

Finland and Sweden aim to allow cross-border offering of services under MiFID II from non-EEA countries in anticipation of Brexit

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Executive summary

- Considering the possibility of a hard Brexit and UK investment firms losing their EU passporting rights, resulting in Finnish institutional investors having limited access to these firms' services, the Finnish government has proposed amending the Finnish Investment Services Act. The amendments would enable non-EEA investment firms to offer services directly into and conduct investment activities in Finland without establishing a branch office.
- UK firms operating in Finland would have to apply for cross-border authorization from the FIN-FSA before Brexit, which would act as an extension of their current EU passport. This would enable them to continue activities in Finland until the FIN-FSA has processed their application for the cross-border authorization.
- The new Finnish provisions are expected to enter into force as soon as possible this year, although it is uncertain whether the Finnish Parliament will be able to adopt the proposals in time. UK-authorized investment firms should, however, ensure that they have a valid EU passport to provide services in Finland and consider applying for the new cross-border authorization. They may continue to offer services while their application is being processed.
- By contrast, assuming that new proposed legislation is adopted in Sweden, UK investment firms in Sweden, can continue to provide current EU passported services from the date of Brexit until the end of 2021.
- Finland and Sweden have not planned or adopted corresponding measures to ease the provision of financial services to customers in other sectors of financial services, such as banking, payment services and insurance.

Background

In December 2018, the Finnish government issued a government bill (277/2018) proposing amendments to the Finnish Investment Services Act (747/2012; the "ISA") and related legislation. On 5 February 2019 the Economic Committee of the Finnish parliament issued a report supporting the proposals. The proposals cover changes to the right of non-EEA (third-country) investment service providers to offer services in Finland. According to the current ISA, third-country investment service providers have limited rights to provide investment services to professional and non-professional investors; in practice they need to establish a separately authorized branch in Finland or a subsidiary in the EEA.

Currently, Article 47 of the Markets in Financial Instruments Regulation ((EU) No 600/2014, the "MiFIR") gives the European Commission the power to adopt equivalence decisions concerning third-countries, enabling investment firms domiciled in such countries to provide services in the EU without having to establish a branch. As the European Commission has not adopted any such decisions, it is currently not possible for non-EEA service providers to enter the Finnish market without a separately authorized branch or a subsidiary in the EEA.

However, Article 46(4) Paragraph 5 of the MiFIR allows Member States to have third-country service providers offer investment services to professional clients and eligible counterparties under a national framework. Chapter 5 Section 5 of the ISA actually contained such a provision on a national framework until the Markets in Financial Instruments Directive (2014/65/EU, the "MiFID II") was implemented in January 2018. The deleted section stated that a third-country investment service provider could offer services to professional investors and eligible counterparties without a branch or subsidiary in Finland with authorization from the Finnish Financial Supervisory Authority (the "FIN-FSA"). However, since no third-country service provider had exercised this exemption before the MiFID II was implemented, the provision was considered obsolete and was thus removed.

The impact of a "cliff-edge" or "hard" Brexit

As of today, the risk of hard Brexit still remains, despite ongoing discussions and negotiations. Many Finnish institutional investors in particular use the services of UK-based investment firms or third-country firms with UK subsidiaries. These firms currently operate under a so-called EU passport, granting an investment firm authorized in one Member State the right to provide services cross-border into other Member States. As a consequence of a hard Brexit, service providers authorized only in the UK would lose their EU passports and access to the single market, simultaneously limiting the ability of Finnish institutional investors to use their investment services. This would in turn adversely affect their ability to diversify risk and choose the most competitive service provider, particularly because the reverse solicitation exemption referred to in Chapter 5 Section 4 of the ISA is considered to have a limited scope of application according to the recitals of the Government bill.

Third-country service providers have also expressed considerable interest in offering their services to Finnish clients directly from the UK after Brexit without establishing branch. Several other EU Member States such as Belgium, Denmark, Germany, Italy, Luxembourg, the Netherlands, Spain and Sweden have already enabled third-country service providers to operate without a branch under Article 46(4) Paragraph 5 of the MiFIR. Of those countries, such as Germany and Sweden are currently enacting interim provisions concerning UK service providers. For these reasons the Finnish government has concluded that it is necessary to add a provision to the ISA that would enable third-country investment firms to offer services into and conduct investment activities in Finland without establishing a branch. This would involve applying for authorization from the FIN-FSA.

Finland and Sweden have not planned or adopted similar measures to ease the provision of financial services to customers in other sectors of financial services, such as banking, payment services and insurance.

The proposed cross-border regime in Finland

The proposed authorization to provide services cross-border into Finland would essentially act as an extension of UK investment service providers' (including banks providing these services under a MiFID passport regime) right to offer services and conduct investment activities in Finland under their currently valid EU passports.

According to the proposed Chapter 5 Section 7 of the ISA, the FIN-FSA will grant the authorization, if

1. the Commission has not adopted an equivalence decision concerning the service provider's home country, or if such a decision would not be in force. (If such a decision were in force, the investment firm could be entered into a register maintained by the European Securities Markets Authority ("**ESMA**"), allowing the investment firm to provide services also to Finnish investors);
2. the regulatory environment in the third country and the supervision of the service provider by the third-country regulator is essentially equivalent to the regulation and supervision under the MiFID II and ISA. In practice, the service provider's home country regulator should have concluded a memorandum of understanding concerning cooperation arrangements with the FIN-FSA;
3. the service provider is authorized in its home country to provide investment services;
4. the service provider has an action plan specifying the services and possible ancillary services to be offered and activities to be conducted, its organizational structure and description of possible outsourcings of critical and important functions; and
5. the service provider has sufficient capital.

Other possible requirements specified by the FIN-FSA based on the final legislation must also be met. The bill does not specify the exact documentation or information to be provided, nor does it list the possible reporting requirements or application fees. According to the Finnish Parliaments' Economic Committee's proposal the annual supervisory fee would be 3.210 euros per year.

According to Chapter 3 Section 2 of the ISA, the FIN-FSA must process an authorization application within six months of receiving the application. If the application is incomplete, the six months will be calculated from the date on which the applicant has provided all necessary documents and information.

Interim arrangements for UK investment firms

Finland

The Finnish government bill also specifies interim arrangements for UK firms, enabling them to temporarily continue their activities in Finland after Brexit. This option would be reserved for UK investment firms or credit institutions providing investment services based on a valid EU passport, provided that they apply for cross-border authorization by no later than the date Brexit enters into force. These service providers could then continue to provide the services specified in their passporting notification until the FIN-FSA has processed their authorization. After that, the applicant could operate in Finland with the new cross-border authorization, if granted. Any new services, however, would have to be authorized separately, as described above.

It would also be possible to submit the application before the amendments enter into force, provided that the application be supplemented as needed, and considering that the processing period for the application would not begin before Brexit enters into force. During the six-month processing period specified above, the service provider would be subject to the regulations of its home country.

Sweden

The Swedish government has taken a slightly different tack. In January 2019 it published a draft bill that, when enacted by the Swedish Parliament, would allow UK firms currently operating under an EU passport in Sweden to continue providing any services passported at the time of Brexit until the end of 2021. Any new services, however, would have to be authorized separately. The amendments are expected to enter into force on 15 March and apply from the departure of the UK from the EU.

Other Brexit-related matters in Finland and in Sweden

The recitals of the Finnish government bill also address some Brexit-related problems concerning OTC derivatives. Some actions taken post-Brexit concerning OTC derivative agreements that have been concluded pre-Brexit could be considered to constitute a new agreement, which would trigger an authorization requirement. The government bill proposes that the FIN-FSA would be responsible for deciding whether an action constitutes a new agreement. The FIN-FSA should consider the goals of the regulation, the consequences of the interpretation for market participants and the functioning, integrity and stability of the market, as well as the need to ensure consistency with other Member States' established interpretations.

On 1 January 2019 new rules entered into force in Sweden concerning settlement systems authorized by, and operating under the laws of, non-EEA countries. The new rules allows the Swedish Financial Supervision Authority to grant operators of such systems equivalence with EEA systems, ensuring the same finality protection for non-EEA systems as EEA systems enjoy under the Finality Directive. Also, systems that will cease to be EEA systems on Brexit will be "grandfathered" into the finality regime until 30 March 2020, a period that may be extended, if applications for equivalence have been submitted to the relevant authority prior to Brexit.

Next steps in Finland and in Sweden

The Finnish government bill has not yet been adopted as law, but it has been presented to the Parliament. The new provisions should enter into force as soon as possible in early 2019. Due to the Finnish parliament election in spring 2019, the parliamentary term will be shorter than usual, creating a risk that some bills may not be processed properly before the end of the term because of time constraints.

If the proposed amendments are adopted in substantially the same form as in the government bill, we would advise UK-authorized investment firms currently providing regulated investment services or conducting regulated investment activities in Finland or considering such activities to ensure that they have a valid EU passport for the provision of the services they wish to offer in Finland. UK investment firms should contact their local counsel in Finland concerning the possibility to apply for a cross-border authorization to continue the services they are currently providing to institutional investors in Finland.

The Swedish bill is currently being vetted by the consultative Legislative Council, comprised of justices from the Supreme Court and the Supreme Administrative Court. There is no reason to believe that the bill will not pass into law.

If you have further questions, please do not hesitate to contact [Roschier, Attorneys Ltd.](#)