MIFID2 – ROMANIA IMPLEMENTATION UPDATE

* 1. Law no. 126 of 2018 on markets in financial instruments ("**MiFIL**") implementing MiFID2, the MiFID2 delegated Directive and the Directive on the reorganisation and winding up of credit institutions was published in the Official Gazette of Romania on 26 June 2018. The main objectives of MiFIL are to improve investor protection, enhance market transparency by expanding pre- and post-trading requirements and to promote competition in the areas of trading and settlement. Here we provide a brief overview of the main elements of the package of reforms under MiFID2 (implemented in Romania through MiFIL) and focus in particular on some Romanian additions to the MiFID2 package likely to impact the market in the coming months.
     1. MIFID 2 AT A GLANCE

The former MiFID framework has been replaced by two pieces of legislation: a Directive (MiFID2), which repealed and partly recast MiFID and a Regulation (MiFIR), which partly replaced MiFID, to which several level 2 delegated acts and technical standards were added.

The main elements of the reforms under the MiFID2 framework are:

* + - * 1. With respect to market structure:

introduction of a new multilateral, discretionary trading venue, the Organised Trading Facility (OTF), for non-equity instruments;

expanded scope of Systematic Internaliser (SI) category with increased transparency requirements;

aim to substantially limit the ability of firms to trade equities on a “pure” over the counter basis and drive trading onto rule based venues or transparent SI execution;

new systems and controls requirements for organised trading venues;

introduction of trading controls for algorithmic trading activities;

obligation to trade certain derivatives on trading venues;

introduction of a harmonised EU regime for non-discriminatory access to trading venues, CCPs and benchmarks;

* + - * 1. With respect to transparency and transaction reporting:

equity market transparency increased;

new transparency requirements for fixed income instruments and derivatives with scope of requirements calibrated for liquidity;

widening the scope of MiFID transaction reporting obligations;

* + - * 1. In terms of conduct, supervision and product scope:

increased conduct of business requirements to improve investor protection;

regulatory perimeter extended to cover structured deposits;

strengthened supervisory powers with new powers to ban products or services that threaten investor protection, financial stability or the orderly functioning of markets;

* + - * 1. With respect to commodities:

change in scope of regulatory perimeter for commodities business;

introduction of a harmonised position limits regime for commodity derivatives to improve transparency, support orderly pricing and prevent market abuse;

* + - * 1. Third countries:

limited attempt to harmonise regime for access to EU markets by third country firms.

While MiFIR and most of the accompanying level 2 delegated acts and technical standards apply directly in Member States, requiring no national implementation, the MiFID2 Directive itself is not directly applicable and requires amendment of national laws. The MiFID2 delegated Directive (dealing with the safeguarding of financial instruments and client funds, product governance and fees and commissions) and the Directive on the reorganisation and winding up of credit institutions also require national transposition measures.

In Romania MiFIL implements the MiFID2, the MiFID2 delegated Directive and the Directive on the reorganisation and winding up of credit institutions and repeals several provisions of the Capital Markets Law 297/2004 (the latter being the level 1 piece of legislation implementing the former MiFID in Romania). It is expected that the Financial Supervisory Authority (FSA) and the National Bank of Romania (NBR) will enact level 2 legislation with a view to implement certain of the provisions of MiFIL.

* + 1. SCOPE AND COMPETENT AUTHORITIES UNDER MIFIL

In terms of the scope and the competent authorities, the Romanian regulator:

clarified that there are two supervisory authorities in relation to MiFID2 – the FSA (having a primary role) and the NBR (a limited role, related to regulation, supervision, licensing and control of credit institutions carrying out MiFID2 services and activities); the way in which the NBR and the ASF would interact with eachother and with the relevant supervised persons in relation to the MiFID framework will be set out out in a collaboration protocol as well as detailed in joint NBR-ASF level 2 legislation;

implemented the MiFID2 exemptions under Article 2 of MiFID2 (in contrast with past implementation of MiFID, when no MiFID exemptions were implemented). These exemptions exclude from MiFID2 compliance certain entities covered by a different regulatory regime (such as insurance companies) and entities which, due to certain circumstances in which they perform the relevant investment services, would not be deemed to have an impact on the market and its participants that would warrant their compliance with MiFID2 (such as persons providing investment services exclusively for certain affiliates or persons providing investment services consisting exclusively in the administration of employee-participation schemes, among others); and

has opted to implement the optional exemptions under Article 3 of MiFID2 with respect to certain Romanian entities - although it is not a copy-out approach, nor is it clear at this point how this will apply due to absence of level 2 legislation, which is yet to be enacted by the FSA.

* + 1. Insolvency and pre-insolvency measures

In addition to implementing with respect to investment firms certain provisions of the Directive 2001/24/EC on the reorganisation and winding up of credit institutions, MiFIL regulates measures regarding certain insolvency and pre-insolvency measures with respect to investment firms, market operators, asset managers, alternative investment fund managers and internally managed alternative investment funds, including: special administration, administrative liquidation and insolvency.

* + 1. EXTERNAL CALL CENTERS GO OUT OF BUSINESS

MiFIL prohibits the marketing of investment services and activities via external call centers. The "marketing of investment services" includes any form of presentation of the relevant investment firm, with the purpose of attracting clients, which: (i) entails direct interaction with potential clients; (ii) implies remuneration in accordance with the number of attracted clients or their activity.

* + 1. BINARY OPTIONS AND CFDS FOR RETAIL ARE PERMANENTLY RESTRICTED IN ROMANIA

By Decisions 2018/795 and 2018/796 of 22 May 2018 ESMA used its prerogatives under Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council to temporarily restrict the marketing, distribution or sale to retail clients in the Union of contracts for differences, and respectively temporarily prohibit the same with respect to binary options. By contrast, MiFIL makes these restrictions and prohibition permanent in Romania. ASF recently published draft level 2 legislation setting out the relevant restrictions on permitted leverage with respect to CFDs for retail.

* + 1. RESTRICTIONS ON ONLINE DERIVATIVES TO RETAIL

The Romanian regulator went even further than ESMA in its endeavour to protect retail clients by prohibiting (with few exceptions) the marketing, sale or distribution on a professional basis to retail clients of financial derivative instruments traded via an online platform, in the following circumstances:

where such instruments have a maturity of maximum 48 hours and involve, either directly or indirectly, a leverage exceeding the limits permitted by the FSA (through certain level 2 legislation to be enacted by the FSA); or

where the marketing, sale or distribution is carried out through certain means prohibited by MiFIL, including: incentives to clients for recommending or signing-up new clients; use of external call centers; use of software providers whose remuneration is dependent on firm gains resulting from losses by clients; "door to door" practices; or trading account funding via automatic debit of the client's credit card. Typically, these are all situations in which a retail client would be more susceptible to incur a greater losses because it is either incentivized (rewards), pressured into (via calls, "door to door" sales) or has little control on its exposure (automatic debit of a credit card).

* + 1. NEW COLLATERAL REGISTRY

The creation and enforcement of mortgages and security financial collateral arrangements on financial instruments (other than financial derivatives) registered with the Romanian central depositary will be carried out in accordance with level 2 legislation to be enacted by FSA. For publicity and enforceability against third parties such collateral arrangements must be registered with the central publicity register maintained by the Romanian central depositary. The ranking of a collateral arrangement will be given by the moment of registration of the collateral arrangement with the central publicity register.

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