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Markets in Financial Instruments Act 2018 – sanctions specified for certain offences under the MiFID Regulations

The recently enacted Markets in Financial Instruments Act 2018 (the “**2018 Act**”), sets out maximum sanctions available for certain offences under the European Union (Markets in Financial Instruments) Regulations 2017 (the “**MiFID Regulations**”) where a person is convicted on indictment.¹ These are higher than those provided for under the European Communities Act 1972 (the “**1972 Act**”).

Summary proceedings for offences under the MiFID Regulations may be brought and prosecuted by the Central Bank of Ireland (the “**Central Bank**”). The Director of Public Prosecutions is responsible for prosecuting offences on indictment.

Firms should be aware that breaches of the MiFID Regulations also fall within the remit of the Central Bank’s Administrative Sanctions Procedure and that administrative sanctions can also be applied to entities which are not “regulated financial service providers” in certain circumstances.

“Relevant offences”

The 1972 Act provides that where an offence is committed under regulations made pursuant to the 1972 Act, the maximum sanctions available on conviction on indictment shall be a fine of €500,000 and

¹ The Act also deals with other matters which do not relate to the MiFID Regulations.

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a prison term of three years.

The 2018 Act lists various provisions of the MiFID Regulations, a contravention of which will constitute a “*relevant offence*.” The 2018 Act states that a person who is guilty of a “*relevant offence*” shall be liable, on conviction on indictment, to a fine not exceeding €10million and/or to a prison term not exceeding ten years. The maximum available sanctions for a conviction on indictment for a “*relevant offence*” are therefore significantly greater than the maximum sanctions for indictment, provided for under the 1972 Act.

The breaches of the MiFID Regulations which constitute a “*relevant offence*” include (among others) the following:

- ❑ failing to comply with requirements imposed on a person or firm by an Authorised Officer who has been appointed by the Central Bank;
- ❑ failure by a person to make certain notifications to the Central Bank before making a relevant acquisition or disposal in an investment firm or of the investment firm to notify the Central Bank if it becomes aware of any acquisition or disposal of holdings in its capital that would cause it to exceed or fall below the thresholds set out in Regulation 19(2) of the MiFID Regulations);
- ❑ failure by an investment firm to make adequate arrangements to safeguard clients’ ownership rights, when holding financial instruments belonging to clients;
- ❑ failure by an investment firm to comply with the conditions and requirements of its authorisation;
- ❑ failure by an investment firm to take all appropriate steps to identify and prevent or manage conflicts of interest that arise in the course of providing investment services or ancillary services (or a combination of both);
- ❑ failure by an investment firm to act honestly, fairly and professionally in accordance with the best interests of its clients and to comply with the principles set out in Regulation 32 (“General Principles and information to clients”) or Regulation 33 (“Assessment of suitability and appropriateness and reporting to clients”) of the MiFID Regulations; and
- ❑ failure by an investment firm to execute orders on terms most favourable to a client.

Other offences under the MiFID Regulations

As mentioned above, the 2018 Act states that a breach of certain provisions of the MiFID Regulations will be a “*relevant offence*”. However the MiFID Regulations also list numerous other provisions a breach of which will constitute a criminal offence (although these are not specifically designated as a “*relevant offence*” under the 2018 Act). For example Regulation 119(8) states that

a person who contravenes any provision of Regulation 119(5) or Regulation 119(6) shall be guilty of an offence. Regulation 119(5) contains sixty-seven subsections.

The MiFID Regulations also provide that where an offence is committed under the Regulations by a corporate and is proved to have been committed with the consent, connivance or approval of any person who is a director, manager, secretary or other officer of the body corporate, that person shall also be guilty of an offence.

Other sanctioning powers

Regulated financial service providers (and people involved in their management) should also be aware that they can be sanctioned under the Central Bank's Administrative Sanctions Procedure (the "**ASP**") for any breach of the MiFID Regulations.

The maximum monetary penalty which can be imposed on a regulated entity under the Central Bank's ASP for a breach of the MiFID Regulations (subject to the exceptions noted below) is €10 million or 10 per cent of its total annual turnover in the preceding year – whichever is the greater – or a penalty of up to €1 million on a person.

In certain instances the MiFID Regulations provide derogations from the "standard" penalties applicable under the ASP regime to allow for different and sometimes higher penalties to be applied for certain breaches of the MiFID Regulations e.g. a maximum monetary penalty of up to €5million can be imposed on a person for certain specified breaches of the MiFID Regulations.

Other sanctions are also available to the Central Bank under this regime such as the revocation of regulated entity's authorisation (if it is not authorised by the European Central Bank) or a direction disqualifying a person from being involved in the management of a regulated entity for a certain period.

Individuals and firms which are not "regulated financial service providers" can also be subject to administrative sanctions by the Central Bank for certain breaches of the MiFID Regulations. These include the financial penalties referred to above and a direction to pay the Central Bank a monetary penalty which represents up to twice the amount of the benefit derived from the breach where that can be determined (even if this exceeds the above monetary penalties).

A person or firm cannot be prosecuted for a criminal offence if they have had a monetary penalty imposed on them by the Central Bank under either of the above administrative sanctioning regimes.

Contact Information

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