

Steven Maijoor
Chair
European Securities and Markets Authority (ESMA)
103 rue de Grenelle
75345 Paris
France

Brussels, 5 December 2018

Dear Chairman Maijoor,

We are grateful to you for making public your recent letter to Vice President Dombrovskis concerning MiFID II/MiFIR third country regimes. The American Chamber of Commerce to the EU (AmCham EU) is a longstanding advocate of open, well-functioning and appropriately regulated transatlantic, and global, capital markets. We believe they are a crucial driver of long-term economic growth and competitiveness in Europe and the US.

We are strong supporters of the Capital Markets Union (CMU) project and have consistently advocated for an open CMU. As firms with a strong commitment to Europe, we are concerned that measures impeding access to EU markets from non-EU jurisdictions would be to the detriment of consumers, businesses and governments, and would negatively impact the attractiveness of the EU. An open approach, ensuring that Europe maintains its access to global liquidity, would also go a long way towards realising the ambition of building thriving EU capital markets.

We have long been supporters of a system of equivalence which promotes transparency, predictability and deferential treatment between regulatory authorities. We have been strong advocates of global coordination around rules so as to promote similar, positive outcomes like transparency, stability and investor protection. However, attempts to either impose rules directly on market participants in third country jurisdictions (extraterritoriality), force market participants to set up branches or subsidiaries in order to access markets (relocation) or taking an overly granular approach to assessing equivalence of another jurisdiction's rules, all have negative outcomes for consumers and the broader economy. We are in favour of development of improvements to the monitoring non-EU firms in order for EU authorities to manage cross-border risks, but we are concerned about a system which may attempt to prevent cross-border business.

In this context, we wished to raise some specific concerns with issues you raised in your letter to the Vice President.

MiFID II regime for third country firms:

- The proposals in your letter seek to strengthen the MiFID/R third country equivalence process and to provide national competent authorities (NCAs) with supervisory oversight powers over third country firms providing services in the EU.
- These proposals risk: 1) Disrupting third-country market access to the EU, ultimately restricting financial services choices for EU clients; 2) Re-opening the equivalence debate with other third country jurisdictions such as the U.S. and 3) Prompting other regulators to be similarly restrictive. These outcomes would generally lead to market fragmentation, making it more difficult to participate in the EU capital markets or for EU counterparts to participate in the global financial market.
- We encourage policymakers in the EU to work towards greater deference to regulatory regimes within the G20 countries and the use of international standards as a benchmark for determining whether another

jurisdiction has a comparable regulatory regime. ESMA's proposal to make all third country firms comply with relevant MiFID/R rules seem unnecessary as the equivalence process should already have established that these non-EU firms comply with equivalent rules in their home jurisdiction.

- In addition, you suggest that NCAs should be able to exercise 'some direct supervisory powers' on third country firms. We believe that the current and existing MiFIR Article 47(2) cooperation arrangements between ESMA and third countries regulators already provide ESMA with powers in terms of exchange of information, notifications to ESMA, and coordination of supervisory activities, including on-site inspections etc. It would therefore be helpful to understand what additional supervisory powers you would like to acquire for ESMA or for the NCAs.
- We are concerned that these proposals could make EU markets less open and less competitive and would risk third countries adopting similar measures against EU firms in response to this provision, which would harm EU firms in their international activities.

Reverse solicitation:

- Reverse solicitation under MiFID II has been introduced to allow persons established in the Union to receive investment services by a third country firms at their own exclusive initiative. Where a third-country firm provides services at the own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union.
- Reverse solicitation under MiFID/R provides helpful flexibility to firms to access investment services from third country firms that they might not be able to get from EU institutions.
- Imposing undue restrictions to be introduced on reverse solicitation would make it harder for EU clients to access these services which would ultimately restrict financial services choices for EU clients.
- ESMA has already issued comprehensive Q&A guidance on what is meant by reverse solicitation. We would strongly suggest that any further clarifications in this space should undergo a proper consultation to evaluate the potential impact on the EU economy.

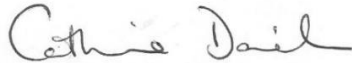
Outsourcing:

- We note that ESMA is calling for the introduction of a more stringent regime for the outsourcing of critical and important functions to third country entities under MiFID/R.
- We agree with ESMA that institutions should not outsource activities such that they operate as 'empty shell' companies and that institutions should have the substance to identify and manage the risks they generate. However, it is important for the right balance to be struck.
- Outsourcing is a very common and well-established practice in financial services, and is an integral part of many firms' operating models. These activities give investors and businesses the ability to access expertise and excellence across the globe for a number of functions.
- Any clarification or strengthening of the outsourcing regime under MiFID/R should be carefully thought through such that it does not introduce inefficiency into global operating models.
- The ESAs already have existing tools at their disposal to ensure supervisory convergence among Member States; including issuing guidelines and recommendations, providing additional opinions to NCAs, and conducting thematic and peer reviews. We believe these tools should be used to encourage supervisory convergence or highlight any potential shortfalls in the current outsourcing regime before any changes are made to MiFID/R.

We understand that ESMA's views have been proposed as a consequence of the UK's decision to leave the EU, however we are concerned about their broader implications. These requirements would limit the capacity of EU-based banks, broker dealers, asset managers, corporates and other financial market participants to access market liquidity outside of Europe. Limiting the ties between EU and non-EU market participants would be a backwards step for EU capital markets and their connection to the world.

In addition, we wish to underline the recent transatlantic developments, in particular the CFTC's recent White Paper on cross-border swaps reform which includes expanding exemptive authority for non-U.S. CCPs and trading venues, showing "appropriate deference" to non-U.S. regulatory regimes. We support moves to design a more coherent regulatory framework that reflects the global nature of financial markets. We hope U.S. and EU policymakers do not miss an important opportunity to work together to rethink and improve international coordination.

Yours sincerely,



Catherine Davidson
Chair
Financial Services Committee
AmCham EU