

Insight

MiFID uncertainty across Europe could create problems

Five years after its initial proposal, MiFID's implementation date finally arrived on 1 November 2007.

This Insight considers the current status of MiFID just three weeks on:

- Which States are now MiFID compliant?
- How do firms of non-MiFID compliant States passport their services?
- What areas present uncertainty under the current arrangements?
- What limitations exist until all States transpose and implement MiFID?

Current status

Only the UK, Ireland and Romania met the original transposition deadline of 31 January 2007; by 1 November 2007, the date of MiFID application, 11 Member States had failed fully to adopt their implementing legislation. Of these, four States (the Czech Republic, Hungary, Poland and Spain) have still not completed their transposition, and Poland and the Czech Republic estimate that their domestic rules will not be in place until March 2008. The Commission has warned that infringement actions for late transposition will be rigorously pursued, and has also referred to the possibility that States might be liable in damages to firms and individuals who suffer loss as a result of that late transposition.

The current patchwork of incomplete transposition across the EU gives rise to uncertainty about the operation of the 'passport' for firms between States that have adopted MiFID rules and those that have not. Firms that are authorised in their 'home' State in accordance with MiFID are entitled to provide services or establish a branch in 'host' States, and to carry on business in the host State largely on the basis of their home State rules. However, it has been unclear whether a firm whose home State has not transposed is able to carry on business after 1st November in a State that has implemented MiFID, since the firm will not have the MiFID authorisation necessary to 'passport' into a State where the MiFID regime is in place. MiFID contains no transitional provisions that address this situation.

Continuing validity of ISD passport: CESR agreement

The uncertainty surrounding the passporting arrangements has been recognised by the Commission and regulators, and CESR has recently adopted a statement of 'practical arrangements' between regulators aimed at ensuring as far as possible the continuity of cross-border business in such cases. The arrangements are based on an agreement between regulators to recognise existing



We welcome Ruth Walters who has recently joined the Brussels office of White & Case.

Ruth most recently worked at the European Commission in Brussels where she was closely involved in the implementation of the Markets in Financial Instruments Directive.

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authorisations and related passports under the Investment Services Directive ('ISD'), with the result that an ISD authorisation granted before 1st November to firms whose home State has not transposed MiFID will continue to be valid.

However, a firm with an ISD authorisation and passport may only continue carrying on existing business in a 'host' State that has transposed MiFID if the firm is subject to an appropriate conduct of business regime. This has the following effect:

In the case of a firm that provides services through a branch, it may only continue to provide those services if it complies with the host State rules implementing the conduct of business regime under MiFID (that is, the rules on client information, suitability and appropriateness, best execution, client order handling, transaction reporting and pre- and post-trade transparency).

In the case of a firm that does not have an establishment in the host State, it may only continue providing cross-border services only if it complies with host State rules that are comparable to the operating conditions under MiFID. These will include the conduct of business rules mentioned above in relation to firm's operating through branches, and also include rules regarding the identification and management of conflicts of interest.

Issues of uncertainty

These practical arrangements are based on the understanding that a firm's ISD authorisation was subject to conditions 'comparable to' those imposed by Articles 9 to 14 of MiFID: that is requirements relating to the suitability of persons who effectively direct the business and those who control the firm; membership of an Investor Compensation Scheme; regulatory capital; and the organisation of the firm, including control of conflicts of interest, sound administrative and accounting procedures, and risk assessment and management.

CESR appears to accept that authorisations under the ISD will be subject to conditions that are comparable to the relevant MiFID requirements. However, implementation of the ISD was far from uniform, and a further indication from CESR as to whether the ISD authorisations of those 7 States that have not yet transposed do in fact satisfy the relevant MiFID requirements would be welcome.

CESR could also usefully clarify whether the pre-MiFID rules of those 7 States are comparable to the operating conditions under MiFID. CESR has already indicated that compliance with the relevant CESR standards 'could be' regarded as a presumption of comparability. This is helpful as far as it goes, but firms could operate with greater certainty if CESR were to assess whether the rules in question comply with the CESR standards.

Limits of CESR Agreement

These practical arrangements only apply to ISD authorisations and related passports granted before 1st November 2007. This means that a firm whose home State has not transposed MiFID cannot use an authorisation granted after that date to carry on investment services or activities in a State that has transposed the new regime. Similarly, if an ISD authorisation is amended after that date to add a new service or activity, that new service or activity cannot be passported.

The most important implication of this is that CESR's 'practical arrangements' do not apply to activities that were not subject to authorisation under the ISD, and are regulated for the first time at EU level under MiFID. These include operating a multilateral trading facility and regulated activities concerning commodity derivatives, credit derivatives and financial contracts for differences.

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