

MiFID2 and MiFIR – expected timeline

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C L I F F O R D
C H A N C E

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The formal timetable for the implementation of the EU markets reforms has now begun.

The new EU directive and regulation on markets in financial instruments (MiFID2 and MiFIR) were published in the Official Journal (OJ) on 12 June 2014 and will enter into force on the twentieth day thereafter. The new rules will begin to apply 30 months later on 3 January 2017, subject to limited transitional provisions.

Before the rules are implemented, Member States will have to adopt national legislation and rules to implement the new directive.

In addition, the European Commission must adopt the delegated and implementing acts and the regulatory and implementing technical standards (RTS/ITS) to be proposed by ESMA to further specify the requirements of the new directive and regulation.

The European Securities Markets Authority (ESMA) has already issued a consultation paper on its technical advice to the Commission and a discussion paper to assist it in preparing the draft RTS/ITS to be submitted to the Commission. The deadline for responses is 1 August 2014.

The timeline below shows the key stages leading to application of the new rules.

However, there are still uncertainties as to when the final national rules and Level 2 measures will be available to enable firms to complete their implementation of MiFID2/MiFIR with confidence.

The related market abuse reforms are to apply six months in advance of MiFID2/MiFIR.

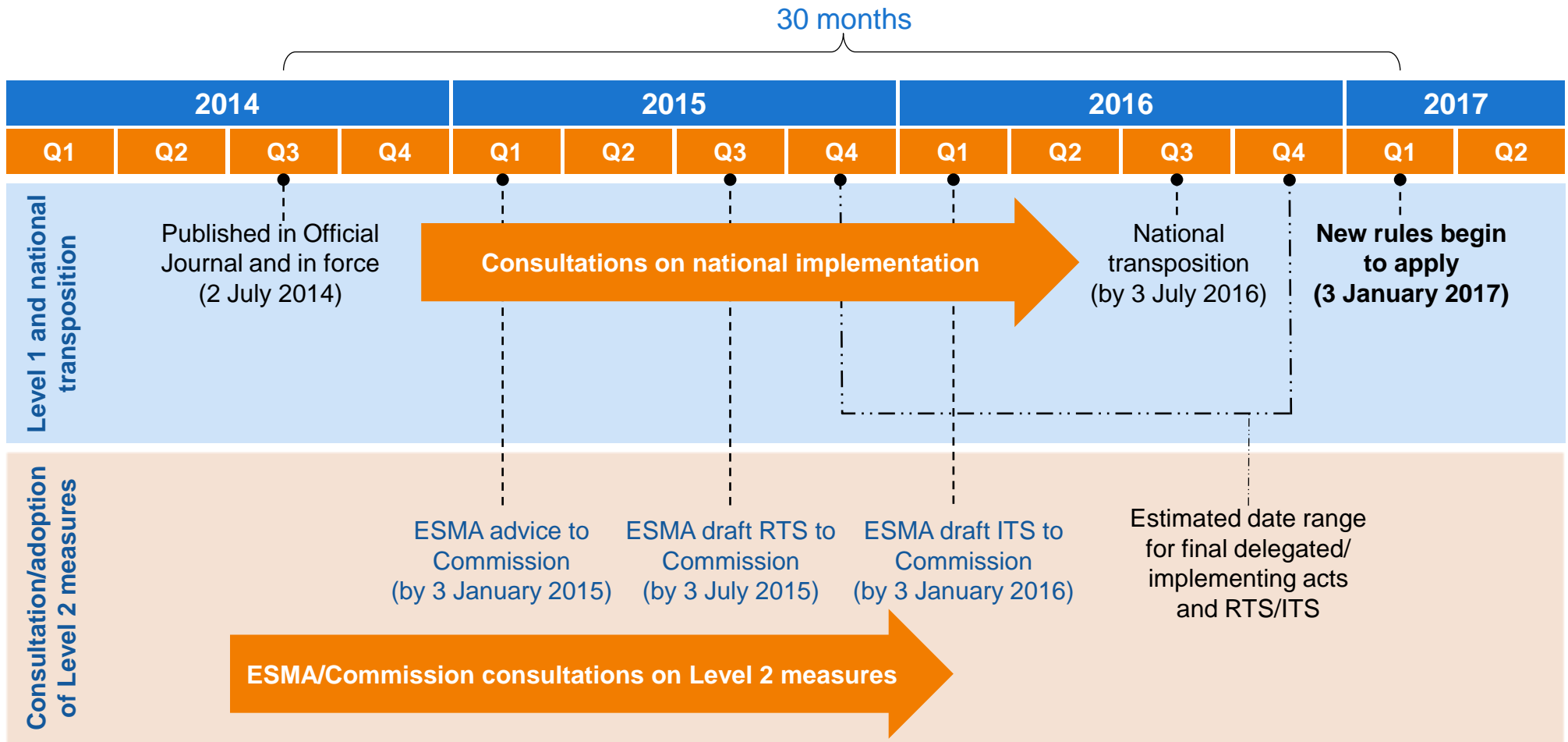
The new EU regulation on market abuse (MAR) and the directive on criminal sanctions for market abuse (CSMAD) were published in the OJ on the same day as MiFID2/MiFIR and will also enter into force on the twentieth day thereafter.

However, the new market abuse rules will begin to apply 24 months later on 3 July 2016, although the provisions which refer to organised trading facilities and certain other new provisions of MiFID2/MiFIR will not take effect until six months later when MiFID2/MiFIR apply.

The UK has exercised its right to opt out of CSMAD in favour of introducing its own new criminal sanction regime.

For more information, read our briefing: MiFID2 and MiFIR – What you need to know (June 2014) available at www.cliffordchance.com

MiFID2 and MiFIR: expected timeline



Notes:

- Very limited transitional provisions
- The Commission/ESMA may develop FAQs and guidelines
- Market Abuse Regulation starts to apply from 3 July 2016
- ESMA will likely also consult on RTS on OTC derivative trading mandate before new rules begin to apply
- Equivalence assessments required for third countries

MiFID2 and MiFIR: key elements of the reforms

Market structure

- Introduction of a new multilateral, discretionary trading venue, the Organised Trading Facility (OTF), for non-equity instruments.
- Expanded scope of Systematic Internaliser (SI) category with increased transparency requirements.
- Requirement for investment firms to trade listed equities on a Regulated Market (RM), Multilateral Trading Facility (MTF), OTF or SI and effective limitation of “pure” over the counter business for cash equities.
- New systems and controls requirements for organised trading venues.
- Introduction of trading controls for algorithmic trading activities.
- Obligation to trade clearable derivatives on organised trading platforms.
- Introduction of a harmonised EU regime for non-discriminatory access to trading venues, CCPs and benchmarks.

Commodities

- Change in scope of regulatory perimeter for commodities business.
- Introduction of a harmonised position limits regime for commodity derivatives to improve transparency, support orderly pricing and prevent market abuse.

Transparency and transaction reporting

- Equity market transparency to be increased.
- New transparency requirements for fixed income instruments and derivatives with scope of requirements calibrated for liquidity.
- “Consolidated Tape” for trade data. Requirement to submit post-trade data and transaction reports to authorised providers.
- Widening scope of MiFID transaction reporting obligations.

Conduct, supervision and product scope

- Increased conduct of business requirements to improve investor protection.
- Regulatory perimeter extended to cover structured deposits.
- Strengthened supervisory powers with new powers to ban products or services that threaten investor protection, financial stability or the orderly functioning of markets.
- Strengthened administrative sanctions to ensure effectiveness and harmonisation.

Third countries

- Limited attempt to harmonise regime for access to EU markets by third country firms.

Level 2 process

Technical standards

Where ESMA submits draft RTS/ITS, the Commission has 3 months to decide whether to endorse them (extendible by 1 month for ITS).

Where it decides not to endorse the RTS/ITS in full or with amendments, it must send the draft back to ESMA first and ESMA can amend and resubmit the RTS/ITS to the Commission within 6 weeks.

If ESMA does not do so or its amendments are not consistent with the Commission's proposals, the Commission may adopt the RTS/ITS with the amendments it considers relevant or reject them.

Delegated and implementing acts

Delegated acts are adopted by the Commission.

Implementing acts are adopted by the Commission working with the Securities Committee of representatives of Member States under the examination procedure laid down in Regulation (EU) No.182/2011.

Objection period

The Council of the EU and the European Parliament can object to RTS and delegated acts (but not ITS or implementing acts) within 3 months of adoption, extendible by a further 3 months.

For RTS, these periods are shortened to 1 month, extendible by a further month, if the Commission adopts the RTS without modifications to ESMA's draft.

The RTS and delegated acts are published in the OJ after the end of the objection period (unless the Council and Parliament previously both notify Commission that they have no objections). ITS and implementing acts are published in the OJ immediately following adoption.

Third country equivalence assessments under MiFID2 and MiFIR

	Relevance of equivalence assessment	Comment
Equivalent third country regulated markets (securities)	Investment firms may satisfy mandatory trading requirement for shares by execution on these markets (Article 23(1) MiFIR). Appropriateness requirements are waived for execution-only transactions in certain shares and bonds admitted to trading on these markets (Article 25(4)(a)(i) and (ii) MiFID2).	Under Article 25(4)(a) MiFID2, a third country market is considered equivalent to a regulated market for these purposes† if it is considered equivalent to a regulated market for the purposes of the rules on offers of securities to employees under Article 4(1) of Prospectus Directive. A competent authority must request an equivalence determination by Commission with respect to the third country (but no determinations have yet been made).
Equivalent third country trading venues (OTC derivatives)*	Counterparties may satisfy mandatory trading requirement for OTC derivatives by execution on venues established in an equivalent third country (Article 28(1)(d) MiFIR).	Commission determines equivalence of third country regime under Article 28(4) MiFIR.‡
Equivalent third country regulated markets (ETD)	Rules on indirect clearing under Article 30 MiFIR apply to ETD, which includes derivatives executed on third country venues equivalent to regulated markets.	Article 2(1)(32) MiFIR defines ETD to include derivatives traded on a third country market considered equivalent to a regulated market under Article 28 MiFIR (see above).
Duplicative and conflicting rules (derivatives)	Deemed compliance with rules on execution and clearing of derivatives in Articles 28 and 29 MiFIR where one counterparty is established in an equivalent third country and counterparties comply with rules in that country (Article 33 MiFIR).	Commission determines equivalence of third country regime under Article 33(2) MiFIR. Third country rules must be effectively applied and enforced in an equitable and non-distortive manner. Commission (with ESMA) must monitor third country rules and report annually to European Parliament and the Council.
Access rights for third country CCPs and trading venues*	Third country trading venues and CCPs have rights of access to EU CCPs, trading venues and benchmarks if they are established in equivalent third countries (Article 38 MiFIR).	Commission determines equivalence of third country regime under Article 38(3) MiFIR. Third country trading venues may only request access to CCPs if equivalent under Article 28 MiFIR and third country CCPs may only request access to EU trading venues if recognised under EMIR (Article 38(1) MiFIR).
Cross-border services*	Third country firms from equivalent jurisdictions must register with ESMA to provide cross-border services to eligible counterparties and per se professional clients on the basis of their home state rules (Article 46 MiFIR).	Commission determines equivalence of third country regime under Article 47(1) MiFIR. Firm must be authorised in the third country and additional criteria must also be satisfied under Article 46, including the existence of cooperation arrangements with ESMA.

• A reciprocity requirement applies, i.e. there must be an effective equivalent system for recognising or giving access to EU firms.

† When MiFID2 applies, a contract will also not be an OTC derivative contract under Article 2(7) EMIR if it is executed on a regulated market or a third country market considered to be equivalent to a regulated market under Article 25(4)(a) MiFID2 (not Article 28 MiFIR – contrast the definition of ETD in MiFIR).

‡ The exemption from the mandatory trading requirement for intragroup transactions involving third countries depends on an equivalence assessment under EMIR

Transitional provisions

General provisions

National competent authorities can grant **exemptions for “C6 energy derivative contracts”** from the clearing obligation and clearing threshold in EMIR until 3 July 2020.

Member States must apply the provisions regarding the publication of a **consolidated tape for non-equities** from 3 September 2018.

Amendments to AIFMD which resolve the uncertainty as to whether fund managers authorised under AIFMD may provide certain investment services on a cross-border or branch basis are to be applied from 3 July 2015.

Existing national regimes will continue to apply to **third country firms conducting cross-border business** until 3 years after the adoption by the Commission of an equivalence decision in relation to the third country.

MiFID2 revokes the provisions of **MiFID grandfathering** firms' classifications of clients as professional clients on the basis of pre-November 2007 national rules.

Some firms may require **authorisation for the first time** as a result of the change of scope of the new rules, but MiFID2 does not include transitional provisions covering firms that have applied for authorisation but not yet received a decision on their application by the time the new rules apply.

Open access

The provisions giving CCPs and trading venues **non-discriminatory access to benchmarks** do not begin to apply until 3 January 2019.

The Commission can exclude **exchange traded derivatives** from the provisions on open access for CCPs and trading venues for up to 30 months following 3 January 2017 (and, if it does not act, the CCP or trading venue can apply to its competent authority for exemption from open access until 3 July 2019).

There are transitional provisions relating to **open access** for newly established CCPs clearing securities, smaller CCPs clearing exchange traded derivatives and proprietors of new benchmarks.

- **AIFMD:** the EU Alternative Investment Fund Managers Directive
- **C6 energy derivative contracts:** derivative contracts relating to coal or oil that are traded on an OTF and must be physically settled
- **CCP:** central counterparty
- **Commission:** the European Commission
- **Competent authority:** the national authority designated by a Member State as responsible for carrying out functions under an EU regulation or directive
- **CSMAD:** the new directive on criminal sanctions for market abuse
- **EMIR:** the EU regulation on OTC derivatives, CCPs and trade repositories
- **ESA:** European Supervisory Authority (i.e. EBA, EIOPA or ESMA)
- **ESMA:** European Securities and Markets Authority
- **ETD:** defined in MiFIR as derivatives traded on a regulated market or an equivalent third country market under MiFIR and as such not falling within the definition of OTC derivative in EMIR
- **EU:** European Union
- **ITS:** implementing technical standards proposed by an ESA and adopted by the Commission under powers conferred by an EU regulation or directive
- **MAR:** the new EU market abuse regulation
- **Member State:** member state of the EU
- **MiFID:** the EU Markets in Financial Instruments Directive
- **MiFID2 and MiFIR:** the directive and regulation replacing MiFID
- **MTF:** multilateral trading facility
- **OJ:** Official Journal
- **OTC derivative:** defined in a derivative contract the execution of which does not take place on a regulated market or an equivalent third country market under MiFID2
- **OTF:** organised trading facility
- **RM:** regulated market
- **RTS:** regulatory technical standards proposed by an ESA and adopted by the Commission under powers conferred by an EU regulation or directive
- **SI:** systematic internaliser
- **Third country:** a country which is not a Member State
- **Trading venue:** defined in MiFID2 as an RM, MTF or OTF

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