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Markets in Financial Instruments Directive and Regulation

A Cicero Consulting Special Report

Introduction

The European Commission's intention in its Regulation on Market in Financial Instruments (MIFIR) and Market in Financial Instruments Directive (is to toughen up its rules on transparency; improve data quality and cost; prohibit discriminatory practices and to ensure the effective supervision of products/commodities and positions. With these in place, the objective to create a more transparent trading environment and particularly for OTC derivatives - through reinforced transparency, conduct of business, market abuse and investor protection rules - will have been achieved. So too will the 2009 G20 objective that "all standardised OTC derivative contracts be traded on exchanges or electronic trading platforms, where appropriate". But none of this will be delivered by December 2012 which was the deadline set by the G20 in Pittsburgh 2009. Given the substantive changes being proposed most industry stakeholders will welcome this lag in timeline which will give a much needed opportunity to seek amendments via the European Parliament and Council to the proposal currently on the table today.

One of the most substantial changes centres on the Commission's objective to ensure **non-discriminatory access to clearing.** The Commission is seeking to remove various other "commercial barriers" – i.e. removing vertical silos **within exchanges.** This is a significant overhaul of the current framework whereby exchanges can control both the trading and clearing of instruments off their own platforms, which gives them a significant competitive advantage. This will not be welcomed by the exchanges. From the European Commission's perspective the latter activity was deemed to be highly discriminatory and opening up access to clearing flows will "lower investment and borrowing costs, eliminate inefficiencies and foster innovation in the European markets". There is no doubt this will be a divisive point within the European Parliament and Council.

Another substantive reform is in the area of high frequency trading. **High frequency trading** has been within the focus of lawmakers since the flash crash in May 2010, which saw liquidity being zapped out of the market by many high frequency traders. Under the Directive new requirements such as an obligation on Regulated Markets, MTFs and OTFs to establish 'circuit breakers' that set minimum tick sizes and are able to slow down the flow orders from algorithms, will for the first time be imposed on these market makers. The requirements also state that "an **algorithmic trading strategy shall be in continuous operation during trading hours** of the trading venue to which it sends orders or through the systems of which it executes transactions. The trading parameters or limits of an algorithmic trading strategy shall ensure that the strategy posts firm quotes at competitive prices with the results of providing liquidity on a regular and ongoing basis to these venues at all times, regardless of prevailing market conditions". The liquidity requirements being

stipulated will undoubtedly stem high frequency trading because algorithms usually dip in and out of the market at high frequency due to specific market conditions or circumstances. Consequently the workability of the requirement for algorithmic trading strategies to be automatically active throughout the trading day is already being criticised and questioned by those operating in the area. It will be important that ESMA's work on HFT which was opened for consultation until October 3 will take a more workable line and can influence the revision of the MiFID II proposal.

MiFID is also proposing **commodity position limits**. The US Commodity Futures Trading Commission this week voted through rulemaking which will limit the number of contracts a firm may hold and will require traders to aggregate their positions. There is similarity between the CFTC ruling and that which is being proposal under the Directive - traders will have to provide weekly reports specifying the number of long and short positions by trader category; changes between past and present reports; percentage of total open interest represented per category and number of traders per category. In addition ESMA will have the power to limit the ability of any person or firm from taking too large a position or exposure if they believe this to present a systemic risk to the market.

There is still concern among trading venues regarding **regulatory arbitrage between the EU and US, and more specifically between the European OTF and the U.S. Swap Execution Facility.** The introduction of Organised Trading Facilities (OTFs) while broadly welcomed, there is a fear that OTF may create a regime in Europe that is substantially different from the US. In Europe OTC derivatives will be trading on MTFs in addition to OTFs. In the US, while the rules are still being decided upon by the Commodity Futures Trading Commission, it is feared that firstly standardised derivatives will only be able to trade on an SEF and secondly that SEF will not allow for single dear venues or voice broker systems. This is in contrast to the more flexible route being pursued under MiFID which allows for the single dealer venues or voice broker systems.

There has been much debate on whether or not the European Commission should mandate the provision of a **consolidated tape**. From the Commission perspective mandating a consolidated tape in itself would not solve the underlying problems with granularity, consistency and reliability of post trade data.

Adapting data standards and reducing the cost of post trade data are preconditions to the successful and affordable consolidation of post trade data regardless of how it is consolidated. To achieve this, the European Commission is supporting the establishment of **Approved Publication Arrangements** (which was put forward by CESR (as it was then known) late 2010). APAs, which will be regulated under MIFID, will require that all firms who execute transaction should be required to publish their

trade reports through an APA. The role of the APA would be to improve data standards to ensure non-duplication and consistency in post trade reporting.

Regarding the consolidated tape under the Directive it is stipulated that "the envisaged solution is based on an authorisation of providers working along pre-defined and supervised parameters which are in competition with each other in order to achieve technically highly sophisticated and innovative solutions, serving the market to the greatest extent possible". In order to assess the effectiveness of this move the European Commission will need to provide a report on the functioning of the consolidate tape in practice. This would include the number of providers offering the services of a CT; the percentage of trading volume and most importantly the prices they charge. While there is broad support for the European Commission's objective to improve post-trade transparency in the OTC markets, there are many trading venues that would have preferred the European Commission to adopt a utility type tape such as the FINRA TRACE taped which operates in the US. A consolidated tape is an important step towards not just in increasing price transparency but is an important tool for measuring best execution in OTC markets. Currently there is no solid definition of what constitutes best execution in the EU, and the Commission's report on the functioning of CTPs will show whether it has taken the right decision or whether following the U.S. example would have been better.

Cost is a key factor and many will support the more by the Commission to unbundle pre and post trade data in addition to requesting regulated markets, MTFs and OTFs to make their post trade information available free of charge 15 minutes after the transaction is executed. In practice a significant number of trades executed electronically are reported within 1-3 minutes of execution. The Commission will not receive push back on that provision.

Conduct of business rules and particularly provision of investment advice is also a key focus of the current proposals. The Commission has been criticised during the consultation process for failing to clarify exactly what it considers to be an inducement; it does not for example provide detailed guidance on the differences between fees, commissions and non-monetary benefits. At present, the Commission defines an inducement as being any fee paid to a firm by a third party or on behalf of a third party. The ban as foreseen under MiFID 2 applies irrespective of whether the payment can be linked to an improvement in the service provided to the client. Firms will only be able to receive limited non-monetary benefits such as training on the benefits of a product, as long as it is not seen to interfere with their ability to provide impartial advice on that product. The industry has noted that the Commission's definition of what counts as an inducement is very wide and covers all payments made by a third party regardless of whether these payments have been agreed by a client.

The Commission's **proposal to ban inducements** to independent advisers is in contrast to the UK RDR which bans commission being paid to both independent and restricted advisers. Similarly the Netherlands, prior to the publication of the Commission's MiFID II proposal signalled its intention to ban all forms of commission on advisory and execution-only business by January 2013 in order to create a level playing field domestically between execution-only platforms and financial advisers. France is likely to oppose the banning of inducements on the grounds that most people buy funds through their banks – take away inducements and you take away the need for financial advisers who already account for less than 10% of the market. The French asset management sector is unlikely to take this lying down.

Much of the details regarding to the disclosure of all costs and associated charges to the client will be determined under the **Packaged Retail Investment Products** proposal which is due February 2012. PRIPS will propose a Key Investor Information Document for retail products where costs will to be presented in a simplified and standardised format, with entry and exit fees listed separately from management fees and the cost of running the fund.

Both the Directive and Regulation will enter onto the agenda of the Economic and Monetary Affairs Committee before the end of year, but finalisation of first reading will, optimistically speaking, take well into a year. MEP Markus Ferber, who is the chief lawmaker on this proposal, has a hefty job ahead of him and industry a hefty job to bring forward alternative approaches to him.

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DIRECTIVE - TITLE ONE

Definitions and Scope		
The scope and definitions in the Directive remain roughly in line with the original text. The Commission has moved to tighten up consumer protection by requiring member states to have analogous conduct of business, and supervision and authorisation regulation in place in order to grant Article 3 exemptions. This exemption was previously granted on the condition that firms were regulated.		
Subject matter and scope	Article 1	• The Directive will apply to investment firms in the EU and those based in third countries providing investment services in the EU and data reporting service providers • The Directive will establish requirements for the authorisation and operating conditions of investment firms, provision of investment services by third country firms, authorisation and operation of regulated markets and data reporting service providers and supervision by the competent authorities • The Directive will also apply to credit institutions when providing investment services
Exemptions	Article 2	• MiFID 1 exemptions remain in place except the following are no longer exempt: people dealing on their own account on an MTF or who execute client orders, those dealing on their own account who are market makers in relation to commodity derivatives, emissions allowances or derivatives of emissions allowances • Dealing on own account in commodities or commodities derivatives will no longer be exempt
Optional exemptions	Article 3	• In order for Article 3 Optional Exemptions to remain, Member States must have analogous conduct of business and authorisation and supervision regulation to that included in MiFID • Article 3 exemptions and their justification must be provided to ESMA
Definitions	Article 4	• The definitions remain in line with the definitions of the MiFIR Regulation with additional definitions of areas related to trading venues such as Algorithmic Trading.

DIRECTIVE - TITLE TWO

Authorisations and operating conditions for investment firms

Much debate has been had in the lead up to the publication of MiFID 2 over the proposal to ban commission from being paid to independent advisers only that had been seen in earlier drafts. This clause remains in place in the final text meaning that MiFID is set against the RDR in the UK, where commission is banned for both independent and restricted advisers. If the text remains as it is throughout the co-decision procedure, the FSA will have to apply for an exemption to maintain the RDR's total ban on commission. The UK financial advice industry will be concerned that they may be at placed at a competitive disadvantage to their European counterparts who will continue to accept commission.

The Directive also introduces a requirement for firms to demonstrate in their reports to client that the advice that they are providing is tailored specifically to their circumstances. This will require further clarification, it is not yet clear for example if categorising clients by their appetite for risk will be sufficient or if firms will be required to demonstrate that their advice takes into account a far more specific range of factors.

MTFs will also have the opportunity to be registered as an SME growth market if the majority of their listings are SMEs. This is an initiative from the Commission to facilitate greater liquidity to SMEs, ensuring growth in the EU.

Requirement for authorisation	Article 5	• All firms must be authorised by member state authorities, this includes operators of both MTF's and OTFs. All firms must be registered and the information should be publically accessible • All firms must have a head office in the same country as is registered office
Scope of Authorisation	Article 6	• Authorisation granted by member states must specify the activity carried out by the firm and a firm seeking to extend the activity that it carries out must apply for further authorisation • Authorisation is valid across the European Union
Procedures for granting and refusing requests for authorisation	Article 7	• Firms must provide a programme of operations and the organisational structure before being approved for authorisation. • ESMA shall develop by 2016 technical standards setting out the form that the information provided should take
Withdrawal of authorisations	Article 8	• Authorisation can be withdrawn if use is not made of the withdrawal within 12 months, if a firm breaches the conditions of the Directive or no longer meets the conditions under which provision was granted
Management body	Article 9	• Members of the management body must have sufficient skills and experience and must commit sufficient time to perform their duties. • A board member may not combine more than one executive directorship with two non-executive directorships or four non-executive directorships. • The management body must have collective knowledge to understand the company and the risks of the business • Firms must establish nomination committees to assess compliance with the above requirements. Firms must notify the competent authorities of the

		management body • Firms must ensure diversity on the management committee and depending on their size, ensure there is diversity of gender, age, education, qualifications and geographical diversity. • ESMA will draft standards setting out requirements in this area • Management must set out the strategic objectives of a firm and define and approve its organisational capabilities • Authorisation can be refused if the authorities are not convinced of the capabilities of the management team
Shareholders and members with qualifying holdings	Article 10	• The identities of shareholders and members with qualifying holdings must be provided to the authorities
Notifications of proposed acquisitions	Article 11	• Authorities must be notified if a person or company proposes to take a qualifying holding in another company
Assessment Period	Article 12	• Competent authorities have 60 days to carry out an assessment of the proposed acquisition. The authority may ask for additional information within 50 days of receiving the notification
Assessment	Article 13	• The competent authority will assess the reputation of the proposed acquirer and those who will run the business, the financial soundness of the proposer and whether the investment firm will continue to comply with the prudential requirements in the Directive
Membership of an authorised investor compensation scheme	Article 14	• Firms seeking authorisation must have in place an investor compensation scheme
Initial capital endowment	Article 15	• Firms must have a sufficient initial capital endowment in order to be granted authorisation
Organisational requirements	Article 16	• Firms must take reasonable measures to prevent conflicts of interest from arising and firms will be responsible for the activity of their employees and tied agents • Firms must have safeguards and suitable accounting procedures in place and keep a record of all services and transactions undertaken by the firm • Firms must record and store phone conversations or electronic communications involving transactions when dealing on own account and client orders when transmitting and executing orders. Records must be kept for three years.

Algorithmic trading	Article 17	• Firms that engage in algorithmic trading must have risk control systems in place to ensure that the systems do not threaten the integrity of the market and cannot be used improperly. Firms must have in place effective continuity arrangements to cope with system failures. • Firms must provide an annual update of its algorithmic trading strategies to the national competent authorities as well as trading parameters and risk controls. • An algorithmic trading strategy must be in continuous operation during trading hours. The trading parameters shall ensure that the strategy posts firm quotes at competitive prices to provide liquidity on a regular and on-going basis • Firms must have in place a system to review those who have access to its trading system and that suitable risk controls are in place • Firms must ensure that clearing services are only applied to people who meet certain appropriateness criteria to reduce risks to the market
Trading process and finalisation of transactions in an MTF and an OTF	Article 18	• Operators of MTFs and OTFs must ensure that appropriate safeguards are in place to protect the integrity of the market. This includes the establishment of a contingency arrangements to cope with system disruption • Operators of MTFs and OTFs have must transparent rules in place for the financial instruments that can be traded • Operators of MTFs and OTFs must provide the competent authority with a detail description of the functioning of their systems. All authorisations of MTFs and OTFs shall be notified to ESMA and published.
Specific requirements for MTFs	Article 19	• Operators of an MTF must establish a set of rules for the execution of orders and have in place arrangements to manage the adverse consequences of any conflict of interest between the MTF and its owner or operator
Specific requirements for OTFs	Article 20	• Operators of an OTF will be prevented from executing orders against the proprietary capital of an investment firm or market operator of an OTF. An investment firm cannot act as a systematic internaliser in an OTF that it operates itself • Requests to operate an OTF must include an explanation of why the system cannot operate as a regulated market or an MTF
Regular review of conditions for initial authorisation	Article 21	• Member states will be required to monitor firms to ensure that they comply with the provisions of the Directive. Investment firms must notify member state authorities of material change to their business
General obligation in respect of on-going supervision	Article 22	• Member states will ensure that appropriate systems are in place to ensure that the competent authorities can access the required information to ensure that a firm is complying with the Directive
Conflicts of interest	Article 23	• Firms must take all appropriate steps to identify conflicts of interest between themselves, their managers, their employees or their tied agents. • The Commission will draft delegated acts to will require firms to take reasonable steps to identify and prevent conflicts of interest.

General principles and information to clients	Article 24	• Marketing communications to clients must be fair, clear and not misleading • Firms must provide clients with information about the investment firm when providing investment services and must specify whether this advice is on an independent or restricted basis. The firm must also specify if they intend to provide an on-going service. • Financial products and strategies must include appropriate warnings of the risks associated with investing as well as information on the costs and associated charges. • Firms providing services on an independent basis must assess a sufficiently large and diverse portion of the market and may not accept any fees by a third party, i.e. commission. • Firms providing portfolio management may not receive commission. • If a firm offers an investment service as part of a package of services, the firm must inform the client of the possibility to purchase the services separately.
Assessment of suitability and appropriateness and reporting to clients	Article 25	• Firms must obtain enough information from a potential client to test their suitability for a product before providing investment advice or portfolio management services. This information should include their financial situation and investment profile. • Firms that provide execution only will not need to obtain this information as long as they are offering only shares, bonds, money market instruments excluding those that embed a derivative, UCITS and other non-complex financial products. • A record of documents agreed by the client and firm must be kept. • Firms must also provide reports of the service provided to their clients. If investment advice is provided, firms must show how the advice provided is tailored to their needs.
Provision of services through the medium of another investment firm	Article 26	• Instructions may be placed through another firm; the investment firm that mediates the client's instructions will be the responsible party.
Obligation to execute orders on terms most favourable to the client	Article 27	• Firms must obtain the best possible result for their client, taking into account factors including price, likelihood of execution and settlement, costs and speed. • Execution venues must make public information relating to the price and speed and likelihood of execution. • Firms must provide information to their clients on how orders will be executed including whether the transaction will be executed outside an MTF or OTF. Firms must notify clients of any changes to their execution policies or strategies.
Client order handling rules	Article 28	• Client orders should be implemented promptly and fairly. Should an order be entered onto a regulated market but not immediately executed, firms must make public to other participants so that it can be executed as quickly as possible.

Obligations of investment firms when appointing tied agents	Article 29	• Investment firms may appoint tied agents to promote their services, receive orders or solicit business. Firms will always be responsible for the activity of tied agents. • Tied agents shall be admitted to a public register and will only be admitted if they possess sufficient capabilities.
Transactions executed with eligible counterparties	Article 30	• Investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may enter into transactions with eligible counterparties without being obliged to comply with investor protection obligations concerning information to clients. • Eligible counterparties are investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, other financial institutions, national governments and public bodies that deal with public debt at national level, central banks and supranational organisations.
Monitoring of compliance with the rules of the MTF or the OTF and with other legal obligations	Article 31	• Operators of MTFs and OTFs must have in place mechanisms to monitor compliance of their users or clients with their rules. • Investment firms and market operators operating an MTF or OTF shall monitor the transactions concluded by their users or clients and monitor them for potential market abusive conduct. • Significant breaches of the rules need to be reported by the regulated market to the competent authorities, and to the authority responsible for the investigation and prosecution of market abuse.
Suspension and removal of instruments from trading on an MTF	Article 32	• An investment firm or operator of an MTF that suspends or removes a financial instrument, it informs other trading venues trading the same instrument and its competent authority. The competent authority will inform the authorities of the other Member States, who will in turn require the trading venues to similarly suspend or remove the financial instrument.
Suspension and removal of instruments from trading on an OTF	Article 33	• An investment firm or operator of an MTF that suspends or removes a financial instrument, it informs other trading venues trading the same instrument and its competent authority. The competent authority will inform the authorities of the other Member States.
Cooperation and exchange of information for MTFs and OTFs	Article 34	• A regulated market must immediately inform other regulated markets, MTFs and OTFs in case of ○ Disorderly trading conditions ○ Potential market abuse ○ System disruptions • ESMA shall develop standards for the specific conditions triggering the submission of information.
SME growth markets	Article 35	• An MTF may apply to its home authority to be registered as an SME growth market, if the majority of issuers whose instruments are traded are SMEs and subject to conditions concerning the provision of sufficient publicly available information.
Freedom to provide investment services and activities	Article 36	• Any investment firm authorised and supervised by the competent authorities of another Member State may freely perform investment services and/or activities as well as ancillary services within their territories, provided that such services and activities are covered by its authorisation.

		• Ancillary services may only be provided together with an investment service and/or activity. • Where an investment firm or credit institution intends to use tied agents, the competent home authority needs to communicate the identity of the tied agents to the host authority designed as contact point.
Establishment of a branch	Article 37	• Investment services, activities and ancillary services may be provided through the establishment of a branch, as long as these services are covered by the authorisation granted to the investment firm. • Where an investment firm or credit institution intends to use a tied agent established in a Member State outside its home Member State, the tied agents are assimilated into the branch.
Access to regulated markets	Article 38	• Investment firms from other Member States which are authorised to execute client orders or to deal on own account have the right of membership or have access to regulated markets established in their territory, either directly through a branch or through remote access to the regulated market without establishing a branch
Access to central counterparty, clearing and settlement facilities and right to designate settlement system	Article 39	• Member states shall ensure that firms from other member states have non-discriminatory access to a central counterparty, clearing and settlement systems • Member states must ensure that regulated markets in their territory offer participants the right to designate the system for settlement of transactions in financial instruments undertaken on that regulated market
Provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs	Article 40	• Member states must allow operators of an MTF to establish arrangements with a central counterparty or clearing house and settlement system in another member state
Establishment of a branch	Article 41	• Firms intending to provide investment services through a branch in another member state must receive prior authority from the competent authorities on the condition that the member state of origin is approved and exchanges of information between regulators is in place • The prudential framework of the third country must be considered comparable to that of the host member state • A request for authorisation must be submitted to the competent authority within the host member state
Obligation to provide information	Article 42	• Third country firms intending to seek authorisation to provide investment services in another member state must provide the host member state with information on the supervisory authority in the host country and all relevant details of the firm
Granting of the authorisation	Article 43	• The host member state shall only grant authorisation when they are satisfied that conditions under Article 41 are met (i.e. equivalent prudential regulation is in place)

Provision of services in other Member States	Article 44	• A non-EU firm authorised in one Member State shall be able – subject to procedural conditions - to provide all services it is authorised for in other EU Member States without establishing new branches.
Registration	Article 45	• Member States shall register non-EU firms in a publicly accessible register which shall be updated on a regular basis. • Every authorisation shall be notified to ESMA, which maintains a consolidated list on its website.
Withdrawal of authorisations	Article 46	• The authorisation of a third country firm may be withdrawn by the national authority if not used within 12 months, if based on false statements, if the provider no longer complies with the conditions for authorisation, or for breach of MiFID rules. • Every withdrawal of authorisation shall be notified by ESMA.

DIRECTIVE - TITLE THREE

Regulated Markets		
To further strengthen the stability of the system of regulated markets and indeed other trading venues, the Commission proposal introduces additional corporate governance criteria, in line with the Commission's work in other initiatives with the aim of creating greater diversity on management bodies and ensuring that members of these bodies have sufficient knowledge of the risks they are involved in. Secondly and also evidenced by the accompanying proposals on market abuse and criminal sanctions in case of intentional market abuse, great emphasis is put on algorithmic and high frequency trading. Regulated markets for example need to ensure they have mechanisms in place that can reduce the speed of orders, and can set minimum tick sizes, to enhance the stability of markets, and prevent a flash crash.		
Authorisation and applicable law	Article 47	• Systems can only be authorised as a Regulated Market if the competent authority believes that both the operator and the system comply with at least the provisions of this Title. • Trading on regulated markets is governed by the law of the home member state of the regulated market. • The authorisation may be withdrawn if not used within 12 months, if based on false statements, if the provider no longer complies with the conditions for authorisation, or for breach of MiFID rules.
Requirements for the management of the regulated market	Article 48	• Members of the management body of any market operator need to be of sufficiently good repute and have sufficient knowledge, skills, time and experience to perform their duties, notably on the risk involved in the operator's activities. • Operators must establish a nomination committee to assess compliance with these criteria, unless the national supervisor decides that given the scale, nature and complexity of the operator this is not required. • Management body members cannot combine certain multiple executive directorships or non-executive directorships, unless the national supervisor has given permission to do so. • Management bodies need put in place policy promoting gender, age, education, professional and geographical diversity. • ESMA shall develop draft technical standards on the criteria members of management bodies need to possess, and the criteria for diversity.

Requirements relating to persons exercising significant influence over the management of the regulated market	Article 49	• Persons in a position to (in)directly exercise significant influence of the management of the regulated market need to be suitable
		• The operator the regulated market must:
		  ○ Publish and submit to the competent authority information about the ownership of the regulated market, as well as identity and scale of any parties in a position to exercise significant influence; and
		  ○ Publish and inform the competent authority of any transfer of ownership leading to a change in the identity of those with significant influence.
		• Proposed changes to those with significant interests may be refused by the national authority if there are objective and demonstrable reasons for threats to the management.

Organisational requirements	Article 50	• Regulated markets need to meet the following criteria: ○ Have arrangements in place that identify and manage conflicts of interests between the interests of regulated market, its owner or operator, and the functioning of the regulated market; ○ Have adequate risk management systems in place; ○ Have properly functioning technical including backup arrangements in place; ○ Operate under transparent and non-discriminatory rules, with objective criteria for executing orders; ○ Have effective arrangements to finalize and settle transactions ○ Have sufficient financial resources for its orderly functioning, taking into account the nature and risks of transactions concluded.
Systems resilience, circuit breakers and electronic trading	Article 51	• Regulated markets have in place effective systems to ensure that its trading systems are resilient and have sufficient capacity to deal with peak volumes, as well as backups in case of system failure. • A regulated market also needs to have in place systems to reject orders that exceed pre-determined volume or price limits, or are wrong. • Regulated markets also need to be able to halt trading if there is a significant price movement in a financial instrument, and should be able in exceptional cases to cancel or correct any transaction. • Systems should also be in place to ensure that algorithmic trading systems cannot create disorderly trading conditions, including a mechanism to slow down the flow of orders and setting minimum tick sizes.
Admission of financial instruments to trading	Article 52	• Regulated markets need to have clear and transparent rules in place for the admission of instruments, ensuring fair, orderly and efficient trading (and freely negotiable in the case of transferable securities)
Suspension and removal of instruments for trading	Article 53	• The operator of the regulated market may suspend or remove a financial instrument which no longer complies with the rules of the regulated market unless this would cause damage to investors' interests or the orderly functioning of the market. • If an operator suspends or removes a financial instrument it informs other trading venues trading the same instrument and its competent authority. The competent authority will inform the authorities of the other Member States, who will in turn require the trading venues to similarly suspend or remove the financial instrument.
Cooperation and exchange of information for regulated markets	Article 54	• A regulated market must immediately inform other regulated markets, MTFs and OTFs in case of ○ Disorderly trading conditions ○ Potential market abuse ○ System disruptions • ESMA shall develop standards for the specific conditions triggering the submission of information.
Access to the regulated market	Article 55	• Access to or membership of regulated markets shall be based on transparent and non-discriminatory rules, based on objective criteria. • Regulated markets may admit investment firms, credit institutions and other persons of good repute, sufficient levels of trading ability, experience

		and competence, and resources. • Operators of a regulated market are required to regularly submit a list of participants and members to the national authorities.
Monitoring of compliance with the rules of the regulated market and other legal obligations	Article 56	• Regulated markets shall monitor the transactions and orders undertaken by their members or participants to identify breaches of those rules, disorderly trading conditions or market abuse. • Significant breaches of the rules need to be reported by the regulated market to the competent authorities, and to the authority responsible for the investigation and prosecution of market abuse.
Provisions regarding central counterparty and clearing and settlement arrangements	Article 57	• Regulated markets may enter into arrangements with CCPs and CSD of another Member State, unless it is demonstrably threatening the orderly functioning of the regulated market. • The home competent authority shall take into account the supervisory activities carried out by other supervisors.
List of regulated markets	Article 58	• Every EU Member State shall share a list of regulated markets operating in that country with the other EU Member States and ESMA • ESMA will publish this list on its website.

DIRECTIVE - TITLE FOUR

Position limits and reporting		
In line with the provisions of the MiFIR Regulation, the Directive imposes an obligation on Member States to ensure that trading venues apply limits on the maximum number of contracts that persons can enter into. Furthermore, weekly reporting of positions per class of traders is required, with the objective of giving national regulators and ESMA better oversight of what is going on in commodity markets, and to what extent which categories of traders have taken long and short positions in these markets. This plays into the objective of the G20 to reduce volatility in commodity markets.		
Position limits	Article 59	• Member States need to ensure that RMs, MTFs and OTFs that trade commodity derivatives apply limits or equivalent measures on the maximum number of contracts market members or participants can enter into, in order to: ○ Support liquidity; ○ Prevent market abuse; ○ Support orderly pricing and settlement conditions. • The limits need to be transparent and non-discriminatory, specifying clear quantitative thresholds. • RMs, MTFs and OTFs need to inform their competent authority of the details, which submits these to ESMA for publication in an online database in summary form. • The Commission will adopt the maximum number of contracts persons can enter into over a specific period of time through delegated acts. • National authorities cannot set limits beyond the limits set by the delegated act from the Commission, unless there are exceptional circumstances objectively justifying the need for proportionate rules that take into account market liquidity and the orderly functioning of the market. • If a national authority does set more restrictive limits it shall inform ESMA with a justification. ESMA will issue an opinion published online within 24 hours. The authority needs to publish any reasons for taking measures contrary to ESMA's opinion on its website.
Position reporting by categories of traders	Article 60	• Member States need to ensure that RMs, MTFs and OTFs that trade commodity derivatives: ○ Publish a weekly report with the aggregate positions held by various categories of traders; and ○ Provide the competent authority with a complete breakdown of the positions held by any or all market members or participants (including those held on behalf of clients), upon request. • To facilitate the publication of the weekly report, market members or participants need to submit to their respective trading venues the details of their positions in real-time. • Traders shall be categorised by trading venues as follows: ○ Investment firms under MiFID or credit institutions under CRD; ○ UCITS or AIFM investment funds; ○ Other financial institutions, including (re-)insurance and occupational

		pension undertakings; ○ Commercial undertakings; ○ Operators of emission trading schemes; • The weekly reports should specify ○ Number of long and short positions by trader category; ○ Changes thereto since the previous report; ○ Percentage of total open interest represented per category; and ○ Number of traders per category. • The Commission can adopt delegated acts specifying the thresholds, categories of traders, and a time limit for centralised publication of the weekly reports by ESMA.

DIRECTIVE - TITLE FIVE

Data reporting services		
The introduction of various data reporting services providers is one of the ways the Commission aims to improve transparency, ensuring that trade details are reported avoiding duplication, distributed to market participants in a consolidated way, and reported to regulators and ESMA. Out of the three options put forward by the Commission in the consultation in December 2010, the Commission has opted for the option of having multiple Consolidated Tape Providers competing, with view of driving prices down. In contrast to the U.S. FINRA TRACE tape. However, it is not sure if this eventually serves as the best tool for measuring best executing in OTC markets. To assess whether it has taken the most effective decision, the Commission must report on the functioning of CTPs in the EU, their number, market share and price levels.		

Requirements and scope for authorisation	Article 61-62	• Prior authorisation is required for all persons and existing market operators who want to provide data services as:
		  ○ Approved Publication Arrangements (APAs);
		  ○ Consolidated Tape Providers (CTPs); or
		  ○ Approved Reporting Mechanisms (ARMs)
		• Member States shall publicly register all data reporting services providers established per Member States, and ESMA shall keep a public database of all providers in the EU.
		• Authorisation allows a provider to provide services throughout the EU.

Procedures for granting, refusing and withdrawing authorisation	Article 63-64	• The prospective data reporting services provider must provide all necessary information to the national authority for authorisation, including the types of services that are to be provided, and its organisational structure. • Any decision to grant or refuse access shall be taken within 6 months. • The authorisation may be withdrawn if not used within 12 months, if based on false statements, if the provider no longer complies with the conditions for authorisation, or for breach of MiFID rules. • ESMA shall develop standards setting out the required information.
Requirements for the management body of a data reporting services provider	Article 65	• Members of the management body of an APA, CTP or ARM need to be of sufficiently good repute and have sufficient knowledge, skills, time and experience to perform their duties. • ESMA shall develop guidelines to assess the suitability of management members. • Insufficient suitability can be a reason to refuse authorization.
Organisational requirements for APAs	Article 66	• Operators of APAs will make public the volume, price and time of transactions concluded under Article 19 and 20 of MiFIR (post-trade disclosure) as close to real time as technically possible, and free of charge after 15 minutes. • Operators of APAs need to have appropriate digital security arrangements in place, as well as systems that allow potential reporting errors to be corrected. • ESMA shall develop draft standards on common formats, data standards

		and technical arrangements to facilitate the consolidation of information. The Commission shall determine what constitutes a reasonable commercial basis.
Organisational requirements for CTPs	Article 67	• Operators of CTPs will consolidate various elements and details of transactions concluded under Article 5, 9, 19 and 20 of MiFIR (post-trade disclosure) as close to real time as technically possible, and free of charge after 15 minutes. • CTPs will consolidate the details into a single continuous electronic data stream and ensure fast access on a non-discriminatory basis. • Operators of CTPs need to have appropriate digital security arrangements in place, as well as systems that allow potential reporting errors to be corrected. • ESMA shall develop draft standards on common formats, data standards and technical arrangements to facilitate the consolidation of information. The Commission shall determine what constitutes a reasonable commercial basis.
Organisational requirements for ARMs	Article 68	• Operators of ARMs will report the information under Article 23 of MiFIR to regulators and ESMA as quickly as possible, not later than close of the following working day. • An operator of an ARM is required to have in place adequate mechanisms to prevent conflicts of interests with its clients. • Operators of ARMs need to have appropriate digital security arrangements in place, as well as systems that allow potential reporting errors to be corrected. • The Commission shall determine what constitutes a reasonable commercial basis.

DIRECTIVE - TITLE SIX

Competent Authorities		
There is a strengthening of the rules here for Member State, their regulators and all interactions between each other. Sanctions have increased too, with more focus on access of data as and when is needed.		
Designation of competent authorities	Article 69	• Each Member State shall designate the competent authorities which are to carry out each of the duties provided.
Cooperation between authorities in the same Member State	Article 70	• If a Member State designates more than one competent authority to enforce a provision of this Directive, their respective roles shall be clearly defined and they shall cooperate closely.
Powers to be made available to competent authorities	Article 71	• Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. To include: ○ have access to any document in any form whatsoever ○ demand information from any person and if necessary to summon and question a person with a view to obtaining information ○ carry out on-site inspections ○ require existing telephone and existing data traffic records
Remedies to be made available to competent authorities	Article 72	• Competent authorities shall be given all supervisory remedies that are necessary for the exercise of their functions. To include: ○ Require the cessation of any practice that is contrary to the provisions of MiFIR; ○ Request the freezing and/ or segregation of assets; ○ Adopt any measure to ensure that investment firms and regulated markets continue to comply with legal requirements ○ require the suspension of trading in a financial instrument
Administrative sanctions	Article 73	• Member States shall ensure that their competent authorities may take the appropriate administrative sanctions and measures where the provisions adopted have not been complied with and shall ensure that these measures are effective, proportionate and dissuasive.
Publication of sanctions	Article 74	• Member States shall provide that the competent authority publishes any sanction or measure that has been imposed for breaches of the provisions of Regulation
Breach of authorisation requirement and other breaches	Article 75	• This Article shall apply to the following: ○ Performing investment services or activities as a regular occupation or business on a professional basis without obtaining authorization ○ Acquiring, directly or indirectly, a qualifying holding in an investment firm or further increasing, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary without notifying in writing the competent authorities of the investment firm in which the acquirer is seeking to acquire or increase a qualifying holding

Effective application of sanctions	Article 76	• Member States shall ensure that when determining the type of administrative sanctions or measures and the level of administrative pecuniary sanctions, the competent authorities shall take into account all relevant circumstances, including: ○ The gravity and the duration of the breach; ○ The degree of responsibility of the responsible natural or legal person
Reporting of breaches	Article 77	• Member States shall ensure that competent authorities establish effective mechanisms to encourage reporting breaches, which should include at least: ○ Specific procedures for the receipt of reports and their follow up ○ Appropriate protection for employees of financial institutions who denounce breaches committed within the financial institution
Submitting information to ESMA in relation to sanctions	Article 78	• Member States shall provide ESMA annually with aggregated information regarding all administrative measures or administrative sanctions imposed. ESMA shall publish this information in an annual report.
Right of appeal	Article 79	• Member States shall ensure that any decision taken is properly reasoned and is subject to right of appeal
Extra-judicial mechanism for investors' complaints	Article 80	• Member States shall ensure the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate.
Professional secrecy	Article 81	• Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated, as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy.
Relations with auditors	Article 82	• Member States shall provide that any person authorized for carrying out the statutory audits of account documents shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which that person has become aware while carrying that that task and which is liable to: ○ Constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorization or which specifically govern pursuit of the activities of investment firms; ○ Affect the continuous functioning of the investment firm; ○ Lead to refusal to certify the accounts or to the expression of reservations
Obligation to cooperate	Article 83/ 84	• Competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under this Directive, making use of their powers whether set out in this Directive or in national law. • A competent authority of one Member State may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation.
Exchange of information	Article 85	• Competent authorities of Member States having been designated as contact points for the purposes of this Directive shall immediately supply one another with the information required for the purposes of carrying out the duties of the competent authorities.

Binding mediation	Article 86	• The competent authorities may refer to ESMA situations where a request relating to one of the following has been rejected or has not been acted upon within reasonable time: ○ to carry out a supervisory activity, an on-the-spot verification, or an investigation ○ to exchange information as provided for
Refusal to cooperate	Article 87	• A competent authority may refuse to act on a request for cooperation in carrying out an investigation, on-the-spot verification or supervisory activity only where: ○ judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed ○ Final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.
Consultation prior to authorisation	Article 88	• Competent authorities of the other Member States involved shall be consulted prior to granting authorization to an investment firm which is: ○ Subsidiary of an investment firm or credit institution authorized in another Member State; ○ Subsidiary of the parent undertaking of an investment firm or credit institution in another Member State ○ Controlled by the same natural or legal persons as control an investment firm or credit institution authorized in another Member State
Powers for host Member States	Article 89	• Host Member States may, for statistical purposes, require all investment firms with branches within their territories to report to them periodically on the activities of those branches
Precautionary measures to be taken by host Member States	Article 90	• Where the competent authority of the host Member State has clear and demonstrable grounds for believing that an investment firm acting within its territory under the freedom to provide services is in breach of the obligations arising from the provisions adopted pursuant to this Directive or that an investment firm that has a branch within its territory is in breach of the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authority of the host Member State, it shall refer those findings to the competent authority of the home Member State.
Cooperation and exchange of information with ESMA	Article 91	• The competent authorities shall cooperate with ESMA • The competent authorities shall, without delay, provide ESMA with all information necessary to carry out its duties
Cooperation with third countries	Article 92	• Member States may conclude cooperation agreements providing for the exchange of information with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required.

REGULATION - TITLE ONE

Subject matter, Scope and Definitions		
Subject matter and scope	Article 1	• The Regulation aims to set uniform requirements in the following six fields ○ disclosure of trade data; ○ reporting of transactions to the competent authorities; ○ trading of derivatives on organised venues; ○ non-discriminatory access to clearing; ○ product intervention powers of competent authorities and ESMA and on position management and position limits; ○ provision of investment services or activities without a branch by third country firms.
Definitions	Article 2	• The definitions provided in the Regulation also apply to the new MiFID Directive. • The Commission may through delegated acts specify some technical elements of the definitions to adjust them to market developments.

REGULATION - TITLE TWO

Transparency for Trading Venues		
Transparency is and has been the cornerstone of MiFID. The Regulation groups pre- and post trade transparency rules for both equity and non-equity instruments. In addition rules are introduced to make the aggregation and consolidation of details around trades easier, enabling both market participants and supervisors to have a consolidated data stream of information on prices and volumes of concluded trades. Industry will welcome in particular the fact that the Commission proposes to exclude large-in-scale operations from pre-trade transparency requirements; as such an obligation could have negative effects on trading and liquidity in the markets.		
Chapter 1 – Transparency for equity instruments		
Pre-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments	Article 3	• Those operating an MTF/OTF shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems. • This requirement applies for shares, depositary receipts, ETFs, certificates and other similar financial instruments. • Actionable indications of interest shall also be made public. • The arrangements for making this information public shall be accessible on reasonable commercial terms to investment firms.
Granting of waivers	Article 4	• Competent authorities shall be able to waive the obligation to make information public – particularly in the case of large-scale orders. • Before a waiver is granted, ESMA must be informed of its intended use and functioning – and the intention to grant a waiver must be made at least 6 months before it is intended to take effect. • The Commission may adopt measures specifying particular circumstances under which waivers may be granted.
Post-trade transparency requirements for trading venues in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments	Article 5	• Those operating an MTF/OTF shall make public the price, volume and time of the transactions executed – as close to real-time as is technically possible. • This requirement applies for shares, depositary receipts, ETFs, certificates and other similar financial instruments. • The arrangements for making this information public shall be accessible on reasonable commercial terms to investment firms.

Authorisation of deferred publication	Article 6	• Competent authorities shall be able to authorise regulated markets to provide for the deferred publication of details of transactions based in their type or size. • In particular, large-scale transactions may be deferred. • Those operating an MTF/OTF shall obtain prior approval of arrangements for deferred trade-publication, and shall clearly disclose those arrangements to market participants and the investing public. • ESMA shall monitor the use of arrangements for deferred trade publication and shall report to the Commission annually on how they are used.
Chapter 2 – Transparency for non-equity instruments		
Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives	Article 7	• Those operating an MTF/OTF shall make public prices and the depth of trading interests at those prices for orders or quotes advertised through their systems. • This requirement shall also apply to actionable indications of interest. • Information should be made available to the public on a continuous basis during normal trading hours. • The arrangements for making this information public shall be accessible on reasonable commercial terms to investment firms.
Granting of waivers	Article 8	• Competent authorities shall be able to waive the obligation to make information public – particularly in the case of large-scale orders. • Before a waiver is granted, ESMA must be informed of its intended use and functioning – and the intention to grant a waiver must be made at least 6 months before it is intended to take effect. • The Commission may adopt measures specifying particular circumstances under which waivers may be granted.
Post-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives	Article 9	• Competent authorities shall be able to authorise regulated markets to provide for the deferred publication of details of transactions based in their type or size. • In particular, large-scale transactions may be deferred. • Those operating an MTF/OTF shall obtain prior approval of arrangements for deferred trade-publication, and shall clearly disclose those arrangements to market participants and the investing public. • ESMA shall monitor the use of arrangements for deferred trade publication and shall report to the Commission annually on how they are used.
Authorisation of deferred publication	Article 10	• Competent authorities shall be able to authorise regulated markets to provide for the deferred publication of details of transactions based in their type or size. • In particular, large-scale transactions may be deferred. • Those operating an MTF/OTF shall obtain prior approval of arrangements for deferred trade-publication, and shall clearly disclose those arrangements to market participants and the investing public. • ESMA shall monitor the use of arrangements for deferred trade publication and shall report to the Commission annually on how they are used.

Chapter 3 – Obligation offer trade data on a separate and reasonable commercial basis		
Obligation to make pre- and post-trade data available separately	Article 11	• Those operating an MTF/OTF shall publish pre- post-trade transparency data separately. • The Commission may adopt measures specifying the methods and criteria and the level of disaggregation required form making data available on a separate basis.
Obligation to make pre- and post-trade data available on a reasonable commercial basis	Article 12	• Regulated markets, MTFs and OTFs shall make information published available to the public on a reasonable commercial basis. • Information shall be made available free of charge 15 minutes after the publication of a transaction.

REGULATION - TITLE THREE

Transparency for Investment Firms trading OTC including Systematic Internalisers		
More clarity is provided here on determining when a firm is an SI. The intention is to keep the definition as clean and clear as possible. A SI may not bring together third party buying and selling interests in functionally the same was as a regulated market, MTF or OTF, and is therefore not a trading venue. To remain OTC, it needs to be non systematic and irregular. To allow for this there are new provisions on bonds, structured finance products, emission allowances and standardised derivatives. In addition, and as was raised in the consultation minimum quote sizes are introduced, with two-way quotes are required. Lastly post-trade transparency rules are proposed.		
Obligation for investment firms to make public firm quotes	Article 13	• Systematic internalisers (SI) in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall publish a firm quote in those instruments admitted to trading on a regulated market or traded on an MTF or an OTF for which they are systematic internalisers and for which there is a liquid market. • Systematic internalisers may decide the size or sizes at which they will quote. • The standard market size for each class of instrument shall be a size representative of the arithmetic average value of the orders executed in the market for the financial instruments included in each class
Execution of client orders	Article 14	• Systematic internalisers shall make public their quotes on a regular and continuous basis during normal trading hours. • The quote shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.
Obligations of competent authorities	Article 15	• The competent authorities shall check the following: ○ that investment firms regularly update bid and offer prices published in accordance with Article 13 and maintain prices which reflect the prevailing market conditions; ○ that investment firms comply with the conditions for price improvement laid down in Article 14(2).
Access to quotes	Article 16	• Systematic internalisers shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the investors to whom they give access to their quotes. • Delegated acts to include amongst other things: ○ the criteria specifying when a quote is published on a regular and continuous basis and is easily accessible as well as the means by which investment firms may comply with their obligation to make public their quotes; ○ the criteria specifying those transactions where execution in several securities is part of one transaction or orders that are subject to conditions other than current market price
Obligation to publish firm quotes in bonds, structured finance products,	Article 17	• Systematic internalisers shall provide firm quotes in bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible or are admitted to trading on a regulated market or are

emission allowance and derivatives		traded on an MTF or an OTF when the following conditions are fulfilled ○ they are prompted for a quote by a client of the systematic internaliser; ○ they agree to provide a quote.
Monitoring by ESMA	Article 18	• Competent authorities and ESMA shall monitor the application of this Article regarding the sizes at which quotes are made available to clients of the investment firm and made available to other market participants relative to other trading activity of the firm, and the degree to which the quotes reflect prevailing market conditions in relation to transactions in the same or similar instruments taking place on regulated markets, MTFs, or OTFs
Post-trade disclosure by investment firms	Article 19/ 20	• Investment firms which, either on own account or on behalf of clients, conclude transactions in (see below) shall make public the volume and price of those transactions and the time they were concluded: ○ shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments admitted to trading on a regulated market or which are traded on an MTF or an OTF, shall make public the volume and price of those transactions and the time at which they were concluded. ○ transactions in bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible or are reported to trade repositories in accordance with Article [6] of Regulation [EMIR] or are admitted to trading on a regulated market or are traded on an MTF or an OTF • Commission to adopt by delegated acts identifiers of different trades to be published

REGULATION - TITLE FOUR

Transaction Reporting

The new rules extend the scope of transaction reporting requirements to cover OTF's and MTFs and will give supervisors greater ability to monitor for attempted market abuse and order book manipulation. The Commission is hoping that increasing transparency will increase market stability and reduce the build-up of systemic risk.

There is some unease over the increased powers of the supervisors although the Regulation does require a close working relationship to be established between national authorities and European supervisors.

The Commission has estimated the compliance cost of the entire Regulation to be anywhere between €512m-€732m and ongoing costs of €312m and €576m. Part of this cost will be the introduction of new systems to comply with the additional requirements on transaction reporting.

Obligation to uphold integrity of markets	Article 21	• Competent authorities will have a duty to monitor the activities of investment firms and make sure that they act honestly, fairly and professionally and in a manner that promotes the integrity of the market
Obligation to maintain records	Article 22	• Investment firms are required to keep for five years all data relating to transactions in final instruments on both their account and for clients • They will be required to record the name of the client and information required by the Directive on Financial Crime • Operators of regulated markets, MTF's and OTFs will also be required to keep the same information for five years • All of this information will be made available to ESMA on request.
Obligation to report transactions	Article 23	• Investment firms shall report all transactions to the competent authority no later than the close of the following working day. • This obligation does not apply to financial instruments that are not admitted on MTFs and OTFs, to products whose value does not depend on an instrument admitted to an OTF or MTF or instruments that do not have an impact on the value of instruments traded on an MTF or OTF. • The reports provided to the competent authority shall provide details relating to the names, numbers and quantities of the instruments bought and sold, the dates and times of execution, prices and a means of to identify the client. The computer algorithms within the investment firm responsible for execution will also need to be provided. • When transmitting orders, investment firms will be required to provide details of the transaction. Operators of OTFs and MTFs will also be required to publish transaction data carried out on their platforms. These reports must also be submitted to the competent authority • ESMA will draft standards on the data standards and formats for each of the reports submitted to the competent authority

REGULATION - TITLE FIVE

Derivatives

'Title Five' deals with one of the cornerstones of the G20 Pittsburgh statement that "All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest."

Consistent with that of EMIR, for the clearing of derivatives, the provisions here seek to outline and define what derivatives are suitable to require trading on platforms. Which derivatives though will be dealt with through provisions at Commission and ESMA levels. Technical standards will be drawn up to determine a derivative's suitability, accounting for a need for it to be already listed on a venue and be sufficiently liquid. Public consultations will also be undertaken by ESMA before any advice is submitted to the Commission.

Obligation to trade on regulated markets, MTFs or OTFs	Article 24	• Financial counterparties shall conclude transactions in derivatives that belong to a class of derivatives that has been declared subject to the trading obligation on: ○ Regulated markets; ○ MTFs; ○ OTFs; ○ Third country trading venues • Derivatives declared subject to the trading obligation shall be eligible to be admitted to trading or to trade on any trading venue on a nonexclusive and non-discriminatory basis • The Commission shall adopt by means of delegated acts measures specifying the types of contracts referred to in paragraph 2 which have a direct, substantial and foreseeable effect within the Union and the cases where the trading obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.
Clearing obligation for derivatives traded on regulated markets	Article 25	• The operator of a regulated market shall ensure that all transactions in derivatives pertaining to a class of derivatives declared subject to the clearing obligation that are concluded on the regulated market are cleared by a CCP.
Trading obligation procedure	Article 26	• ESMA shall develop draft implementing technical standards to determine the following which of the class of derivatives subject to the clearing obligation shall be traded on a venue and the date from which the trading obligation takes effect • In order for the trading obligation to take effect, the class of derivative needs to be admitted to trading on at least one venue, and be sufficiently liquid
Register of derivatives subject to the trading obligation	Article 27	• ESMA shall publish and maintain on its website a register specifying the derivatives that are subject to the obligation to trade on the venues.

REGULATION - TITLE SIX

Non-discriminatory clearing access for financial instruments		
The clauses on non-discriminatory access to clearing once again pit the UK against Germany and France and will re-ignite a debate that raged during negotiations on EMIR. Some in the industry have argued however, that for a genuinely competitive market place to be created, the Regulation would also need to cover margining and close netting, which are not included in the text. The UK supports the opening of exchanges to competition and has argued that the silo system is contrary to the principles of the single market. The German and French Governments meanwhile, are opposed to a significant liberalisation of the silo system. The Germans have argued that liberalising the silo system presumes interoperability between different exchanges and clearing houses while the French have claimed that liberalisation will fragment the market and reduce information transparency. The debate on these clauses is likely to continue as the text is debated in the Parliament and Council.		
Non-discriminatory access to a CCP	Article 28	• CCPs must clear financial instruments on a non-discriminatory basis taking into account fees and trading venue. This does not apply to derivatives subject to access obligations under EMIR • A request for access must be submitted to both the CCP and the competent authority. The CCP must provide a written response within three months of accepting or denying access • Competent authorities can only a venue access if they believe that granting access would threaten the proper functioning of the market • Third country access can only be granted to venues based in third countries that the Commission has deemed to have equivalent supervision and where a reciprocal access arrangement exists. • The Commission will adopt through Delegated Acts the conditions where access can be denied by a CCP including the volume of transactions, the number of users and other factors that may entail additional risk; and the conditions where access is granted for example, the confidentiality of information provided and the non-discriminatory; and transparent basis of fees and operational requirements regarding margining.
Non-discriminatory access to a trading venue	Article 29	• Trading venues must provide trade feeds including price related to trade feeds on a non-discriminatory and transparent basis following a request from any CCP that wishes to clear financial transactions executed on that venue. This does not apply to derivatives subject to clearing rules in EMIR (OTC derivatives). • Requests to access a trading venue must be formally

		submitted to a trading venue and a competent authority. The competent authority can only deny access where they believe that providing access would threaten the smooth functioning of the market. • CCPs established in third countries that are recognised as having analogous regulation by the Commission may access trading venues as long as a reciprocal arrangement is in place. • The Commission will adopt Delegated Acts that specify the conditions by which a trading venue can reject a request for access, including the volume of transactions, number of users and other factors that it believes would create undue risk. • Similarly, the Commission will adopt by Delegated Act rules under which access is granted.
Non-discriminatory access to and obligation to licence benchmarks	Article 30	• Where the value of a financial instrument is calculated by reference to a benchmark, the person with proprietary rights must ensure CCPs and trading venues have access to the relevant price and data feeds on information on the composition, methodology and pricing of the benchmark; and licenses for the purpose of trading and clearing. • Access to the benchmark will be granted on a commercial basis and at a price no higher than the lowest price offered to another CCP or trading venue. • CCPs or trading venues cannot enter into agreements with the owner of the benchmark that would restrict access to other CCPs or trading venues or alter the terms on which another body accesses the information on the benchmark.

REGULATION - TITLE SEVEN

Supervisory measures on product intervention and positions

It is evident that the Commission's intention for introducing rules on product interventions and positions is driven by a need for greater investor protection, and wider G20 efforts (mainly driven by France) to strengthen the stability of financial markets and reducing volatility in commodity markets. These rules will complement similar regulatory intervention powers that were agreed by Council and European Parliament on short-selling and credit default swaps, where traders need to disclose short positions to regulators, and where regulators and ESMA may temporarily restrict short-selling.

As the approaches to product intervention and supervision of positions differ at national level, the Regulation introduces harmonised powers for authorities to intervene in coordination with ESMA, while ESMA can overrule national authorities if it deems that national action is insufficient.

Industry has strongly voiced its opinion against the imposition of product intervention and position limits, arguing that regulatory intervention powers could create uncertainty among market participants and reduce innovation in new financial instruments. In any event, inconsistency between various national regimes should be avoided.

Position limits are too inflexible to properly address commodity derivatives, and regulatory intervention in commodities markets could be done better on a case-by-case basis, are often heard arguments.

The checks and balances introduced by the Commission's proposal take these concerns into account to a degree, but a number of issues remain. While it should be welcomed that ESMA cannot intervene permanently and that intervention measures will not have retrospective effect - providing at least some certainty - it is difficult to predict when exactly ESMA deems it opportune to overrule national regulators.

Similarly, while ESMA must consider the potentially negative effects on liquidity in commodity markets if it is to enforce position limits, it will be difficult to assess whether just 24 hours notice – or even less, in exceptional circumstances - is proportionate.

Product Intervention		

ESMA powers to temporarily intervene	Article 31	• To address threats either to investor protection or to the stability of the financial markets, ESMA may temporarily ban or limit:
		  ○ The marketing, distribution or sale of certain financial instruments or financial instruments with certain features, or
		  ○ A type of financial practice or activity
		• ESMA may only do so where a threat to investor protection or market stability exists, is not adequately addressed by existing EU legislation, and national authorities have taken no or inadequate measures.
		• ESMA must however consider the potential harmful consequences on investors or on the efficiency of financial markets, and the risk of creating regulatory arbitrage
		• ESMA must also inform competent authorities of its intention ahead of taking a decision, and any notice of intervention by ESMA shall be published on its website.
		• Any ban or limitation by ESMA will not have retrospective effect.

		• ESMA must regularly and at least every three months review the bans and limitations in place; if there is no renewal after three months the measure expires.

Product intervention by competent authorities	Article 32	• National authorities may ban or limit:
		  ○ The marketing, distribution or sale of certain financial instruments or financial instruments with certain features, or
		  ○ A type of financial practice or activity
		• The authority may only do so where a threat to investor protection or market stability exists, is not adequately addressed by existing EU legislation, and the proposed action is proportionate to the risk.
		• The national authority must also have consulted with other authorities that may be affected, and the proposed action may not have discriminatory effect on other EU market participants.
		• The authority must also inform ESMA and all other competent authorities with one month notice with details of:
		  ○ The financial instrument or practice concerned;
		  ○ The nature of the ban or restriction; and
		  ○ The evidence the decision is based on.
		• The decision shall also be published on the website of the national authority.

Coordination by ESMA	Article 33	• ESMA will coordinate action taken by national authorities under Article 32. • It shall adopt an opinion whether national bans or limitations are proportionate and justified, and state whether additional action by other national authorities is required. • If a national authority takes or proposes to action contrary to ESMA's opinion, it must publish on its website the reasons to do so.
Positions		
Coordination of national position management and position limits by ESMA	Article 34	• ESMA shall ensure a consistent approach in the coordination of national position management by competent authorities with regard to the nature and scope of the measures, and their duration. • To this end ESMA will maintain a database on its website will all measures in force, including their details.

Position management powers of ESMA	Article 35	• To address threats either to the stability of the financial markets including delivery arrangements for physical commodities, and if no or insufficient action has been taken by national authorities, ESMA may:
		  ○ Request all relevant document on the size or purpose of a position or exposure from any person;
		  ○ After analysing the document, require the person to reduce the size or exposure;
		  ○ Limit the ability of a person to enter into a commodity derivative.
		• ESMA must however consider the potential harmful consequences on the efficiency of financial markets including on the delivery of physical commodities, the risk of creating regulatory arbitrage, as well as reduced liquidity or uncertainty for market participants.
		• Any decision must be notified at least 24 hours in advance, and must contain the addressees, details and reason for the decisions.

		• If applicable, the notice also specifies the applicable quantitative restrictions, such as the maximum number of contracts the (class of) persons can enter into. • ESMA must inform competent authorities of its intention ahead of taking a decision. • Any ban or limitation by ESMA will not have retrospective effect. • ESMA must regularly and at least every three months review the bans and limitations in place; if there is no renewal after three months the measure expires.

REGULATION - TITLE EIGHT

Provision of services without a branch by third country firms

The Regulation introduces a strict equivalence regime for third country firms that wish to provide services in the EU. A framework established on strict equivalence ensures consistency within the European regulatory landscape and seems a logical consequence of the global nature of the market.

The Commission is likely to face great resistance on this. Industry - both within and outside the EU – argued that the EU should be open, and that access by third country firms should be flexible. Their take is that strict equivalence in combination with up to 6 months of uncertainty whether a registration is granted does not offer this flexibility.

A preferred alternative would be allowing third country firms to meet certain minimum standards to deal with at least eligible counterparties and professional clients in the EU. This would open up markets and greatly remove the risk of reciprocal regulation with extraterritorial effect introduced by other jurisdictions. It will also allow for greater coordination among jurisdictions and companies will have more sight on the specific criteria they need to meet to be allowed to provide their services in the EU.

EU markets home to significant trading activity such as the UK will also object to strict equivalence, preferring the current regulatory environment. This may significantly delay the negotiations, as attempts to create a similar regime under the Alternative Investment Fund Managers (AIFM) Directive led to a stalemate, meaning MEPs and financial attachés should prepare for strong negotiations on this topic.

General provisions	Article 36	• Third country firms need to be registered in ESMA's third country register in order to provide certain services to eligible counterparties in the EU without establishing a branch in the EU
		• If ESMA wants to enlist a third country firm that has requested to be registered, the following requirements need to be met:
		  ○ The Commission has adopted an equivalence decision on the legislative and supervisory environment in the third country;
		  ○ The firm is authorised in the home country to provide the services it intends to provide in the EU; and
		  ○ A cooperation agreement is in place between ESMA and the third-country.
		• Third country firms can only apply for the register after the Commission has adopted an equivalence decision; ESMA shall decide within 180 days to grant or refuse the application.
		• Once granted, third country firms must inform clients that the firm is allowed to provide specific services to eligible counterparties only, and that they are not subject to supervision in the EU.
		• Persons established in the EU may receive investment services from non-registered third country firms only on that person's initiative.

Equivalence decisions	Article 37	• With assistance of the European Securities Committee, the Commission may decide that the legal and supervisory environment in a third-country is equivalent to the requirements set out by the MiFID 2 and CRD IV packages, including relevant implementing measures. • The third country must also have an equally reciprocal registration regime

		for the provision of services by investment firms authorised by MiFID 2. • The legal and supervisory framework needs to meet all of the following criteria to be deemed equivalent: ○ Investment firms are subject to authorisation and effective ongoing supervision and enforcement; ○ Investment firms are subject to equivalent capital requirements and conditions for shareholders and the management body; ○ organisational requirements, including internal control mechanisms, safeguarding of client assets, and algorithmic trading; ○ Investment firms are subject to equivalent conduct of business rules; ○ The framework ensures transparency and integrity of the market to prevent market abuse, including rules on insider dealing and market manipulation. • If the third country framework is deemed equivalent, ESMA shall enter into a cooperation agreement with a third country supervisor, containing at least: ○ The means of exchange of all information regarding non-EU firms requested by ESMA; ○ The means for timely notification of ESMA if the third country authority considers a third country firm in breach of legislation; ○ Procedures on the coordination of supervisory activities.
Register	Article 38	• ESMA's register shall be published on its website and shall be publicly available, containing information on services that third country firms are authorized to provide, and on the competent third country supervisor.
Withdrawal of registration	Article 39	• ESMA may withdraw a registration if ○ Arguments supported by documented evidence show that the non-EU firm is detrimental to investors or financial markets; or ○ Arguments supported by documented evidence show that the non-EU firm has breached rules in its home country that form the basis for the Commission's equivalence decision. • The decision to withdraw a registration may only be taken if ESMA has referred the matter to the third-country supervisor which has taken no or insufficient action, and after ESMA has given at least 30 days notice to the third country supervisor of its intention to withdraw. • The Commission will reassess whether the equivalence decision can continue to remain applicable.

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