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# The Practical Implications of MiFID II

by

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23rd June 2016 | by

The second Markets in Financial Instruments Directive, 2014/65/EU (MiFID II) was introduced following years of discussion between the European Union and EU Member States.

## Overview

The recent global financial crisis was thought to have exposed some areas falling within the sphere of the Markets in Financial Instruments Directive 2004/39/EU (MiFID I). MiFID II is being introduced to reinforce the integrity of the financial system by seeking to ensure it is more transparent and responsible.

MiFID II is accompanied by Regulation (EU) No. 600/2014 (MiFIR) which will have direct effect in all Member States from its implementation date. Together, the MiFID II Directive and MiFIR are collectively known as MiFID II. MiFID II repeals MiFID I.

Generally, the MiFID II Directive concerns:

- trading venues;
- rules on third country firms; and
- authorisation of those entities regulated under MiFID II.

MiFIR deals with:

- transparency in relation to reporting;
- increased competition; and
- the trading of derivatives.

A number of provisions of MiFID II are applicable at present but these are almost exclusively obligations placed on the European Securities and Markets Authority (ESMA) to produce supplemental materials under MiFID II. Full implementation of MiFID II was expected to be effective from 3 January 2017, but it has now been delayed until **3 January 2018**.

Member States are required to implement legislation in order to transpose the MiFID II Directive into national law by **3 July 2017**.

## Who is affected by MiFID II?

MiFID II applies to investment firms, market operators (including trading venues) and data reporting service providers. It also applies to third country investment firms providing investment services or performing investment activities through the establishment of a branch in the EU or by way of direct access to clients in Member States.

Credit institutions providing or performing investment services are also caught within the scope of MiFID II.

Undertakings for Collective Investment in Transferable Securities (UCITS) management companies or Alternative Investment Fund Managers (AIFMs) may also be caught within the scope of MiFID II when providing investment services. In particular, a number of MiFID II organisational requirements and conduct of business rules apply to AIFMs and UCITS management companies when providing investment services.

Also caught within the scope of MiFID II are Financial Counterparties, Non-Financial Counterparties and Central Counterparties, all of which are governed by the European Markets Infrastructure Regulation (EMIR).

A full list of investment services included within the scope of MiFID II is contained at [Appendix 1](#) of this document. Any entity or individual carrying out the investment services and activities listed in Appendix 1 are caught within the scope of MiFID II. All such entities and individuals must ensure that they have the appropriate MiFID authorisation.

## The extended scope of MiFID II

MiFID II widens the scope of MiFID I: it captures those investment firms already subject to MiFID I and it also captures a significant number of investment firms that did not previously require authorisation under MiFID. This will include commodity trading firms.

MiFID II also expands on the range of financial instruments which are caught within its scope by including emissions allowances and physically settled derivatives that relate to emission allowances. A full list of the financial instruments subject to MiFID II is contained at [Appendix 2](#).

MiFID II creates a new investment service that will require authorisation; **that of operating an organised trading facility (OTF)**. OTFs are multilateral systems where multiple third parties buy and sell interests in bonds, structured finance products, emissions allowances or derivatives. OTFs are those systems which are neither regulated markets nor multilateral trading facilities (MTFs). The net result of these changes means that more trading will now take place on regulated trading venues.

Conduct of business rules, trading venues and transaction reporting are just an example of areas affected by MiFID II.

Investor protection is also a key feature of MiFID II. Firms within scope of MiFID II should begin to consider what steps they can take now, in advance of the implementation date, to ensure readiness for what could be costly and substantial requirements. This could include:

- additional record keeping systems;
- facilities for the recording of telephone conversations;
- updates to product governance policies; and
- enhanced best execution policies.

## MiFID II: Where we are now?

MiFID II was originally due to come into force on 3 January 2017 in all EU Member States, but it will now come into force exactly one year later, on **3 January 2018**.

The possibility of a delay had been well flagged. ESMA has been tasked with drafting regulatory technical standards and implementing technical standards (the "Standards") to accompany MiFID II. While drafting the Standards, ESMA hinted in October 2015 that a delay to MiFID II was possible due to the complex technical infrastructure needed to ensure MiFID II is implemented properly.

Both market participants within the scope of MiFID II and national competent authorities will need to build systems which adhere to the transparency rules and data reporting requirements under MiFID II. The European Commission has estimated that once MiFID II comes into effect, ESMA will collect data from 300 trading venues regarding fifteen million financial instruments.

The delay to the implementation of MiFID II is not expected to affect the drafting of the Level 2 legislation which will supplement the provisions of MiFID II.

Since April 2016, the European Commission has adopted a number of delegated regulations and delegated directives which supplement the MiFID II Directive. The supplementing legislation is currently being considered by the Council of the EU and the European Parliament prior to the publication of each piece of legislation in the Official Journal.

In brief, the delegated regulations and delegated directives concern the following issues:

- safeguarding of client instruments and funds;
- product governance rules;
- inducements;
- organisational requirements;
- operating conditions for investment firms;
- benchmarks; and
- data reporting service providers.

The extension to the effective date of MiFID II does bring welcome relief and legal certainty for market participants. The move could also help reduce market disruption, which was likely if MiFID II was in force prior to all necessary information systems being built.

**In the coming weeks, we will be releasing a number of articles covering specific parts of MiFID II which will be of relevance to market participants especially MiFID firms and asset managers.**

**If you would like further information on MiFID II and how it may affect your business, please contact a member of the Financial Services team.**

# About the Authors