

The deadline for MiFID is drawing close, yet many jurisdictions still have a lot of work to do. **Wim Mijs** and **Stephen Fisher** from the European Banking Federation explain the negative implications for business of failing to implement on time.



# DON'T MISS THE **MiFID** TRAIN

On 1 November 2007 firms must be in compliance with the Markets in Financial Instruments Directive (MiFID), which is one of the most complex and far-reaching pieces of legislation Europe's financial sector has ever had to deal with.

By now, all 27 member states ought to have transposed the European law into national legislation and implementation proper should be well underway. Regrettably, that is not necessarily the case.

### Transposing MiFID into national law

For firms to become MiFID-compliant, a two-step process has to have occurred. Firstly, legislators and/or supervisors are responsible for transposing (which can, depending on the perspective, be deemed as 'translating' or 'interpreting') a European text into the national legal code. Only when this process has been completed does MiFID – that is, the framework and implementing directives (the implementing regulation is directly applicable in each member state) – gain a legal personality in the member states.

The second stage in the process is firms' preparation to become MiFID-compliant by the implementation deadline. Firms should, in theory, have nine months to complete this process.

One of the principal risks the banking industry foresees from the transposition process is if member states add to the European text. In particular, bankers fear requirements being added that go beyond what is requested at European level, a practice often referred to as 'gold plating'.

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Most jurisdictions have agreed to copy the EU text into national law in an intelligent fashion. This means that divergence will be kept to the minimum necessary to facilitate the smooth implementation of MiFID into the local legal and business environments.

However, other risks exist. One of the notable advantages that MiFID has over the previous legislation governing this area, the Investment Services Directive, is that it opens up markets to greater competition.

A consequence of MiFID for some member states is the abolition of the 'concentration rule' – the mandatory routing of orders via the local stock exchange. Under MiFID this requirement has been abolished, but industry must be vigilant not only regarding gold plating, but also practices that could be deemed to be against the spirit of MiFID.

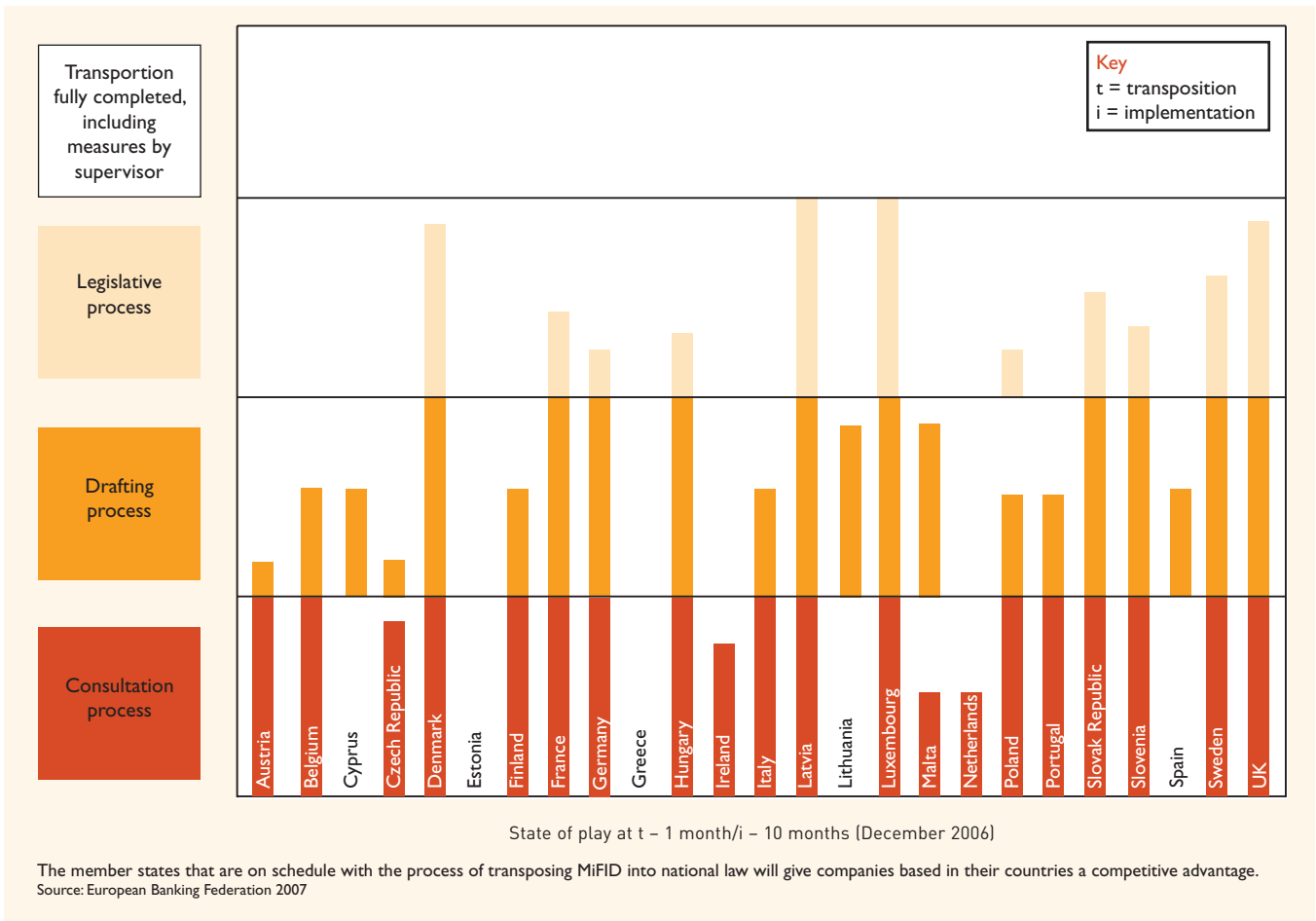
For example, a de facto concentration rule could re-emerge if member states fail to take action against the systematic routing of orders via a local stock exchange. Although hypothetical at this stage, this is one scenario that could appear after 1 November and one that is very much against the letter and spirit of the MiFID best execution requirements.

### Uncertainty is expensive

MiFID affects all parties trading in Europe, from investment banks in the City of London to retail clients in Romania's Transylvanian mountains. The directive's reach and the changes it implies explain why people have been energised to such an extent that we now have 'MiFID the Movie' and [mifidjobs.com](http://mifidjobs.com), and why so many commentators have written about the 'day of the MiFIDs'.

Although the initial reaction was to freeze in the headlights of this oncoming legislative train, most in the industry have now figured out how to jump on board and enjoy the ride.

- Member states must keep to the implementation schedule.
- Late implementation will put firms at a competitive disadvantage.
- Consultation is an essential part of the process.



Firms are currently in the third month of a budget cycle that probably has a cost allocated against it labelled 'MiFID implementation'. This cost line can be broken down into various elements, including design, build, test and implement IT systems, run compliance checks, and consult legal opinion. But as yet there is no revenue line against MiFID to balance the costs. Understandably, this troubles Europe's bankers.

However, what really worries bankers is uncertainty, and uncertainties add to costs. A significant number of

jurisdictions are still some time away from fully transposing the European MiFID text into national legislation and/or issuing guidance that helps firms interpret the ways in which they can become MiFID-compliant. The figure gives an overview of the transposition process in selected EU member states.

In some cases these delays are due to genuine timetabling issues resulting from political instability. In other cases, member states appear to have woken up late to the implications of MiFID and are playing catch-up.

### First mover advantage

There are competitive implications for the late transposition of MiFID. Those jurisdictions that transpose the legislation on time will give companies the full nine months to ready themselves for the deadline.

Conversely, where there have been delays in transposing the text into national law, the timetable for firms to implement MiFID has been squeezed. This is detrimental to the competitive position of companies based in late-implementing MiFID jurisdictions. First mover advantage is very much in evidence when it comes to implementing MiFID.

The message from industry is clear: companies need as much time as possible to be ready for MiFID. The nine months foreseen by the MiFID Extension Directive, which sets out an extension of the deadlines for transposing and implementing MiFID, in itself poses an enormous challenge to industry to be ready on time given the levels of IT and systems compliance required under the directive.

Where national parliaments' time to fully transpose the EU text into national legislation spills over into the implementation period, firms come under even greater pressure. The European Commission has categorically ruled out granting a further extension to the deadlines associated with MiFID.

## MiFID priorities

Banks need clarification and guidance on:

- The practical operation of the European passport, especially with regard to the effective division of responsibilities between a firm's home and host supervisor
- How transactions are reported, to whom and according to which deadlines
- The treatment of inducements – otherwise known as the commission a firm receives for the provision of investment advice and other services
- A policy-based approach to fulfilling MiFID best execution requirements

Therefore, stakeholders would be well advised to put pressure on their national legislatures to deliver the national legislation, if they have not already done so.

{ 'Industry needs as much time as possible between now and the deadline to be ready for MiFID.' }

### Legal implications of late transposition

One of the many legal questions that Europe's bankers are currently seeking answers to regards the status of the firm's EU passport; that is, the ability to sell goods and services in other European jurisdictions from the home jurisdiction.

Specifically, industry is seeking clarification on the liability banks would have vis-à-vis their clients where the member state of the inwardly passporting firm was late in implementing MiFID, but the host state had implemented it on time. There is also some confusion about the situation where the member state of the outwardly passporting firm implemented MiFID on time but the host state implemented it late.

This issue is far from clear and it will only become clearer as we approach the deadline. However, it could be useful to assume that for a firm passporting out from a late implementer it would be at the discretion of the member state whether or not to admit the firm. Firms are urging member states to be pragmatic so that if such a scenario arose, the ISD passport would be extended until the outwardly passporting firm's member state had implemented MiFID.

Under the second scenario, expert opinion suggests that there would not be any legal basis to refuse a firm whose member state had implemented MiFID on time from carrying out business on the MiFID passport in a member state that was late implementing the directive.

### Key questions

The implications of late transposition and implementation dominate discussions among those closest to the directive. Numerous uncertainties remain which have a direct impact on the policy decisions that firms implementing MiFID must make.

The Committee of European Securities Regulators (CESR) is a network of European securities regulators charged with converging supervisory practices for securities business. For MiFID this process is known as Level 3 guidance – referring to its position in the Lamfalussy legislative process, which applies to some pieces of financial services legislation. Upon completion of the implementing measures for MiFID, CESR set out an ambitious programme and timetable to fill in the gaps by issuing guidance information.

The European Banking Federation (EBF) has identified a number of priority areas where greater attention is needed before firms can implement MiFID in a smooth and coherent way (see box, p6).

These areas, along with questions about market transparency and the minimum record keeping requirements for firms, are the main operational issues that have to be tackled before MiFID can be smoothly implemented.

### Europe's MiFID conversation

A year ago, the implementing measures had just been released and long negotiations were still going on. But with the detail of MiFID now bedded down into a European text, bankers' priorities have shifted from the political to the practical, as the implementation date looms large on the horizon.

The EBF draws on the expertise of its 29 member national banking associations to create a truly European position based on expertise from markets large and small. It approached MiFID implementation with a simple message: to be in the best shape on 1 November, a dialogue has to take place.

The EBF has to a large extent facilitated this dialogue within pan-European industry circles as well as with legislators and supervisors. As we get deeper into the implementation process, this dialogue gains even more importance. Pan-European operational feedback from each member state is the key to unlocking successful implementation of MiFID.

Recent projects unveiled by some large investment banks to break up stock exchanges' dominant positions in equity trading and trade reporting show clearly that the possibilities MiFID has always promised are now coming to fruition. But to get to the potential riches that lie in the world beyond MiFID, several months of difficult decisions taken against a punishing implementation timetable still lie ahead.

Answers to these tough questions will be found in the MiFID dialogue that is taking place all across Europe today. FBA

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Mijs studied law at the University of Leiden in the Netherlands, specialising in European and international law. He taught in the Faculty of Law at the University of Leiden until 1990 and then at the International Court of Arbitration at the Peace Palace in The Hague until 1993. He then joined ABN Amro in Amsterdam before moving to Brussels to head up the ABN Amro EU Liaison Office. He moved back to The Hague in 2002 where he became the head of government affairs for ABN Amro.

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### Stephen Fisher

Stephen Fisher is the financial markets adviser to the European Banking Federation (EBF) having joined the federation in 2004. He is responsible for EBF policy in respect of MiFID, clearing and settlement, the market abuse regime and the evolution of the Lamfalussy Process.

Prior to moving to Brussels, Fisher worked in London for the Financial Services Authority (FSA) for four years. During his first year there he attained the Investment Management Certificate from the UK Society for Investment Professionals.

He holds a first-class MA in social anthropology and Spanish from the University of St Andrews, Scotland, and is currently studying for an MSc in finance and financial law (by distance learning) from the University of London.