FEATURE

Understanding, transposing and implementing MiFID: What an ordeal!

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Introduction

European politicians have, for the last two decades, been repeating the mantra that European economic growth can be enhanced through further European integration in the area of financial services, which should result in intensified cross-border competition, and therefore increased efficiency in the provision of financial services. *Ceteris paribus*, more efficient provision of financial services should lead to more effective allocation of capital and more access to liquidity which, in turn, should give large and medium sized enterprises the opportunity to generate further growth and employment prospects.[1]

A report issued by London Economics, in association with PricewaterhouseCoopers and Oxford Economic Markets in 2002, explains that *integration could increase EU GDP by euro 130 billion over the next 10 years, increase employment by 0.5%, and reduce the cost of equity capital by 0.5%.*[2]

Nine years ago, upon reflecting on the UK's economic reform through the enhancement of financial market integration, the Cardiff European Council made a request to the European Commission to set up an action plan to improve the single market in financial services.[3] The European Commission responded to the European Council's request by devising what is generally referred to as the Financial Services Action Plan ['FSAP']. The FSAP is a far-reaching reform programme of forty two measures that has the purpose of finalising the integration of national financial markets and which, once fully implemented, should create a sound regulatory framework for the pan-EU capital market.[4]

The Markets in Financial Instruments Directive[5] ['MiFID'] which, on coming into force on 1 November 2007, will replace the current Investment Services Directive ['ISD'], *'is a cornerstone of the EU's grand project to build a single market in financial services to give investors more choice on where they can buy shares and other securities'* [6]. The main purpose behind the ISD (1993) was that of allowing investment firms to provide investment services across Europe through the adoption of a legal/regulatory framework based on the principles of minimum harmonisation, mutual recognition and home country authorisation.[7] This Directive was the first piece of EU legislation which attempted to develop a European framework for investment services.[8] The MiFID on the other hand aims at *'kick*[ing] *life into* [Europe's] *capital markets'*[9], through more harmonised rules [maximum harmonisation], which have the twofold purpose of guaranteeing an appropriate level of investor protection across Europe and ensuring that the European passport for investment firms and regulated markets (already in existence by way of the ISD) operates more efficiently and effectively. In order to do so, MiFID was drafted with the objective of addressing each of the principal shortcomings of the ISD, identified in the European Commission's 2002 proposal .[10]

The purpose of this article is to assist the reader in understanding: [**a**] two of the concerns which brought about a European Commission proposal to change the ISD; [**b**] the manner in which MiFID addresses these concerns; and [**c**] Malta's MiFID transposition and implementation process. However, before going into each of these issues, it is worthwhile, for the reader's benefit, to give a general introduction to MiFID, its structure and the applicable transposition and implementation deadlines.

What is MiFID?

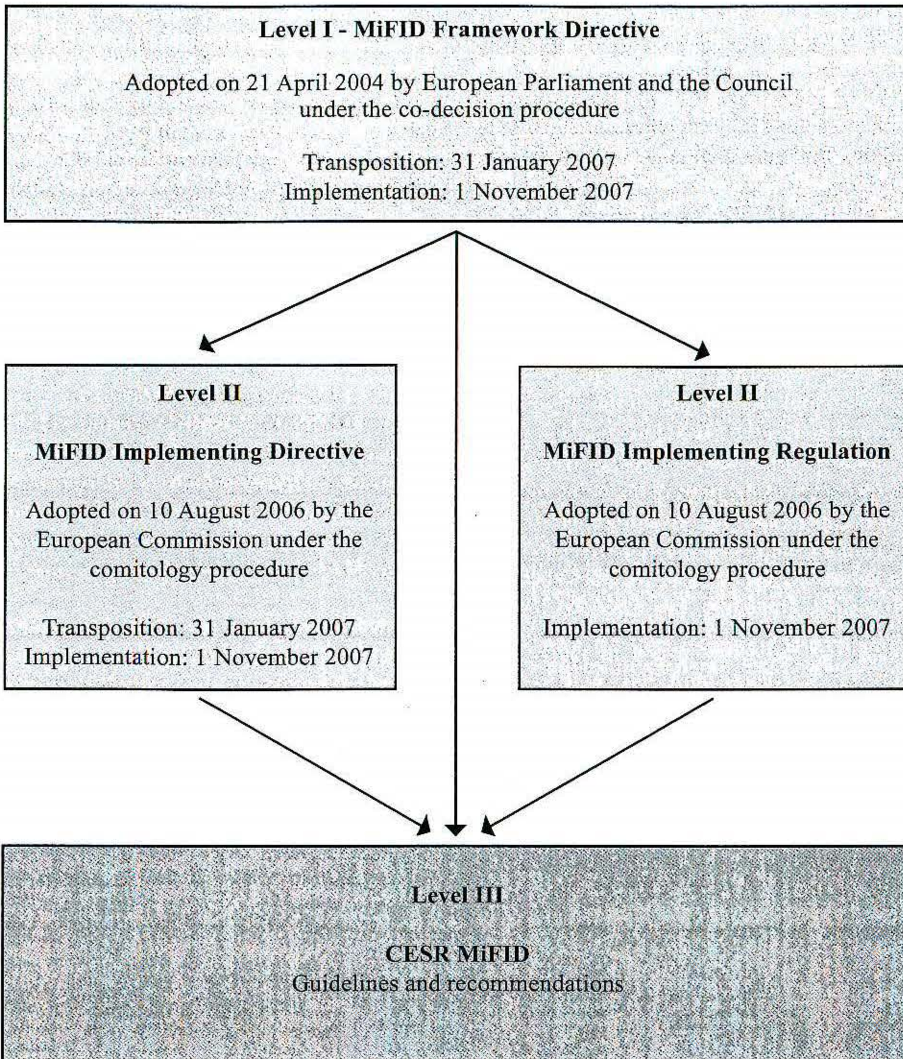
MiFID, adopted on 21 April 2004, is a far-reaching European Directive which deals with the regulation of a wide array of services. These services can safely be classified into two: [a] the services which are generally offered by an investment firm, such as reception and transmission of orders, investment advice, execution of orders on behalf of clients, portfolio management etc, and [b] the services of trading platforms which, in terms of MiFID, can be provided by regulated markets, multilateral trading facilities [also referred to as alternative trading systems] and systematic internalisers [or better investment firms which on an organised, frequent and systematic basis, deal on own account [11]]. The Directive also gives wide powers to Securities Regulators of Member States and by way of specific provisions, it instils further co-operation between regulators in this area of financial services.

MiFID was made under the Lamfalussy law-making model. Accordingly, it is a framework Directive, made by the European Parliament and the Council under the EU co-decision procedure, containing *'general principles'*. These level I principles are supplemented by two level II implementing measures, an EC Regulation[12] and an EC Directive[13]. These implementing measures were adopted on 10 August 2006, through the EU comitology procedures, i.e. adopted by the European Commission after consultation with the Committee of European Securities Regulators ['CESR'], the advisory committee, and after obtaining the opinion of the European Securities Committee, being the political supervisory comitology committee[14], and the European Parliament. These Level II implementing measures augment sixteen articles of the MiFID framework Directive[15].

Member States had to transpose the MiFID framework and implementing Directives by 31 January 2007[16], yet, as already indicated in the introductory section of this article, the MiFID will not come into force before 1 November 2007. The reason behind this time difference between the transposition and implementation deadlines is that of giving the industry a period in which to effect the required changes to their systems, policies and procedures in order to bring these in line with the requirements of this Directive and its implementing measures[17].

One of the main concerns of the industry with respect to MiFID implementation has always been the possible inconsistencies in the interpretation and practical implementation of MiFID by the twenty seven Member State Regulators[18]. With the aim of assisting Member State Securities Regulators with the consistent implementation of MiFID Level I and II requirements, and to foster MiFID supervisory convergence among these Regulators, CESR, with assistance from the European Commission, has drafted and adopted Level III guidance and recommendations which have the purpose of delivering EU wide common implementation of specific problematic areas of MiFID.

Table 1 - Structure of MiFID:

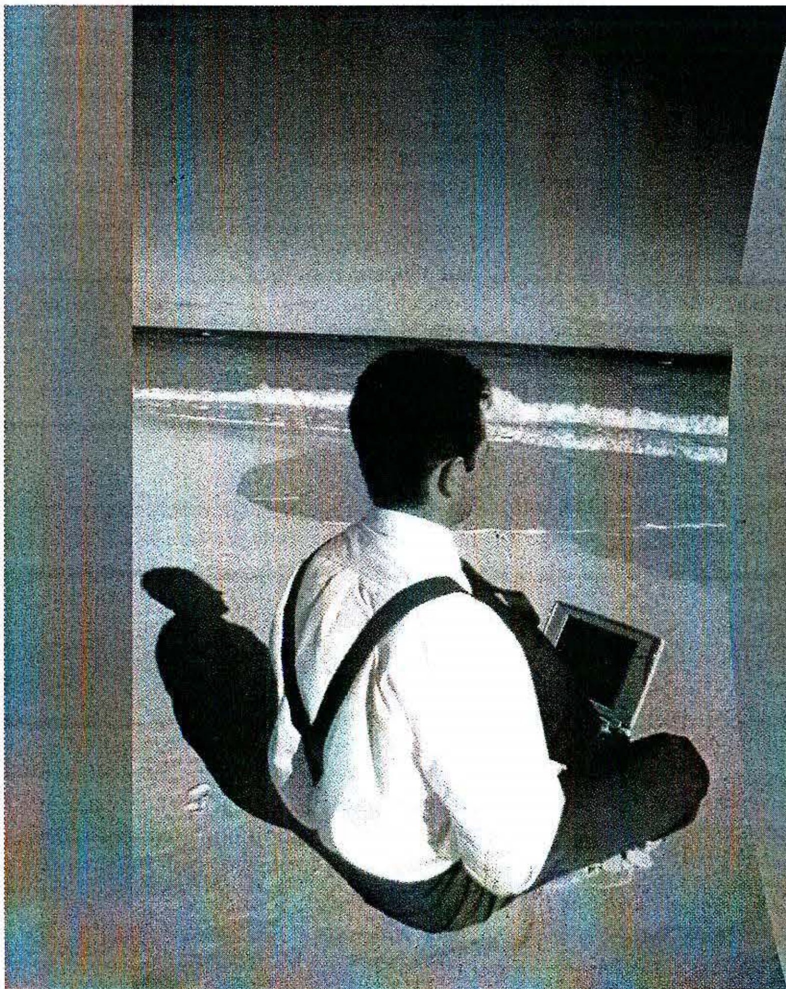


MiFID: Dealing with the shortcomings of the ISD

'We need to update the Union's securities markets legislation to reflect profound changes in securities trading infrastructure, exchanges, clearing, and settlement systems since the Investment Services Directive came into force five years ago. Under the influence of the euro and new technologies the pace of change can only accelerate. We want to ensure that the new rules protect investors, promote orderly, efficient and integrated markets, and preserve financial stability.' Fritz Bolkestein – ex EU Commissioner [2000] [19].

In its 2002 [20] proposal for a new Directive dealing with the regulation of investment firms and regulated markets, the European Commission gave the following seven reasons why the ISD should be replaced:

[1] ISD does not provide sufficient harmonisation to allow effective mutual recognition of investment firm licenses;
[2] ISD contains outdated investor protection disciplines;
[3] ISD does not span the full range of investor-oriented services;
[4] ISD does not address the regulatory and competitive issues that arise when exchanges start competing with each other and with new order-execution platforms;



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[5] ISD provides for an optional approach to the regulation of market structure;
[6] ISD provisions relating to designation of and cooperation between competent authorities are under-developed;
[7] ISD provisions are inflexible and out-of-date.

Due consideration of all these shortcomings would entail a detailed analysis which is beyond the purpose and parameters of this article. Accordingly, only the first two of these shortcomings will be examined in some detail, indicating the way in which these two weaknesses are addressed by MiFID.

ISD does not provide sufficient harmonisation to allow effective passporting of investment firms

Under the ISD, minimum harmonisation and mutual recognition formed the basis for the ISD passporting framework. Investment firms authorised by their home state regulatory authority, after making the required notification, could operate in other EU jurisdictions [host states] without requiring any additional authorisation to operate in the host state.

At the time of the drafting of the ISD, the approach adopted was that of requiring '*only the essential harmonisation necessary and sufficient to secure mutual recognition of authorisation and of prudential supervision system, making possible the grant of a single authorisation valid throughout the Community*' [21]. The EU passport for investment firms under the ISD had, in theory, the purpose of opening up the EU market to investment firms established in an EU member state, by giving them the opportunity of operating in other member states by either providing cross-border services or by establishing a branch.

In theory, the above-quoted single-market objective of the ISD was meant to enhance competition within the EU which in turn would have increased the efficiency of the European financial market. However, in practice, the deemed benefits of the EU single passport for investment firms withered away because of two factors: [i] under the ISD, host member states were still allowed to impose their requirements on incoming passporting firms, whether cross border or through the establishment of a branch[22], and [ii] the ISD failed to provide for harmonised standards in all areas of ongoing supervision[23]. Indeed, as time passed it became clear that due to these two factors, the efficacy of the passport for investment firms was being substantially undermined.

MiFID: Removing the obstacles to passporting by investment firms

MiFID improves the application of the EU passport for investment firms by legally separating the responsibility for enforcing MiFID rules between home state and host state regulators. As a matter of fact, MiFID removes the above-quoted obstacles to the use of the single passport by: [i] requiring that only in the case of branch operations can a host Authority assume responsibility for enforcing its rules, therefore in the case of investment firms passporting to provide cross-border services the rules of the home member state apply, and [ii] ensuring, by way of maximum harmonisation requirements, that, in substance, the rules of member states are consistent. Hopefully, this extended level of harmonisation, coupled with the cooperation of Member State Regulators through CESR, should result in a situation where investment firms passporting their services to jurisdictions outside their home member state are in reality made subject to rules which, in practice, apply and are applied in the same manner across the EU.

ISD contains outdated investor protection disciplines

Through the FSAP, the EU is *inter alia* trying to build a retail investor culture. There are two main reasons why the EU would like to attract retail investors to financial markets: [i] retail investors have a supply of untapped funds which could be a source of capital for European companies; and [ii] returns from financial markets can be a valid source of income which, in old age, could complement state welfare provision.

However, the extent to which retail investors are ready to risk their extra income by investing in financial markets depends on the degree of trust which such investors have in these markets. In turn, investor confidence is a factor of the investors' perception on whether: [i] their income will be adequately protected; and [ii] the investment firms entrusted with providing them with a service are acting in their [the investors'] best interest.

The ISD has been analysed as not being adequate to safeguard investors' interest and to mitigate the risks of today's evolving world of financial markets. In particular, the European Commission 2002 proposal, stressed on the importance of enhanced regulation in the area of best execution which is one of the pillars of investor protection, *the need to .... compel firms acting on behalf of the end-investors to make active use of new trading opportunities to get the best deal on the client's behalf.*'[24] In order to ensure proper investor protection, the proposal also emphasised the importance of harmonised regulation in the areas of conduct of business rules, client order handling and conflicts of interest.

MiFID and investor protection

As stated above, MiFID will be instilling extensive harmonisation in Europe's current investor protection rules. Indeed, the EU's policy to create a retail investor culture is clearly expressed in MiFID's conduct of business regime which is '*designed to produce a cohort of robust, informed, and active investors, exercising autonomous choice.*'[25]

The basic principle of MiFID's investor protection rules is that investment firms should, when providing a service to a client, act honestly, fairly and professionally in accordance with the best interest of the client.[26] MiFID expresses a fundamental vision of what investor protection means in practice by *inter alia* regulating the three stages in the provision of investment services by an investment firm, namely:

Stage 1: *Pre-provision of the investment service*

Marketing - Adverts must be fair, clear and not misleading.

Client Disclosure Requirements - Enough information must be provided to the client to enable him/her to be able to understand the nature and risks of the investment service that is being offered and, consequently, to take investment decisions on an informed basis.

Client Agreement - Must set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the clients.

Stage 2: *When providing the investment service*

Suitability Test - When providing investment advice or portfolio management, investment firms must obtain information regarding the client's: [i] knowledge and experience in the investment field; [ii] financial situation; and [iii] investment objectives, so as to enable the investment firm to make a suitable recommendation.

Appropriateness Test - When providing an investment service other than investment advice or portfolio management, investment firms must obtain information regarding the client's knowledge and experience in the investment field so as to enable the

investment firm to assess whether the service or the financial instrument requested by the client is appropriate for him/her.

Best Execution - When executing client's orders, investment firms must take reasonable steps to obtain the best possible result for the client.

Client order handling - Prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm.

Stage 3: *Post provision of the investment service*

Client Reporting - The Client must receive from the investment firm adequate reports on the service provided to its clients.

While all the above requirements are equally worthy of mention, the scope of this contribution will be limited to the best execution rule. In terms of MiFID article 21, when executing clients' orders, investment firms must have to look at all ways to deliver the best possible result for their clients, taking into account a wide range of factors including price, time it takes to execute orders and costs.[27] In addition Investment Firms are also required to have a best execution policy that must be accepted by the investor.

The MiFID best execution rule has the purpose of '*address*[ing] *the information imbalance between the investor and firm as to price formation and ensure that an investor's trade is executed on the most favourable terms.*'[28] In actual fact, this requirement is ensuring that, in an environment where a financial instrument may be bought or sold through a variety of execution venues[29], investors still get the best deal, as investment firms are required to consider trading conditions on a range of venues and to execute clients' orders on that execution venue which will allow the investment firm to obtain the best possible result for the client.

Having considered the origins and structure of the cornerstone of the EU's FSAP and the manner in which it addresses two of the shortcomings of the ISD, one may now proceed with a brief explanation of the manner in which Malta dealt with the transposition and implementation of this Directive.

Has Malta been miffed by MiFID?

MiFID has been on the agenda of Malta's policy makers and legal drafters since late 2004 and as all individuals involved in the MiFID project can vouch, transposing this Directive into local legislation was not an easy task. Malta already has a thorough legal and regulatory regime which deals with the authorisation, regulation and supervision of investment firms ['Investment Services Licence Holders'] and regulated markets ['Malta Stock Exchange']. As MiFID is a maximum harmonisation directive[30], when transposing this piece of EU law, Malta's drafters had to address the necessary changes to local securities legislation in order to ensure as far as possible both harmonisation and continuity. Accordingly, the transposition of this Directive and the Commission Implementing Directive necessitated a major overhaul of Malta's current securities legislation being, the Investment Services Act, 1994 ['ISA'], the Financial Markets Act, 1990 ['FMA'], and the Regulations and Rules[31] issued thereunder.

The changes to the ISA and FMA were made through the enactment by Parliament in July of the Various Financial Services Laws (Amendment) Act, 2007. These amendments will come into force on 1 November 2007. New legal notices (Regulations) and amendments to current legal notices made under the said Acts were issued for consultation to the industry in May 2007[32]. These are in the process of being adopted by the Minister of Finance. The ISA and FMA Rules were respectively issued to the industry in draft format on 31 January 2007 and 27 July 2007. The projected date for the coming into force of the ISA and FMA Regulations and Rules

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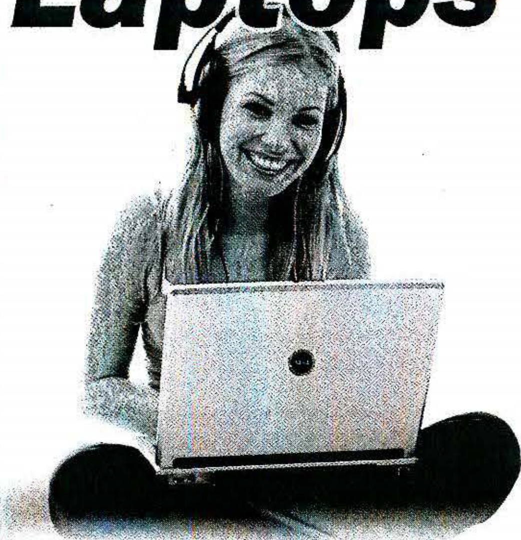

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is the same date when the amendments to the primary Acts will come into force, i.e. 1 November 2007. By this date, Investment Services Licence Holders and the Malta Stock Exchange must have in place policies and procedures which implement these provisions.

As much as the transposition of MiFID was a difficult job for Malta's legal drafters, the implementation of MiFID is definitely proving to be a challenge for the Maltese industry. In this regard, in order to assist Investment Services Licence Holders to come in line with the requirements of MiFID, the Malta Financial Services Authority ('MFSA') formulated what is referred to as an '**Industry Practical Implementation Agenda**'.[33] This is composed of a MiFID training programme, MiFID focused visits, and the issuing of MiFID Guidance Notes. Seminars on MiFID were held in May and July of this year. The purpose of these seminars was that of providing the industry with a general overview of the local requirements which will be transposing various parts of this Directive. In July the MFSA also commenced its MiFID focused visits. These visits have *inter alia* the purpose of assessing Investment Services Licence Holders' level of implementation of the Investment Services Rules which transpose the MiFID and to make recommendations, where necessary, to ensure the proper compliance with these Rules. Lastly, in August, MFSA issued the MiFID Guidance Notes, the ultimate aim of which is that of providing the industry with assistance in the implementation of certain aspects of the Rules which have the purpose of transposing the MiFID, such as the client categorisation, best execution and transaction reporting requirements.

The following tables summarise the above explanation on Maltaís transposition and implementation of MiFID:

Table 2 Maltaís transposition of MiFID	
First Tier of Legislation	Investment Services Act, 1994 [ëISAí] Financial Markets Act, 1990 [ëFMAí] ➢ Amendments through the Various Financial Services Laws (Amendments) Act, 2007 ➢ Published 3 August 2007 ➢ Coming into force of amendments - 1 November 2007
Second Tier of Legislation	ISA Regulations FMA Regulations ➢ Consultation paper issued on 24 May 2007 ➢ Projected date of coming into force - 1 November 2007
Third Tier of Rules	Investment Services Rules ➢ Published in draft format ñ 31 January 2007 Financial Market Rules ➢ Published in draft format ñ 27 July 2007 ➢ Projected date of coming into force - 1 November 2007

Table 3 Maltaís implementation of MiFID	
Industry Training	Delivered in May and July of 2007
Guidance Notes	Published in draft format - 24 August 2007 ➢ Projected date of coming into force - 1 November 2007
MiFID Focused Visits	Started in July 2007

Conclusion

1 November 2007 is just a few days away and hopefully by now '*the clouds of confusion that once surrounded the MiFID have largely cleared.*'[34] Updating policies and procedures to implement MiFID has proved to be a considerable challenge for the industry. However, depending on how investment firms deal with the implementation of this directive, MiFID could quite easily evolve from a compliance burden into a world of business opportunities. This will be true for those firms which are capable of abandoning the status quo and adopting a strategy that will allow them to organise themselves to exploit such opportunities. One such opportunity will be the increased ease of passporting services in other EU jurisdictions.

On becoming a member of the EU, three years ago, Malta became part of a single market which incorporates over 450 million individuals. The opportunity for expansion within such a market is immense. This notwithstanding, only two Investment Services Licence Holders have, so far, passported their services into other EU jurisdictions. '*The markets are changing and the winners will be those that do more than merely seek to tick the compliance box.*'[35] Time will tell whether, now with MiFID, more Maltese firms will be up to the challenge of adopting an approach that applies this directive smartly, maximising the prospects to expand their business by taking their services to another EU jurisdiction.

About the author

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This article was written in a personal capacity and does not reflect the views of the Malta Financial Services Authority.

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28. Ibid, pg 403.
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