

Polish Financial Supervision Authority's standpoint regarding the application of the Directive 2004/39 of European Parliament and Council (MiFID) in Poland since 1st November 2007

The following standpoint constitutes a summary of an analysis undertaken by the Polish Financial Supervision Authority (PFSA) and it is submitted for information purposes only. The standpoint presents the principles of proceedings, which shall be applied by PFSA since the 1st of November 2007, in case of lack of timely implementation of Directives 2004/39 and 2006/73.

PFSA reserves itself all rights to introducing any amendments and supplementing the presented standpoint.

Information included in the standpoint does not constitute any legal advice whatsoever. Moreover, the PFSA is not an organ/entity allowed to provide official interpretation of European law, it is also not allowed to determine the scope and principles of applying the European law in a binding way in relation to third parties.

The set of legal acts regulating the provision investment services since the 1st of November 2007 in case of lack of timely implementation of EU Directives into national legal system

The deadline for implementation of following EU Directives into national legal system expired on the 31st of January 2007:

- Directive 2004/39 of the European Parliament and of the Council of 21st April 2004 on markets in financial instruments (MiFID I)
- Commission Directive 2006/73 EC of 10 August 2006 implementing Directive 2004/39 of the European Parliament and of the Council regarding organizational requirements and operating conditions for investment firms and defined terms for the purposes of the Directive (MiFID II)

Member states are obliged to apply the provisions of the Directives since 1st of November 2007.

Directive MiFID I constitutes a new legal framework for providing investment services in the EU through determining the conditions for licensing and conducting investment services and activities by investment firms, as well as for regulated markets and UCITS. Directive MiFID plays an essential role in creating a stable and common framework for a common European capital market.

MiFID Directive is being implemented into Polish legal system by means of the Act amending the Act of 29th July 2005 on Trading in Financial Instruments and its executive regulations, and also by means of the Act amending the Act of 27th of May 2004 on Investment Funds and =executive regulations to the above mentioned Act. The suitable drafts of Acts have been submitted to the Polish Parliament (Sejm) in May 2007. Due to the shortened term of the Parliament in Poland the above mentioned drafts have not yet been passed.

Given the above mentioned facts, it seems necessary to set up some temporary principles which shall be applied by the time of full transposition of MiFID Directives.

Binding law since the 1st of November 2007 in case of lack of implementation of MiFID Directives 2004/39 and 2006/73

In case of lack of implementation MiFID I and MiFID into national legal system by the 1st of November 2007, a problem regarding the application of the appropriate provisions relating to the capital market may appear. The following acts and regulations shall co-exist:

- provisions currently being in force outlining the functioning of the capital market (Act on Trading in Financial Instruments of July 29th 2005, Act on Investment Funds and the executive regulations to the above mentioned acts),
- Directive 2004/39 of the European Parliament and of the Council of 21st April 2004 on markets in financial instruments
- Commission Directive 2006/73 EC of 10th August 2006 implementing Directive 2004/39 of the European Parliament and of the Council regarding organizational requirements and operating conditions for investment firms and terms defined for the purposes of the Directive
- Commission Regulation No 1287/2006 of 10th August 2006 implementing Directive 2004/39 EC of the European Parliament and of the Council regarding record - keeping obligations for investment firms, transactions reporting, market transparency, admission of financial instruments to trading, and terms defined for the purposes of that Directive.

In such circumstances it seems inevitable to consider applying by the PFSA both European and national acts.

Considering the scope of application of European law and the interrelation between European law and national legal system in particular since the 1st November 2007, Polish Financial Supervision Authority shall follow the below mentioned rules determining the general interpretation of the EU law:

1. Rule of priority of European law

The above mentioned rule stipulates that in case of a conflict with any prior or former national rules, all provisions of European law take precedence in every EU Member State. In any case when the national rules of Member States are at variance with directly applicable provisions of European law, the courts and administrative organs are obliged to apply provisions of the latter.

2. Direct applicability of European Law – Directives

The above mentioned rule has been formulated in result of judicature of European Court of Justice (ECS). With regard to the Directives, the ECS has acknowledged that rights granted to individuals through the European law may be directly applied in front of national courts and organs, once the following requirements are met:

- The provisions of a directive are accurate and unconditional,
- Rights of the individuals towards the member state result from the directive's provisions,
- The deadline for transposition of directive by the Member State has expired, or the transposition has been not conducted correctly.

It shall be emphasized that when formulating the above mentioned rules, the European Court of Justice underlined only the obligation of the Member States, i.e. direct vertical effect of the Directive – the individual's right to refer to the directly applicable provisions of the EU law in front of Member State organs.

3. Indirect effect of Directives

The above mentioned rule is a general interpretation rule. According to it, national courts and administrative organs are obliged to interpret national law according to European law. In the process of applying law, Member States and their administrative organs are obliged to interpret the national provisions in such a manner that the aims of a directive which has not been transposed, would still be achieved.

Application of norms regulating the capital market since the 1st November

By applying the above mentioned rules, Polish national legal system shall function as follows by the time of full implementation of MIFID Directives into Polish legal system:

1. Polish legal acts shall remain in force unless they are contrary to suitable provisions of MIFID Directives.
2. Entities, versus administrative state organs, will be able to apply directly these provisions which grant them withrights (not those which create an obligation for them), once the conditions of direct applicability are met (clarity, unconditionally, late implementation)
3. Commission Regulation, as a part of Polish national legal system, from the date of its entry into force on, appliesdirectly and needs no impelmentation into Polish national legal system (art. 249 Treaty of the European Union),
4. State courts and administrative organs are obliged to interpret the Polish national legal system in a way which enables them to achieve the aims of not implemented directives and Commission regulation.

Taking into account the above mentioned rules, Polish Financial Supervision Authority provides the following information regarding direct application the provisions of MIFID Directives 2004/39, 2006/73 and Commission Regulation 1287/2006 since the 1st November 2007.

Commission Regulation 1287/2006

Considering the provisions of Commission Regulation 1287/2006 it shall be underlined that, due to the lack of implementation of Directive 2004/39, art. 7 and 8 of the above mentioned Regulation are applicable to the broker - traded securities only. All other provisions of the Commission Regulation are applicable directly and replace the provisions of Polish capital market law currently in force.

Directive 2004/39 and 2006/73

With regard to investment firms and regulated markets, the following provisions of MIFID Directive I and II are directly applicable.

MIFID I - 2004/39

art. 2.1.d	to be applied directly
art. 19.6, 9	to be applied directly
art. 20	to be applied directly
art. 24.1-2	to be applied directly
art. 31.5	to be applied directly
art. 33.1	to be applied directly

art. 34.1	to be applied directly
art. 35.1	to be applied directly
art. 41.1 first sentence	to be applied directly
art. 42. 3, 4, 6	to be applied directly
art. 46	to be applied directly
art. 71	to be applied directly

MIFID II - 2006/73

art. 13	to be applied directly
art. 14	to be applied directly
art. 15	to be applied directly
art. 28.3	to be applied directly
art. 48	to be applied directly
art. 49	to be applied directly

With respect to investment fund management companies (pl. TFI) which are to manage another person's securities or to counsel in scope of securities trading, the following MiFID I and MiFID II provisions are directly applicable:

MIFID I

art. 2.1.h	to be applied directly
art. 10.3	to be applied directly
art. 19.6, 9	to be applied directly

MIFID II

art. 13	to be applied directly
art. 14	to be applied directly
art. 15	to be applied directly
art. 28. 3	to be applied directly