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## EU Regulatory Update: MiFID II

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## EU REGULATORY UPDATE: MIFID II




- MiFID II implementation progress
- Inducements and delegation issues: some market colour
- MiFID II impact on AIFMs and UCITS management companies and gold-plating in general: some market colour

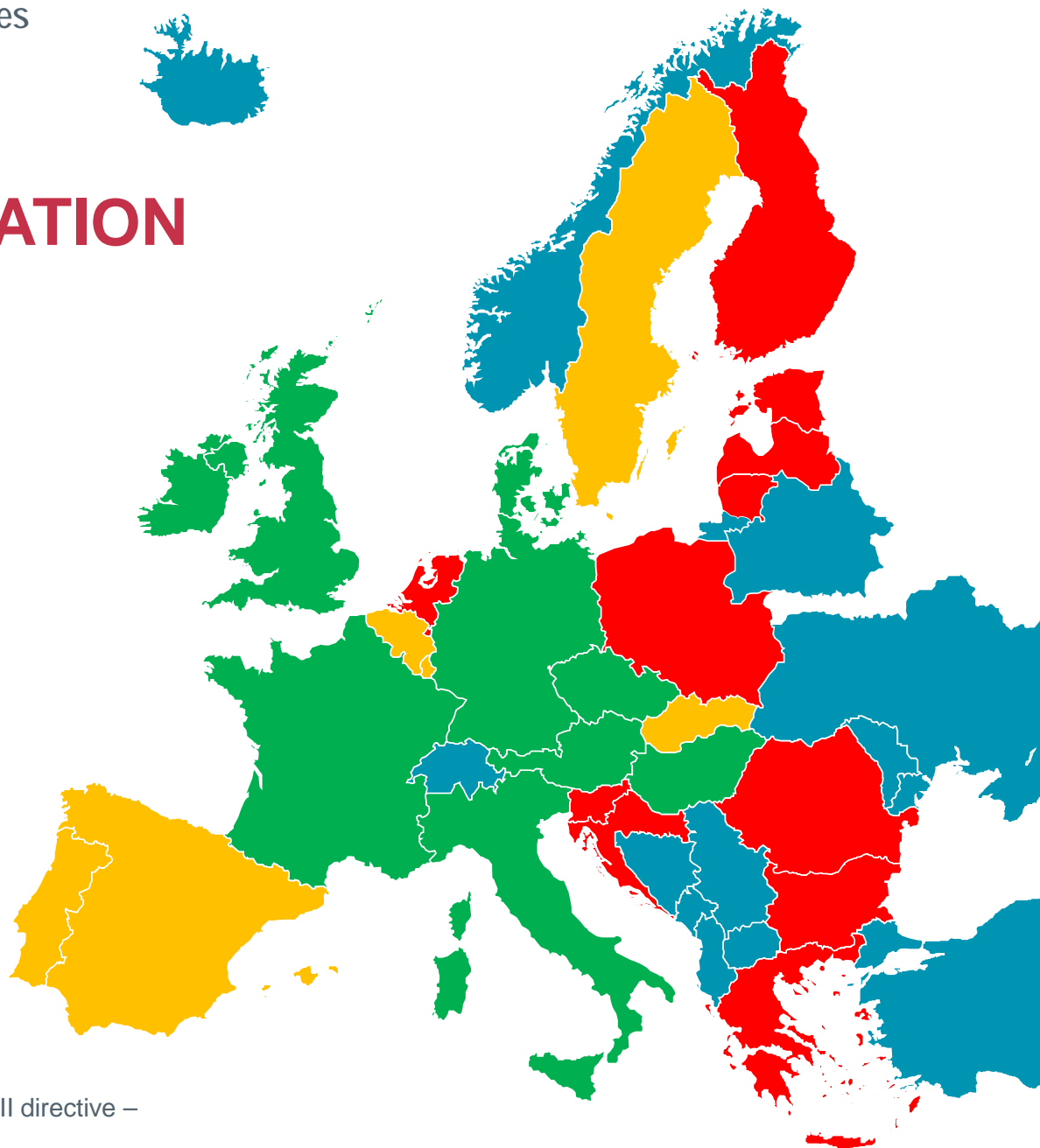




# MIFID II IMPLEMENTATION PROGRESS

Key:

-  Full transposition measures indicated
-  Partial transposition measures indicated
-  No transposition measures indicated



Source: European Commission: MiFID II directive – transposition status



## MIFID II IMPLEMENTATION PROGRESS

- Ireland – committed to supervisory convergence and implementing on time without additional Central Bank of Ireland guidance as ESMA's authority is recognised
- Luxembourg – some delays in implementation, but we understand that level 2 is likely to be implemented word for word
- Netherlands – appear to be last minute in implementation and concerns as to whether they will implement on time
- Sweden – we understand that the Swedish regulator has said that implementation by 3 January 2018 is unlikely
- UK – fully compliant implementation but acceptance of compliance on a 'best efforts' basis





# MIFID II IMPLEMENTATION PROGRESS IN ITALY

- Main Legal Framework
  - Level 1 measure: Legislative Decree No. 58 of February 24, 1998 (Italian Unified Financial Act)
  - Level 2 measure: Regulation on Intermediaries adopted by the National Commission for Companies and the Stock Exchange (CONSOB) with resolution no. 16190 of 29 October 2007 (Intermediaries Regulation)
- Implementation Progress
  - Italian Unified Financial Act
    - Amended on August 26, 2017 by Legislative Decree No. 129 of August 3, 2017
    - Amended United Financial Act in force starting from January 3, 2018
    - Final Amended United Financial Act already published
  - Intermediaries Regulation
    - A number of public consultation procedures launched by CONSOB (starting from July 6, 2017)
    - No outcome available yet
    - Amended Intermediaries Regulation available only draft form



# MIFID II IMPLEMENTATION PROGRESS IN GERMANY

## WpHG-2018

### (Securities Trading Act)

- Status: adopted 23/06/2017 and will come into effect on 03/01/2018
- Implements MiFID II and parts of Delegated Directive
- Refers to directly applicable Delegated Regulation for details
- Essentially, 1:1 implementation without gold-plating

## MaComp-2018

### (Minimum Requirements for Compliance)

- Status: consultation ended 30/11/2017; responses are currently evaluated
- Implements Delegated Directive (in particular personal dealings, suitability declarations, inducements) and ESMA-Guidelines

## WpDVerOV-2018

### (Regulation on Conduct Rules and Organisational Requirements for Investment Firms )

- Status: adapted 27/10/2017 and will come into effect on 03/01/2017
- Implements Delegated Directive (in particular inducements, clients' assets, product governance) and, where necessary, Delegated Regulation
- Essentially, 1:1 implementation without gold-plating





# INDUCEMENTS AND DELEGATION ISSUES: SOME MARKET COLOUR

- Clear preference for managers to pay for research from P&L and expect delegates to do the same, but some not making any demands on non-EU delegates
- More uncertainty amongst fixed income managers who regard the research component of the service received from brokers as being 'free' – but in effect they are still likely to be regarded as paying for research by regulators
- Concern about disclosure issues where MiFID clients treated differently from other clients who might want to opt into the same deal
- Focus on interaction with non-EU law – e.g. SEC no-action relief
- Some UK/FCA guidance rather confusing/difficult to apply to practical situations involving international groups: but the overall objective of the FCA is clear



## INDUCEMENTS AND DELEGATION ISSUES: SOME MARKET COLOUR

- Germany - no unique local position on these matters to be expected and BaFin's approach yet to emerge; national third-country regime does not provide for inducement exemptions and application is questionable; recent BaFin consultation also covered interpretation of inducement provisions
- Luxembourg – typically “seeks most flexible solution”; no unique local position on these matters and CSSF approach yet to emerge; third country regime under MiFID which entails recognition of the equivalence of third country laws may inspire a similar approach before equivalence decisions made
- Ireland – CBI reluctant to express a view and prefer to defer to ESMA/EU Commission; some firms may rely on FCA's letter to AIMA; Irish MiFID firms to take their own reasoned stance and may be different approaches





## INTERACTION OF MIFID II WITH U.S. LAW

- U.S. law provides a safe harbour from claims that a manager has breached its fiduciary duty on account of
  - Paying more than the lowest available commission for eligible research and brokerage services
  - Using research for the benefit of other clients for whom the manager exercises investment discretion
- Manager must make a good faith determination that the value of research and brokerage services is reasonable in relation to the amount of commissions paid
- The economics of RPAs are largely indistinguishable from CSAs/CCAs, which are consistent with the Section 28(e) safe harbor
- Problem: Payments for research from P&L and from RPAs are not “commissions”



## INTERACTION OF MIFID II WITH U.S. LAW

- Payment of “hard dollars” for research creates several issues under U.S. law
  - Regulation of research providers as “Investment Advisers”
    - SEC relief – brokers will not need to register for 30 months
  - Safe harbor from liability for “paying up” for and sharing research
    - SEC relief – RPAs treated as “commissions”
  - Aggregation of trade orders
    - SEC relief for disparate expense allocation, if attributable solely to research
  - Custody of RPA funds
    - Presently unresolved





# INTERACTION OF MIFID II WITH U.S. LAW

- U.S. Market Responses and Open Issues
  - Fully abandon use of “soft dollars” and pay for research from P&L – global managers with robust internal research groups
  - Administer CSAs and RPAs side-by-side – possible, but technically challenging
  - Reliance on FCA letter to AIMA and similar positions outside the UK – inconsistent guidance from EU managers regarding MiFID II compliance by non-EU delegates
    - Treatment of credit spreads
    - Enhanced reporting
    - Commission sharing arrangements
  - “No Soft” orders and reimbursement of research costs – balancing “free rider” concerns of other clients and fund boards



# MIFID II IMPACT ON AIFMS AND UCITS MANCOS AND GOLD-PLATING IN GENERAL: SOME MARKET COLOUR

- UCITS and AIFs may have MiFID-licensed manager: some anomalous differences in seemingly similar scenarios both for this reason and between jurisdictions
- In the UK there is gold-plating in this area – e.g. rules on payments for research and telephone taping are being applied to AIFMs and UCITS ManCos; MiFID II product governance rules applied as guidance to AIFMs/UCITS ManCos; MiFID II best execution rules applied to UCITS ManCos but not AIFMs
- But transaction reporting not being extended to AIFMs/UCITS ManCos, even if they are carrying on MiFID activities e.g. separate account management



# MIFID II IMPACT ON AIFMS AND UCITS MANCOS AND GOLD-PLATING IN GENERAL: SOME MARKET COLOUR

## Collective Portfolio Management

- No gold-plating of MiFID II

## Ancillary Services

- Marketing of third-party funds
- Investment Advice
- Portfolio Management
- Safekeeping and Administration



## Portfolio Managers and Sub-Advisors

- Authorisation
- Business Organisation
- Conduct of Business

## Dealing with Distributors

- Definition of Target Markets
- Cost Transparency
- Complex Products
- Product Intervention
- Information Obligations regarding Sales, Product Intervention, Customer Complaints

## Selected Items

- Model Distribution Agreement by BVI, MiFID II side-letter, MiFID II commitment letter
- Model Outsourcing Agreement by BVI
- EMT-Mapping
- Trail Commissions, Clean Share Classes
- Taping
- Model Wording for Research Costs

# MIFID II IMPACT ON AIFMS AND UCITS MANCOS AND GOLD-PLATING IN GENERAL: SOME MARKET COLOUR

- Investment Services
  - When providing portfolio management, investment advice and (AIFMs only) reception and transmission of orders, Italian ManCos and EU ManCos acting through an Italian branch shall fully comply with MiFID II (and level 2 measures)
- Marketing of own and third-party funds
  - When marketing own and third-party funds, Italian ManCos and EU ManCos acting through an Italian branch shall comply with MiFID II (and level 2 measures) governing
    - Product governance requirements for distributors
    - Knowledge and competence requirements for personnel involved in the marketing activities
- Collective Portfolio Management
  - When performing collective portfolio management service (no matter if they also provide other investment services) Italian ManCos shall comply with MiFID II (and level 2 measures) governing
    - General organisational requirements and clients' complaints handling
    - Investment research and marketing communications



THANK YOU

