

# MiFID II - MiFIR Reform

*The revision of the 'market' discipline in MiFID II and MiFIR*

## Unlocking the Future of Financial Markets: Navigating MiFID II / MiFIR Reforms with Expertise and forward-looking approach

Embrace the transformative MiFID II / MiFIR reforms with the Bird & Bird Team of the Finance & Financial Regulation Practice, your partners in navigating the evolving regulatory landscape.

Our focused expertise in financial market regulations equips trading venue operators and investment firms, including authorized banks, with strategic legal advice to seamlessly integrate these reforms.

### 1. Foreword – The Landscape

On 28 February 2024, the final acts relating to the Directive amending MiFID II<sup>1</sup> and the Regulation amending MiFIR<sup>2</sup> (MiFIR review) were co-signed, concluding a process that originated from proposals published in November 2021 as part of the September 2020 Capital Markets Union Action Plan.

The two acts were published on 8 March 2024 in the Official Journal of the European Union and thus have entered into force on 28 March 2024. Thus, the MiFIR review applies from that date, while the MiFID II reform requires Member States to adopt the necessary laws, regulations and administrative provisions by 29 September 2025.

As stated in the MiFIR review and further clarified by the European Commission in its draft Communication of 27 March 2024 and ESMA's public statement of the same date, in all cases where the MiFIR provisions need to be complemented by new or amended Commission Delegated Regulations in order to be fully operational, the existing Delegated Regulations, as applicable before 28 March 2024, continue to apply, together with the provisions they complement, in order to ensure legal certainty for market participants as to the applicable regime<sup>3</sup>.

These legislative acts introduce significant innovations to increase the transparency and effectiveness of securities market regulation in the European Union and to enhance investor protection. At the same time, they aim to reduce the compliance burden on investment firms and trading market participants, thereby enhancing the competitiveness of the EU financial sector.

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<sup>1</sup> Directive (EU) 2024/790 of the European Parliament and of the Council of 28 February 2024 amending Directive 2014/65/EU on markets in financial instruments.

<sup>2</sup> Regulation (EU) 2024/791 of the European Parliament and of the Council of 28 February 2024 amending Regulation (EU) No 600/2014 as regards enhancing data transparency, removing obstacles to the emergence of consolidated tapes, optimising the trading obligations and prohibiting receiving payment for order flow.

<sup>3</sup> See the European Commission's draft notice (C(2024) 2083) - published on 27 March 2024 - on the interpretation and implementation of the transitional provisions of the MiFIR review as regards enhancing data transparency, removing obstacles to the emergence of consolidated tapes, optimising the trading obligations and prohibiting receiving payment for order flow and the ESMA Public Statement (ESMA74-2134169708-7163) on "Transition for the application of the MiFID II/MiFIR review".

## MiFID I: Prelude to Reform

The Markets in Financial Instruments Directive (MiFID), in operation since 1 November 2007, played a key pioneering role in defining the regulation of financial markets in the European Union (EU) in a modern way, primarily targeting investment firms (as well as banks authorised to provide investment services) and operators of regulated markets, whose authorisation requirements, business conduct and organisational standards for the performance of authorised services/activities were established. For what is of interest here, the decisions to introduce Multilateral Trading Facilities (MTFs) - operated by an investment firm or a regulated market operator - and to remove the possibility for Member States to require that all trading in financial instruments take place on specific trading venues were made to increase pan-European competition between the then existing trading venues (regulated markets) and between these and the new MTFs, with a view to achieving greater harmonisation and efficiency gains.

For the same purposes, for all trading venues and systematic internalisers, specific pre- and post-trade transparency requirements for equity securities (with exemptions depending on the market model and the type of order or transaction) were envisaged, to be met by the publication of relevant market information, thus made accessible to investors.

The innovations introduced by MiFID I represent a significant qualitative departure from previous regulatory standards.

## The financial crisis of 2007-2011 as a watershed

The financial crisis of 2007-2011 acted as a critical turning point in the global financial landscape.

A significant revelation of this period was the institutional and regulatory shortcomings in addressing supranational financial phenomena and systemic risks within a globally integrated financial environment. Prior to the crisis, there was a notable disregard for the excessive leverage employed by financial institutions, the opacity of over-the-counter (OTC) trading, the mis-matching between assets and liabilities, the complexity of financial products, and the emergence of unregulated 'shadow banking' entities. These factors collectively eroded trust in the financial system's efficiency in resource allocation, propelling a cycle of mistrust, reduced financial trading, and market illiquidity.

In response to these challenges, the world's leading economies, under the G20, mandated the Financial Stability Board (FSB) in 2009 and 2010 to devise strategies aimed at addressing the most unregulated and opaque segments of the financial system. The objectives included enhancing systemic risk reduction, increasing banks' prudential and liquidity standards, strengthening the market infrastructure, and imposing trading, clearing, and transparency requirements on derivatives.

This initiative was followed by the EU's regulatory agenda adjustments aligning with the FSB's policy framework to fortify the stability and integrity of the global financial system.

## 2. The importance of MiFID II / MiFIR in the post-financial crisis context

In the context of the post-financial crisis, the European Commission, adhering to the Financial Stability Board's recommendations, initiated a consultation process in October 2011 to overhaul financial market regulations. This led to the introduction of amendments to MiFID II, MiFIR, and EMIR (the European Market Infrastructure Regulation) concerning OTC derivatives, central counterparties, and trade repositories. The finalized texts of MiFID II and MiFIR were published in June 2014 and took effect on 3 January 2017, maintaining their relevance with several adaptations to date.

MiFID II and MiFIR represent critical components in enhancing the transparency, safety, and efficiency of European financial markets, aiming to prevent financial instability and harmful market practices.

Key innovations introduced by MiFID II and MiFIR include:

- i **expanded regulatory coverage in the EU**, including new market participants, financial instruments, and another model of MTF such as the Organised Trading Facilities (OTFs), dedicated to the trading of bond, structured products and derivatives on discretionary basis, aiming to ensure a level playing field and enhance market integrity.

- ii **enhanced transparency in investment services and market operations**, through improved pre- and post-trade transparency, and the requirement for transaction reporting.
- iii **strengthened investor protection** through new requirements for suitability tests, independent advice, and fee transparency.

Additionally, the framework introduced several new elements, such as the establishment of a Consolidated Tape for market data, the mandate for trading standardised derivatives on trading venues, support for SME growth markets, non-discriminatory access to clearing and settlement systems, regulation of algorithmic and high-frequency trading, and granting national authorities broad enforcement powers.

However, the complexity of the regulatory requirements has increased, highlighting the need for ongoing reform to keep pace with technological advancements and evolving market practices.

### 3. The European Commission's Action Plans for the Capital Markets Union

Prior to the implementation of MiFID II and MiFIR, there was a consensus among EU institutions that the regulatory framework was insufficient to address the fragmentation of capital markets within the European Union. This fragmentation was attributed to the absence or inconsistent application of European rules, different national laws, tax regimes and insolvency procedures, which hindered the ability of investors and firms to operate with the same efficiency across the EU.

The Capital Markets Union (CMU) Action Plan, launched by the European Commission in September 2015, aimed to mitigate these challenges by removing barriers to cross-border investment.

The CMU plan outlined several key initiatives to promote the development of the European financial sector, including harmonising rules for market participation, establishing a framework for standardised securitisation, supporting pan-European information systems, regulating non-bank financing, reforming corporate insolvency laws and creating efficient post-trading infrastructures for cross-border transactions.

Following the launch of the CMU, the EU's regulatory agenda was challenged to maintain momentum by subsequent policy measures, including the 2017 update of the CMU, the 2018 Fintech Action Plan and the 2019 European Green Deal. These initiatives aimed to adapt the financial sector to technological innovation, improve cybersecurity, protect consumers and reorient the EU economy towards sustainability.

The outbreak of the COVID-19 pandemic in early 2020, perceived as an exogenous shock with profound social and economic consequences in all EU Member States, underlined the need for a revised CMU plan.

On 24 September 2020, the European Commission unveiled a revised action plan for the Capital Markets Union (CMU), with a renewed focus on specific priorities to enhance the EU's financial market landscape. This "new action plan" includes several key initiatives:

- i **Listing Act Package**: adopted on 7 December 2022, this package proposed significant legislative changes, including amendments to MiFID II, in particular the relaxation of the 'research unbundling rule' for SMEs. This rule change allows for combined payments for execution and research services, with the aim of making public capital markets more attractive to EU companies and improving SMEs' access to capital. The changes aim to reduce burdens on issuers while maintaining market integrity and investor protection. A provisional agreement was reached by the Council and Parliament on 1 February 2024 and endorsed by the Committee of Economic and Monetary Affairs (ECON) on 22 February 2024. The Parliament's first reading is scheduled for 22 April 2024. For some background on the Listing Act Package, please see [here](#).
- ii **European Single Access Point (ESAP)**: a proposal for a digital platform that offers EU-wide access to public disclosures by companies, including financial and sustainability-related information. The ESAP aims to lower search and processing expenses for users without imposing disproportionate administrative costs on disclosing companies. The ESAP regulation was published on 20 December 2023, as part of the CMU package.
- iii **Strengthening Retail Investors' Confidence**: This initiative was outlined in a Commission Communication of 24 May 2023, which sets out the 'Retail Investment Strategy' (RIS). The strategy, which is still under negotiation with the European Parliament and the Council, focuses on

increasing retail investors' confidence in capital markets. It is reported that ECON adopted the RIS on 20 March 2024. For some background on the discussion of introducing an inducement ban, see our separate articles from 2023 [here](#) and [here](#).

- iv **Revision of the Central Securities Depositories Regulation (CSDR):** this revision aims at improving the EU securities settlement infrastructure (e.g., equities, bonds) and facilitating cross-border settlement services, including through a cross-border Central Securities Depository (CSD) passport. The goal is to develop a more integrated post-trading services industry in the EU. The amending Regulation<sup>4</sup> was adopted on 13 December 2023, published in the OJ on 27 December 2023 and (most of its provisions) entered into force on 16 January 2024.
- v **Consolidated Tape for Trade Data:** The Commission has committed to bringing forward a legislative proposal to support the establishment and efficient functioning of a 'consolidated tape' of market data in the EU. This instrument, already foreseen in MiFID II and MiFIR, is designed to make aggregated trade data mandatory across the EU in order to improve transparency and market efficiency.

## 4. The revision of the MiFID II and MiFIR regulatory package

The explanatory memoranda to the Directive amending MiFID II and the Regulation amending MiFIR set out a clear objective for the adopted regulatory changes: fostering a more efficient single financial market in the EU. To accomplish this, it has identified three critical areas of focus:

- **improving transparency and availability of market data:** this priority seeks to improve the transparency and accessibility of market-related information so that market participants can make more informed decisions.

- **improving the level playing field between execution venues:** this priority is aimed at ensuring fairness and a level playing field for all trading platforms, removing disparities that may disadvantage certain participants.

- **ensuring that EU market infrastructures remain internationally competitive:** this focuses on maintaining and enhancing the global competitiveness of EU financial market infrastructures, ensuring that they can operate effectively in the international arena.

These priorities guide the regulatory updates and serve as benchmarks against which the effectiveness of these innovations will be assessed. The overall objective is to promote a truly efficient, transparent and competitive single market for trading across the European Union.

Most of the legislative measures are contained in the Regulation amending MiFIR, while the Directive contains only those amendments to MiFID II that are necessary to align the two texts and ensure the overall coherence of the regulatory framework. The two legislative acts should therefore be read together.

The amendments are divided into specific sections, each of which addresses specific regulatory and market areas.

### 4.1 Transparency and access to market information

#### The Consolidated Tape.

The Consolidated Tape system is pivotal to the European Union's strategy for enhancing the integration and efficiency of its trading market system. By aggregating and broadcasting core market data in real time, the system covers essential information such as best bids and offers (including price and volume) for equities, and transaction details for both equities and non-equities, along with regulatory data related to the functioning of order-matching systems. This comprehensive data pool encompasses inputs from all trading

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<sup>4</sup> Regulation (EU) 2023/2845 of the European Parliament and of the Council of 13 December 2023 amending Regulation (EU) No 909/2014 as regards settlement discipline, cross-border provision of services, supervisory cooperation, provision of banking-type ancillary services and requirements for third-country central securities depositories and amending Regulation (EU) No 236/2012

venues and systematic internalisers across the EU, aiming to deliver a transparent and detailed view of market operations at the level of individual financial instruments.

The primary objective of the Consolidated Tape is to improve market participants' access to high-quality market data, thus enabling them to make more informed trading decisions. It achieves this by continuously updating the terms and conditions of trading venues, which is crucial for market transparency and facilitating compliance with best execution requirements. The granularity of the information provided by the system enhances the ability of investors and other market participants to effectively assess market conditions, thereby supporting the broader goal of creating a more integrated, transparent, and efficient European trading environment.

The consolidated market data publication system enhances the ability to assess the structural characteristics, functionalities, and services of various trading venues and their market segments.

Key aspects facilitated by the consolidated tape include:

- estimation of market liquidity through volumes traded, trading frequency, average transaction size, the number and types of market participants, and other pertinent information.
- evaluation of the probability and speed of order execution based on order size and nature.
- assessment of brokerage and other related costs, including execution, clearing, and settlement venue fees, as well as commissions paid to third parties.
- analysis of the impact on financial instrument prices and other settlement conditions.

This framework enables investment firms to refine and monitor their order execution policies with greater efficiency, leveraging a vast database for policy development and review. The system supports periodic checks and is also beneficial for policies concerning order receipt, transmission, or the use of a single trading venue for specific financial instruments. Essentially, the consolidated tape aids in making informed decisions and streamlining operational processes in a fragmented market environment.

## Consolidated Tape Providers (CTP) and Data Contributors

The regulatory framework for Consolidated Tape Providers (CTP) within the European Union is established under Regulation (EU) No 600/2014. CTPs are authorized entities responsible for gathering publicly available information on transactions involving equity and non-equity financial instruments. This information is sourced from regulated markets, Multilateral Trading Facilities (MTFs), Organised Trading Facilities (OTFs), Authorized Publication Arrangements (APAs), and systematic internalisers, all of which are subject to transparency obligations.

CTPs are tasked with consolidating this information into a continuously updated electronic data stream, making it publicly available in real-time to the extent technically feasible and under commercially reasonable conditions. Despite the legislative framework in place, there has been a noticeable lack of applications for CTP authorization. This lack of interest is attributed to three primary challenges: (i) the uncertainty surrounding the acquisition of data from various execution venues or relevant APAs; (ii) the non-harmonization of data reported by these venues leading to reduced quality and increased consolidation costs, and (iii) the absence of commercial incentives for operating as a CTP.

To address these challenges, an amendment to MiFIR has been introduced to require trading venue operators, systematic internalisers and APAs (referred to as 'data contributors') to provide regulatory and market data concerning shares, ETFs, bonds traded on trading venues, and OTC derivatives subject to clearing obligation, directly to the data centre of the CTP service provider.

Market data contributors are required to transmit data in a standardized format, using high-quality transmission protocols, with the aim of achieving real-time data provision. Consolidated Tape Providers (CTPs) have the discretion to select their preferred transmission protocol from the options provided by data contributors.

According to the new MiFIR, accredited CTPs will play a key role in the collection, aggregation and dissemination of the market information that 'data contributors' are obliged to transmit. The CTPs will be designated one per asset class (equities and listed index funds; bonds; listed and OTC derivatives) through



a selective process managed by ESMA for a period of five years, thus ensuring control over the entire system of data generation and transmission to the consolidated publication system. They must ensure the accuracy, timeliness and consistency of the data to be published. Only CTPs selected and authorised by ESMA may collect data from contributors under the mandatory contribution scheme. Article 27-nonies of MiFIR defines the organisational requirements for CTPs.

ESMA has nine months - starting on 28 March 2024 - to organise the first selection procedure to award a single entity the right to act as a CTP for five years. One CTP will be authorised for each of three asset classes: bonds, equities (shares and ETFs) and OTC derivatives (or their subclasses).

**Data Quality.** To ensure the accuracy and timeliness of the information provided to 'consolidated tape' systems, strict quality standards defined through regulatory technical standards are imposed. ESMA shall develop draft regulatory technical standards to specify the quality of the transmission protocol, measures to address trade misreporting and implementing rules in relation to data quality, including provisions on cooperation between data contributors and the CTP, and, if necessary, the quality and substance of data for the operation of consolidated tapes, taking into account the opinion expressed by a panel of experts selected by the Commission through an open procedure, international developments and standards agreed at EU or international level. This approach ensures that there are clear and uniform criteria for quality, transparency and efficiency in the collection, processing and dissemination of market data.

**Data synchronisation.** Another key component to ensure the high quality of data is their time synchronisation. To this end, all data contributors and the consolidated tape provider affix time stamps to their data in a harmonised manner and are required to synchronise their transaction time stamp systems, i.e., the business clocks used to record the date and time of any reportable event, on the basis of the regulatory technical standards developed by ESMA and validated, as usual, by the European Commission. The Regulation amending MiFIR provides for the extension of this requirement not only to trading venues and their members, participants or users, systematic internalisers, but also to designated public transmission entities, APAs and CTPs. As this requirement is now contained in MiFIR (Regulation (EU) No 600/2014), it is to be removed from MiFID II (Directive 2014/65/EU) and Member States need to adopt their local laws to this change.

## 4.2 Simplification of the regulatory framework and operational clarity

### **Transfer of regulation of multilateral systems**

**from MiFID II to MiFIR:** the transfer of provisions from a directive to a regulation has important legal and practical implications for the EU legal system and the actors involved. It will ensure direct application in all Member States without the need for national implementing legislation, thus ensuring a 'level playing field' between regulated markets, Multilateral Trading Facilities (MTFs) and Organised Trading Facilities (OTFs) through uniformity and consistency in the interpretation and application of the rules governing MTFs at EU level. It also consolidates the 'level playing field' between regulated markets and systematic internalisers by requiring the latter to comply with the provisions of Title III of MiFID II that apply to regulated markets, thus maintaining a level playing field between trading venues and systematic internalisers.

### **Alignment of the obligation to make pre- and post-trade data available with the obligation to provide data to the CTPs:**

Titles II and III of MiFIR require trading venues, APAs, investment firms and systematic internalisers to make public pre-trade and post-trade data relating to transactions in each specific instrument. This obligation is essential to allow market participants to access this data. However, in order to avoid an undue burden on data contributors, the obligation to publish data is aligned as much as possible with the obligation to provide data to the CTPs.

### **Changes related to direct electronic access:**

The revision concerns the requirement for providers of direct electronic access to be authorised investment firms or credit institutions.

The new directive recognises the effectiveness of the gate-keeper function performed by these firms and institutions, allowing greater operational flexibility and reducing the regulatory burden on firms providing direct access to their clients.

### **Introduction of designated publication entity status,**

which allows an investment firm to be responsible for making a transaction public through an APA without having to opt for systematic internaliser status. Furthermore, competent authorities should grant investment firms the status of designated entity for publication for specific categories of financial instruments, in line with the request of such investment firms, and should communicate such requests to ESMA. ESMA should keep a public register of such designated entities per class of financial instruments so that market participants can identify them.

**Best Execution:** introduces the temporary suspension of the reporting requirements on best execution for execution venues, pending a technical assessment of the usefulness of the information produced. This is an administrative relief measure that should be read in conjunction with the provision for enhancing the information tool constituted by the consolidated market data publication system.

ESMA is called upon to develop draft regulatory technical standards (RTS) on the criteria to be considered when establishing and assessing the effectiveness of the *order execution* policy pursuant to Article 27(5) and (7) of MiFID II, taking into account the difference between retail and professional clients.

## 4.3 Managing excessive volatility and derivative markets.

**Rules to limit excessive volatility and assessment of the regulatory framework:** MiFID II contains rules requiring trading venues to implement mechanisms to limit excessive market volatility, in particular trading breaks and price *collars*. Specific rules for transparency on the activation of such mechanisms by EU trading venues to suspend or limit trading in exceptional circumstances, ensuring the stability of financial markets, are introduced through the MiFID II amending directive. ESMA is required to establish draft regulatory technical standards (RTS) on the principles to be considered by trading venues when defining the main technical parameters for the suspension or limitation of trading.

**Improvements to trading obligations:** for example, by imposing a single ceiling on the *dark trading* volume of an equity instrument at the level of the total trading of that instrument in the EU by the amendment of MiFIR.

**Alignment of the obligation to trade derivatives** (including OTC derivatives) on trading venues with the obligation to clear derivatives.

For derivatives, whether traded on a trading venue or OTC, public transparency obligations are required for transactions in (1) sufficiently standardised derivatives subject to clearing obligations under EMIR (Regulation (EU) No 648/2012), (2) where the underlying is traded on a trading venue, or (3) where the underlying is an index or basket composed of financial instruments traded on a trading venue.

It also harmonises (and removes the discretion of national competent authorities) the deferral regime for the publication of post-trade data in respect of transactions in non-equity instruments.

Moreover, the revised MiFIR requires market operators and investment firms operating a trading venues to make certain pre- and post-trade data available on a reasonable commercial basis and to ensure non-discriminatory access to this information.

**Prohibition of receiving or offering payments for routing order flows to specific trading venues (PFOF).** Different interpretations of this article by national competent authorities have led to divergent approaches to the application of *best execution* requirements and the supervision of market practices. This divergence is particularly evident in the different ways in which order flow practices are treated in the EU. This is why it was chosen to prohibit investment firms from receiving such payments in the EU through the instrument of the regulation amending MiFIR. This prohibition states that it is incompatible with the objective of ensuring the best execution of orders for clients for a financial intermediary to receive fees, commissions or non-monetary benefits from third parties for the execution of client orders on a specific trading venue or for the transmission of client orders to third parties for execution on a specific venue. Accordingly, investment firms are prohibited from accepting such payments. This will require in particular certain neo-brokers to change their business (and pricing) models materially.



## 5. Conclusions

Navigating the complexities of financial market regulations requires not only a deep understanding of the legislative landscape but also a strategic approach to compliance and market participation. The recent revisions to MiFID II and MiFIR, spearheaded by the European Union, mark a pivotal moment in the ongoing evolution of the financial markets. These changes are designed to enhance market transparency, improve investor protection, and ensure that the EU's financial infrastructure remains competitive on a global scale. At the B&B Team of F&FR Practice, we specialize in providing tailored legal advice that empowers trading venue operators and investment firms, including authorized banks, to seamlessly integrate these regulatory advancements into their operations. Our expertise is directed towards optimizing compliance strategies and facilitating effective market participation under the new regulatory regime.

In conclusion, the comprehensive revisions to the 'market' discipline within MiFID II and MiFIR represent a significant stride towards enhancing the transparency, efficiency, and investor protection within the European securities market. The introduction of critical measures such as the Consolidated Tape Providers, amendments aimed at harmonizing data quality, and provisions to manage excessive volatility and derivative markets underscores a concerted effort to address the evolving challenges and complexities of the financial landscape. Furthermore, the adjustments seek to simplify the regulatory framework, providing clearer operational guidance to market participants and reducing compliance burdens.

The Bird & Bird Team of the Finance & Financial Regulation Practice stands ready to offer specialized legal advice to assist trading venue operators and investment firms, including authorized banks, in navigating these changes. Our expertise is aimed at streamlining the integration of MiFID II and MiFIR provisions to ensure full compliance, thus facilitating a seamless transition to a more transparent, competitive, and integrated European financial market. Our commitment is to provide our clients with the insights and strategic guidance necessary to adapt to and thrive within the newly established regulatory environment, reinforcing the EU's position as a leading global financial marketplace.

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