Law and Financial Markets Review

ISSN: 1752-1440 (Print) 1752-1459 (Online) Journal homepage: https://www.tandfonline.com/loi/rlfm20

MiFID II and MiFIR: stricter rules for the EU financial markets

Danny Busch

To cite this article: Danny Busch (2017) MiFID II and MiFIR: stricter rules for the EU financial markets, Law and Financial Markets Review, 11:2-3, 126-142, DOI: 10.1080/17521440.2017.1412060

To link to this article: https://doi.org/10.1080/17521440.2017.1412060

Published online: 07 Jan 2018.

Routledge
Taylor & Francis Group
Law and Financial Markets Review, 2017
Vol. 11, Nos. 2–3, 126–142, https://doi.org/10.1080/17521440.2017.1412060

MiFID II and MiFIR: stricter rules for the EU financial markets

DANNY BUSCH

Institute for Financial Law (IFL), Radboud University, Nijmegen, the Netherlands

This article analyses and discusses the new MiFID II and MiFIR rules for the EU financial markets. In particular, it analyses the concepts "regulated market", "Multilateral Trading Facility" (MTF), "Organised Trading Facility" (OTF) and "(systemic) internalisation". It also discusses (i) pre-trade and post-trade transparency, (ii) transaction reporting, (iii) data services providers, (iv) concentration of trading, (v) position limits, and (vi) position management powers in the case of trading in commodity derivatives and reporting obligations.

Keywords: MiFID II; MIFIR; EU financial markets; regulated market; Multilateral Trading Facility (MTF); Organised Trading Facility (OTF); systemic internalisation; pre-trade transparency; post-trade transparency; transaction reporting; data services providers; approved publication arrangement (APA); consolidated tape provider (CTP); approved reporting mechanism (ARM); concentration of trading; shares; derivatives; position limits; position management powers; commodity derivatives; reporting obligations

A. Introduction

Investment firms and regulated markets have been closely regulated by the EU Markets in Financial Instruments Directive (MiFID), the MiFID Implementing Directive and the MiFID Implementing Regulation since 1 November 2007.[1] MiFID and the MiFID Implementing Directive have been transposed into national legislation in the various Member States of the European Union (EU) and the European Economic Area (EER). Naturally, the MiFID Implementing Regulation has not been transposed into national law. The regulation has direct effect and, under European law, *may* not therefore be transposed into national law. MiFID aims to provide a high level of harmonised investor protection, financial market transparency and greater competition between trading venues.

On 3 January 2018 – some 10 years later – the MiFID regime will already be replaced by MiFID II, which comprises, among other things, a directive (MiFID II), the Markets in Financial Instruments Regulation (MiFIR) and a truly impressive number of implementing measures, commonly referred to as level 2 legislation.[2] MiFID may have the reputation of being strict, but MiFID II/MiFIR tightens the reins even more. It is not hard to guess the reason: the financial crisis has revealed gaps in the MiFID legislation, notably in investor protection, as well as shortcomings in the functioning and transparency of financial markets. This article is confined to an assessment of the main changes to financial markets regulation.[3]

MIFID has helped to boost competition between trading venues, particularly by abolishing the optional concentration rule,[4] tightening up the best execution rules and introducing various pre-trade and post-trade transparency obligations. Reasonably healthy competition has already been achieved between regulated markets and multilateral trading facilities (MTFs), judging by the market share captured by MTFs.[5] Nonetheless, in recent years various deficiencies have become apparent in MiFID. MiFID II/MiFIR aims to address these deficiencies wherever possible.

B. Terms and definitions

1. General

For a proper understanding of the subject matter, the definitions given in MiFID II of the terms "regulated market", "MTF" and "organised trading facility" (OTF) will now be discussed. This will be followed by an examination of the substantive rules.

2. Regulated market and MTF

MiFID II defines "regulated market"[6] and "multilateral trading facility"[7] (MTF) using very comparable wording. In fact, this was also the case under MiFID. Recital 7 MiFIR explicitly emphasises that these definitions should remain closely aligned with each other to reflect the fact that they represent effectively the same organised trading functionality. An important difference is that the operation of an MTF is an investment activity, and the operator is therefore subject to the MiFID/MiFID II rules that apply to investment firms carrying out investment activities. As the operation of a regulated market is not an investment activity, the operator is not subject to the rules that apply to investment firms. The operator of a regulated market is subject to the MiFID/MiFID II rules that apply to regulated markets. Although these rules are admittedly comparable to the rules that apply to the operation of an MTF, they are not identical.

The key aspects of the two definitions are as follows.

(1) Multiple third-party buying and selling interests in financial instruments must be brought together in a way that results in a contract for the purchase or sale of the instruments. According to Recital 7 MiFIR, this occurs when they are brought together under the system's rules or by means of the system's protocols or internal operating procedures. The same recital emphasises that the definition should exclude bilateral systems where an investment firm enters into every trade on own account, even as a riskless counterparty interposed between the buyer and seller. In other words, situations in which the investment firm (a) acts solely as the investor's contractual counterparty (dealing on own account) or (b) acts on behalf of the client on one side of the transaction and on its own account on the other side of the transaction (internalisation of the order, whether or not on a systematic basis, see § 4 below) are *not* covered by the definition of regulated market or MTF. However, the matching of opposing orders (agency crosses) may come within the definition of a regulated market or MTF, but this must then be carried out in accordance with non-discretionary rules (see point 2 below).

(2) The buying and selling interests must be brought together on the regulated market in accordance with non-discretionary rules set by the system operator. Recital 7 MiFIR explains that this requirement means that the interests must be brought together under the system's rules or by means of the system's protocols or internal operating procedures, including procedures embodied in computer software. The term "non-discretionary rules" means, according to Recital 7 MiFIR, rules that leave the regulated market or the market operator or investment firm operating an MTF with no discretion as to how interests may interact.

It should be noted here that MiFID II introduces the small and medium-sized enterprise (SME) growth market (a species of the MTF genus).[8] The small and medium-sized business sector across Europe needs help to escape the current stagnation. MiFID II aims to assist by facilitating access to capital and promoting the development of specialist SME markets. Under MiFID these markets have usually been operated as MTFs and are also known as junior markets. In order to raise the visibility and profile of these markets, MiFID II introduces a new subcategory known as the SME growth market.[9] The requirements for SME growth markets try to strike the correct balance between maintaining high levels of investor protection and reducing the unnecessary administrative burden for issuers on those markets. The more detailed requirements for SME growth markets (such as the criteria for admission to trading on such a market) are prescribed in secondary legislation.[10] It is hoped that the special rules which MiFID II is introducing for SME growth markets will ensure that this initiative is a success. AIM, the baby sister of the London Stock Exchange, is already a success. Evidently, it is therefore possible to achieve a properly functioning SME growth market even within the current regulatory framework.

3. *A new trading venue: the OTF*

In order to make EU financial markets more transparent and efficient and to level the playing field between the various venues offering multilateral trading services, MiFID II introduces a new trading venue category of organised trading facility (OTF).[11] As stated in Recital 8 MiFIR, the term "OTF" has been intentionally broadly defined so that now and in the future it should be able to capture all types of organised execution and arranging of trading which do not correspond to the functionalities or regulatory specifications of regulated markets and MTFs. The aim is to ensure that any trading system in financial instruments is properly regulated.[12] The European Union also intends that the trading of standardised over-the-counter (OTC) contracts should come within the definition of OTF. This fulfils the G20 obligation to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms.[13]

The key aspects of the definition of OTF are as follows.

(1) Multiple third-party buying and selling interests in financial instrument must be brought together in a way that results in a contract for the purchase or sale of bonds, structured finance products, emissions allowances and derivatives. Only non-equity instruments can therefore be traded on an OTF.[14] Consequently, it is immediately apparent that the object of ensuring that every trading system in financial instruments is regulated has not been fully realised.

For the sake of clarity, in Recital 8, second paragraph, MiFIR explicitly states that an OTF should not include facilities where there is no genuine trade execution or arranging taking place in the system, such as (a) bulletin boards used for advertising buying and selling interests, (b) other entities aggregating or pooling potential buying or selling interests, (c) electronic post-trade confirmation services or (d) portfolio compression, which reduces non-market risks in existing derivatives portfolios without changing the market risk of the portfolios.[15]

(2) Non-discretionary rules apply to the execution of transactions on regulated markets and MTFs. By contrast, in the case of an OTF the operator must carry out order execution on a discretionary basis. The operator is bound in this connection by the pre-trade and post-trade transparency requirements and by conduct of business rules, including the best execution obligations and client order handling obligations. Both a market operator and an investment firm may operate an OTF. Naturally, a market operator is then bound by the rules that apply to investment firms which operate an OTF.[16]

An investment firm or market operator operating an OTF should be able to exercise discretion at two different levels: (a) when deciding to place an order on the OTF or to retract it again, and (b) when deciding *not* to match a specific order with the orders available in the system at a given point in time, provided that that complies with specific instructions received from clients and with best execution obligations.[17] The OTF is therefore a hybrid concept: operating an OTF is an investment activity, but, in so far as client orders are matched with each other through an OTF, I would assume that this constitutes an investment service and that the conduct of business rules that apply to the provision of an investment service must therefore be observed in so far as relevant. This position is prompted by the fact that the operator of an OTF (unlike the operator of a regulated market or an MTF) always has a degree of discretion and can therefore influence the interaction between buying and selling interests (see above), just as in the case of internalisation (whether systematic or otherwise) and agency crosses outside an OTF (in these cases too there is, in part, the provision of an investment service).

Moreover, certain ways of executing transactions on an OTF are expressly prohibited, and other ways are expressly permitted. This concerns the following situations.

(i) The combination of internalisation or systematic internalisation with an OTF is prohibited. Precisely because trading on the OTF takes place in accordance with discretionary rules and the operator of the OTF can therefore influence the execution of orders, there would be a real risk of conflicts of interest between investors and the operator of the OTF if internalisation or systematic internalisation could be combined with the operation of an OTF. This prohibition is evident, first of all, from Article 20(1) MiFID II, which provides that an investment firm or market operator operating an OTF must establish arrangements preventing the execution of client orders in an OTF (a) against the proprietary capital of the investment firm or market operator operating the OTF or (b) from any entity that is part of the same group or legal person as the investment firm or market operator. It is also evident from Article 20(4) MiFID II, which provides that the operation of an OTF and of a systematic internaliser may not take place within the same legal entity. An OTF may not connect with a systematic internaliser in a way which enables orders in an OTF and orders or quotes in a systematic internaliser to interact.[18]

(ii) However, opposing client orders in bonds, structured finance products, emission allowances and derivatives (see point above) may be crossed with each other (agency crossing system) through an OTF.[19] For the system that crosses client orders, the investment firm or market operator operating the OTF may decide if, when and how much of two or more orders it wants to match within the system. The operator may facilitate negotiation between clients so as to bring together two or more potentially compatible trading interests in a transaction.[20] Just as in the case of internalisation or systematic internalisation, agency crosses involve a real risk of a conflict of interest, precisely because trading on an OTF takes place in accordance with the discretionary rules of the OTF. This applies not only between the clients on the opposite sides of a transaction but also – just in the case of internalisation or systematic internalisation – between clients and the operator of the OTF. After all, the operator has every interest in matching as many transactions as possible on its venue. However, internalisation or systematic internalisation through or combined with an OTF is not permitted precisely because of the real risk of a conflict of interest (see point (i) above), although agency crosses are permitted on an OTF and there are no other safeguards such as the client's prior consent. This prior consent is required, however, if the order is executed through matched principal trading, although this activity amounts, in economic terms, to the same as agency crosses (see point (iii) below).

(iii) Matched principal trading is permitted on an OTF provided that (a) it concerns the purchase or sale of bonds, structured finance products, emission allowances and certain derivatives (see point 1 above),[21] (b) the client has consented to the process[22] and (c) it does not concern derivatives belonging to a class of derivatives that has been declared subject to the clearing obligation[23] in accordance with Article 5 of the European Market Infrastructure Regulation (EMIR).[24] Matched principal trading is defined in Article 4(1)(38) MiFID II as:

> a transaction where the facilitator interposes itself between the buyer and the seller to the transaction in such a way that it is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.

Matched principal trading therefore relates to a situation in which an investment firm simultaneously takes opposing positions on own account in relation to various counterparties with the same investment life. In this way, the investment firm is not in fact exposed to a risk. In economic terms, this resembles trading on both sides of a transaction for the account of the client, in other words agency crosses. Under MIFID this nonetheless constitutes a form of dealing on own account, but under MIFID II matched principal trading is treated as acting on behalf of the client. Recital 24 of MIFID II provides, after all, that:

> Dealing on own account when executing client orders [i.e. internalisation or systematic internalisation, *DB*] should include firms executing orders from different clients by matching them on a matched principal basis (back-to-back trading), which should be regarded as acting as principal [this should read "acting as contractor", *DB*] and should be subject to the provisions of [MiFID II] covering both the execution of orders on behalf of clients and dealing on own account.

This equating of matched principal trading with internalisation or systematic internalisation is based on a fallacy. In economic terms, matched principal trading bears a much closer resemblance to agency crosses because client orders that are in fact opposites are matched with one another. It is therefore remarkable that agency crosses are permitted on an OTF *without* the need for the client's consent, whereas this consent is required in the case of matched principal trading. In both cases there is a real risk of a conflict of interest, not only between the clients who are (at least in economic terms) on either side of a transaction, but also – just as in the case of internalisation or systematic internalisation – between clients and the operator of the OTF.[25]

(iv) The operator of an OTF may also deal solely on own account with regard to sovereign debt instruments for which there is not a liquid market.[26] The operator then acts as a quasi-market maker. A party *other* than the operator of the OTF may act as market maker on the OTF in relation to *all* types of financial instrument traded on the OTF (i.e. not only sovereign debt instruments for which there is not a liquid market, but also bonds, structured finance products, emissions allowances and derivatives; see point 1 above).[27] An investment firm is not deemed to be carrying out market making on an OTF on an independent basis if it has close links with the operator of the OTF.[28]

4. Internalisation or systematic internalisation

An investment firm may transmit a client order for execution to a regulated market, MTF or OTF, but may also execute an order in house. One way in which this can be done is by internalisation or systematic internalisation of the order. As noted previously, in executing an order in such a case an investment firm acts on one side of the transaction for the account of the client and on the other on its own account. This also includes so-called single-dealer platforms (SDPs), i.e. trading venues on which all transactions are performed with a single investment firm, in any event in so far as this firm always acts on behalf of the client on one side of the transaction and on its own account on the other.[29]

Internalisation or systematic internalisation is not a separate investment service or activity, but a combination of trading on behalf of the client and trading on own account. Where internalisation qualifies as systematic, this means that an investment firm must fulfil certain transparency obligations before engaging in trading.[30] This is why both MiFID and MiFID II provide accurate definitions of "systematic internalisers". Systematic internalisers are also subject to post-trade transparency obligations, but these apply whether or not the internalisation is systematic.[31]

Article 4(7) MiFID defines a "systematic internaliser" as "an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF".

Article 4(1)(20), first paragraph, MIFID II contains a comparable definition, although the words "an investment firm, which on an organised, frequent and systematic basis, deals" have been replaced by "an investment firm which, on an organised, frequent, systematic *and substantial basis*, deals" [*DB*'s italics]. Moreover, the phrase "outside a regulated market or an MTF" has been expanded to include "or an OTF". Strictly speaking, this addition is unnecessary because systematic internalisation is expressly prohibited on an OTF (see § 3 at (i), above). Finally, another addition to the definition in MIFID II is that the situation must not involve the operation of a multilateral system.[32] This addition also seems unnecessary since systematic internalisation does not involve the operation of a trading venue (i.e. a regulated market, MTF or OTF[33]). To my knowledge, there are no multilateral systems other than trading venues.

Under MiFID the criteria for determining whether an investment firm is a systematic internaliser are set out in Article 21 of the MiFID Implementing Regulation, which has direct effect. In brief, systematic internalisation is an activity that: (a) has a material commercial role for the firm, and is carried on in accordance with non-discretionary rules and procedures; (b) is carried on by personnel, or by means of an automated technical system, assigned to that purpose, irrespective of whether those personnel or that system are used exclusively for that purpose; (c) is available to clients on a regular or continuous basis.

An important departure under MiFID II is that the criteria for a systematic internaliser are set out in much more detail.

(1) To start with, Article 4(1)(20), second paragraph, MiFID II defines terms in more detail. Whether transactions are executed on a *frequent and systematic basis* is measured by the number of OTC trades in the financial instrument carried out by the investment firm on own account when executing client orders. Whether this occurs on a *substantial basis* is measured (a) either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a specific financial instrument or (b) by the size of the OTC trading carried out by the investment firm in relation to the total trading in the EU/EEA in a specific financial instrument.[34]

In addition, Article 4(1)(20), paragraph 2, MiFID II, provides that the definition of a systematic internaliser applies only where (i) the pre-set limits for a *frequent and systematic basis* and for *a substantial basis* are both crossed *or* (ii) where an investment firm chooses to opt in under the systematic internaliser regime.

(2) Second, in the relevant delegated regulation, it is quantified what is meant by the terms "frequent and systematic" and "substantial basis" for each type of financial instrument. The relevant delegated regulation distinguishes for this purpose between (a) shares, depositary receipts, exchange traded funds (ETFs), certificates and other similar financial instruments; (b) bonds; (c) structured finance products; (d) derivatives; and (e) emission allowances.[35]

C. Pre-trade and post-trade transparency

1. General

MiFID already imposes pre-trade and post-trade transparency requirements for trading on regulated markets and MTFs and for trading that takes place through internalisation or systematic internalisation. However, the transparency obligations are greatly expanded and harmonised in MiFID II. Every effort is being made to reduce the incidence of trading on dark pools to ensure that orders placed and transactions executed can be taken into account as far as possible in price formation. Strengthening transparency is one of the shared principles to strengthen the financial system, as confirmed in the G20 Leaders' Statement in London on 2 April 2009.[36] The rules under MiFID and MiFID II are discussed in broad outline below. Various aspects are elaborated at Level 2.[37] Reference will be made to the relevant Level 2 instruments in so far as this is relevant to the broad outline.

2. Pre-trade transparency for multilateral trading venues

2.1. MiFID

Under MiFID, regulated markets have an obligation in respect of *shares* admitted for trading on a regulated market (and MTFs have an equivalent obligation in respect of listed shares traded through them) to make public the following information: (a) the current bid and offer prices which are advertised through their systems, and (b) the depth of trading interests at those prices.[38] It follows that under MiFID there is no pre-trade obligation to provide information about financial instruments other than shares. However, MiFID does leave the Member States free to extend the pre-trade information obligation to financial instruments other than shares.[39] The information to be made public must be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours.[40]

In certain cases, however, the competent regulatory authorities may waive the pre-trade transparency obligations. It is the exercise of this power in various Member States which has led to the formation of equity dark pools. This is detrimental to good price formation because certain bid and offer prices are not shared with the public. On the other hand, in certain circumstances information can also disrupt a market, for example where large orders from pension funds spark an intense reaction. Whatever the case, four waivers from the pre-trade transparency obligations exist under MiFID for both regulated markets and MTFs:

(a) waiver for systems based on a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is widely published and is regarded generally by market participants as a reliable reference price (reference price waiver);[41]
(b) waiver for systems that formalise negotiated transactions, each of which meets one of the following criteria: (i) the transaction is made *either* at or within the current volume weighted spread reflected on the order book or the quotes of the market makers of the regulated market or MTF operating that system, *or*, where the share is not traded continuously, within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator; (ii) the transaction is subject to conditions other than the current market price of the share (negotiated trades waiver);[42]
(c) waiver for orders held in an order management facility maintained by the regulated market or the MTF pending their being disclosed to the market (order management facility waiver);[43]
(d) waiver for transactions that are large in scale (large-in-scale waiver).[44]

2.2. MiFID II

The main changes introduced by MiFID II in relation to pre-trade transparency for multilateral trading facilities (MTFs) are as follows.

(1) Under MiFID II pre-trade transparency obligations are extended to the new trading venue – the organised trading facility (OTF). As a result, the pre-trade transparency obligations apply to regulated markets, MTFs *and* OTFs.[45]
(2) The pre-trade transparency obligations have been extended to financial instruments other than listed shares. MiFID II distinguishes in this connection between equity and non-equity instruments. Equity instruments are shares, depositary receipts, ETFs,[46] certificates and other similar financial instruments.[47] Non-equity instruments are bonds, structured finance products, emission allowances and derivatives.[48] The transparency requirements for both equity and non-equity instruments are calibrated for the type of trading system, including order-book, quote-driven, hybrid, periodic auction trading and (in the case of non-equity instruments) voice trading systems.[49]
(3) Under MiFID II it will be more difficult for national regulatory authorities to waive the pre-trade transparency obligations in respect of listed *shares*. (The same is also true of other equity instruments, but under MiFID there was usually no pre-trade transparency obligation in respect of such instruments.) The four MiFID waivers referred to in § 2.1 above are maintained,[50] but MiFID II introduces a so-called volume cap mechanism for orders placed in systems which are based on a trading methodology by which the price is determined in accordance with a reference price and for certain negotiated transactions.[51] The introduction of the volume cap mechanism aims to ensure that the use of waivers for reference prices and certain negotiated trades does not unduly harm price formation.[52] As a result, the use of waivers that are subject to the volume cap mechanism is limited as follows:
    (a) *the percentage of trading in a financial instrument carried out on a trading venue* under those waivers is limited to 4% of the total volume of trading in that financial instrument on all trading venues across the EU/EEA over the previous 12 months;[53]
    (b) *overall EU/EEA trading in a financial instrument* carried out under those waivers is limited to 8% of the total volume of trading in that financial instrument on all trading venues across the EU/EEA over the previous 12 months.[54]

If the limit referred to in (a) is exceeded, the competent authority that authorised the use of those waivers by that venue must within two working days suspend their use on that venue in that financial instrument for a period of six months.[55] If the limit referred to in (b) is exceeded, *all* competent authorities must, within two working days, suspend the use of those waivers across the EU/EEA for a period of six months.[56] The European Securities and Markets Authority (ESMA) publishes the following information within five working days of the end of each calendar month: (i) the total volume of EU/EEA trading per financial instrument in the previous 12 months, and (ii) the percentage of trading in a financial instrument carried out across the EU/EEA under those waivers and on each trading venue in the previous 12 months, and the methodology that is used to derive those percentages.[57]

(4) The introduction of pre-trade transparency obligations for non-equity instruments (see 2 above) is accompanied by four possible waivers:
  (a) orders that are large in scale compared with normal market size (compare the large-in-scale waiver for equity instruments);[58]
  (b) orders held in an order management facility of the trading venue pending disclosure (compare the order management facility waiver for equity instruments);[59]
  (c) actionable indications of interest in request-for-quote and voice trading systems that are above a size specific to the financial instrument, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors;[60]
  (d) derivatives which are not subject to the trading obligation specified in Article 28[61] and other financial instruments for which there is not a liquid market.[62]

Besides the waivers described above, the competent authorities may also temporarily suspend the transparency obligations in respect of non-equity instruments. The competent authority responsible for supervising one or more trading venues on which a class of bond, structured finance product, emission allowance or derivative is traded may, where the liquidity of that class of financial instrument falls below a specified threshold, temporarily suspend the transparency obligations. The specified threshold is defined on the basis of objective criteria specific to the market for the financial instrument concerned. Notification of such temporary suspension is published on the website of the relevant competent authority.[63]

3. Pre-trade transparency for systematic internalisers

3.1. MiFID

Under MiFID systematic internalisers are also subject to pre-trade transparency obligations. As in the case of regulated markets and MTFs, these transparency obligations apply only to *shares* admitted to trading on a regulated market. Systematic internalisers make public their quotes on a regular and continuous basis during normal trading hours. They are also allowed, under exceptional market conditions, to withdraw their quotes.[64] The quotes are made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.[65] The transparency obligations for systematic internalisers differ in various important ways from those for regulated markets and MTFs:

(1) A systematic internaliser is only obliged to publish a firm quote in those shares admitted to trading on a regulated market for which they are systematic internalisers and for which there is a *liquid market*. In the case of shares for which there is not a liquid market, systematic internalisers must disclose quotes to their clients *on request*.[66]

(2) The transparency obligations are applicable to systematic internalisers only when dealing for sizes up to standard market size. Systematic internalisers that only deal in sizes above standard market size are not subject to the standard size provision.[67]

(3) The provision for systematic internalisers does not allow Member States the option of extending the transparency obligations to financial instruments other than listed shares.

(4) Unlike the situation with regulated markets and MTFs, waivers are not possible.

3.2. MiFID II

The main changes which MiFID II makes to pre-trade transparency requirements for systematic internalisers are as follows.

(1) The pre-trade transparency obligations have been extended to financial instruments other than listed shares. MiFID II distinguishes in this connection between equity and non-equity instruments. Equity instruments are shares, depositary receipts, ETFs, certificates and other similar financial instruments.[68] Non-equity instruments are bonds, structured finance products, emission allowances and derivatives.[69]

(2) The pre-trade transparency obligations for systematic internalisers are less far-reaching in the case of non-equity instruments than in the case of equity instruments (in essence, the transparency in relation to equity remains the same as under MiFID; see § 3.1 above).[70] In the case of non-equity instruments, an investment firm must make firm public quotes for non-equities traded on a trading venue for which it is a systematic internaliser and for which there is a liquid market[71] when the following (cumulative) conditions are fulfilled: (a) it is prompted for a quote by a client of the systematic internaliser;[72] (b) the systematic internaliser agrees to provide a quote;[73] (c) the size of the request-for-quote is below the size that would expose the systematic internaliser – as liquidity provider – to undue risk (because on the basis of this information another party could act *against* the investment firm).[74]

4. Post-trade transparency

4.1. MiFID

Under MiFID regulated markets are obliged to publish the following information about *shares*: (a) the price, (b) the volume and (c) the time of the executed transactions. The details of these transactions must be made public (i) on a reasonable commercial basis, and (ii) as close to real-time as possible.[75] MTFs on which listed shares are traded and investment firms which conclude transactions in shares admitted to trading on a regulated market outside a regulated market or MTF are subject to the same post-trade transparency obligations.[76] This transparency obligation therefore applies to transactions carried out not only through systematic internalisation but also through non-systematic internalisation, matching opposing client orders and trading solely on own account. As we have seen, the pre-trade transparency obligation for transactions in listed shares outside a regulated market or MTF applies only to investment firms that systematically internalise these orders (and hence not to non-systematic internalisers, the matching of opposing client orders and trading solely on own account). MiFID leaves the Member States free to extend the post-trade information obligation to financial instruments other than listed shares.[77]

The competent authorities may authorise regulated markets, MTFs and investment firms which conclude transactions outside a regulated market or an MTF to defer publication of details of transactions based on their type or size. In particular, the competent authorities may authorise deferred publication in respect of transactions that are large in scale compared with the normal market size for that share or that class of shares. A regulated market must obtain this prior approval from the competent authority and must provide clear information about the deferment arrangements to market participants and the investing public.[78] To ensure the good and orderly operation of the financial markets, the conditions on which a regulated market may defer publication of trading transactions are set out in the MiFID Implementing Regulation.[79]

4.2. MiFID II

The main changes which MiFID II makes in relation to post-trade transparency are as follows.

(1) Under MiFID II post-trade transparency obligations are extended to the new trading venue – the organised trading facility (OTF). As a result, the post-trade transparency obligations apply to regulated markets, MTFs *and* OTFs (together known as trading venues) and investment firms that settle transactions outside a trading venue.[80]

(2) The post-trade transparency obligations are extended to financial instruments other than listed shares. MiFID II distinguishes for this purpose between equity and non-equity instruments. Equity instruments are shares, depositary receipts, ETFs, certificates and other similar financial instruments.[81] Non-equity instruments are bonds, structured finance products, emission allowances and derivatives.[82]

(3) Investment firms that settle transactions outside a trading venue must make the information public through an approved publication arrangement (APA).[83] An APA is a concept introduced by MiFID II which is discussed in § E. 2 below.

D. Maintaining and reporting transactions

1. General

Title IV MiFIR (transaction reporting) sets out the obligation of investment firms and trading venues to keep data relating to transactions in financial instruments and then to report these details to the competent authorities. The aim is to enable the competent authorities – coordinated by ESMA – to use these data to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.[84] This also enables them to detect and investigate potential cases of market abuse.[85] The reporting obligations are much wider than under MiFID and therefore cover a wider range of execution venues and more types of financial instruments.[86]

2. Obligation to maintain records

Investment firms must keep at the disposal of the competent authority, for five years, the relevant data relating to all orders and all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records must contain all the information and details of the identity of the client, and all information required under the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.[87]

The operators of a trading venue (and, in so far as this involves operators of MTFs and OTFs, this may also be investment firms) must keep at the disposal of the competent authority, for at least five years, the relevant data relating to all orders in financial instruments which are advertised through their systems. The records must contain the relevant data that constitute the characteristics of the order, including those that link an order with the executed transaction(s) that stems from that order and the details of which are reported to the competent authority (see § 3. below). The Commission has developed regulatory technical standards to specify the details of the relevant order data required to be maintained.[88]

3. Obligations to report data to the competent authority

Investment firms which execute transactions in financial instruments must report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. The reporting duty applies to both transactions on own account and transactions on behalf of clients.[89]

The *operator of a trading venue* (including investment firms in the case of operators of MTFs and OTFs) is subject to the same obligation, albeit in respect of transactions in financial instruments which (i) are carried out by a firm which is *not* subject to MiFIR, (ii) are traded on its platform and (iii) have been executed through its systems.[90]

The competent authority must establish the necessary arrangements to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives that information.[91] The competent authority makes available to ESMA, *upon request*, the information it has received.[92] With regard to financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs, trading venues must provide competent authorities with identifying reference data for the purposes of transaction reporting.[93] This means that the national regulatory authorities and, on request, ESMA too are swamped by a veritable flood of information. It may be wondered whether the idea of always going through such data in good time in order to enable the competent authorities, where necessary, to take action in good time is realistic.

The reports are made to the competent authority (i) by the investment firm itself, (ii) by an approved reporting mechanism (ARM) acting on its behalf or (iii) by the trading venue through whose system the transaction was completed.[94] An ARM is a regulated entity (see § E.4 below). This system of reporting to the competent authorities is stricter than under MiFID. MiFID allowed reports to be submitted for an investment firm by a non-regulated entity acting on its behalf.[95] In view of the options mentioned above at (i) to (iii), MiFID II permits reports to be made only through regulated entities.[96]

The reporting obligation applies to the following financial instruments, irrespective of whether or not the transaction is carried out on the trading venue concerned:

(a) financial instruments which are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made;
(b) financial instruments where the underlying is a financial instrument traded on a trading venue; and
(c) financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue.[97]

As the reporting obligation in respect of the above-mentioned financial instruments also applies where they themselves have not been admitted to trading or traded on a trading venue but are *either* financial instruments where the underlying is a financial instrument traded on a trading venue *or* financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue, MiFID II also introduces a reporting obligation for OTC derivatives. This is an important change introduced by MiFID II.[98]

Regulatory technical standards specify the relevant categories of financial instrument to be reported.[99] In order to avoid an unnecessary administrative burden on investment firms, financial instruments that are not susceptible to market abuse should be excluded from the reporting obligation.[100] The significance of this exemption seems limited since it is virtually always possible to commit market abuse in some way or another.

The reports should, in particular, include (i) details of the names and numbers of the financial instruments bought or sold, (ii) the quantity, (iii) the dates and times of execution, (iv) the transaction prices, (v) a designation to identify the clients on whose behalf the investment firm has executed that transaction, (vi) a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, (vii) a designation to identify the applicable waiver under which the trade has taken place, (viii) means of identifying the investment firms concerned and (ix) a designation to identify a short sale as defined in Article 2 (1)(b) of Regulation (EU) No 236/2012 in respect of any shares and sovereign debt within the scope of Articles 12, 13 and 17 of that Regulation.[101] Regulatory technical standards specify this information and the data standards and formats for the information to be reported.[102]

The question arises of whether this reporting system is adequate and does not unduly duplicate the reporting obligations under the European Market Infrastructure Regulation (EMIR). By 9 January 2019 at the latest, ESMA must submit a report to the Commission on the functioning of Article 26 MiFIR, including assessment of (i) its interaction with the related reporting obligations under EMIR, and (ii) whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable monitoring of the activities of investment firms. The Commission may take steps to propose any changes, including providing for transactions to be transmitted only to a single system appointed by ESMA instead of to the competent authorities. The Commission must forward ESMA's report to the European Parliament and to the Council.[103]

E. Data services providers

1. Introduction

The pre-trade and post-trade transparency obligations described in § C. above are helping to considerably reduce the incidence of trading on dark pools, thereby ensuring that more data are made public and, it is hoped, promoting reliable price formation. According to the best execution rules, an investment firm must execute an order at the place where the most favourable result can be achieved for the client.[104] This presupposes that the investment firm is able to compare in an efficient manner the market information on trading activity at the various places of execution throughout the EU/EEA. For this purpose, it is necessary for the market information on transactions performed to be made public in standardised form for ease of comparison. Things become even easier if the relevant market information on trading activity is available in consolidated form (known as "consolidated tape"). Investment firms and – in a broader sense – the investing public are not the only parties to have an interest in receiving high-quality market information on trading activity. National regulatory authorities and ESMA also have an interest in the availability of such information in order to be able adequately to monitor the financial markets.[105]

MiFID II recognises the importance of high-quality market information by introducing new regulated entities known as data reporting services providers which require authorisation. They may perform their activities only if they have authorisation from the competent authority.[106] They are also under the continuous supervision of the competent authority.[107] The management body of a data reporting services provider must fulfil certain requirements.[108] In principle, the providers are independent entities, but an investment firm or market operator that operates a trading venue may also act as a data reporting services provider, provided, of course, that it complies with the rules governing such providers.[109]

The Member States must keep a register of all data reporting services providers. The register is publicly accessible and contains information on the services for which the data reporting services provider is authorised. It is updated on a regular basis, and every authorisation is notified to ESMA.[110] ESMA then draws up a list of all data reporting services providers in the EU/EEA. The list contains information on the services for which the data reporting services provider is authorised, and it is updated on a regular basis. ESMA publishes and updates the list on its website.[111]

MiFID II distinguishes between three categories of data reporting services providers: (i) approved publication arrangements (APAs), (ii) consolidated tape providers (CTPs) and (iii) approved reporting mechanisms (ARMs). One and the same provider may simultaneously act as APA, CTP and ARM.[112]

2. APA

As noted above in § C.4.2, point (3), APA stands for approved publication arrangement. APA is defined as a person authorised under MiFID II to provide the service of publishing trade reports on behalf of investment firms that conclude transactions outside a trading venue.[113] As noted above in § C.4.2, point (3), investment firms that conclude transactions outside a trading venue must make the market information public through an APA.[114] In contrast, trading venues must themselves make public the market information on the transactions concluded on their venue (i.e. without the intermediary of an APA).[115]

An APA must have adequate policies and arrangements in place to make public the market information as close to real time as is technically possible, on a reasonable commercial basis.[116] The information must be made available free of charge 15 minutes after the APA has published it. The APA must be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in a format that facilitates the consolidation of the information with similar data from other sources.[117] Regulatory technical standards determine common formats, data standards and technical arrangements facilitating the consolidation of information.[118]

The market information made public by an APA must include at least the following elements: (a) the identifier of the financial instrument; (b) the price at which the transaction was concluded; (c) the volume of the transaction; (d) the time of the transaction; (e) the time the transaction was reported to the APA; (f) the price notation of the transaction; (g) the code for the trading venue the transaction was executed on, or where the transaction was executed via a systematic internaliser the code "SI" or otherwise the code "OTC"; and (h) if applicable, an indicator that the transaction was subject to specific conditions.[119] Regulatory technical standards specify what information must be made public.[120] Point (g) suggests that an APA may also make transactions public through a trading venue. However, this seems incorrect as an APA – in keeping with the definition of this term (see above) – only makes transactions public on behalf of investment firms that conclude transactions outside a trading venue.

Finally, an APA must fulfil the following organisational requirements: (i) operate and maintain effective administrative arrangements designed to prevent conflicts of interest with its clients;[121] (ii) have sound security mechanisms in place designed to guarantee the security of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage before publication;[122] (iii) maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times;[123] and (iv) have systems in place that can effectively check trade reports for completeness, identify omissions and obvious errors and request re-transmission of any such erroneous reports.[124] Regulatory technical standards specify these concrete organisational requirements in greater detail.[125]

3. CTP

A "Consolidated tape provider" (CTP) is a person authorised under MiFID II to provide the service of (i) *collecting* trade reports from regulated markets, MTFs, OTFs and APAs in respect of transactions in equity and non-equity instruments which are executed through trading venues, via agency crosses, internalisation or systematic internalisation or dealing solely on own account[126] and (ii) *consolidating* them into a continuous electronic live data stream providing price and volume data per financial instrument.[127]

In short, the information made public through an APA and through the trading venues themselves is then *collected* and *consolidated* and made available by the CTP to the market.

A CTP must have adequate policies and arrangements in place (i) to collect the information on equity and non-equity instruments made public through the trading venues themselves and through APAs and (ii) to consolidate it into a continuous electronic data stream and make the information available to the public as close to real time as is technically possible,[128] on a reasonable commercial basis.[129]

In the case of equity instruments, the information must, at least, include the following details: (a) the identifier or identifying features of the financial instrument; (b) the price at which the transaction was concluded; (c) the volume of the transaction; (d) the time of the transaction; (e) the time the transaction was reported; (f) the price notation of the transaction; (g) the code for the trading venue the transaction was executed on, or where the transaction was executed via a systematic internaliser the code "SI" or otherwise the code "OTC"; (h) where applicable, the fact that a computer algorithm within the investment firm was responsible for the investment decision and the execution of the transaction; (i) if applicable, an indicator that the transaction was subject to specific conditions; (j) if the competent authority has given a trading venue a waiver in respect of *pre-trade* transparency obligations, a flag to indicate which of those waivers the transaction was subject to.[130] The same information must be provided in the case of non-equity instruments (with the exception of the information mentioned at (h) and (j) above).[131]

The information is made available free of charge 15 minutes after the CTP has published it. The CTP must be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and (i) in formats that are easily accessible and utilisable for market participants (equity instruments) or (ii) in generally accepted formats that are interoperable and easily accessible and utilisable for market participant (non-equity instruments).[132]

Regulatory technical standards specify (a) the means by which the CTP may comply with the above-mentioned information obligations; (b) the content of these information obligations; (c) the financial instruments data which must be provided in the data stream and for non-equity instruments the trading venues and APAs which need to be included; (d) other means to ensure that the data published by different CTPs are consistent and allow for comprehensive mapping and cross-referencing against similar data from other sources, and are capable of being aggregated at EU/EEA level.[133] The CTP must ensure that the data provided are consolidated from all the regulated markets, MTFs, OTFs and APAs and for the financial instruments specified by regulatory technical standards under point (c) above.[134]

The CTP must satisfy the following organisational requirements: (i) have in place administrative arrangements designed to prevent conflicts of interest;[135] (ii) have in place sound security mechanisms designed to guarantee the security of the means of transfer of information and to minimise the risk of data corruption and unauthorised access;[136] and (iii) maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.[137] Regulatory technical standards specify the concrete organisational requirements.[138]

4. ARM

ARM stands for approved reporting mechanism. ARM means a person authorised under MiFID II to provide the service of reporting details of transactions to competent authorities or to ESMA on behalf of investment firms.[139]

An ARM has adequate policies and arrangements in place to report the information required under Article 26 MiFIR as quickly as possible, and no later than the close of the working day following the day upon which the transaction took place. Such information must be reported in accordance with the requirements laid down in Article 26 MiFIR. This elaborates the types of financial instrument to which the reporting obligation applies and the content of the reports. Regulatory technical standards specify the reporting obligations of the ARM.[140] For more information about Article 26 MiFIR see § D.3 above.

The ARM must fulfil the following organisational requirements: (i) have in place arrangements designed to prevent conflicts of interest with its clients;[141] (ii) have in place sound security mechanisms (designed to guarantee the security and authentication of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage, maintaining the confidentiality of the data at all times);[142] (iii) maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times;[143] (iv) have systems in place that can effectively check transaction reports for completeness, identify omissions and obvious errors caused by the investment firm and where such error or omission occurs, to communicate details of the error or omission to the investment firm and request re-transmission of any such erroneous report; and (v) have systems in place to enable the ARM to detect errors or omissions caused by the ARM itself and to enable the ARM to correct and transmit, or re-transmit as the case may be, correct and complete transaction reports to the competent authority.[144] Regulatory technical standards specify the above organisational requirements.[145]

F. Concentration of trading

1. General

One of the accomplishments of the MiFID regime was the abolition of the concentration rule. This meant that it was no longer necessary for orders in financial instruments to be concluded through a regulated market. Instead, they could be executed through an MTF or even outside a regulated market or MTF. Naturally, the best execution rules must still be fulfilled in choosing how a transaction will be executed.[146] Nonetheless, the idea behind MiFID II is once again to have a degree of concentration of trading, for example in order to boost liquidity and promote the correct price formation. Naturally, this new regime is much less far-reaching than the concentration rule as there remains sufficient scope for competition between different trading venues.

2. Shares

According to the MiFID II regime, an investment firm must ensure that the trades it undertakes in *shares* admitted to trading on a regulated market *or* traded on a trading venue take place on a (a) regulated market, (b) an MTF, (c) a systematic internaliser, or (d) a third-country trading venue assessed as equivalent.[147] In short, the trade in shares of this kind must be concentrated on trading venues and systematic internalisers. This means that trades in shares of this kind may not be executed through discretionary agency crossing[148] or solely acting on own account. OTFs too are admittedly a trading venue, but are not eligible because trades in shares (and other equity instruments) may not be executed on them.[149]

Nonetheless, the principle underlying concentration of the trade in shares admitted to trading on a regulated market or traded on a trading venue is subject to an exception in the following two cases:

(a) if trades are non-systematic, *ad hoc*, irregular and infrequent, *or*
(b) are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process.

Regulatory technical standards specify the particular characteristics of those transactions in shares that do not contribute to the price discovery process as referred to at (b) above, taking into consideration cases such as: (i) non-addressable liquidity trades; or (ii) where the exchange of such financial instruments is determined by factors other than the current market valuation of the financial instrument.[150]

3. Derivatives

The basic principle for standardised OTC derivatives is also concentration of trading on trading venues.[151] This is a consequence of the G20 Summit in Pittsburgh on 25 September 2009, where the leaders stated:

> *Improving over-the-counter derivatives markets:* 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. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements. We ask the financial stability board and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse.[152]

The central clearing and mandatory reporting to trade repositories in the EU/EEA is regulated in the European Market Infrastructure Regulation (EMIR), whereas the rules on the concentration of trading on stock exchanges and electronic trading platforms are contained in MiFIR. In this respect, therefore, MiFIR cannot be viewed separately from EMIR. The G20 agreement that standardised OTC derivatives contracts should be cleared through trading venues was an important reason for the introduction of the OTF.

Transactions in standardised OTC derivatives may be conducted *only* on (a) regulated markets, (b) MTFs, (c) OTFs *or* (d) third-country trading venues (in the last case, provided that the third country provides for an effective equivalent system for the recognition of trading venues in the EU/EEA), if the following conditions have been fulfilled.[153]

(1) The transactions must be between (a) financial counterparties, (b) non-financial counterparties or (c) financial and non-financial counterparties. The *financial counterparties* are (i) investment firms, (ii) credit institutions (banks), (iii) insurers and reinsurers, (iv) undertakings for the collective investment of transferable securities and, where relevant, their management company, (v) institutions for occupational retirement pension, and (vi) alternative investment funds (AIFs) managed by AIFMs. The *non-financial counterparties* are *undertakings* established in the EU/EEA, with the exception of undertakings which are financial counterparties.[154] In short, transactions in derivatives with private individuals are not covered by the obligation to have transactions routed through a trading venue.

(2) This does *not* concern intragroup transactions, as referred to in EMIR.[155]

(3) This does *not* concern intragroup transactions which are covered by the transitional provisions of EMIR.[156]

(4) The transaction must involve derivatives belonging to a class of derivatives that has been declared subject to the trading obligation *and* listed in the register published and kept by ESMA on its website.[157] Regulatory technical standards specify, among other things, what OTC derivatives transactions will be covered by this obligation.[158]

G. Position limits and position management powers in the case of trading in commodity derivatives and reporting

1. General

It was also agreed during the G20 Summit in Pittsburgh that improvements would be made to the regulation, functioning and transparency of financial and commodity markets to address excessive commodity price volatility. Further to this statement and to a Commission communication of 2 February 2011, it was declared during the G20 Summit in Cannes on 4 November 2011 that market regulators should be granted effective intervention powers to prevent market abuses. In particular, market regulators should have and use formal position management powers, among other powers of intervention, including the power to set *ex ante* position limits, as appropriate.[159] MiFID II therefore contains an extensive set of rules dealing with position limits for commodity derivatives. In outline, these are as follows.

2. Position limits

The aims of imposing position limits are (a) to prevent market abuse, (b) to support orderly pricing and settlement conditions, including preventing market distorting positions, and ensuring, in particular, convergence between prices of derivatives in the delivery month and spot prices for the underlying commodity, without prejudice to price discovery on the market for the underlying commodity.[160]

The competent authority sets position limits for each type of commodity derivative traded on trading venues and for economically equivalent OTC contracts.[161] It does this on the basis of a method of calculation determined by the Commission.[162] The method used for the calculation of position limits may not create barriers to the development of new commodity derivatives, but ESMA should ensure when determining the methodology for calculation that the development of new commodity derivatives cannot be used to circumvent the position limits regime.[163] Position limits should be set for each individual commodity derivative contract. In order to avoid circumvention of the position limits regime through the ongoing development of new commodity derivative contracts, ESMA should ensure that the methodology for calculation prevents any circumvention by taking into account the overall open interest in other commodity derivatives with the same underlying commodity.[164]

Position limits must always be determined by reference to the net position which a person can hold at any time. The limits are set on the basis of not only all positions held by a person but also those held on its behalf at an aggregate group level.[165] The position limits specify clear quantitative thresholds for the maximum size of a position in a commodity derivative that persons can hold.[166] The competent authority communicates the same information as well as the details of the position limits it has established to ESMA, which publishes and maintains on its website a database with summaries of the position limits and position management controls.[167]

The position limits do *not* apply to positions held by or on behalf of a non-financial entity, provided they are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity.[168] The entity concerned may apply to the competent authority for an exemption.[169]

ESMA monitors at least once a year how the competent authorities have implemented the position limits set in accordance with the methodology for calculation established by the Commission.[170]

3. Position management controls

An investment firm or a market operator operating a trading venue which trades commodity derivatives must apply position management controls. Those controls must include at least the powers for the trading venue to: (a) monitor the open interest positions of persons; (b) access information; (c) require a person to terminate or reduce a position, on a temporary or permanent basis as the specific case may require, and to unilaterally take appropriate action to ensure the termination or reduction if the person does not comply; (d) where appropriate, require a person to provide liquidity back into the market at an agreed price and volume on a temporary basis with the express intent of mitigating the effects of a large or dominant position.[171]

The investment firm or market operator operating the trading venue must inform the competent authority of the details of position management controls.[172] The competent authority communicates the same information as well as the details of the position limits it has established to ESMA, which then publishes and maintains on its website a database with summaries of the position limits and position management controls.[173]

4. Reporting obligations

An investment firm or market operator operating a trading venue (MTF, OTF or regulated market) must make public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives or emission allowances or derivatives. ESMA is arranging for centralised publication of the information included in those reports.[174] The competent authorities must be supplied at least daily with a complete and detailed breakdown of the positions of all persons.[175] To ensure that the operator of the trading venue can fulfil this obligation, members or participants of these trading venues must report to the operator operating that trading venue the details of their own positions held through contracts traded on that trading venue at least on a daily basis, as well as those of their clients and the clients of those clients until the end client is reached.[176]

H. Conclusion

MiFID II contains important new concepts and provisions for the financial markets. MiFID II introduces a new trading venue (the OTF) and a species of the genus MTF (the SME growth market). The rules for investment firms which systematically internalise have become more detailed, and the pre-trade and post-trade transparency obligations have been extended to financial instruments other than listed shares. This is one of the factors helping to reduce the incidence of dark pools, but another is that it is becoming more difficult under MiFID II for competent authorities to grant waivers of pre-trade transparency obligations. The reporting obligations of transactions in financial instruments have been considerably expanded, since they now also relate to OTC derivatives. MiFID II introduces a new type of regulated entity – the data reporting services provider – to ensure that the available information on completed transactions is of a high standard. Investment firms and – in a broader sense – the investing public are not the only parties to have an interest in receiving high-quality market information on trading activity. National regulatory authorities and ESMA also have an interest in the availability of such information in order to be able adequately to monitor the financial markets. The idea behind MiFID II is once again to have a degree of concentration of trading, *both* for shares admitted to trading on a regulated market or traded on a trading venue *and* for standardised OTC derivatives, for example in order to boost liquidity and promote correct price formation. MiFID II also contains a detailed arrangement for position limits for commodity derivatives, once again as a consequence of G20 agreements to address the exceptional volatility of commodity derivatives. In short, MiFID II introduces a substantial package of new rules which will have a major impact on the financial markets and the players active in them. ■

Acknowledgement

I thank Mr Han Gulyás, PhD scholar at Radboud University Nijmegen, for his assistance in completing the footnote references. All errors are solely the author's responsibility.

Professor Dr Danny Busch, LLM (Utrecht), MJur (Oxon), Chair for Financial Law and Director of the Institute for Financial Law (IFL) of Radboud University Nijmegen, the Netherlands, Visiting Professor at *Università degli Studi di Genova*, Visiting Professor at *Università Cattolica del Sacro Cuore di Milano* and Member of the Dutch Banking Disciplinary Committee (*Tuchtcommissie Banken*). E-mail: d.busch@jur.ru.nl. IFL Website: http://www.ru.nl/ifl/.

1 Directive 2004/39/EC, *OJ* L 145, 30 April 2004, pp. 1–47 (MiFID); Directive 2006/73/EC, *OJ* L 241, 2 September 2006, pp. 26–58 (MiFID Implementing Directive); Regulation (EC) No 1287/2006, *OJ* L 241, 2 September 2006, pp. 1–25 (MiFID Implementing Regulation).

2 The MiFID II regime consists of (1) Directive 2014/65/EU, *OJ* L 173, 15 May 2014, pp. 349–496 (MiFID II); (2) Regulation (EU) No 600/2014, *OJ* L 173, 15 May 2014, pp. 84–148 (MiFIR); and (3) an impressive number of implementing measures. The relevant directives pertaining to MiFID II will

in a similar fashion as MiFID I be transposed into national law. Initially, MiFID II and MiFIR stipulated that the bulk of the new legislation would become binding on the financial sector as per 3 January 2017, but this has been extended to 3 January 2018. See (1) Directive 2016/1034/EU, *OJ* L 175, 23 June 2016, pp. 8–11; (2) Regulation (EU) No 2016/1033, *OJ* L 175, 23 June 2016, pp. 1–7. The reason for the extension lies in the complex technical infrastructure that needs to be set up for the MiFID II package to work effectively. The European Securities and Markets Authority (ESMA) has to collect data from about 300 trading venues on about 15 million financial instruments. To achieve this result, ESMA must work closely with national competent authorities and the trading venues themselves. However, the European Commission was informed by ESMA that neither competent authorities nor market participants would have the necessary systems ready by 3 January 2017. In light of these exceptional circumstances and in order to avoid legal uncertainty and potential market disruption, an extension was deemed necessary. See http://europa.eu/rapid/press-release_IP-16-265_en.htm?locale=en.

3 The MiFID II rules on high-frequency trading (flash trading or HFT), other forms of algorithmic trading (AT) and direct electronic market access (DEA) also constitute major changes for the financial markets. I addressed the MiFID II regulation of HFT, AT and DEA in a separate article, published in the *Law and Financial Markets Review*, issue 2/2016. Apart from stricter rules for the financial markets, MiFID II also contains stricter rules for investment firms providing investment services, including (1) entirely new rules on product governance and product intervention, (2) stricter conduct of business rules and (3) entirely new rules for third-country investment firms. These changes will not be addressed in this article. See on these and other MiFID II topics: Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR* (OUP 2017); Danny Busch, 'MiFID II: Stricter Conduct of Business Rules for Investment Firms' (2017) 3 *Capital Markets Law Journal*.

4 This rule meant that it was up to the Member States themselves to decide whether retail orders in financial instruments should necessarily be executed by sending them to the stock markets, which were still mainly national at that time. See Article 14(3) of Directive 93/22/EEC, *OJ* L 141, 11 June 1993, pp. 27–46 (Investment Services Directive or ISD, MiFID's predecessor).

5 See European Commission, Impact Assessment MiFID (COM (2011) 656 final), p. 88 ff.

6 Article 4(1)(21) MiFID II contains the following definition of "regulated market": 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 the system and in accordance with its non-discretionary rules – 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 (Regulated markets) of MiFID II. Article 4(1)(14) MiFID contained the same definition.

7 Article 4(1)(22) MiFID II contains the following definition of "MTF": 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 the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II (Authorisation and operating conditions for investment firms) of MiFID II. Article 4(1)(15) MiFID contained the same definition. For the sake of clarity, MiFID II adds here that an investment firm that operates an internal matching system which executes client orders in shares, depositary receipts, ETFs, certificates and other similar financial instruments on a multilateral basis must ensure it is authorised as an MTF under MiFID II and comply with all relevant provisions pertaining to such authorisations. See Article 23(2) MiFIR.

8 Article 4(1)(13) MiFID II defines "small and medium-sized enterprises" as: companies that have an average market capitalisation of less than EUR 200,000,000 on the basis of end-year quotes for the previous three calendar years.

9 The plans for a Capital Markets Union (CMU) are also intended to facilitate the better funding of the SME sector. See the documents that are available at http://ec.europa.eu/finance/capital-markets-union/index_en.htm. See also: Danny Busch, 'A Capital Markets Union for a Divided Europe' (2017) 3 *Journal of Financial Regulation*; D Busch, E Avgouleas and G Ferrarini (eds), *Capital Markets Union in Europe* (OUP, 2018) [forthcoming].

10 See also Article 33 MiFID II and Recitals 132–135 MiFID II. The Commission has published regulatory technical standards on the more detailed requirements for SME growth markets. See Commission Delegated Regulation (EU) 2017/565, *OJ* L 87, 25 April 2016, pp. 1–83, Article 77–79.

11 See Recital 8 MiFIR. Article 4(1)(23) MiFID II contains the following definition of "organised trading facility": 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 (Authorisation and operating conditions for investment firms).

12 Recital 6 MiFIR.

13 As regards this obligation, see Recital 25 MiFIR and also § F.3 below.

14 See the definition of OTF in Article 4(1)(23) MiFID II; Recital 8, first paragraph, MiFIR.

15 See also Recital 8, second paragraph, MiFIR. As regards portfolio compression, see Article 31 MiFIR and Commission Delegated Regulation (EU) 2017/567, *OJ* L 87, 18 May 2016, pp. 90–116, Article 17–18.

16 As regards the applicability of the best execution duty, see, above all, Article 20(6), last paragraph, in conjunction with Article 27 MiFID II. This view is also confirmed by Recital 9 MiFIR: "While regulated markets and MTFs have non-discretionary rules for the execution of transactions, the operator of an OTF should carry out order execution on a discretionary basis subject, where applicable, to the pre-transparency requirements and *best execution* obligations. Consequently, conduct of business rules, *best execution* and *client order handling* obligations should apply to the transactions concluded on an OTF operated by an investment firm or a market operator" [*DB*'s italics].

17 Article 20(6) in conjunction with Article 27 MiFID II; Recital 9, first paragraph, MiFIR.

18 Article 20(4) MiFID II. The connection between an OTF and another OTF may not be arranged in a way which enables orders in different OTFs to interact. See Article 20(4), last sentence, MiFID II.

19 See, for example, Article 20(6), second paragraph, MIFID II.

20 Article 20(6), third paragraph, MiFID II.

21 See Article 20(2), first paragraph MiFID II.

22 Article 20(2), first paragraph, MiFID II.

23 Article 20(2), second paragraph, MiFID II.

24 Regulation (EU) No. 648/2012, *OJ* L 201, 27 July 2012, pp. 1–58.

25 Cf. also Article 20(7) MiFIR, where it is provided that the competent authority must monitor the engagement of the operator

of an OTF in matched principal trading to ensure that it continues to fall within the definition of such trading in Article 4 (1)(38) MiFID II (on this subject see the main text below) and that its engagement in matched principal trading does not give rise to conflicts of interest between the investment firm or market operator and its clients. It is noteworthy that there is no mention of the risk of a conflict of interest between the clients who, in economic terms, are on either side of the transaction.

26 Article 20(3) MiFID II.

27 Article 20(5), first paragraph, MiFID II.

28 Article 20(5), second paragraph, MiFID II.

29 Cf. Recital 20 MiFIR.

30 See § C.3 below.

31 See § C.4 below.

32 "Multilateral system" is defined as "any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system" (Article 4(1)(19) MiFID II).

33 See the definition of "trading venue": "a regulated market, an MTF or an OTF" (Article 4(1)(24) MiFID II).

34 See also Recital 19 MiFIR.

35 See Commission Delegated Regulation (EU) 2017/565, *OJ* L 87, 25 April 2016, pp. 1–83, Article 12–17.

36 See also Recital 1 MiFIR.

37 See *inter alia* Commission Delegated Regulation (EU) 2017/567, *OJ* L 87, 18 May 2016, pp. 90–116; Commission Delegated Regulation (EU) 2017/571, *OJ* L 87, 2 June 2016, pp. 126–141; Commission Delegated Regulation (EU) 2017/572, *OJ* L 87, 2 June 2016, pp. 142–144; Commission Delegated Regulation (EU) 2017/577, *OJ* L 87, 13 June 2016, pp. 174–182; Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349; Commission Delegated Regulation (EU) 2017/585, *OJ* L 87, 14 July 2016, pp. 368–381; Commission Delegated Regulation (EU) 2017/587, *OJ* L 87, 14 July 2016, pp. 387–410.

38 Article 44(1), first paragraph, MiFID (regulated markets); Article 29(1), MiFID (MTFs). Precisely what information must be made public in the case of both regulated markets and MTFs is specified in Article 17 of the MiFID Implementing Regulation, in conjunction with Table 1 of Annex II to the Regulation.

39 See the words "Member States shall, at least, require (…)" in Article 44(1), first paragraph, MiFID (regulated markets) and Article 29(1) MiFID (MTFs).

40 Article 44(1) first paragraph, MiFID (regulated markets); Article 29(1) MiFID (MTFs).

41 Article 18(1)(a) MiFID Implementing Regulation.

42 Article 18(1)(b) in conjunction with Article 19 MiFID Implementing Regulation.

43 Article 18(2) MiFID Implementing Regulation.

44 Article 29(2), Article 44(2) and Article 27(1), fifth paragraph, MiFID. An order qualifies as large in scale compared with the normal market size if it is equal to or larger than the minimum size of an order specified in Table 2 of Annex II to the MiFID Implementing Regulation. To determine whether an order is large in scale compared with the normal market size, all shares admitted to trading on a regulated market are classified according to their average daily turnover, which is calculated in accordance with the procedure laid down in Article 33 MiFID Implementing Regulation. See Article 20 MiFID Implementing Regulation.

45 See the definition of "trading venue" in Article 4(1)(24) MiFID II in conjunction with Articles 3 and 8 MiFIR.

46 ETF stands for exchange traded funds.

47 Article 3(1) MiFIR.

48 Article 8(1) MiFIR.

49 Article 3(2) MiFIR (*equity*); Article 8(2) MiFIR (*non-equity*). The precise data that must be published are set out by the Commission in regulatory technical standards; see Article 4(6)(a) (*equity*) and Article 9(5)(b) MiFIR (*non-equity*). The regulatory technical standards for non-equity have in any event been published, see Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349. See also ESMA/2014/1570, *Consultation Paper – Annex B – Regulatory technical standards on MiFID II/MiFIR (19 December 2014)*, pp. 47–50.

50 Article 4 MiFIR.

51 Recital 17 MiFIR. The double volume cap for negotiated transactions applies to transactions that are made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the regulated market or MTF operating that system (Article 4(1)(b)(1) MiFIR).

52 Recital 17 and Article 5(1), opening words MiFIR.

53 Article 5(1)(a) MiFIR.

54 Article 5(1)(b) MiFIR. However, the volume cap mechanism does not apply to negotiated transactions which are in a share, depositary receipt, ETF, certificate or other similar financial instrument for which there is not a liquid market, or to negotiated transactions that are subject to conditions other than the current market price of that financial instrument. See Article 5 (1), last paragraph, MiFIR. "Liquid market" is defined in Article 4(1), in point (25), MiFID II, and in Article 2(1)(17) MiFIR. For a further specification of a liquid market, see Commission Delegated Regulation (EU) 2017/567, *OJ* L 87, 18 May 2016, pp. 90–116, Article 1–5 (*equity*).

55 Article 5(2) MiFIR.

56 Article 5(3) MiFIR.

57 Article 5(4). See also Article 5(5)–(8) MiFIR and Commission Delegated Regulation (EU) 2017/577, *OJ* L 87, 13 June 2016, pp. 174–182, Article 8.

58 Article 9(1), opening words and (a), MiFIR. This is elaborated in Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Article 3 in conjunction with Article 13.

59 Article 9(1), opening words and (a), MiFIR. This is elaborated in Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Article 4.

60 Article 9(1), opening words and (b), MiFIR. This is elaborated in Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Article 5 in conjunction with Article 13. It should be noted here that even if the waiver referred to in Article 9(1), opening words and (b), MiFIR is granted, a certain degree of transparency is still guaranteed. After all, Article 8(4) MiFIR provides that, where such a waiver is granted, market operators and investor firms must make public at least indicative pre-trade bid and offer prices which are close to the price of the trading interests advertised through their systems in bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue must make that information available to the public through appropriate electronic means on a continuous basis during normal trading hours. Those arrangements ensure that information is provided on reasonable commercial terms and on a non-discriminatory basis.

61 As regards this trading obligation, see § F.3 below.

62 Article 9(1), opening words and (c), MiFIR. This is elaborated in Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Article 6 read in conjunction with Article 13. "Liquid market" is defined in Article 4(1), in point (25) MiFID II. For a further description of liquid market, see

Commission Delegated Regulation (EU) 2017/567, *OJ* L 87, 18 May 2016, pp. 90–116, Article 1–5 (*equity*), and Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Annex III (*non-equity*).

63 Article 9(4), first paragraph, MiFIR. The temporary suspension is valid for an initial period not exceeding three months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding three months at a time if the grounds for the temporary suspension continue to be applicable. Where the temporary suspension is not renewed after that three-month period, it lapses automatically (Article 9(4), second paragraph, MiFIR). Before suspending or renewing the temporary suspension of the transparency obligations, the relevant competent authority notifies ESMA of its intention and provides an explanation. ESMA then issues an opinion to the competent authority as soon as practicable on whether in its view the suspension or the renewal of the temporary suspension is justified (Article 9 (4), third paragraph, MiFIR). The Commission has set out the regulatory technical standards to specify the parameters and methods for calculating the threshold of liquidity, see Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Article 16 read in conjunction with Article 13.

64 Article 27(3), first paragraph, MiFID.

65 Article 27(3), second paragraph, MiFID.

66 Article 27(1), first paragraph, MiFID. Article 22 MiFID Implementing Regulation indicates how the existence of a liquid market must be determined for a share.

67 Article 27(1), second paragraph, MiFID. Article 23 in conjunction with Table 3 of Annex II, MiFID Implementing Regulation indicates how the standard market size must be determined.

68 Article 14(1) MiFIR. The Commission has developed regulatory technical standards to specify exactly what data must be published. See Article 14(7) MiFIR and Commission Delegated Regulation (EU) 2017/587, *OJ* L 87, 14 July 2016, Article 9.

69 Article 18(1) MiFIR.

70 Article 14 MiFIR.

71 "Liquid market" is defined in Article 4(1), in point (25) MiFID II. For a further description of liquid market, see Commission Delegated Regulation (EU) 2017/567, *OJ* L 87, 18 May 2016, pp. 90–116, Article 1–5 (*equity*), and Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Annex III (*non-equity*).

72 Article 18(1)(a) MiFIR.

73 Article 18(1)(b) MiFIR.

74 Article 18(10) in conjunction with Article 9(5)(d) in conjunction with Article 9(1), opening words and (b) MiFIR.

75 Article 45(1), first paragraph, MiFID. Article 27 in conjunction with Table 1 of Annex 1 MiFID Implementing Regulation specifies precisely what data must be made public.

76 Article 30(1), first paragraph, MiFID (MTFs); Article 28(1) MiFID (trading outside regulated markets and MTFs). Article 27 in conjunction with Table 1 of Annex 1 MiFID Implementing Regulation specifies precisely what information must be made public.

77 See the words "Member States shall, at least, require (…)" in Article 45(1), first paragraph, MiFID (regulated markets); Article 30(1), first paragraph, MiFID (MTFs); Article 28 (1) MiFID (trading outside regulated markets and MTFs).

78 Article 45(2) MiFID (regulated markets); Article 30(2) MiFID (MTFs); Article 28(2) in conjunction with Article 45(2) MiFID (trading outside regulated markets and MTFs).

79 See Article 28 in conjunction with Table 4 of Annex II MiFID Implementing Regulation.

80 See the definition of "trading venue" in Article 4(1), in point (24), MiFID II in conjunction with Articles 6 and 10 MiFIR. As regards investment firms that settle transactions other than on a trading venue, see Articles 20 and 21 MiFIR.

81 Article 6(1) MiFIR (equity; trading venues); Article 20(1) MiFIR (equity; investment firms which settle transactions outside a trading venue). Precisely what data must be published is specified by the Commission in regulatory technical standards; see Article 7(2)(a) (equity; trading venues) and Article 20(2) (equity; investment firms which settle transactions outside a trading venue); and see Commission Delegated Regulation (EU) 2017/587, *OJ* L 87, 14 July 2016, pp. 387–410, Article 12(1).

82 Article 10(1) MiFIR (non-equity; trading venues); Article 21 MiFIR (non-equity; investment firms which settle transactions outside a trading venue). Precisely what data must be published is specified by the Commission in regulatory technical standards; see Article 11(4)(a) (non-equity; trading venues) and Article 21 (3) (non-equity; investment firms which settle transactions outside a trading venue); and see Commission Delegated Regulation (EU) 2017/583, *OJ* L 87, 14 July 2016, pp. 229–349, Article 7(1).

83 Article 20(1) MiFIR (equity); Article 21(1) MiFIR (non-equity).

84 Article 24 MiFIR.

85 Recital 32 MiFIR.

86 For the MiFID regime see: Article 25 MiFID and Articles 9–16 MiFID Implementing Regulation.

87 Directive 2005/60/EC, *OJ L* 309, 25 November 2015, p. 15 ff.; Article 25(1) MiFIR.

88 See Commission Delegated Regulation (EU) 2017/580, *OJ* L 87, 24 June 2016, pp. 193–211.

89 Article 26(1), first paragraph, MiFIR. The Commission has set regulatory technical standards to specify what constitutes a transaction and execution of a transaction. See Commission Delegated Regulation (EU) 2017/590, *OJ* L 87, 28 July 2016, pp. 449–478, Article 3 (transaction) and 4 (execution). The fact that dealing on own account is also a transaction is apparent from Article 3(c) of Commission Delegated Regulation (EU) 2017/590.

90 Article 26(5) MiFIR.

91 Article 26(1), second paragraph, MiFIR, and see Commission Delegated Regulation (EU) 2017/590, *OJ* L 87, 28 July 2016, pp. 449–478, Article 16.

92 Article 26(1), third paragraph, MiFIR. Investment firms which *transmit* rather than execute (see main text) orders must include in the transmission of that order all the details as specified in MiFIR (see below in the main text). Instead of including the mentioned details when transmitting orders, an investment firm may choose to report the transmitted order, if it is executed, as a transaction. In that case, the transaction report by the investment firm must state that it pertains to a transmitted order. See Article 26(4) MiFIR, and see Commission Delegated Regulation (EU) 2017/590, *OJ* L 87, 28 July 2016, pp. 449–478, Article 4.

93 See Article 27(1), first paragraph, MiFIR, as elaborated in this provision and in the regulatory technical standards developed by the Commission, see Commission Delegated Regulation (EU) 2017/585, *OJ* L 87, 14 July 2016, pp. 368–381.

94 Article 26(7), first paragraph, MiFIR. Investment firms have responsibility for the completeness, accuracy and timely submission of the reports which are submitted to the competent authority. By way of derogation from that responsibility, where an investment firm reports details of those transactions through an ARM which is acting on its behalf or a trading

venue, the investment firm is not responsible for failures in the completeness, accuracy or timely submission of the reports which are attributable to the ARM or trading venue. In those cases and subject to Article 66(4) MiFID II, the ARM or trading venue is responsible for those failures. Investment firms must nevertheless take reasonable steps to verify the completeness, accuracy and timeliness of the transaction reports submitted on their behalf. See Article 26(7) MiFIR.

95 Article 25(5) MiFID.

96 Cf. N Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford University Press, 2014) 501.

97 Article 26(2) MiFIR.

98 Cf. Article 25(3) MiFID, where the reporting duty applies only to transactions in financial instruments admitted to trading on a regulated market.

99 Article 26(9)(e) MiFIR, and see Commission Delegated Regulation (EU) 2017/590, *OJ* L 87, 28 July 2016, pp. 449–478.

100 Recital 32, MiFIR.

101 Article 26(3) MiFIR. Additional data must be supplied for transactions *not* carried out on a trading venue and for commodity derivatives. See also the regulatory technical standards referred to in Article 26(9)(c) and (d) MiFIR.

102 Article 26(9)(c) and (a) MiFIR, and see Commission Delegated Regulation (EU) 2017/590, *OJ* L 87, 28 July 2016, pp. 449–478. The specifications will be harmonised to a greater extent than under MiFID. Cf. N Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford University Press 2014) 500, footnote 387.

103 Article 26(10) MiFIR.

104 Article 21 MiFID and Articles 44–46 MiFID Implementing Directive; Article 27 MiFID II and Commission Delegated Regulation (EU) 2017/565, *OJ* L 87, 25 April 2016, pp. 1–83, Article 64–66.

105 Cf. Recital 115, MiFID II.

106 Article 59(1) MiFID II.

107 Article 59(4) MiFID II.

108 Article 63 MiFID II.

109 Article 59(2) MiFID II.

110 Article 59(3), first paragraph, MiFID II.

111 Article 59(3), second paragraph, MiFID II.

112 See Article 60(1) MiFID II, which provides that a data reporting services provider may extend its business to additional data reporting services. See for more detail on data reporting services providers Commission Delegated Regulation (EU) 2017/571, *OJ* L 87, 2 June 2016, pp. 126–141.

113 Article 4(1)(52) MiFID II in conjunction with Articles 20 and 21 MiFIR.

114 Article 20(1) MiFIR (equity); Article 21(1) MiFIR (non-equity).

115 Article 6(1) MiFIR (equity instruments); Article 10(1) MiFIR (non-equity instruments).

116 As regards the term "reasonable commercial terms": Commission Delegated Regulation (EU) 2017/567, *OJ* L 87, 18 May 2016, pp. 90–116, Article 6–11.

117 Article 64(1) MiFID II.

118 Article 64(6) MiFID II, and see Commission Delegated Regulation (EU) 2017/571, *OJ* L 87, 2 June 2016, pp. 126–141, Article 14–20.

119 Article 64(2) MiFID II.

120 Article 64(8)(b) MiFID II, and see Commission Delegated Regulation (EU) 2017/571, *OJ* L 87, 2 June 2016, pp. 126–141.

121 Article 64(3), first sentence, MiFID II. In particular, an APA which is also a market operator or investment firm must treat all information collected in a non-discriminatory fashion and operate and maintain appropriate arrangements to separate different business functions. See Article 64(3), second sentence, MiFID II.

122 Article 64(4) MiFID II.

123 Article 64(4) MiFID II.

124 Article 64(5) MiFID II.

125 Article 64(8)(c) MiFID II, and see Commission Delegated Regulation (EU) 2017/571, *OJ* L 87, 2 June 2016, pp. 126–141.

126 Cf. the remark in footnote 89 that dealing solely on own account can also result in a transaction.

127 Article 4(1), in point (53) MiFID II in conjunction with Articles 6, 7, 10, 12, 13, 20 and 21 MiFIR.

128 Article 65(1), opening words, MiFID II (equity instruments) in conjunction with Articles 6 (trading venues) and 20 (outside trading venues) MiFIR; Article 65(2), opening words, MiFID II (non-equity instruments) in conjunction with Article 10 (trading venues) and 21 (outside trading venues) MiFIR.

129 For more about the term "reasonable commercial basis", see: Commission Delegated Regulation (EU) 2017/567, *OJ* L 87, 18 May 2016, pp. 90–116, Article 6–11.

130 Article 65(1) MiFID II.

131 Article 65(2) MiFID II.

132 Article 65(1), third paragraph, MiFID II (equity instruments); Article 65(2), third paragraph, MiFID II (non-equity instruments).

133 Article 65(8)(a)–(d) MiFID II.

134 Article 65(3) MiFID II.

135 Article 65(4), first sentence, MiFID II. In particular, a market operator or an APA, who also operates a consolidated tape, must treat all information collected in a non-discriminatory fashion and must operate and maintain appropriate arrangements to separate different business functions. See Article 65(4), second sentence, MiFID II.

136 Article 65(5) MiFID II.

137 Article 65(5) MiFID II.

138 Article 65(8)(e) MiFID II, and see Commission Delegated Regulation (EU) 2017/571, *OJ* L 87, 2 June 2016, pp. 126–141.

139 Article 4(1), in point (54) MiFID II.

140 Article 66(5)(a) MiFID II.

141 Article 66(2), first sentence, MiFID II. In particular, an ARM that is also a market operator or investment firm must treat all information collected in a non-discriminatory fashion and must operate and maintain appropriate arrangements to separate different business functions. See Article 66(2), second sentence, MiFID II.

142 Article 66(3) MiFID II.

143 Article 66(3) MiFID II.

144 Article 66(4) MiFID II.

145 Article 66(5)(b) MiFID II, and see Commission Delegated Regulation (EU) 2017/571, *OJ* L 87, 2 June 2016, pp. 126–141.

146 Article 21 MiFID and Articles 44–46 MiFID Implementing Directive; Article 27 MiFID II and Commission Delegated Regulation (EU) 2017/565, *OJ* L 87, 25 April 2016, pp. 1–83, Article 64–66.

147 Article 23(1) MiFIR.

148 Discretionary agency crossing of shares takes place by definition other than on a trading venue. On a regulated market or an MTF, the trade always takes place subject to non-discretionary rules, so that the operator of the trading venue cannot influence the conclusion of transactions. The same applies where the transaction is concluded through agency crosses. Although an OTF is admittedly a trading venue on which transactions are executed under discretionary rules, even if concluded through agency crossing, only transactions in non-equity instruments may be concluded through an OTF. See also the main text below.

[149] For a more detailed consideration of the OTF, see § B.3, above.

[150] Article 23(3) MiFIR, and see Commission Delegated Regulation (EU) 2017/587, *OJ* L 87, 14 July 2016, pp. 387–410, Article 2.

[151] Owing to the concentration of trades in standardised OTC derivatives on trading venues, there can, strictly speaking, no longer be said to be OTC trading, but for the sake of convenience I will continue to refer to it below as OTC trading.

[152] See point 13 of the G20 Leaders Statement: The Pittsburgh Summit 24–25 September 2009 (http://www.g20.utoronto.ca/2009/2009communique0925.html#system).

[153] Article 28(1), opening words and (a)–(d), MiFIR.

[154] Article 28(1), opening words, MIFIR in conjunction with the definitions of "financial counterparty" and "non-financial counterparty" in Article 2 (8) and (9) EMIR.

[155] Article 28(1), opening words, MIFIR in conjunction with Article 3 EMIR on intragroup transactions.

[156] Article 28(1), opening words, MIFIR in conjunction with Article 89 EMIR.

[157] Article 28(1), opening words, MIFIR in conjunction with Articles 32 and 34 MiFIR.

[158] Article 32(1) and (6) MiFIR.

[159] Recital 125 MiFID II.

[160] Article 57(1)(a) and (b) MiFID II; Recital 127 MiFID II.

[161] The Commission has developed regulatory technical standards to determine whether an OTC contract is economically equivalent to an OTC contract traded on a trading venue. See Article 57(12)(c) MiFID II and Commission Delegated Regulation (EU) 2017/591, *OJ* L 87, 1 December 2016, pp. 479–491, Article 6.

[162] The Commission has developed regulatory technical standards for this purpose. See Article 57(3) MiFID II and Commission Delegated Regulation (EU) 2017/591, *OJ* L 87, 1 December 2016.

[163] Recital 130 MiFID II.

[164] Recital 131 MiFID II.

[165] Article 57(1), opening words, MiFID II. Regulatory technical methods determine when a person must be aggregated within a group. See Article 57(12)(b) MiFID II. This also sets out the methodology for aggregating and netting OTC and on-venue commodity derivatives positions to establish the net position for purposes of assessing compliance with the limits. See Article 57(12)(e) MiFID II. The competent authorities do not impose limits which are more restrictive than those adopted by ESMA, *except* in exceptional cases where they are objectively justified and proportionate taking into account the liquidity of the specific market and the orderly functioning of that market. See Article 57(13) MIFID II.

[166] Article 57(2) MiFID II.

[167] Article 57(10), second paragraph, MiFID II.

[168] Article 57(1), *in fine*, MiFID II. The Commission has developed regulatory technical standards to determine whether a position qualifies as reducing risks directly relating to commercial activities. See Article 57(12)(a) MiFID II and Commission Delegated Regulation (EU) 2017/591, *OJ* L 87, 1 December 2016, pp. 479–491, Article 7.

[169] See Article 57(12)(f) MIFID II. The Commission has developed regulatory technical standards to determine the procedure by which a person may apply for an exemption. See also Article 57(12)(f) MiFID II and Commission Delegated Regulation (EU) 2017/591, *OJ* L 87, 1 December 2016, pp. 479–491, Article 8.

[170] Article 57(7) MiFID II.

[171] Article 57(8) MiFID II; Recital 128 MiFID II.

[172] Article 57(10), first paragraph, MiFID II.

[173] Article 57(10), second paragraph, MiFID II.

[174] Article 58(1)(a) MiFID II; Recital (129) MiFID II. The Commission has developed regulatory technical standards specifying the form of these reports; see Article 58(5), first paragraph, MiFID II and Commission Delegated Regulation (EU) 2017/565, *OJ* L 87, 25 April 2016, pp. 1–83, Article 83. Note that these reporting obligations also apply to emission allowances or derivatives thereof. See Commission Delegated Regulation (EU) 2017/565, *OJ* L 87, 25 April 2016, pp. 1–83, Article 83(1).

[175] Article 58(2) MiFID II. Regulatory technical standards determine these breakdowns; see Article 58(5), first paragraph, MiFID II.

[176] Article 58(3) MiFID II.