Linklaters

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Revision of the Markets in Financial Instruments Directive (MiFID II) Fact Sheet

Background to MiFID II and its purpose

The Markets in Financial Instruments Directive ("**MiFID**") came into force 1 November 2007 as part of the European Single Market Programme to remove barriers to cross border financial services within Europe, foster a competitive and level playing field between EEA trading venues for financial instruments and ensure appropriate levels of financial service consumer/investor protections across the EEA.

The Commission conducted a review of certain provisions of MiFID as required by the terms of the Directive. The financial crisis in 2008 exposed weaknesses in the regime, including a lack of transparency, particularly in the non-equities market. The legislation also needed to be updated to keep pace with the growing complexity of technology and financial innovation.

The Commission published a paper consulting on changes to MiFID in December 2010, followed by formal proposals for a recast Directive ("**MiFID II**") and new Regulation ("**MiFIR**") in October 2011.

Progress to date

1 November 2007	MiFID came into force
December 2010	Commission launched an initial consultation to revise MiFID
October 2011	Commission published proposals for a revised MiFID (MiFID II and MiFIR)
26 October 2012	European Parliament adopted amendments to proposals
21 June 2013	EU Council agreed its general approach
September 2013	Commencement of trilogue discussions between Commission, Parliament, and Council
14 January 2014	Political agreement reached on MiFID II proposals
3 March 2014	ECON approved political agreement on MiFID II/ MiFIR
15 April 2014	European Parliament adopted MiFID II/ MiFIR in plenary
23 April 2014	Commission mandated European Securities and Markets Authority ("**ESMA**") with regard to delegated and implementing acts
13 May 2014	Council adopted MiFID II / MiFIR
22 May 2014	ESMA publishes discussion and consultation papers on Level 2 measures (consultation period closes on 1 August 2014)
12 June 2014	MiFID II / MiFIR published in the Official Journal
2 July 2014	MiFID II / MiFIR came into force (20 days after publication in the Official Journal)

Current status of MiFID II / MiFIR

Political agreement on the MiFID proposals was reached on 14 January 2014, after several months of trilogue negotiations between the Commission, Parliament, and Council. Parliament endorsed the MiFID II and MiFIR on 15 April 2014, and the Council adopted the legislation on 13 May 2014. The Commission and some Member States have entered statements into the minutes of Coreper (the Permanent Representatives Committee of the Council), registering disagreements with some elements of the final text and suggesting reviews of some issues.

Agreed changes to the MiFID regime include the introduction of a new type of trading venue, the organised trading facility ("**OTF**"), to capture non-equity trading that falls outside the current regime. Investor protections have been strengthened, and new curbs imposed on high frequency and commodity trading. Pre- and post-trade transparency has been increased, and a new regime for third country firms introduced. The changes also include new requirements for non-discriminatory access to trading venues, central counterparties, and benchmarks, and harmonised supervisory powers and sanctions across the EU.

These and other provisions of MiFID II and MiFIR are discussed in greater detail below. These descriptions are based on the texts approved by the Parliament.

Next steps and timetable for implementation

MiFID II and MiFIR were published in the Official Journal on 12 June 2014 and entered into force on 2 July 2014, 20 days after publication. As a directive, MiFID II must be transposed into national law by Member States by 3 July 2016, whereas MiFIR will have direct effect as a regulation. Both MiFID II and MiFIR must generally apply within Member States by 3 January 2017.

Many of the provisions of MiFID II and MiFIR will be implemented by means of technical standards to be drafted by ESMA and approved by the Commission. The Commission will also enact delegated acts based on advice given by ESMA.

The Commission formally requested ESMA to provide technical advice on possible delegated acts and implementing acts on 23 April 2014. The Commission has asked ESMA to provide its technical advice within six months after entry into force of the new legislation. The Commission will seek to adopt the delegated acts six months after ESMA provides its technical advice, and intends to publish final delegated acts no later than 18 months after MiFID II and MiFIR enter into force. In preparing the delegated acts, the Commission will also consult with experts appointed by the Member States within the Expert Group of the European Securities Committee.

On 22 May 2014, ESMA published a discussion paper regarding technical standards as well as a consultation paper regarding its technical advice on delegated acts. The consultation will end on 1 August 2014. ESMA will provide its technical advice to the Commission towards the end of 2014. A consultation paper with draft technical standards will be published at the end of 2014 or early in 2015, with a view to delivering final technical standards to the Commission by July 2015.

The Parliament and the Council will have three months to object to the delegated acts and regulatory technical standards adopted by the Commission, which period can be extended by an additional three months. If the Commission makes no changes to the regulatory technical standards drafted by ESMA, the review period is only one month, extendable by an additional month. Implementing acts are not reviewable by the Parliament and Council.

The Commission will report on certain aspects of MiFID II within two years of the application date.

Broad overview of the key changes set out in MiFID II/ MiFIR			
Trading Venues: OTFs and MTFs	Derivatives Trading	Trading Rules for Equity Instruments	Non-Discriminatory Access
Trading Venues: Systems Resilience, Circuit Breakers and Electronic Trading	Investment Firms: Algorithmic Trading and Direct Electronic Access	Commodity Derivative Position Limits and Reporting	Third Country Firms
Pre- and Post-Trade Transparency Requirements	Transaction Reporting and Recordkeeping	Investor Protection	Organisational Requirements
Corporate Governance	Scope of MiFID	MiFID Exemptions	Optional Exemptions
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1 Trading Venues: Organised Trading Facilities and Multilateral Trading Facilities (MiFID II, recitals 13, 14, 112, Articles 4(1)(22), 4(1)(23), 18-20; MIFIR, recitals 7-9, Article 23) (Back to Top)

An "organised trading facility" is defined in MiFIR as a multilateral system, other than a regulated market ("**RM**") or multilateral trading facility ("**MTF**"), in which multiple third-party buying and selling interests are able to interact in the system in a way that results in a contract under MiFID. The final agreement limits OTFs to bonds, structured finance products, emission allowances and derivatives, unlike the original Commission proposal, which would have permitted OTFs to trade equity instruments as well.

The OTF regime is intended to capture broker crossing systems, which fall outside the current MiFID regime for regulating RMs, MTFs, and systematic internalisers ("**SIs**"), as well as systems for trading liquid derivatives that are eligible for clearing under the European Market Infrastructure Regulation ("**EMIR**"). Unlike RMs and MTFs, operators of OTFs will have discretion as to how to execute orders, subject to pre-transparency and best execution obligations.

Operators of OTFs are prohibited from executing client orders against their proprietary capital, which distinguishes them from SIs. However, the Commission's original proposal was amended so that OTF operators will be permitted to engage in matched principal trading in some cases, provided both sides of the transaction are executed simultaneously and the client consents. OTF operators may also deal on own account in illiquid sovereign debt.

The requirements for MTFs have been aligned with those of RMs so that investment firms and market operators operating an MTF will be required to have (a) systems and measures in place to manage, identify and mitigate risks, (b) effective arrangements for the efficient and timely finalisation of transactions executed under its systems and (c) sufficient financial resources for its orderly functioning. Both OTFs and MTFs will be required to have arrangements in place to identify and manage conflicts of interest.

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Investment firms that operate an internal matching system which executes client orders in shares and other equity instruments on a multilateral basis must be authorised as an MTF. This provision was not included in the Commission's original proposal.

2 Derivatives Trading (MiFIR, recitals 25-27, Articles 28-34) (Back to Top)

In order to meet G20 commitments, derivative contracts declared subject to the trading obligation by ESMA will be required to be traded on an RM, MTF, or OTF. Transactions may be conducted on an OTF even if the derivative is traded on an RM or MTF. The trading obligation will only apply where both counterparties are subject to clearing obligations under EMIR, and excludes intra-group transactions and portfolio compression exercises. ESMA will determine which classes of derivatives are subject to the trading obligation. In order for the trading obligation to take effect, the class of derivatives must be sufficiently liquid.

Derivatives that are subject to the trading obligation may be traded on third country trading venues, provided the Commission has adopted an equivalence decision and the third country provides for equivalent recognition of EU trading venues. The Commission may also adopt implementing acts that would enable parties to comply with equivalent third country trading rules in lieu of EU requirements where one of the counterparties is established in that third country.

The trading obligation also applies to third country entities that would be subject to the clearing obligation if they were established in the EU, which transact in derivatives declared subject to the trading obligation, if the contract has a direct, substantial, and foreseeable effect within the EU or if necessary to prevent evasion of MiFIR.

MiFIR also includes a new requirement that transactions in cleared derivatives must be submitted and accepted for clearing as quickly as technologically practicable using automated systems, including derivatives not subject to the clearing obligation under EMIR.

3 Trading Rules for Equity Instruments (MiFIR, Article 23) (Back to Top)

Transactions in shares admitted to trading on an RM or traded on a trading venue must take place on an RM, MTF or SI, or an equivalent third country trading venue, unless they are (a) non-systematic, ad-hoc, irregular and infrequent, or (b) carried out between eligible and/or professional counterparties and do not contribute to the price discovery process. Investment firms that operate an internal matching system which executes client orders in shares and other equity instruments on a multilateral basis must be authorised as an MTF. These provisions were not included in the Commission's proposal.

4 Non-Discriminatory Access (MiFIR, recitals 28, 37-40, Articles 35-38, 52, 54, 55) (Back to Top)

The Commission proposal aimed to promote competition by mandating non-discriminatory access to central counterparties ("**CCPs**"), trading venues, and benchmarks. This was one of the most controversial issues within trilogue. As agreed, CCPs will be required to clear transactions executed in different trading venues on a non-discriminatory and transparent basis, including as regards collateral requirements, netting, cross-margining, and fees, subject to the CCP's operational and technical requirements. Trading venues must provide trade feeds on a transparent and non-discriminatory basis to CCPs, including as regards fees, though this does not apply to derivative contracts that are already subject to access obligations under Article 8 of EMIR.

In order to address fungibility concerns, non-discriminatory treatment by a CCP of contracts traded

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on a trading venue will only be required where (a) in the case of collateral and netting, the inclusion of the contracts would not compromise the close-out and other netting procedures of the CCP based on applicable insolvency law, and (b) cross-margining with correlated contracts cleared by the same CCP takes place under a risk model that complies with Article 41 of EMIR. Article 7(1) of EMIR will be amended to include similar language. CCP access will only be permitted if it would not (a) require an interoperability arrangement in the case of non-OTC derivatives (except where the trading venue and all CCPs party to the arrangement have consented and risks from inter-CCP positions are collateralised at a third party) or (b) threaten the functioning of the financial markets, in particular due to liquidity fragmentation, or adversely affect systemic risk. CCPs and trading venues will need to reply to a request for access within three months in the case of transferable securities and money market instruments and six months in the case of exchange-traded derivatives, and will need to make access possible within three months of a positive response. Smaller trading venues (in the case of exchange-traded derivatives) and newly established CCPs (in the case of transferable securities and money market instruments) will benefit from 30-month transitional periods, and transitional arrangements will also apply for exchange-traded derivatives. A trading venue can extend this period by an additional 30 months if it remains below the size threshold. ESMA will conduct a risk assessment to determine whether all exchange-traded derivatives should be subject to a similar transitional period. If ESMA decides that there is no need to exclude exchange-traded derivatives during this time, a CCP or trading venue may nevertheless apply to its competent authority to avail itself of transitional arrangements for exchange-traded derivatives. Licenses, price and data feeds, and access to information about benchmarks used to determine the value of financial instruments must be provided to CCPs and other trading venues on a non-discriminatory basis at a reasonable commercial price within three months following a request. (The Commission would have required access to be made available at the lowest available price, but this was not accepted.) CCPs and trading venues may not enter into agreements with benchmark providers that would limit access by competitors. The benchmark access requirements will not apply until 30 months after application of the Regulation, and new benchmarks will not need to be licensed until 30 months after a financial instrument referencing that benchmark has commenced trading or been admitted to trading. Third country trading venues and CCPs may request access to EU CCPs, trading venues and benchmarks if the Commission has made an equivalence determination with respect to that third country. Third country CCPs must be recognised under Article 25 of EMIR in order to request access to an EU trading venue. In each case, the third country must also provide equivalent access for foreign CCPs and trading venues.
5 Trading Venues: Systems Resilience, Circuit Breakers and Electronic Trading (MiFID II, recitals 59-68, Articles 18(5), 48, 49, 50) (Back to Top) RMs, MTFs, and OTFs will be required to implement systems, procedures and arrangements: • to ensure that their trading systems are resilient, have sufficient capacity, are able to ensure orderly trading under conditions of severe market stress, are fully tested, and are subject to business continuity arrangements; and

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- to reject orders that exceed pre-determined volume and price thresholds or are clearly erroneous.

Algorithmic trading

Trading venues must have systems, procedures and arrangements in place to prevent and manage disorderly trading conditions arising from algorithmic trading systems, including by limiting the ratio of unexecuted orders, slowing order flow, enforcing minimum tick sizes, and requiring members or participants to test algorithms. Minimum tick size regimes must be adopted for shares and equity-like instruments, and ESMA may extend this requirement to other instruments if appropriate. Trading venues must also be able to flag algorithmic trading and make information available to regulators upon request.

Parliament's proposal for a minimum order resting period of half a second was not accepted.

Trading halts

Trading venues must be able to halt or constrain transactions if there is a significant price movement in a short period and, in exceptional cases, to cancel, vary or correct transactions. Parameters for halting trading must be reported to competent authorities. If trading venue that is material in terms of liquidity halts trading, it must notify competent authorities so that a market-wide response can be coordinated.

Direct electronic access

Trading venues must have systems, procedures and arrangements in place to ensure that only authorised investment firms and credit institutions are able to provide direct electronic access, that they retain responsibility for trades executed using that service, and that they assess the suitability of persons to whom access is provided. Trading venues must set appropriate standards and be able to identify trading that takes place using direct electronic access and, if necessary, stop orders. Direct market access that is not in compliance with these requirements must be suspended or terminated.

Market making schemes

Trading venues must enter into agreements with market makers and have schemes in place to ensure a sufficient level of liquidity. The content of such agreements must be notified to competent authorities, and trading venues must monitor and enforce compliance by investment firms.

Co-location services

Rules on co-location services must be transparent, fair, and non-discriminatory.

Fee structures

Fee structures must be transparent, fair, and non-discriminatory and must not create incentives for disorderly trading or market abuse. Venues must impose market making obligations in individual shares or a suitable basket of shares in exchange for any rebates and may impose higher fees on cancelled orders and high frequency traders.

Synchronisation of business clocks

It has also been agreed that trading venues and their participants must synchronise the business clocks they use to record the date and time of reportable events.

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6 Investment Firms: Algorithmic Trading and Direct Electronic Access (MiFID II, recitals 59-68, Article 17) (Back to Top)

Algorithmic trading

Investment firms that engage in algorithmic trading must have in place suitable systems and controls to ensure their trading systems are resilient and have sufficient capacity, are subject to appropriate trading thresholds and limits, and prevent erroneous orders or the system otherwise functioning in a way that could create or contribute to a disorderly market. Firms must have business continuity arrangements in place and ensure that their systems are tested and monitored. They must also have systems and risk controls to ensure that their trading systems can not be used in any way that is contrary to the Market Abuse Regulation or the rules of a trading venue to which they are connected.

Firms engaged in algorithmic trading must notify the competent authorities of their home country and of the relevant trading venue. The home country regulator may request additional details regarding their algorithmic trading strategies and other information, and may communicate this information to the trading venue's regulator upon request. Such firms must keep related records. Firms engaged in high frequency trading must store time sequenced records of all placed orders, including cancellations of orders, executed orders, and quotations on trading venues and make them available to competent authorities upon request.

Algorithmic trading for market making purposes must be carried out continuously during a specified proportion of a trading venue's trading hours, except under exceptional circumstances, in order to provide liquidity on a regular and predictable basis. Firms engaged in algorithmic trading to pursue a market making strategy must enter into a binding written agreement with the trading venue and have effective systems and controls in place to ensure they comply with their obligations.

Direct electronic access

A firm which provides direct electronic access to a trading venue must have systems and controls in place to review the suitability of clients using the service, to prevent clients from exceeding pre-set trading and credit thresholds, to monitor trading, and to implement appropriate risk controls. Direct electronic access without these controls is prohibited. The investment firm will be responsible for ensuring that its clients comply with the requirements of MiFID II and the rules of the trading venue. Rights and obligations must be set out in a binding written agreement between the firm and the client, under which the firm retains responsibility under MiFID.

As with algorithmic trading, a firm providing direct electronic access to a trading venue must notify its home regulator and that of the trading venue. The home regulator may require a description of the firm's systems and controls and evidence that they have been applied, and may communicate this information to the trading venue's regulator upon request. Such firms must also keep related records.

Clearing services

Firms that act as a general clearing member for their clients must have systems and controls in place to ensure that clearing services are only provided to suitable persons who meet clear criteria and that requirements are imposed on these persons to reduce risks to the firm and the market. Rights and obligations must be set out in a binding written agreement.

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7 Commodity Derivative Position Limits and Reporting (MiFID II, recitals 125-131, Articles 57, 58, 69(2)(j), (o), (p); MIFIR, recitals 30, 31, Articles 44, 45) (Back to Top)

Position limits

Position limits were another hotly contested topic within trilogue. As agreed, Member State regulators will set limits on the size of a net position that a person can hold at all times in commodity derivatives traded on trading venues as well as economically equivalent OTC contracts. Limits will not apply to positions held by or on behalf of non-financial entities for hedging purposes.

The limits will be established in accordance with a methodology for calculation determined by ESMA, on the basis of all positions held by a person individually and on its behalf at aggregate group level, in order to prevent market abuse and support orderly pricing and settlement conditions. The methodology will take a number of factors into account, including maturity of the contracts, the deliverable supply of the underlying commodities, the overall open interest in the contract and other financial instruments having the same underlying, market volatility, the number and size of market participants, the characteristics of the underlying commodity market, and the development of new contracts. Member States can apply stricter limits on a temporary basis in exceptional cases.

The limits will be intended to ensure, in particular, the convergence between prices of derivatives in the delivery month and spot prices for the underlying commodity. Competent authorities will reset position limits whenever there is a significant change in deliverable supply or open interest or another significant change in the market.

ESMA will facilitate and coordinate the setting of position limits by competent authorities. If a commodity derivative is traded in more than one jurisdiction, the regulator of the trading venue where the largest amount of trading takes place will set a single position limit for all trading in that contract. The competent authorities of a Member State may impose sanctions for breaches (a) by persons in that Member State or abroad of position limits set in that Member State and (b) by persons in that Member State of position limits set in that or any other Member State.

Trading venues that trade commodity derivatives will be required to apply position management controls, enabling them to (a) monitor open interest positions, (b) access information, including documentation, regarding the size and purpose of a position or exposure, the beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market, and (c) require persons to terminate or reduce positions on a temporary or permanent basis or to put liquidity back into the market at an agreed price and volume on a temporary basis in order to mitigate the effects of a large or dominant position. Operators of a trading venue must provide the competent authority with details of these controls.

Member State regulators will also be able to demand information, including documentation, regarding the size or purpose of a position or exposure entered into via a commodity derivative and any assets or liabilities in the underlying market, request persons to reduce the size of their position or exposure, and limit the ability of a person from entering into a commodity derivative. ESMA will play a coordinating role and, in exceptional circumstances, may exercise similar powers.

Position Reporting

As with position limits, these points were highly political, and several amendments to the

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Commission's original proposal were agreed. Trading venues will be required to publish aggregate positions in commodity derivatives or emission allowances or derivatives thereof by category of person on a weekly basis, but only when the number of persons and their open positions exceed minimum thresholds. Position holders will be classified by the nature of their main business, taking account of any applicable authorisation. Reports must specify the number of long and short positions by category, changes thereto since the previous report, the percentage of the total open interest represented by each category, and the number of position holders in each category. They must also distinguish between hedging transactions and other positions. Weekly reports must be communicated to Member State regulators and to ESMA for centralised publication.

In addition, trading venues must provide Member State regulators at least daily with a complete breakdown of positions held by all persons, including members or participants and their clients. Members or participants of RMs and MTFs and clients of OTFs must provide reports on at least a daily basis to the relevant trading venue with details of their own positions and those of their direct and indirect clients through contracts traded on that trading venue.

Investment firms trading in contracts outside a trading venue must provide a breakdown on at least a daily basis to the relevant competent authority of their positions and those of their direct and indirect clients in commodity derivatives traded on a trading venue and equivalent OTC contracts. These reports must be provided to the competent authority of the trading venue where the commodity derivative is traded or, where the commodity derivative is traded in significant volumes on trading venues in more than one jurisdiction, to the central competent authority. They must also distinguish between hedging transactions and other positions.

8 Third Country Firms (MiFID II, recitals 109-111, Articles 39-43; MiFIR, recitals 41-44, Articles 46-49, 54) (Back to Top)

The treatment of third country firms was also the subject of considerable debate within trilogue. The Commission had proposed a passporting regime for third country firms providing services to retail clients from a branch in a Member State as well as those providing services to eligible counterparties ("**ECPs**") and professional clients ("**PCs**") without a branch. In each case, the Commission would have required a determination that the firm was subject to equivalent supervision in its home jurisdiction.

Retail clients

As agreed, MiFID II provides that a Member State may require third country firms to establish a branch in that Member State in order to provide services to retail clients and clients treated as professionals upon request, unless at the exclusive initiative of the client. No equivalence decision by the Commission is required, and no passporting regime is provided for. If a Member State does require a branch, it will have to have sufficient initial capital, its management body must comply with MiFID requirements, and the firm must belong to an investor compensation scheme. The firm must also be authorised and supervised in its home country, cooperation arrangements between the third country and Member State regulators must be in place, and the third country must have agreed to exchange tax information with that Member State. MiFID II also provides harmonised procedures for the granting and withdrawal of authorisations by competent authorities.

ECPs and PCs

A third country firm without an EU branch may provide services to ECPs and PCs anywhere in the EU if it has registered with ESMA and the Commission has adopted and not withdrawn an equivalence decision. The firm must also be authorised and supervised in its home country, and

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cooperation arrangements must be in place between its home country regulator and ESMA. Before providing services, firms must inform EU clients that they are only allowed to provide services to ECPs and PCs and that they are not subject to supervision in the EU. They must also offer to submit any dispute to the jurisdiction of a court or arbitral tribunal in a Member State. Third country firms may provide services to ECPs and PCs without registration at the exclusive initiative of the client.

A third country firm with a branch in a Member State may provide services to ECPs and PCs in other Member States without establishing new branches, provided the Commission has adopted an equivalence decision. The firm must also comply with information requirements for the cross-border provision of services and activities. The branch will remain subject to the supervision of the Member State where it is authorised, but the competent authorities of different Member States may establish cooperation arrangements to ensure investor protection.

A third country regime may be determined to be equivalent if firms are subject to equivalent prudential and business conduct requirements and the third country has an effective equivalent system for recognising third country investment firms. Member States may allow third country firms to provide services to ECPs and PCs in accordance with national regimes in the absence of an equivalence decision or if a decision is no longer in effect. In addition, third country firms will be able to continue to provide services in accordance with national regimes for a transitional period of three years after the Commission has adopted an equivalence decision.

Member States may not impose additional requirements on authorised branches or firms beyond what is provided in MiFID II and MiFIR, and may not treat third country firms more favourably than EU firms.

9 Pre- and Post-Trade Transparency Requirements (MiFIR, recitals 1, 5, 10, 12-18, 22, 23, 26, Articles 3-22; MiFID II, recitals 117-119, Articles 64, 65) (Back to Top)

The Commission's proposals for pre- and post-trade transparency were also controversial. The current requirements under MiFID, which are limited to shares, will be extended to cover other equity-like instruments such as depositary receipts and exchange-traded funds, as well as non-equity instruments including bonds, structured finance products, emission allowances, and derivatives, in each case including actionable indications of interest. Pre-trade transparency may be waived, and post-trade disclosures deferred, in certain circumstances. Pre- and post-trade transparency for non-equity instruments may also be temporarily suspended if liquidity falls below a given threshold. While identical transparency requirements will apply to all trading venues, SIs will be subject to a different, tailored pre-trade transparency regime.

Pre-trade transparency and waivers

The reference price waiver, which the Commission had deleted, has been retained for equity instruments, and a negotiated price waiver added, subject to volume caps of 4% per trading venue and 8% overall across the EU. ESMA will determine how these limits are applied. Large-in-scale and order management waivers will also be available.

In the case of non-equity instruments, if a waiver has been granted, indicative pre-trade bid and offer prices must be published continuously during trading hours. Waivers will be available for large-in-scale orders and orders held pending disclosure, actionable indications of interest in request-for-quote and voice trading systems above a specified size, derivatives not subject to the trading obligation, and other financial instruments for which there is no liquid market. Derivative

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transactions of non-financial counterparties entered into for hedging purposes will be exempt from pre-trade transparency.

For both equity and non-equity instruments, pre-trade transparency requirements will be calibrated for different types of trading systems including order-book, quote-driven, hybrid, and periodic auction trading systems. Pre-trade transparency for non-equity instruments will also be calibrated for voice trading systems.

Member State regulators may withdraw waivers for non-equity instruments in certain circumstances. Regulators may also temporarily suspend pre-trade transparency requirements for non-equity instruments if liquidity falls below a specified threshold. ESMA will coordinate the operation of waivers and suspension of obligations by competent authorities.

Deferred publication of post-trade information

As is currently the case for shares, the publication of post-trade information may be deferred for equity instruments in some cases. ESMA may mediate disputes between the competent authorities of different Member States regarding the authorisation of deferred publication.

Deferred publication of trade information for non-equity instruments may be authorised for large-in-scale transactions, illiquid financial instruments and transactions above a specified size that would expose liquidity providers to undue risk. When authorising deferred publication, regulators may (a) request the publication of limited and/or aggregated information during the deferral period, (b) allow aggregated publication or the omission of volume information for an extended period, and (c) in the case of sovereign debt transactions, allow aggregated disclosures for an indefinite period. Regulators may also temporarily suspend post-trade transparency requirements for non-equity instruments if liquidity falls below a specified threshold.

Availability

Pre- and post-trade information must be made available by trading venues to the public separately and on a reasonable commercial basis and ensure non-discriminatory access. Information must be made available free of charge 15 minutes after publication.

Firm quote requirements for systematic internalisers

In the case of SIs, as proposed by the Commission, firm quote requirements are extended to non-equity and other equity-like instruments traded on a trading venue and for which there is a liquid market, in addition to shares. The minimum quote size for equity instruments must be at least 10% of the standard market size. For structured finance products, emission allowances and derivatives traded on a trading venue for which there is no liquid market, SIs must disclose quotes to clients on request if they agree to provide a quote, subject to pre-trade transparency waivers.

SIs must make their published firm quotes for non-equity instruments available to their other clients, though they may decide the clients to whom they give access to quotes, as is the case for equity instruments. SIs will undertake to enter into transactions in non-equity instruments with any other client under the published conditions when the quoted size is below a specified amount. SIs won’t be required to publish a firm quote for financial instruments that fall below a liquidity threshold. Firm quote requirements will not apply to non-equity transactions above a specified size that would expose liquidity providers to undue risk.

Post-trade disclosure by investment firms

Post-trade disclosure requirements for investment firms, including SIs, have been extended to

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include non-equity and equity-like instruments and instruments traded on an MTF or OTF. This information will be published through an "approved publication arrangement" ("**APA**") meeting the requirements of MiFID II, which will make the information public as close to real time as technologically possible on a reasonable commercial basis and free of charge 15 minutes after publication. As with post-trade transparency for trading venues, post-trade disclosures by investment firms may be deferred in certain circumstances.

Consolidated tape

The agreed version of MiFID II also includes an amended version of the Commission's proposals for a consolidated tape provider ("**CTP**"), which will consolidate post-trade information into a continuous electronic data stream and made it publicly available as close to real time as technologically possible on a reasonable commercial basis and free of charge after 15 minutes. Both APAs and CTPs are new concepts under MiFID II and MiFIR. As of yet, no CTP has been identified.

Requirements for a non-equity consolidated tape will not take effect until 50 months after MiFID II enters into force. ESMA will develop data standards and formats for information to be published and will report on the functioning of the consolidated tape for equities and for non-equities within two years of the application date for each.

10 Transaction Reporting and Recordkeeping (MiFIR, recitals 32-36, Articles 24-27; MiFID, Article 66) (Back to Top)

Reporting

While investment firms will still have to report details of their transactions in instruments admitted to trading or traded on an RM or MTF (and now also an OTF) to their national competent authorities, they will now also have to report transactions in financial instruments (a) where admission to trading has been requested, and (b) where the underlying is a financial instrument (or an index or basket of financial instruments) traded on a trading venue. The reporting obligation applies regardless of whether the transaction is carried out on the trading venue.

The reported information must include the identity of the client (using legal entity identifiers where appropriate) and the person or algorithm responsible for the investment decision and execution. Short sales and any applicable waivers must also be identified. In the case of commodity derivatives, the report must indicate whether the transaction reduces risk in an objectively measurable way in accordance with MiFID II.

Investment firms that transmit orders must include the relevant information in the transmission of that order. Alternatively, the firm may choose to report the executed order as a transaction, in which case the report must state that it pertains to a transmitted order. Trading venues will be required to report transactions by firms not subject to MiFIR.

Reports can be made by approved reporting mechanisms ("**ARMs**") or trading venues on behalf of investment firms. Trading venues must have adequate security mechanisms, resources and back-up facilities in place to carry out this function. The firm will remain responsible for the completeness, accuracy and timely submission of the reports, other than failures attributable to the ARM or trading venue (provided the firm takes reasonable steps to ensure the completeness, accuracy and timeliness of those reports). If there are errors or omissions, a corrected report must be submitted to the competent authority.

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Transactions reported in accordance with EMIR to a trade repository which is approved as an ARM will satisfy the MiFIR reporting requirement, provided the other requirements of MiFIR have also been met.

Trading venues must provide competent authorities with identifying instrument reference data for the purposes of transaction reporting. SIs must also provide reference data for instruments subject to reporting. The reference data must be ready to submit in an electronic and standardised format before trading commences in a financial instrument and must be updated whenever there are changes to data in respect of that instrument.

Recordkeeping

Recordkeeping requirements for investment firms will be extended to trading venues, and ESMA will be able to access investment firm records. Investment firms must keep data relating to all orders (as well as transactions). Records maintained by trading venues must include data that constitute the characteristics of an order, including data that link orders to executed transactions.

11 Investor Protection (MiFID II, recitals 70-106, Articles 24-30) (Back to Top)

A number of amendments and additions have been made to the investor protection provisions of MiFID. The design, marketing, and distribution of products by investment firms must be tailored to the target market. Remuneration and sales targets should not incentivise staff to recommend inappropriate financial instruments to retail clients. Member States may impose additional requirements in exceptional circumstances.

Enhanced information to clients

When bundling products or services, a firm must tell its clients whether the individual components can be purchased separately and provide evidence of the costs and charges for each component. Firms must also adequately inform retail clients of the different components and how their interaction modifies the risks.

Information regarding costs and associated charges must relate to both investment and ancillary services and include the cost of advice, the cost of the financial instrument and how the client may pay for it, and any third party payments. Information about costs and charges, including costs and charges in connection with the investment service and the financial instrument, which are not caused by underlying market risk, must be aggregated, with an itemised breakdown provided upon client request. This information must be provided to the client at least annually during the life of the investment.

Firms must also indicate whether they will provide the client with a periodic assessment of the suitability of recommended financial instruments.

Inducements

Fees, commissions, and non-monetary benefits from or to third parties must be designed to enhance client service and be consistent with the firm's duty to act in its clients' best interest and must also be disclosed to clients. Firms providing independent advice or portfolio management may not accept any fees, commissions, or monetary or non-monetary benefits from third parties in relation to the advice or service. Minor non-monetary benefits that could enhance the quality of service may be permitted, provided they are disclosed and do not impair compliance with the firm's duty to act in its client's best interest.

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Independent advice

Firms must tell clients in advance if investment advice is given on an independent basis and whether it is based on a broad or more restricted analysis of the market and, in particular, whether the range is limited to financial instruments issued or provided by related entities. Firms that provide advice on an independent basis must assess a sufficiently large number and diversity of financial instruments available on the market and should not limit the range to instruments issued by the firm or related entities.

Suitability and appropriateness

Member States will publish criteria used to assess knowledge and competence and will require investment firms to ensure and demonstrate to regulators on request that advisors possess the necessary knowledge and competence to fulfil their obligations.

Investment firms providing investment advice or portfolio management must take into account the client's risk tolerance and ability to bear losses. When an investment firm recommends a bundled package of services or products, the overall package must be suitable.

Reports to clients on the service provided must include periodic communications, taking into account the type and complexity of financial instruments and the nature of the service provided. Firms providing investment advice must provide a statement of suitability before the transaction is made or immediately after the client becomes bound, specifying how the advice given meets the preferences, objectives, and other characteristics of the retail client. In the case of portfolio management, the periodic report must contain an updated suitability statement.

Changes to "execution only" regime

The list of financial instruments in MiFID that are covered by the "execution only" regime has been modified. The list now excludes shares in structured UCITS and non-UCITS funds, shares that embed a derivative, bonds not admitted to trading on an RM, equivalent third country market, or MTF, and bonds and money market instruments whose structure makes it difficult for the client to understand the risk involved. Transactions that involve loans or credits to investors to enable them to carry out the transaction are also excluded from the regime, though this will not apply to existing credit limits of loans, current accounts, and overdraft facilities. Structured deposits have been added to the "execution only" regime, other than those incorporating a structure that makes it difficult for a client to understand the risk of return or the cost of exiting the product before term.

Best execution

Best execution for retail clients will be determined based on total consideration, including the price of the financial instrument and all costs and expenses related to execution. When assessing different execution venues, firms must take into account their own commissions and costs for executing the order on different venues. Firms may not receive any remuneration, discount or non-monetary benefit for routing orders to a particular venue that would be in breach of requirements on conflicts of interest or inducements.

Trading venues, SIs and execution venues must publish at least annually data relating to the quality of execution of transactions on that venue. Investment firms must inform clients where orders have been executed. Firms that execute client orders must also publish annually, for each class of financial instrument, the top five execution venues in terms of client orders, as well as information on quality of execution.

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Tied agents All Member States are required to allow firms to appoint tied agents. However, Member States have retained their discretion to allow tied agents to handle clients' money and financial instruments. The Commission would have prohibited this, but some Member States see it as necessary for the widespread provision of financial services. **Eligible counterparties** Obligations relating to transactions with eligible counterparties have been expanded to include information requirements and reports on the service provided. Firms must act honestly, fairly and professionally and communicate in a way that is fair, clear and not misleading, taking into account the nature of the eligible counterparty and its business.
12 Organisational Requirements (MiFID II, recitals 52, 57, 71, Article 16) (Back to Top) **Product approval and target markets** Organisational requirements have been expanded to include an approval process for new financial instruments and adaptations of existing financial instruments before they are marketed or distributed to clients, specifying the target market and ensuring that risks to the target market have been identified and that the distribution strategy is consistent with the target market. Financial instruments should be regularly reviewed to assess whether the product and distribution strategy remain appropriate for the target market. Distributors should be provided with information regarding the financial instrument and the product approval process, including the target market. When a firm offers or recommends financial instruments that it does not manufacture, it should have arrangements in place to obtain this information and understand the characteristics and target market of each financial instrument. **Information security** Firms should have security mechanisms in place to guarantee the security and authentication of the means of transfer of information, minimise the risk of data corruption and unauthorised access, and prevent information leakage in order to maintain confidentiality. **Recording of telephone conversations and electronic communications** Firms must keep records relating to all services, activities, and transactions, including recordings of telephone conversations and electronic communications relating to transactions concluded when dealing on own account and client order services relating to the reception, transmission, and execution of client orders. This includes conversations and communications intended to result in transactions and client order services, even if the transactions or services are not concluded. Clients must be informed that conversations and communications will be recorded. Firms must take all reasonable steps to record relevant conversations and communications made using equipment provided or permitted by the firm. Orders can be placed through other channels, provided communications are made using a durable medium and meetings are documented. Firms must take reasonable steps to prevent employees and contractors engaging in telephone conversations and electronic communications on privately owned equipment that the firm is unable to record or copy. These records must be provided to the client upon request and kept for five years, or seven years if requested by the competent authority. **Safeguarding client assets** In order to safeguard client assets, the Commission prohibited investment firms from concluding

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title transfer collateral arrangements with retail clients for the purpose of securing or otherwise covering their obligations. This was agreed.

Member States may impose additional requirements on the safeguarding of client assets beyond what is required by MiFID II, provided they are objectively justified and proportionate so as to address specific risks to investor protection or market integrity. Member States must give advance notice of any such additional requirements to the Commission, which will provide an opinion on their proportionality and justification.

13 Corporate Governance (MiFID II, recitals 53-55, Articles 9, 45, 63) (Back to Top)

MiFID II includes new requirements for management bodies of investment firms, RMs, and data reporting services providers.

Investment firms

Investment firms and their management bodies must comply with the corporate governance provisions of CRD IV (Directive 2013/36/EU), though members of the management body may hold one additional non-executive directorship than allowed under that Directive. Management bodies must be accountable for the implementation of governance arrangements that ensure effective and prudent management, including the segregation of duties and prevention of conflicts of interest in a manner that promotes market integrity and client interests. The management body must monitor and periodically assess the effectiveness of the governance arrangements and take steps to address deficiencies.

As set out in Article 88 of CRD IV, the management body must:

- have overall responsibility for the firm and approve and oversee the implementation of its strategic objectives, risk strategy and internal governance;
- ensure the integrity of the accounting and financial reporting systems;
- oversee the process of disclosure and communications; and
- oversee senior management.

The chairman of a firm may not simultaneously act as the chief executive officer of the same firm, unless justified by the firm and authorised by competent authorities.

The composition of the management body must reflect an adequate range of experiences and be sufficiently diverse. Members of the management body must:

- commit sufficient time to perform their functions;
- comply with numerical limits on the number of executive and non-executive directorships they can hold;
- have adequate collective knowledge, skills and experience to be able to understand the firm’s activities and main risks; and
- act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of senior management where necessary and oversee and monitor management decision-making.

Firms must devote adequate resources for the induction and training of members of the management body.

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Some large or complex firms may also be required to establish nomination committees composed of non-executive members of the management body. Among other things, the nomination committee must take diversity into account when proposing candidates. The committee must also decide on a target for the representation of the underrepresented gender in the management body and prepare a policy for meeting that target. The target, policy and implementation must be made public. The nomination committee should also try to ensure that the management body is not dominated by one individual or a small group of individuals. These provisions are intended to accommodate the different governance structures used across Member States, including unitary and dual board structures. **RMs and data reporting services providers** RMs are subject to governance requirements similar to those for investment firms, including with regard to numerical limits on directorships, diversity, and nomination committees. Data reporting services providers are subject to more limited governance requirements, with no numerical limits on directorships or requirements for diversity or nomination committees.
14 Scope of MiFID (MiFID II, recitals 9-11, 39, 40, 87-89, Annex I, Sections A, B, C) (Back to Top) The entities, activities, and instruments to which MiFID will apply have been amended. **Investment services and activities, ancillary services** The operation of an OTF has been added to Annex I, Section A of the Directive as an investment service and activity to reflect the introduction of the new OTF platform. Safekeeping and administration of financial instruments for client accounts will remain an ancillary activity within Section B. (The Commission had proposed to reclassify it as an investment service.) Maintaining securities accounts at the top tier level is excluded, as it will be covered by the CSD Regulation. **Financial instruments** Emission allowances, consisting of units recognised under the EU directive on emissions trading (2003/87/EC), have been added to Annex I, Section C of the Directive. Physically settled derivatives related to emission allowances have also been added. (Previously only cash-settled were caught.) Commodity derivatives that can be physically settled and that are traded on an OTF have been added as well, though this was a heavily negotiated point. It was agreed that wholesale energy products (as defined in REMIT (Regulation 1227/2011)), including natural gas and electricity contracts, that are traded on an OTF and must be physically settled will be exempt. The meaning of “physically settled” will be clarified in a delegated act to avoid any loopholes. Derivative contracts related to coal or oil entered into by non-financial counterparties that are traded on an OTF and must be physically settled will benefit from a phase-in period of 42 months for the clearing and margining obligations of EMIR, but will be subject to other EMIR requirements. ESMA will take this into account when developing technical standards specifying the clearing obligation. This period may be extended by the Commission, once by two years and once by a year. The Commission will prepare a report by 1 January 2018 evaluating whether these contracts should be subject to these requirements in light of the potential impact on energy prices and the functioning of the energy markets and, if appropriate, submit a legislative proposal to the Parliament and Council.

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The Parliament had proposed to add insurance contracts linked to investment-related instruments so that they would be subject to MiFID. This was not agreed. Instead, these issues will be picked up in the ongoing review of the Insurance Mediation Directive (2002/92/EC).

Structured deposits

Some provisions of MiFID have been extended to credit institutions and investment firms when selling or advising clients in relation to structured deposits.

15 MiFID Exemptions (MiFID II, recitals 18-25, 35, 41, Article 2(1)) (Back to Top)

A number of changes have been made to the list of MiFID exemptions.

"Dealing on own account exemption"

Currently, persons who do not provide investment services other than dealing on own account are exempt, unless they are (a) market makers or (b) deal on own account outside an RM or MTF on an organised, frequent and systematic basis by providing a system accessible to third parties. This exemption has been amended so that it will not apply to dealing on own account in commodity derivatives, emission allowances or derivatives thereof. Members of and participants in an RM or MTF, persons who have direct market access to a trading venue, and persons engaged in high frequency trading will also be excluded from the exemption.

Emission allowances trading by installation operators

MiFID II will not apply to operators with compliance obligations under the EU directive on emissions trading (2003/87/EC) who, when dealing in emission allowances, do not execute client orders or provide any investment services or perform any investment activities other than dealing on own account, provided they do not apply a high frequency trading technique.

"Ancillary business exemption"

The "dealing on own account" limb of this exemption will be restricted to commodity derivatives, emission allowances or derivatives thereof, and will include market makers (provided that market making in commodity derivatives is not their main business). As proposed by the Commission, it will exclude persons who deal on own account by executing client orders. The exemption also applies to persons who provide investment services (other than dealing on own account) in commodity derivatives, emission allowances or derivatives thereof to the customers or suppliers of their main business. The activity must be ancillary on an individual and group basis, and high frequency traders will not be able to use the exemption. Firms will be required to notify regulators annually that they are using the exemption and, upon request, report the basis on which they consider an activity to be ancillary.

Commodities dealer exemption

As proposed by the Commission, the exemption for persons who deal on own account in commodities and commodities derivatives has been deleted.

"Locals" exemption

The exemption for "locals" (i.e. those who exclusively deal on own account on derivatives and cash markets for hedging purposes or who deal for accounts of other market members or make prices for them, where performance is guaranteed by clearing members) has been deleted.

Commodity related systems

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The Commission's proposed new exemption for transmission system operators has been amended to include persons acting as service providers on behalf of transmission system operators, as well as certain other persons, and limited to relevant activities in commodity derivatives. The exemption will not apply to the operation of a secondary market.

Central Securities Depositaries

Central Securities Depositaries ("**CSDs**") will be authorised under the CSD Regulation, which was agreed in trilogue in December 2013. They will be subject to MiFID rules where they carry out MiFID services or activities that are not expressly mentioned in the Annex to the CSD Regulation.

16 Optional Exemptions (MiFID II, recitals 29, 42, Article 3) (Back to Top)

The scope of optional exemptions by Member States has been extended to include persons who provide investment services exclusively in (a) commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of local electricity undertakings and/or natural gas undertakings or (b) emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of operators of installations subject to the EU directive on emissions trading (2003/87/EC), provided in each case that these clients jointly hold 100% of the capital or of the voting rights of such persons, exercise joint control and would be exempt under the ancillary business exemption if they carried out the investment services themselves.

Any persons to whom optional exemptions apply must be subject to analogous Member State requirements regarding authorisation and supervision, conduct of business, and organisational requirements. Exempted persons must also be covered by an investor compensation scheme or professional indemnity insurance providing equivalent protection to clients. A grandfathering period of five years will apply to Member States that currently require exempted persons to be jointly and severally liable with UCITS management companies for whom they act as intermediaries by receiving and transmitting orders and/or providing investment advice.

17 Product Intervention (MiFIR, recital 29, Articles 39-43) (Back to Top)

National regulators, ESMA, and the European Banking Authority ("**EBA**") will have new product intervention powers. ESMA and national regulators will monitor the market for financial instruments and, where appropriate, ban or restrict financial instruments, activities or practices. In some cases, they may proactively investigate new products or financial instruments before they are marketed or sold and ban or restrict them on a precautionary basis. A competent authority must notify ESMA and other Member State regulators before it takes action, though it may take urgent action with less notice in exceptional circumstances. ESMA will play a coordinating role.

Competent authorities and the EBA will have similar powers, and the EBA will play a similar coordinating role, with respect to structured deposits.

Competent authorities may impose a ban or restriction if, among other things, the product, activity, or practice gives rise to significant investor protection concerns or poses a threat to financial or commodity markets or to the stability of the financial system in one or more Member States, or if a derivative has a detrimental effect on price formation in the underlying market.

ESMA or the EBA may take action to address a significant investor protection concern or a threat to markets or to the stability of the financial system in the EU if applicable regulatory requirements do not address the threat and competent authorities have not taken adequate action. In the case of agricultural commodities derivatives, ESMA will be required to consult with the regulators of

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physical agricultural markets before taking action.

18 Supervisory Powers and Sanctions (MiFID II, recitals 141-150, Articles 69-75) (Back to Top)

More defined measures have been introduced giving Member States less flexibility with regard to powers, remedies and sanctions. In some cases the Commission's original proposal has been amended to be consistent with the Market Abuse Regulation. Changes to the current regime include the following:

- Data traffic records held by telecommunications operators may be required if permitted by national law, there is reasonable suspicion of a breach, and they may be relevant.
- Competent authorities will be given the power to suspend the marketing or sale of investment products in certain circumstances, and require the removal of a person from the management board of an investment firm or market operator.
- In the case of a breach, sanctions and other measures can be applied to members of the management body and other responsible persons, subject to national law. Mechanisms must be in place to ensure that compensation is paid or other remedial action taken for financial loss or damage as a result of a breach of MiFID II or MiFIR.
- Sanctions or measures imposed by competent authorities must be published and reported to ESMA, though this does not apply to sanctions of an investigatory nature. Publication may be delayed, made anonymous, or avoided altogether if it would be disproportionate or would jeopardise the stability of the financial markets or an ongoing investigation. Appeals and annulments of earlier decisions must also be published. Information must remain on the official website for at least five years or, in the case personal information, in accordance with data protection rules.
- With respect to a number of specific infringements, appropriate administrative measures will be made available to regulators, including (a) public statements, (b) cease and desist orders, (c) withdrawal or suspension of authorisation, (d) temporary or, for repeated serious breaches, permanent bans against members of the management body and other responsible individuals, (e) temporary bans on investment firms being members of or participants in trading venues, and (f) maximum fines of up to 10% of total annual turnover (in the case of legal persons), at least EUR 5 million (in the case or legal or natural persons), and at least twice the benefit derived, where this can be determined. Competent authorities may impose sanctions exceeding these amounts or additional types of sanctions.
- When determining the type and level of sanctions, competent authorities must take specified factors (including turnover or income and net assets of the responsible person) into account.
- Competent authorities may exercise their sanctioning powers directly, in collaboration with other authorities, by delegation to other entities and by application to judicial authorities.
- With regard to agricultural commodity derivatives, competent authorities should cooperate with and report to public bodies responsible for regulating physical agricultural markets.
- Competent authorities must implement effective mechanisms to encourage reporting of potential or actual breaches, including protections for whistle blowers. Secure

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communication channels for such reports should be established. Employees who report breaches must be protected against retaliation, discrimination, and other types of unfair treatment, at a minimum. The identity of the parties must be protected at all stages of the procedures unless disclosure is required by national law in the context of further investigation or subsequent judicial proceedings. Investment firms and other entities subject to MiFID, including branches of third country firms, must enable employees to report potential or actual breaches internally through an independent and autonomous channel.

Member States may decide not to impose administrative sanctions on infringements which are already subject to national criminal law as long as Member States communicate to the Commission the relevant criminal law provisions and measures are in place to cooperate and exchange information with other Member States and with ESMA. Failure to cooperate or comply in an investigation or with an inspection or request will also be regarded as a breach of the Directive.

19 SME Growth Markets (MiFID II, recitals 132-135, Article 33) (Back to Top)

In order to help small and medium-sized entities ("**SMEs**") access capital, MiFID II introduces a new category of MTFs known as SME growth markets. At least 50% of the issuers whose financial instruments are traded on an SME growth market should be SMEs. For these purposes, an SME is defined as a company that had an average market capitalisation of less than EUR 200,000,000 on the basis of end-year quotes for the previous three calendar years.

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Contacts

For further information please contact:

London

Michael Kent
Partner, Financial Regulation Group
(44 20) 7456 3772
michael.kent@linklaters.com

Peter Bevan
Partner, Financial Regulation Group
(44 20) 7456 3776
peter.bevan@linklaters.com

Martyn Hopper
Partner, Financial Regulation Group
(44 20) 7456 5126
martyn.hopper@linklaters.com

Nadia Swann
Partner, Financial Regulation Group
(44 20) 7456 5232
nadia.swann@linklaters.com

Carl Fernandes
Partner, Financial Regulation Group
(44 20) 7456 3002
carl.fernandes@linklaters.com

Sarah Parkhouse
Partner, Financial Regulation Group
(44 20) 7456 2674
sarah.parkhouse@linklaters.com

Harry Eddis
Partner, Financial Regulation Group
(44 20) 7456 3724
harry.eddis@linklaters.com

Nikunj Kiri
Partner, Financial Regulation Group
(44 20) 7456 3256
nikunj.kiri@linklaters.com

Amsterdam

Henk Arnold Sijnja
Partner, Financial Regulation Group
(31 20) 799 6260
henkarnold.sijnja@linklaters.com

Brussels

Etienne Dessy
Counsel, Banking and Capital Markets
(32 2) 501 90 69
etienne.dessy@linklaters.com

Frankfurt

Andreas Steck
Partner, Financial Regulation Group
(49 69) 710 03 416
andreas.steck@linklaters.com

Frederik Winter
Partner, Financial Regulation Group
(49 69) 710 03 407
frederik.winter@linklaters.com

Luxembourg

Hermann Beythan
Partner, Financial Regulation Group
(352) 2608 8234
hermann.beythan@linklaters.com

New York

Robin Maxwell
Partner, Financial Regulation Group
(1) 212 903 9147
robin.maxwell@linklaters.com

Madrid

Paloma Fierro
Partner, Financial Regulation Group
(34 91) 399 6054
paloma.fierro@linklaters.com

Hong Kong

Stephen Fletcher
Partner, Financial Regulation Group
(852) 2901 5028
stephen.fletcher@linklaters.com

Umesh Kumar
Partner, Financial Regulation Group
(852) 2842 4894
umesh.kumar@linklaters.com

Milan

Valentina Zadra
Counsel, Capital Markets
(39 02) 88 393 5340
valentina.zadra@linklaters.com

Paris

Marc Perrone
Partner, Financial Regulation Group
(33 1) 56 43 58 67
marc.perrone@linklaters.com

Linklaters

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Author: Christopher Bernard and Kirsty Gibson

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