

## **IX. *MiFID II and the Importance of Equivalence Decisions***

### **A. Introduction**

Markets in Financial Instruments Directive (MiFID), put into force on November 1, 2007, is the European Union's (EU) regulatory framework of its financial markets.<sup>1</sup> MiFID sets out business conduct requirements, authorization requirements, regulatory reporting, trade transparency, and rules on the admission of financial instruments to trading, with the focus on opening EU markets to greater competition.<sup>2</sup> MiFID II, implemented on January 3, 2018, is the EU's second attempt to regulate financial markets, but with a focus on increasing transparency.<sup>3</sup> The new rules under MiFID II require that if a stock is traded on an EU-regulated platform, EU investment firms must do all their transactions on that platform or on a foreign venue deemed equivalent by the European Commission (EC).<sup>4</sup> This equivalence requirement has posed a problem with foreign exchanges, including the United States. Without an equivalence decision, EU investors in U.S. equities cannot access more liquid American stock exchanges.<sup>5</sup> Furthermore, MiFID II may force EU investors trading onto smaller

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<sup>1</sup> Press Release, Eur. Comm'n, Markets in Financial Instruments Directive (MiFID): Frequently Asked Questions (Oct. 29, 2007), [http://europa.eu/rapid/press-release\\_MEMO-07-439\\_en.htm](http://europa.eu/rapid/press-release_MEMO-07-439_en.htm) (“[MiFID] sets out a comprehensive regulatory regime covering investment services and financial markets in Europe . . .”).

<sup>2</sup> CFA INST., MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE II: IMPLEMENTING THE LEGISLATION, 1, 1 (2015) (“MiFID I focused on opening up markets to greater competition”); *MiFID II*, EUR. SEC. & MKT. AUTH., <https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir> [<https://perma.cc/N4A7-7USC>].

<sup>3</sup> CFA INST., *supra* note 2 (“A central theme of the MiFID II reforms is increased transparency.”); *MiFID II*, *supra* note 2.

<sup>4</sup> Silla Brush, *MiFID Stock Headache for U.S., Swiss Trades Set to be Lifted*, BLOOMBERG (Nov. 15, 2017), [www.bloomberg.com/news/articles/2017-11-15/u-s-swiss-stock-trading-said-likely-to-gain-mifid-equivalence](http://www.bloomberg.com/news/articles/2017-11-15/u-s-swiss-stock-trading-said-likely-to-gain-mifid-equivalence) [<https://perma.cc/ZX6Y-LPP9>].

<sup>5</sup> Francesco Guarascio & Huw Jones, *EU, U.S. Close to Deal on Stock Exchanges Before MiFID II Deadline*, REUTERS (Nov. 16, 2017), <https://www.reuters.com/article/us-eu-mifid-usa-swiss/eu-u-s-close-to-deal-on-stock-exchanges-before-mifid-ii-deadline-idUSKBN1DG1CY> [<https://perma.cc/VL9F-DKVH?type=image>] (finding EU investors would be unable to access more liquid US stock exchanges, such as Nasdaq and New York Stock Exchange, without an equivalence decision).

EU trading platforms, even if most trading activity occurs overseas.<sup>6</sup> Additionally, some investment firms have simply stopped offering trading in EU-based markets because of the low levels of liquidity in EU markets, leading to reduced trading volumes.<sup>7</sup>

MiFID II equivalency rulings in December 2017 between EU and U.S. exchanges put an end to concerns trading would be disrupted when MiFID II went into effect.<sup>8</sup> The agreements with the Commodity Futures Trading Commission (CFTC) authorized trading venues,<sup>9</sup> U.S. National Securities Exchanges (NSEs), and Alternative Trading Systems (ATS)<sup>10</sup> allowed investment firms to continue to access the EU.<sup>11</sup> As vice president of the EC in charge of Financial Stability, Financial Services and Capital Markets Union, Valdis Dombrovskis, noted, “[I]t is important that European firms can trade shares on international markets.”<sup>12</sup> He stated equivalence “can bring tangible benefits

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<sup>6</sup> Silla Brush, *Trillions in Stock and Derivative Trades at Risk over New EU Rules*, BLOOMBERG (Aug. 7, 2017), <https://www.bloomberg.com/professional/blog/trillions-stock-derivative-trades-risk-new-eu-rules/> [https://perma.cc/9FG6-3VGY].

<sup>7</sup> Sophie Baker, *European Firms Will be Able to Trade Dual-Listed Stocks on U.S. Exchanges Despite MiFID II, EC Says*, PENSIONS & INV. (Dec. 14, 2017), <http://www.pionline.com/article/20171214/ONLINE/171219867/european-firms-will-be-able-to-trade-dual-listed-stocks-on-us-exchanges-despite-mifid-ii-ec-says> [https://perma.cc/J2VK-EK6K] (“Instead of . . . trading foreign stocks on EU markets that have extremely low levels of liquidity, some EU firms may have simply stopped offering trading in these names, leading to reduced trading volumes.”).

<sup>8</sup> *Id.* (“Today’s decisions ensures that (MiFID II) investment firms can continue to access the EU.”).

<sup>9</sup> See discussion *infra* Section D.2.

<sup>10</sup> See discussion *infra* Section D.3.

<sup>11</sup> Hayley McDowell, *EU and US Reach Agreement on Derivatives Trading Ahead of MiFID II*, THE TRADE (Dec. 6, 2017), <https://www.thetrade.com/Regulation/EU-and-US-reach-agreement-on-derivatives-trading-ahead-of-MiFID-II/> [https://perma.cc/3NEN-F2SK] (“The [EC] and the derivatives regulator in the US have agreed on terms which will see mutual recognition of trading venues weeks before MiFID II.”).

<sup>12</sup> Joint Statements of Valdis Dombrovskis, Vice President, Eur. Comm’n, and J. Christopher Giancarlo, Chairman, Commodities Futures Exch. Comm’n, EU and CFTC: Mutual Recognition of Derivatives Trading Venues (Dec. 5, 2017) [hereinafter EU and CFTC Joint Statement], [https://ec.europa.eu/info/sites/info/files/171205-joint-statement-ec-cftc\\_en.pdf](https://ec.europa.eu/info/sites/info/files/171205-joint-statement-ec-cftc_en.pdf) [https://perma.cc/RVS9-US7V].

to market operators on both sides of the Atlantic.”<sup>13</sup> He further noted European firms can grow stronger by “trading in derivatives on US trading platforms and effectively hedge against risk”<sup>14</sup> while “US firms can hedge their exposures on EU platforms, facilitating trade and exchange between the EU and the US.”<sup>15</sup> Ultimately, the equivalence decisions facilitated trading between the EU and US and ensured that this trading could continue without interruption.<sup>16</sup> Although the response to the implementation of MiFID II has mostly been positive, there is still uncertainty that remains to be resolved.<sup>17</sup>

This article discusses the initial concern surrounding MiFID II and the lack of equivalence decisions and the ultimate successful implementation of equivalence decisions between the EU and United States. First, Section B provides an overview of the regulatory framework of MiFID and MiFID II. Second, Section C discusses equivalence decisions generally and their need in the context of MiFID II. Third, Section D details the steps taken by the EU and United States in reaching a decision before MiFID II came into force. Fourth, Section E highlights criticisms of equivalence decisions.

## B. The Regulatory Framework

### I. MiFID

The original MiFID established a new regulatory regime for EU financial markets.<sup>18</sup> Its purpose was “not to control financial instruments but to create a common internal market and more competition amongst trading platforms.”<sup>19</sup> It represented the EU’s effort to create a single European financial market that could rival the U.S. markets.<sup>20</sup> In addition to competition, it “aimed to ensure appropriate

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<sup>13</sup> McDowell, *supra* note 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See discussion *infra* Sections D.4, E.

<sup>18</sup> Council Directive 2004/39, 2004 O.J. (L 145) (EC).

<sup>19</sup> Markus Henn, *Markets in Financial Instruments Directive (MiFID) and Regulation (MiFIR)*, WEED (Dec. 2011), [http://www2.weed-online.org/uploads/factsheet\\_mifid.pdf](http://www2.weed-online.org/uploads/factsheet_mifid.pdf) [<https://perma.cc/5MU2-BNRM>].

<sup>20</sup> Philip Stafford, *What Is MiFID II and How Will It Affect EU’s Financial Industry?*, FIN. TIMES (Sept. 15, 2017), <https://www.ft.com/content/ae935520-96ff-11e7-b83c-9588e51488a0> (“The original MiFID was intended to be a

levels of protection for investors and consumers of investment services across the [EU].”<sup>21</sup> Specifically, it sought to end the monopoly of stock exchanges and decrease trading costs.<sup>22</sup> Consequently, MiFID implemented conduct rules, transparency requirements, and regulated derivatives, in addition to expanding investment services.<sup>23</sup> It entered into force in November 2007 when the financial crisis began.<sup>24</sup> Although MiFID did contribute to a more competitive EU market, it also highlighted the underlying weaknesses in MiFID.<sup>25</sup> The financial crisis and market developments, such as algorithmic trading, made clear that MiFID needed to be reformed.<sup>26</sup> For example, MiFID led to the development of new trading platforms falling outside MiFID’s scope.<sup>27</sup> In particular, trading increased in dark pools,<sup>28</sup> and MiFID did not contain anything to prevent this explosion.<sup>29</sup> Since MiFID did not contain regulation of over-the-counter trades, high frequency trading

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cornerstone of EU efforts to create a single financial market for the bloc that could rival the depth and dynamism of the US capital markets.”)

<sup>21</sup> Mark Rudis, *MiFID Overview*, RUDIS LAW (Oct. 19, 2017), [www.attorneytaxlien.com/mifid-overview/](http://www.attorneytaxlien.com/mifid-overview/) [https://perma.cc/RE8F-DS78].

<sup>22</sup> Stafford, *supra* note 20.

<sup>23</sup> Rudis, *supra* note 21.

<sup>24</sup> Stafford, *supra* note 20.

<sup>25</sup> Press Release, Eur. Comm’n, Review of the Markets in Financial Instruments Directive (MiFID): Frequently Asked Questions (Oct. 20, 2011) [hereinafter EC Press Release], [http://europa.eu/rapid/press-release\\_MEMO-11-716\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-716_en.htm?locale=en) [https://perma.cc/EGK8-29WY].

<sup>26</sup> Council Directive 2014/65, 2014 O.J. (L 173/349) (“The financial crisis has exposed weaknesses in the functioning and in the transparency of financial markets. The evolution of financial markets has exposed the need to strengthen the framework for the regulation of markets in financial markets . . . .”); Rudis, *supra* note 21 (“[The EC] reviewed the MiFID framework and concluded that change was needed . . . to address issues identified as a result of the 2008 financial crisis, market developments such as the growth of algorithmic trading . . .”).

<sup>27</sup> EC Press Release, *supra* note 25.

<sup>28</sup> “Dark pools are essentially private stock exchanges reserved for the largest traders, including hedge funds, major institutional funds, pension funds, and big banks . . . [D]ark pools have an increased level of secrecy because neither the size of the trade nor the identity of the participants are revealed until a trade is filled.” Tom Winter, *Gazing into ‘Dark Pools,’ the Tool that Enables Anonymous Insider Trading*, NBC NEWS (Jan. 23, 2013), <https://www.nbc.com/id/100400981> [https://perma.cc/3TR4-W67M].

<sup>29</sup> Henn, *supra* note 19 (“MiFID encouraged the explosion of these markets—and contained nothing to prevent the financial crisis.”).

or derivatives trading, the drafters of MiFID II aimed “to repair the shortcomings of MiFID I and to improve the functioning of financial markets and investor protection.”<sup>30</sup>

In 2011, the EC published a proposal for revision of MiFID.<sup>31</sup> The MiFID revision focused on more robust and efficient market structures, new technology, increasing transparency, reinforcing the role and powers of regulators, and stronger investor protection.<sup>32</sup> This proposal brought about the implementation of MiFID II.<sup>33</sup>

## 2. *MiFID II*

Building on the existing MiFID framework, MiFID II seeks to promote greater transparency by focusing on increasing available information and decreasing dark pool trading.<sup>34</sup> In particular, MiFID II requires disclosure of order details for transactions conducted on a trading venue.<sup>35</sup> MiFID II mirrors regulations from other governments, such as the U.S. Dodd-Frank Act.<sup>36</sup> Dodd-Frank and MiFID II both

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<sup>30</sup> *MiFID II—Why Is MiFID I Being Revised*, AUTHORITY FOR THE FIN. MKTS., [hereinafter AFM] <https://www.afm.nl/en/professionals/onderwerpen/mifid-2/introductie-herziening> [<https://perma.cc/6TKS-C8EU>].

<sup>31</sup> Eur. Comm’n, Proposal for a Regulation of the European Parliament and of the Council on Markets in Financial Instruments and Amending Regulation [EMIR] on OTC Derivatives, Central Counterparties and Trade Repositories (COD) No. 2011/0296, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0652&from=EN> (explaining the need for revision of MiFID).

<sup>32</sup> EC Press Release, *supra* note 25.

<sup>33</sup> *MiFID II Should Lead to More Transparent Markets*, DEUTSCHE BORSE AG (2013), <http://www.deutsche-boerse-cash-market.com/blob/1187444/2971648eba3e794ef1903031b178bb38/data/MiFIDII.pdf> [<https://perma.cc/69SL-F37J>] (declaring the EC released a final proposal for a second version of MiFID).

<sup>34</sup> EUR. SEC. & MKT. AUTH., *supra* note 2 (“MiFID and MiFIR will ensure fairer, safer, and more efficient markets and facilitate greater transparency for all participants. New reporting requirements and tests will increase the amount of information available, and reduce the use of dark pools and OTC trading.”).

<sup>35</sup> *MiFID II/MiFIR Series*, NORTON ROSE FULBRIGHT (Apr. 2014), <http://www.nortonrosefulbright.com/knowledge/publications/115289/mifid-ii-mifir-series#autofootnote3> [<https://perma.cc/A42U-T4XV>].

<sup>36</sup> Paige Long, *EU-US Regulators Close to Reaching Equivalence Decision*, LAW360 (Sept. 20, 2017), <https://www-law360-com.ezproxy.bu.edu/articles/>

amend provisions in light of the financial crisis, especially regarding changes in the regulation of derivative markets.<sup>37</sup> For example, they both impose clearing obligations and risk mitigation techniques, trade reporting, registration requirements for clearing organizations, and new trade execution requirements.<sup>38</sup>

Comparing MiFID and MiFID II, MiFID II is wider reaching.<sup>39</sup> It expands the scope of coverage to derivatives, expands the definition of “trading venue,” creates stricter policies, and unifies regulators to decrease ambiguities.<sup>40</sup> In particular, derivatives that are sufficiently liquid and available for trading on at least one trading venue must be traded on authorized venues.<sup>41</sup> These authorized venues are regulated markets, multilateral trading facilities (MTFs), organized trading facilities (OTFs), and equivalent third-country trading venues.<sup>42</sup> MTFs and OTFs bring together buyers and sellers to facilitate trades.<sup>43</sup> This requirement is meant to provide transparency<sup>44</sup> and

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965868/eu-us-regulators-close-to-reaching-equivalence-decision (drawing a comparison between MiFID II and Dodd-Frank).

<sup>37</sup> EC Press Release, *supra* note 25 (“Like the Dodd-Frank Act . . . the review of MiFID both amends provisions already in force and adds to them in light of the financial crisis and other market developments. The most visible area of common ground concerns the overhaul of regulation of derivative markets . . .”).

<sup>38</sup> Memorandum from Hogan Lovells, James Doyle et al., *Summary of Key EU and U.S. Regulatory Developments Relating to Derivatives*, 1, 4 (June 2017), <https://www.hoganlovells.com/~media/hogan-lovells/pdf/2017-general-pdfs/eu-us-derivatives-brochure-june-2017-v1.pdf> [https://perma.cc/AD47-ZWXJ].

<sup>39</sup> Ron Finberg, *MiFID II vs MiFIR: Are They the Same Thing or Different?*, CAPPITECH (July 30, 2017), <http://www.cappitech.com/blog/mifid-ii-vs-mifir-thing-different/> [https://perma.cc/QFK8-MZ3F].

<sup>40</sup> *Id.*

<sup>41</sup> Press Release, Eur. Sec. & Mkt. Auth., ESMA Finalises MiFID II’s Derivatives Trading Obligation (Sept. 29, 2017), <https://www.esma.europa.eu/press-news/esma-news/esma-finalises-mifid-ii%E2%80%99s-derivatives-trading-obligation> [https://perma.cc/54NP-DE9W] [hereinafter ESMA Press Release]; Shanny Basar, *Equivalence Becoming Urgent*, BLOOMBERG (Oct. 4, 2017), <https://www.bloomberg.com/professional/blog/equivalence-becoming-urgent/> [https://perma.cc/23X9-UUHS].

<sup>42</sup> ESMA Press Release, *supra* note 41.

<sup>43</sup> Int’l Swaps & Derivatives Ass’n, *Leap to MiFID II*, 3 ISDA Q. 1, 12 (Nov. 2017), <https://www.isda.org/a/0IKEE/IQ-ISDA-Quarterly-November-2017.pdf> [hereinafter ISDA] (“A [MTF] is a platform introduced by the original MIFID requirements, which brings together multiple buyers and sellers of a

reflects the G-20's 2009 commitment to trade over-the-counter derivatives on electronic platforms.<sup>45</sup> The United States met this commitment with Dodd-Frank's implementation of swap execution facilities (SEFs).<sup>46</sup> SEFs ensure derivatives were traded on a CFTC-registered facility.<sup>47</sup>

But the requirement that derivatives be traded on authorized venues also causes a potential problem with trading between the EU and third-party countries, including the United States.<sup>48</sup> MiFID II regulations require transactions completed on an EU-regulated platform occur on the EU-regulated platform or a foreign venue deemed equivalent.<sup>49</sup> If the EU and U.S. authorities failed to agree on an equivalence ruling, EU investment firms would be unable to participate in American markets, even though European markets are less liquid.<sup>50</sup> For example, without an equivalence decision, fund managers "would have to buy or sell shares in Google parent Alphabet or Amazon via their less liquid listings in Frankfurt, rather than the main listing on the Nasdaq in New York."<sup>51</sup> This regulation thus creates great complex-

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particular financial instrument in a way that results in a trade . . . OTFs will be permitted to use discretion when matching buyers and sellers.").

<sup>44</sup> See ESMA Press Release, *supra* note 41.

<sup>45</sup> ISDA, *supra* note 43.

<sup>46</sup> *Id.* ("The US Dodd-Frank Act brought [SEFs] into existence in 2013 to meet the electronic platform commitment, but it has taken the EU until now to follow suit.").

<sup>47</sup> Stephen Humenik & Uttara Dukkupati, *A Big Step Toward Harmonizing Swap Trading Markets*, LAW360 (Feb. 1, 2018), <https://www-law360-com.ezproxy.bu.edu/articles/1007375/a-big-step-toward-harmonizing-swap-trading-markets>.

<sup>48</sup> Basar, *supra* note 41 ("Market participants warned that US and [EU] entities may not be able to transact certain derivatives in January if there is no decision on the equivalence of trading venues . . . .")

<sup>49</sup> Brush, *supra* note 4 ("[T]he new MiFID rules state that if a stock is traded on an EU-regulated platform, EU investment firms must do all their transactions there or on a foreign venue deemed equivalent.").

<sup>50</sup> Philip Stafford, *EU-US MiFID II Accord Will Go Down to the Wire, Official Warns*, FIN. TIMES (2017), <https://www.ft.com/content/b62df3fa-9e05-11e7-8cd4-932067fbf946>.

<sup>51</sup> Philip Stafford, *Three Challenges Facing Investors Ahead of MiFID II*, FIN. TIMES (Aug. 24, 2017), <https://www.ft.com/content/d4d362ee-8727-11e7-8bb1-5ba57d47eff7>.

ity<sup>52</sup> which needed to be resolved by an equivalence decision before MiFID went into effect.<sup>53</sup>

### C. The Purpose of Equivalence

#### 1. EU Equivalence Overview

The EU may deem certain non-EU regulatory regimes equivalent to its own.<sup>54</sup> If a country is not deemed equivalent, it will not be able to trade with EU investment firms.<sup>55</sup> EU third-country equivalence decisions assessments began with the goal of facilitating cross-border financial activities.<sup>56</sup> The EC stated these equivalencies “are a core element of the Commission’s international strategy for financial services.”<sup>57</sup> The goals of equivalence include balancing financial stability and investor protection with open and integrated markets as well as promoting international regulatory standards.<sup>58</sup> Furthermore, equivalence should achieve reduced overlaps in compliance, a less burdensome prudential regime, and a wider range of investor services.<sup>59</sup>

The EC, with advice from the three European Supervisory Authorities,<sup>60</sup> conducts an assessment of a third-country’s legal and

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<sup>52</sup> Johannes Frey-Skött, *What MiFID II Means for Non-EU Trading Firms and Venues*, ITIVITI (Oct. 10, 2017), <https://www.itiviti.com/itiviti-talks/what-mifid-ii-means-for-non-eu-trading-firms-and-venues/> [<https://perma.cc/4WMX-CUCP>].

<sup>53</sup> See also Stafford, *supra* note 50.

<sup>54</sup> *Recognition of Non-EU Financial Frameworks (Equivalence Decisions)*, EUROPEAN COMMISSION, [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions_en) [<https://perma.cc/VC5N-9ADF>] (last visited Feb. 16, 2018).

<sup>55</sup> See also Stafford, *supra* note 51.

<sup>56</sup> See Eur. Comm’n, Working Document, *EU Equivalence Decisions in Financial Services Policy: An Assessment 4* (2017) [https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017\\_en.pdf](https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf) [<https://perma.cc/SG7J-XSN9>] (“Appropriately regulating and supervising financial activities in a cross-border context has been an important challenge for the European Union . . .”).

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> A. Margerit, M. Magnus & B. Mesnard, *Third-country Equivalence in EU Banking Legislation*, EUR. PARL. BRIEFING (PE 587.369) 1, 4 (2017), <http://www.>

supervisory framework to render an equivalence decision.<sup>61</sup> The assessment process is based on a proportionality and risk-based approach.<sup>62</sup> The EC first identifies risks in the EU financial system that may result from exposure to a third-country's framework.<sup>63</sup> The EC then verifies the third-country's compliance with the equivalence criteria and applies the criteria in a proportionate way to the identified risks.<sup>64</sup> These risks are the focus of the equivalence decision, but other factors are considered.<sup>65</sup>

In order to determine an equivalence decision, the EC considers four factors.<sup>66</sup> First, whether the markets have effective authoriza-

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europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL\_BRI(2016)587369\_EN.pdf [<https://perma.cc/7ZKS-4RFC>] (stating the European Supervisory Authorities (EBA, EIOPA, and ESMA) advise the EC on equivalence assessments); see Regulation 1093/2010, of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority European Banking Authority, amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, 2010 O.J. (L 331/12); Regulation 1094/2010, of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, 2010 O.J. (L 331/49); Regulation 1095/2010, of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, 2010 O.J. (L 331/84).

<sup>61</sup> Directive 2016/1034, of the European Parliament and of the Council of 23 June 2016 amending Directive 2014/65/EU on markets in financial instruments, 2016 O.J. (L 175/8) (amending Directive 2014/65/EU Article 25(4) to include assessing the legal and supervisory framework of a third country to determine equivalence decisions).

<sup>62</sup> Nicolas Dorgeret, Willemijn de Jong, Doris Kolassa & Katharina Krell, Equivalence Decisions Under the Markets in Financial Instruments Directive and Regulation (MiFID II/MiFIR), EUR. PARL. BRIEFING (PE 600.785) (2018), [http://www.europarl.europa.eu/cmsdata/136768/ECON\\_Scrutiny\\_Paper%20MiFIDII\\_and\\_MiFIR\\_%20Equivalence\\_and\\_PSD2.pdf](http://www.europarl.europa.eu/cmsdata/136768/ECON_Scrutiny_Paper%20MiFIDII_and_MiFIR_%20Equivalence_and_PSD2.pdf) [<https://perma.cc/HGF6-LCQR>] (explaining that the examination process is based on proportionality and risk-based approach).

<sup>63</sup> Eur. Comm'n, *supra* note 56 at 5–6.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Commission Implementing Decision 2017/2320, 2017 O.J. (L 331/94).

tion, supervision, and enforcement on an ongoing basis.<sup>67</sup> Second, whether the markets have clear and transparent rules for securities so the securities are traded fairly, efficiently, and are freely negotiable.<sup>68</sup> Third, whether security issuers are subject to information requirements to ensure a high level of investor protection.<sup>69</sup> Fourth, whether there is prevention of market abuse from insider dealing and market manipulation.<sup>70</sup>

## 2. MiFID II and Equivalence

MiFID II requires an equivalence decision in order to allow market transactions to continue on all platforms and prevent double-reporting of trades.<sup>71</sup> Regarding U.S. and EU trades, an equivalence decision would “replace the more arduous process of functional equivalence whereby the U.S. vets EU trading venues individually against U.S. rules.”<sup>72</sup> Without an equivalence decision, it is possible a trade allowed on a SEF under Dodd-Frank and on an EU trading venue under MiFID II would not be able to occur because the trade would not satisfy U.S. and EU requirements.<sup>73</sup> This would place EU firms at a competitive disadvantage in other countries because those countries would trade on their own trading venues or bilaterally.<sup>74</sup> However, under the equivalence decision, both U.S. and EU parties could trade on an European OTF or MTF or an American SEF.<sup>75</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Long, *supra* note 36 (“Once an equivalence determination is made, market participants in the two regions will be able to maintain transatlantic trading relationships based on wherever they find liquidity and market makers, and to continue executing trades on platforms in each jurisdiction. It will also prevent unnecessary double-reporting of trades in each region once MiFID comes into force.”).

<sup>72</sup> *Id.*

<sup>73</sup> ISDA, *supra* note 43, at 13.

<sup>74</sup> *Id.* at 14.

<sup>75</sup> *See id.* at 13–14 (“An equivalence decision would ideally mean the [CFTC] and [EC] would mutually recognise and accept the rules in each other’s jurisdictions, so a US counterparty could still satisfy its regulatory obligations by trading on an OTF or MFT rather than a SEF, and vice versa.”).

## D. Steps Towards Equivalence

### 1. *The First Step: Proposal—The Common Approach*

The first step towards an equivalence decision occurred on October 13, 2017 when the CFTC and the EC announced a mutual approach for derivatives trading venues.<sup>76</sup> “The Commodity and Exchange Act (CEA) requires counterparties to execute certain swap transactions on a designated contract market (DCM), a registered [SEF] or a SEF that is exempt from registration.”<sup>77</sup> Exemptions are possible if the facility is “subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in the foreign board of trade’s home country.”<sup>78</sup> The proposal intends that the EC recognize CFTC-authorized SEFs and DCMs as equivalent under MiFID II and that the CFTC allow an exemption for EU-authorized trading venues from registering with the CFTC.<sup>79</sup> Additionally, the proposal sets out the governing determination of equivalence with the EC assessing the standards under MiFID II and the CFTC assessing under CEA Section 5h(g).<sup>80</sup> Finally, the proposal highlights the next steps to implement the common approach. It states the CFTC and EC

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<sup>76</sup> Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Comparability Determination on EU Margin Requirements and a Common Approach on Trading Venues (Oct. 13, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7629-17> [<https://perma.cc/2X8D-DH66>] (announcing CFTC and EC determinations on comparability and equivalence of margin requirements for uncleared swaps, as well as a common approach regarding certain authorized derivative trading venues).

<sup>77</sup> Memorandum from Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, Mark D. Young et al., CFTC and European Commission Make Progress on Cross-Border Agreements (Oct. 18, 2017) [hereinafter Skadden Memo], <https://www.skadden.com/insights/publications/2017/10/cftc-and-european-commission-progress> [<https://perma.cc/BF34-Z6K9>].

<sup>78</sup> 7 U.S.C § 6 (2006).

<sup>79</sup> Skadden Memo, *supra* note 77.

<sup>80</sup> Joint Statements of Vladis Dombrovskis, Vice President, Eur. Comm’n, and J. Christopher Giancarlo, Chairman, Commodities Futures Exch. Comm’n, The United States Commodity Futures Trading Commission and the European Commission: A Common Approach on Certain Derivatives Trading Venues (Oct. 13, 2017), [https://ec.europa.eu/info/sites/info/files/171013-joint-statement-ec-cftc\\_en.pdf](https://ec.europa.eu/info/sites/info/files/171013-joint-statement-ec-cftc_en.pdf) [<https://perma.cc/ZJ2W-TH8N>].

will notify each other of a list of eligible SEFs and DCMs and MiFID II to become comparable trading venues.<sup>81</sup>

2. *The Second Step: EC and CFTC Mutual Recognition of Derivatives Trading Venues*

On December 5, 2017, the EC adopted an equivalence decision recognizing 23 SEFs and 14 DCMs as eligible for compliance with EU trading requirements<sup>82</sup> as they fulfilled the EC's four requirements for equivalence.<sup>83</sup> As a result of the EC's decision and following the common approach, the CFTC then recommended the CFTC issue an exemption from its SEF registration for the EU's MTFs and OTFs.<sup>84</sup> On December 8, 2017, the CFTC issued this exemption order for 10 MTFs and six OTFs authorized in the EU from the CFTC's SEF registration requirement.<sup>85</sup> The CFTC found MiFID II established regulatory frameworks for MTFs and OTFs and thus satisfied the CEA exemption standard.<sup>86</sup> The list may be amended to include additional MTFs and OTFs provided they satisfy the CEA standards.<sup>87</sup> The order became effective January 3, 2018 when MiFID II went into effect.<sup>88</sup> Once in effect, the CFTC exemption represented the first time the agency allowed U.S. swap transactions to occur on non-U.S. trading venues.<sup>89</sup> As CFTC Chairman J. Christopher Giancarlo noted, these

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<sup>81</sup> *Id.*

<sup>82</sup> Commission Implementing Decision, 2017/2238, 2017 O.J. (L 320/11).

<sup>83</sup> *Id.*

<sup>84</sup> EU and CFTC Joint Statement, *supra* note 12.

<sup>85</sup> CFTC Order of Exemption (Dec. 8, 2017) [hereinafter CFTC Order of Exemption],

[http://www.cftc.gov/idc/groups/public/@requestsandactions/documents/ifdocs/mtf\\_otforder12-08-17.pdf](http://www.cftc.gov/idc/groups/public/@requestsandactions/documents/ifdocs/mtf_otforder12-08-17.pdf) [<https://perma.cc/JN4G-5Z4Y>] (finding the "regulatory frameworks for MTFs and OTFs satisfy the statutory standard . . . for granting an exemption from the SEF registration requirement.").

<sup>86</sup> Humenik & Dukkupati, *supra* note 47.

<sup>87</sup> CFTC Order of Exemption, *supra* note 85.

<sup>88</sup> *Id.*

<sup>89</sup> Guy Dempsey Jr. et al., *EU and CFTC Implement Mutual Recognition of Derivatives Trading Venues*, CORP. & FIN. WKLY. DIG. (Dec. 8, 2017), <https://www.corporatefinancialweeklydigest.com/2017/12/articles/eu-developments/eu-and-cftc-implement-mutual-recognition-of-derivatives-trading-venues/> ("[T]he Exemption Order . . . will represent the first time that the CFTC will have permitted US persons to transact in swaps on non-US trading venues.").

equivalence decision announcements allow the CFTC and EU “to work together to defer to each other’s regulatory frameworks.”<sup>90</sup>

### 3. *The Last Step: EC Recognition of US Legal and Supervisory Frameworks*

On December 13, 2017, the EC issued a second equivalence decision regarding stock exchanges in the US, Australia, and Hong Kong.<sup>91</sup> For the US, the decision deemed 21 US NSEs, including Nasdaq and the New York Stock Exchange, and 33 ATSS, including Barclays ATS and J.P. Morgan ATS, as equivalent under MiFID II.<sup>92</sup> The decision allows European investment firms to access liquidity in dual listed shares outside of the EU.<sup>93</sup> Dombrovskis stated that this recognition will increase the EU’s competitive position because it will now have access to major international trading venues.<sup>94</sup> He highlighted that the equivalence decision “is an important step in building a vibrant capital markets union.”<sup>95</sup>

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<sup>90</sup> Press Release, Commodity Futures Trading Comm’n, CFTC Approves Exemption from SEF Registration Requirement for Multilateral Trading Facilities and Organised Trading Facilities Authorized Within the EU (Dec. 8, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7656-17> [<https://perma.cc/RJD5-AVM4>] [hereinafter Press Release CFTC 12-8-17].

<sup>91</sup> Francesco Guarascio, *EU Clears Deal on U.S. Stock Exchanges Removing Major MiFID II Hurdle*, REUTERS (Dec. 13, 2017), <https://www.reuters.com/article/us-eu-mifid-usa/eu-clears-deal-on-u-s-stock-exchanges-removing-major-mifid-ii-hurdle-idUSKBN1E723U> [<https://perma.cc/PV4P-DA5U>] (reporting that the EC reached equivalence decisions with the US, Australia, and Hong Kong).

<sup>92</sup> Commission Implementing Decision 2017/2320, *supra* note 67 (concluding that the listed NSEs and ATSS are equivalent under Directive 2014/65/EU).

<sup>93</sup> Guarascio, *supra* note 92 (“Under the adopted decision, European ‘investment firms can continue to access the liquidity in dual listed shares outside the EU’ in the authorized trading venues . . .”).

<sup>94</sup> Paige Long, *US Stock Exchanges Get All Clear on MiFID II Equivalence*, LAW360 (Dec. 13, 2017), <https://www-law360-com.ezproxy.bu.edu/articles/994317/print?section=capitalmarkets>.

<sup>95</sup> *Id.*

#### 4. *Implementation of the Equivalence Decisions*

As of February 2018, “one bête noir has yet to raise its head.”<sup>96</sup> Although it may be too early to know the outcome, liquidity overall has functioned smoothly.<sup>97</sup> There has not been any regulatory arbitrage between the EU and United States, even though some market watchers had believed trading would shift to the United States after MiFID II’s implementation.<sup>98</sup> But in fact, MTF volumes have actually risen 10–15 percent.<sup>99</sup> This increase illustrates the equivalence between the CFTC and EC is working, since traders view MTF and OTF European platforms as the same as SEFs.<sup>100</sup> Moreover, European client volume on SEFs have doubled.<sup>101</sup> Since SEFs are typically based in the United States, this doubling shows the equivalence decisions have benefited U.S. traders.<sup>102</sup>

#### E. Criticism

A critical opponent of MiFID II is the Government of the United Kingdom (UK),<sup>103</sup> criticism stemming from political considerations.<sup>104</sup> One problem is that the EC only grants MiFID II equivalence

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<sup>96</sup> Rob Daly, *Regulatory Arbitrage Not an Issue*, MKTS. MEDIA (Feb. 5, 2018), <http://marketsmedia.com/regulatory-arbitrage-issue/> [<https://perma.cc/LX4V-EKGD>].

<sup>97</sup> Dan Butcher, *Why U.S. Traders Could Benefit from MiFID II*, EFIN. CAREERS (Feb. 2, 2018), <https://news.efinancialcareers.com/us-en/307297/mifid-ii-trade-execution-sef-mtf/> [<https://perma.cc/DYQ7-TTEU>] (quoting Sonali Das Theisen of Citi as stating that “it’s too early to really know the outcome, but that in credit trading at least, liquidity has ‘functioned fairly smoothly’”).

<sup>98</sup> Daly, *supra* note 96.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Butcher, *supra* note 97.

<sup>102</sup> *Id.* (“With SEFs typically based in the U.S., this looks like good news for U.S. traders.”).

<sup>103</sup> Kirstene Baillie et al., *Brexit: Issues for MiFID Firms*, FIELD FISHER (Sept. 2016), <http://www.fieldfisher.com/media/4664514/brexit-issues-for-mifid-firms.pdf> [<https://perma.cc/CE6P-26F4>] (“MiFID firms benefit from MiFID I and, prospectively, MiFID II passports . . . . If and when the UK becomes a ‘third country,’ UK firms would have limited options.”).

<sup>104</sup> See Niamh Mulholland, *Regulatory News—Brexit*, KPMG (June 20, 2017), <https://home.kpmg.com/ie/en/home/insights/2017/06/regulatory-news-brexit.html> [<https://perma.cc/77Q3-4Y5A>].

to countries, not individual firms.<sup>105</sup> When the UK leaves the EU, it will become a third country and will need to be deemed equivalent in order to continue to trade with the EU.<sup>106</sup> Because of the uncertainty surrounding Brexit, “existing UK financial services firms will still have to wait for the UK to receive a positive assessment before they can avail themselves of the equivalence mechanism in question.”<sup>107</sup> But equivalence cannot be determined until after the regulatory regime of a post-Brexit UK.<sup>108</sup> Furthermore, “equivalence can be revoked at only 30 days’ notice, making medium- and long-term business planning difficult.”<sup>109</sup>

The EU’s decision regarding Swiss stock exchanges serves as an example for the UK.<sup>110</sup> The EC determined that Swiss exchanges will receive one year of access to the single market, unlike the unlimited equivalence that the United States received.<sup>111</sup> In defending its time limited equivalence decision, the EC noted that equivalence is not a right to be claimed by non-EU countries.<sup>112</sup> In regard to Switzerland, the EC cited ongoing political negotiations making it necessary to condition financial-services firms’ market access on broader progress.<sup>113</sup> The UK must consider this justification because, similar to Switzerland’s trade talks, the UK’s trade talks may be tied to equivalence decisions.<sup>114</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> John Paul Salter, *Passporting and Equivalence: Brexit’s Impact on the City of London*, THE UK IN A CHANGING EUROPE (Apr. 18, 2017), <http://ukandeu.ac.uk/explainers/passporting-and-equivalence-the-impact-of-brexit-on-the-city-of-london/> [<https://perma.cc/V4MP-65FR>].

<sup>107</sup> Mulholland, *supra* note 104.

<sup>108</sup> Salter, *supra* note 106 (“[T]he new arrangement would rest on a decision on the similarity between the regulatory regime in a post-Brexit UK, and that in place in the EU.”).

<sup>109</sup> *Id.*

<sup>110</sup> Alexander Weber, *EU’s MiFID Deal on Swiss Exchanges Sends Signal for Brexit*, BLOOMBERG (Dec. 21, 2017), <https://www.bloomberg.com/news/articles/2017-12-21/eu-s-mifid-deal-on-swiss-exchanges-sends-signal-for-brexit-talks> [<https://perma.cc/T2DT-UCF9>].

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (“[I]f financial services are included in the trade talks, single-market access for clearinghouses, exchanges, broker-dealers and other firms would be thrown into the grand give-and-take . . .”).

## **F. Conclusion**

In conclusion, the equivalence decisions announced in December 2017 were important for a smooth transition in putting into force MiFID II. With no disruptions in trading between the EU and United States, concerns surrounding transactions between these two markets have mostly ceased. Adverse or unforeseen effects have yet to materialize from the EU-US equivalence decisions. However, it remains to be seen how MiFID II and the Brexit movement interact. The uncertainty in the UK makes this outcome less clear and will possibly result in these unforeseen consequences that will need to be addressed after the UK leaves the EU.

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