

European passporting rights – the freedom to provide investment services in Malta

The freedom to provide services in the EU/EEA is enshrined in the Treaty of the Functioning of the European Union. Licensed European investment firms may exercise their rights under the freedom to provide services or the freedom of establishment regimes in order to provide their investment services in another EU/EEA Member State without having to undergo the licensing process in the hosting jurisdiction. In this respect, this briefing note will highlight the possibility of European investment firms to provide investment services in or from within Malta under the passporting regime and the exemptions applicable thereto, as well as the restrictions and exemptions applicable to third-country investment firms desirous of providing such services.

EU/EEA Investment Firms

In terms of the Investment Services Act (Cap. 370 of the Laws of Malta, the “ISA”), an investment firm shall not provide an investment service (any service falling within Annex 1 of Directive 2014/65/EU (“MiFID II”)) (the “Investment Service/s”) in or from within Malta unless it is in possession of a valid investment services licence. Nevertheless, no licence requirement will be triggered where a European investment firm: (a) passports its services in Malta; or (b) provides services on a reverse solicitation basis.

A European investment firm which is seeking to provide or perform Investment Services in Malta, in exercise of a European passporting right, shall be exempt from applying for an investment services licence in Malta under the ISA, provided that the following conditions are met:

- the European investment firm has communicated its intention to provide services in Malta to its home regulatory authority;
- a programme of operations has been submitted to its home regulatory authority, stating in particular the investment services as well as ancillary services which it intends to provide in Malta and whether it intends to do so through the use of tied agents established in its home EU/ EEA State. Where the European investment firm intends to use tied agents, it shall also communicate the identity of those tied agents; and
- the Malta Financial Services Authority (the “MFSA”) has received the above information from the European regulatory authority of the European investment firm.

Upon having fulfilled all of the above, the European investment firm may initiate the investment services concerned in Malta.

Conversely, if a European investment firm provides Investment Services on a reverse solicitation basis, i.e. at the initiative of the client, it is exempt from applying for an investment services licence in Malta or even from having passporting rights into Malta. Following the implementation of MiFID II, the MFSA have issued official guidelines on what constitutes ‘at the initiative of the client’ in the context of the provision of investment services. In this respect, an investment service may not be considered to be provided at the initiative of an investor if this is demanded by an investor in response to a personalised communication from or on behalf of the investment firm to that particular investor, which contains an invitation or is intended to influence the investor in respect to a specific product or transaction. On the contrary, an investment service can be considered to be provided at the initiative of the investor, if the investor demands it on the basis of any communication containing a promotion or offer of products made by any means that by its very nature is general and addressed to the public or a larger group or category of investors.

Third-Country Investment Firms

A third-country investment firm intending to provide Investment Services or perform investment activities in or from Malta, with or without any ancillary services to clients, is required in accordance to the ISA, to establish a branch in Malta. In order to be eligible to establish such a branch, the third-country investment firm must satisfy the following conditions:

- the provision of services for which the third-country firm requests licensing is subject to authorisation and supervision in the third country where the firm is established and the requesting third-country firm is properly authorised;
- operation arrangements, that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors, are in place between the MFSA and the overseas regulatory authority of the country where the firm is established;

- sufficient initial capital is at free disposal of the Malta branch;
- one or more persons are appointed to be responsible for the management of the branch and they all comply with the requirements applicable to the management body prescribed in Investment Services Rules and, or Conduct of Business Rules;
- the third country where the third-country firm is established has signed an agreement with Malta which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital; and
- the firm belongs to an authorised or recognised investor-compensation scheme.

It may be possible for a third-country firm to draw up exemptions from the establishment of a branch in Malta where it intends to perform investment activities with or without any ancillary services to eligible counterparties and to 'de facto' professional clients within the meaning of Section I of Annex II of MiFID II.

In order for this exemption to be applicable, the third-country investment firm must satisfy the requirements of Article 46 of the Regulation on Markets in Financial Instruments (EU Regulation 600/2014) ("**MiFIR**"), which provide that: (i) the third-country firm must be registered in the register of third-country firms kept by the European Securities and Markets Authority; (ii) an equivalence decision must have been delivered by the European Commission in respect of the third-country firm's home jurisdiction; and (iii) the third-country firm is authorised in the jurisdiction where its head office is established to provide the investment services or activities to be provided in Malta.

Exemptions also apply where the third-country firm intends to provide investment services to a retail client or an 'elective' professional client within the meaning of Section II of Annex II of MiFID II. In these circumstances, where the retail client or the elective professional client initiates on its own exclusive initiative the provision of an investment service or activity by the third-country investment firm, that firm shall not be required to establish a branch or otherwise obtain a licence in Malta. Nevertheless, an initiative by such clients shall not entitle the third-country firm to market its investment products or services to those clients otherwise than through the branch.

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