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FINANCIAL REGULATION

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Q TO WHAT EXTENT DO YOU BELIEVE TODAY'S FINANCIAL INSTITUTIONS ARE OPERATING IN AN ENVIRONMENT OF INCREASING REGULATORY SCRUTINY AND ENFORCEMENT ACTIVITY?

FOLEY: From an Irish perspective, EU regulation of the financial services sector has increased exponentially since 2012. As a result of the 2008 financial crisis, increased transparency requirements were imposed on certain financial and non financial counterparties by Regulation 648/2012 (EMIR). These followed on from the MiFID 1 Directive in 2007 and which was implemented in Ireland in the same year. Probably the most complex of all the EU regulations in recent years are those implementing Basel III, which for the most part was implemented through the Capital Requirements Regulation (CRR) and the Capital Requirements Directive (CRD IV). The CRR had direct effect in Ireland from January 2014 and the CRD IV was implemented by Statutory Instrument No. 158 of 2014 the European Communities (Capital Requirements Directive) Regulations. With effect from November 2014, the Central Bank's exclusive authority over the authorisation and supervision of credit institutions changed, with a number of supervisory responsibilities and decision making powers moving to the European Central Bank (ECB) through the establishment of the Single Supervisory Mechanism (SSM).

Q COULD YOU OUTLINE SOME OF THE BROAD LEGAL AND REGULATORY CHANGES AFFECTING THE FINANCIAL SERVICES SECTOR?

FOLEY: Every sector of financial services in Ireland is or has been subject to increased regulation since 2012 – primarily EU related, although some significant Irish specific regulation has been implemented by the government in 2015 and 2016. In February 2016, the Central Bank stated that it intends to supervise all financial firms in a way that makes it materially less likely they will collectively or individually fail in a way which endangers financial stability or consumers. In this context in 2011, the Central Bank introduced a Probability Risk and Impact System (PRISM). PRISM gives the Central Bank a unified and much more systematic risk based framework, making it easier for supervisors to challenge the financial firms they regulate, judge the risks and take action to mitigate those risks. The Central Bank further explained that under PRISM the most significant firms, being those with the greatest impact on financial stability and the consumer, will receive a high level of

supervision, leading to early intervention to mitigate those risks.

Q WHAT ARE THE IMPLICATIONS OF THESE RECENT REGULATORY REQUIREMENTS FOR FINANCIAL INSTITUTIONS?

FOLEY: The implications are clear, one has to comply and incur the cost of doing so. Compliance, process and systems costs in certain sectors may make continued participation in certain markets no longer viable. The job of a director of a financial institution has now become very onerous indeed – even more so in the case of a credit institution and investment firm as a result of CRD IV.

Q IN YOUR EXPERIENCE, HOW ARE FINANCIAL INSTITUTIONS RESPONDING AND ADAPTING TO THESE REGULATORY CHANGES? HOW IMPORTANT IS IT TO ESTABLISH A STRONG INTERNAL GOVERNANCE FRAMEWORK TO MAINTAIN COMPLIANCE?

FOLEY: If one considers from an Irish perspective that most of the requirements originate with the EU and the sanctions that can be imposed for non-compliance, particularly in articles 66 and 67 of the CRD IV, financial institutions have no choice but to comply and incur the expense of doing so. Compliance has now moved centre stage. On top of this, there are challenges imposed by peer to peer lenders, payment services providers and crowdfunding platforms, all of which create more competition for financial institutions. In Ireland, in addition to all the financial services regulation, there is a Code of Corporate Governance for Credit Institutions and Insurance Undertakings. In 2015, it was split and renamed to provide for requirements for insurance undertakings and credit institutions separately, but the nature of these requirements have not changed. The contents of these documents have been imposed as a requirement to which insurance undertakings had to comply from 1 January 2016, and credit institutions from 11 January 2016.

Q WHAT POLICY AND PROCESS CHANGES MIGHT FINANCIAL INSTITUTIONS

FOLEY: Given that so much of the regulatory requirements are driven by the EU, and with the greater use of the Lamfalussy process for complex regulation, thereby facilitating maximum harmonisation of such legislation,

NEED TO IMPLEMENT TO MAINTAIN COMPLIANCE WITH NEW REGULATIONS?

it is possible to generate policies and processes that would apply on a cross-border basis. However, where an EU Directive is a minimum harmonisation measure, firms can only develop compliance policies cross-border within the framework provided by the particular Directive. Moreover, where you have Irish specific legislation such as the Companies Act 2014, requiring credit institutions and insurers to convert to Designated Activity Company (DAC) status, directors' statutory duties under the Companies Act 2014, it is clear that credit institutions and insurers have to develop specific policies to implement and comply with these.

Q IN WHAT WAYS ARE DATA PROTECTION AND PRIVACY LAWS IMPACTING THE OPERATIONS OF FINANCIAL INSTITUTIONS? DOES MORE NEED TO BE DONE TO ADDRESS CYBER RISK AND RELATED LIABILITIES?

FOLEY: The EU's Data Protection Directives have been implemented in Ireland in the Data Protection Acts 1988 and 2003. These have been supplemented by data protection commission guidance, and a number of codes of practice including specifically on data breach. Data security obligations are also present in many other financial services related legislation and codes, including in the 2012 Consumer Protection Code. There are also significant security and data protection related obligations in Payment Services Directive II, the Market Abuse Regulations and the upcoming General Data Protection Regulation. As a consequence, financial institutions have to embed and consider security in all aspects of their operations, but also have to ensure personal data is processed in a compliant way – including where processed – and that access can be demanded by data subjects at any time, unless the financial institution can avail of a statutory right to refuse access.

Q COULD YOU PROVIDE AN INSIGHT INTO SOME OF THE CHALLENGES ASSOCIATED WITH ENSURING THAT COMPLIANCE POLICIES AND PROCEDURES ARE ADHERED TO ACROSS MULTIPLE JURISDICTIONS?

FOLEY: Clearly, a lack of harmonisation between Member States makes cross-border compliance more difficult. With the adoption of the new Irish Companies Act 2014 and its commencement on 1 June 2015, interpretation and application of Irish company law has become much less difficult. Additionally, there is a good deal of commonality now between English company law as set out in the Companies Act 2006 and the Companies 2014 Act. To that extent, cross-border compliance becomes somewhat easier. To take one area, Ireland has become one of the largest centres for

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the administration of UCITS and non-UCITS collective investment schemes (CIS) and the listing of CIS. This is in no small part due to the fact that the Irish implementation of the EU UCITS directives, Irish regulation of non-UCITS CIS and the implementation of the AIFMD is very clear. In March 2015, the Irish Collective Asset-management Vehicles (ICAV) Act 2015 was signed into law. It provides an additional legal structure for Irish authorised investment funds, both UCITS and AIFs. ICAVs, which are AIFs, are authorised by the Central Bank under the ICAV Act 2015. ICAVs which are UCITS are authorised by the Central Bank under the European Communities (UCITS) Regulations 2011. However, when one compares the Irish CIS regime with the regime for CIS in other countries, it is much more difficult to develop multijurisdictional compliance policies. The Irish experience suggests, legislation which is clear and supported by comprehensive guidance and decision making which is transparent and made without undue delay, brings with it inward investment.

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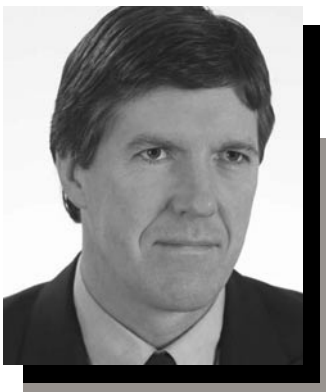

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Paul Foley practices English and Irish law, and specialises in corporate, financial services and internet law. He advises companies on the taking of investment, the purchase and sale of companies, syndicated borrowing and corporate compliance, advises financial institutions on facility letters including letters of credit, security and taking security, statutory and regulatory compliance and structures and advises on complex internet offerings including electronic banking, payment services, peer to peer lending, privacy policies and crowdfunding.

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