The grand vision of the European single market

La nouvelle DSI se propose, entre autres, de réguler le conseil en investissement avec pour objectif une meilleure protection des investisseurs. Si l'intention est louable, le texte demande de nombreuses précisions tenant, par exemple, à son périmètre d'application ou à la définition des prérogatives d'un conseiller en investissement non indépendant. Par ailleurs, sa mise en œuvre et son but ultime, à savoir la création d'un grand marché unique des services d'investissement, dépendra de la volonté des différents États à adapter la directive aux spécificités de leur marché national et à lisser les discriminations qui peuvent encore demeurer, par exemple, sur le plan fiscal.

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■ For a fund management firm like Fidelity there has been a temptation to regard the ISD as being of secondary importance to the UCITS Directive. The UCITS Directive governs the mutual fund, the product that is the core of our business. What's more, UCITS management companies are exempt from the ISD. But we ignore it at our peril, all the more so in the light of some of the ideas contained in the European Commission's amended text that is now being debated in the European Council and Parliament.

But we cannot assess this Directive in isolation. It is just one of a whole series of Directives and initiatives that make up the Financial Services Action Plan, the Commission's grand scheme to bring about a single market for financial services by 2005, and it needs to be seen in that context. Beyond that, all new legislative measures emanating from Brussels are at the mercy of the national governments and regulators that have to implement them into local law and formulate the detailed rules that govern the practicalities of our business. The single market ambitions at the centre are often thwarted by inconsistency at the edges and a failure to enforce measures effectively.

Let's look first at one or two of the details in the draft Directive. A major development in the proposed new regime is that firms offering advisory services will be brought under the ISD for the first time.

Firms offering advisory services

This is intended to enhance the level of protection for individual investors. The accompanying explanatory notes with the Directive make clear the Commission's view that there needs to be a step change in the Community's legislative framework for protecting individual investors, not least from themselves. This is to be done by obliging firms to ensure they look deep enough into a potential investor's circumstances and even his knowledge of investment to enable them to make a credible decision about what products or services are suitable. This sounds fine in theory and probably does little more than codify existing practice for genuine financial advisers. But the all-encompassing nature of the obligations outlined in the Directive could end up – depending on how the text is eventually interpreted by regulators – placing this obligation on all investment firms regardless of the nature of the client relationship. Throughout Europe there are investors able and willing to make their own decisions and buy products on an 'execution-only' basis. Are they to be catered for? Or will they be forced into an advisory relationship where they will, one way or another, pay for advice they neither want nor need? The Directive appears to allow some leeway by enabling regulators to « take into account the nature of the product involved ». But it is not clear how far regulators might take that, still less that they will all interpret it in a consistent fashion. In short, the Conduct of Business rules in the Directive should be aimed at – and only at – those firms offering advisory services. That is what we understand the Commission's intention to be. It should be made clear in the text.

The notion of « tied agent »

The Directive also tries to formalise the definition of a « tied agent », laying down clear rules that such an agent can only work for a single principal. This may be intended to give clarity to the relationship so that investors will know who or what they are dealing with. But it is an example of the Directive, partly because it tries to operate at a very detailed level, simply failing to keep pace with changes that are already taking place in the market. Restricting a tied agent in this way might have appeared logical once. But today it flies in the face of one of the most far-reaching and exciting developments in the area of retail investment, namely open architecture. Just as many agents, especially in banks are gearing up to be able to offer investors a range of products and services from a variety of providers, this Directive looks set to stop that in its tracks. This should not be allowed.

The Directive also seeks to increase the transparency around trading in equities. Again we fear that some of these measures may fail to reflect adequately the reality in the market place. It is hard to argue against transparency. But so much of the trader's skill resides in his ability to achieve best execution by taking advantages of the flexibilities in the market. If prices, once declared, cannot be changed, or spreads altered, the market will become less liquid, not more. Costs could rise as a result and the impact on investors of restricted liquidity in what can be relatively volatile markets will be significant. The Directive intends to apply these measures to retail size orders, leaving the market's larger players unaffected. We would like to see this section of the Directive clarified or, better still, dropped altogether since it does not add significantly to the overall objective.

These are some of the details from the draft directive that will be argued over, line-by-line, in the months ahead by the civil servants in Brussels. But any real assessment of how the investment landscape across Europe may change has to put the ISD in the context of Commission's broader efforts to implement the Financial Services Action Plan.

Implementation is the key

Set alongside other Directives, such as UCITS, Distance Selling, E-Commerce etc. the new ISD should be an important step towards the new European market. The range of products that can now be offered to Europe's investors is being expanded. The marketing should become easier with, for example, the UCITS Simplified Prospectus. The enhanced 'passporting'regimes envisaged should enable firms to operate more freely across borders. Choice will become wider and competition will sharpen pricing and quality throughout the EU.

But before our optimism gets the better of us, a word of caution. It is a fact of political life in the hoped-for single market that there is always something of a gap between the stated political objectives of an initiative like a new Directive and the reality of what will happen in practice when that Directive — with all its necessary compromises and unnecessary fudges — finally becomes law in 15 members states.

Implementation is the key. The grand vision of the European Single Market will depend as much on how Directives like the ISD are implemented so as to achieve the Commission's objectives. Without genuine political commitment on the part of member states success will be limited. That means two things. First, Directives need to be implemented in a consistent way across the continent or the need to cater for, and adapt to 15 sets of national requirements will simply add costs and administration to the business process. Here, the new regulatory structure that has emerged from the Lamfalussy process has an important role to play. Second, national governments need to ensure that those legal or regulatory powers they still have at the national level, especially over tax, are not used to frustrate the vision of a market without borders. It is on this latter point that Fidelity continues to battle against discrimination of one form or another in virtually every market in Europe. As the recent PWC/FEFSI report showed, the picture is far from encouraging. Germany, Spain, Austria, the UK and France all maintain tax regimes that, in one form or another, discriminate against non-domestic funds.

The Commission was quite clear when it published its draft of the Investment Services Directive that it has a vision of consolidation and integration in financial markets across Europe. At the same time it has published research to show that a genuine single market would produce savings in costs and efficiency that would add significantly to Europe's GDP. The prize for Europe's savers is clear. The ISD is an important building block. But, as with all great architecture, success depends on the skill of the builders as much as on the quality of the materials. ●