



Brexit - Implications for MiFID firms

28 June 2016

The outcome of the referendum on 23 June has raised a host of questions for MiFID investment firms currently located in the UK on what will happen following the UK's exit from the EU. It currently appears that the next 6 months and beyond will bring a period of substantial uncertainty in relation to the continuation of the financial services passporting regime currently enjoyed by UK based MiFID firms throughout the EU/EEA.

While the full implications of Brexit will depend on negotiations between the EU and UK, it is foreseeable that some UK MiFID firms may seek to migrate operations from the UK to elsewhere in the EU. There have already been press reports that some UK MiFID firms have begun the process of planning to obtain financial services authorisations and/or licences in other EU/EEA jurisdictions to continue to avail of unfettered access to EU/EEA markets. It is also possible we may see MiFID firms seek to avail of the cross-border merger mechanisms available under EU/EEA law.

UK based managers can still provide investment services to Irish corporates

The first point worth noting is that investment firms will continue to be permitted to provide investment services to Irish corporates from their office in London following the departure of the UK from the EU. This could be quite a significant point in the context of managed capital markets transactions such as CLOs.

As implemented under Irish law MiFID does not require managers to hold an MiFID licence provided the manager has no head or registered office or branch in Ireland. As such, for European CLOs managed by UK collateral managers, it is possible that the UK collateral manager could continue to be used where the CLO is structured through an Irish SPV (although one also has to consider risk retention rules in the context of such transactions and in this respect we refer you to our Brexit advisory for securitisation and capital markets transactions).

Where passporting is a key requirement for an investment firm, they will need to consider relocation.

Relocation to Ireland

Ireland will remain a member state of the European Union and will continue to be subject to EU laws on the establishment and ongoing regulation of financial services providers including MiFID firms. As the only native English speaking and common law jurisdiction within the EU, Ireland may be an alternative location for MiFID firms and other regulated financial services providers currently located in the UK. Ireland's firm commitment to EU membership should extend to the timely implementation of MiFID II by January 2018.

We have set out below a brief overview of the Irish financial services environment, along with a short illustrative case study on the process of obtaining authorisation as a MiFID firm in Ireland.

Irish Regulatory Environment

A UK MiFID firm will find many close similarities between the Irish and UK regulatory environments. The majority of Irish financial services law is made up of Irish implementing measures for EU financial services directives (along with over-arching directly effective EU financial services regulations).



As a general comment, the Irish legislature tends to adopt a 'copy-out' approach when implementing EU directives into Irish law by way of enacting primary or secondary legislation (statutory instruments) which follow the text of the relevant directive closely. This approach applies in the case of the Irish domestic implementing legislation for MiFID which tracks many of the provisions of MiFID on a word for word basis. This approach assists in providing clarity as to scope and intent of domestic legislation and avoids unhelpful or unnecessary 'gold-plating'. We anticipate a similar approach will be taken in respect of MiFID II.

The Central Bank of Ireland (the CBI)

The CBI is the body responsible in Ireland for both the prudential and conduct of business regulation of MiFID firms in Ireland. Historically the CBI has had complete overall responsibility for the authorisation and supervision of regulated financial service providers in Ireland. Since 4 November 2014 this changed with certain supervisory responsibilities and decision making powers moving to the European Central Bank (ECB) through the establishment of the Single Supervisory Mechanism.

The substantial difference in size, scale and resources available between the CBI and the UK Financial Conduct Authority (the FCA) means that UK MiFID firms dealing with the CBI will notice some differences between the approaches of each regulator. As a general comment, the CBI produces less industry guidance than the FCA – for example, there is no Irish equivalent to the FCA Handbook. MiFID firms are expected to obtain their own legal advice when queries arise on how they should comply with their regulatory requirements and obligations.

In order to focus its resources efficiently, the CBI operates a risk-based framework for the supervision of MiFID firms, known as The Probability Risk and Impact System (PRISM). Under PRISM, larger and more significant firms (those with the potential to have the greatest impact on financial stability and consumers) receive the highest level of direct supervision. Lower impact firms are supervised on a proportionate basis to their perceived risk, for example with thematic reviews, reactive or desk based supervision.

The CBI has identified the following as the principal criteria for assessing applications for authorisation as an Irish MiFID firm:

- » acceptability and transparency of the ownership of the financial service provider;
- » fitness and probity of individual directors and senior management;
- » adequacy of proposed capital to be invested;
- » adequacy of internal controls and risk management systems;
- » level of resources and expertise of staff.

Timing of relocation

The exact date of departure of the UK will not be known until Westminster invokes Article 50 of the EU Lisbon Treaty by notifying the European Council of the UK's intention to withdraw from the EU. Once the notification is delivered the process appears to be irreversible and the final deadline for exit will be 2 years after such notification. Given the relatively short period before the final separation between the UK and the EU, and the complicating factor of MiFID II's January 2018 deadline for implementation, it would now seem to be in the interest of MiFID firms generally to consider their options. With this in mind we outline below a short case-study highlighting the steps involved in the migration of a MiFID firm to Ireland.

One point to bear in mind at the outset is that early engagement with the CBI is important – while the CBI has guidelines on the timing for approval of MiFID firms these are not binding on the CBI and, as such, to ensure continuity of regulation within the EU, earlier engagement with the CBI will obviously be of benefit and will reduce the risk of any gap in regulatory oversight.

Taxation

Ireland has a favourable corporate tax regime which is attractive to companies looking to establish operations in Ireland. The 12.5% corporation tax rate on trading income is one of the lowest in the EU and one of the lowest 'onshore' statutory corporate tax rates in the world. A higher 25% corporation tax rate applies to non-trading income (i.e. passive income).



As a member of the European Union, Ireland benefits from various protections afforded under EU law, including the benefit of the Parent/Subsidiary Directive and the Interest and Royalties Directive which can apply to eliminate withholding taxes on payments between residents of EU member states. Ireland also has an extensive double tax treaty network and various domestic provisions which can substantially reduce or eliminate withholding taxes on non-Irish source income, as well as facilitate the repatriation of profits outside of Ireland in a tax efficient manner. Ireland also has a double tax treaty with the UK which, regardless of what agreement is reached on exit, will facilitate investment between the two jurisdictions.

Sample Case Study – Migration of an Investment Firm

By way of an illustrative example, we have set out below a brief overview of the authorisation process for an investment firm in Ireland, along with some observations and comments on this process. Although the CBI has made a public commitment to abide by the timelines set out below, there is a strong risk that these timelines will slip if there is a flood of applications for authorisation post-Brexit.

Applicable legislation	<p>S.I. No. 60 of 2007 – the European Communities (Markets in Financial Instruments) Regulations 2007 implements MiFID in Ireland and governs the authorisation of MiFID investment firms.</p> <p>MiFID firms in Ireland will also be subject to ancillary or related EU financial legislation as implemented into Irish law, eg CRD IV, and the the 3rd AML Directive.</p>
Pre-application steps	<p>In advance of any application for authorisation being submitted, the applicant must complete a Key Facts Document (“KFD”). Within 20 working days of receipt of the KFD, the CBI will arrange a preliminary meeting with the applicant.</p>
Level 1 / Level 2	<p>Following the preliminary meeting, the CBI will designate the applicant either a:</p> <p>Level 1 firm - comprises small firms with non-complex investment strategies, providing a limited range of services; or</p> <p>Level 2 firm - comprises larger firms, including those with complex investment strategies, providing a broad range of services, or holding client assets.</p>
Content of the application	<p>A complete application will typically include at a minimum:</p> <ol style="list-style-type: none"> a. CBI application form; b. detailed business plan; c. copies of policies and procedures; d. fitness and probity information for directors/senior managers; e. financial projections and capital calculations. <p>It should be possible to leverage off existing UK documentation and/or past UK applications to prepare the application in an efficient manner</p>
Timing of authorisation	<p>Level 1 firm: CBI’s determination on the application should issue within 60 working days from the date of submission of the complete application suite of documents.</p> <p>Level 2 firm: CBI’s determination on the application should issue within 120 working days from the date of submission of the complete application suite of documents.</p>



Contacts

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