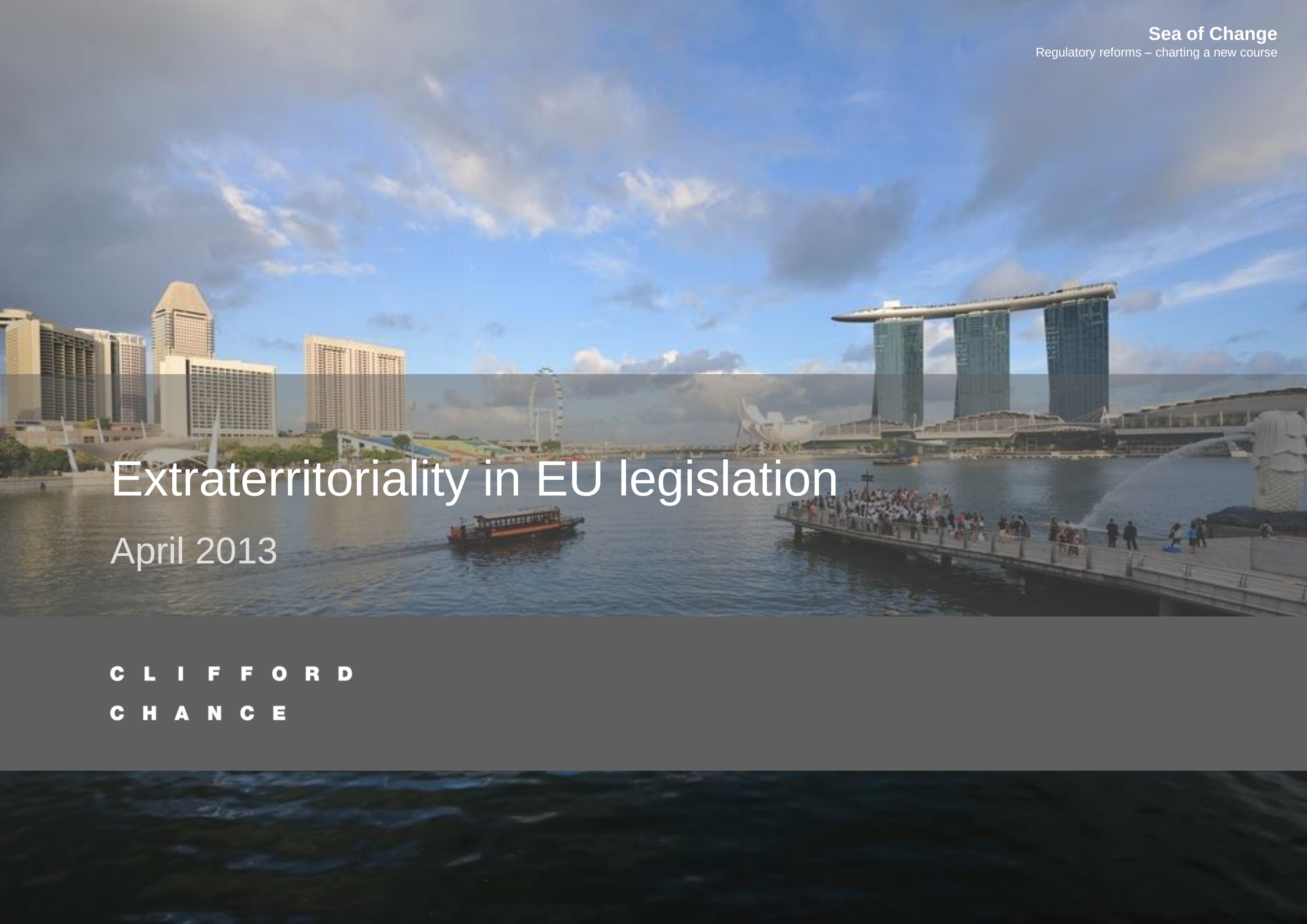

Extraterritoriality in EU legislation

April 2013

CLIFFORD CHANCE

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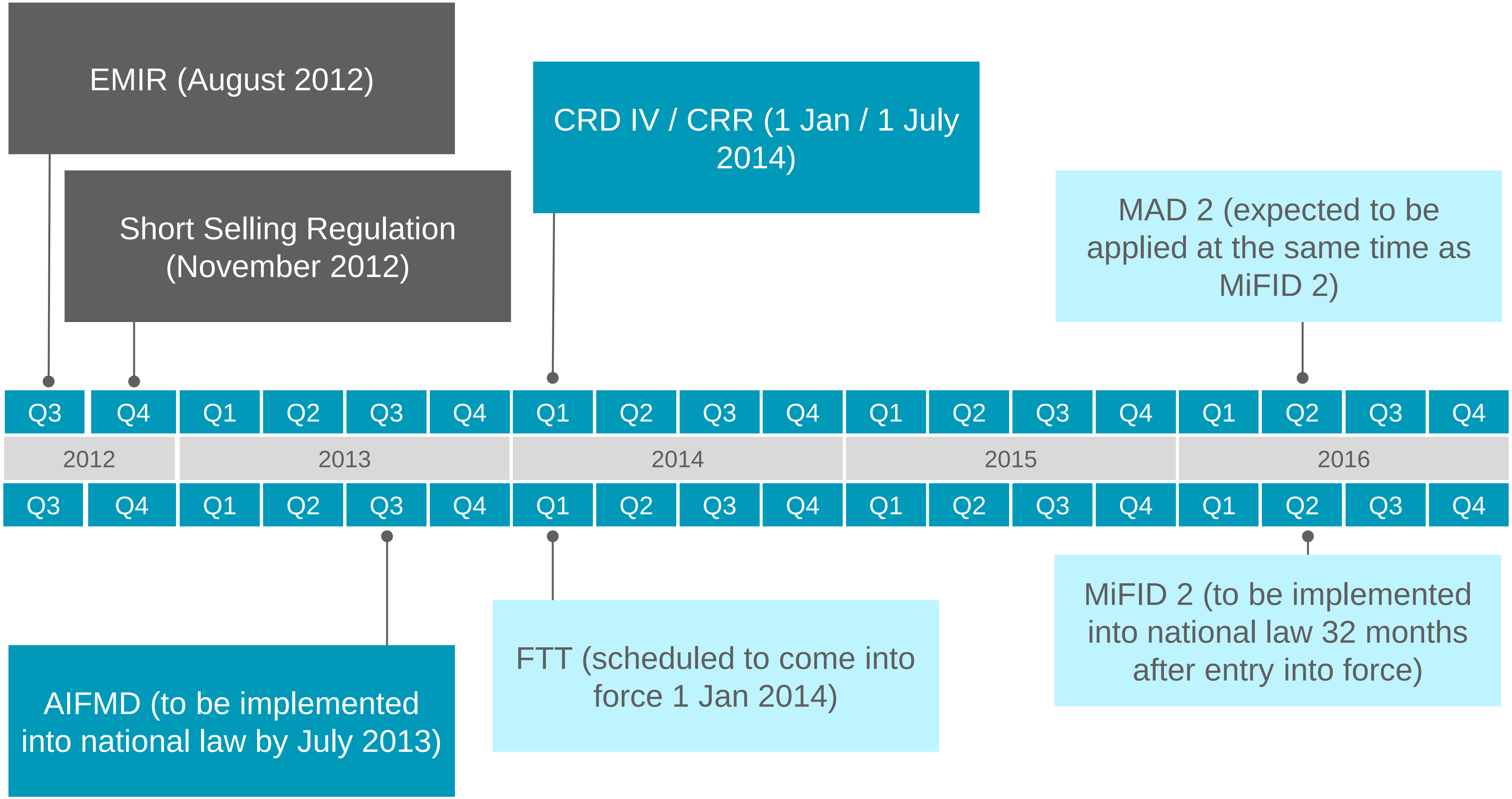
Implementation Timeline



EMIR - summary

The Regulation on OTC derivatives, CCPs and trade repositories (**EMIR**) came into force on 16 August 2012. However, many obligations require secondary legislation in order to become effective. The first of these obligations became effective in March 2013.

NFC+ notification, timely confirmation, daily valuation
Effective 15 March 2013

↓

Portfolio reconciliation, portfolio compression, dispute resolution
Effective 15 September 2013

↓

Reporting obligation
Effective 90 days after a trade repository becomes registered

↓

Mandatory clearing obligation for specified OTC derivatives
Expected Summer 2014

↓

Margin requirements for uncleared OTC derivatives
Expected 1 January 2015

EMIR – Impact on Asian counterparties

Clearing

- Application to a non-EU entity that would have been an FC or NFC+ if established in the EU

Risk mitigation

- Unclear whether all obligations apply to EU entities when dealing with non-EU entities

Reporting

- “counterparties” and “CCPs” required to report

Branches

- Non-EU branches of EU entities
- EU branches of non-EU entities

Application to non-EU funds

Transactions between two non-EU entities

EMIR – Impact on Asian CCPs

Article 25 EMIR – a CCP established in a third country may provide clearing services to clearing members or trading venues established in the EU only where that CCP is recognised by ESMA.

Transitional provisions

- Available to non-EU CCPs recognised in an EU jurisdiction prior to 19 December 2012.
- Transitional period lasts until 15 September 2013 (if CCP does not apply) or until the CCP's application has been determined.

Equivalence / reciprocity requirement

- Recognition only available to third-country CCPs if relevant third country regime has been determined to be equivalent.
- Third country must give effective equivalent recognition to foreign CCPs.

Clearing member / trading venue "established" in EU

- No definition of "established" in EMIR.
- Commission Q&A state that a non-EU branch of an EU entity will be considered to be "established" in the EU.

EMIR - Equivalence assessments

Requirement for equivalence assessments:

- Article 13 (clearing, reporting, risk mitigation)
- Article 25 (non-EU CCPs)
- Article 77 (non-EU trade repositories)

Basis for equivalence assessment:

- Legislation in the relevant jurisdiction
- Strict vs outcomes basis?
- Effective and non-distortive enforcement (Article 13)
- Reciprocal access / co-operation arrangements (CCPs)
- Treaty / co-operation arrangements (trade repositories)

	CCPs	TRs	Clearing, reporting	Risk mitigation
US	I	I	I	I
Japan	I		I	I
Australia	II		II	II
Canada			II	II
Dubai	II			
Hong Kong	II	II	II	II
India	II			
Singapore	II			
Switzerland	II		II	II
Rest of world				

Key:

Phase I	ESMA to advise on equivalence by 15 June 2013
Phase II	ESMA to advise on equivalence by 15 July 2013
	No current request for ESMA advice on equivalence

Capital Requirements Directive and Regulation (CRD IV)

Implements Basel III in the EU

Bonus cap

- Sets a maximum ratio between fixed and variable remuneration.
- Permits Member States to set stricter requirements.

Exposure to qualifying CCPs

- Preferential risk weighting for bank's direct exposures as a clearing member to qualifying CCPs.
- 2% risk weighting for derivative transactions cleared through qualifying CCP.
- Transitional provisions allowing EU firms to treat EU/non-EU CCPs as qualifying CCPs for 15 months.

Legislative proposal
20 July 2011

Agreement on final text
Parliament vote - 16 April 2013; Council endorsement TBD

Publication in Official Journal

Entry into force / national implementation
1 January 2014 / 1 July 2014

CRD IV – Impact on Asian markets

Bonus Cap

- Competent authorities must ensure that remuneration provisions (Articles 88(2) – 91) will apply at group, parent company and subsidiary levels including entities established in "offshore financial centres".
- For non-EU headquartered groups, the remuneration rules should be restricted to EU subsidiaries.

Exposure to Qualifying CCPs

- Transitional provisions allow EU firms to treat non-EU CCPs as qualifying until 15 June 2014 (Commission may extend by up to 6 months).
- Possibility that not all relevant non-EU CCPs will wish to or be able to obtain recognition as QCCPs: relevant test under CRD IV is recognition under EMIR (to be assessed by ESMA) rather than compliance with CPSS IOSCO standards.
- Groups subject to EU consolidated supervision may not be able to avoid higher risk charges by using non-EU subsidiary as clearing member of non-EU CCP since indirect exposures are also caught.

Short Selling Regulation

SSR enters into force (directly applicable in EU Member States)

1 November 2012

Commission to report on appropriateness of various measures

30 June 2013

Grandfathering for existing national measures expires

1 July 2013

Grandfathering for CDS

Sovereign CDS concluded before 25 March 2012 may be held to maturity

Scope

- All shares admitted to trading on a regulated market in the EU or a multilateral trading facility in the EU
- Sovereign debt issued by EU sovereign issuer
- CDS in relation to such sovereign debt

What does it do?

- Restriction on entering into uncovered short sales in shares or sovereign debt
- Restriction on entering into uncovered sovereign CDS
- Notification / disclosure if positions exceed specified threshold
- EU competent authorities given power to make temporary emergency measures & ESMA given the power to coordinate such measures

SSR - Impact on Asian Markets

Notification / Disclosure Obligations	■ Expressly apply to natural and legal persons established in a third country ■ Will apply to Asian firms and investors even if they have no presence or business in the EU
Scope of Instruments Covered	■ An exemption is available where the "principal trading venue" of the shares is in a non-EU jurisdiction ■ Relevant EU competent authority is required to determine principal trading venue at least every 2 years ■ ESMA is required to publish a list of exempt shares every 2 years
Temporary Emergency Measures	■ Unclear whether these apply to non-EU persons ■ EU competent authorities must notify ESMA before imposing bans ■ Competent authorities must obtain consent of any other EU competent authority whose market may be affected (but this has not always been complied with) ■ Bans are still being introduced with little or no notice

Financial Transaction Tax

Transactions caught

- Transactions in debt securities, equities and entry into/modification of derivatives where at least one party is a financial institution and at least one party is established in the FTT Zone
- Transactions in debt securities and equities where at least one party is a financial institution and the issuer of the underlying debt/equity is established in the FTT Zone
- Certain other intra-group transactions

Harmonised minimum rate

- 0.1% of purchase price for financial instruments
- 0.01% of notional principal for derivatives
- However, the effective rate will be higher:
  - each party which is a financial institution will be separately liable;
  - cascade effect

Stage in legislative process

- Legislative proposal adopted on 14 February 2013
- May apply from as early as 1 January 2014

Definitions:

FTT Zone: 11 Member States – Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain

Financial institution: includes investment firms and regulated markets authorised under MiFID, credit institutions authorised under the Banking Directive, AIFs authorised under AIFMD and any other undertaking which carries on specified activities

Covers a wide range of EU and non-EU, authorised and unauthorised entities

FTT – Impact on Asian markets

Exemptions

- No intra-group or market maker exemption.
- Exemption for primary market transactions and for transactions with certain EU public bodies (i.e. Central banks of EU Member States). But no equivalent exemption for non-EU public bodies.

Express Extraterritorial Application

- Application to financial institutions incorporated / with their registered office in the FTT zone, as well as to FTT zone branches of non-FTT zone financial institutions.
- Application to financial institutions incorporated outside the FTT zone with no FTT zone branches when dealing with parties in the FTT zone or non-FTT zone branch of a party incorporated / with its registered office in the FTT zone and whenever they deal in securities issued by an entity established in the FTT zone.
- Exemption where person liable to tax can show there is no link between the economic substance of the transaction and the territory of any FTT zone Member State.
- Anonymous trading systems.

Alternative Investment Fund Managers Directive (AIFMD)

- Territorial scope of the authorisation regime
- Exemption for conflicting obligations but not for duplicative requirements

Authorisation regime

- Non-EU AIFMs wishing to market without a passport can do so in accordance with national private placement regimes until 2018
- Can only do so where appropriate co-operation agreements with regulators

Marketing without a passport

- An AIF may find itself subject to other EU legislation by virtue of being an AIF (e.g., EMIR, FTT)

Other consequences

Stage in legislative process

- Came into force on 21 July 2011
- Member States have until 22 July 2013 to implement

What does it do?

- Requires managers of alternative investment funds (those not currently subject to EU regulation) to seek authorisation or registration
- Imposes conduct of business and transparency obligations on those managers
- Creates an EU passport to replace existing national private placement regimes

Revised Markets in Financial Instruments Directive / Regulation (MiFID 2)

Stage in legislative process

- Commission adopted legislative proposal in October 2011. Council and Parliament still finalising their amendments
- The text is expected to be agreed by end 2013 and be applied during 2016

What does it do?

- Repeals and re-states the existing Markets in Financial Instruments Directive
- Expands the scope of regulated activities
- Introduces new powers for ESMA and for national regulators
- Introduces new regulation of cross-border business

Cross-border business	Possible removal of existing national exemptions / EU registration regime Passive solicitation Transitional provisions
EU branch	Can only establish a branch if head office is in an equivalent jurisdiction
Mandatory exchange trading	Firms may only enter into transactions on exchanges in jurisdictions for which the Commission has adopted an equivalence determination
Position limits / product intervention	Apply to anyone carrying on activities in the EU

Revised Market Abuse Directive / Regulation (MAD 2)

Extraterritorial scope

- Covers instruments admitted to trading on an EU regulated market, MTF or OTF
- Sanctions (including criminal penalties) apply to any person anywhere in the world

Disclosure of inside information

- Disclosure regime for "issuers" of derivatives could catch any counterparty to a derivative contract

Exemptions

- Exemption for transactions by certain EU public bodies (e.g., public debt management authorities). But no equivalent exemption for non-EU entities

Stage in legislative process

- Commission adopted legislative proposal in October 2011. Council and Parliament still finalising their amendments.
- The text is expected to be agreed by end 2013 and be implemented during 2016

What does it do?

- Repeals and re-states the existing Market Abuse Directive
- Regulation of certain spot commodity contracts and behaviour in relation to benchmarks
- Expands scope of instruments subject to market abuse regime
- Introduces a new criminal regime for certain breaches

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