm commitment basis over the previous 12 months;
 - (d) the turnover and the aggregated value of the assets corresponding to the services and activities referred to in point (a);
 - (e) whether investor protection arrangements have been taken, and a detailed description thereof;

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- (f) the risk management policy and arrangements applied by the firm to the carrying out of the services and activities referred to in point (a);
- (g) the governance arrangements, including key function holders for the activities of the firm in the Union;
- (h) any other information necessary to enable ESMA or the competent authorities to carry out their tasks in accordance with this Regulation.

ESMA shall communicate the information received in accordance with this paragraph to the competent authorities of the Member States where a third#country firm provides investment services or performs investment activities in accordance with this Article.

Where necessary for the accomplishment of the tasks of ESMA or the competent authorities in accordance with this Regulation, ESMA may, including upon the request of the competent authority of the Member States where a third#country firm provides investment services or performs investment activities in accordance with this Article, ask third#country firms providing services or performing activities in accordance with this Article to provide any further information in respect of their operations.

- 6b. Where a third#country firm provides services or performs activities in accordance with this Article, it shall keep, at the disposal of ESMA, the data relating to all orders and all transactions in the Union in financial instruments which they have carried out, whether on own account or on behalf of a client, for a period of five years.

Upon the request of the competent authority of a Member State, where a third#country firm provides investment services or performs investment activities in accordance with this Article, ESMA shall access the relevant data kept at its disposal in accordance with the first subparagraph and shall make that data available to the requesting competent authority.

- 6c. Where a third#country firm does not cooperate in an investigation or an on#site inspection carried out in accordance with Article 47(2), or where it does not comply with a request from ESMA in accordance with paragraph 6a or 6b of this Article in due time and in a proper manner, ESMA may withdraw its registration or temporarily prohibit or restrict its activities in accordance with Article 49.;

- (e) paragraph 7 is replaced by the following:

7. ESMA, in consultation with EBA, shall develop draft regulatory technical standards to specify the information that the applicant third#country firm is to provide in the application for registration referred to in paragraph 4 and the information to be reported in accordance with paragraph 6a.

ESMA shall submit those draft regulatory technical standards to the Commission by 26 September 2021.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.;

(f) the following paragraph is added:

8. ESMA shall develop draft implementing technical standards to specify the format in which the application for registration referred to in paragraph 4 is to be submitted and the information referred to in paragraph 6a is to be reported.

ESMA shall submit those draft implementing technical standards to the Commission by 26 September 2021.

Power is conferred on the Commission to supplement this Regulation by adopting the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.;

(5) Article 47 is amended as follows:

(a) paragraph 1 is replaced by the following:

1. The Commission may adopt a decision in accordance with the examination procedure referred to in Article 51(2) in relation to a third country stating that the legal and supervisory arrangements of that third country ensure all of the following:

- a that firms authorised in that third country comply with legally binding prudential, organisational and business conduct requirements which have equivalent effect to the requirements set out in this Regulation, in Regulation (EU) No 575/2013 and Regulation (EU) 2019/2033 of the European Parliament and of the Council⁽¹⁾, in Directive 2013/36/EU, Directive 2014/65/EU and Directive (EU) 2019/2034 of the European Parliament and of the Council⁽²⁾, and in the implementing measures adopted under those legislative acts;
- b that firms authorised in that third country are subject to effective supervision and enforcement ensuring compliance with the applicable legally binding prudential, organisational and business conduct requirements; and
- c that the legal framework of that third country provides for an effective equivalent system for the recognition of investment firms authorised under third#country legal regimes.

Where the scale and scope of the services provided and the activities performed by third#country firms in the Union following the adoption of the decision referred to in the first subparagraph are likely to be of systemic importance for the Union, the legally binding prudential, organisational and business conduct requirements referred to in the first subparagraph may only be considered to have equivalent effect to the requirements set out in the acts referred to in that subparagraph after a detailed and granular

assessment. To that end, the Commission shall also assess and take into account the supervisory convergence between the third country concerned and the Union.

1a The Commission is empowered to adopt delegated acts in accordance with Article 50 to supplement this Regulation by further specifying the circumstances under which the scale and scope of the services provided and activities performed by third#country firms in the Union following the adoption of an equivalence decision referred to in the paragraph 1 are likely to be of systemic importance to the Union.

Where the scale and scope of the services provided and activities performed by third#country firms are likely to be of systemic importance for the Union, the Commission may attach specific operational conditions to equivalence decisions to ensure that ESMA and national competent authorities have the necessary tools to prevent regulatory arbitrage and monitor the activities of third#country investment firms registered in accordance with Article 46(2) in respect of services provided and activities performed in the Union by ensuring that those firms comply with:

- a requirements which have an equivalent effect to the requirements referred to in Articles 20 and 21;
- b reporting requirements which have an equivalent effect to the requirements referred to in Article 26, where such information cannot be obtained directly and on an ongoing basis through a Memorandum of Understanding with the third#country competent authority;
- c requirements that have an equivalent effect to the trading obligation referred to in Articles 23 and 28, where applicable.

When adopting the decision referred to in paragraph 1 of this Article, the Commission shall take into account whether the third country is identified as a non#cooperative jurisdiction for tax purposes under the relevant Union policy or as a high#risk third country pursuant to Article 9(2) of Directive (EU) 2015/849.

1b The prudential, organisational and business conduct framework of a third country may be considered to have equivalent effect where that framework fulfils all of the following conditions:

- a firms providing investment services or performing investment activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- b firms providing investment services or performing investment activities in that third country are subject to sufficient capital requirements and, in particular, firms providing services or carrying out the activities referred to in point (3) or (6) of Section A of Annex I to Directive 2014/65/EU are subject to comparable capital requirements to those they would apply if they were established in the Union;
- c firms providing investment services or performing investment activities in that third country are subject to appropriate requirements applicable to shareholders and members of their management body;

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- d firms providing investment services or performing investment activities are subject to adequate business conduct and organisational requirements;
- e market transparency and integrity is ensured by preventing market abuse in the form of insider dealing and market manipulation.

For the purposes of paragraph 1a of this Article, when assessing the equivalence of third-country rules as regards the trading obligation set out in Articles 23 and 28, the Commission shall also assess whether the third country's legal framework provides for criteria for the designation of trading venues as eligible for compliance with the trading obligation which have a similar effect to those set out under this Regulation or under Directive 2014/65/EU.;

- (b) paragraph 2 is amended as follows:
 - (i) point (a) is replaced by the following:
 - (a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all information regarding the non#Union firms authorised in third countries that is requested by ESMA, and, where relevant, the arrangements for the onward sharing by ESMA of such information with competent authorities of the Member States.;
 - (ii) point (c) is replaced by the following:
 - (c) the procedures concerning the coordination of supervisory activities including investigations and on#site inspections which ESMA may carry out, in cooperation with the competent authorities of the Member States where the third#country firm provides investment services or performs investment activities in accordance with Article 46, where it is necessary for the accomplishment of the tasks of ESMA or the competent authorities in accordance with this Regulation, having duly informed the competent authority of the third country thereof.;
 - (iii) the following point is added:
 - (d) the procedures concerning a request for information pursuant to Article 46(6a) and (6b) that ESMA may submit to a third#country firm registered in accordance with Article 46(2).;
- (c) the following paragraphs are added:
 - 5. ESMA shall monitor the regulatory and supervisory developments, the enforcement practices and other relevant market developments in third countries for which equivalence decisions have been adopted by the Commission pursuant to paragraph 1 in order to verify that the conditions on the basis of which those decisions have been taken are still fulfilled. ESMA shall submit a confidential report on its findings to the Commission on an

annual basis. Where considered appropriate by ESMA, ESMA may consult EBA with regard to the report.

The report shall also reflect the trends observed on the basis of the data collected under Article 46(6a), in particular as regards firms providing services or performing the activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU.

6 The Commission shall, on the basis of the report referred to in paragraph 5, submit a report to the European Parliament and to the Council at least on an annual basis. The report shall include a list of the equivalence decisions taken or withdrawn by the Commission in the reporting year, as well as any measures taken by ESMA pursuant to Article 49, and provide the rationale for those decisions and measures.

The Commission report shall include information on the monitoring of the regulatory and supervisory developments, the enforcement practices and other relevant market developments in third countries for which equivalence decisions have been adopted. It shall also take stock of how the cross-border provision of investment services by third-country firms has evolved in general and in particular as regards the services and activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU. In due course, the report shall also include information concerning ongoing equivalence assessments that the Commission is undertaking in relation to a third country.;

(6) Article 49 is replaced by the following:

Article 49

Measures to be taken by ESMA

1 ESMA may temporarily prohibit or restrict a third-country firm from providing investment services or performing investment activities with or without any ancillary services in accordance with Article 46(1) where the third-country firm has failed to comply with any prohibition or restriction imposed by ESMA or EBA in accordance with Articles 40 and 41 or by a competent authority in accordance with Article 42, has failed to comply with a request from ESMA in accordance with Article 46(6a) and (6b) in due time and a proper manner, or where the third-country firm does not cooperate with an investigation or an on-site inspection carried out in accordance with Article 47(2).

2 Without prejudice to paragraph 1, ESMA shall withdraw the registration of a third-country firm in the register established in accordance with Article 48 where ESMA has referred the matter to the competent authority of the third country, and that competent authority has not taken the appropriate measures needed to protect investors or the proper functioning of the markets in the Union, or has failed to demonstrate that the third-country firm concerned complies with the requirements applicable to it in the third country or with the conditions under which a decision in accordance with Article 47(1) has been adopted, and one of the following applies:

a ESMA has well-founded reasons, based on documented evidence, including but not limited to the annual information provided in accordance with Article 46(6a), to believe that, in the provision of investment services and activities

in the Union, the third#country firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets;

- b ESMA has well#founded reasons, based on documented evidence, including but not limited to the annual information provided in accordance with Article 46(6a), to believe that, in the provision of investment services and activities in the Union, the third#country firm has seriously infringed the provisions applicable to it in the third country and on the basis of which the Commission has adopted the Decision in accordance with Article 47(1).

- 3 ESMA shall inform the third#country competent authority of its intention to take action in accordance with paragraph 1 or 2 in due course.

In deciding the appropriate action to take under this Article, ESMA shall take into account the nature and seriousness of the risk posed to investors and the proper functioning of the markets in the Union, having regard to the following criteria:

- a the duration and frequency of the risk arising;
- b whether the risk has revealed serious or systemic weaknesses in the third#country firm's procedures;
- c whether financial crime has been occasioned, facilitated or otherwise attributable to the risk;
- d whether the risk has arisen intentionally or negligently.

ESMA shall inform the Commission and the third#country firm concerned of any measure adopted in accordance with paragraph 1 or 2 without delay and shall publish its decision on its website.

The Commission shall assess whether the conditions under which a decision in accordance with Article 47(1) was adopted continue to persist in relation to the third country concerned.;

- (7) in Article 52, the following paragraph is added:

13. By 31 December 2020, ESMA shall assess the staffing and resources needs arising from the assumption of its powers and duties in accordance with Article 64 of Regulation (EU) 2019/2033 and submit a report on that assessment to the European Parliament, to the Council and to the Commission.;

- (8) in Article 54, paragraph 1 is replaced by the following:

1. Third#country firms may continue to provide services and activities in Member States, in accordance with national regimes, until three years after the adoption by the Commission of a decision in relation to the relevant third country in accordance with Article 47. Services and activities not covered by such a decision may continue to be provided in accordance with national regime..

- (1) Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ 314, 5.12.2019, p. 1).
- (2) Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ 314, 5.12.2019, p. 64).’;