



EVERY WHICH WAY BUT LOOSE

The recent publicity around PPI and ensuring consumers are protected from things that they probably do not fully understand also has some foundation in policy making in Brussels. This would of course include the reason for the emergence of MiFID and MiFID II.

Core principles of MiFID include a number of measures aimed at protecting investors in the context of the provision of investment services. Those rules take into account the type of services such as investment advice or execution of orders and the classification of clients, with higher protection granted to retail clients. The MiFID rules include both conduct of business requirements which covers, for instance, collecting sufficient information to ensure that the products provided are suitable or appropriate for the client and organisational requirements to identify and manage any conflicts of interest.

However, modifications and improvements are introduced to strengthen the framework for the provision of services. Firstly, the scope of the Directive is broadened in order to cover financial products outside the scope of MiFID I but which satisfy similar investor needs and raise comparable investor protection challenges. In the future, the sale of structured deposits will have to comply with several MiFID requirements, and in particular with conduct of business and conflicts of interest rules.

MiFID II will also extend some of the information to clients and conflict of interest requirements to insurance-based investment products by amending the Insurance Mediation Directive 2002/92/EC.

Secondly, conduct of business requirements are modified in order to grant additional protection to investors. The rules for investment advice are improved both when advice is provided on an independent basis and in the long term. Advisers declaring themselves as independent will need to match the client's profile and interests against a broad array of products available in the market and say whether they will provide the client with a periodic assessment of the suitability of advised products.

Independent investment advisers and portfolio managers will be required to transfer all fees, commissions or any monetary benefits paid or provided by a third party to the client who should be accurately informed about all such commissions. The conditions for services where investors receive less protection from firms are more limited. In particular, the Directive clarifies the conditions and situations in which investors are able to transact freely in certain non-complex instruments with minimal protection afforded by investment firms.

Thirdly, organisational requirements for the provision of services to investors are strengthened. For instance, the involvement of senior management in the design of the firm's policies as to how products and services may be sold or provided to their clients and the adoption of adequate internal controls are consolidated.

MiFID II also introduces harmonised powers and conditions for national competent authorities, the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) to prohibit or restrict the marketing and distribution of certain



financial instruments and structured deposits, financial activities or practices in case of threats to investor protection, financial stability or the orderly functioning of markets.

The revision of the Market Abuse Directive (MAD) and MiFID has been considered at the same time because together they guarantee the competitiveness, efficiency and integrity of EU financial markets. In order to ensure that they are fully coherent and support each other's objectives and principles, they needed to be updated in tandem.

Moreover, the pan-EU competition facilitated by MiFID has given rise to new challenges in terms of cross-border supervision, and maximum harmonisation of the rules and competent authorities' powers in relation to offences are a necessary step.

MiFID applies to the provision of investment services or activities by banks and investment firms in relation to financial instruments and to the operation of regulated markets. The objective is to support the development of a more integrated, competitive and efficient EU market in financial instruments with appropriate rules regarding conditions for authorisation as investment firms, organisational requirements to ensure they are managed appropriately, market transparency and investor protection.

The Regulation on OTC derivatives, central counterparties and trade repositories (EMIR) on the one hand, and the Regulation on short-selling and credit default swaps on the other, have different objectives and therefore complement MiFID. The former aims to minimise counterparty credit risk and operational risk, while the latter increases harmonisation and transparency, and mitigates risks associated with short selling and the use of credit default swaps.

Packaged retail investment products (PRIPs) are common products in the retail investment market, with broadly comparable functions for

investors while taking a variety of legal forms. While offering benefits for investors, PRIPs are often complicated and opaque.

In line with the Regulation to improve the quality of information that is provided to consumers, MiFID II addresses some of the problems identified in the PRIPs market by creating a robust and coherent framework in the areas of information about the product to clients and the rules governing the sales process for those PRIPs that are financial instruments or structured deposits, such as the conduct of business and the conflicts of interest requirements for intermediaries distributing these products.

At the same time, the measures on product disclosure proposed in the PRIPs context complement the investor protection measures on investment advice and sales services regulated under MiFID.

In the UK advisory market currently, there is a lot of debate around the impact of 'robo adviser' models or digital wealth management which has infiltrated from across the Atlantic. However, as most of you will be aware, regulation in the USA is very different from that applied by the FCA in the UK.

MiFID II is the legislation through which the EU has implemented a number of measures to meet our G20 commitments, in particular in relation to derivatives and is in line with the principles of regulation established by the International Organisation of Securities Commissions (IOSCO). This helps ensure convergence with other jurisdictions, including the US, Australia, Asia, and South America. Other jurisdictions are at different stages in the process of implementation, with some further advanced than others.

Many provisions of MiFID II reflect core precepts in the regulation of securities markets globally. However, different jurisdictions have rules specific to their own markets. Assessments of comparability, as is the case



under equivalence assessments for third-country recognition, should not be made on a line-by-line basis but rather look at the totality of the relevant legislation in terms of achieving the relevant objectives.

As regards the US, MiFID II covers areas addressed by various pieces of US financial markets regulation such as the Securities Exchange Act and the Commodity Exchange Act. Like the Dodd-Frank Act, which amends these texts, the review of MiFID both amends provisions already in force and adds measures in light of the financial crisis and other market developments.

The US and EU approaches and legislation are very much aligned in terms of achieving the same objectives. For example, the revised MiFID complements the regulation on OTC derivatives, central counterparties and trade repositories (EMIR). The adoption of these new digital driven services will still continue apace but the differences in operation and regulation between those in the USA and here in the UK will continue to differ.

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