

MiFID II/MiFIR – divergence emergence?





Introduction

Since the beginning of the Brexit transition period, developments in both the UK and EU have impacted the MiFID rules in various ways.

In the UK, there have been changes under the EUWA on-shoring process; “quick-fix” amendments; and the beginnings of implementing the conclusions of the Wholesale Markets Review. Most recently, FSMA 2023 and the Commencement No 1 Regulations bringing in transitional amendments to UK MiFIR from 29 August 2023.

In the EU, there were also “quick-fix” amendments in response to the Covid-19 pandemic, and the EU MiFID II/MiFIR Review has resulted in a number of proposals for substantive change.

The shifting pieces in the UK and EU are starting to now give rise to meaningful divergence, albeit in some cases both the UK and EU are making changes which seek to address the same regulatory policy issues or which overlap in part. However, the way in which changes have been made often belies their similarity, and means that comparing EU and UK versions of the text for provisions does not give the full picture. For example, where the UK has had to make changes via an on-shored regulation but the EU proposes to make changes at directive level, but the substance of the changes is the same.

Our summary below sets out the key moving parts on each side of the Channel, and assesses how divergent the changes really are.

Summary table of key MiFID II/MiFIR changes since UK's departure from the EU

Topic	Material divergence? ¹	UK	EU
Information to clients	No	Information provided to clients must be provided electronically (rather than on paper), except that retail clients can request paper copies. (UK Quick Fix Regulations and Investor Reporting Amendment Regulations)	Substantively the same as the UK. (EU Quick Fix Directive)
Information to clients: costs and charges – distance communications	No	Costs and charges information for the sale or purchase of a financial instrument may be provided after conclusion of the transaction provided the firm has the client's consent, has offered to delay the transaction and has given the client the option to receive the information over the telephone before conclusion of the transaction. (UK Quick Fix Regulations)	Substantively the same as the UK. (EU Quick Fix Directive)
Information to clients: costs and charges – professional clients	No	Costs and charges information requirements apply to professional clients only when the service provided is investment advice or portfolio management. (UK Quick Fix Regulations)	Substantively the same as the UK. (EU Quick Fix Directive)
Inducements: exemptions SME research²	Yes – but similar approach in each case	Bundled research is allowed when it relates to companies with a market capitalisation of below GBP200m. (UK Conduct and Organisational Changes)	Bundled research is allowed when it relates to companies with a market capitalisation of below EUR1bn (EU Quick Fix Directive)

⁰¹ This column gives a high level view on the extent of divergence between the UK and EU positions (whether changes already made, future amendments, or proposals). Where changes are substantively similar, these are marked "no" and are coloured red. Changes which have some similarities or overlap in part have an appropriate comment and are coloured amber. For clear divergence, these are marked "yes" and are coloured green.

⁰² This summary does not include proposals impacting MiFID II and MiFIR in relation to the proposed directive to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises.

Topic	Material divergence? ¹	UK	EU
Inducements: other (non-SME) exemptions for research	Yes – UK change only	Exemptions from the inducements rules: (i) third party research on fixed income currencies and commodities instruments; (ii) research providers who do not provide execution services and are not in a group that provides execution services; and (iii) clarification that openly available written research is out of scope of the inducements rules. (UK Conduct and Organisational Changes)	No equivalent EU changes.
Research: UK review	Yes – UK change only	Please refer to rows above on SME research and other research exemptions. In addition, the UK Investment Research Review has made a number of significant recommendations. In particular from a MiFID perspective, there is a recommendation for optionality regarding payment for research, so that asset managers can pay for research on a bundled basis. There is also a recommendation to clarify and tailor the UK regulatory regime for research more broadly. The remaining recommendations relate to: the introduction of a research platform; greater retail access to research; academic institution input; a code of conduct for issuer-sponsored research; and a review of IPO research rules. (UK Investment Research Review)	No equivalent EU changes.
Reporting to clients: adequate reports	No	Removal of prescriptive reporting requirements for professional clients. (UK MiFID Quick Fix Regulations)	Substantively the same as the UK. (EU Quick Fix Directive)

Topic	Material divergence? ¹	UK	EU
Reporting to clients: additional reporting obligations for portfolio management or contingent liability transactions	Yes – UK change only	Removal of the 10% depreciation reporting requirement, whereby the overall value of a portfolio, or a retail client account including leveraged financial instruments or contingent liability transactions, depreciated by 10% and multiples of 10% thereafter had to be reported to the client by the relevant portfolio manager or investment firm. (Investor Reporting Amendment Regulations)	No equivalent EU changes.
Cost-benefit analysis for investment advice or portfolio management re switching	No	Removal of requirement for professional clients. (UK MiFID Quick Fix Regulations)	Removal of requirement for professional clients except where professional clients inform the firm they wish to benefit from the relevant provisions. (EU Quick Fix Directive)
RTS 27 reporting	No	Removal of RTS reporting requirements. (UK MiFID Quick Fix Regulations and UK Conduct and Organisational Changes)	Suspension of RTS reporting requirements and ESMA statement confirming no regulatory expectation to comply, and proposal to remove the requirements permanently. (EU Quick Fix Directive, ESMA RTS 27 Public Statement and EU MiFID II/MiFIR Review)
RTS 28 reporting	Yes – UK change only	Removal of RTS reporting requirements. (UK Conduct and Organisational Changes)	No equivalent EU changes.
Product governance³	Yes – EU change only	No equivalent UK changes.	Exemption for instruments which are bonds with no other embedded derivative than a make-whole clause, or where the instrument is marketed or distributed exclusively to eligible counterparties. (EU Quick Fix Directive)

⁰³_This summary does not include changes under the EU Retail Investment Strategy or the UK Consumer Duty.

Topic	Material divergence? ¹	UK	EU
Position limits regime: scope	Some – but substantive overlap too	<p>Proposal to reduce scope so that it only applies to agricultural contracts and physically settled contracts, supported by the FCA.</p> <p>(WMR Response and UK FCA Statement on Supervision of Commodity Position Limits)</p> <p>Removal of economically equivalent over-the-counter contracts from scope of FCA rules.</p> <p>(FSMA 2023)</p>	<p>Reduction of scope so that it only applies to agricultural commodity derivatives and critical or significant commodity derivatives (and EEOTC contracts).</p> <p>(EU Quick Fix Directive)</p>
Position limits regime: exemptions	Some – but substantive overlap too	<p>UK regulatory forbearance for firms transacting to fulfil liquidity provision obligations.</p> <p>UK proposal to exempt firms transacting to fulfil liquidity provision obligations and firms offering risk-mitigation services.</p> <p>(FCA Statement on Supervision of Commodity Position Limits and WMR Response)</p>	<p>New exemptions for: (i) firms hedging on behalf of a non-financial entity in their group; (ii) firms transacting to fulfil liquidity provision obligations; and (iii) securitised derivatives.</p> <p>(EU Quick Fix Directive)</p>
Commodity derivatives: ancillary activities test exemption	Potentially – but this will depend on the similarity of the new tests	<p>Proposals to revert to the commodity dealer exemption for persons whose main business consists of dealing on own account in commodities and/or commodity derivatives provided that they are not part of a group providing investment or banking services, and removal of annual notification requirement.</p> <p>(WMR Response)</p>	<p>Reversion to a qualitative test and removal of annual notification requirement.</p> <p>(EU Quick Fix Directive)</p>
Pre-trade transparency: equities – waivers	Yes – technical changes differ	<p>Amendment to the definition of ‘most relevant market in terms of liquidity’, as used for the purposes of the reference price waiver.</p> <p>Further changes expected following the FCA's review of the equity regime in more detail.</p> <p>(UK Technical Standards (Markets in Financial Instruments Transparency) Instrument 2023 and UK Policy Statement PS 23/4)</p>	<p>Amendment to the reference price waiver, setting a new floor of twice standard market size.</p> <p>(EU MiFID II/MiFIR Review)</p>

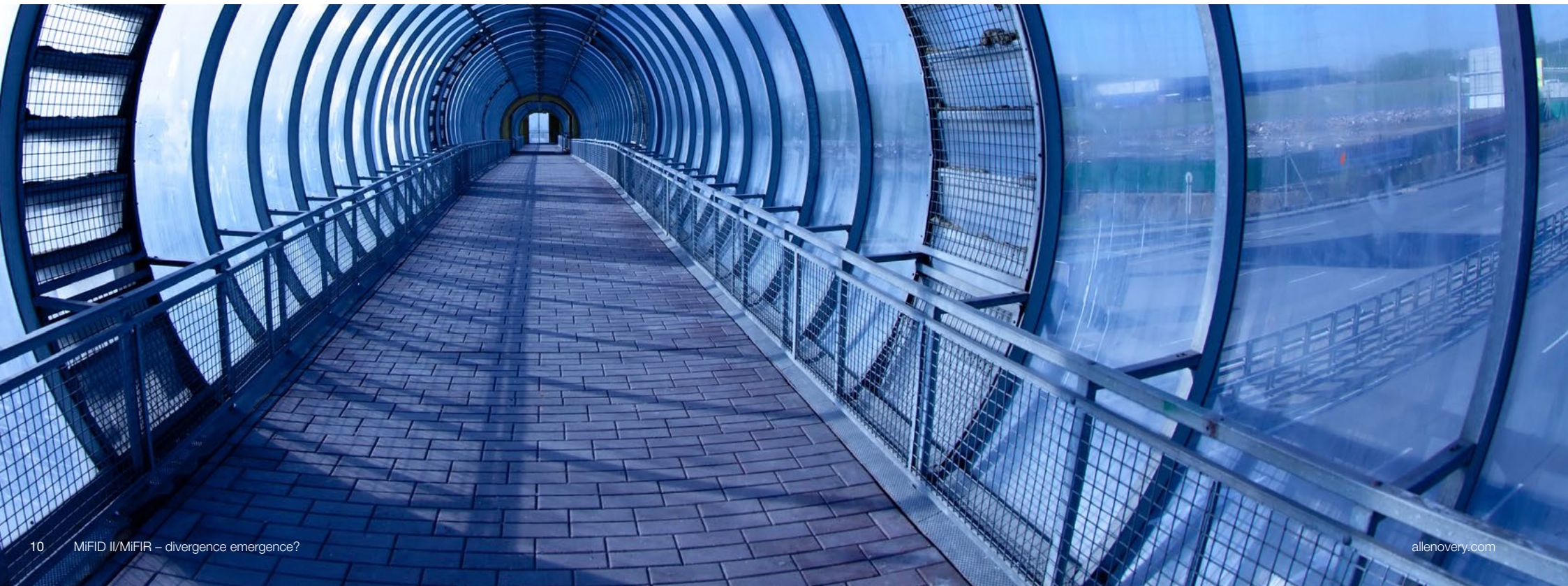
Topic	Material divergence? ¹	UK	EU
Pre-trade transparency: equities – waivers – DVC	Yes	UK DVC will be removed on 29 August 2023. (FSMA 2023)	EU DVC amended to an EU-wide 7% single volume cap. (EU MiFID II/MiFIR Review)
Post-trade transparency: equities – RTS 1	Yes – technical changes differ	Updates including streamlining amendments for provisions relating to transactions that do not contribute to the price discovery process, a new designated reporter regime, changes to size thresholds for the OMF waiver and allowing overseas tick sizes to be used – coming into force on 29 April 2024. (Technical Standards (Markets in Financial Instruments Transparency) Instrument 2023 and UK Policy Statement PS 23/4)	Updates including streamlining amendments for provisions relating to transactions that do not contribute to the price discovery process and new LIS threshold for ETFs – coming into force on 1 January 2024. (EU Commission Delegated Regulation 2023/944)
Pre-and post-trade transparency: non equities – waivers and deferrals, and RTS 2	Yes – technical changes differ	Updates to RTS for the new designated reporter regime. (Technical Standards (Markets in Financial Instruments Transparency) Instrument 2023 and FCA Policy Statement PS 23/4) FCA expected to consult more broadly later this year.	Certain RTS 2 changes including in relation to the quarterly bond liquidity assessment, annual calculations regarding large in scale and size-specific to the instrument thresholds for bonds. (EU Commission Delegated Regulation 2023) Proposals to shorten and harmonise publication deferrals (with carve-outs for sovereign debt). (EU MiFID II/MiFIR Review)
Systematic internaliser: definition	Potentially not – this will depend on the final rules in each case	New qualitative definition of systematic internaliser to apply but not yet in force, and no date set. (WMR Response and FSMA 2023)	New qualitative definition of SI expected to be discussed during technical trilogues

Topic	Material divergence? ¹	UK	EU
Systematic internalisers: midpoint crossing	Some – but substantive overlap too	More flexibility for SIs via removal of the large-in-scale limitation on SI ability to cross at midpoint, coming into force on 29 August 2023. (FSMA 2023)	More flexibility for SIs via additional SI ability to cross at midpoint within the current bid and offer prices where trades may be below the large-in-scale threshold but are twice the standard market size or higher, in so far as those tick sizes are complied with. (Commission Delegated Regulation 2023/944)
Systematic internalisers: minimum quote size	Potentially – this will depend on the final rules in each case	Industry appetite for the current minimum quote size – which is 10% of the standard market size of the relevant instrument – to closer to 100% of the standard market size. (WMR Response)	Proposals to raise 10% threshold to twice standard market size. (EU MiFID II/MiFIR Review)
Share trading obligation (STO)	Yes	UK STO will be removed on 29 August 2023. (FSMA 2023)	Proposal to limit scope of STO to EEA ISIN shares, excluding: (i) EEA ISIN shares traded on a third-country venue in the local currency; and (ii) trades carried out between professionals/eligible counterparties which do not contribute to the price discovery process. (EU MiFID II/MiFIR Review)
Derivatives trading obligation (DTO): scope	Yes – but same approach in each case	UK DTO will be aligned with UK CO on 29 August 2023. (FSMA 2023)	Proposal to align EU DTO with EU CO. (EU MiFID II/MiFIR Review)
Derivatives trading obligation: suspension powers	Yes	New FCA suspension or modification powers, where necessary for the purpose of preventing or mitigating disruption to financial markets. (FSMA 2023)	Proposal for new powers of suspension which are limited to: (i) alignment with CO suspension; and (ii) suspension for market-makers with non-EEA counterparties.



Topic	Material divergence? ¹	UK	EU
Derivatives trading obligation: post-trade risk reduction services	Potentially – UK change only (for now)	Proposal to expand post-trade risk reduction services exemption to include services beyond portfolio compression. (WMR Response, FSMA 2023)	No specific proposal yet but discussions are ongoing in relation to the perimeter for post-trade risk reduction service exemptions (which are relevant to the DTO and the CO).
Consolidated tape	(N/A)	Draft legislative and proposed rule changes to encourage the development of a UK consolidated tape (in bonds first, then equities). (Draft Data Reporting Services Regulations 2023, FCA Consultation Paper CP 23/15)	Proposal for a new selection process for a consolidated tape provider across different asset classes. (EU MiFID II/MiFIR Review)
Market making agreement requirements	Yes – UK change only	Proposal to remove the requirement for algorithmic trading firms pursuing market making strategies to enter into market making agreements with trading venues. (WMR Response)	No equivalent changes.
Open access regime for ETDs	No	Removal of the ‘open access obligation’ for exchange-trade derivatives (although this has already been suspended). (UK Government Guidance on Open Access Regime for Exchange Traded Derivatives)	Same as UK. (EU MiFID II/MiFIR Review)
Payment for order flow	No	UK position remains as before – payment for order flow is generally not possible to manage in compliance with the MiFID rules on conflicts of interest and inducements. (UK FCA Publication on PFOF)	Proposal to ban payment for order flow. (EU MiFID II/MiFIR Review)

Topic	Material divergence? ¹	UK	EU
Trading venue perimeter	Some – but substantive overlap too	New Trading Venue Perimeter Guidance.	New Trading Venue Perimeter Opinion.
Remove direct electronic access limitation on dealing on own account exemption	Yes – EU change only	No change.	Proposal to remove the reference to direct electronic access from the dealing on own account exemption.



Sources and definitions

CO	Clearing obligation (under EMIR)
Commencement No 1 Regulations	Financial Services and Markets Act 2023 (Commencement No. 1) Regulations 2023
Draft Data Reporting Services Regulations 2023	Draft UK statutory instrument, the Data Reporting Services Regulations 2023 – available here
DTO	Derivatives trading obligation
DVC	Double volume cap
EEOTC	Economically equivalent over-the-counter
EMIR	European Market Infrastructure Regulation (Regulation (EU) No 648/2012)
ESMA RTS 27 Public Statement	Public statement on the deprioritisation of supervisory actions on the obligation to publish RTS 27 reports after 28 February 2023 in light of the ongoing legislative procedure on the MiFID II/MiFIR Review – available here
ETD	Exchange-traded derivative
EU MiFID II/MiFIR Review	Proposals made to amend MiFID and MiFIR, as set out in a proposed amending directive – available here – and a proposed amending regulation – available here
EU Quick Fix Directive	Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 – available here
EUWA	European Union (Withdrawal) Act 2018
FCA Consultation Paper CP 23/15	The FCA's Consultation Paper CP 23/15 on the Framework for a UK Consolidated Tape – available here
FCA Publication on PFOF	The FCA's publication on its approach to payment for order flow – available here

FCA Statement on Supervision of Commodity Position Limits	The FCA's statement on the supervision of commodity position limits – available here
FSMA 2023	Financial Services and Markets Act 2023
Investor Reporting Amendment Regulations	Markets in Financial Instruments (Investor Reporting) (Amendment) Regulations 2022 – available here
MiFID/MiFID II	Markets in Financial Instruments Directive (Directive 2014/65/EU)
MiFIR	Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014) (see also UK MiFIR)
STO	Share trading obligation
Trading Venue Perimeter Guidance	Amendments to the Perimeter Guidance in the FCA Handbook as set out in the FCA Policy Statement PS 23/11 – available here
Trading Venue Perimeter Opinion	ESMA's Opinion on the Trading Venue Perimeter as included in the ESMA Final Report – available here
UK Conduct and Organisational Changes	FCA rule changes made as set out in PS21/20: Changes to UK MiFID's conduct and organisational requirements – available here
UK Government Guidance on Open Access Regime for Exchange Traded Derivatives	UK guidance update on the open access regime for exchange traded derivatives – available here
UK Investment Research Review	The Kent UK Investment Research Review – available here
UK MiFIR	The UK version of the Markets in Financial Instruments Regulation, as on-shored and amended
UK Quick Fix Regulations	Markets in Financial Instruments (Capital Markets) (Amendment) Regulations 2021 – available here
WMR	The UK Wholesale Market Review – consultation available here
WMR Response	The UK Treasury's response to the Wholesale Market Review – available here



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