

The Authors



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Introduction

MiFID II (Markets in Financial Instruments Directive), that applies from January 2017, enhances the existing regulatory regime for trading and selling of financial instruments. The main purpose of the regime is to increase investor protection, by promoting transparency and safer markets through enhanced reporting, policy and documentation standards. The scope of this framework is now extended to the majority of non-equity products and a significant part of OTC derivatives.

In accordance with their MiFID II mandate, the European Securities and Market Authority (ESMA) has issued detailed Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) on MiFID II, hereafter jointly referred to as the Technical Standards (TS). After publishing an initial Discussion Paper (DP) in May 2014 and two Consultation Papers (CP) in December 2014 and February 2015, ESMA published on 28 September a final draft, which incorporates feedback from various stakeholder groups.

This document provides an overview of the main changes between the initial Draft Technical Requirements for MiFID II and the final Draft Technical Standards (TS=RTS and/or ITS).

ESMA will also provide Technical Standards on two other related regulatory frameworks, MAR (Market Abuse Regulation) and CDSR (Central Securities Depository Regulation).

MAR aims at enhancing investor protection and market integrity and also requires ESMA to develop TS on prospectus related matters.

CSDR harmonises the authorisation and supervision of central securities depositories (CSDs) within the EU. It provides organisational, conduct of business and prudential requirements to ensure CSDs are safe, efficient and sound. It also introduces a settlement discipline regime, including measures to prevent and address settlement fails, such as a mandatory buy-in and cash penalties. ESMA's TS include harmonised CSD requirements and internalised settlement reporting. In June 2015 ESMA issued a consultation on the Technical Requirements for the buy-in process. The delivery of the RTS on settlement discipline has been postponed until year-end.

Our Observations

The good news is that, in key areas such as transaction reporting, ESMA Technical Standards regarding MiFID II are not materially different from the version that the industry has been working from since the summer. However, there are still areas of change, and how all of this will fit in with the still unpublished Delegated Acts remains to be seen.

Currently, the main deltas we have observed are:

- **Bond transparency:** ESMA indicated that, under the terms of the RTS & current market data, 2,000 bond instruments would fall under the transparency thresholds. This will amount to 4% of the European market, but the relative value could be a much more relevant indicator;
- **Position limits:** Set to be assessed through two sets of criteria; an asset specific market share & a 'main business' threshold;
- **Market data:** Market venues will be required to publish their data in an unbundled manner, i.e. Data disaggregated by asset class, by instruments, by sectors, etc.

Our preliminary conclusion is that MiFID II is now largely ready for the implementation teams including having your 'change the bank' and 'run the bank' officers validating the gaps and the known unknowns and building implementation assumptions using a risk-based approach.

This assumes the final requirements will be published by the European Commission in November 2015. The main uncertainties for the delegated acts requirements can be linked to:

- Investor protection: Contingent on delegated acts, where there remain a dozen uncertainties; and
- Governance, systems & controls: Split between the current state requirements and the delegated acts, there remains a dozen risks.

In order to be compliant by year-end 2016 implementation plans across key workstreams must be finalised and approved in the coming months.

Next Steps

ESMA's TS now await endorsement by the European Commission which has three months to approve. Once endorsed, both the European Parliament and the Council have a 3+3 months' objection period¹. After CSDR, which entered into force back in 2014, MAR and MiFID II will enter into force in 2016 and 2017 respectively.

ESMA has not submitted its draft MiFIR RTS on exchange-traded derivatives in order to ensure consistency with the EMIR RTS on the indirect clearing of OTC derivatives. ESMA believes that in order to ensure the orderly functioning of markets, amendments need to be made to the EMIR RTS and a consultation on these changes is expected. It will then submit both sets of draft RTS together.

¹The European Parliament and Council have a right to object to a delegated act within 3 months (which can be extended by a further 3 months).

OVERVIEW OF KEY CHANGES BETWEEN MIFID II DRAFT AND FINAL REQUIREMENTS

Markets and market structure	Mifid 2 draft positions 2014	Mifid 2 final requirements September 2015	Avantage Reply comments
Trading Obligations	<p>Investment firms have to undertake their transactions in shares admitted to trading on a regulated market, except for:</p> <ul style="list-style-type: none"> • Non-systematic or irregular transactions; • Transactions which are carried out between eligible or professional counterparties. 	<p>ESMA proposes an exhaustive list of types of transactions which must be:</p> <ul style="list-style-type: none"> • Transactions executed by reference to a price that is calculated over multiple time instances according to a given benchmark, including transactions executed by reference to a volume-weighted average price or a time-weighted average price; • Transactions which are part of a portfolio trade which includes five or more different shares; • The transaction is contingent on the purchase, sale, creation or redemption of a derivative contract or other financial instrument where all the components of the trade are to be executed only as a 	<p>The definition of irregular, ad-hoc or non-systematic transaction should be defined by banks within the same parameters.</p> <ul style="list-style-type: none"> • These requirements should be read in conjunction with the: RTS on market-making agreements, order to transaction ratio, co-location, fees, tick sizes and material markets in terms of liquidity relating to trading halt notifications. • RTS on arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and disclosure of particular interests or indications or conflicts of interest.

		<p>single lot such as exchanges for related positions;</p> <ul style="list-style-type: none"> • The transactions are executed by a management company or an alternative investment fund manager which transfers the beneficial ownership of shares from one collective investment undertaking to another and where no investment firm is a party to the transaction; • The transaction is a give-up or a give-in transaction; • The transaction has as its purpose the transferring of shares as collateral in bilateral transactions or in the context of CCP margin or collateral requirements or as part of the default management process of a CCP; • The transaction results in the delivery of shares in the context of the exercise of convertible bonds, options, covered warrants or other similar derivatives; • The transaction is a securities financing transaction; 	
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		<ul style="list-style-type: none"> The transaction is carried out under the rules or procedures of a trading venue, a CCP or a central securities depository to effect a buy-in of unsettled transactions. 	
Commodity Position Limits	<p>The draft RTS in relation to commodity derivatives covers:</p> <ul style="list-style-type: none"> The criteria for establishing the circumstances in which an activity may be considered to be ancillary to a firm's main business; and The methodology for the calculation of, and the application of, position limits for commodity derivatives traded on trading venues and economically equivalent OTC contracts. 	<p>Similar standards on criteria for establishing when an activity is ancillary to the main business on and methodology for calculating and applying position limits;</p> <p>In its final rulings, ESMA eased earlier positions on commodity limits for non-financial traders, and proposed a special regime for new and illiquid contracts.</p>	<p>"Under the Proposals, commodity derivatives market participants may potentially have to obtain a Mifid license, which would force them to comply with the fourth Capital Requirements Directive (CRD IV) a short after-time-limited exemption expiring on December 31, 2017. Firms captured by Mifid are also automatically classified as financial Counterparties under the European Market Infrastructure Regulation (EMIR), which means clustering. They are unable to benefit from the EMIR clearing thresholds gold hedging exemption. While the rules include an 'ancillary business exemption' for nonfinancial companies whose core business is not commodity trading, it may still strength many of them to become Mifid-licensed. If the EC Detects unintended consequences, it expressed the possibility to postpone the entry into power of the relevant provisions. "</p>
Algorithmic Trading	<p>A firm engaging in algorithmic trading will be required to have in place effective systems, risk controls to ensure its trading</p>	<p>The organisational requirements for different types of firm were specified in the RTS.</p>	<p>ESMA's proposals for regulatory technical standards and delegated acts requirements are in line with existing regulatory guidance such as</p>

	<p>systems are resilient & have enough capacity. They are subject to appropriate thresholds and limits which prevent sending erroneous orders, contributing to a disorderly market and used for any purpose that is contrary to the rules of a trading venue to which it is connected.</p> <p>Firms must have effective business continuity arrangements to deal with any system failure and ensure their systems are tested and monitored.</p> <p>Trading venues will also be required to have systems to ensure that algorithmic trading cannot create or contribute to disorderly trading on the market and to manage any such conditions that do arise. These will include systems to limit the ratio of unexecuted orders to transactions, slow down order flow and regulate minimum tick sizes. Trading venues will be required to provide facilities for</p>	<p>Similar standards on organisational and related requirements for firms that carry on algorithmic trading, provide direct electronic access and act as general clearing members and trading platforms that permit such trading.</p> <p>When considering the organisational requirements of trading venues and investment firms to be set down in the regulatory technical standards, ESMA proposes that the proportionality principle must be preserved and the nature, scale and complexity of the business must be taken into account. Investment firms should undertake a detailed self-assessment to determine the level of operational requirements that should apply to them. For some algorithmic traders and trading venues many of the technical proposals will be seen as business as usual.</p>	<p>its 2012 Guidelines on Systems and Controls in an Automated Trading Environment.</p> <p>It will curb the amount of equities trading that can be done in so-called “dark pools” or off-exchange venues and demand more trade reporting and curbs on algorithms from high-frequency traders.</p>
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	<p>their members to test algorithms. Trading venues will also be required to be able to identify orders generated by algorithmic trading, different algorithms used and the persons initiating the orders.</p> <p>ESMA presented two options for the HFAT definition in the CP. The first is based on the definition of HFAT that the German regulators currently use. It provides easy identification of parameters such as an absolute threshold on message rates. The second captures firms that have a median order lifetime lower than the median lifetime of all orders on the trading venue. Once designated as utilising an HFAT technique on one EU trading venue, that member would be treated as doing so on all EU trading venues.</p>		
<p>Pre trade transparency</p>	<p>MiFID II provides for two types of trading venues: regulated markets</p>	<p>ESMA propose to establish the content of pre-trade information that trading venues shall make public depending on the type of trading system</p>	<p>ESMA changed the pre-trade transparency requirements for products: liquidity in bond</p>

	<p>and multilateral trading facilities (MTFs).</p> <p>The draft RTS cover the following:</p> <p>Transparency requirements in respect of shares, depositary receipts, exchange traded funds, certificates and other similar financial instruments.</p> <p>Transparency requirements in respect of bonds, structured finance products, emission allowances and derivatives.</p> <p>The volume cap mechanism and the provision of information for the purposes of transparency and other calculations.</p>	<p>operated, extending the requirements to actionable indication of interests which are, according messages between members or participants of a trading venues containing all the necessary information to agree to a trade.</p> <p>To provide further flexibility and to avoid that members or participants who are providing their quotes to the requester first are put at a disadvantage, the final RTS allows for the publication of all submitted quotes in response to a RFQ at the same time, i.e. once all quotes have been provided and the moment they become executable.</p> <p>ESMA is maintaining the proposal to adopt arrangements for the publication which ensure that the information is sufficiently reliable and free of errors, that the information is capable of being consolidated with other similar data from other sources and that it is made available to market participants on a non-discriminatory basis.</p> <p>For ESMA a quote is the price which reflects prevailing market conditions if it is close in price to quotes of equivalent sizes for the same financial instrument on the most relevant</p>	<p>markets would be calculated on an instrument by instrument basis.</p> <p>It also tweaked requirements for market-makers, requiring them to post prices at least 50 per cent of the daily trading hours on a venue.</p> <p>The double cap mechanism and criteria for determining whether derivatives should be subject to the trading obligation and whether derivatives have a direct, substantial and foreseeable effect within the EU.</p> <p>Numerous industry respondents did not agree with the definition of hybrid systems due to the lack of clarity about the type of systems that would be caught under this category. Given the constant evolution of markets, and consequently of trading systems, ESMA proposes to retain the hybrid systems definition so as to have a category for trading systems that may develop in the future.</p>
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<p>Post trade transparency</p>	<p>Information:</p> <p>The details of transactions that investment firms, including systematic internalisers and market operators and investment firms operating a trading venue shall make available to the public for each class of financial instrument concerned.</p> <p>Identifiers:</p> <p>Under current MiFID trading venues and investment firms are already required to make public additional information in the form of flags when a transaction is determined by factors other than the current market price, in the case of negotiated transaction and following any amendment of previously disclosed information.</p> <p>Requirement:</p>	<p>ESMA, in line with the discussion paper, proposes to require investment firms and trading venues to report the following ten information in respect of transactions executed by them or under their rules:</p> <ol style="list-style-type: none"> i. Trading date and time; ii. Instrument identification code; iii. Unit price; iv. Price currency; v. Quantity; vi. Venue of execution; vii. OTC trading; viii. Publication date and time; ix. Venue of Publication; x. Transaction identification code. <p>ESMA has reviewed the list of identifiers following responses to the discussion paper and</p>	<p>In regard of the proposal to report the NAV by trading venues and investment firms, ESMA disagrees that such information should be required in post-trade reports.</p> <p>The main purpose of identifiers is to complement the information content of post-trade reports by disclosing the technical characteristics of a transaction or the particular circumstances under which a transaction has occurred.</p> <p>This set of standards covers requirements for data reporting services providers.</p> <ul style="list-style-type: none"> • Definition of ARMs <p>Article 4 MIFID II, definition number 54: “‘approved reporting mechanism’ or ‘ARM’ means a person authorized under this Directive to provide the service of reporting details of transactions to competent authorities or to ESMA on behalf of investment firms”</p> <ul style="list-style-type: none"> • Definition of APAs

	<p>Article 26(6) MiFIR: “In reporting the designation to identify the clients as required under paragraphs 3 and 4, investment firms shall use a legal entity identifier established to identify clients that are legal persons.”</p> <p>Reporting (How to report LEIs):</p> <p>Article 1 of RTS 22 (obligations under Article 26 of MiFIR): “The information shall be provided using the data standards and formats specified in Table 2 Annex I”.</p> <p>Article 5 of RTS 22: Identification of the investment firm executing a transaction, this takes two paragraphs.</p>	<p>is proposing to require the following flags to be included in post-trade reports:</p> <ul style="list-style-type: none"> i. Benchmark trade ii. Agency cross trade iii. Non-price forming trades iv. Transaction not contributing to the price discovery v. Special dividend trades; vi. Post-trade large in scale transactions; vii. Reference price transactions; viii. Negotiated transactions in liquid financial instruments; ix. Negotiated transactions in illiquid financial instruments; x. Negotiated transactions subject to conditions other than the current market price; xi. Algorithmic transactions; xii. Transactions above the SMS; xiii. Transactions in illiquid instruments; 	<p>Article 4 of MiFID II, definition 52: “ ‘approved publication arrangement’ or ‘APA’ means a person authorized under this Directive to provide the service of publishing trade reports on behalf of investment firms pursuant to Articles 20 and 21 of Regulation (EU) No 600/2014 [MiFIR]”</p> <ul style="list-style-type: none"> • Authorization of APAs and ARMs: <p>Article 59 of MiFID II §3: Member States shall register all data reporting services providers.</p> <ul style="list-style-type: none"> • Annex I section D of MiFID II lists data reporting services. Data reporting services are (1) Operating an APA, (2) Operating a CTP (3) Operating an ARM.
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		<p>the relevant transaction from 3 January 2017 until 1 January 2020;</p> <ul style="list-style-type: none"> • within 5 minutes after the execution of the relevant transaction after 1 January 2020; • Two-Day deferral publication in case of lack of liquidity: RTS 2, article 8: “[...] no later than 19:00 local time on the second working day after the date of the transaction”. One criteria for this deferral is the lack of liquidity. Annex III of RTS 2 details how liquidity is assessed by ESMA and this includes derivatives (swaps, futures). <p>Treatment of FX derivative: FX in the scope of MiFIDII/MiFIR</p> <ul style="list-style-type: none"> • Exemption of post-trade reporting if counterparty is a central bank <p>MiFIR article 1 § 6 exempts FX trades with members of the ESCB from post-trade requirements: [...] shall not apply to regulated markets, market operators and investment firms in respect of a transaction where the counterparty is a member of the European</p>	
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		<p>System of Central Banks (ESCB) and where that transaction is entered into in performance of monetary, foreign exchange and financial stability policy.</p> <ul style="list-style-type: none"> Exemption of post-trade reporting if used for hedging by a non-financial counterparty <p>MiFIR article 8 § 1: publication obligation does not apply to those derivative transactions of non-financial counterparties which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group</p> <ul style="list-style-type: none"> FX currently considered illiquid because of lack of data <p>RTS 2 point 28: [...] the lack of data allowing a comprehensive analysis of the entire market permitted the definition of the qualitative liquidity criteria to be considered for the segmentation of the asset class but prevented the determination of the liquidity thresholds. As a result, until data of better quality is available, the asset class of foreign exchange derivatives</p>	
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		<p>should be considered not to have a liquid market.</p> <ul style="list-style-type: none"> FX therefore benefit from a two day deferral of post-trade transparency <p>MiFIR article 9 § 1: Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) [article 8 concerns transparency of non-equity instruments].</p> <p>RTS 2, article 8: [...] investment firms operating a trading venue shall make public each transaction no later than 19:00 local time on the second working day after the date of the transaction, provided one of the following conditions is satisfied: [...] there is not a liquid market.</p> <ul style="list-style-type: none"> FX will later be treated like other derivatives in the future <p>RTS 2 article 13, includes FX derivatives and addresses FX in a similar way as other derivatives (commodity derivatives, securitized derivatives, interest rate derivatives or equity derivatives...)</p>	
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<p>Transaction Reporting</p>	<p>The draft RTS on market data reporting include the following: the reporting obligations under Article 26 of MiFIR; the supply of financial instruments reference data under Article 27 of MiFIR; the maintenance of relevant data relating to orders in financial instruments; and clock synchronisation (RTS 25).</p> <p>Branches of investment firms</p> <p>Under the existing approach, a branch has to determine whether a transaction was carried out by itself or the home investment firm when in reality both entities may have carried out parts of the activity bringing about the transaction.</p> <p>Deferred publication of transactions</p> <p>A key element of the deferred publication regime relates to the necessary condition for authorising a deferred publication that the</p>	<p>Branches of investment firms</p> <p>In the Discussion Paper three fields were proposed:</p> <ul style="list-style-type: none"> i. The branch of the reporting firm which received the order from the client, ii. The branch of the reporting firm whose trader executed the transaction; iii. The branch of the reporting firm whose membership was used for executing the transaction. <p>Deferred publication of transactions</p> <p>ESMA proposes that a necessary condition to authorise a large in scale transaction to be deferred is that the transaction must be between an investment firm dealing on own account other than on a matched principal basis as per Article 4(1)(38) of MiFID II and another counterparty.</p> <p>High quality global journalism requires investment. Please share this article with others using the link below, do not cut & paste the</p>	<p>Branches of investment firms</p>
			<p>Deferred publication of transactions</p> <p>ESMA agrees that the deferred publication regime should rest on the presumption that the investment firm is at risk. For that reason ESMA proposes to further qualify that the deferral should only apply when the investment firm is dealing on own account other than on a matched principal basis.</p>

	<p>transaction is between an investment firms dealing on own account and a client of that investment firm.</p>	<p>article. See our Ts&Cs and Copyright Policy for more detail. Email</p> <p>ftsales.support@ft.com to buy additional rights. http://www.ft.com/cms/s/0/b89a1748-65c9-11e5-97e9-7f0bf5e7177b.html#ixzz3nbUzloRU</p> <p>Esma also ruled that exchanges should price their data on a “reasonable commercial basis”. Bourses and trading venues will also have to divide up and publish more of the trading data they collect. It also cut the period in which trades conducted on exchanges to just one minute.</p>	
Insider Dealing	<p>Pursuant to the new market abuse regime, all ETS compliance buyers will need to respect the prohibitions of insider dealing and market manipulation, and where applicable, follow the related obligations like disclosure of inside information and holding an insiders' list.</p>	<p>ESMA published its RTS and ITS under the Market Abuse Regulation (MAR). The standards cover:</p> <p>ITS on the format and updating procedure for insider lists and the template for notification and public disclosure of managers' transactions.</p>	
Market Manipulation	<p>The proposed rules on market abuse, including both insider dealing and market manipulation, more specifically the proposals for</p>	<p>RTS on appropriate arrangements, systems and procedures with notification templates for use in</p>	

	a Market Abuse Regulation (MAR) and a Criminal Sanctions for Market Abuse Directive (CSMAD) will deliver that.	preventing, detecting and reporting abusive practices or suspicious orders or transactions.	
MAR Disclosure Requirements	<p>ESMA has published its draft RTS and ITS under the Market Abuse Regulation (MAR). The standards cover:</p> <p>ITS on technical means for public disclosure of inside information and delaying inside information.</p>	<p>ESMA considered the strong request for alignment of requirements related to provision of instruments reference data under MAR and MiFIR and decided to align to the extent possible the relevant provisions. In particular, the same details of financial instruments will have to be included in the instrument reference data reported under both regulations. Furthermore, the data will have to be reported using the same standards and formats and by means of the same technical format. Timelines for submissions of reference data to the competent authorities, as well as for their subsequent transmission from the competent authorities to ESMA were also aligned.</p>	
Unbundling of Dealing Commissions	<p>ESMA proposed an unbundled model, where commission use was limited. This was most disruptive and should be applied by the industry globally. The proposals were part of MiFID II's clampdown on third-party inducements.</p>	<p>Venues will be required to publish their data in an unbundled manner, i.e. Data disaggregated by asset class, by instruments, by sectors...</p>	<p>The European Commission did not publish plans on one of the most controversial issues in MiFID for banks and investors, concerning unbundling trading commission from research. This may change ESMA RTS requirements.</p>

<p>Best Execution</p>	<p>10 key characteristics of MiFID II's Best Execution obligation</p> <p>Best execution factors</p> <p>Total consideration and cost</p> <p>Client instruction</p> <p>Routing client orders</p> <p>Disclosure of execution policy</p> <p>Disclosure of data relating to execution quality</p> <p>Disclosure of top five execution venues</p> <p>Monitoring obligations</p> <p>Material Changes</p>	<p>ESMA clarified some points regarding publication of illiquid date which are rarely traded: "where no transactions occurred in a particular financial instrument on a particular day, execution venues are not required to publish the reports dealing with price information".</p> <p>ESMA requires that the information required for Systematic internaliser (SI) should be published within three months, rather than one month, after each quarter. ESMA also requires that SIs, market makers and other liquidity providers are exempt from reporting point-in-time transaction data for any transactions above Standard Market Size or Size Specific to the financial instrument.</p> <p>In ESMA's consultation paper it amended the point in time requirements to capture the average price during a two minute period and has removed or better clarified some of the other metrics.</p> <p>ESMA considers now, that the relevant venue should provide the information as set out in the RTS for each order book in order to ensure that the public has information on the quality of execution on all markets.</p>	<p>ESMA shall develop standards to determine the format and the periodicity of data relating to the quality of execution and also the content and the format of information to be published by investment firms.</p>
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		<p>The categorisation should be taken into account for order flow reporting on the top five venues, because information could be distorted if client orders executed on behalf of professional clients were combined with orders in respect of retail clients.</p> <p>In the final RTS, ESMA has clarified the difference between aggressive and passive orders.</p>	
<p>Clearing obligation (Exchange traded derivatives)</p>	<p>The draft RTS cover:</p> <ul style="list-style-type: none"> • The criteria for determining whether derivatives should be subject to the trading obligation; and • The criteria for determining whether derivatives have a direct, substantial and foreseeable affect within the European Union. 	<p>The Final Report contains RTS on the obligation to clear derivatives traded on regulated markets and the timing of acceptance for clearing (RTS 26).</p>	<p>There are requirements applying on and to trading venues: this part includes standards on admitting instruments to trading and suspending or removing them from trading, as well as ITS on functioning of multilateral and organised trading facilities.</p> <p>There are Regulatory Technical standards on access in respect of Central Counterparties (CCPs) and benchmarks and data disaggregation.</p>

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