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Presidency note in preparation of 3rd political trilogue on conditions and procedures for authorisation, organisation and registration

Date: 04. September
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Working Party on Financial Services and the Banking Union

Retail Investment Strategy (RIS)

11 September 2025

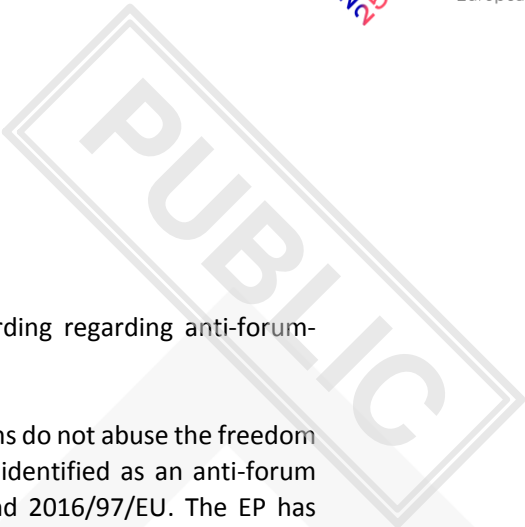
Executive summary

In this note, the Danish Presidency (PCY) proposes assessments and potential landing zones on the following topics concerning conditions and procedures for authorisation, organisation and registration:

1. Authorisation / registration in light of principles of the freedom of services
2. Procedures for refusing requests for authorization or registration and withdrawals of them
3. Regular review of conditions for initial authorization
4. Collaboration platforms and on-site inspections
5. New third country regime elements in IDD

The proposals build on 4CT and written comments from MS. They intend to also consider possibilities for burden reduction and avoidance of duplication or conflicts with existing provisions. The specific approaches will then be considered in the negotiations with the EP.

- 1. Authorisation / registration in light of principle of freedom of Services (MiFID II art. 5 & IDD art. 3(7))**



Political lines 68c-68d, 440a-44dc

The **COM proposal** and **Council mandate** do not include wording regarding anti-forum-shopping principles.

The **EP position** introduces a new amendment to ensure that firms do not abuse the freedom to provide services and the freedom of establishment. This is identified as an anti-forum shopping principle to be included in directives 2014/65/EU and 2016/97/EU. The EP has proposed slightly different approaches in MiFID II and IDD.

Firstly, in IDD (but not in MiFID), the EP proposes a general MS requirement to ensure that national competent authorities (NCAs) uphold the integrity of the internal market when making decisions concerning registration of legal entities (l. 440b).

Secondly, the EP sets out an approach concerning the anti-forum shopping approach in relation to the exercise of freedom of services. In MiFID the EP wording proposes that investment firms utilising the Freedom of Services are defined as firms with their head office in the same MS as their registered office and carrying out their business in that same MS and operating fully within the single market (l. 68d). In IDD the focus of the proposed article and thus the requirements in next element below is on intermediaries that are established in a home MS but perform investment activities solely in host MS (l. 440c).

Thirdly, in both MiFID and IDD the EP proposes to include further requirements for Member States to ensure understanding for firms which are registered in one MS but provide their services predominantly (in MiFID) and solely (in IDD) in another MS and they act consistently with Union law and principles of the internal market (IDD) or single market (MiFID).

MS have expressed support for the fundamental principles of freedom of services and of establishment as well as the aim of combating forum-shopping or regulatory arbitrage in the EU. However, several MS express varying degrees of concern about the proposed changes due to the vague wording of the provisions which would introduce new broad, undefined assessments of firms with regard to host MS aspects and have potential negative implications for the freedom to provide services in the EU as the proposals may actually introduce obstacles to cross-border activity in general rather than combat unlawful forum shopping and set limitations to the European passport approach. Two MS have expressed that inclusion of the proposed amendments to art. 5(4) MiFID and art. (7) IDD constitute redlines. MS further comment that the basic principle of EU regulation is to ensure consistent and similar rules across the EU, specifically in order to avoid forum shopping. Combined with the establishment of the European Supervisory Authorities, it should further strengthen convergence and consistent application leaving little or no room for malicious forum shopping activity.

Finally, some MS note that repeating content from existing recitals is not recommended.

PCY analysis

1.1. New general principle concerning upholding the integrity of the internal market

In general, the introduction of a general and high-level principle such as ensuring integrity of the internal market in **the EP position** (Line 440b in IDD, not included in MiFID) introduces a new criterion to the decision making without setting out the substance to be applied and acted upon. Thus, it could lead to different application by MS resulting in legal uncertainty for entities as to which criteria they must comply with when applying for authorisation or registration. This in turn has the potential to disrupt the integrity of the market that it otherwise seeks to protect and would constitute an obstacle for cross border activity and the exercise of the freedom to provide services within the single market. It also risks adding compliance burdens for firms and supervisors without a clear added value. Focus for MS must be to ensure compliance and supervision of the rules in the act.

Secondly, the rights for undertakings to exercise the freedom to provide services and the freedom of establishment constitute core freedoms under the Treaty of the European Union (TFEU). These fundamental rights are the basis for setting out the structure and drafting of EU legislation in the respective areas, in this instance financial services acts. Each act sets out relevant goals to be achieved through the requirements set forth in the act.

For IDD, the goals are to coordinate national rules conserving access to activities of insurance and reinsurance distribution, the protection of consumers and policyholders, the promotion and maintenance of a fair, safe and stable insurance market and contributing to financial stability.

For MIFID, the goals are to set out the frame, rules and approaches that the entities subject to the act must abide or face relevant supervisory or enforcement activity from the competent authority and potentially legal action before the courts.

These goals in turn contribute to upholding the principles of the TFEU, including the integrity of the internal market. This is explicitly indicated in IDD in recital 9 whereby *“The inability of insurance intermediaries to operate freely throughout the Union hinders the proper functioning of the internal market in insurance. This Directive is an important step towards an increased level of consumer protection and market integration”*. Similar applies to MIFID recital 3: *“To that end, it is necessary to provide for the degree of harmonisation of approaches to offer high level of investor or consumer/policy holder protection and allow firms to provide services throughout the Union being an internal market, on the basis of home country supervision”* and that the directive sets out the rules regarding e.g. the exercise of freedom of establishment and of the freedom to provide services, cf. recital 7 MiFID.

The PCY does not see added value in the addition in line 440b. It is also unclear why EP has proposed the amendment in IDD, but not in MiFID. The PCY proposes that it should be deleted. The PCY also intends to ask for explanation from the EP on the intentions behind the proposed amendments. (see proposal 2)

1.2 Anti-forum shopping approach (first sentence of lines 68d and 440c)

Generally, the second and third part of the proposals by the EP seem to be aimed at enacting the content of the existing recital (46) of MiFID II, which has also been replicated in a new recital.

Currently, both MIFID and IDD provide for a regime to ensure the right and possibility for firms to exercise the freedom to provide services set out in the Treaty as well as provides for action where such activity may constitute a breach of this freedom, in MIFID art. 34 and 35 and in IDD art. 4-6. As mentioned above, the acts set out harmonised rules to ensure level playing field for the entities when providing services in the Union. The basic principle for any activity is registration or authorisation in their home MS which also is the basis for allowing the firm or intermediary to operate in other MS provided that appropriate notification procedures have been followed. Such procedures are also provided for in the acts.

The PCY also notes that deliberate circumvention of the rules by an entity in bad faith such as described in recital 46 of MiFID II and art. 9(2) IDD¹ would always constitute activity that must be dealt with by the relevant NCA in the course of its supervisory activity based on the requirements set out in the relevant sectoral legislation. The PCY also wishes to stress that while the goal of combating unlawful forum-shopping is valid, forum-shopping by utilising differences in rules is not in itself illegal nor necessarily suspicious.

The EP proposes in the first sentence of line 68d that the current rules requiring an investment firm to have its head office in the same MS as its registered office (current requirements in MiFID) is supplemented with the requirement that in order to operate fully within the single market and utilise the freedom to provide services, the investment firm must carry out its business in that MS (as proposed included in line 68d). When considering the recital proposals, the PCY believes the intention of the wording may be to combat anti-

¹ Art. 9(2) IDD: "Moreover, this Directive shall not affect the power of the competent authority of the host Member State to take appropriate measures to prevent an insurance distributor established in another Member State from carrying out activity within its territory under the freedom to provide services or, where applicable, the freedom of establishment, where the relevant activity is entirely or principally directed towards the territory of the host Member State with the sole purpose of avoiding the legal provisions which would be applicable if that insurance distributor had its residence or registered office in that host Member State and, in addition, where its activity seriously endangers the proper functioning of insurance and reinsurance markets in the host Member State with respect to the protection of consumers.[x]"

forum shopping similar to that of IDD wording. However, the effect of the wording is that only investment firms operating in home MS can be seen as fully utilising freedom to provide services, thereby indicating that activity in host MS could or should be seen as inherently suspicious. The premise is flawed in the view of the PCY, as the freedom to provide services would cover cross-border activity, which is not included in the wording. An understanding that cross-border activity were to be presumed suspicious also directly contradicts the fundamental rights under TFEU, sets up obstacles for the single market, contradicts the right to freely provide investment services or perform investment activities in a host MS without further requirements from the host MS, cf. art. 34(1) MiFID II and thereby fundamentally disturbs the use of the well-established passporting regime in the act itself. If the proposed wording lacks an explicit reference to cross-border activity whereby it would cover the similar scope as in IDD, i.e. activity solely in host MS, then the wording is to be redrafted to mirror IDD wording. Otherwise, there is no obligation set out for the NCA to adhere to. However, this would be duplicative of intentions already included in the MiFID as it stands today, reflected by particularly existing recital 46.

The IDD provision proposed by EP focuses only on situations where all the activities of intermediaries take place in host MS. While this focus mirrors the EP wish to address anti-forum shopping whereby a firm chooses to exercise activity outside of the home MS due to potentially less stringent rules, it still presumes that the choice of exercising activity outside of the home MS is connected with abuse or due to malicious motives. The arguments against the provision are therefore similar to those for MiFID addressed above. Furthermore, the IDD already contains a much less intrusive provision for such situations in Article 7(1) - possibility for an agreement on the division of competences between the home and host authority. There is also the safeguard clause in Article 9(2), already mentioned by the PCY. In the EP text, it is unclear what would be the relationship between these existing provisions and the new rules proposed by EP.

The PCY also notes that any such provision would create an unlevel playing field with insurance companies subject to the Solvency II regime as no similar change is envisaged for such entities. However, the PCY would not propose to open Solvency II in this regard.

The **PCY proposes** these suggestions from the EP should be deleted.

1.3 New obligations of assessment for MS (l. 68d second sentence, 440c-440d)

With regard to the third element the EP proposes new general obligations for MS in both MiFID and IID to ensure an investment firm or insurance or ancillary insurance intermediary has sufficient understanding of risks and legal requirements to which the firm or its clients are subject to and acts in a manner consistent with Union law and the principles of the single market (MiFID) or internal market (IID).

As noted under 1.1, the basis for the right to exercise freedom to provide services and the freedom of establishment under MiFID and IDD reside upon the fundamental requirement that 1) the firm or intermediary has been granted an authorisation or registration for its activities in its home MS and 2) a clear division of responsibility between the home and host MS where they cooperate when there is reason to suspect that there may have been a breach of the obligations set out under the directives, cf. IDD art. 5(1) and MiFID, art. 34.

Within MiFID activity, it is not possible for MS to impose additional requirements on firms or credit institutions when exercising the freedom to provide investment services and activity, cf. 2nd subparagraph of art. 34(1). It is possible to apply further requirements under the IDD due to the nature of minimum harmonisation, however a host MS is required to communicate such specificities to the home MS which in turn must communicate them to the intermediary.

Generally, MiFID and IDD also include explicit obligations to ensure cooperation between home and host MS to enforce obligations in the directive by way of the intermediaries' initial notification to the home MS of intention to carry out activity in another MS, home MS communication thereof to the host MS and information about significant changes in the activity of the intermediary that may affect to initial registration, cf. art. 4 IDD and art. 34 MiFID.

The PCY is of the view that the proposed wording by the EP that the "MS shall ensure the firm or intermediary has sufficient understanding of risk and legal requirements to which it or its clients are subject" adds a further and burdensome condition to the cross-border activity to be assessed by the MS. In MiFID drafting it seems to be the task of the home MS, while it is unclear in the IDD drafting which MS has the obligation (perhaps both home and host MS). Regardless, it is a criterion contrary to the prohibition in MiFID, in subparagraph 2 of art. 34(1), to the principle of acquired authorisation or registration as the basis for activity in the host MS in both MiFID and IDD and potentially provides for duplicative assessments from both the home and host MS. Moreover, home MS is not currently subject to this type of assessment of the firm or intermediary upon being granted authorisation or registration in the home MS.

The requirement of an entity acting in a manner consistent with Union law is already embedded in the MiFID II and IDD framework through compliance with the set of requirements, including the cooperation between host and home MS if potential breaches are identified or suspected. The compliance with the requirements is verified by the supervisory activities of the competent authorities in their own capacity and through cooperation at the European level. This is clearly set out in MiFID II where there is a requirement for authorisation in the home MS in accordance with art. 5(1) MiFID as a prerequisite to exercising the freedom to provide investment services and activities, cf. art. 34(1) MiFID II. Similarly, IDD requires registration by an intermediary in the home MS prior to exercising its freedom to provide services in a host MS, cf. art. 4(1), 4(2) and 4(3).

The PCY also notes that the IDD already provides for the possibility to confer the role of home MS to a host MS by way of agreement between the two NCAs, cf. art. 7(1) IDD. This is an exemption to the normal division of responsibilities based on concrete assessment by the NCAs of the case. It would be counterproductive to undermine this by the EP's proposed assessment obligations when cross-border activity occurs.

Overall, the PCY finds it unclear what these added elements would entail considering that based on current rules firms should have a sufficient understanding of risks and legal requirements and comply with the law to which they are subject when carrying out their activity.

The PCY finds the final element of acting consistent with the principles of the single market is a political statement and is the reason for setting out the sectoral legislation as such. The wording resembles wording concerning upholding the integrity of the internal market in line 440b in IDD. The PCY therefore, refers to the above section 1.1 for arguments for removal of such reference from both MiFID II and IDD.

PCY proposal

The **PCY proposes** that EP proposals constitute a disproportionate approach to achieving the goal of combatting regulatory arbitrage and present significant challenges to the current rules for cross-border activity and NCA cooperation, as well as introduce disproportionate obstacles to the freedom to provide services and the freedom of establishment in the EU.

Proposal 1: The PCY primary proposal would be that the wording should be deleted.

Proposal 2: The PCY would remove the reference to upholding the integrity of the internal market in l. 440b (IDD) but seek to address further concerns of the EP. (section 1.1 above)

Proposal 3:

- 3a -recital: Alternatively, if the intention of the EP is to ensure increased focus on situations of possible abuse of the freedom to provide services or freedom of establishment, it could be possible to include such wording in a recital connected to the notification of intent to carry out activity in MS other than the home MS. However, this may require a change in the articles to be legally sound as one should refrain from including political statements in recitals.
- 3b – article: If a stronger requirement is needed, it may be feasible to introduce in MiFID a similar provision to that of IDD art. 9(2) clarifying the anti-forum shopping principle.

Proposal 4: If even stronger content is preferred and provided it would be legally sound, it may be possible to include either as a separate new article as proposed by EP or to include wording in the existing articles concerning freedom to provide services in MiFID and IDD, i.e. a new paragraph in MiFID art. 34 (2a) and in IDD art. 4(1a). These locations should ensure connection with information to be provided at the time of exercise of the freedom to provide services. The aim of the wording would be to ensure that the investment firm or intermediary intending to carry out activity entirely towards the territory of a host MS shall provide the home and host MS with information showing it understands the risk and legal requirements to which it or its clients are subject in the host MS. In this regard the information on national specificities provided by the host MS in IDD could be sufficient to meet the burden of proof with regard of the legal requirements in the host MS, whereas in MIFID, technically, there should not be any specific requirements that the firm should be subject to. Moreover, it could potentially impact the principle of passporting. The EP proposed wording of “acting in a manner consistent with the Union law and the principles of the single market” would not be upheld.

Questions to MS:

Q1. Do MS agree with the PCY proposal no. 1 to delete all provisions as a primary goal?

Q2: Proposal 2 - Do MS agree with the PCY to request deletion of all the new EP provision concerning upholding the integrity of the internal market in IDD, l. 440b?

Q3. Provided clarification of intention from the EP, could MS show any openness towards wording e.g. in a recital (proposal 3a) or article (proposal 3b – provided it is legally feasible) that MS should be vigilant of situations involving sole activity in host MS and require further information upon notification of such activity (proposal 3a and 3b)?

Q4. Could MS show flexibility to including an article moving in the direction of the EP wording, provided legally feasible? (proposal 4)

2. Procedures for refusing requests for authorization or registration and withdrawals of such (art. 7 MiFID, art. 3(5), (5a) IDD)

Political lines: 75-85, 436-440

The **COM proposal** proposes that competent authorities in future must inform ESMA/EIOPA of firms that have not been granted authorisation / registration and the reason for this, or when their authorisation has been withdrawn. ESMA/EIOPA must maintain a list of the activities or services and reasons for refusal or withdrawal.

The **EP position** retains the COM proposal but adds that notifications to ESMA/EIOPA must be done without undue delay.

The **Council mandate** deletes these provisions.

PCY analysis

Both MiFID and IDD require competent authorities to maintain public registers of all investment firms or insurance, reinsurance and ancillary insurance intermediaries (hereinafter collectively named “firms”) which are authorized or registered and notify ESMA/EIOPA about granted requests for authorisation/registration of activity subject to the directives (art. 5(3) MiFID, art. 3(1)-(4) IDD). ESMA/EIOPA are also required to maintain public registers of such granted requests. Withdrawals of authorizations under MiFID are published on the national register for a period of five years, cf. art 5(3) subpara 3 MiFID. For IDD, the intermediaries are removed from the list, art. 3(4) subpara 6 IDD, and home MS are obliged to inform host MS of removal from the register, cf. (art. 3(4) subpara 6 IDD. In this respect the current rules already provide for transparency in areas in question, albeit the national level. The PCY notes that this does not include situations where authorisation is refused from the beginning.

MS have generally commented that they see no added value in introducing an obligation to further notify ESMA/ EIOPA of all firms that have not been granted authorization /refused registration, or of every withdrawal of authorisation or registration or removal from the register regardless of the reasons for such action. Firstly, the proposed range of potential situations and thus notifications is broad as it covers all and any reason for not granting or refusing authorization/registration or withdrawing them, regardless of whether the refusal is based on substantive problems or minor issues in the process, or whether the applicant has changed its mind and withdrawn the application. Similar considerations apply to the situation of withdrawal or removal from the register.

Secondly, in the eyes of consumers, retail customers, etc. the important information in public registers would be whether a firm is allowed to operate, not that it has not been granted authorisation or has been refused registration. This is the third consideration from the view of supervisory coordination where it is important to balance the added burden of increased notification from the NCAs to ESMA/EIOPA and the latter’s obligations to maintain updated lists for supervisory information with the value of the information on this list. Notably, information on refusal of authorization or registration could be valued as more of a data collection exercise without proven added value compared to the work to be undertaken. Such additional data sharing could be undertaken by other means, if considered needed.

Thirdly, the PCY proposes that there is no need to go further than similar provisions in other financial legislation on e.g. alternative investment funds in 1st subparagraph of art. 7(5)

Directive (EU) 2024/927² where “*The competent authorities shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn in accordance with this Chapter, and of any changes to the list of AIFs managed or marketed in the Union by authorised AIFMs.*”

However, **the PCY** asks whether MS might consider added value in data sharing with regard to information on withdrawal of authorisation or removal of registration in order to prevent a firm from shopping between different jurisdictions. If so, one might consider qualifying the situations where the withdrawal or removal from a register was due to supervisory action affecting the scope of authorisation or registration.

If any of the provisions were to be maintained, the PCY does not find it necessary to include a qualification of the timing for notification to ESMA/EIOPA as proposed by the EP.

Question to MS:

Q5: Could MS show any openness toward maintaining the second notification requirement with regard to withdrawal of authorization or registration / removal from the register, provided it is motivated by action by the competent authority?

3. Regular review of conditions for initial authorization (art. 21 MiFID)

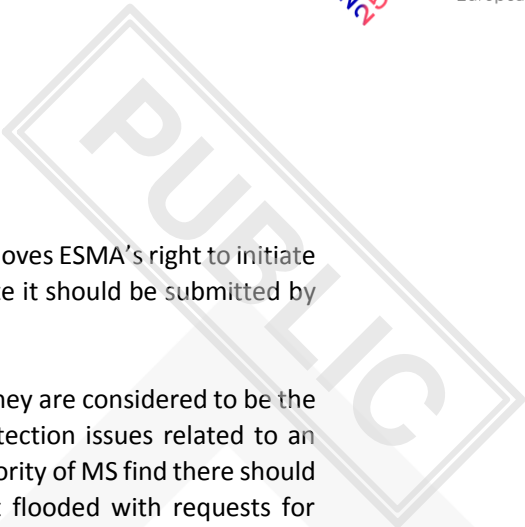
Political lines 154-157

The **COM proposal** proposes to introduce a right for ESMA or host NCAs to request home NCAs to examine whether a firm still meets conditions for its authorisation and the home NCA must respond with findings within two months of the request. If the concerns prove to be justified about potential threats to investor protection, ESMA may on its own initiative or at the request of one or more NCAs, set up and coordinate a collaboration platform.

The **EP position** maintains the COM proposal without changes.

The **Council mandate** amends the COM proposal by requiring there to be material investor protection concerns underlying the request and that the requesting NCA provides reasons for the request, allowing the deadline of two months to be extended by mutual agreement and

² [Directive \(EU\) 2024/927 of the European Parliament and of the Council of 13 March 2024 amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment funds, ELI: http://data.europa.eu/eli/dir/2024/927/oj](http://data.europa.eu/eli/dir/2024/927/oj)



removing ESMA's access to request a review. The Council also removes ESMA's right to initiate the collaboration platform and requires that a request to initiate it should be submitted by two or more NCAs.

MS are open to provide for this extra tool for the host NCAs, as they are considered to be the closest to assess whether there may be potential investor protection issues related to an investment firm operating in their jurisdiction. However, the majority of MS find there should be a materiality threshold to ensure that home NCAs are not flooded with requests for reviews of initial authorisations as this would be resource intensive and could disturb the supervisory work programmes of the home NCA. Moreover, MS find it prudent to provide the home NCA with an explanation of what has been identified as potential risk to focus the efforts of the home NCA. A few MS prefer the COM proposal in its entirety. A few MS are open to giving ESMA the right to make such requests, whereas the majority of MS see this as a prerogative of supervisors.

PCY analysis

The issue of collaboration platform is similar to the issues dealt with in section 4 and the PCY refers to the solutions proposed there.

Currently, the home NCA must continuously ensure that an investment firm complies with the conditions for the initial authorisation, cf. art. 21. A host NCA may not be privy to all the specific requirements in the individual authorisation of an investment firm but will be aware of the overall requirements to be assessed when granting the initial authorisation. The host NCA will also have information about what may pose an investor protection concern in their jurisdiction. The PCY therefore finds it to be in line with good supervisory practice and cooperation to provide relevant information when requesting assistance from another party in order to assist the home NCA in identifying an area for revision. This is also a common requirement when setting out memoranda of understanding.

The PCY understands the primary reason for removing ESMA's access to such a request is that it is not a supervisor under MiFID. However, the underlying issue is to be able to spot potential investor protection concerns in one or more jurisdictions. This is a key task for ESMA through its role in identifying risks, vulnerabilities and trends in the EU as well as ongoing supervisory convergence work with the NCAs both on a cooperative basis as well as bilateral basis. If ESMA can connect an identified investor protection concern to an investment firm, the PCY can see a case for ESMA being able to make the request in question rather than having to contact a host NCA to make the request.

PCY proposal

The **PCY proposes** that ESMA also be allowed to make such a request (as set out in the COM proposal), with the understanding that the request would need to concern a specific investment firm, not constitute a broad study of compliance with conditions for authorization.

The PCY proposes to defend the remaining changes in the Council mandate.

Question to MS:

Q6: Can MS show flexibility towards the COM and EP to allow ESMA to make a request for a specific review of conditions for authorisation of an investment firm? If no, please explain why.

4. Collaboration platforms and on-site inspections (art. 21 new para 4, art. 87a MiFID and art. 5(4), art.12b IDD)

Political lines 157, 388-391, 396, 450, 512-514

The **COM proposal** introduces the possibility to establish collaboration platforms in case of justified concerns about negative effects on investors. Such platforms can be set up on ESMA/EIOPA's own initiative or at the request of one or more NCAs. The COM proposal also sets out that in the event of disagreement within the platform, ESMA/EIOPA may recommend the home MS to consider launching a joint on-site inspection with other concerned NCAs.

The **EP position** retains the COM proposal overall but also gives ESMA/EIOPA a power to launch and coordinate a joint on-site inspection. In IDD, the EP proposes to add the situation for a platform when there are concerns regarding an insurance manufacturer distribution or intention to distribute products in another MS using insurance distributors registered in the host MS.

The **Council mandate** deletes the possibility for ESMA/EIOPA to set up and coordinate a platform on its own initiative and requires a request from two or more NCAs rather than merely one NCA. Provisions regarding the joint on-site inspection mirror the COM proposal.

Several MS generally oppose providing ESMA/ EIOPA with own initiative powers to set up collaboration platforms, particularly for purposes related to supervisory activity. This is primarily because such activities should be reserved to the NCAs. Some MS have requested clarification on what "justified concerns" about negative effects would entail warranting the setting up of a platform. Finally, a few MS have commented that the wording should be aligned to Solvency II provisions on setting up similar platforms.

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PCY analysis

The COM proposal seeks to align rules concerning ESA's competences to initiate collaboration platforms with similar provisions in Solvency II Directive following the ESA-review from 2019.

In general MS are hesitant to allocate further powers to ESMA/EIOPA to initiate coordination platforms or specific supervisory activity solely based on a wish to allocate further specific tasks to the ESAs without a proven issue to be dealt with. In relation to platforms, ESMA and EIOPA already have powers to establish relevant means of cooperation and coordination, including by way of any supervisory tools they deem necessary in accordance with art. 29(2) of the ESAs founding regulations. Thus, it is not necessary to include a general provision for such activity as proposed. Moreover, such activity should be subject to the presence of a cross-border aspect, i.e. more than one NCA is affected when considering the range of resources and costs associated with the work both from the side of NCAs as well as ESMA/EIOPA. MS do not see the provisions in Solvency II on such platforms as a precedent to be replicated.

The requirement for establishing a collaboration platform is existence of as "justified concerns" about negative effects on investors/policyholders or customers. The PCY is of the view that it would not be feasible to further indicate what this covers in the level 1 text. It would be an issue for assessment and presentation by the requesting authorities similar to other supervisory assessments in the hands of NCAs. The request could be rejected by the other NCAs involved in the case based on the merits of the case.

ESMA/EIOPA do not have supervisory powers as NCAs within MiFID or IDD. If ESMA/EIOPA were to initiate joint on-site inspections on their own initiative, this would not only depart unnecessarily from the division of roles of NCAs and ESMA/EIOPA but also seem problematic from the legal perspective of ESMA/EIOPA not being competent authorities themselves. The approach from the Commission with a recommendation to the relevant home NCA seems proportionate and respectful of the legal and supervisory structure.

The **PCY proposes** to:

- Retain the Council mandate with regard to collaboration platforms,
- Not further elaborate on what "justified concerns" may entail, and
- Reject the EP changes regarding the initiation of joint on-site inspections (retain the COM proposal).

Questions to MS:

Q7. Do MS see any possibility for openness towards the COM and EP with regard to the setting up of collaboration platforms?

Q8. Do MS agree that ESMA/EIOPA should not be able to initiate joint on-site inspections and that the text should revert to the COM proposal?

5. New third-country regime elements in IDD

This section covers three aspects concerning a third-country regime:

1. Scope of third country approach (art. 1(6)), *lines 416a-416d*,
2. Third country and registration (art. 3(4)v), *lines 433-433b*
3. Minimum professional requirements (art. 10(1)), *line 471a*

The **COM proposal** and **Council mandate** do not contain provisions related to the third-country regime.

The **EP position** proposes to replace the existing rules on third-country operators in IDD art. 1(6) with a new third-country regime. Under the new art. 1(6), insurance or reinsurance intermediaries from third countries would be required to establish a branch and register within an EU MS to do business in that MS. In the case of intra-group relationships, where insurance or reinsurance intermediaries from third countries are acting through intermediaries established in the Union, Member States would be obliged to check whether the insurance intermediary in the Union has an appropriate level of corporate substance in the Member State and that it possesses appropriate knowledge and ability in order to complete its tasks and perform its duties adequately. If these conditions are not met, MS should refuse registration or remove the insurance intermediary from the register. There are further restrictions for cases where an insurance intermediary registered in the Union establishes a branch in a third country with the primary purpose of providing insurance distribution services within the Union. Such activities shall be substantially restricted in terms of scope and duration.

Similar conditions of ‘an appropriate level of corporate substance’ with regard to intra-group relationships with a branch of a registered intermediary in a third country have also been inserted in the provisions on the requirements of registration in IDD Art. 3(4) (lines III.433-433b) and in relation to the minimum professional requirements in IDD Art. 10(1) (line III.471a in EP mandate).

MS are divided with regard to the EP proposal in relation to all insurance products, not only IBIPS, and consider such amendment should be considered in a general review of the IDD. Four MS have expressed specific opposition to the proposals, several MS have expressed concerns, and three MS have expressed openness subject to further clarification of the intention and wording from the EP.

MS have commented on the provision potentially triggering retaliation measures from third countries due to limitations on distribution channels affecting the insurance industry as a whole due to its global nature. MS most notably commented that the concept of “corporate substance” for a branch or for the EU entity is too vague to be actionable by MS’ NCAs. Further, the link to registration under art. 3 would seem to limit the use of the regime to very few cases.

MS agree that it is important that technical expertise or specialist risk coverage in the EU is adequately addressed. However, this would form part of the overall assessment upon registration under art. 3, which is already required in art. 3 in IDD. One MS believes the first subparagraph of art. 1(6) in the current IDD should be retained in order to maintain clarity on the scope of the IDD with regard to extra-territorial effects and ensure that risks and commitments located outside the EU remain out of scope. Two MS refer to the approach of the EP on requiring a branch establishment and registration going counter to EIOPA Supervisory Statements, where one MS underlines the benefits from third country ties. Another MS prefers to maintain the approach by EIOPA’s Supervisory Statement issued on 3rd February 2023 (ref. EIOPA-22/362) whereby the EU should make use of supervisory tools e.g. encouraging relocation or secondment of staff from the third-country branch to the EU intermediary.

Some MS find the proposal that such branches should be substantially restricted in terms of scope and duration is unclear and may go against the general principle of third-country intermediaries not having to fulfill all requirements in host MS.

Finally, some MS have commented that any wording should also not pre-suppose any specific form of establishment in the third country such as registration, but rather that the third country is the primary jurisdiction, i.e. if considered under existing terminology in EU legislation, an entity “with head office in a third country”.

PCY analysis

Overall, this is an area unrelated to the goals of RIS, as the goal of these EP amendments are to require the presence of third-country entities within the EU. This would be better suited when considering a full review of the IDD. However, the PCY considers this amendment could pursue a legitimate objective to ensure protection of consumers or policyholders under the IDD by requiring that third-country entities are familiar with the target audience and markets

they enter into. Any third-country regime must be carefully considered in order to avoid unintentional and harmful effect to the competitive possibilities of the EU and limitations of product availability to consumers.

Currently, IDD focuses on the feasibility of exercising supervisory action over an intermediary in intragroup situations, by obliging MS to refuse registration of an intermediary if it has close links to a third-country entity, and the law, regulations or administrative provisions of that third country (or difficulties with the enforcement of such laws, regulations or administrative provisions) would prevent effective supervisory action, cf. art. 3(7).

If a specific third-country regime is to be regulated at level 1, the PCY believes it would be necessary to go further than just urging the use of supervisory tools as proposed by one MS, as this measure would not be sufficient to ensure relocation or professional educational requirements of the employees addressing European consumers or policyholders.

The PCY has considered whether the MiFIR third country rules in title VIII on “provision of services and performance of activities by third-country firms following an equivalence decision with or without a branch” could be of inspiration. However, this regime targets services to eligible counterparties and to professional clients. Thus, there may be aspects concerning non-professional customers (which are at the heart of IDD) that are not taken into account. A full assessment of potential adaptation would be necessary and would go beyond the current scope of work within RIS.

Secondly, the requirement to ensure registration in a home MS would be relevant in order to ensure assessment at the time of entry into the EU. However, it is unclear what is covered by “corporate substance”. On the one hand, it could be seen as a goal to require establishment in the EU. On the other hand, the proposal highlights knowledge and ability to complete the tasks and perform duties according to requirements of the registration. If there is no intention to require actual establishment in the EU, these requirements appear to be duplicative. The PCY notes that the concept of “substance” is not new and is found e.g. in the AIFMD with regard to adequacy of substance or risk management arrangements concerning delegation arrangements, cf. recital 11, 47, 49 and art. 7 (2) of Directive (EU) 2024/927. However, the concept is in the recitals and the article provides substance requirements. Similar ideas are found in MiCA regulation Article 59(2) “2. Crypto-asset service providers authorised in accordance with Article 63 shall have a registered office in a Member State where they carry out at least part of their crypto-asset services. They shall have their place of effective management in the Union and at least one of the directors shall be resident in the Union.”.

The PCY understands the EP proposal to primarily address the issue of initial access of third-country intermediaries to the EU. The requirement in line 416d regarding substantial restriction in terms of scope and duration of the activity of a branch of an insurance or reinsurance intermediary established in a third country is unclear. It is also unclear what is

meant by “restrictions in terms of scope” but this could be related to the activity in question. However, it is difficult to see why this should be required in addition to the registration requirement.

The PCY finds it would be a fundamentally different approach to set a duration, i.e. a time limit for exercising activity once registration has been granted despite the fact that requirements continue to be fulfilled. This restriction in duration may only be related to the activities developed in the EU by the third-country branch but the branch has still been registered according to the EU rules. The PCY does not see a valid reason for such a restriction, provided the establishment of the branch in the EU does not constitute a shell company. A shell company would cover the situation where a parent company from a third country establishes a subsidiary within the EU and the subsidiary then, in turn, establishes a branch in the country of the parent company, i.e. in the third country, which then does business with the subsidiary's customers in the EU using the resources of the parent company. This situation is similar to the challenges faced in the AIFMD sphere concerning delegation of activity.

The proposed drafting lacks guidance as to how this restriction is to be implemented or monitored. If further guidance on the intention cannot be provided, the provision should be deleted.

The PCY considers that the additions to lines 433-433b and 471a are consequential amendments following from the changes to lines 416a-416d. Should changes to lines 416a-416d be acceptable, the rest of the changes could also be relevant but should not result in duplication of requirements.

PCY proposal

- If changes to the third-country regime are to be upheld, current first subparagraph on art. 1(6) regarding risks and commitments located outside the Union must be retained. Wording to be retained is: “This Directive shall not apply to insurance and reinsurance distribution activities in relation to risks and commitments located outside the Union”.
- Seek further clarification as to what the intention is of the EP with this new regime and what consequences those new requirements would entail.

Question to MS:

Q9: Do MS agree with introducing a third-country regime in the IDD?

Q10: Do MS agree that if changes are made to art. 1(6), the extra-territoriality provision in the first paragraph should be retained?

Q11: Do MS agree with introducing requirements for one or more of the following:

- a) registration requirement
- b) require an appropriate level of corporate substance and/or
- c) impose specific restrictions on activity, but not on duration?

If yes, what should be covered by “appropriate level of corporate substance” and how can the restrictions to activity be specified?

Q12: If your answer is no to Q9 and Q11, would MS be open to introducing a wording in recital (and potentially an article, provided legally sound) to combat establishment of “shell companies” in the EU?