

MiFID 2 / MiFIR GOLD PLATING TRACKER

Legend:

- HO & LB** Gold plating measures in relation to rule implementation applies to both a head office and a local MiFID branch operating in this jurisdiction
- HO Only** Gold plating measures in relation to rule implementation does not apply to a local MiFID branch in this jurisdiction. Only applies where Head Office domiciled in this jurisdiction (prudential matter over which host state has no jurisdiction)
- ✓ (rule) Goldplating measures in place in relation to rule implementation itself
- ✓ (firm) Goldplating measures in place in relation to the types of firms to which the rule is applied (e.g. application to AIFMs/UCITS management companies that do not hold MiFID top up permissions, third country firms without a local branch, Article 3 firms)
- C** **Consultation – national measures in progress**
- × (rule) No goldplating measures in place in relation to rule implementation itself
- × (firm) No goldplating measures in place in relation to the types of firms to which the rule is applied
- I** Indicative only. Based on local MiFID1 gold plating (MiFID2 implementation is not yet finalised)
- F** Final. Based on final MiFID2 implementation

For further information, please see:

MiFID2 Manager Goldplating and Implementation Status Maps
MiFID2 Manager Goldplating Tables

This table amalgamates the information contained in the MiFID2 Manager Goldplating tables and illustrates the areas in which EEA jurisdictions have gold plated MiFID2 (or in EEA jurisdictions where MiFID2 implementation is not yet finalised, the areas in which those jurisdictions have gold plated MiFID1 which may provide an indication as to likely gold plating under MiFID2). As the position under MiFID2 becomes clearer this tracker will be updated.

	UK (F)	Germany (F)	Netherlands (I)	France (I)	Italy (I)	Luxembourg (I)	Belgium (I)	Ireland (I)	Spain (I)
Services and Activities (Core and Ancillary)	× (rule / firm)	×	×	×	×	×	✓ HO Only	×	×
Financial Instruments – Definitions	× (rule / firm)	×	×	×	×	×	×	×	×
Retail / Professional Client Classification	✓ (rule) HO & LB × (firm)	×	×	×	✓ HO Only	×	×	×	×
Senior Management	× (rule / firm)(but additional SMCR requirements)	×	×	×	×	×	×	×	×
Organisational Requirements	× (rule) (but retention of some pre-existing requirements) HO & LB ✓(firm)	×	×	×	×	×	×	×	×
Record Keeping	× (rule)	×	×	×	×	×	×	×	×

	UK (F)	Germany (F)	Netherlands (I)	France (I)	Italy (I)	Luxembourg (I)	Belgium (I)	Ireland (I)	Spain (I)
	✓(firm)								
Recording of Telephone Conversations	* (rule) ✓(firm)	*	*	*	*	*	*	*	*
Client Assets and Title Transfer Collateral Arrangements	* (rule) (but retention of some pre-existing requirements) HO Only ✓(firm)	*	*	*	*	*	*	✓ HO Only	*
Algorithmic Trading / High Frequency Trading	*	*	*	✓ HO Only	*	*	*	*	*
Direct Electronic Access	*	*	*	*	*	*	*	*	*
MTF	*	*	*	*	*	*	*	*	*
OTF	*	*	*	*	*	*	*	*	*
Regulated Markets	*	*	*	*	*	*	*	*	*
Conflicts of Interest	* (rule) ✓(firm)	*	*	*	*	*	*	*	*
Client's Best Interest Rule	*	*	*	*	*	*	*	*	*
Product Governance – Manufacturers / Distributors	* (rule) (but some additional guidance provisions taken from previous FCA and FSA communications) HO & LB ✓(firm)	* (possibly unintentional) HO & LB	*	*	✓ HO & LB	*	✓ HO & LB	*	* HO & LB
Clear, Fair and Not Misleading Communications	* (rule/firm)	*	*	*	*	*	*	*	*
Information to Clients	* (rule) ✓ (firm)	*	*	*	*	*	*	*	✓ HO & LB
Client Agreements	*	*	*	*	*	*	*	*	*
Client Reporting	*	*	*	*	*	*	*	*	*
Inducements	✓ (rule) HO & LB ✓ (firm)	* (possibly unintentional) HO & LB	✓ HO & LB	✓ HO & LB	*	*	*	*	* HO & LB

	UK (F)	Germany (F)	Netherlands (I)	France (I)	Italy (I)	Luxembourg (I)	Belgium (I)	Ireland (I)	Spain (I)
Suitability and Appropriateness	* (rule) ✓ (firm)	*	*	*	*	*	*	*	*
Knowledge and Competence Requirements for the Provision of Investment Services	* (rule) (but retention of pre-existing TC requirements which go beyond minimum standards set by ESMA) ✓ (firm)	*	*	*	*	*	*	*	* HO & LB
Appropriateness Assessment	*	*	*	*	*	*	*	*	*
Best Execution	* (rule) ✓ (firm)	*	*	*	*	*	*	*	*
Client Order Handling	* (rule) ✓ (firm)	*	*	*	*	*	*	*	*
Tied Agents	* (rule / firm)	*	*	*	*	✓ HO Only	*	*	*
Eligible Counterparties	* (rule / firm)	*	*	*	*	✓ HO Only	*	*	*
Passporting	* (rule / firm)	*	*	*	*	*	*	*	*
Establishment of a Branch	* (rule / firm) (no intention to implement article 39 MiFiD2)	*	*	*	*	*	*	*	* HO & LB
Clearing and Settlement	* (rule / firm)	*	*	*	*	*	*	*	*
Trading Venues, Members & Participants – Synchronisation of Business Clocks	* (rule / firm)	*	*	*	*	*	*	*	*
Commodity Derivatives – Position Limits	* (rule / firm)	*	*	*	*	*	*	*	*
Position Reporting – Investment Firms	* (rule / firm)	*	*	*	*	*	*	*	*
Position Reporting – Trading Venues	* (rule / firm)	*	*	*	*	*	*	*	*
Data Reporting Services	* (rule / firm)	*	*	*	*	*	*	*	*
Pre-Trade Transparency Equity Instruments	* (rule / firm)	*	*	*	✓ HO Only	*	*	*	*

	UK (F)	Germany (F)	Netherlands (I)	France (I)	Italy (I)	Luxembourg (I)	Belgium (I)	Ireland (I)	Spain (I)
Post-Trade Transparency Equity Instruments	* (rule / firm)	*	*	*	✓ HO Only	*	*	*	*
Waivers for Equity Instruments	* (rule / firm)	*	*	*	*	*	*	*	*
Volume Cap Mechanism	* (rule / firm)	*	*	*	*	*	*	*	*
Pre-Trade Transparency Non-Equity Instruments	* (rule / firm)	*	*	*	✓ HO Only	*	*	*	*
Post-Trade Transparency Non-Equity Instruments	* (rule / firm)	*	*	*	✓ HO Only	*	*	*	*
Waivers for Non-Equity Instruments	* (rule / firm)	*	*	*	*	*	*	*	*
Availability of Data – Obligation to Make Pre / Post Trade Data Available	* (rule / firm)	*	*	*	*	*	*	*	*
Transparency for SIs and Firms Trading OTC – Making Public Firm Quotes	* (rule / firm)	*	*	*	*	*	*	*	*
Systematic Internalisers	* (rule / firm)	*	*	*	*	*	*	*	*
Post-Trade Disclosures – Shares, Depository Receipts, ETFs	* (rule / firm)	*	*	*	*	*	*	*	*
Post-Trade Disclosures – Bonds, Structured Finance Products, Emissions Allowances and Derivatives	* (rule / firm)	*	*	*	*	*	*	*	*
Retention of Information by Trading Venues	* (rule / firm)	*	*	*	*	*	*	*	*
Mandatory Trading Obligation – Investment Firms	* (rule / firm)	*	*	*	*	*	*	*	*
Mandatory Trading Obligation – Derivatives	* (rule / firm)	*	*	*	*	*	*	*	*
Transaction Reporting	* (rule / firm)	*	*	*	*	*	*	✓ HO & LB	*
Financial Instrument Reference Data	* (rule / firm)	*	*	*	*	*	*	*	*
Derivatives Trading	* (rule / firm)	*	*	*	*	*	*	*	*
FX Spot Contracts	* (rule / firm)	*	*	*	*	*	✓ HO & LB	*	*

	UK (F)	Germany (F)	Netherlands (I)	France (I)	Italy (I)	Luxembourg (I)	Belgium (I)	Ireland (I)	Spain (I)
Non-Discriminatory Clearing Access for Financial Instruments	* (rule / firm)	*	*	*	*	*	*	*	*
Product Intervention Powers	* (rule / firm)	*	*	*	Subject to consultation	*	✓ HO Only	*	*
Third Country Services	* (rule / firm)	*	*	*	*	*	*	*	*

A Note on Goldplating

Home/Host state split: The starting point under MiFID/MiFID2 is that the Home State has responsibility for a Head Office in its jurisdiction, and all branches in the EEA. However, by way of derogation from this rule, certain articles can fall within the jurisdiction of a host state – thus giving the host state competent authority the power over the EEA branch in that host state, rather than the Home State. These generally relate to investor protection measures (from the Directive these are: information to clients, suitability and appropriateness and reporting, best execution and client order handling) with prudential matters saved to the Home State.

A Member State can only gold plate matters and make them applicable to an EEA branch operating within their country, where the topics fall within those over which a host state can exercise jurisdiction as per Article 35(8) of the Directive. The above table shows where Member States have gold plated aspects of MiFID2 (or where MiFID2 has not yet been implementation, where those Members States have gold plating aspects of MiFID1, and therefore may introduce additional requirements in these areas under MiFID2, although much is still unknown), and the coding 'LB' stands for 'local MiFID branch' meaning that gold plating in these areas can impact branches in those jurisdictions because the topics fall within the articles mentioned in D Art 35(8).

It is still open to any Member State to gold plate other aspects of MiFID2 (subject to the notification requirement to ESMA), but any provisions which do not fall within their remit as host state will not apply to any EEA branches in their jurisdiction. The above table reflects these matters with the coding 'HO Only' – meaning that it is only where a firm has its head office in that jurisdiction that the measures will apply.

MiFID2 Manager Office Type column: 'EEAHO' only, where the provisions apply at Head Office level and to all EEA MiFID branches (as per the general rule). This means that Head Office policy can be adopted wholesale by all EEA branches. Where the column says EEAHO and EEAB, a host state has a discretion (should it chose to exercise it) to supervise a **branch** for certain discrete issues (as shown in 35(8) below). However, this column does also need to have EEAHO in it, because otherwise people using the Manager might incorrectly assume the provisions **only** apply to a branch – whereas of course they also apply to a Head Office operating in that jurisdiction.

The purpose of this table is to consider the application of MiFID2 to HO and LB entities. However, in relation to third country firms, the general position under MiFID2 in relation to third country firms is that such firms should not be treated more favourably than MiFID firms. We expect that many Member States will implement their MiFID2 rules so that the rules applicable to EEAHO will equally apply to third country firms operating in that Member State through a branch (for example the UK implementation does this in new GEN 2.2.22A). Please note that this table does not consider specifically the position of third country firm branches, but please see the Gold Plating Tables in the MiFID2 Manager main document.

Legal references

Recital (90) of the preamble to MiFID2 says:

“By way of derogation from the principle of home Member State authorisation, supervision and enforcement of obligations in respect of the operation of branches, it is appropriate for the competent authority of the host Member State to assume responsibility for enforcing certain obligations specified in this Directive in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch, and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.”

This is added to by Article 35(8):

Article 35(8). The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down in Articles 24, 25, 27, 28, of this Directive and Articles 14 to 26 of Regulation (EU) No 600/2014 and the measures adopted pursuant thereto by the host Member State where allowed in accordance with Article 24(12). The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 24, 25, 27, 28 of this Directive and Articles 14 to 26 of Regulation (EU) No 600/2014 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory.