



Pershing Divergence Tracker¹

Overall, the impact of the MiFID II review is likely to create some confusion across the industry for firms operating across jurisdictions with potential duplication of effort and the need to work to different timelines. Given the difficulty of navigating all the changes, Pershing has started a ‘divergence tracker’ to help our business provide an overview by theme of how the EU and UK requirements are changing.

AS AT 13 MAY 2022

Key Themes	What is Changing?	Points of Interest Relating to EU/UK Divergence
<p>Investor Reporting</p>	<p>The EC’s MiFID II 'Quick Fix' Directive, which was implemented in February 2022, included the move to electronic communication methods, specifying that all information required to be provided to clients or potential clients should be provided in electronic format. However, retail clients can still request paper copies and this needs to be made available free of charge.</p> <p>For UK firms, the UK’s Statutory Instrument, the Markets in Financial Instruments (Capital Markets) (Amendment) Regulations 2021 published by HM Treasury in July 2021 makes electronic the default method of communication with wholesale clients, while at the same time the HM Treasury will also likely consult further on switching to electronic communication for retail clients as well.</p>	<p>EU firms subject to the EC ‘Quick Fix’ requirements are required to issue electronic methods for their communications with all clients (except where retail clients opt into paper) from February 2022.</p> <p>For UK firms, on the other hand, the switch to electronic communications as the default method of communication will apply to wholesale clients only, and from 26 July 2021. We await to see if the UK also adopts this for retail clients (see Wholesale Market Review consultation here).</p> <p>While the move to electronic communication methods is a good ‘green’ initiative, it will require a joint effort for firms to implement, while they will also have to maintain processes for paper-based communications in case retail clients wish to opt in. The different methods of default communications applying in the EU and UK based on client categorisation will also lead to further complexities for firms going forward. Firms that operate across both the UK and EU should assess the impact of the new requirement to provide</p>

		electronic communications across both their EU and UK entities.
Costs and Charges	<p>The EC's MiFID II 'Quick Fix' Directive, which was implemented in February 2022 included, amongst others, amendments to the requirement on costs and charges disclosures, whereby professional clients and eligible counterparties are exempted (both ex-ante and ex-post), except for investment advice or portfolio management services.</p> <p>In the UK, as per the amendments in the UK's Statutory Instrument, professional clients are exempted from the requirement to provide information on all costs and charges from 26 July 2021, except for investment advice and portfolio management.</p>	While the EU and UK approaches are aligned in disapplying costs and charges disclosure requirements for professional clients and eligible counterparties (except for investment advice and portfolio management), EU firms were required to comply from 28 February 2022, while for UK firms the changes applied from 26 July 2021.
Ex-post reporting requirements (10% drop reporting)	<p>The EC's MiFID II 'Quick Fix' Directive, implemented in February 2022 provides an exemption so that professional clients and eligible counterparties do not have to be provided with certain ex-post requirements (but professional clients can opt in). These include statements such as periodic custody statements, contract notes, portfolio management periodic reports and 10% drop reports.</p> <p>For UK firms, there are slight differences in terms of the changes brought in by the UK's Statutory Instrument in relation to ex-post reporting to wholesale clients. While the obligation is removed to provide detailed contract notes, professional clients will still have to be provided with 'essential information' concerning the execution of their order. In relation to portfolio management periodic reports, while the obligation to provide professional clients with a periodic statement in a durable medium remains, the detailed requirements for periodic reporting to clients are switched off. Unlike the EU Quick Fix, the UK Statutory Instrument makes no</p>	As there are a number of slight differences in terms of the amendments made by the EU Quick Fix and the UK's Statutory Instrument, firms in scope by these changes should carefully review and consider the impact on their business in terms of operating in divergent regimes.

changes to the requirements to provide custody statements.

In relation to 10% drop reporting, the FCA has put in place [temporary measures](#) with respect of 10% depreciation portfolio notifications to professional clients, and to retail clients (under certain circumstances) until the end of 2022.

In addition, the UK's Statutory Instrument removes the 10% depreciation notification requirement for investment firms providing portfolio management services to professional clients, and HM Treasury is also exploring (see [consultation](#)) how the rule should be applied to retail clients in the future, with a potential to abolish it altogether.

Product Governance

The EC's [MiFID II 'Quick Fix' Directive](#), implemented in February 2022, included the removal of product governance requirements for simple corporate bonds with "make-whole clauses".

Separately, ESMA also launched an [initiative](#) with National Competent Authorities (NCAs) to assess how the product governance rules have been implemented. This work will be conducted in 2021 and may lead to further guidance and changes in this area.

From a UK perspective, in February 2021, the FCA published a [Review](#), which looked at how a sample of asset management firms have implemented MiFID II's product governance regime (FCA PROD) when manufacturing products and how far they consider the interests of end clients through the product lifecycle. It is clear, that this will remain a high focus area and the FCA will consider if any changes to PROD rules will be required for distributors on the back of this report.

For **UK firms**, HM Treasury is expected to consult on any changes to the UK PROD rules on the back of the 'Quick Fix' change, and the FCA is also expected to do a broader review.

Transaction Reporting

In March 2021, ESMA published its [Final Report](#) with proposed changes to the MIFIR Transaction Reporting (TR) Regime.

ESMA's review focused on technical aspects of TR that have evolved and seeks to provide further fine-tuning and clarity on certain data fields based on over two years' worth of transaction reporting experience under MiFIR, with proposals including:

- The replacement of the trading on a trading venue (TOTV) concept with the SI approach for OTC derivatives
- The removal of the short sale indicator
- The alignment with reporting regimes such as MAR, EMIR and the Benchmark Regulation
- The reliance on international standards, including LEIs, ISINs and CFIs
- The inclusion of three additional data elements with a view to harmonise the way they are reported and avoid inconsistent and duplicative reporting of the same information at the national level.

If ESMA's proposals in this Final Report are implemented, it will mean divergence between EU and UK transaction reporting regimes, unless the FCA follows suit. ESMA proposes, for example, to remove the short sale indicator and require firms to provide details on decision makers in relation to an order and include client categorisation information.

Transmission of Orders: ESMA had proposed to mandate investment firms receiving orders to report for investment firms transmitting orders under a so-called transmission arrangement (the current position is a voluntary arrangement). The intention was to remove a regulatory burden for smaller firms that had difficulty in being fully compliant due to the basic technical level of reporting systems. This proposal has been dropped after strong objection from the sell side and a mixed response from the buy side as it was felt, among other things, that the requirement is unbalanced and much too favourable to transmitting firms.

From a UK perspective, the WMR review did not propose any specific amendments to the UK MIFIR transaction reporting regime. However, there was a wider acknowledgement that the industry may not want to unpick the requirements that were costly to implement. Instead, the focus should be removing duplicative reporting between the different regulations (i.e. MiFIR, SFTR, EMIR). The FCA may also publish its own consultation on changes to the UK's transaction reporting regime in 2022, which may lead to further regulatory fragmentation of the two regimes.

Any revision of existing rules around the transaction reporting framework and the associated system and coding changes will likely require extensive resource for firms to implement. Firms should review ESMA's proposals in detail and also monitor how the FCA responds.

Best Execution

The EC's [MiFID II 'Quick Fix' Directive](#) included the suspension of the obligation to produce best-execution under RTS 27 (for execution venues, market makers and SIs) from 28 February 2022.

The UK Government's [Markets in Financial Instruments \(Capital Markets\) \(Amendment\) Regulation](#) and the FCA's policy statement ([PS21/20](#)) confirmed the removal of the RTS 28 reporting obligation for investment firms' top 5 execution venues, in addition to the removal of RTS 27 reporting obligation for venues.

The EU Quick Fix only suspends RTS 27 reporting for two years (until 28 February 2023) and neither suspends nor deletes RTS 28.

The **UK's** removal of the RTS 28 reports for investment firms' top five execution venues was welcome news across the industry as it was seen of limited value.

The **UK's** approach goes further than the 'Quick Fix' amendment to solely remove the RTS 27 obligation for venues, which means this will be an area of rule divergence between the EU and UK going forward.

Pre- and Post-Trade Transparency Regime

As part of the European Commission's proposals to review MIFIR requirements published in November 2021, new measures to reduce the double volume cap (DVC) for dark trading from 8% to 7%, and also remove the venue-specific 4% DVC were announced. The EC has also have also set out changes to the systematic internaliser (SI) regime which may force volumes away from the venues and into the lit markets.

From a UK perspective, the [Wholesale Markets Review](#) contains a number of proposals on changes to the transparency regime, the MiFID rules governing trading venues, and the functioning of equity markets. By and large, the proposals aim to simplify the current requirements, increase the UK's competitiveness and deliver better outcomes for consumers. Areas include, for example, recalibrating the transparency regime for fixed income and derivatives, amending the Reference Price Waiver (RFW) to encourage best execution, amending the market data/consolidated tape regime, simplifying the systematic internaliser (SI) regime, and changes targeting SME Growth Markets, amongst others.

Items of specific interest in relation to dark pools and the Share Trading Obligation:

Dark pools: While the **UK** confirmed the removal of the DVC requirement, the EU's approach differs as the EU wants to retain this tool and only proposed to adjust the limits slightly.

Share Trading Obligation (STO): ESMA proposes to reduce the scope of the STO and limit it to any shares with an EEA ISIN ESMA strongly rejects the argument often put forward by market participants that best execution obligations (e.g. because a third country market may be more liquid and offer better pricing) should take precedence over the STO stating that it would effectively turn the STO into an empty shell.

This differs from the UK approach as the **UK** government recently [announced](#) that it will abolish the **UK** STO applicable to **UK** shares.

Overall, ESMA's proposals differ to the **UK** proposals as contained in the Wholesale Markets Review in a number of areas and will create further divergence if implemented as proposed.

¹ The Divergence Tracker (DT) is the result of a review of all the publications listed in the Annex ([available on request](#)). The DT is limited to items that Pershing believes to be of interest to its clients and is not a comprehensive assessment of all the changes to MIFID II that may apply to clients. Furthermore, the DT is not intended to be legal advice and any clients in doubt of the impact of any of the information set out in the DT should seek independent legal advice.

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