Brexit and the Possible Implications for MiFID II

There is no doubt in anybody's mind that the result of the UK referendum to leave Europe has caused some major ripples around the world.

While the political fallout and the negotiations about the future will continue for many months if not years to come, I thought it would be useful to look at the possible impacts of the UK's decision to leave within the context of MiFID II and the new rules that will be coming into force in January 2018 for records keeping and surveillance.

MiFID II has been many years in the making with the directive weighing in at over 300 pages, and the technical standards still being produced by ESMA. It could be said that millions of man hours have already been expended on the interpretation of the directive and how it might fit into each country's rulebook.

It is unlikely the UK will be able to negotiate and complete its exit from the European Union before MiFID II's go live date of January 2018. In that context we should look at how the rules might apply before the live date, after the live date, and after the exit.

The record-keeping and surveillance sections of MiFID II are some of the least contentious areas of the directive, as such, it would seem logical to me that, in this area at least, there will be little variation from what has already been consulted upon and turned into technical standards by ESMA.

The work to transcribe the technical standards into each country's rulebook has been underway for many months and I'm sure that the FCA is already close to being able to publish the draft rules.

The most recent news about the directive from the European Parliament was that they had voted to delay the implementation until January 2018. What was interesting about the announcement from the European Commission was that it specifically did not change the date of transcription into each country's rulebook. This means that it is still possible for each country to write these rules into its respective rulebook and implement them prior to the backstop date of January 2018.

Given that the rules are not a significant variation from what is currently in place in the UK, with the exception of the retention period and discretionary investment advisers, it is quite possible that the record-keeping changes could come into place as early as January 2017 in the UK although it will be interesting to see how political pressure changes the regulatory landscape after the result of the referendum.

After the UK's exit from the European Union you might expect to see some diverging from the European standards that have been agreed in the past few years on some of the more

contentious issues in MiFID II. As already mentioned, the record-keeping and surveillance components of the new rules have been generally agreed by all 28 member states. So what can we expect in terms of changes in the future?

Experience tells me there are two areas in which the UK has a slightly different approach from the current regulatory and privacy regimes from other European countries. For many years the UK tier 1 banks have conducted some form of surveillance of the communications of their trading floors. This is in contrast to many banks within other European member states who have regarded the surveillance of communications as being an intrusion of privacy. This difference is removed in the new directive rules but it will be interesting to see how each member state implements these rules after January 2018. Further, surveillance programs have a 100% record of uncovering undesirable behavior, which is not to say that they uncover market abuse or manipulation but they certainly uncover behavior that requires further training or education to ensure a better level of conduct in the future. The way in which each member state implements these directives may be critical in determining their effectiveness in the future.

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