MiFID – challenge for Swiss investment firms as well?

DR MARTIN HESS AND DR HAN-LIN CHOU, WENGER & VIELI

MiFID – the European Markets in Financial Instruments Directive – comes into effect on 1 November 2007. MiFID aims at creating an integrated structure for a pan-European market for investment services. In particular, it seeks to make cross-border trading in securities in Europe simpler for financial institutions and investors by improving the passport rights created under the Investment Services Directive, and by extending them to new products and services such as investment advice.

MiFID will apply to investment firms domiciled in member states of the EU and the EEA. Swiss investment firms (mainly financial institutions regulated as banks and securities traders) are – in principle – not within the geographic scope of the directive. However, the change in the business environment in Europe is a concern for many Swiss investment firms.

What are the implications of MiFID for Swiss investment firms?

Swiss law (comprising Banking Act, Stock Exchange and Securities Trading Act ("SESTA") as well as civil law and court practice) provides for regulations similar to MiFID, but not by a tailor-made legislation. Some examples:

Organizational rules

MiFID requests among other to establish a comprising compliance and regular reporting to the executive board and the board of directors (Art. 13.2 MiFID). Already today, Swiss investment firms obligated to install an internal control system according to Banking Act, SESTA and Art. 728 a of the Code of Obligation (CO). The "fit and proper" requirement of the Banking Act, Art. 11 SESTA and the provisions of the CO regarding the agency further prevent Swiss investment firms from businesses leading to conflicts of interest (Art. 18 MiFID). Moreover, the protection of account deposits and clients' assets (Art. 13.8 MiFID) is covered by Art. 16/37d Banking Act and Art 6a SESTA. The outsourcing of services (Art. 15.3 MiFID) is comprisingly addressed in a (mandatory) Circular of the Swiss Federal Banking Commission (no 99/2).

Rules of business conduct

The rules of business conduct (Art. 19 MiFID) aim at harmonizing European-wide the existing rules of conduct; the investment firm has to act honestly, fairly and professionally in accordance with the best interests of its clients. The level of detail of MiFID is far beyond the wording of explicit provisions of Swiss law, but the scope of the provisions of MiFID is fully covered by the principles outlined in Art. 11 SESTA (defining the duties of providing information, diligence and loyalty) and Art. 398 para 2 CO (the agent has to act faithfully and diligently). With respect to the transparency of costs, Art. 400 CO stipulates the duty to render account to the principal. With respect to inducements, the Swiss Federal Court has – in compliance with Swiss teaching – decided that they are only admissible, if the client has been made aware of such kickbacks and has waived them in full cognisance.

Suitability

The obligation of the investment firm to classify its clients and to carry out a suitability test for each client before entering into business (Art.19 para. 4 MiFID) does not exist in the same form in Switzerland. The Swiss Federal Court has stated recently that it is not within the scope of the bank's duty of information to assess the financial circumstances of a client and to appraise whether a contemplated transaction is suitable for an individual client. Notwithstanding this decision, based on the duty of care of the law of mandate and of the "know-your-customer" rule of the anti-money laundering regulations, Swiss investment firms are bound to establish a client profile which serves as a benchmark for the diligence required.

Self-implementation on case-to-case basis

Experience shows that although Swiss law is substantially equivalent to EU legislation, the simple fact that the respective rules in Swiss law have various sources (such as several laws and ordinances as well as court practice and legal teaching), makes it difficult for Swiss rules to be understood and acknowledged by EU/EEA countries. Switzerland is


Dr Han-Lin Chou & Dr Martin Hess

legally not bound to abide by European directives. However, European Customers of Swiss investment firms, their counterparts and competitors in Europe will rely on the MiFID rules which will presumably become a new European benchmark. Therefore, Swiss banks and securities traders might be willing to voluntarily comply with the MiFID, and – from a business and marketing prospect – internationally acting Swiss investment firms will have to voluntarily implement the MiFID requirements.

One example: MiFID will enhance the competition between trading venues by recognising new types of trading venue and by ensuring free choice between, free access to and interoperability between various trading venues, central counterparties and central securities depositories. As a consequence thereof, the internationally oriented Swiss infrastructure providers SWX Swiss Exchange and SIS-Sega InterSettle and SIS x-clear have already signed the European Code of Conduct for Clearing and Settlement which implements the MiFID principles of free access and interoperability in the post trade area. ■

www.wengerlaw.ch

WENGER & VIELI
ATTORNEYS-AT-LAW