

MIFID II /MIFIR

Reference documents:

- Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC (insurance mediation) and directive 2011/61/EU (AIFMD) EUOJ L 173/349 12/6/2014
- Regulation 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation 648/2012 (EMIR) EUOJ L 173/84 12/6/2014

Link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_173_R_0009&from=EN

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_173_R_0005&from=EN

http://ec.europa.eu/finance/securities/docs/isd/mifid/its-rts-overview-table_en.pdf

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032752983&dateTexte=&categorieLi en=id>

Entry into force: 2/07/2014 (level 1) – 3/01/2018 (level 2)

Presentation

The proposed texts are a revision of the Markets in Financial Instruments Directive (MiFID), which came into force in November 2007. After 3 and a half years of implementation, this update had been expected, especially since the current MiFID had given rise to various interpretations in its transposition into national laws, resulting in over-regulation in certain Member States.

Moreover, the Commission wanted to adapt the Directive to the changes having taken place in the financial markets over recent years: new trading venues, new products, innovations stemming from technological developments such as high-frequency trading.

It also wanted to draw the lessons from the 2008 financial crisis and integrate the recommendations made by the G20 in Pittsburg in September 2009 concerning the need to improve the transparency and surveillance of certain markets, which were less regulated at the time, such as OTC derivatives markets.

As a reminder, the initial version of MiFID laid down a regulatory framework for the provision of investment services to investors (such as brokerage, consulting, trading, portfolio management, underwriting, etc.) by banks and investment companies (investment service providers), but also for the operation of regulated markets, in particular equity markets, by market operators. It also aimed to promote and control the provision of cross-border investment services via the granting of a European passport to investment companies, enabling them to provide their services across the EU either through the free provision of services or through the set-up of a branch. Another significant provision – the rule concerning the concentration of orders on a particular regulated market – authorises investment companies to choose their preferred trading venue(s), in particular the one enabling them to offer their clients the best execution guarantee.

The proposed revision consists of a Regulation (MiFIR) which will be applicable directly and "as is" in the Member States, and a Directive (MiFID II) which will require transposition in the Member States.

The 2 texts (the Directive and the Regulation) must be read jointly as they jointly form the legal framework governing the requirements applicable to Investment Companies (ICs), Regulated Markets (RMs) and providers of data reporting services.

The proposed changes are numerous and significant. The main provisions contained in the 2 texts are the following:

MiFID2:

With the new Regulation MIFIR, MiFID 2 aims to overcome problems that emerged during the implementation of MiFID which, since 2007, has prevented Member States from requiring that negotiations take place on some exchanges.

The Directive **strengthens the framework for the regulation of markets in financial instruments**, including where trading in such markets takes place over-the-counter (OTC), in order to increase transparency, better protect investors, reinforce confidence, address unregulated areas, and ensure that supervisors are granted adequate powers to fulfil their tasks. It contains the provisions governing the authorisation of the business, the acquisition of qualifying holding, the exercise of the freedom of establishment and of the freedom to provide services, the operating conditions for investment firms to ensure investor protection, the powers of supervisory authorities of home and host Member States and the regime for imposing sanctions.

The main elements of the new Directive are the following:

Enhancing the regulatory framework: the Directive aims to move the negotiation organised financial instruments **towards multilateral and well-regulated trading platforms**. Strict transparency rules prohibit anonymous trading of shares and other equity instruments, which is an obstacle to a fair and efficient price formation. As a result, all trading platforms, that is, regulated markets, the systems of multilateral trading (*multilateral trading facilities* - MTF) as well as the new systems of organised trading facility (OTF) should apply **transparent and non-discriminatory access rules**.

Corporate governance: the Directive provides that Member States shall ensure that the management body of an investment firm defines, oversees and is accountable for the implementation of the governance arrangements that ensure **effective and prudent management** of the investment firm including the segregation of duties in the investment firm and the prevention of conflicts of interest, and in a manner that promotes the integrity of the market and the interest of clients.

Protection of investors: taking account of the increasing complexity of services and instruments, the Directive introduced a certain degree of harmonisation to offer investors a high level of protection across the Union. It also requires that investment firms should act in accordance with the **best interests of their clients**. Investment firms should accordingly understand the features of the financial instruments offered or recommended.

The investment firms which manufacture financial instruments should ensure that those products are manufactured to **meet the needs of an identified target market of end clients** within the relevant category of clients (retail customers, professionals and counterparties).

These companies are also required to inform customers about the fact that the **advice** is offered on an independent basis and the risks associated with the recommended products and investment strategies. When advice is provided on an independent basis **a sufficient range** of different product providers' products should be assessed prior to making a personal recommendation.

To **further protect consumers**, it is also appropriate to ensure that investment firms do not **remunerate or assess the performance of their own staff** in a way that conflicts with the firm's duty to act in the best interests of their clients, for example through remuneration, sales targets or otherwise which provide an incentive for recommending or selling a particular financial instrument.

Staff who advise on or sell investment products to retail clients possess an **appropriate level of knowledge and competence** in relation to the products offered. In addition, all information, including marketing communications, addressed by the investment firm to clients or potential clients should be **fair, clear and not misleading**.

Adaptation of the legislation to technological developments: the Directive regulates the risks arising from high frequency algorithmic trading where a trading system analyses data or signals from the market at high speed and then sends or updates large numbers of orders within a very short time period in response to that analysis.

Both investment firms and trading venues should ensure **robust measures** are in place to ensure that algorithmic trading or high-frequency algorithmic trading techniques do not create a disorderly market and cannot be used for abusive purposes. Trading venues should also ensure their trading systems are resilient and properly tested to deal with increased order flows or market stresses and that controls are in place, such as **'circuit breakers'**, to temporarily halt trading or constrain it if there are sudden unexpected price movements.

Commodity derivatives: in order to prevent market abuses, the competent authorities, in line with the methodology for calculation determined by ESMA, establish and apply **position limits on the size of a net position** which a person can hold at all times in commodity derivatives traded on trading venues and economically equivalent OTC contracts.

With regard to the **energy derivative contracts** (petrol, charbon), a transition period is provided up to July 2020 for the application of the clearing obligation and the margining requirements established in the [Regulation \(EU\) No 648/2012](#). The Commission should, by 1 January 2018, prepare a report assessing the potential impact on energy prices and the functioning of the energy market of the expiry of the transitional period.

Cooperation: the Directive reinforces the measures concerning the exchange of information between national competent authorities as well as the reciprocal obligations of authorities for assistance and cooperation.

The competent authorities should provide each other with the relevant information for the exercise of their functions in order to **detect and to prevent offences** under the Directive.

Third country firms: the Directive creates a harmonised legal framework regulating the access of third country firms to the EU market. It provides that a Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients in its territory establish **a branch** in that Member State.

The branch shall acquire a prior authorisation by the competent authorities of that Member State in accordance with certain conditions. The requesting firm should be, among other, properly authorised, and paying due regard to any FATF recommendations in the context of anti-money laundering and countering the financing of terrorism

MiFIR

With the directive MIFID II, **Regulation MiFIR aims to set up a new framework establishing uniform requirements relating to financial instruments** in relation to: i) disclosure of trade data, ii) reporting of transactions to the competent authorities, iii) trading of derivatives and shares on organised venues, iv) non-discriminatory access to CCPs, to trading venues and benchmarks, v) product intervention powers and powers on position management and position limits, vi) provision of investment services or activities by third-country firms.

The main elements of the new Regulation are the following:

Market structure and transparency: the new rules are intended to ensure that trading in financial instruments is carried out, as far as possible, on **organised and appropriately regulated venues**, in a totally transparent manner, both before and after the negotiation.

The Regulation introduced a **new trading venue category** of organised trading facility (**OTF – organised trading facility**) for bonds, structured finance products, emissions allowances and derivatives. This new category should be appropriately regulated and complement the existing types of trading venues.

All trading platforms, that is, regulated markets, the systems of multilateral trading (*multilateral trading facilities* - MTF) as well as the new systems of organised trading facility (OTF) should apply **transparent and non-discriminatory access rules**.

Appropriately **calibrated** transparency requirements therefore need to apply to all types of trading venues, and to all financial instruments traded thereon.

Access to central counterparties (CCPs): rules for accessing CCPs under transparent and non-discriminatory conditions are also introduced. CCPs should accept to clear transactions executed in different trading venues, to the extent that those venues comply with the operational and technical requirements established by the CCP, including the risk management **requirements**.

Waivers and Volume Cap Mechanism: the competent authorities may, in certain cases, be able to waive the obligation for market operators and investment firms operating a trading venue to make public the pre-transparency requirements. In order to **ensure that the use of the waivers provided for does not unduly harm price formation**, trading under those waivers is restricted as follows:

- the percentage of trading in a financial instrument carried out on a trading venue under those waivers should be **limited to 4% of the total volume of trading** in that financial instrument on all trading venues across the Union over the previous 12 months;
- overall Union trading in a financial instrument carried out under those waivers shall be **limited to 8% of the total volume of trading** in that financial instrument on all trading venues across the Union over the previous 12 months.

Trading obligation: to ensure more trading takes place on regulated trading venues and systematic internalisers, the Regulation introduces, so far as investment companies are concerned, a trading obligation for shares admitted to trading on a regulated market or traded on a trading venue.

Statement on transactions in financial instruments: these transactions should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms.

Investment firms shall keep at the disposal of the competent authority, **for five years**, the relevant data relating to all orders and all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client.

Investor protection and integrity of financial markets: the new regime introduces an explicit mechanism for prohibiting or **restricting the marketing, distribution and sale** of any financial instrument or structured deposit giving rise to serious concerns regarding investor protection, orderly functioning and integrity of financial markets, or commodities markets, or the stability of the whole or part of the financial system.

So as to **limit speculation on commodity derivatives**, the Regulation provides that measures to be taken to counteract possible negative externalities on commodities markets from activities on financial markets. This is true, in particular, for agricultural commodity markets the purpose of which is to ensure a secure supply of food for the population. In those cases, the measures should be coordinated with the authorities competent for the commodity markets concerned.

The European Securities and Markets Authority (ESMA) should be able to request information from any person regarding their position in relation to a derivative contract, to request that position to be reduced, as well as to limit the ability of persons to undertake individual transactions in relation to commodity derivatives.

Provision of services by third-country firms: in harmonising the current rules, the new regime guarantees certainty and uniform treatment of third-country firms accessing the Union. It ensures that an **assessment of effective equivalence has been carried out by the Commission** in relation to the prudential and business conduct framework of third countries and should provide for a comparable level of protection to clients in the Union receiving services by third-country firms.

The Commission should ensure that the application of third-country requirements i) does not prevent Union investors and issuers from investing in or obtaining funding from third countries, or ii) prevent third-country investors and issuers from investing, raising capital or obtaining other financial services in Union markets unless that is necessary for objective and evidence-based prudential reasons.

Current Situation:

- **Entry into application of level 2**

The entry into force of level 2 has been postponed. The new date is the 3rd of January 2018 (one year delay).

However, on the 10th of February the European Commission has proposed a one year extension to the entry into application of MIFID2 (the new date is the 3rd of January 2018) and therefore has published two drafts of texts aiming at modifying all the dates standing in the text and related to the former timeline.

Man should also note that this postponement concerns the whole package – the Commission has concluded that a partial postponement may have undesirable effects – will have an impact on two other regulations (MAR and CSDR) since they both make reference to the “3rd January 2017”.

On the 18th of May 2016 the European Parliament and the council have approved the delay. The official agreement will be done on the 7th of June 2016.

- ESMA's Technical Advices

ESMA has issued its Technical Advices in December 2014. The European Commission should write and adopt the level 2 texts based on those advices. There should be one delegated directive and two delegated regulations. The delegated directive will focus on parts of articles 16, 24 & 25 (investor protection) of the directive level1. The new texts will then have to go to the European Parliament and to the Council for a non objection period.

The European Commission has published:

- The two delegated acts – a directive (on the 7th of April 2016) and a regulation (on the 25th of April 2016) both related to the level 1 directive (MIFID2).
- On the 16th of May a regulation in relation to the level 1 regulation (MIFIR)

Now the level 2, coming from the ESMA's technical advices, has been achieved.

- ESMA's draft RTS/ITS (the RTS are more in relation with the investor protection)

ESMA has transmitted to the European Commission

- 6 draft RTS/ITS upon third country firms on the 29 of June 2015
- 27 RTS and 1 ITS on the 28th of September 2015, mainly on market infrastructures and transparency
- 8 ITS on the 11 of December 2015 upon several topics (cooperation between competent authorities, suspension / removal of financial instrument from trading, sanctions, APA-CTP-ARM, ...)

The European Commission has published on its website a list of those Technical Standards indicating their status as well as the deadline for adoption / non objection (see paragraph “links” in this document). For most of them the non objection period is over now so that they should be published in the coming days in the EU JO. The EC has also adopted end of July 2016 the RTS 22 which covers the regulatory reporting requirements.

- Transposition of the level 1

Member States have now until the 3rd July 2018 to transpose the level 1 and level 2 Directives (due to the one year delay). French regulators decided to maintain the momentum. The level 1 has been transposed (publication in the French JO on the 23rd of June). However, the MIFID2/MIFIR requirements assets managers (when managing also UCITS or AIF) will have to comply with are not clearly defined.

- Future level 3

ESMA is working on business cases regarding the regulatory reporting. The consultation period on these cases is now close. AFTI and AMAFI have made a jointly answer to the Consultation Paper.

ESMA is also currently working on a future Q&A.

It seems that ESMA foresees guidelines rather than a Q&A for the product governance part. This means there will be a new Consultation Paper before.

Main steps:

- Level 1

Publication of both EP reports (from Markus Ferber) on 16 March 2012 (MIFID II) and 27 March 2012 (MIFIR)

Vote in ECON on 26 September 2012

Vote in plenary on 26 October 2012 (no legislative resolution has been voter in order to let some latitude to the negotiations with the Council and the Commission (Trilog)

June.2013: Council General approach (COREPER) - on the 17 - agreed by the ECOFIN on the 21st

September 2013 : Trilog on investor protection, commodities, scope of exemption (4th), on trading requirements, centralised clearing, pre- and post-trade, reporting (11th), on sanctions, third countries regime (25th)

1/10/2013: Commission non paper on investor protection: inducement, safekeeping, product intervention

October 2013: Trilog on investor protection (9th), on sponsored access, HFT, centralized trading obligations (derivatives), pre and post transparency / reporting, third country regime (21st)

November 2013: Trilog on access, sanctions, redress, commodities, investor protection (possible) (6th), on market structure, ESMA powers, scope, exemptions (7th), on market structure, transparency, trading and clearing obligation and access (21st)

December 2013: Trilog on market structure, transparency, investor protection, third country regime, sanctions, access (4th), last Trilog meeting of the year on commodities, third country regime, and market access (18th)

Collapse of Trilog / No agreement reached under Lithuanian Presidency.

14.01.2014: Political agreement (last Trilog)

19/2/2014: Approval by the COREPER of the compromise agreement with EP

15/4/2014: Adoption by the EP

14/5/2014: Council formal approval

12/6/2014: Publication in the Official Journal of the European Union

Entry into force: 20 days after OJEU publication, ie. 2 July 2014

- Level 2

23/4/2014: EC Mandate to ESMA

22/5/2014: ESMA Consultations (deadline: 1^{er} august 2014)

July 2014: 2 ESMA Open hearing

19/12/2014: Publication of the ESMA technical advice

19/12/2014: publication of a Consultation paper (following the discussion paper of last summer) for the drafting of RTS/ITS. Deadline for responses: 2 march 2015.

- Level 3

23/12/2015: Consultation Paper on the future guidelines (essentially on the regulatory reporting)

Next Steps:

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Adoption by the EP and the Council of the level 2 texts
Publication of the RTS/ITS previously adopted by the EC
Publication of the ESMA's guidelines related to the regulatory reporting

Contact list: EU Commission / EU Parliament

EC: Maria Teresa Fabregas Fernandez (Markt G3 Securities Markets)

EP: Markus Ferber (DE, PPE) – Rapporteur

- Goebbels (LU, S&D) – Shadow
- Schmidt (SE, ALDE) – Shadow
- Giegold – Canfin (DE-FR, Greens) – Shadow
- Swinburne (UK, ECR) – Shadow

Contact SGSS/SMI: Marie-Claire de Saint-Exupéry et Sylvie Bonduelle (marie-claire.de-saint-exupery@sgss.socgen.com; sylvie.bonduelle@sgss.socgen.com)