In a nutshell:
• As the EU considers targeted relaxations to some MiFID II requirements (albeit only for institutional and professional clients), other major global markets are looking to introduce investor protection reforms comparable to the original MiFID II reforms
• Whilst there may be some apparent convergence, local protectionism through regulation seems on the rise
• Firms will have to continue to manage the differences, as universal rules and global market access for investors remain out of reach

The EU’s regulation of investment firms and markets could be described as ‘advanced’, or onerous, depending on your viewpoint - in some respects even a global ‘gold standard’. Other jurisdictions are adopting, selectively, parts of the EU regime. But does that mean more alignment of global regulatory standards? Not necessarily. The direction of travel is more ambiguous. We explore below some of the trends in emerging global standards of investor protection and investor access.

THE EU REGULATORY BACKGROUND
In January 2018, after a one-year delay and many years in development, the EU “MiFID II” legislation came into force throughout the EU, replacing the original (2007) Markets in Financial Instruments Directive (MiFID) regime. MiFID II introduced greater transparency and discipline in EU markets – particularly derivatives markets. It also significantly enhanced investor protection standards, with increased obligations for the quality and quantity of disclosure and product governance (origination and distribution) practices, inducements restrictions and conflicts management rules.
Another high-profile reform introduced by MiFID II was the mechanism for a “third-country” (non-EU) firm passport, to facilitate access for non-EU firms to EU institutional investors. Three years on, however, the regime has yet to be fully activated by the EU - which continues to pose challenges for UK firms seeking to preserve cross-border access to EU markets post-Brexit.

Some of the MiFID II reforms are now being revisited by the EU, while comparable investor protection reforms have recently been implemented or proposed in other major global markets.

**THE MIFID GLOBAL FOOTPRINT**

Investor protection has been an area of focus in other key jurisdictions, where the themes of MiFID have informed the regulatory change agenda. Some of the recent or planned reforms in Australia and the US, for example, have notable parallels. **Australia** is preparing to introduce rules on design and distribution obligations for investment firms (similar to the MiFID II product governance regime) combined with complementary product intervention powers for regulators (also following MiFID II). Australia has also introduced rules in the investment advice sector to improve the training and competency of investment advisers, scope of advice disclosures and suitability assessment requirements. Similarly, the **US** Securities and Exchange Commission has recently introduced reforms to enhance the quality and transparency of retail investors’ relationships with investment advisers and broker-dealers. Key elements include overarching obligations for advisers to act in clients’ best interests (a duty that has long been fundamental to the MiFID rules) and pre-sale “relationship summary” disclosure requirements (which also echo the extended pre-sale client disclosure requirements under MiFID II).

> The design and distribution obligations, which now commence on 5 October 2021, represent a step-change in financial services regulation, placing greater responsibility on issuers and distributors of financial products to appropriately design and distribute their financial products."

- Sean Hughes, ASIC
Importantly, however, both the Australian and US advice sector reforms focus on retail clients, whereas one theme of the MiFID II reforms was extending retail investor protections to professional clients and also some disclosures and protections to institutional clients. Interestingly, this aspect of the MiFID II reforms is among several elements of the regime that are currently under review by the EU and could be at least partially reversed.

**TWO STEPS FORWARD, ONE STEP BACK FOR THE EU?**

On the EU side, the European Commission (EC) is currently leading a far-reaching review of the MiFID II regime. Its publications to date acknowledge that the reforms may have gone too far in some areas (although arguably not far enough in others). Various investor protection requirements have been identified as priority review areas (e.g. specific inducements rules such as the ban on broker-funded research) and the EC is also reviewing various aspects of the trading regime. Meanwhile, some countries (including the UK and Spain), have gold-plated certain elements of even the MiFID II inducements rules, resulting in continued differences in investor protection standards across the EU.

Most recently, the EC has published a Covid-19-related “MiFID II Quick Fix” amendment proposal, which frontloads many of the reforms being considered under the MiFID review for imminent implementation. This includes scaling back or even switching off some disclosure requirements for institutional and professional clients; switching off product governance obligations for certain corporate bonds; and suspension of the ban on broker-funded research for coverage of SMEs and fixed income. The EC press release describes these changes as “targeted alleviations to investor protection measures that have already been deemed to be of no use or even detrimental to investors”. This partial retrenchment from the original MiFID II reforms under the Quick Fix proposal and the broader MiFID II review could be viewed as a sign that the EU investor protection may be diverging from international reform trends. However, since the liberalisation on the EU side is mostly confined to institutional and professional clients (with little change to retail standards), we could in fact see a greater convergence of rules across major investment markets in the near-term.
.. this amendment to MiFID II applying to investments in financial instrument (*sic*) has the aim of removing administrative burdens that result from documentation and disclosure rules that are not counterbalanced by corresponding increases in investor protection.”
- European Commission

Both the EU and the UK are also (separately) considering whether there should be greater distinction within the “retail” client class, with more flexible standards for sophisticated and/or High Net Worth (HNW) investors (i.e. “semi-professional” investors), which would bring the EU categorisation more into line with the US, Hong Kong and Singapore (although initial findings on the EU side have appeared to reject this approach).

TOUGH AT THE TOP
Another global trend in regulation which looks set to continue is the augmentation of governance standards for financial services firms and particularly the ramping up of individual accountability for senior management and compliance roles. The UK’s “senior managers and certification regime” was introduced for banks in 2016 and is now largely in force for all UK regulated firms. In Australia, the Banking Executive Accountability Regime is also in the process of being rolled out to insurers and eventually to all investment firms. In Singapore, the Monetary Authority of Singapore recently issued Guidelines on Individual Accountability and Conduct, focusing on senior management accountability and governance. The forthcoming EU Investment Firms Directive and Regulation (IFD) will strengthen governance standards for EU investment firms, which will complement MiFID II governance standards on conflicts of interest, compliance and outsourcing under MiFID II.

GLOBAL DIRECTIONS, LOCAL PROTECTIONS

Is local protectionism through regulation on the rise? Another area of MiFID that will be “strengthened” through consequential amendments in the IFD is the third country passport regime. Although this regime has not yet even gone live, the IFD amendments will render it substantially more burdensome, both in terms of the standards for the EU certification of countries as “equivalent” (a condition of EU market access) and the compliance burdens for firms from deemed-equivalent non-EU jurisdictions that choose to register for the passport (and thereby submit to extensive disclosure and reporting obligations to EU authorities). The timing and direction of these reforms (with the UK poised to become a third country from January) has raised inevitable questions over whether these reforms are intended primarily to protect local investors – or local investment markets. The UK is in the process of introducing similar legislation, which on the one hand should help to maintain equivalent standards in the UK, but on the other could (depending on the final UK rules) result in a similarly restrictive market access regime.

The MiFID-like reforms being introduced in jurisdictions such as Australia and the US should also in theory be conducive to “third country passport” access for Australian or US firms targeting EU investors, although the EU’s determination to shift the goalposts renders access not only more challenging but also potentially less attractive. For now, therefore, despite some apparent convergence in the investor protection reform agenda, there is some way to go before this translates into global market access for investors or universal rules for firms.

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