Amendments to MiFID II and MiFIR

The EU's markets in financial instruments

OVERVIEW

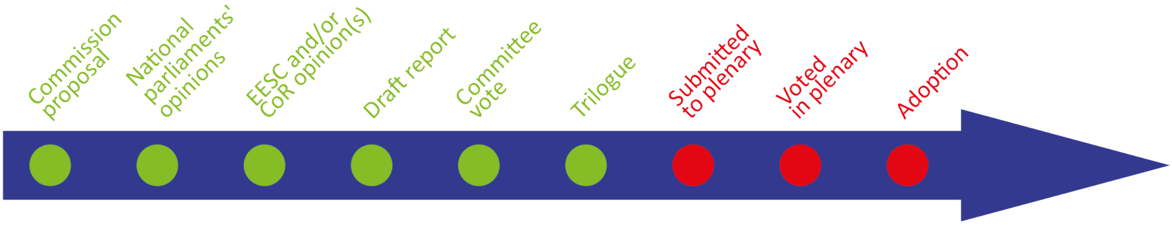
The second Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) are the principal texts regulating investment services and financial markets activities in the EU. Following an extensive consultation and in light of the recent developments in the context of the coronavirus pandemic, the European Commission proposed the establishment of an EU-wide consolidated tape for financial markets instruments, as well as making targeted changes to market structure, so as to increase transparency and strengthen the competitiveness of EU financial markets. Consolidated tape is a high-speed electronic system that reports the latest price and volume data on sales of exchange-listed stock.

The proposals are currently being discussed by the co-legislators. Within the European Parliament, both have been assigned to the Committee on Economic and Monetary Affairs (ECON), which adopted its reports on 1 March 2023 and also decided to enter into trilogue negotiations on that basis. A provisional agreement was reached on 29 June 2023.

Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 600/2014 as regards enhancing market data transparency, removing obstacles to the emergence of a consolidated tape, optimising the trading obligations and prohibiting receiving payments for forwarding client orders

Committee responsible:	Economic and Monetary Affairs (ECON)	COM(2021) 726 and COM(2021) 727
Rapporteur:	Danuta Maria Hübner (EPP, Poland)	25.11.2021
Shadow rapporteurs:	Eero Heinäluoma (S&D, Finland) Nicola Beer (Renew, Germany) Karima Delli (Greens/EFA, France) Johan Van Overtveldt (ECR, Belgium) Gunnar Beck (ID, Germany) José Gusmão (The Left, Portugal)	2021/0384(COD) and 2021/0385(COD) Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Next steps expected:	Approval of the text agreed in trilogue	



Author: Issam Hallak
Members' Research Service
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Introduction

Investment services and activities in financial markets are governed by the second Markets in Financial Instruments Directive (**MiFID II**) and the Markets in Financial Instruments Regulation (**MiFIR**). In 2020, the European Commission announced the Capital Markets Union 2020 Action Plan (COM(2020) 590), comprising 16 actions. As part of the key objective to 'integrate national capital markets into a genuine single market', Action 14 aims to amend MiFID II and MiFIR in view of establishing consolidated tape (Box 1). On 25 November 2021, the Commission announced a package of legislative proposals to 'ensure better data access and revamped investment rules', that include the review of the MiFIR, and two proposals to amend the MiFID II and MiFIR.[1]

Existing situation

The current Directive and Regulation on Markets in Financial Instruments are the outcome of a long regulatory process. The first Markets in Financial Instruments Directive (Directive 2004/39/EC or MiFID I) updated the earlier Council Directive 93/22/EEC on investment services in the securities field. MiFID I was designed to set rules on the conduct of business and organisational requirements for investment firms, authorisation requirements for regulated markets, requirements for regulatory reporting to avoid market abuse, a requirement for trade transparency as regards shares, and rules on the admission of financial instruments to trading.

> **Box 1. Consolidated tape provider**
>
> A 'consolidated tape' is a database designed to provide a continuous electronic live data stream on prices and trading volumes, consolidating the information obtained from several trading venues across the EU.
>
> MiFIR defines 'consolidated tape provider' (**CTP**) as a person authorised to collect and provide such consolidated timely data.

In 2011, the European Commission carried out an assessment of MiFID I with a view to eliminating the weaknesses exposed by the global financial crisis of 2008-2009 and delivering on the relevant commitments assumed by the EU at G20 level. The assessment also sought to help increase competition between venues in the trading of financial instruments and to adjust MiFID I to the various technological advances that had taken place since 2007 (such as high frequency trading and algorithmic trading). The result was MiFID II and MiFIR. Below is a summary of the contents of these two regulatory texts.

MIFID II

Title I (Articles 1-4) contains articles that define its scope (and exemptions[2]), offer Member States the possibility not to apply MiFID II to persons meeting certain criteria, and provide the key definitions used in the directive.[3]

Title II (Articles 5-43) contains provisions and procedures for the authorisation of investment firms (Articles 5-19) and for their operating conditions (Articles 21-34). Articles 34-38 establish the rights of investment firms and Articles 39-43 focus on the provision of investment services and activities by third-country firms (investment firms whose registered seat and head office are not located in the EU).

Title III (Articles 44-56) contains provisions on regulated markets.

Title IV (Articles 57-58) contains provisions on position limits and position management controls in commodity derivatives and reporting.

The provisions of **Title V** (Articles 59-66) focus on data reporting services.

Title VI (Articles 67-88) contains provisions on the national competent authorities (NCAs). Specifically, Articles 67-78 relate to the designation, powers and redress procedures applied by the NCAs, Articles 79-87 deal with the cooperation both among the NCAs and between them and the

European Securities and Markets Authority (**ESMA**), while Article 88 concerns cooperation (exchange of information) with third countries. Lastly, Article 70 obliges Member States to empower their NCAs to impose administrative sanctions and measures applicable to all infringements of MiFID II and MiFIR.

Title VII (Articles 89 and 89a) contains provisions on delegated acts.

MIFIR

Title I (Articles 1-2) contains the subject matter, scope and necessary definitions for the regulation.

Title II (Articles 3-13) focuses on ensuring transparency for trading venues. Specifically, Articles 3-7 contain transparency provisions for equity instruments, Articles 8-11 contain transparency provisions for non-equity instruments and Articles 12-13 set the obligation for market operators and investment firms operating a trading venue, to offer the public the pre-trade and post-trade transparency data separately and on a reasonable commercial basis, and to ensure non-discriminatory access to information.

Title III (Articles 14-23) contains provisions on transparency for systematic internalisers and investment firms trading away from regulated markets – i.e. over the counter, **OTC** – and establishes a tick-size regime for systematic internalisers.

Title IV (Articles 24-27) contains provisions on transaction reporting.

Title IVa (Articles 27a-27i) contains provisions on data reporting services.

Title V (Articles 28-34) contains provisions on transactions in derivatives.

Title VI (Articles 35-38) contains provisions that ensure non-discriminatory clearing access to financial instruments.

Title VIa (Articles 38a-38o) sets the powers and competences of ESMA, and the procedures it applies. Additionally, the provisions set out the administrative sanctions and other administrative measures applicable to infringements of the requirements under the regulation.

Title VII (Articles 39-45) contains provisions on supervisory measures for product intervention and positions. Specifically, Articles 39-43 focus on product monitoring and intervention, while Articles 44-45 focus on positions or exposures entered into via derivatives.

Title VIII (Articles 46-49) focuses on the provision of services and performance of activities by third-country firms, following an equivalence decision.

Title IX contains provisions on delegated (Article 50) and implementing (Article 51) acts, while the final articles of the regulation (52-54b) set the obligations to report and review, amend the European Market Infrastructure Regulation (EMIR), establish transitional provisions as well as transitional measures related to ESMA, and regulate relations with auditors.

Parliament's starting position

In its resolution of 8 October 2020 on further development of the capital markets union (CMU), the Parliament noted that it supports the revision of the MiFID II regime in order to induce investment research by small and medium-sized enterprises. It called on the Commission to assess whether it is necessary to review MiFIR to eliminate potential frictions that can affect the ability of EU companies to raise capital, especially in view of the end of the transition period following the UK's departure from the EU. In addition, it urged the Commission to clarify the differentiation between professional and retail investors on all levels of MiFID II, taking the view that it is important to allow retail investors, on their request and through the application of clear criteria, to be considered professional investors. It also requested the Commission to consider if the introduction of a category of semi-professional investors would better respond to the reality of participation on the financial markets and assess whether the introduction of such a category would be needed or not. Lastly, it was of the view that the reporting framework established by MiFID II and EMIR was costly and complex, and therefore needed simplifying.

Preparation of the proposal[4]

In 2018, the Commission launched a consultation to assess the overall functioning of MiFID II and MiFIR after they had been in application for two years. The consultation ended in May 2020. Taking into account some of the findings from this consultation and the need to make EU financial markets more resilient to the economic fallout resulting from the coronavirus pandemic, in 2020 the Commission proposed a first round of amendments to MiFID II. These aimed at recalibrating the requirements of the directive to ensure a high level of transparency for the client, while at the same time preserving the standards of protection for EU firms. The Commission also proposed to amend the MiFID II rules affecting energy derivatives markets in order to incentivise the development of euro-denominated energy markets – which are key for strengthening the international role of the euro – and allow EU companies to cover their risks, while safeguarding the integrity of commodity markets, especially for agricultural products.

In parallel to the above consultation, on 5 December 2019, ESMA published a MiFID II/MiFIR review report on the development in prices for pre-and post-trade data and on the consolidated tape for equity instruments, whereby quoted prices across trading venues in the EU would be centralised. The report made an assessment of and recommendations on the development of prices for market data and the application of the main MiFID II/MiFIR provisions aimed at reducing the cost of market data. It also provided an assessment of and recommendations on the functioning of the consolidated tape regime. On 16 July 2020, ESMA published another MiFID II/MiFIR review report on the transparency regime for equity and equity-like instruments, the double volume cap mechanism and the trading obligations for shares. In this report, ESMA formulated proposals on simplifying the structure of the transparency regime and improving the overall pre- and post-trade transparency available to market participants.

On 19 January 2021, the Commission published a communication on 'the European economic and financial system: fostering openness, strength and resilience', in which it announced it would carry out a further review of MiFID/MiFIR in 2021. The aim of the review (the proposed amendments) would be to improve, simplify and further harmonise the securities markets transparency framework, with a view to increasing secondary trading in euro-denominated debt instruments. This, in its view, included the design and implementation of a trading consolidated tape provider (**CTP**). The Commission was of the view that such a consolidated tape 'will ensure that more trading takes place on transparent regulated platforms, thereby increasing market depth and attractiveness of euro-denominated securities both for issuers and investors'.

In the impact assessment accompanying its proposal for amending MiFID II and MiFIR, the Commission noted it wanted to tackle three problems that prevail in the capital markets within the EU: i) liquidity and trade execution risk for all capital market participants; ii) high cost in consolidated market data; and iii) absence of a business case for the consolidation of data. To this end, it explored two sets of options: i) improve market data quality/facilitate market data consolidation (consolidation options); and ii) facilitate market data licensing/create a business case for market data consolidation (licensing options).

With regard to the consolidation options, the Commission decided to select two out of the five options considered. Those were the 'competing consolidators' and the 'single consolidator'. The first option involved competing market data consolidators registered with ESMA that would collect market data and consolidate it directly at their subscribers' data centre, allowing a lower data latency. The second would assign the consolidation of all market data to a single market data consolidator, selected by ESMA through a tender and independent from any of the contributors.

With regard to the licensing options, the Commission chose the 'statutory subscription fee and RPW access fee', which would set a minimum statutory subscription fee (with revenue redistribution) and include an additional usage fee for venues using market data as a reference price.

The changes the proposal would bring

With regard to MiFID II

Articles 1(7), 50, 70(3) would be deleted and Articles 4(1)(19), 27(3) and 27(10) would be replaced to update those MiFID II provisions that the proposed amendments to MiFIR in the package would render superfluous.

Article 2(1d)(ii) would remove the licensing requirement for persons dealing on their own account in a trading venue by means of direct electronic access (DEA), to the extent that they do not provide or perform any other investment services. The Commission notes that this change is in line with a recommendation by ESMA in its report on algorithmic trading.

Article 31(1) would require Member States to oblige investment firms and market operators operating a multilateral trading facility (**MTF**) or organised trading facility (**OTF**) to have arrangements in place to ensure they meet the data quality standards now set in MiFIR.

Article 47(1) would require Member States to oblige regulated markets to have arrangements in place to ensure the data quality standards now set in MiFIR.

Amendments to Article 70(3) would insert points cross-referencing to other articles and requiring Member States to provide for sanctions against infringements of certain new provisions in MiFIR. Those relate to the reviewed volume cap mechanism; mandatory contributions to CTPs; the quality of data reported to CTPs; and payments for order flow.

With regard to MiFIR

The amendments to Article 1 address certain aspects of the subject matter and scope of the regulation, in particular with regard to the obligation for multilateral systems to operate with a trading-venue licence.

The amendments to Article 2(1) (definitions) would expand the definitions of 'multilateral system' and 'consolidated tape provider' instead of referencing other articles or legislation, so as to i) increase transparency; and ii) insert new definitions that are essential for market data consolidation ('market data contributor', 'core market data' and 'regulatory data').

Article 4 enables NCAs to waive certain transparency requirements for market operators and investment firms operating a trading venue, as regards equity instruments. The amendments to the article would add that systems matching orders must be larger than twice the market size. It would further add the consolidated tape for shares or ETFs to the list of elements used in calculating the reference price (paragraph 2).

The amendments to Article 5 (volume cap) would replace the current double volume cap (4 % and 8 %) with a single volume cap set at 7 % for trades executed under the reference price waiver or the negotiated trade waiver. They would further delete paragraphs 2, 3 and 5 of the Article.

Two points (1(b)) and (5(d)(i)) would be deleted from Article 9 (waivers for non-equity instruments).The amendments to Article 11 (NCA authorisation of deferred publication of the details of transactions based on the size or type of the transaction) would i) shorten and harmonise publication deferrals for non-equity post trade reports to the public; and ii) remove the discretion of NCAs to allow post-trade reports for non-equities to be deferred for four weeks, by replacing it with EU-wide thresholds. The amendments to Article 13 (obligation to make pre-trade and post-trade data available on a reasonable commercial basis) would add a paragraph empowering ESMA to specify the content, format and terminology of the reasonable commercial basis information that trading venues, approved publication arrangements, CTPs and systematic internalisers have to make available to the public.

Article 14 sets the obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments. The proposed amendment would establish that the provisions of the article apply to systemic internalisers not when they deal in sizes up to the standard market size, but when the standard market size is double. Furthermore, the minimum quote size would be at least the equivalent of twice the standard market size and no longer 10 % of the standard market size of a share. Finally, a newly inserted provision would prohibit systemic internalisers from matching orders at the mid-point within the current bid and offer prices.

The amendments to Article 17a would add an extra phrase, establishing that matching orders at mid-point within the current bid and offer prices below a size that is large in scale but is above twice the standard market size is allowed, to the extent that those tick sizes are complied with.

The Commission notes that the aim of the amendments to Articles 14 and 17 is to strengthen the public quoting obligations for systematic internalisers.

Three new Articles 22a-22b-22c would be inserted.

The first concerns the provision of market data to the CTP. The article would oblige market data contributors to provide the CTP with all the market data as set out in Article 22b(2), in a harmonised format, through a high quality transmission protocol, and as close to real-time as is technically possible. In addition, each CTP would be free to choose the connection it wishes to use for the provision of those data. The article would further prohibit market data contributors from receiving any remuneration for providing the connectivity, other than the revenue-sharing for shares (see below, Article 27da).

With regard to the quality of market data (article 22b), the proposal would provide for the creation of an expert stakeholder group by the Commission. The group would provide advice, on a yearly basis, on the quality and the substance of market data, the common interpretation of market data and the quality of the transmission protocol referred to in the previous article. The article would further empower the Commission to adopt delegated acts to specify the quality and the substance of the market data and the quality of the transmission protocol.

Furthermore, Article 22c would oblige trading venues and their members or participants, systematic internalisers, APAs and CTPs to synchronise their business clocks to record the date and time of any reportable event. In that context, ESMA would be empowered to develop draft regulatory technical standards (**RTS**) to specify the level of accuracy to which clocks are to be synchronised.

Amendments to Article 23(1) (trading obligation for investment firms) would establish that an investment firm must ensure that the trades it undertakes in shares with an international securities identification number (**ISIN**) take place on a regulated market, MTF, systematic internaliser or a third-country trading venue assessed as equivalent. The article would further empower ESMA to publish a list on its website containing the shares with an ISIN subject to the share-trading obligation; ESMA would be required to update that list regularly.

The Commission would also amend Articles 26 (obligation to report transactions) and 27 (obligation to supply financial instrument reference data), further empowering ESMA to adopt draft RTS with regard to transactions-reporting and reference data, and obliging the authority to submit to the Commission a report assessing the feasibility of more integration in transaction reporting and streamlining of data flows.

A new Article 27da would be inserted, to establish the selection process for the authorisation of a single CTP for each asset class (shares, ETFs, bonds and derivatives).

Amendments to Article 27h would introduce a provision on the organisational requirements[5] for CTPs and quality of service standards that apply to all CTPs selected and appointed by ESMA (Article 27h).

A new Article 27ha (reporting obligations for CTPs) would oblige CTPs to make available for free on their website, performance statistics and incident reports relating to data quality and systems, at the end of each quarter. It would also oblige them to keep and preserve records relating to their business for a period of no less than five years. The article would further empower ESMA to develop draft RTS to specify the content, timing, format and terminology of the reporting obligation.

The amendments to Article 32 (trading obligation procedure) would add three paragraphs to the article. According to the newly inserted paragraphs, when ESMA considers that the suspension of the clearing obligation is a material change in the criteria for the trading obligation to take effect, it can request the Commission to suspend the trading obligation for the same classes of OTC derivatives that are subject to the request to suspend the clearing obligation. This request is not public. After having received the request, the Commission would, without undue delay, either have to suspend the trading obligation for the classes of OTC derivatives that are subject to the request via an implementing act, or reject the requested suspension. In case it opts for the latter, the Commission would have to inform ESMA, the Parliament and the Council of the reasons why it rejected the requested suspension and make its decision public.

The Commission would add a new Article 32a, according to which, at the request of an NCA, the Commission could suspend the derivatives trading obligation with respect to certain investment firms, after having consulted ESMA. For the procedure to start, the NCA should demonstrate that certain conditions have been met.[6] When assessing whether to suspend the trading obligation, the Commission would have to assess whether the suspension can have a distortive effect on the clearing obligation. Lastly, the Commission would have to regularly review whether the grounds for the suspension of the trading obligation continue to apply.

Articles 35 (non-discriminatory access to a central counterparty[7]) and 36 (non-discriminatory access to a trading venue) would be amended, so that the requirements would no longer apply to exchange-traded derivatives.

Articles 38g(1) and 38h(1) would link ESMA's supervisory powers to the new Articles 22a and 22b.

A new Article 39a would prohibit systematic internalisers from requesting any fee or commission or non-monetary benefits from any third party for forwarding client orders to such third party for their execution (payment for order flow).

Article 50 would be amended to empower the Commission to adopt the necessary delegating acts for the regulation.

Article 52 would introduce a requirement for the Commission and ESMA to provide monitoring and reporting three years after the first authorisation of consolidated tape.

Lastly, Article 52(14) and 54(2) would be deleted.

Advisory committees

The European Economic and Social Committee (EESC) adopted its opinion on the review of the MiFIR during its plenary session of 23 March 2022. The EESC welcomed the fact that the Commission had put forward a proposal to establish CTPs for the shares, exchange-traded funds, bonds and derivative financial instruments asset classes. Moreover, it welcomed the proposal itself and the proposed accompanying measures. On the controversial issue of a ban on 'payment for order flow', the EESC recommended strengthening the principle that financial intermediaries may only select the trading venue or counterparty for the execution of their clients' transactions with a view to achieving the best execution for their clients. In that context, it supported the Commission's view that tangible or intangible remuneration of financial intermediaries by trading venues or counterparties for the transfer of execution orders is fundamentally inconsistent with the ban. The EESC made two further recommendations to the Commission: i) to take more action to further develop the equities culture (which remains uneven across Europe); and ii) to accompany preventive rules on consumer protection with measures to improve consumer education.

National parliaments

The proposal was examined by the national parliaments of 13 Member States. The subsidiarity deadline expired on 22 March 2022. Political dialogues took place with the Czech Senate, German Bundesrat, and Spanish Cortes Generales.

Stakeholder views[8]

In a 25 November 2021 press release, the European Fund and Asset Management Association (EFAMA) noted it was pleased with the 'robust MiFIR proposal from the European Commission addressing key areas of reform around the creation of a CTP, along with adjustments to transparency requirements on trading'. Nevertheless, in a 15 December joint statement on the Commission's proposal, EFAMA noted its concerns about 'a model which puts "fair remuneration of data contributors" as a key feature enabling an equities consolidated tape'. In that context, it called for defining the revenue-sharing scheme more precisely and for extending it to all contributors beyond regulated markets. In addition, it deplored the fact that some of ESMA's recommendations had not been included in the proposal. Lastly, it noted that with regard to equities, the proposal attempts to direct flow to regulated markets at the expense of other execution venues. EFAMA is of the view that such market structure changes create an 'unlevel playing field' and compromise competition introduced with the original MiFID to the detriment of clients and the competitive and diverse nature of the EU's trading landscape.

Similarly, in a 26 November press release, Adam Farkas, chief executive of the Association for Financial Markets in Europe (AFME) broadly welcomed the proposal but expressed regret that the proposal does not prioritise a consolidated tape for equities with pre-trade trading data. In this context, Farkas urged the co-legislators to extend the scope of the consolidated tape for equities to include pre- and post-trade trading data from the outset. In addition, Farkas noted that, while the members of the association support well-calibrated and transparent fixed income markets, the 'analysis of comprehensive data is essential for this accurate calibration to ensure an informed, balanced and effective transparency regime'. Therefore, Farkas was of the view that 'AFME would like to first see the development of a bond consolidate tape and to then make any necessary changes to the post-trade transparency regime once sufficient data has been gathered'.

Legislative process

On 9 March 2022, ESMA published its assessment of and recommendations on the Commission's proposal. ESMA strongly supported the main elements of the MiFIR proposal, as they seek to create the conditions conducive to the emergence of CTPs. Nonetheless, it highlighted a number of challenges.

The first challenge relates to the timelines currently envisaged for the selection process (three months after entry into force of the regulation to organise the selection process and a further three months to decide which entity to select and authorise). In this context, ESMA proposed extending the timeline for the selection procedure from the current six to nine months. The second challenge relates to the authorisation of the CTP. The current proposal bundles the selection and authorisation into one step, which risks discouraging CTP applicants and/or may force ESMA to accept a low level of compliance at the start of the CTP operations. In this context, ESMA recommends splitting the selection procedure and the authorisation process for the CTPs into two separate steps.

Another concern for ESMA is the 'fall-back clause' in the Commission proposal, under which, if one year after the regulation enters into force no CTP has emerged for any asset class, the Commission should review the framework and may decide on whether ESMA should operate the CTP. According to ESMA, reviewing the framework only one year after the entry into force of the amended regulation would be too early. It therefore proposed extending the timeline for triggering the fall-back clause to three years, starting from the moment at which ESMA launches the selection procedure. Additionally, ESMA voiced doubts as to whether it would be better that a private entity operates a CTP in case of lack of interest from the private sector, and urged the Parliament and Council to consider empowering ESMA with the necessary resources and funding, should they be convinced about the merits of the fall-back clause.

ESMA also voiced concern over the inconsistency in the proposal between the scope of the derivatives CTP and the scope of the transparency requirements (which are based on the 'traded on a trading venue' concept), arguing that this inconsistency is likely to raise significant practical implementation issues.

Lastly, with regard to the non-equity deferral regime, ESMA noted that, given the proposal had been developed for bonds and not for the remaining non-equity asset classes – in particular derivatives – it had concerns regarding whether the proposal might be appropriate for all non-equity instruments. ESMA was also concerned that the proposal, as it currently stands, is overly complex and may result in inconsistent calibrations of the pre- and post-trade transparency requirements, which would be unfortunate. Therefore, ESMA would recommend a simpler approach, i.e. to i) require the publication of post-trade information for transactions above the large-in-scale (LIS) threshold and for transactions in illiquid instruments as close to real time as possible, with the volume being masked; and ii) publish all the details of the transaction, including the volume, two weeks after the execution of the transaction.

The co-legislators are currently examining the proposals. In Parliament, the files have been assigned to the Committee on Economic and Monetary Affairs (ECON), (rapporteur: Danuta Maria Hübner, EPP, Poland). The committee's decision to enter into interinstitutional negotiations was announced in plenary on 13 March 2023.

Council negotiation mandate

On 20 December 2022, the Council agreed its mandate for the negotiations on both the MiFID and MiFIR II amending proposals. Overall, the Council considers that the MIFIR review constitutes an important step to strengthen market transparency, and it will empower investors, especially smaller investors, giving them easier access to the necessary data to invest in stocks and bonds. According to the Council, transparent and accessible financial markets will strengthen the integrity, competitiveness and efficiency of the single market.

In its mandate, the Council proposes to modify the deferral times which should be based on the liquidity of a bond, structured finance product and emission allowance, and the size of transactions. These changes would apply on deferrals for the size and liquidity profile of transactions in bonds, structured products and emissions allowances. Masking price and volume of transactions for very large trades by bond liquidity providers should not exceed four weeks for OTC derivatives. ESMA will determine the duration of these deferrals. Certain provisions about the investment firms trading on their own account are also strengthened, as they provide liquidity to the market even during market stress conditions.

Parliament's negotiation position

On 2 March 2023, the ECON committee adopted its report for the interinstitutional negotiations. The report on the amending (MIFIR) regulation includes new provisions on derivative market margins, especially the 'consequences of introducing minimum holding periods for commodity derivatives is an element that deserves further consideration', and suggests that ESMA carry out an analysis on whether this could limit volatility on derivatives markets without affecting the functioning of these markets. The report notes that, given the current definition of SI, it is likely that there is an excessive number of SIs meaning a high likelihood of double reporting. Some investment firms may also reduce their trading activities in order to avoid SI status and the obligations associated with it. The report suggests that the link between SIs and price post-trade discovery be removed, and MiFID to introduce the status of 'designated reporting entity' with a public list provided by the ESMA. SIs could then remain liquidity providers for the market, removing the reporting obligations (Report Recital 19a).

The report also gives further powers to ESMA in various domains. In particular, ESMA should regularly assess the calibration of the threshold of the single volume cap of dark trading as defined in Recital 7 of the proposal, including its scope and its effects on the competitiveness of EU firms. ESMA could formulate suggestions in a report to the Commission within three years after the entry into force of the amending regulation. ESMA would also draft the RTS of the data consolidation by CTPs.

The report on the amending regulation also proposes that the market data contributor receives remuneration (at least) based on the costs incurred to provide the data, and retail investors should have access to the data (Recital 21).

The report[9] on the amending (MiFID) directive proposes to include provisions providing that an investment firm should be considered to be a systematic internaliser only when it is 'deemed to perform its activities on an organised, frequent, systematic and substantial basis or when it chooses to opt-in under the systematic internaliser regime'. Moreover, ESMA would be requested to develop regulatory standards on the criteria for best execution[10] to clarify the various interpretations currently made by local supervisory authorities. Noting that the 'extreme circumstances' experienced by energy and commodity derivatives markets throughout the energy crisis of 2022 resulted in a very low number of activations of trading halts as envisaged in MiFID, the report calls for further information and more transparency on the circumstances that lead to trading halts. The report also highlights the importance of setting the right parameters to ensure that the EU has competitive liquid commodity derivatives markets that ensure the strategic autonomy of the EU, while preventing market abuse and supporting orderly pricing and settlement conditions.

Provisional agreement

On 29 June 2023, a provisional agreement was reached, of which the three main points are:

- Consolidated tape

  The provisional agreement provides for an EU-wide consolidated tape that would provide the best bid and offer prices, as well as the transaction volumes. Real-time information would be delivered without the identification of the trading venues; post-trade data would identify the trading venue. Regulated trading venues[11] will have to provide pre- and post-trade information to a CTP as close to real time as is technically possible. ESMA will assess by June 2026 whether the consolidated tape framework indeed mitigates information asymmetries, and whether the EU has become a more attractive market place.

  Free access to information on CTPs should be granted to retail investors, academics and civil society organisations (for research purposes), as well as public authorities. Competent authorities should monitor the quality of data quality and take the necessary measures, including sanctions, where their quality is deemed insufficient.

- Ban on payments for order flows

  Receiving payments for forwarding client orders for execution – known as 'payment for order flows' – will be banned, taking effect immediately, except for specific countries for which the ban will have to be applicable by mid-2026.

- Investor protection, commodities and orderly trading

  Regarding derivative instruments on commodities and emission allowances, the Commission's review of position limits and position management controls would focus on facilitating energy transition, food security, markets' resistance to external shocks and achieving competitive and liquid markets. The Member States would also have to enable regulated markets to temporarily halt or constrain trading in emergencies, or if there is a significant price movement in a financial instrument.[12]

After approval by the Council's Committee of the Permanent Representatives (COREPER II) and Parliament's ECON committee, the provisional political agreement will have to be adopted at Parliament's plenary and at the Council.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

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ENDNOTES

1 In addition to the MiFIR/MiFID amending proposals, the package includes:

(i) a proposal for a Regulation establishing a European single access point (ESAP) providing centralised access to publicly available information;

(ii) a proposal amending Regulation (EU) 2015/760 as regards the European Long-Term Investment Funds (ELTIF);

(iii) a proposal amending Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities (UCITS) and Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD).

See separate briefings for the proposals amending ELTIF regulation and UCITS Directive and AIFMD.

2 Those apply to (a non-exhaustive list of) activities carried out by insurance companies, to market-makers, to persons providing investment services exclusively for their parent companies or subsidiaries, to those applying a high-frequency algorithmic trading technique, or to those dealing on their own account when executing client orders.

3 The following definitions are useful in the context of this briefing:

'Multilateral system' means any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system.

'Trading venue' means a regulated market, an MTF or an OTF.

'Regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this directive.

'Multilateral trading facility' or 'MTF' means a multilateral system operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments in a way that results in a contract in accordance with Title II of MiFID II.

'Organised trading facility' or 'OTF' means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of MiFID II.

'Systematic internaliser' means an investment firm which, on an organised, frequent systematic and substantial basis, deals on its own account when executing client orders outside a regulated market, an MTF or an OTF, without operating a multilateral system.

4 See the EPRS briefing making an initial appraisal of the Commission's impact assessment for further details.

5 Requirements for the CTP include: a) the collection of consolidated core market data; b) the collection of licensing fees from subscribers; and c) for shares, a revenue participation scheme for regulated markets in return for their contribution of market data.

6 To request such a suspension, the NCA would have to demonstrate that the investment firm regularly receives requests for a quote for the derivatives subject to the derivatives trading obligation from a non-EEA counterpart which has no active membership on a EU trading venue that offers trading in the derivative subject to the trading obligation and regularly acts as a market maker in the derivative subject to the derivatives trading obligation.

7 Central counterparties interpose themselves between counterparties to derivative contracts traded, becoming the buyer to every seller and the seller to every buyer.

8 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.

9 See also summary.

10 MiFID Article 27 provides for the obligation to execute orders on terms most favourable to the client or agency obligations to the client. The article requires that investment firms take 'all sufficient steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order'.

11 Except smaller markets and SME growth markets, which can decide to opt-in.

12 In exceptional cases, regulated markets should be enabled to cancel, vary or correct transactions.

eprs@ep.europa.eu (contact)

www.eprs.ep.parl.union.eu (intranet)

www.europarl.europa.eu/thinktank (internet)

http://epthinktank.eu (blog)

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