



The Markets in Financial Instruments Directive (“MiFID”) is a strange beast. For a start, it’s two Directives, not one – there’s the Directive itself [2004/39/EC] and an Implementing Directive [2006/73/EC], as well as an Implementing Regulation [1287/2006/EC] which has direct application and doesn’t require national transposition. Famously, the Commission launched infringement procedures earlier this year against those Member States that missed the 31 January transposition deadline.

Status of National Transpositions

The Commission published a further progress update on the transpositions into national law in early July. Ireland, Romania and the United Kingdom were the only three member states to meet the original transposition deadline. By the time of the follow-up survey, they had been joined by Belgium. Denmark had transposed the Implementing Directive and hoped to have the both Directives in place by the end of July, as did France, Germany and Luxembourg. Austria, Bulgaria, Malta, Slovakia and Sweden hoped to have both Directives transposed by August. Greece also anticipated having the main Directive in place in August, but wouldn’t be drawn on a target date for the Implementing Directive any more definitive than “later”. Italy, Lithuania and Portugal had set themselves back-to-school targets of September to finish the process, while Cyprus, Latvia, Poland, Slovenia were aiming for October.

The Directive is also being adopted as law by three non-member states, Iceland, Liechtenstein and Norway, all of whom opted for an October transposition target. This leaves the Czech Republic, Estonia, Finland, Hungary and the Netherlands aiming to get the Directives onto their statute books in November not before the 1 November live date. Spain is aiming for a November transposition of the main Directive but has already also conceded it will not meet the deadline for the Implementing Directive.

The difficulties of attempting to ensure timely and uniform pan-European legislation are becoming very apparent to all involved. While the staggered implementation process (possibly running right up to the very live date of the process, if not beyond) might allow the various national administrations to claim that they had played their part in the project, it has led to significant difficulties for financial-services businesses operating on a cross-border basis as they attempt to define what is being asked of them, let alone implement suitable policies and procedures. While the majority of the requirements are well known and understood from the Directives, it’s the nuances at national level as well as interpretations of general concepts that cause difficulty in implementation.

As a solution, financial institutions have been adopting the UK regulations as a default choice for their European procedures manuals, since the regulations are already strongly defined and the majority of pan-European businesses would have an operational presence in the City of London.

Notwithstanding Irish success in transposing the directives by the initial deadline as statutory instruments,

additional primary legislation will be required in order to create indictable criminal offences for MiFID breaches. The timing of this bill is currently uncertain. It was presented to the Dáil as the Markets in Financial Instruments and Miscellaneous Provisions Bill 2007 in April but subsequently lapsed when the election was called.

National Gold Plating

Despite the 'Maximum Harmonisation' nature of the Directives, there is scope to seek the Commission's permission to add national gold plating measures, where sufficient cause can be shown. Both Ireland and the United Kingdom have made such 'Article 4' requests. The Irish request is to retain the existing client money rules developed in the aftermath of the WR Murrough collapse. The rationale for this is that it didn't make sense for the Irish industry to operate two different client money regimes depending on whether they were providing MiFID services (such as investment advice) or non-MiFID services (such as acting as a mortgage intermediary).

Unusually given the Financial Regulator's recent openness, it declined to make public the Article 4 request, despite freely admitting the request had been made and divulging the general nature of the submission. As the Financial Regulator is exempted from the Freedom of Information Act, such reluctance might have meant Ireland's request to vary a key element of financial services law would have remained 'secret', had the European Commission not published the submission received on its website. To encourage ongoing openness in the regulatory process, we have also made copies of these

documents freely available on www.mifid.ie. By contrast the UK Financial Services Authority published its submission prominently on its website including the full panoply of supporting schedules making its case.

Implementation in Ireland

The Financial Regulator has taken very seriously its key role in implementing the Directive and assisting Irish industry in getting to grips with what is a very wide-reaching piece of legislation. The Financial Regulator has identified fourteen separate areas and established teams inside the Financial Regulator with named contacts for each. This dedication and attention to detail is recognised and applauded.

Transaction Reporting

One of the key concepts of MiFID is transaction reporting to the national regulator - recognition of the fragmentation of financial markets and a move away from old concepts of nationally-traded securities. In part, this is also a spur to create a single pan-European financial trading space unburdened by national exchange membership requirements. The idea is that an instrument could, regardless of domicile or listing location, be traded by two parties located anywhere in the European Union in any suitable forum. In order to preserve the price discovery function currently provided by stock exchanges and recognised markets, the market-facing firms would report the transaction to their home country regulator. This regulator would then route the transaction information to the securities 'home' country for publication by that nation's regulator on their website. The flexibility to trade anywhere would be complimented by the emergence of a single information portal containing details

of all trades. Unfortunately, the requirements for reporting don't envision live transmission and are likely to prove of archaeological interest only by the time they're published by the home country regulator.

Irish market-facing firms are being required to report their transactions as an XML file by close of business the day following the trade date. Transactions must be reported to the Financial regulator via the secure Online Reporting website.

The Online Reporting website is not yet complete, however it is anticipated that a test version of the system will be made available to reporting institutions closer to the reporting deadline of November 1 so they can familiarise themselves with how it works.

An updated Transaction Reporting Workflow Guide was published by the Financial Regulator on its website on 15 August.

Organisational Requirements

The Financial Regulator has published MiFID and Non-MiFID versions of the Handbook for Investment and Stockbroking Firms. The regulatory architecture envisages financial services businesses being governed either by the Consumer Protection Code or by the MiFID Regulations. The Client Money Regulations have already been identified as an area where those two regimes do not line up exactly, and it is in this middle ground that practitioners expect the majority of future issues to arise.

The State of Play

To borrow a local political expression, there's a lot done, more to do. A lot of the infrastructure has been put in place, yet some remains worryingly absent given the

closeness of the live date. There will inevitably be teething problems, but the Financial Regulator is to be congratulated for the hands-on manner in which they have tackled the project, to the extent of publishing FAQ documents with guidance for quite detailed scenarios. Lest MiFID soak up all the attention, let's not forget that 31 December is also the deadline for adoption by industry of its sister directive, the Capital Requirements Directive, which is no less complex a document.

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