

**EXPLANATORY MEMORANDUM TO**  
**THE FINANCIAL SERVICES AND MARKETS ACT 2000 (MARKETS IN**  
**FINANCIAL INSTRUMENTS) (No. 2) REGULATIONS 2017**

**2017 No. 1255**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments

**2. Purpose of the instrument**

- 2.1 These Regulations complete the UK implementation of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast) (OJ L173, 12/6/2014, p.349) (“MiFID II”). MiFID II replaces and extends Directive 2004/39/EC of the European Parliament and Council of 21 April 2004 on markets in financial instruments (OJ No. L145, 30.4.2004 p.1) (“MiFID I”).
- 2.2 These Regulations also correct two minor errors in the UK implementation of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) (OJ No. L173, 12/6/2014 p.1) (“MAR”).

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 These Regulations are laid on 13<sup>th</sup> December and enter into force on 3<sup>rd</sup> January 2018. However, some technical provisions come into force on 2<sup>nd</sup> January for the purpose of making corrections to other statutory instruments (including the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017) (S.I. 2017/701) that will enter into force on 3<sup>rd</sup> January 2018; to ensure the right sequencing it is necessary that the corrections come into force a day earlier than the other provisions of the Regulations. For the provisions subject to early commencement, HM Treasury is allowing 20 days, rather than the minimum 21 day period applying by convention. In light of HM Treasury’s obligation to ensure that the provisions transposing MiFID II into UK law are correct before MiFID II’s application date of 3<sup>rd</sup> January 2018, it was not feasible to delay the coming into force date to comply with the 21 day rule. HM Treasury apologises for the inconvenience caused by slightly reducing the time available to the Committee to consider the provisions of the Regulations coming into force on 2<sup>nd</sup> January 2018.

*Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

#### **4. Legislative Context**

- 4.1 These Regulations are the final piece of domestic legislation required to complete the UK implementation of MiFID II and Regulation (EU) No 600/2014 of the European Parliament and Council on markets in financial instruments (OJ L 173, 12.6.2014, p. 84) (“MiFIR”) which supplements MiFID II. These Regulations also make corrections to the UK law implementing MAR.
- 4.2 MiFID II and MiFIR, which replace MiFID I, set the EU wide regulatory regime for both firms providing investment services relating to financial instruments (such as shares, futures, and derivatives) and for financial markets. MAR contains directly applicable prohibitions on market abuse and imposes various regulatory requirements to aid the prevention and detection of such behaviour.
- 4.3 Regulation 3 amends the Financial Services and Markets Act 2000 (“FSMA”) to correct drafting errors in section 129 and 168 of that Act which implement Articles 23 and 30 of MAR (these Articles concern the powers of competent authorities and administrative sanctions for contraventions of MAR). Regulation 3 also makes a minor consequential amendment in connection with the with the implementation of MiFID II.
- 4.4 Regulation 4 amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) to clarify the position in domestic law of firms waiting for information to make threshold calculations set out in Commission Delegated Regulation (EU) 2017/592 of 1 December 2016 (OJ L 87, 31.3.2017, p. 492.) supplementing MiFID II. This calculation determines if persons trading in commodity derivatives qualify for the exemption set out in Article 2.1(j)(i) or (ii) of MiFID II.
- 4.5 Regulations 5, 6, 7 and 8 contain consequential amendments to secondary legislation relating to the replacement of MiFID with MiFID II. Regulation 9 is a consequential amendment to modifications of FSMA in the Recognised Auction Platform Regulations 2011 (S.I. 2011/2699), to take account of the amendment of section 129 FSMA in Regulation 3.
- 4.6 Regulation 10 extends the transitional permission provisions of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 relating to structured deposits to EEA firms passporting in under Schedule 3 of the Financial Services and Markets Act 2000. This regulation aligns the domestic regime with Chapter 3, Title II of MiFID II
- 4.7 Regulations 11 to 38 inclusive contain amendments to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (S.I. 2017/701). These correct errors in the implementation of MiFID II and MiFIR. One substantive amendment is the addition of a new regulation 28A to transpose Article 79.5 MiFID II.
- 4.8 Prior to agreement in Council, MiFID II was submitted to Parliament for scrutiny. It was cleared by the House of Lords European Scrutiny Committee on 27 February 2013, and was cleared by the House of Commons Scrutiny Committee after a debate on the same day.
- 4.9 MiFID II was the subject of the House of Lords European Union Committee’s second report of the 2012-13 session (HL28), “*MiFID II: Getting it Right for the City and EU Financial Services Industry*”. The report was debated in a Motion to Take Note,

moved by Lord Harrison on 26 March 2013 (Hansard volume 744). In its response, the government welcomed the report, and set out how it would take the recommendations forward.

- 4.10 Three statutory instruments implementing MiFID II have been laid thus far. Firstly the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 (S.I. 2017/488) was made on 28<sup>th</sup> March 2017, having been approved by the House of Commons on 14 March 2017 and the House of Lords on 23 March 2017. The statutory instrument is available to view at:

<http://www.legislation.gov.uk/ukxi/2017/488/contents/made>

- 4.11 The other two statutory instruments implementing MiFID II are the Data Reporting Services Regulations 2017 (S.I. 2017/699), and the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (S.I. 2017/701) (“the main 2017 Regulations”). These statutory instruments are available to view at:

<http://www.legislation.gov.uk/ukxi/2017/699/contents/made>

<http://www.legislation.gov.uk/ukxi/2017/701/contents/made>

- 4.12 A transposition note showing how these Regulations transpose MiFID II will be available from HM Treasury and published on [legislation.gov.uk](http://www.legislation.gov.uk) shortly.

## **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom except for regulations 6 and 8 which apply to Northern Ireland only.

## **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

*What is being done and why*

*MiFID II implementation*

- 7.1 The instrument forms part of the transposition into UK law of MiFID II. MiFID II and MiFIR update MiFID I in light of the financial crisis and technological advances.
- 7.2 MiFID II and MiFIR create more robust and efficient market structures, and require more trades to be conducted through trading venues in order to promote transparency. They will introduce new safeguards for algorithmic and high frequency trading, and improve competition in essential post-trade services such as clearing. They will provide a stricter framework for commodity derivatives and strengthen investor protection. The aims of the EU legislation are consistent with our overall approach to the regulation of financial markets in the UK.
- 7.3 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these

negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

- 7.4 These Regulations set out the regime for commodity derivatives traders who are exempt from MiFID II, provide transitional arrangements for EU firms in the UK wishing to sell structured deposits after 2018 (when such activities will be regulated in the UK), and make minor technical amendments to complete implementation of MiFID II.
- 7.5 Firms trading commodity derivatives are exempt from MiFID II if their speculative trading activity is calculated to be ancillary to their main non-financial business. This statutory instrument amends the Regulated Activities Order (RAO) to ensure that commodity traders have legal certainty while they perform the calculation. The amendment provides that firms trading these commodity derivatives are not undertaking regulated activities while they perform their annual calculations and, if necessary, while they seek authorisation as a MiFID investment firm, provided this is done within a specified period. This amendment will ensure the rules are workable for firms.
- 7.6 MiFID II also regulates structured deposits at the EU level for the first time. Structured deposits are a type of savings account where the rate of interest received is linked to an external measure, such as a stock market index. A transitional arrangement for UK firms was previously provided to extend those firms' permissions to allow them to continue to sell structured deposits, provided they notify the FCA by 3 January 2018. This statutory instrument puts in place a similar arrangement for EU firms so they can continue to provide structured deposits to the UK market without the need to go through a permissions process. In both cases the notification deadline is now 1 April 2018. This will ensure that UK consumers will continue to have access to the widest possible spectrum of products.
- 7.7 Other minor technical amendments include: making consequential amendments to Northern Ireland legislation to ensure uniform application of MiFID II across the UK; updating the definition of a MiFID investment firm to ensure that these firms continue to be subject to financial accounting requirements under the Companies Act 2006; and excluding advice given in newspapers from the general requirement to be authorised before giving advice on structured deposits, in line with existing domestic standards.

#### ***MAR corrections***

- 7.8 The Treasury has also previously implemented the Market Abuse Regulation (MAR), which came into force in July 2016. These Regulations make two minor changes to Part 8 and 11 of the Financial Services and Markets Act 2000 to correct minor errors in the UK's original implementation of MAR.

#### ***Consolidation***

- 7.9 This instrument does not amend other legislation so the issue of consolidation does not arise.

### **8. Consultation outcome**

- 8.1 The Treasury ran a public consultation on the transposition of MiFID II which opened on 27 March 2015 and closed on 18 June 2015.

- 8.2 The Treasury received over 30 responses to the consultation document. The Treasury carefully considered these responses when drafting the three statutory instruments implementing MiFID II laid earlier in 2017. As this fourth statutory instrument makes minor technical changes, the Treasury have not conducted a further formal consultation, but has engaged in discussions with firms, as outlined in paragraphs 9.2 and 9.3.

## **9. Guidance**

- 9.1 It is not considered necessary to issue specific guidance in connection with these Regulations.
- 9.2 The Treasury has had extensive informal engagement with industry representatives during the negotiation and implementation phases of MiFID II and MiFIR.
- 9.3 The Treasury has also had informal engagement with industry representatives on the MiFID II provisions relating to firms trading commodity derivatives.

## **10. Impact**

- 10.1 The Treasury does not consider that any of the provisions in this statutory instrument will have a material cost on business, charities or voluntary bodies.
- 10.2 The Treasury do not believe that there will be any impact on the public sector stemming from this SI.
- 10.3 Two Impact Assessments, relating to MiFID II and MAR respectively, are submitted with this memorandum and are published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.
- 10.4 The Impact Assessment for MiFID II and MiFIR state that transposition will have an estimated annual net cost to business of £148.5 million. The Impact Assessment for MAR, which is a directly applicable regulation, states that the statutory instrument implementing MAR will have an estimated annual net cost to business of £45,000.
- 10.5 The MiFID II Impact Assessment analyses the impact of all of the changes made by MiFID II, and as a result captures the changes made both by this final statutory instrument as well as the preceding ones laid earlier in 2016 and 2017.

## **11. Regulating small business**

- 11.1 The legislation applies to activities that are undertaken by small business. The Treasury do not expect these Regulations to impact on small and micro-businesses.

## **12. Monitoring & review**

- 12.1 The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017, the Data Reporting Services Regulations 2017 and the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016, which are amended by these Regulations contain a requirement for the Treasury to review the legislation, every five years, and set out the conclusions of each review in a published report.

### **13. Contact**

- 13.1 Mark Griffin at HM Treasury Telephone: 020 7270 6651 or email: Mark.Griffin@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.