



Mifid II Implementation Report **2018**

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INTERNATIONAL FINANCIAL LAW REVIEW

Ireland

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SECTION 1: Market outlook

1.1 Please clarify which products or markets your jurisdiction hosts that are affected by Mifid II

Mifid II impacts Irish investment firms (such as brokers, asset managers, wealth managers and corporate advisory firms), market operators, data reporting service providers, trading venues and banks carrying out Mifid investment services. Mifid II has been implemented into Irish law by the Markets in Financial Instruments Regulations S.I. (S.I. No. 375 of 2017) (the Mifid II Regulations).

Ireland is a leading domicile for internationally distributed investment funds and has over 900 global fund managers with assets administered in Ireland. At an international level, Ireland offers offshore managers access to the EU, with the EU-wide marketing passport for undertakings for collective investment in transferable securities (Ucits) and alternative investment funds (AIFs).

Mifid II has indirectly impacted the asset management industry as Ucits ManCos and AIF managers (AIFMs) not authorised to carry out Mifid investment services are required to comply with certain Mifid II outsourcing provisions in the context of sub-delegation.

SECTION 2 (a) – EU member states: implementation

2.1 Outline the areas where local regulators have (a) gold-plated requirements; and (b) exercised national discretion, where provided for in Mifid II in your jurisdiction

(a) Gold-plated requirements

The Mifid II Regulations implement Mifid II directly into Irish law and do not introduce any gold-plated requirements. The National Competent Authority, the Central Bank of Ireland (CBI) has



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Louise regularly advises banks, Mifid investment firms and financial institutions on all aspects of financial regulation and compliance and related matters.

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confirmed that it will rely on guidance issued by the European Securities and Markets Authority (Esma).

(b) Exercised national discretion

The Irish safe harbour exemption for third countries carrying out wholesale investment services has been substantially maintained. Firms continue to be considered not operating in Ireland where there is no branch established in Ireland and they provide services to professional clients and eligible counterparties. However, the safe harbour exemption does have a more limited scope under the Mifid II Regulations than the previous regime. The narrowing of the safe harbour regime means some third country investment firms who previously qualified, no longer do so. To continue providing investment services in Ireland such firms must be authorised by the CBI.

Optional exemptions

Exempt firms

The optional exemption from authorisation is available to firms qualifying under article 3(1)(a), (b) and (c) of Mifid II (exempt firms). However such firms must comply with article 3(2) which provides that certain analogous requirements to those under Mifid II are imposed on exempt firms.

Third Country branches

Third country firms that provide investment services to retail clients and elect-up professionals are required to establish a branch in Ireland.

Sanctions

National discretion will be exercised to implement criminal sanctions for infringements of Mifid II. Maximum fines, of €5 million (approximately \$5.85 million) for natural persons and €10 million for legal persons will be imposed under the Markets in Financial Instruments Bill 2018, to be enacted into Irish law. These sanctions are aligned with fines under the CBI's administrative sanctions regime.

2.2 What has been the biggest issue in respect of these divergences so far?

There is a significant discrepancy between the requirements in article 3(2) of Mifid II and the current domestic provisions under the Investment Intermediaries Act 1995 (IIA) and the CBI's Consumer Protection Code (CPC). The Mifid II investor protections do not apply to exempt firms, and these firms are only subject to investor protection requirements under the CPC. To address the potential for any regulatory arbitrage, the CPC has been amended so that exempt firms will be subject to certain enhanced CPC investor protections, similar to the Mifid II Protections. The exempt firms are now held to the same standards as Mifid II in respect of product governance, remuneration requirements, suitability assessments and disclosure requirements, amongst other provisions. This ensures the end client will be afforded sufficient protection regardless of the applicable regulatory regime.

There is a discrepancy between the definition of an investment instruments known as a tracker bonds in the CPC and a structured deposit under Mifid II. At the time of this article the CBI has confirmed it is looking into this issue.

2.3 What are the most important extraterritorial issues regarding Mifid II in your jurisdiction?

Collective investment undertakings and their managers are exempt from Mifid II. However most Irish Ucits ManCos and AIFMs follow the delegated model whereby the day-to-day asset management and marketing and distribution of a fund is delegated to third party asset manager(s) or distributors which are either authorised in the EU to provide Mifid individual portfolio management or advisory services and/or receipt and transmission of orders or are subject to an equivalent regime outside the EU.

Ucits ManCos and AIFMs are impacted because the relevant service providers need information (such as product costs and charges, and target market information) and other support in order to meet their obligations under Mifid II. Other services providers to Ucits and AIFs not directly affected by Mifid II are being requested to provide information as part of the provision of this support (eg fund administrators/transfer agents). Therefore, Ucits ManCos and AIFMs and Mifid firms are working together to ensure all the necessary Mifid II information is available so that the end client receives the Mifid II investor protections.

2.4 In which areas are market participants still in need of more guidance/certainty over the rules?

As noted above, the inconsistencies between the definitions of a tracker bond under the CPC and a Mifid II structured deposit needs to be clarified and / or rectified to provide consumers with adequate protection. As noted above the CBI is considering this issue and it is hoped guidance will be issued shortly.

Mifid II outsourcing provisions have had an indirect impact on non-EU portfolio management firms and investment advice firms who act as delegates to Mifid II investment management firms, such as US sub-advisors.

The outsourcing requirements in article 31 of the Mifid II Delegated Regulation 565/2017 means that a Mifid firm sub-delegating portfolio management must remain fully responsible for discharging all of its obligations under Mifid II and the end client must receive investor protections to the same extent as if a delegation had not taken place in circumstances where the Mifid firm has delegated portfolio management to a non Mifid firm.

Further clarity is required on the extent of the application of the Mifid II investor protection requirements to non-European Economic Area sub-delegates. The CBI has not outlined any interpretative position relating to the delegation by Mifid firms regulated by the CBI of portfolio management to such firms specifically in the context of whether there should be a pushdown of Mifid unbundling requirements.

SECTION 2 (b) – Non-EU countries

2.1 How well does your market understand Mifid II's requirements now that it's been implemented?

N/A

2.2 In which areas are market participants still in need of more guidance/certainty over the rules?

N/A

SECTION 3: Research

3.1 Please summarise the different approaches both buy and sell-side firms have taken in your jurisdiction with regard to Mifid II's rules on research.

The investment research rules require those on the buy-side to determine whether they will pay for research directly or if they will pass the cost onto their clients. This impacts the broker-dealer and asset management industry. Sell-side firms must unbundle costs, by separating execution costs from research costs, such that the buy-side can demonstrate they are not being induced to trade.

In deciding how to price research the market practice is still being developed in Ireland.

3.2 If pricing research in accordance with Mifid II is not compatible with local law, how have firms approached this to ensure they are compliant?

N/A

3.3 What guidance have local regulators provided to assist with this?

The CBI has said it will not be introducing guidance on Mifid II. Firms are required to rely on the guidelines published by Esma and its Q&A tool.

SECTION 4: Trading/market structure

4.1 Which areas of trading/types of instruments have been most impacted by Mifid II in your jurisdiction, and how?

The pre- and post-trade transparency regime are applicable to non-equity instruments, including structured finance products, bonds, emissions allowances and derivatives and will impact the trading of these products in Ireland.

Position limits for commodity derivatives will apply to investment funds and clients of portfolio managers at fund level rather than at the level of the manager. This will impact the funds industry (excluding Ucits) where the investment manager is trading in commodities on behalf of a number of fund clients to a limited extent.

These trading changes under Mifid II apply at an EU level and Ireland will not apply any additional gold plating requirements.

As noted above, the new requirements that apply to structured deposits under Mifid II impact the current regulatory regime of structured deposits in Ireland under domestic legislation.

4.2 Are the products affected in line with pre-January 3 expectations, or have there been any surprises?

It was hoped that the CBI would have issued guidance on the divergence between structured deposits under Mifid II and tracker bonds under the CPC before January 3 2018. The industry is in a slight set of flux on this issue at present.

4.3 How has the market adjusted to the new transaction reporting and pre and post-trade transparency requirements?

The CBI systems and processes in place for Mifir transaction reporting require that transaction reports must be submitted manually to the CBI via the secure online reporting website (online reporting system). The CBI has issued an ONR transaction reporting user procedure and directs firms to guidance and instructions produced by Esma on Mifir transaction reporting.

The automatic submission functionality, an automated machine-to-machine channel for transaction reporting, was not available from January 3 2018. The CBI currently estimates that a solution will be available towards the end of 2018.

4.4 What are the main considerations that trading venues and exchanges will have to make?

Legal entities active in the trade of shares, bonds, warrants, government bonds and other financial instruments offered on a trading platform require a legal entity identifier (LEI) code. The Irish Stock Exchange (ISE) is one of a number of local operating units (LOUs). LOUs, including the ISE, must ensure that firms executing orders have an accurate and up-to-date LEI.

The ISE has launched a dedicated platform, ISEDirect, through which investment firms can apply for a LEI code.

4.5(a) How prepared have financial counterparties been in obtaining legal entity identifiers to continue trading with Mifid firms or on Mifid-regulated exchanges?

4.5(b) How prepared have issuers been in obtaining legal entity identifiers to continue trading with Mifid firms or on Mifid-regulated exchanges?

The Irish LOU, the ISE, has issued investment firms LEI codes without difficulty. The ISE has developed an online platform through which firms can apply for an LEI code.

SECTION 5: Investor protection

5.1 Explain the impact of the heightened investor protection obligations in your jurisdiction and how it has transpired in the market so far.

Mifid II will introduce increased investor protections for Mifid firms in Ireland. Due to the CPC amendments to incorporate certain Mifid II investor protections, IIA authorised brokers carrying out similar investment activities in relation to similar products are required to provide equivalent protections to their clients.

5.2 Which areas of focus within investor protection have been of most concern/importance to your jurisdiction, and was this in line with pre-January 3 expectations?

The costs and charges disclosure requirements have been challenging for firms to implement, particularly in light of the divergences between Mifid II and Priips methods of disclosure. Firms are still working on ensuring they meet the disclosure requirements. The CBI has stated it understands that this is an area of challenge, and note that the European requirements are difficult to apply in a practical context. The CBI invite firms to raise areas of concern in respect of these EU rules to the CBI. This is an area of regulatory priority for the CBI.

The enhanced suitability and appropriateness requirements create considerable challenges due to the large retail market in a wealth management context. This is also key area of regulatory focus for the CBI.

SECTION 6: Outlook 2017

6.1 What overall risks or opportunities has Mifid II brought to your market so far? Has Mifid II impacted the competitiveness of your market?

Ireland has established itself as a gateway to Europe particularly from an investment management perspective. Since the Brexit vote, authorisation-related activity has continued to increase and it is anticipated that the increase will continue. As Ireland applies Mifid II directly into law, without any gold-plating, and has an engaged and proactive regulator, Ireland is an attractive EU jurisdiction for Brexit contingency plans.

6.2 What do you think the longer term impacts of Mifid II will be on your market?

Mifid II will enhance investor protections, market transparency and will strengthen financial services regulation in Ireland. The fact that Ireland has implemented Mifid II directly and that the CBI rely upon EU guidance means that there is a uniform interpretation of the requirements. As noted above, this is an attractive factor for firms when deciding their Brexit contingency plan. In the long term we would expect more Mifid II firms authorised in Ireland. However for smaller domestic Mifid II firms the enhanced investor protection and operational requirements exposes these firms to great risk of regulatory non-compliance and makes it more expensive to provide services. Some of these small domestic firms are considering merging with bigger firms to ensure their businesses continue to be viable.