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BRIEFING PAPER

Number 3267, 2 June 2015

Market in Financial Instruments Directive

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Inside:

Contents

Contributing Authors: Author, Subject, Section of document

Summary

In 1998, the Commission published its *'Framework for Action'*. This framework evolved into an *Action Plan* which was adopted by the European Commission on 11 May 1999. The Action Plan suggests indicative priorities and time-scales for legislative and other measures to tackle three strategic objectives, namely ensuring a Single Market for wholesale financial services, open and secure retail markets and state-of-the-art prudential rules and supervision.

Part of the initiative was an Investment Services Directive aimed at improving cross border securities trading. This initiative became MiFID which covered issues such as

- The conduct of business of investment firms;
- A requirement to effect 'best execution' principles on all trades;
- A system of client categorisation giving greater protections to retail clients;
- New regulations for market standards;
- Pre and post trade equity transparency; and
- Transaction reporting

The financial crisis of 2010 was an occasion for reviewing all aspects of financial regulation and the MiFID regime was no exception. The discovery of huge derivative trading outside of recognised exchanges was seen by many as a possible source of systemic instability. In October 2011 the Commission announced reform proposals under the following broad headings:

- More robust and efficient market structures;
- Taking account of technological innovations;
- Increased transparency;
- Reinforced supervisory powers and a stricter framework for commodity derivatives markets; and
- Stronger investor protection

This became MiFID II which is scheduled to be in force in January 2017.

1. Introduction

Financial services are one key area which EU leaders and the Commission agreed that urgent reform was necessary across the Community. In 1998, the Commission published its *'Framework for Action'*. This framework evolved into an *Action Plan* which was adopted by the European Commission on 11 May 1999. The Action Plan suggests indicative priorities and time-scales for legislative and other measures to tackle three strategic objectives, namely ensuring a Single Market for wholesale financial services, open and secure retail markets and state-of-the-art prudential rules and supervision. Annual reports on the progress against the action plan are the best summaries of recent developments within the EU on financial services regulation.

2. Investment Services Directive 2004/39/EC

At the time of the Action Plan, the single market passport for investment firms was provided for in the 1993 Investment Services Directive.[1] The Commission argued that the Directive was out of date given market changes. A revised version would seek to bring greater harmony between national rules and establish equivalent standards of investor protection across the EEC. The Commission's proposal was announced on 19 November 2002.[2] The Directive was finally adopted on the 27 April 2004. The accompanying EU press release stated:

> The Directive will allow investment firms, banks and exchanges to provide their services across borders on the basis of their home country authorisation. It will bring closer into line national rules on the provision of investment services and the operation of exchanges, with the ultimate aim of creating a single European "securities rule book". It will benefit investors, issuers and market participants by promoting efficient and competitive markets, notably by allowing banks and other investment institutions to compete fairly with stock exchanges.
>
> The Directive will considerably enhance investor protection, including by setting minimum standards for the mandate and the powers national competent authorities must have at their disposal and establishing effective mechanisms for real-time cooperation in investigating and pursuing breaches of the Directive.
>
> The final text maintains the principle of a pre-trade transparency obligation whereby "internalisers" (i.e. firms trading outside regulated markets) would be obliged to disclose the prices at which they will be willing to buy from and/or to sell to their clients. However, it limits this disclosure obligation to transactions up to "standard market size", defined as the "average size" for the orders executed in the market. This will guarantee that European wholesale markets will not be subject to the rule and that wholesale broker-dealers will not be subjected to significant risks in their role as market makers.
>
> The Directive also includes a set of protective measures for "internalisers" when they are obliged to quote, so that they can provide this essential service to their customers without incurring undesirable risks. These measures include the possibility to update and withdraw their quotes. It will in addition establish a fair marketplace for retail investors and prevent financial institutions from discriminating between small investors, for example by offering some of them undisclosed improvements to prices publicly quoted (so-called 'price improvement').[3]

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1 93/EEC

2 COM(2002)0625; European Commission press release, Investment services: proposed new Directive would protect investors and help investment firms operate EU-wide, IP/02/1706, 19 November 2002

3 EU press release 27 April 2004 (ret'd 13 November 2007)

In March 2005, the Commission produced two working documents outlining possible ways forward for the implementation of the Directive.[4] These documents were revised in May 2005 and in June the Commission released the following press release, which amongst other things announced that the Directive's name had been changed to the Markets in Financial Instruments directive (MiFID):

> The European Commission has proposed a new Directive extending by six months (until 30 October 2006) the deadline by which Member States must write into national law Directive 2004/39/EC on markets in financial instruments ("MiFID"), previously known as the Investment Services Directive. The proposal also gives firms and markets another six months (until 30 April 2007) to adapt their structures and procedures to the new requirements. […] The document is available here:
>
> Internal Market and Services Commissioner Charlie McCreevy said: "We're always prepared to listen to the concerns of Member States and industry. This extension has been made to provide the finance industry with enough time to adequately address the operational and systems issues that arise from the need to implement MIFID Of course, we want to keep delays to a minimum and I urge Member States to adapt their laws, and the industry its practice, ahead of the new deadlines. Meanwhile the consultations on implementing measures will continue."
>
> **Extension of MiFID implementation deadlines**
>
> The Commission decided to propose these deadline extensions following requests from Member States and industry. The proposal also addresses the timing for both the repeal of the current Investment Services Directive (which is replaced by MiFID) and a number of reports on the application of MiFID.
>
> **Consultation on third working document on MiFID**
>
> The working document has been drawn up following technical advice from the Committee of European Securities Regulators (CESR). Its publication is part of the open and transparent process for drawing up technical implementing measures (see IP/02/195).
>
> […]
>
> The document covers some of the proposed implementing measures, in particular: client order handling rules; pre- and post-trade transparency rules for financial institutions executing securities trades internally and equivalent rules for regulated markets and Multilateral Trading Facilities (MTFs); requirements for regulated markets to have clear and transparent rules regarding the admission of financial instruments to trading.

Subsequently, following a proposal by the British Presidency, the implementation date for the Level 2 rules was extended further to November 2007. The Level 2 draft rules were published in February 2006. The accompanying press release stated:

[4] See EU Commission Papers for details

> The proposed measures now being submitted to the European Parliament and the ESC are the so-called "level 2" measures(or "implementation measures") required under the "Lamfalussy" process; they will make operational the principles set out in the "level 1" Directive (***IP/04/546***). The draft measures are being tabled after a very extensive round of intense consultations with all stakeholders over the last two years. They are designed to protect investors and consumers without imposing unnecessary compliance burdens on firms. The measures have been drafted to provide firms with clear and predictable rules and to give greater security to investors and consumers who buy services from foreign firms.
>
> Internal Market Commissioner Charlie McCreevy said: "These Level 1 measures agreed by Parliament and Member States bind us to a basic framework. Our draft Level 2 measures matter. They will provide a high level of protection for investors while keeping red tape to a minimum. They will also increase cross-border competition to the benefit of investors and issuers alike. Our aim is to create a level playing field for firms and to provide clarity for investors, while at the same time ensuring that the new rules can be incorporated into national legal systems as Member States demand. I believe that we have accommodated both of these objectives.[5]

The Directive was approved finally in September 2006. Member States had until 31 January 2007 to implement the legislation and affected firms had until 1 November 2007 to comply. A complete chronology of the directive plus accompanying documentation can be found on the Commission's website.

[5] EU press release 6 February 2006 (ret'd 13 November 2007)

3. Key features

A Financial Services Authority (the then UK Regulator) summary of the key provisions of the directive and their impacts on UK firms is shown below:[6]

Scope

New developments include bringing investment advice within the scope of EU regulation. Commodity derivatives are now a financial instrument for the purposes of MiFID but not all firms trading commodity derivatives are within the scope of the directive. This will depend on whether they fall within an exemption contained in MiFID. We have published draft guidance in CP 06/9 (see above) to assist firms in determining whether they are subject to MiFID.

Organisational requirements

The MiFID requirements are more extensive than the FSA's Handbook in this area. The Handbook will therefore be amended to reflect this. The requirements are likely to cover compliance arrangements, internal systems and controls, outsourcing, record-keeping, management of conflicts of interest, and safeguarding of client financial instruments or money held by firms. CP06/9 (see above) covers the organisational and systems and controls requirements arising both from MiFID and the CRD.

Conduct of business

Common conduct of business standards are established in MiFID. These standards are extensive and will require significant changes to the FSA's Handbook. The starting point for many of these changes is the introduction of a new client categorisation regime which, while presenting similarities with the current FSA regime, differs in some aspects (see below).

Best Execution

The MiFID requirements on best execution will mean some important changes to the current FSA regime. Firms will be required to take all reasonable steps to obtain the best possible deal for their clients taking not just price into consideration, but other factors such as cost, speed and likelihood of execution and settlement. The proposals are broadly consistent with the FSA's CP 154 (October 2002) proposals on best execution. A discussion paper on best execution was published in May 2006 (see above), which considers how the obligations under MiFID may work in practice.

Passporting rights

MiFID improves the operation of the single passport for investment activity. Firms will be able to establish branches in other member states and offer cross-border services in a wider range of cases, following the increase in the scope of the directive. Where a firm establishes a branch in another member state, the host country is responsible for ensuring

6 FSA summary of MiFID impact (ret'd 13 November 2007)

compliance with conduct of business requirements where services are provided within its territory.

Client categorisation

MiFID establishes a common EU framework for classifying counterparties between professional clients, market counterparties and retail clients. The FSA will have to adjust its current counterparty categorisation system to the new framework in a number of areas. A paper which will consider the issues arising from the client categorisation provisions in MiFID, and provide stakeholders with the opportunity to comment, will be published in June 2006.

Regulated market and MTF standards

MiFID establishes new minimum standards for regulated markets (i.e., exchanges) and for multilateral trading facilities (MTFs). FSA's existing standards for recognised investment exchanges and ATSs will require changes (as will the legislative underpinning in the FSMA).

Pre-trade equity transparency

MiFID establishes minimum standards of pre-trade transparency for shares traded on regulated markets and MTFs. It also obliges an investment firm that is a 'systematic internaliser' to undertake what is effectively a public market-making obligation. That is, the firm must provide a definite bid and offer quotes in liquid shares for orders below 'standard market size'.

Post-trade equity transparency

All types of trading in shares, whether on regulated markets, MTFs or OTC, are subject to a post-trade transparency obligation. Exemptions for block trades and the mechanics of publication are detailed in Level 2.

Transaction reporting

Transaction reporting refers to post-trade reporting to regulators and does not refer to the publication of trades. While MiFID requirements will shift the reporting emphasis to the competent authority of the home/host state of firms and not to the competent authority of the regulated markets on which the instrument is traded. While current reporting requirements extend to debt and equity related products, MiFID will require transaction reports for any instrument admitted to trading on a regulated market – including commodity instruments admitted to trading on exchange.

4. The UK response and impact

The Directive will have implications for all financial services firms but the immediate concern in the UK was the impact on cheap, execution-only, share trading, by requiring an expensive fact-find by investment firms. Comparisons were made between the new requirements and the overblown reaction of many to the Y2K (millennium related computer failures) problem

The draft Directive underwent considerable negotiation in its parliamentary stages. The Commission accepted the text in January 2004 and in response to criticism of the Directive and its impact upon execution only dealing and the conditions imposed by transparent price dealing, it issued an explanatory memorandum. The Commission noted:

> In order to enable investors or market participants to assess at any time the terms of a transaction in shares that they are considering and to verify afterwards the conditions in which it was carried out, common rules should be established for the publication of details of completed transactions in shares and for the disclosure of details of current opportunities to trade in shares. These rules are needed to ensure the effective integration of Member State equity markets, to promote the efficiency of the overall price formation process for equity instruments, and to assist the effective operation of "best execution" obligations.
>
> These considerations require a comprehensive transparency regime applicable to all transactions in shares irrespective of their execution by an investment firm on a bilateral basis or through regulated markets or MTFs.[7]

The period since summer 2005, when the draft Level 2 rules were being drawn up saw considerable 'lobbying' by the British financial services industry of the Commissioner Charlie McCreevy.

> Implementation of MiFID in the UK is the responsibility of the Financial Services Authority (FSA). It produced a '*Planning for the MiFID'* paper in November 2005 which contains a summary of the issues that the directive requires the financial services industry to face.[8]

However, when the FSA published its draft new rules, the anticipated wave of complaints did not materialise. Despite an expected short term 'bonanza' of jobs for people to implement and establish the new systems, what finally emerged did not look as bad as some thought. An article from the *Financial Times* reported that:

> Adam Kinsley, director of regulatory strategy at the London Stock Exchange, said many provisions of the directive replicated

[7] Commission explanatory memorandum 21 April 2004. (ret'd 13 November 2007)
[8] Planning for the MiFID (ret'd 13 November 2007)

> practices in London already. "The idea that MiFID needs to cost £100m per firm is out by many multiples,"
>
> […]
>
> Michael McKee, executive- director at the British Bankers' Association, said: "We'd be mad to say we know precisely what MiFID will cost because it introduces new concepts that have yet to be translated into IT requirements. "I don't think it'll turn out to be the dog that never barked (in cost terms) but it might not bark as loudly as some people are suggesting." [9]

The Directive was given effect in the UK by a series of statutory instruments, in particular,

- The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 SI 2007/126
- The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No 3) Order 2006 SI 2006/3384
- The Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2007 SI 2007/125

These were discussed in Committee on 22 January 2007.[10] In his introductory remarks the then Economic Secretary to the Treasury, Ed Balls, said:

> The main implementing regulations cover a wide variety of issues in just over 30 pages of legislation. Despite their length, however, they do not fundamentally remake the UK's regulatory regime under the Financial Services and Markets Act 2000; they essentially amplify existing requirements. Some areas still need to be sorted out, in contact with the Commission and the industry, in the detailed implementation that will follow from the regulations, but we have made substantial progress in a number of areas in a way that has involved consultation with the City. As a result, the directive is broadly welcomed across the UK financial services industry.[11]

The regulations are supplemented by additional rules introduced by the FSA. According to the debate these new rules are 300 pages shorter than those set under the Investment Services Directive that they replaced.

Articles in the press around the date of implementation (November 2007) reflected ongoing concerns and uncertainties. At its most basic, only 14 EU Member States had actually met the implementation deadline.

9 Financial Times, 16 February 2006, *Regulatory overhaul brings rising hopes*
10 Second Delegated Legislation Committee 22 January 2007
11 Ibid c 5

A previous *Financial Times* article commemorating the 20th anniversary of London's 'Big Bang' in October 2006, compared MiFID as possibly going to have as big an impact as the changes in 1986.[12] The same paper's feature article on implementation had downgraded this view: "MiFID arguably most resembles the Y2K computer changeover – without the fear and paranoia".[13] This view is supported by the boom for new computer applications and hardware that the directive imposes due to its best execution requirement. Consultancy fees and the like experienced a minor boom, but nothing like that feared (or hoped for by the companies).

The benefits of MiFID were still being seen as unclear by market participants. Speaking on behalf of institutional investors the Director of the Investment Management Association is quoted as saying:

> In the short-term the impact of Mifid on asset managers is being seen as a cost of change . . . Even now the full effect even of the change is unclear to many firms given delays to, and the fear of uneven, implementation across the EEA.
>
> "But the known unknowns could be said to include changes to market structure, for good or bad; the cost and reliability of trade data, sources for which could be more fragmented; and the extent to which the UK's principle-based regulation can overlay comfortably the EU directives which now dominate this arena. [14]

However, 'best execution' may prove to be a great stimulant for change, perhaps in unintended (by the Commission) ways. The same article continues:

> In recent months, however, it has become increasingly clear that the introduction of Mifid also clears the way for changes in the European equity markets that could have far-reaching consequences for the way in which shares are traded.
>
> It is also clear that, far from just complaining about the cost of Mifid, large financial institutions have also been quietly drawing up plans to turn the new rules to their commercial advantage.
>
> Large London-based investment banks have already grabbed the headlines by unveiling plans to launch Project Turquoise, a new trading platform that will challenge Europe's established stock exchanges. […]
>
> On paper, this represents a huge power shift from brokers to investors. PJ di Giammarino, chief executive of JWG-IT, a Mifid think tank, says brokers should be aware of the possibility that, due to increased reporting requirements, they could be required to justify trades long after they are completed. "They are handing over a loaded gun, which is going to be around for years, and they don't know the quality of the bullets they put in the gun," he says.
>
> The question is whether investors will put these new powers to use. In the case of large pension funds, this seems questionable.

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12 *Many are miffed at the costly MiFID*, Financial Times 26th October 2006,
13 *Mifidiots guide* Financial Times 30 October 2007
14 *Long term beneficiaries yet to emerge*, Financial Times 30 October 2007

The Financial Services Authority, the UK's financial watchdog, has for the past few years been attempting to increase the transparency of trading costs in an effort to encourage institutional investors to push for a harder bargain.

However, this relies on part-time trustees of pension funds - the ultimate beneficiaries of any reduction in trading costs - exerting pressure on fund managers, who then in turn should make greater demands of the banks that execute their trades.

Nevertheless, there are signs that large equity houses are planning to use the increased information they will be required to disclose under Mifid as a way to demonstrate their efficiency to clients and win business from rival traders.

Another possibility is that more aggressive investors - particularly hedge funds - will use the "best execution" requirements to challenge trades on which they have lost money. This would be most likely to happen while some banks are still tinkering with their systems. This year, a survey by Thomson Financial and JWG-IT suggested that 68 per cent of firms expected to be challenged under "best execution" in the first three months of 2008. [15]

[15] *Institutions prepare for the consequences*, ibid

5. Expected costs and Benefits of MiFID

5.1 Benefits

In November 2006 the FSA published the results of a thorough review, by *Europe Economics* into the costs and benefits of the directive.[16] The Report was based on four possible scenarios, of which the FSA presumed the second (shown below) was the most likely.

> • **Non-regulatory factors dominate:** natural economic factors represent material barriers to economic integration. This means that the effects of removing regulatory barriers, in terms of promoting innovation, are relatively small. It is the non-regulatory factors that dominate. In this scenario, only a small proportion of the benefits from integration are attributed to MiFID.

On the basis of this scenario the benefits of MifID identified were:

• reduced costs of obtaining and maintaining authorisation;

• reduced costs of compliance;

• reduced costs of establishing and maintaining 'market reputation';

• reduced operating costs;

• improved access to new markets;

• improved prices resulting from best execution and transparency requirements;

• improved functioning of markets;

• reductions in transactions costs due to aggregation effects; and

• increased competition in the publication of firms' data.

Where these benefits could be quantified, they were and the results (as allocated under the heading of the four scenarios are shown in the table on the following page.

[16] *The Overall impact of MifID*, FSA, 24 November 2006. Note, the findings were based on work produced in April 2006

Benefits of MiFID

Quantified, first-round effects

	Scenario			
	Limited Effect	Non-regulatory factors dominate	Contributor to FSAP	Key Measure
Reduced costs of compliance	Zero	£100m	£100m	£100m
Reductions in transactions costs from aggregation effects	Zero	£100m p.a.	£500m p.a.	£1bn p.a.
Realisation of economic value of data	Zero	£1.8m to £2.5m p.a.	£9m to £12.5m p.a.	£18m - £25m p.a.
Extension to range of passportable activities & simplified passporting regime	Zero	Small but material increase in supply	Small but material increase in supply	Small but material increase in supply
Totals (first round effects)	*Zero*	*<£200m p.a.*	*< £610m p.a.*	*<£1.1bn p.a.*
Quantified, second-round effects				
Effects on the cost of equity	Zero	< 1 basis points	3 to 5 basis points	7 to 9 basis points
Effects on the cost of	Zero	<0.2%	<0.5%	<0.1% with potential additional material benefits from increases in the available pool of capital and increased flow of funds
Quantified estimates (linear) [1]	Zero	£600m	£3.3bn	£6.6 bn
Quantified estimates (emerging over time) [2]	Zero	£240m	£1.2bn	£2.4bn

Notes: 1. Assumes second-round benefits arise linearly over a ten-year period.
2. Assumes second round benefits arise over the later three years of a ten-year timeframe.

Source: FSA, 2006, *Overall Impact of MiFID*

The FSA note that:

> The values implied for such second-round effects are potentially substantial, as Table 3 demonstrates – and vary widely with assumptions as to the importance of MiFID in driving single market benefits and the time profile over which those benefits might arise. We think it likely here that such benefits will tend to emerge over the longer term and that beneficial effects of MiFID on the cost of equity are likely to be small in comparison to non-MiFID factors such as innovation, competition, consolidation, taxation and clearing and settlement. All of this suggests that if such second-round benefits do arise, they are more likely to accumulate to the lower range suggested in the table of up to £240 million.[17]

5.2 Costs

The FSA conducted its own research into the costs of MiFID, largely through surveys of affected firms:

> As a broad simplifying assumption, we have grouped firms into categories on the basis of being 'small', 'medium' or 'large' firms. Firms with 100 employees or fewer are taken as 'small'; those with 5000 or more taken as large; and we classified the remainder as 'medium'.
>
> 5.6 The use of employee numbers to approximate firm size was a useful way to simplify the stratification of the sample, and we are comfortable with this approach. We judged that seeking detailed financial data from the sample group of firms and attempting to benchmark firm size based on this was overly complicated for the exercise. To aggregate across the population, we have drawn on

[17] Ibid p 12

our previous work on firm impact ratings and on the responses to the survey, which suggest a reasonable distribution between small, medium and large firms is 75%, 20% and 5% of the population respectively.

Table 5: Estimates of cost per firm, scaled by firm size

Costs of MiFID, £s

	Median	Mean
Small	10,350	210,852
Medium	250,000	8,668,058
Large	7,200,000	8,041,500

1. Figures do not include zero values and blank responses.

5.7 We have used median rather than mean cost estimates for the aggregate estimation, due to the high variability of the data, including the presence of significant outliers (i.e. zero and blank estimates at one end, and estimates considerably larger than the rest of the population at the other). […]. However, in light of the skewed nature of the averages, we do note that some firms may face costs which are substantially higher than the median.

Overall one-off costs of MiFID

	Number	Median	Aggregate cost
Small	1,575 -2,100	10,350	£16.3 million – £21.7 million
Medium	420 - 560	250,000	£105 million – £140 million
Large	105 - 140	7,200,000	£756 million – £1.008 billion
Total			£877 million – £1.17 billion

5.8 It should be noted that the estimates in Table 6 are of the one-off costs of MiFID implementation, while the benefits scenarios estimated by Europe Economics are ongoing benefits. In addition to the one-off costs described above, there will be ongoing costs, which we did not include in our online survey – but which have been estimated for individual areas of cost (described below). If we were to use the estimate of the ratio of one-off to ongoing costs reported in the LECG report namely, that ongoing costs were around 10% of up-front costs – then a plausible estimate of ongoing MiFID costs would be £88 million to £117 million.

6. The Financial crisis and MiFID II

The financial crisis was an occasion for reviewing all aspects of financial regulation and the MiFID regime was no exception. The discovery of huge derivative trading outside of recognised exchanges was seen by many as a possible source of systemic instability. In October 2011 the Commission announced reform proposals under the following broad headings:

- More robust and efficient market structures
- Taking account of technological innovations
- Increased transparency
- Reinforced supervisory powers and a stricter framework for commodity derivatives markets
- Stronger investor protection[18]

Following extensive consultations new rules were agreed to in January 2014. Their content was outlined in a Commission Press release:

> (1) MiFID II introduces a **market structure framework** which closes loopholes and ensures that trading, wherever appropriate, takes place on regulated platforms. To this end, it subjects shares to a trading obligation. It further ensures that investment firms operating an internal matching system which executes client orders in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments on a multilateral basis have to be authorised as a Multilateral trading facility (MTF). It also introduces a new multilateral trading venue, the Organised Trading Facility (OTF), for non-equity instruments to trade on organised multilateral trading platforms.
>
> These rules ensure a level playing field with Regulated Markets (RMs) and MTFs. The neutrality of OTF operators is ensured through restrictions on the use of own capital, including matched principal trading, and discretion in their execution policy. It introduces a trading obligation for shares as well as a trading obligation for derivatives which are eligible for clearing under the European Markets Infrastructure Regulation (EMIR) and are sufficiently liquid. This will move trading in these instruments onto multilateral and well regulated platforms in accordance with the G-20 commitments.
>
> (2) MIFID II increases **equity market transparency** and for the first time establishes a principle of transparency for non-equity instruments such as bonds and derivatives. For equities a double volume cap mechanism limits the use of reference price waivers and negotiated price waivers (4% per venue cap and 8% global cap) together with a requirement for price improvement at the mid-point for the former. Large in scale waivers and order management waivers remains the same as under MiFID I. MiFID II also broadens the pre- and post-trade transparency regime to include non-equity instruments, although pre-trade transparency waivers are available for large orders, request for quote and voice trading. Post trade transparency is provided for all financial instruments with the possibility of deferred publication or volume masking as appropriate.

[18] EU Commission; Press Release 20 October 2011

Rules have also been established to enhance the effective consolidation and disclosure of trading data through the obligation for trading venues to make pre- and post-trade data available on a reasonable commercial basis and through the establishment of a consolidated tape mechanism for post-trade data. These rules are accompanied by the establishment of approved reporting mechanism (ARM) and authorised publication arrangement (APA) for trade reporting and publication.

(3) To meet the G20 commitments, MiFID II provides for **strengthened supervisory powers** and a harmonised position-limits regime for commodity derivatives to improve transparency, support orderly pricing and prevent market abuse. Under this system competent authorities will impose limits on persons' positions in accordance with a methodology for calculation set by the European Securities and Markets Authority (ESMA). It also introduces a position-reporting obligation by category of trader. This will help regulators and market participants to have better information on the functioning of these markets.

(4) A new framework will improve conditions for **competition in the trading and clearing of financial instruments**. This is essential for the integration of efficient and safe EU capital markets. For this purpose, MiFID establishes a harmonised EU regime for non-discriminatory access to trading venues and central counterparties (CCPs).Smaller trading venues and newly established CCPs will benefit from optional transition periods. The non-discriminatory access regime will also apply to benchmarks for trading and clearing purposes. Transitional rules will ensure the smooth application of these provisions.

(4) MiFID II will introduce trading **controls for algorithmic trading activities** which have dramatically increased the speed of trading and can cause systemic risks. These safeguards include the requirement for all algorithmic traders to be properly regulated and to provide liquidity when pursuing a market-making strategy. In addition, investment firms which provide direct electronic access to a trading venue will be required to have in place systems and risk controls to prevent trading that may contribute to a disorderly market or involve market abuse.

(5) **Stronger investor protection** is achieved by introducing better organisational requirements, such as client asset protection or product governance, which also strengthen the role of management bodies. The new regime also provides for strengthened conduct rules such as an extended scope for the appropriateness tests and reinforced information to clients. Independent advice is clearly distinguished from non-independent advice and limitations are imposed on the receipt of commissions (inducements). MiFID also introduces harmonised powers and conditions for ESMA to prohibit or restrict the marketing and distribution of certain financial instruments in well-defined circumstances and similar powers for the European Banking Authority (EBA) in the case of structured deposits. Concerning Packaged Retail Investment Products (PRIPS), the new framework also covers structured deposits and amends the Insurance Mediation Directive (IMD) to introduce some rules for insurance-based investment products.

(6) The agreement strengthens the existing regime to ensure **effective and harmonised administrative sanctions**. The use of criminal sanctions is framed so as to ensure the cooperation between authorities and the transparency of sanctions. A

> harmonised system of strengthened cooperation will improve the effective detection of breaches of MIFID.
>
> (7) A harmonised regime for granting access to EU markets for **firms from third countries** is based on an equivalence assessment of third country jurisdictions by the Commission. The regime applies only to the cross-border provision of investment services and activities provided to professional and eligible counterparties. For a transitional period of three years and then pending equivalence decisions by the Commission, national third-country regimes continue to apply.[19]

The regulations were formed of a new Directive (Directive 2014/65/EU) and a regulation (Regulation 600/2014) MiFIR but often called EMIR. The European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) will have part responsibility for enforcement. Member States had two years to transpose the new rules which will be applicable starting January 2017.

New legislative provisions bringing the regime into force are currently in the process of being finalised. The directive and regulation can be, and it is expected that they will be, supplemented by implementing measures, so-called 'Level 2 legislation', which takes two forms:

- 'delegated acts' which are drafted by the European Commission on the basis of advice by ESMA, and
- 'technical standards' which are drafted by ESMA and approved by the EC

A dedicated page on the Financial Conduct Authority website provides updated information upon implementation.

[19] EU Press release 14 January 2014

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