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 **NORTON ROSE FULBRIGHT**

MiFID II Academy - Frankfurt

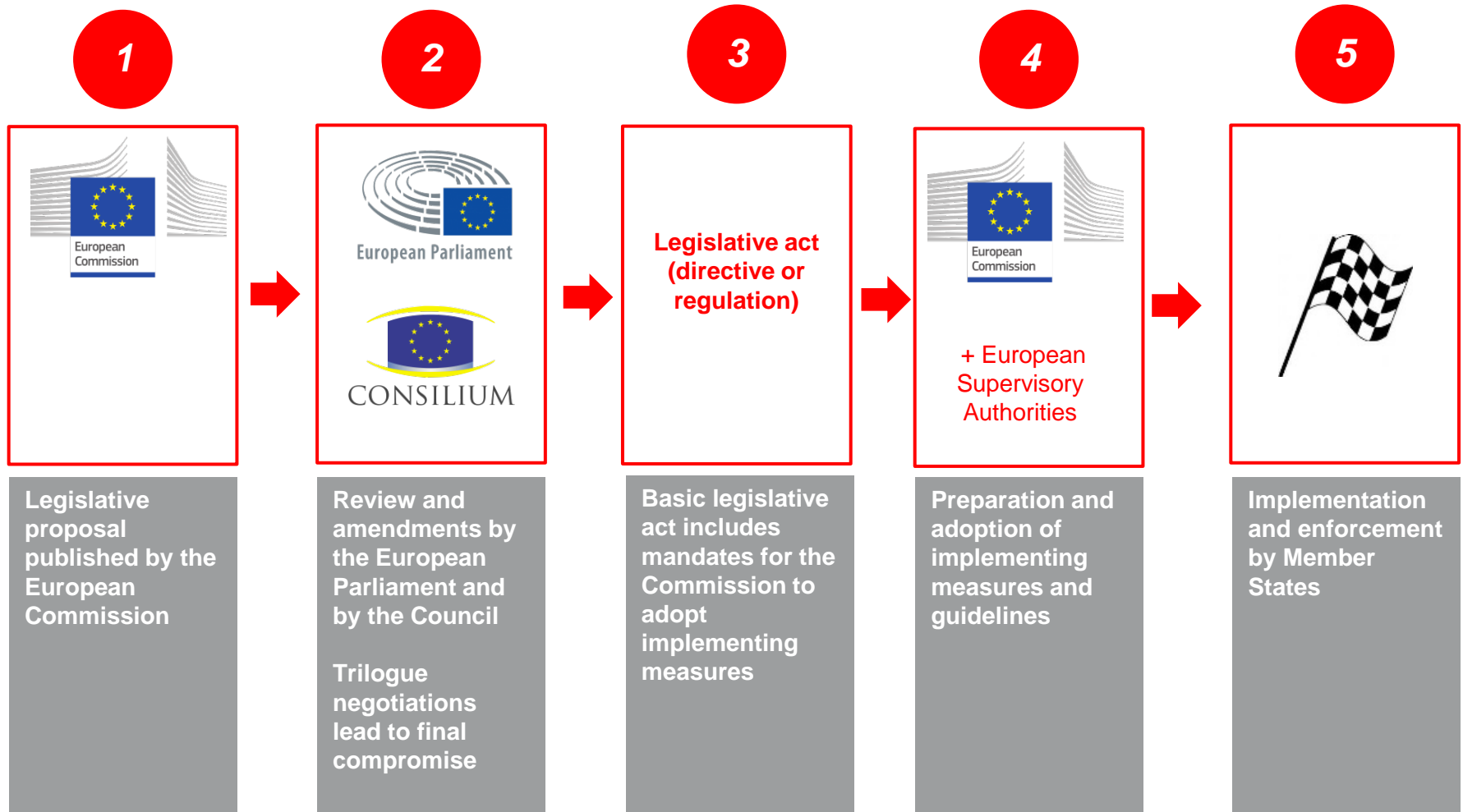
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Hannah Meakin and Imogen Garner

Norton Rose Fulbright LLP
24 November 2016

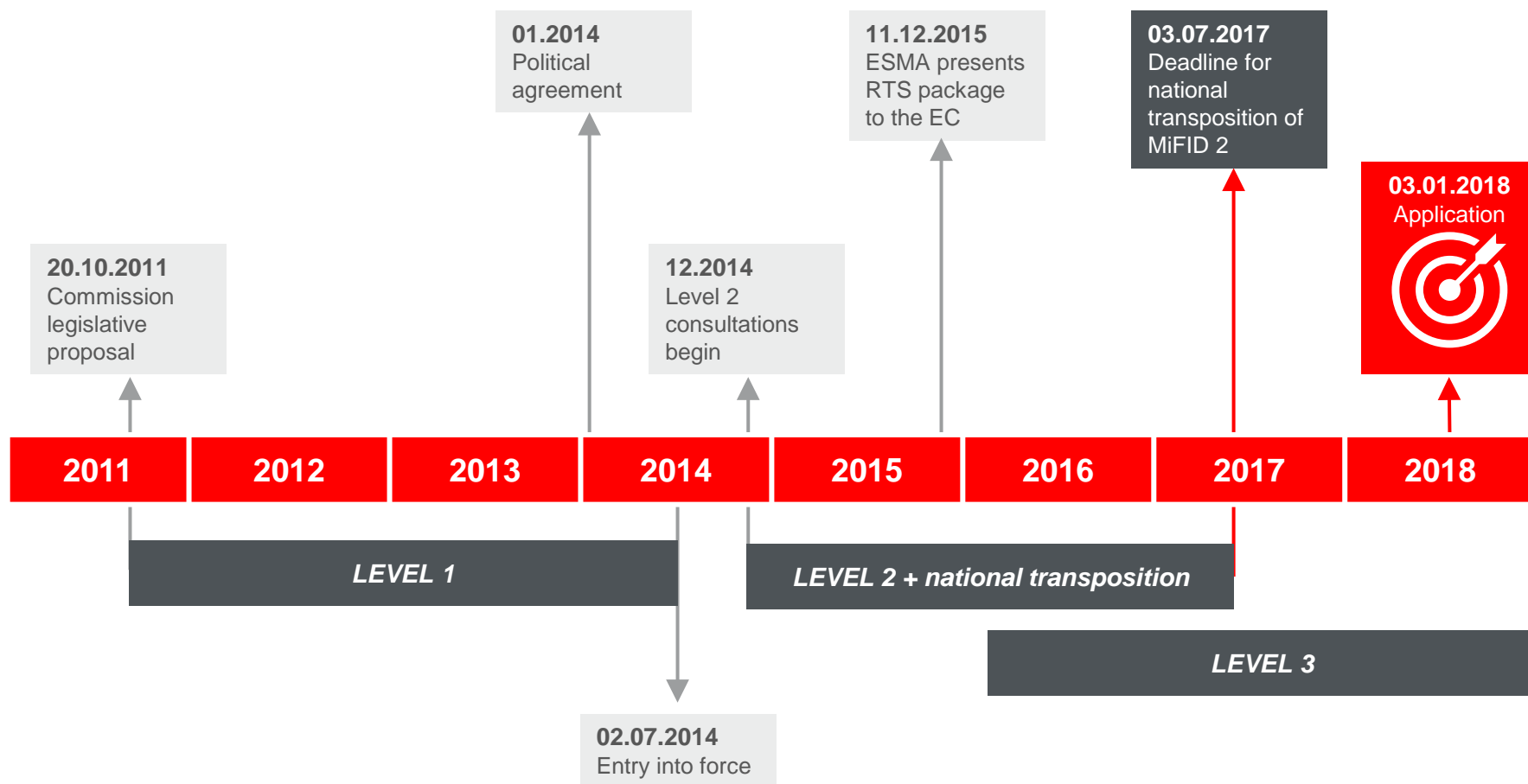
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Background and process

Legislative and regulatory process at a glance



MiFID 2 / MiFIR timeline



Legal instruments – directive v regulation

MiFID 2

Directive

- Requires transposition into national law
- Provides limited discretion and flexibility of application to Member States

MiFIR

Regulation

- Directly applicable – no national transposition required
- Usually more detailed, prescriptive than directives
- No discretion for Member States

Level 2 – Implementing measures / overview

Delegated Acts

- Implementing legislation which supplements the Level 1 text with greater detail
- Example: *Commission Delegated Regulation (EU) .../... supplementing MiFID 2 as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of MiFID 2*

Regulatory Technical Standards

- A form of delegated act on purely technical matters
- Example: *Commission Delegated Regulation (EU) .../... supplementing MiFIR with regards to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives*

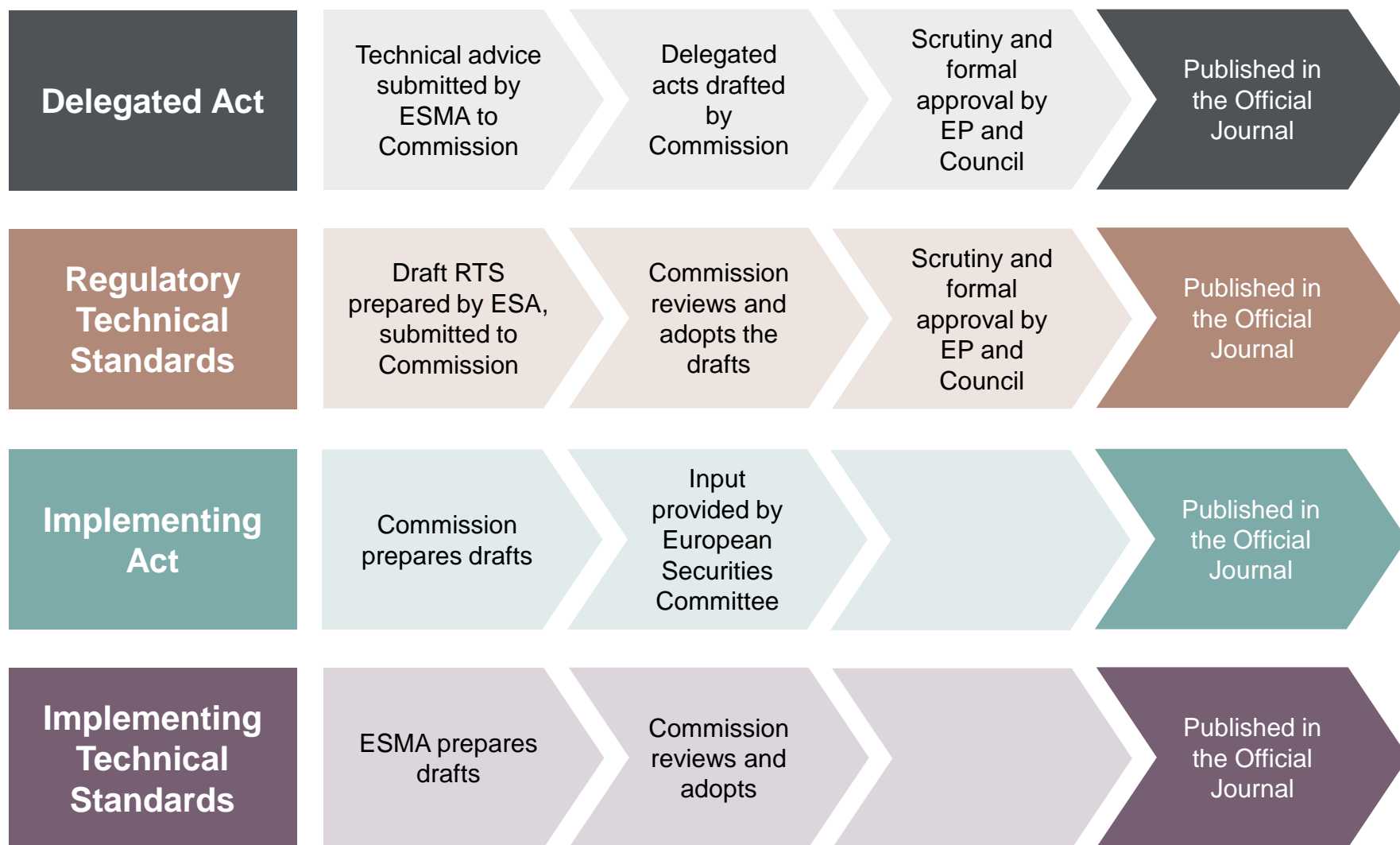
Implementing Acts

- Supplements Level 1 text to ensure harmonised implementation, non-political issues
- Example: *(future) Commission decision determining that third country trading venue is equivalent for the purpose of trading obligation for derivatives under MiFIR*

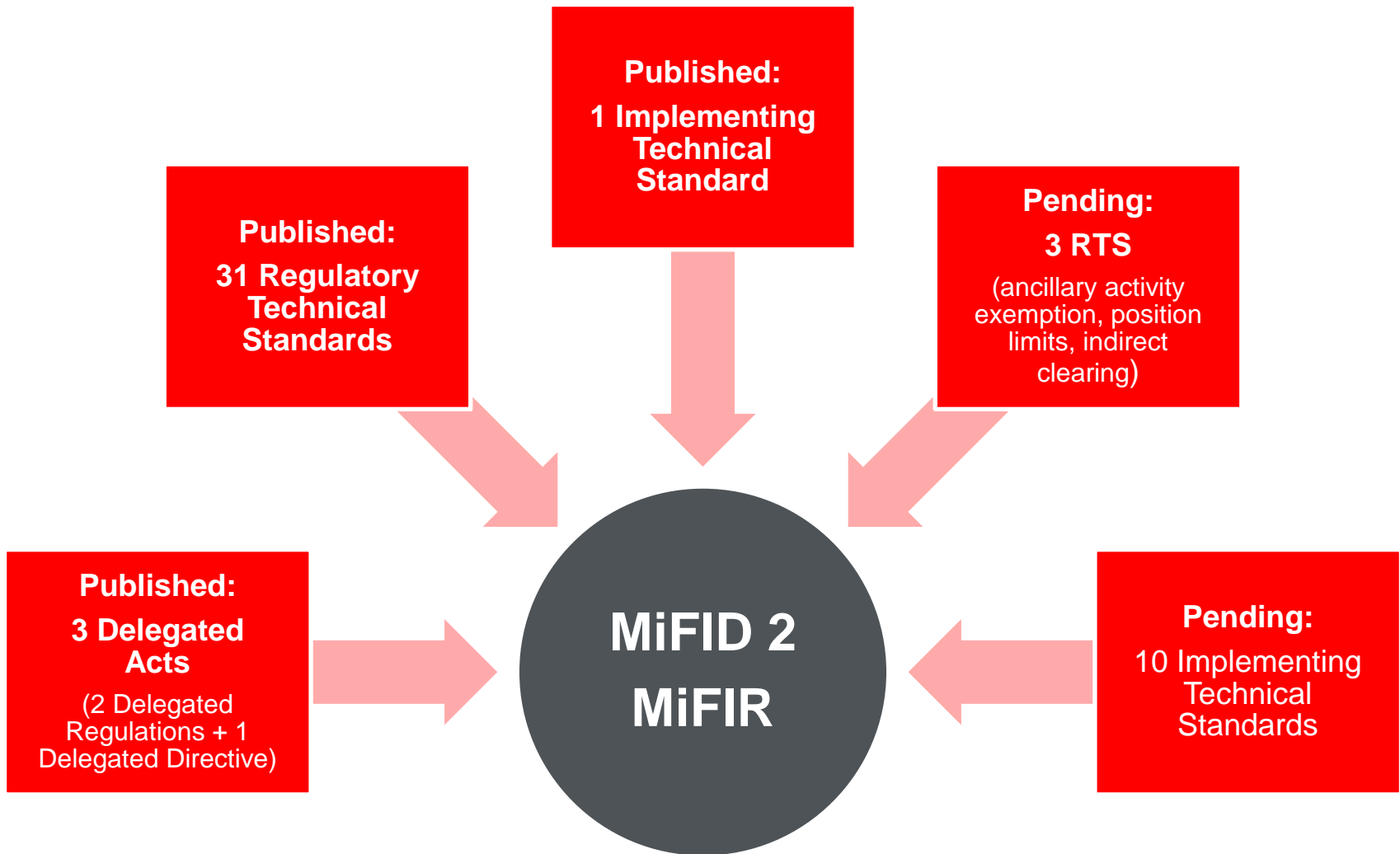
Implementing Technical Standards

- A form of implementing act on purely technical matters
- Example: *Commission Implementing Regulation (EU) 2016/824 of 25 May 2016 laying down implementing technical standards with regards to the content and format of the description of the functioning of MTFs and OTFs*

Level 2 – Process for MiFID 2 / MiFIR



Level 2 – Progress to date



Level 3 – Guidelines and Q&As

Guidelines

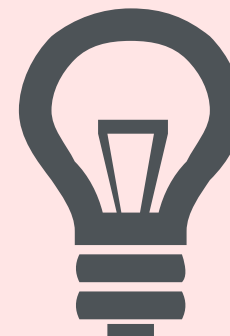
- Developed by ESMA and addressed to the national competent authorities (**NCA**s)
- Non-binding, NCAs must “comply or explain”
- Example: *Guidelines on transaction reporting, order record keeping and clock synchronisation*

Q&As

- Ongoing process – questions submitted directly to ESMA or via NCAs
- Over 300 questions across all MiFID 2/MiFIR issues received to date
- First sets of Q&As published on pre/post-trade transparency, SI regime and market structures

Purpose

- Practical guidance on implementation
- Coherent and efficient supervisory practices
- Harmonised interpretation of key regulatory issues



Background and process: German perspective

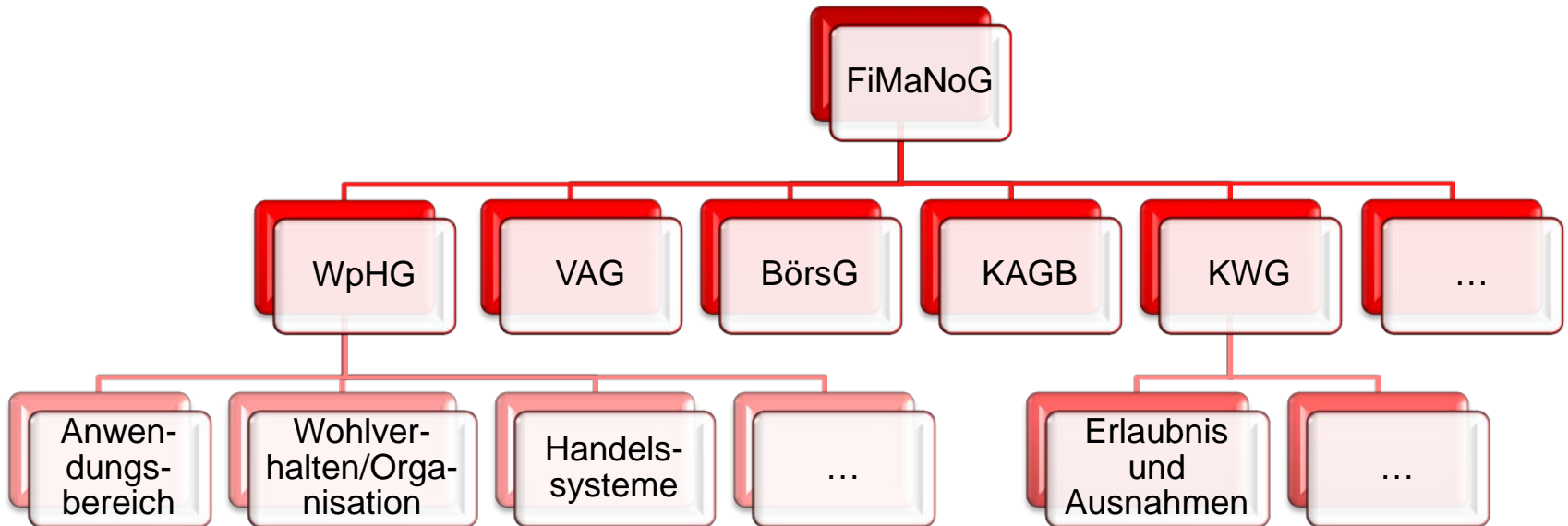
Grundlagen der Transformation

Rechtsetzungsakt: 2. Finanzmarktnovellierungsgesetz (2. FiMaNoG)

- Stand

- Referentenentwurf vom 28. September 2016
- Konsultationsfrist: abgelaufen am 28. Oktober 2016
 - Frist äußerst kurz bemessen für ca. 400 Seiten

2. FiMaNoG (Referentenentwurf)



Grundlagen der Transformation

Rechtsetzungsakt: 2. Finanzmarktnovellierungsgesetz (2. FiMaNoG)

- Angestrebtes Prinzip: 1:1-Umsetzung
 - Ist grundsätzlich erkennbar
 - Trotzdem Abweichungen von europäischen Vorgaben bzgl.
 - Begrifflichkeiten
 - Formulierungen
 - Inhalt

2. FiMaNoG: Unbestimmtheit und Unsicherheit!?

Viele unbeantwortete Fragen

- Wird es weitere Leitlinien geben?
- Was gilt bei Unklarheit/
Doppeldeutigkeit?
- Wie behält man die nötige Flexibilität in der Implementierungsphase?
- Zusatzpflichten: Welche haben Drittschutzcharakter i.S.v. § 823 (2) BGB?

Entscheidungen müssen getroffen werden

- Was sind die relevanten Kernfragen für das jeweilige Geschäftsmodell?
- Wann macht es Sinn, Entscheidungen zu treffen?
- Ist es besser der Erste zu sein oder sollte man Anderen folgen?

Abhängigkeiten

- Welche Abhängigkeiten bestehen in welchen Bereichen?
- Was werden Ihre Kunden benötigen?
- Sind Ihre Dienstleister in der Lage, den neuen Bestimmungen gerecht zu werden?

Einfluss auf den Markt

- Sollten Entscheidungen auf Basis der aktuellen Rechtslage getroffen werden oder auf den bevorstehenden Marktveränderungen aufbauen?
- Eröffnet dies neue Chancen für das jeweilige Geschäftsmodell?

The trading environment of the future

Trading obligation: shares and derivatives

Shares

- **What?** Shares admitted to trading on a regulated market or traded on an MTF
- **Where?**
 - Regulated Market, MTF, SI
 - Equivalent third country trading venue
- **Who?**
 - Investment Firms

- **Trading obligation does not apply to trades that are:**
 - Non-systematic, ad hoc, irregular and infrequent;
 - Carried out between eligible and / or professional counterparties and do not contribute to price discovery;
 - In shares or equity instruments not admitted to trading on a regulated market or traded on an MTF; or
 - By non-Investment Firms (only)

These parties / instruments can trade OTC

Derivatives

- **What?** Derivatives that are traded on a trading venue that are sufficiently liquid and declared subject to the trading obligation
- **Where?**
 - Regulated Market, MTF, OTF
 - Equivalent third country trading venue
- **Who?** Transactions between:
 - An FC and another FC
 - An FC and an NFC+
 - An NFC+ and another NFC+(and third country entities that would be subject to clearing obligation in certain cases)

- **Trading obligation does not apply to:**
 - Non-equity instruments that have not been declared subject to the trading obligation
 - Any trade with an NFC- (including if it trades with an FC or NFC+)
- These parties / instruments can trade OTC or on an SI

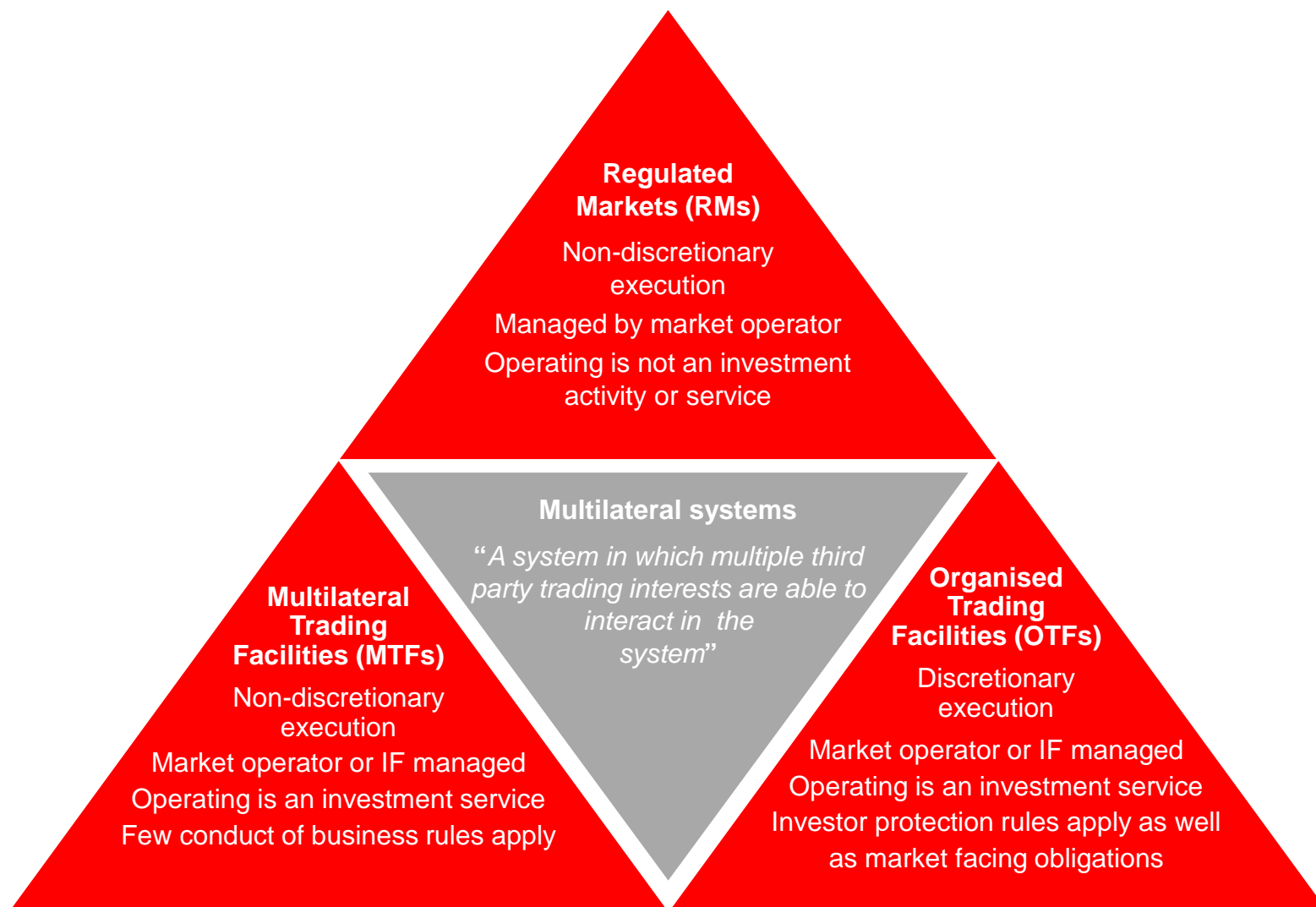
Trading obligation: Mandated classes



To determine whether there is sufficient liquidity:

- ESMA must consider these criteria:
 - Average frequency and size of trades
 - Number and type of active market participants
 - Average size of spreads
 - Anticipated impact on liquidity
 - Impact on commercial activities of non-financial end users
- According to the final RTS, while ESMA will take into account whether a derivative class is liquid for transparency purposes, they will not automatically be deemed liquid for these purposes
- ESMA is consulting on various issues including:
 - Link between transparency and trading obligation
 - How to deal with package transactions
 - Phase ins
- It also warns about moving trading into economically equivalent OTC contracts

Trading venues: New concepts and boundaries



MTFs

MTF: "a *multilateral system*, operated by an investment firm or a market operator, which *brings together* multiple third-party buying and selling interests in financial instruments – in the system and in accordance with *non-discretionary rules* – in a way that *results in a contract*"

Multilateral system

- Operator can't enter into every (any) trade on own account, even as riskless principal – how far does this extend?
- Multiple third party interests can interact
- Does every order need to interact with all other orders or can there be some segmentation?
- Non-discrimination

Brings together multiple interests

- To be understood in broad sense
- Includes orders, quotes and indications of interest
- User ratification does not undermine this
- What is a firm quote or an indication of interest?

In the system

- A set of rules - no need for a technical system for matching orders
- Includes systems where users can execute against multiple quotes requested
- Bring interests together under the rules, protocols or operating procedures
- Could some parts of the functionality fall outside the system?

In accordance with non-discretionary rules

- Rules leave the operator with no discretion as to how interests may interact
- Limited development on this
- Users can have discretion

OTFs

OTF: "a *multilateral system...* in which *multiple third-party buying and selling interests* in bonds, structured finance products, emission allowances or derivatives are able to *interact in the system* in a way that *results in a contract* in accordance with Title II of MiFID II"

Markets facing requirements

- Transparency
- Conflicts management
- Monitoring compliance with the rules and orderly trading
- Market surveillance
- System resilience and tick sizes
- Position reporting

Other differences from MTFs

- Only for non-equities
- Must exercise discretion by deciding to place or retract orders on the OTF and / or deciding not to match an order with other available orders at a given point in time
- Group cannot execute client orders against proprietary capital save in non-liquid sovereign bonds but operator can engage in matched principal trading save for instruments other than mandatory traded derivatives with the client's consent

Client facing obligations

- Clients' best interests
- Appropriate information requirements
- Suitability and appropriateness
- Best execution
- Prompt and fair execution of orders
- Publication of limit orders in shares

Questions without answers (yet)

- Who might become an OTF?
- Where is the line between brokerage and being an OTF – OTFs may facilitate negotiation between clients
- What will OTF rules look like?
- How much discretion will clients accept?
- Does fact you cannot order route to SIs and OTFs matter?

Systematic Internalisers

Definition:

“An investment firm which, on an organised, frequent, systematic and substantial basis deals on own account by executing client orders outside a RM, MTF or OTF ”

Quantitative tests and opt in:

- Firms exceeding both thresholds are caught but others can opt into the regime
- Must notify competent authority

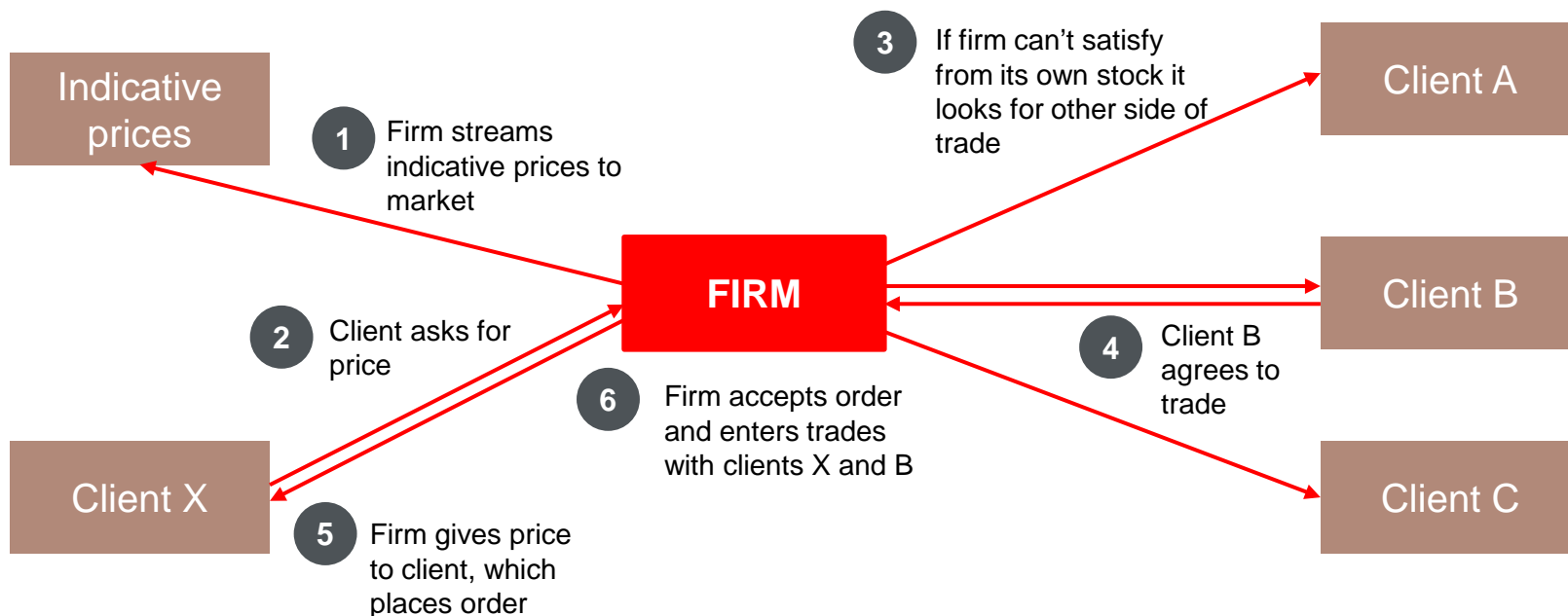
		Equities	Bonds	Structured Finance Products	Derivatives	Emission allowances
Frequent and systematic basis threshold (liquid instruments) OR	Number of transactions executed by the investment firm on own account OTC / total number of transaction in the same financial instrument in the EU	Equal to or more than 0.4% and daily	2.5% and at least once a week	4% and at least once a week	2.5% and at least once a week	4% and at least once a week
Frequent and systematic basis threshold (illiquid instruments) AND	Minimum trading frequency (average during last 6 months)	Daily	At least once a week	At least once a week	At least once a week	At least once a week
Substantial basis threshold criteria 1 OR	Number of OTC trades by investment firm in a financial instrument on own account when executing client orders of equal to or larger than in comparison to the number / nominal amount traded in that financial instrument and executed This is on own account or on behalf of clients executed on a trading venue or OTC	15%	25%	30%	25%	30%
Substantial basis threshold criteria 2	Number of OTC trades by investment firm in a financial instrument on own account when executing client orders/ total volume / nominal amount in financial instrument executed in the EU with or on a trading venue or OTC	0.4%	1%	2.25%	1%	2.25%

Systematic Internalisers:

The future for equities broker crossing networks

- 3 choices for an equities broker crossing network?
 - **MTF**: must be an MTF if operated on a multilateral basis
 - **SI**: must be an SI if not multilateral and exceeds SI thresholds
 - **Neither?**: if multilateral but exercise discretion, i.e. OTF or if deal on own account but below thresholds and don't opt in to SI regime – for use by exempt persons
- An Investment Firm that operates an internal matching system on a multilateral basis should be authorised as an MTF
- Single dealer platform (where trading is always against one firm) v multi-dealer platform, with multiple dealers interacting for same financial instrument
- How bilateral do SIs need to be?
 - Dealing on own account when executing client orders includes matching on a matched principal basis but, Recital 19 of Delegated Regulation 25/4/2016 provide that firms entering into matched principal transactions on a “regular and not occasional” basis should not be considered SIs
 - Does this mean that an SI for non-equities (other than derivatives subject to mandatory trading) could look very similar to an OTF?
- SIs may have more control over access to flow and fewer markets obligations (inc. transparency) but quoting obligations are onerous except in relation to illiquids, where waivers largely remove obligations to publish firm quotes (i.e. pre trade transparency obligations)

Systematic Internalisers: What would this bond arrangement be?



Could it be an SI?

- Does firm deal on own account when executing client orders?
- What if it enters both trades as matched principal?
- Is it on an organised, frequent, systematic and substantial basis?
- Are clients A, B and C really clients?

Could it be an OTF?

- Is it multilateral? Is there interaction?
- Is it a multi-dealer platform?
- Is there a system? Does it matter that firm is liaising between participants?
- Do orders interact in a system in a way that results in a contract?

Systematic Internalisers: Pre-trade transparency

	Equity like instruments	Non-equity like instruments
Make public quotes for liquid instruments	On a regular and continuous basis during normal trading hours	<ul style="list-style-type: none"> • When prompted by client • When agreed to provide a quote and, if illiquid, on request from the client if they agree to provide a quote
Quotes requirements	Must achieve best execution and reflect prevailing market conditions	
Update / withdraw	Can update any time but can only withdraw in exceptional conditions. Article 14 Delegated Regulation 18/5/2016 details when exceptional conditions are deemed to exist	
Access to quotes	Must make available to other clients but can have commercial policy on access provided objective and non-discriminatory	
Obligation	Execute at quoted price in sizes up to standard market size – minimum quote size	Enter transactions under published conditions if at or below size specific to instrument
Acceptable limits	Number of trades with same client and total trades at same time provided non-discriminatory and transparent	Number of trades at any quote provided non-discriminatory and transparent
Price improvement	Same but carve out for professional clients where several securities in one trade	Only in justified cases if it falls within public range close to market conditions

Transparency regime: Dark pool trading?

Shares

- Dark pools continue in theory but volume caps will make unlit trading unpredictable in practice for all but block trades
- Moving to another dark pool could result in a market wide suspension
- Scope for trading elsewhere is limited by trading obligation but could SIs be an alternative?
- Venues and firms will need to be ready to “light up” – will they be expected to have arrangements in place?

Derivatives that are mandated for trading and other liquid non-equities

- Subject to transparency for first time
- Dark pools can exist if trading venues get waivers
- No volume cap
- If transparency drops, competent authorities can suspend pre-trade transparency obligations for up to 3 months but extendable

Whenever instruments are executed on trading venues

Other equity instruments

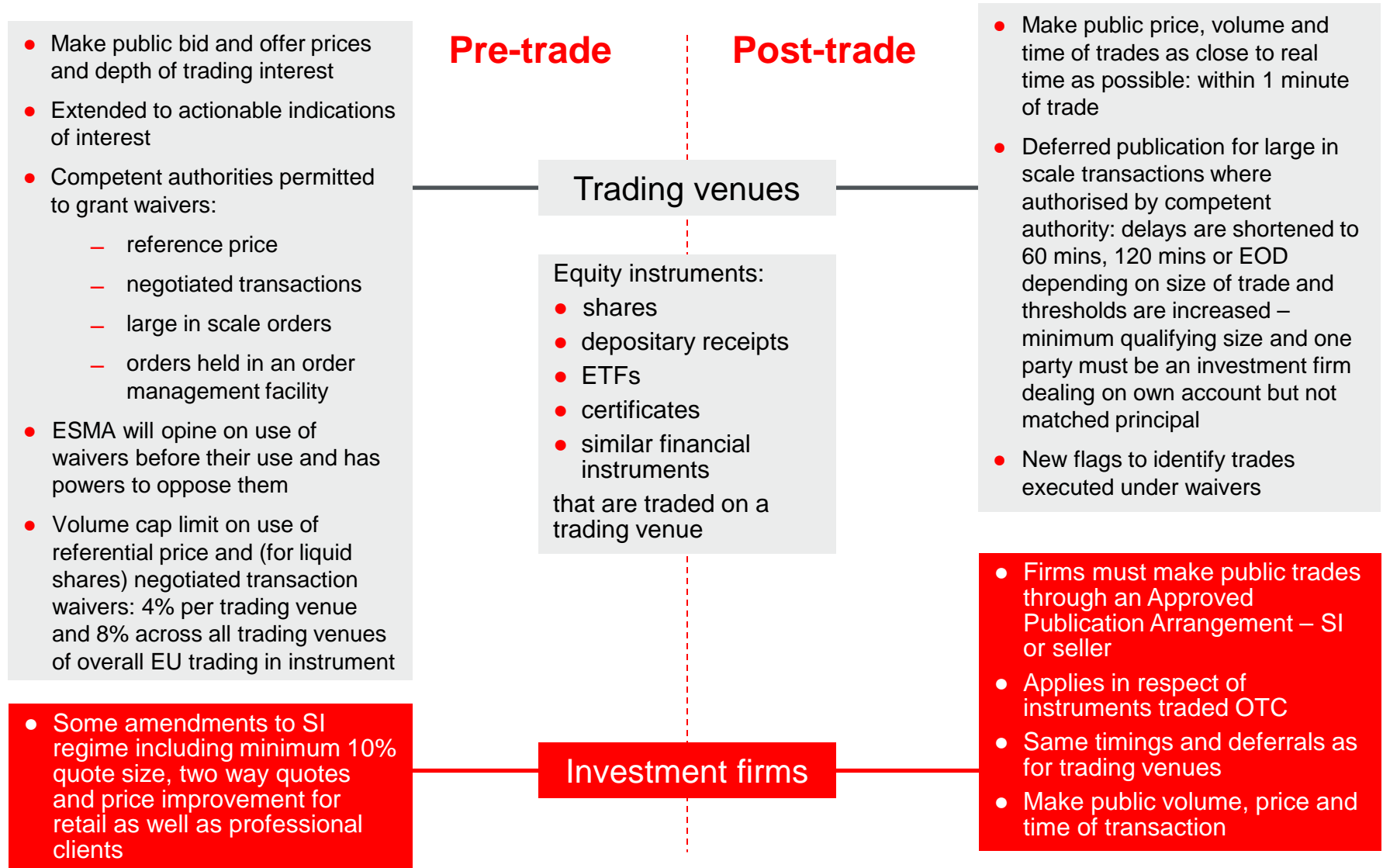
- Subject to transparency for first time and waivers are subject to volume caps
- Volume caps do not apply to negotiated transactions in these instruments for which there is no liquid market in certain cases

Other derivatives and non-liquid financial instruments

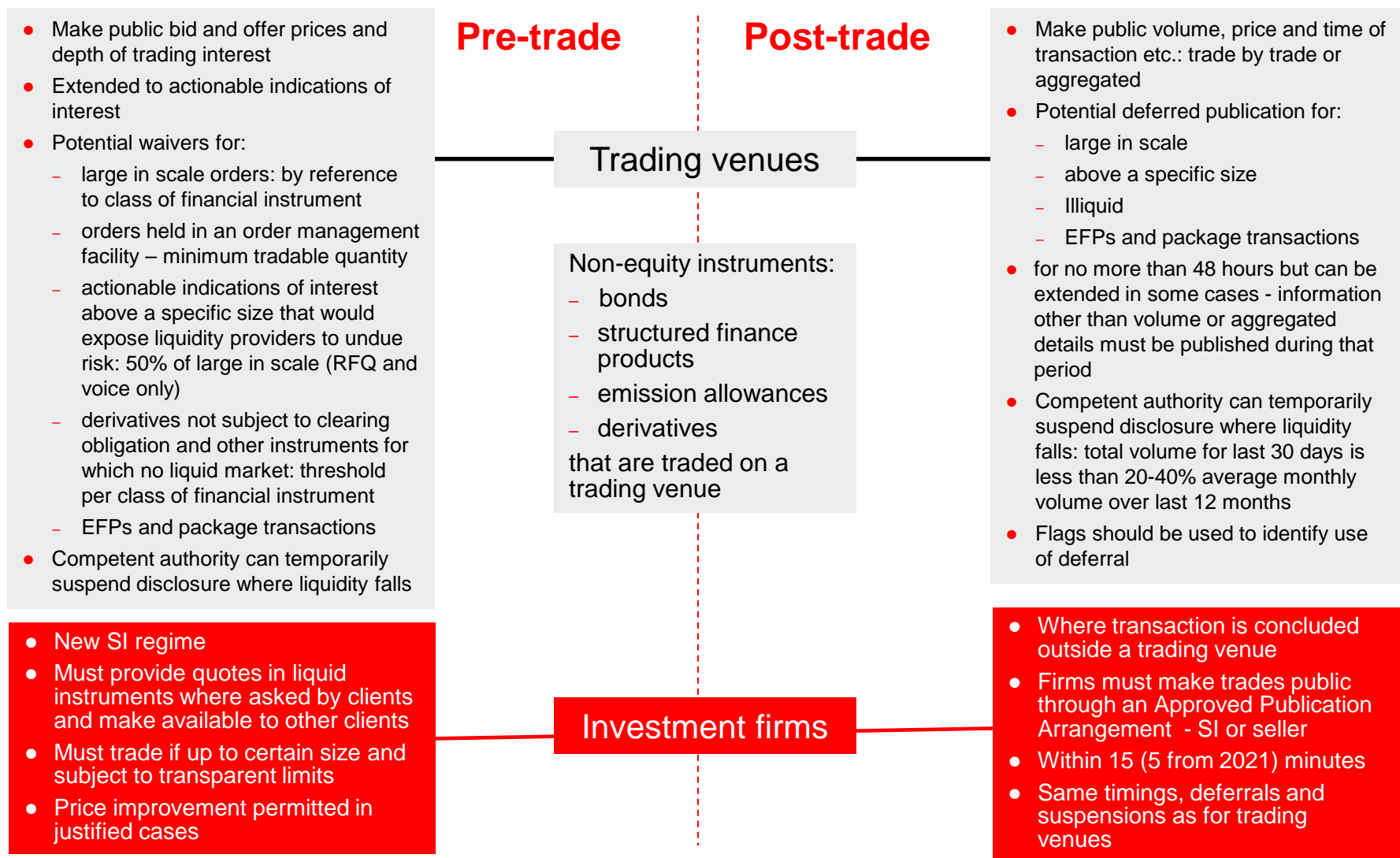
- Seemingly wide waiver from pre-trade transparency so this can remain dark
- Competent authorities can withdraw waivers where they think they are being abused

Trading information

Transparency regime: Equity instruments



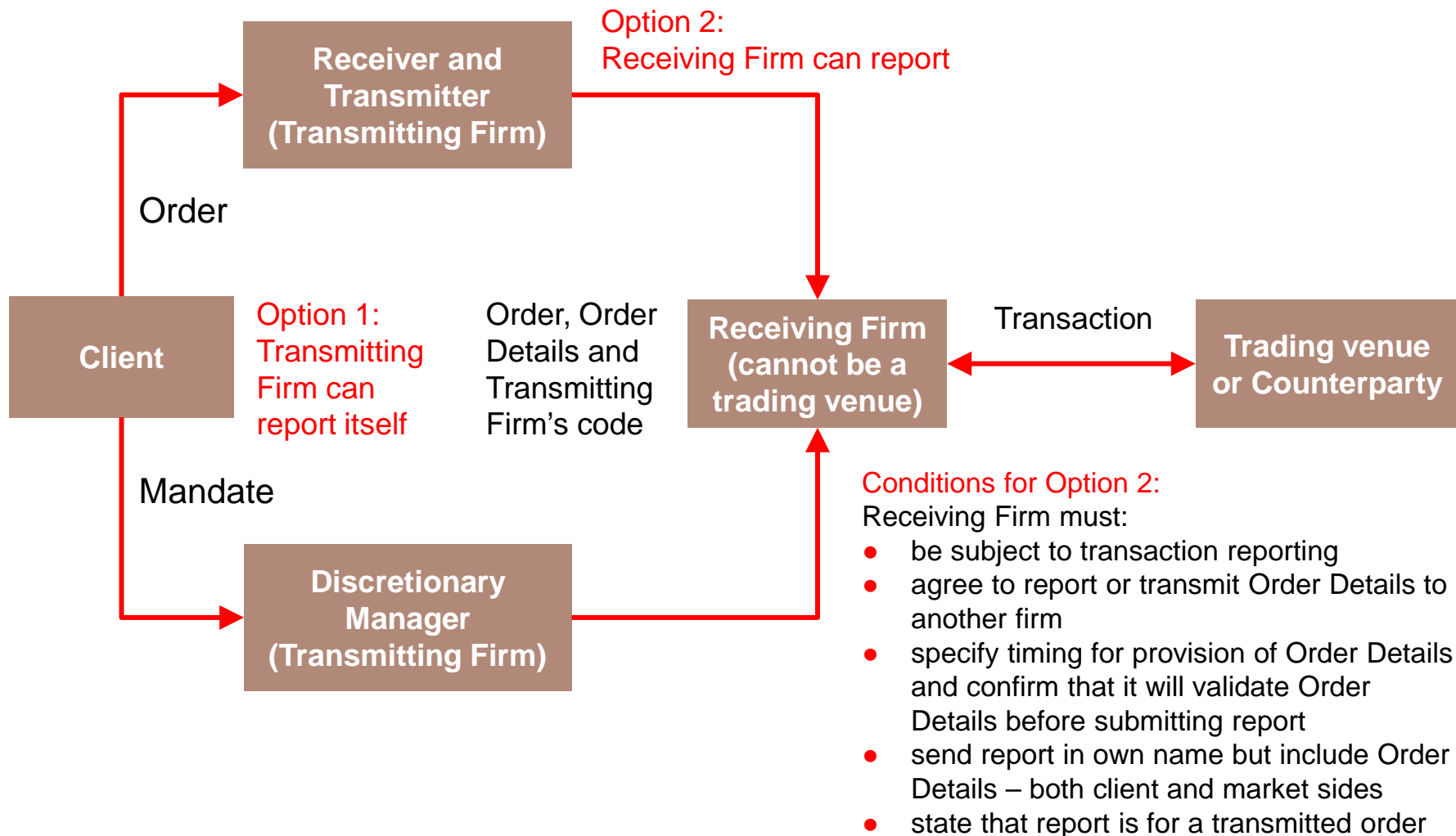
Transparency regime: Non-equity instruments



Transaction reporting: Investment firms

Which trades?	<p>Investment firms that execute transactions in financial instruments:</p> <ul style="list-style-type: none"> • that are admitted to trading or traded on a trading venue or for which a request has been made • where the underlying is a financial instrument traded on a trading venue • where the underlying is an index or basket of financial instruments traded on a trading venue
Transactions and execution	<p>Transaction means conclusion of an acquisition or disposal subject to various exceptions listed in RTS 22</p> <ul style="list-style-type: none"> • Execute means : <ul style="list-style-type: none"> – reception and transmission of orders in relation to one or more financial instruments; – execution of orders on behalf of clients – dealing on own account – making an investment decision in accordance with a discretionary mandate given by a client – transfer of financial instruments to or from accounts • Acquisition means any purchase, entering into derivative, increase in notional amount • Disposal means any sale, closing out of derivative, decrease in notional amount
Which information?	<ul style="list-style-type: none"> • 65 fields (new fields include client ID, IDs of person or committee that make decision to trade and also responsible for decision and execution) – see ESMA Guidelines for explanations • Legal entities to be identified by LEI codes, simplified concatenation for individuals • Codes for algos and committees must be unique, consistent and persistent • Various new designations – eg. transparency waivers, short sales
How?	<ul style="list-style-type: none"> • Firms can report themselves or through an ARM or trading venue – they must take reasonable steps to ensure compliance where they don't report themselves and remain responsible • Trading venues will report trades executed by firms not subject to reporting obligation
To whom and by when?	<ul style="list-style-type: none"> • Home competent authority of firm, even where a branch executes the transaction • Branch code to be included where it receives order or makes decision, has supervisory responsibility for person responsible for decision or execution or transaction is executed on trading venue outside EU using branch membership • As quickly as possible and no later than end of next working day
Link to EMIR?	<ul style="list-style-type: none"> • Transactions reported to a trade repository under EMIR count provided: <ul style="list-style-type: none"> – that trade repository is also an ARM – the report contains all the required details – trade repository transmits information to competent authority

Transaction reporting: Transmission of orders



Trading obligation: FX derivatives

Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivative instruments, financial indices or financial measures which may be settled physically or in cash

Two types of derivative contract are not covered:

A **means of payment** that:

- (a) Must be settled physically otherwise than by reason of a default or other termination event
- (b) Is entered into by at least a person which is not a financial counterparty under EMIR
- (c) Is entered into in order to facilitate payment for goods, services or direct investment; and
- (d) Is not traded on a trading venue

Why is this important?

- Previously no guidance or standardisation on what is an FX derivative
- Critical for EMIR obligations
- What does means of payment really mean?
- What is physical settlement?

A **spot contract**:

A contract for the exchange of one currency against another, where delivery is to be made within the longer of:

- (a) 2 trading days in respect of any pair of major currencies
- (b) Where at least one is not a major currency, the longer of 2 trading days or the period generally accepted in the market as the standard delivery period for that currency pair; or
- (c) Where the main purpose is the sale or purchase of a transferable security or a unit in a collective investment undertaking, the period generally accepted as standard delivery period or 5 trading days if shorter

NDFs, options and swaps are never spot contracts

Ancillary activity: the tests

Test 1: Market share test: per asset class

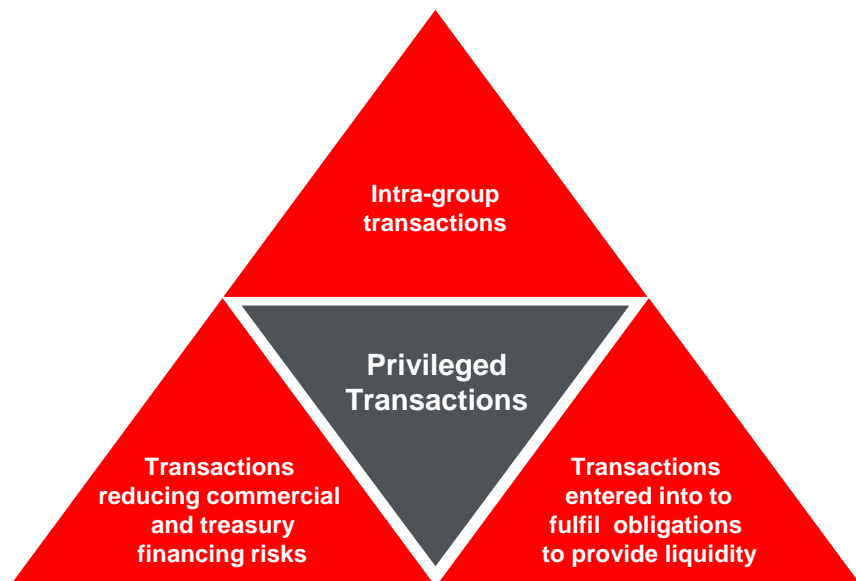
- **Size of your trading activity at group level** [in the EU?] but excluding privileged transactions and transactions executed by a MiFID or CRD IV authorised entity
- **Size of overall market trading activity in the EU** (contracts traded on an EU trading venue and OTC contracts to which an EU person is party)

measured in gross notional value

Test 2: Main business test: aggregate of all relevant asset classes

- **Size of your trading activity at group level** [in the EU?] but excluding privileged transactions and transactions executed by a MiFID or CRD IV authorised entity
- **Size of trading activity undertaken by group** including privileged transactions and those entered into by an authorised entity (calculated by reference to financial instruments entered into)

measured in gross notional value



Asset classes and market share thresholds

Asset class	Main business test 10% or less	Main business test more than 10% but less than 50% (50% of market share threshold)	Main business test equal to or more than 50% (20% of market share threshold)
Metals	4	2	0.8
Oil and oil products	3	1.5	0.6
Coal	10	5	2
Gas	3	1.5	0.6
Power	6	3	1.2
Agricultural products	4	2	0.8
Other commodities	15	7.5	3
EUAs and EUA derivatives	20	10	4

EU: Position limits

Definition:

Limit on net position a person can hold – positions held by a person and on its behalf at an aggregate group level (subsidiary undertakings)

Separate limits for spot and other months (NB. Spot is contract next to expire according to trading venue)

Applies to:

- everyone – whether or not regulated
- all commodity derivatives traded on a trading venue, commodity derivatives considered to be the same and economically equivalent OTC contracts
 - Except positions held by non-financial entities which are objectively measurable as reducing risks directly relating to its commercial activity
 - NB. Must apply for exemption to competent authority which sets limits for that contract

Applied by competent authorities in accordance with methodology in RTS:

Step 1

Start with the baseline limit:

- Spot month - Baseline limit is 25% deliverable supply or, where there is nothing to deliver, open interest
- Other months – baseline limit is 25% open interest

Step 2

Adjust to between 5% and 35% according to factors: maturity, deliverable supply, overall open interest, number of market participants and characteristics of underlying commodity market

Step 3

Special 2,500 lot limit for contracts with combined open interest not exceeding 10,000 lots

Algorithmic trading and direct electronic access

Algorithmic trading

“Trading where a computer algorithm automatically determines ... parameters of orders such as whether to initiate the order, the timing, price or quantity ... or how to manage the order after submission, with limited or no human intervention”

It does not include a system only used to:

- Decide which venue(s) to send an order to
- Process orders where there is no determination of parameters other than venue
- Confirm orders or process transactions post-trade

Delegated regulation:

- A system has no or limited human intervention where:
 - Automated system makes decisions at any of the stages of initiating, generating, routing or executing orders or quotes according to pre-determined parameters
 - Includes both automatic generation of orders and optimisation of order execution
 - Includes smart order routers (which use algorithms to optimise order execution where they determine parameters other than just venue) but not automated order routers (that determine venue but don't change any other parameters of order)
 - Algorithmic trading and DEA are not mutually exclusive

Algorithmic trading: Market making strategy

“An investment firm that engages in algorithmic trading shall be considered to be pursuing a market making strategy when, as a member or participant of one or more trading venues, its strategy when dealing on own account, involves posting firm, simultaneous two-way quotes of comparable size and at competitive prices relating to one or more financial instruments on a single trading venue or across different trading venues, with the result of providing liquidity on a regular and frequent basis to the overall market”

RTS 8

- Market making strategy is a strategy where, during half of the trading days over a one month period, the firm:
 - Posts firm, simultaneous two-way quotes of comparable size and competitive prices
 - Deals on their own account in at least one financial instrument on one trading venue for at least 50% of the daily trading hours of continuous trading at the respective trading venue, excluding opening and closing auction
- **Firm** – orders and quotes that under the rules of a trading venue can be matched against an opposite order or quote
- **Simultaneous, two-way** – posted in such a way that both the bid and the ask-price are present in the order book at the same time
- **Comparable** – size of each quote does not diverge by more than 50% from each other
- **Competitive** – posted at or within the maximum bid-ask range set by the trading venue and imposed on investment firms that have signed a market making agreement

Algorithmic trading: HFT

High frequency algorithmic trading technique (HFT)

- Infrastructure that is intended to minimise latencies, including at least one of:
 - Co-location
 - Proximity hosting; or
 - High-speed direct electronic access
- System determination of order initiation, generating, routing or execution without human intervention for individual trades or orders
- High message intraday rates which constitute orders, quotes or cancellations

Why is this important?

- Keep accurate and time sequenced records of orders, cancellations, executions and quotes
- Cannot rely on exemptions so will need to be authorised

A high message intraday rate consists of the submission on average of:

- At least 2 messages per second for any single financial instrument
- At least 4 messages per second for all financial instruments traded on a trading venue

Delegated regulation:

- Only liquid instruments
- Include market making activity
- Only proprietary orders and orders structured to avoid this
- Don't include messages from DEA clients
- Trading venues must make available monthly estimates of the average messages per second taking into account the preceding 12 months
- Engaging in HFT on one trading venue or through one trading desk triggers requirements

Direct electronic access

“An arrangement where a member or participant or a client of a trading venue permits a person to use its trading code so the person can electronically transmit orders relating to a financial instrument directly to the trading venue and includes arrangements which involve the use by a person of the infrastructure of the member or participant or client, or any connecting system provided by the member or participant or client, to transmit the orders (direct market access) and arrangements where such infrastructure is not used by a person (sponsored access)”

Delegated regulation

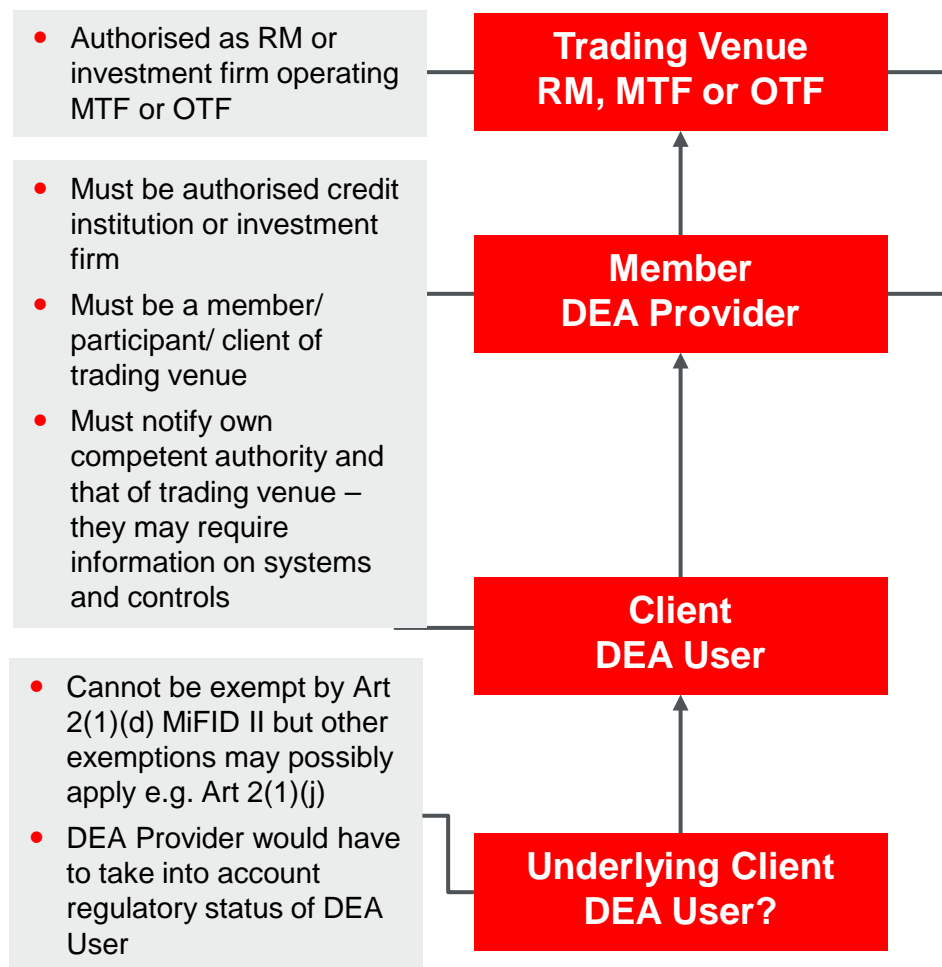
- Critical test is ability to exercise discretion regarding exact fraction of second of order entry and lifetime of orders within that timeframe
- Not where it takes place through optimisation of order execution processes that determine the parameters of the order other than the venue, unless these arrangements are embedded into the clients' systems and not into those of the member

Why is this important?

- Firms using DEA cannot rely on own account dealing exemption
- Additional due diligence obligations
- Does this provide easy avoidance mechanisms?
- Is electronic brokerage DEA?

DEA: The chain

Regulatory status



Main responsibilities



Trading: German perspective

Positionsmeldungen

Untertägige Meldung (§ 49 (5) WpHG-E)

- Erhebliche Herausforderung in Bezug auf Warenderivate, da Meldewesen meist auf Tagesend-Basis eingestellt ist
- Unklar,
 - was eine „*kritische Marktsituation*“ ist
 - wann die untertägigen Meldungen zu erfolgen haben
- Klärung möglicherweise in späterer Rechtsverordnung

Market Making

Definition (§ 2 (8) 1 Nr. 2 lit. a) WpHG-E)

- Wortlaut: „kontinuierliche Anbieten des An- und Verkaufs von Finanzinstrumenten zu selbst gestellten Preisen für eigene Rechnung“
- MiFID II
 - Enthält zusätzliche Tatbestandsvoraussetzung: „unter Einsatz des eigenen Kapitals“
- Konsequenz: zumindest Unklarheit und damit Rechtsunsicherheit sowie Gefahr des Goldplating

OTF

Behandlung von Aufträgen (§ 62 (1) Nr.1 WpHG-E)

- Keine richtlinienkonforme Umsetzung
 - Wortlaut:
*„Der Betreiber [...] organisierten Handelssystems ist dazu verpflichtet, nicht diskriminierende Regelungen für den Zugang zu dem [...] organisierten Handelssystem festzulegen, zu veröffentlichen und umzusetzen, die **kein** Ermessen des Betreibers vorsehen“*
 - MiFID II (Art. 20 (6)): OTF haben bzgl. Behandlung von Aufträgen einen Ermessensspielraum (= Abgrenzungsmerkmal zu MTF)
 - => Deutsche Regelung (§ 62 WpHG-E) kommt damit der Unterscheidung zwischen MTF und OTF nicht nach

OTF & MTF

Finanzinstrumente

- Fehlende Ausnahme für Vermögensanlagen (keine richtlinienkonforme Umsetzung)
 - Nach WpHG-E sind diese Vermögensanlagen Finanzinstrumente (§ 2 (4) Nr. 7)
 - Pflichten für Betrieb von OTF oder MTF beziehen sich damit auch auf Vermögensanlagen
 - Nach MiFID II sind diese Vermögensanlagen keine Finanzinstrumente (Anhang I Abschnitt C)
- => Goldplating

Systematischer Internalisierer

Definition:

„häufige organisierte und systematische Betreiben von Handel in erheblichem Umfang für eigene Rechnung außerhalb eines organisierten Marktes oder multilateralen oder organisierten Handelssystems, indem ein für Dritte zugängliches nicht multilaterales System angeboten wird, um mit ihnen Geschäfte durchzuführen“

Konkretisierung auf Level II (Art. 12-17 delegierte Verordnung MiFID II)

- Quantitative Grenzen für Tatbestandsmerkmale
 - Häufigkeit und
 - Erheblichkeit des Umfangs
- Firmen werden nur erfasst, wenn Sie beide Grenzen (Häufigkeit und erheblicher Umfang) überschreiten

Neuer Anwendungsbereich: derivative Finanzinstrumente

WpHG-E / KWG-E	Gibt es Änderungen?	Auswirkungen?
<p>Folgeänderungen in WpHG-E / KWG-E erforderlich</p> <p>MiFID II - Anhang I C (4): Derivate in Bezug auf Wertpapiere, Währungen, Zinssätze- oder Erträge, Emissionszertifikate oder andere Derivat-Instrumente, finanzielle Indizes oder Messgrößen, die effektiv geliefert oder bar abgerechnet werden können (MiFID II - Anhang I C (4))</p>	<p>Aufnahme von Emissionszertifikaten als Basiswert für Termingeschäfte in § 2 (3) Nr. 1 f) WpHG-E/ § 1 (11) 4, Nr. 1 f) KWG-E</p> <p>Emissionszertifikate eigenständige Finanzinstrumente in § 2 (4) Nr. 5 WpHG-E/ § 1 (11) Nr. 9 KWG-E</p>	<p>MiFID II:</p> <p>Eigenständige Finanzinstrumente; Derivate auf Emissionszertifikate sind derivative Finanzinstrumente bei Vorliegen der übrigen Voraussetzungen</p> <p>EMIR:</p> <p>Emissionszertifikate als eigenständige Finanzinstrumente, werden nicht von EMIR erfasst; Derivate auf Emissionszertifikate fallen dagegen in den Anwendungsbereich der EMIR</p>
<p>MiFID II - Anhang I C (5): Warenderivate, welche bar abgerechnet werden müssen oder auf Wunsch einer Partei bar abgerechnet werden können (ohne dass ein Ausfall oder anderes Beendigungsereignis vorliegt)</p>	<p>Nein</p> <p>Regelung in § 2 (3) Nr. 2 a) WpHG-E/ § 1 (11) 4, Nr. 2 a) KWG-E entspricht Vorgängerregelung.</p>	<p>N/A</p>

Neuer Anwendungsbereich: derivative Finanzinstrumente

WpHG-E / KWG-E	Gibt es Änderungen?	Auswirkungen?
<p>Folgeänderungen in § 2 (3) Nr. 2 b) WpHG-E/ § 1 (11) 4, Nr. 2 b) KWG-E</p> <p>MiFID II - Anhang I C (6): Warenderivate, die effektiv geliefert werden können, vorausgesetzt, sie werden an einem geregelten Markt, über ein MTF oder über ein OTF gehandelt; ausgenommen davon sind über ein OTF gehandelte Energiegroßhandelsprodukte, die effektiv geliefert werden müssen</p>	<ul style="list-style-type: none"> • Aufnahme von über ein OTF gehandelten Warenderivaten • „REMIT – Ausnahme“: Konkretisierung durch delegierte Rechtsakte • Sog. „C.6 Energiederivatkontrakte“ in Bezug auf Kohle oder Öl, die an einem OTF gehandelt werden und effektiv geliefert werden müssen, unterliegen bestimmten Übergangsbestimmungen in Bezug auf EMIR 	<ul style="list-style-type: none"> • Durch Aufnahme von OTF wird eine breitere Gruppe von Instrumenten erfasst • Diese werden in den Anwendungsbereich von EMIR fallen und sind „OTC“ i.S.d. EMIR • Ebenfalls Auswirkungen auf EMIR-Schwellenwertberechnung • „REMIT-Ausnahme“: Erfasste Produkte fallen nicht in den Anwendungsbereich von EMIR, MiFID II und CRD IV

Neuer Anwendungsbereich: derivative Finanzinstrumente

WpHG-E / KWG-E	Gibt es Änderungen?	Auswirkungen?
<p>Folgeänderungen in § 2 (3) Nr. 2 c) WpHG-E/ § 1 (11) 4, Nr. 2 c) KWG-E und entsprechenden delegierte Rechtsakten</p> <p>MiFID II - Anhang I C (7): Warenderivate, die effektiv geliefert werden können, die sonst nicht in C (6) genannt sind und nicht kommerziellen Zwecken dienen, die die Merkmale anderer derivativer Finanzinstrumente aufweisen</p>	<p>Zusatz, ob Clearing und Abwicklung über anerkannte Clearingstellen erfolgen oder ob eine regelmäßige Margin-Einschusspflicht besteht, ist entfallen</p> <p>Delegierte Rechtsakte zur Festlegung der genannten Derivatekontrakte, die Merkmale anderer derivativer Finanzinstrumente aufweisen</p>	<p>Zusammenspiel von MiFID II, MMVO und REMIT</p> <p>MMVO vs. REMIT:</p> <p>Es kommen unterschiedliche Regelungen abhängig davon zur Anwendung, ob sich ein Marktmissbrauch auf einen Spotkontrakt oder einen Derivatekontrakt mit Strom oder Gas als Basiswert bezieht (<i>der nicht von der Ausnahme in C (6) enthalten ist</i>)</p> <p>ACER vs. BaFin:</p> <p>Zuständigkeit unterschiedlicher Behörden</p>

Investor protection: hot topics

Overview

Where are we at?



Level 1:

- Finalised - takes effect from 3 Jan 2017

Level 2:

- Final Delegated Directive (CASS, product governance and inducements)
- Final Delegated Regulation (other topics)

Level 3

- Guidelines on complex debt instruments and structured deposits (4 February 2016)
- Guidelines on cross-selling (22 December 2015)
- Guidelines for assessing knowledge and competence (22 March 2016)
- Consultation on management body for market operators (5 October 2016)
- Consultation on product governance requirements (5 October 2016)
- Q&As on MiFID and MiFIR investor protection topics (10 October 2016)

Overview of changes



- **Significant number of micro changes** being made to the existing investor protection regime
- **Small number of macro changes** being introduced to the existing investor protection regime
- Together they **SNOWBALL** into **significant regulatory reform** in the way firms conduct their business
- The devil is in the detail!
- Level 2 **significantly alters** the Level 1 landscape
- **Material impact** on all firms

Client categorisation

Professional clients and eligible counterparties

Per Se ECPs

- Municipalities and local authorities can no longer be per se ECPs

Opted Up ECPs

- Removed ability for opted up professional clients to become opted up ECPs
- **Specific procedure** for the opting up process
- Includes **warning** to ECPs that they are losing protection
- ECP to provide **written confirmation** that they are requesting ECP status either **generally** or for **specific service**
- Acknowledgment that ECPs are **aware of consequences**

Per Se Professional

- Municipalities and local authorities can no longer be per se professionals
- A public body can only be treated as per se professional client if managing public debt at a national or regional level

Opted up Professional

- Municipalities and local authorities can be opted up to be professional clients
- Competent authorities can introduce qualitative or quantitative measures for this assessment

Communications

To:

Retail or Professional Clients

Delegated Regulation states that all communications to professional clients now the same as for retail clients (save for one rule which is retail only) – this contradicts the recitals and ESMA's technical advice. To be confirmed if this will be amended.

New requirements:

- **Same language** to be consistently used across information. 'Language' refers to language of a Member State
- Must be a fair and prominent indication of **risks** (where benefits also referenced) with **equal font size**
 - Information to be kept **up-to-date**
 - Requirements when mentioning **future performance**

Eligible Counterparties

- Must communicate in a way that is '**fair, clear and not misleading**'
- Firms have flexibility about how to comply with the fair, clear and not misleading test for ECPs

Product governance / distribution

Whats new?

Completely new regime (level 1)

- Introduction of **product approval process** (with associated policies and procedures) overseen by senior management
- **Identify target market** for product and tailor products to that market
- Ensure **distribution strategy** is consistent with target market
- **Periodic review** of product, target market and distribution channels
- **New requirements** on distributors / sales intermediaries to understand product, target market, features and risks
- Information flow through distribution chain

Moderate extension (Level 2)

- Regime extended to apply to **services (not just products)**
- **Proportionality** applies
- **Two sets** of policy proposals:
 - **product manufacturers**
 - **distributors** (someone who offers and/or recommends products to clients)
- Introduction of **specific oversight, control and governance obligations** on firms
- **Final distributor** in the chain has the obligation to comply with the requirements
- **Intermediate distributors** also have certain obligations
- consider threat to **orderly functioning / stability** of market when developing products
- only **one target market** assessment required
- **additional steps** prescribed which manufacturers might take when an event occurs which affects the potential risk / return of the product
- products manufactured by **non-MiFID entities** not exempt
- **compliance oversight** needed
- Firms that **create, issue, design products** are themselves manufacturers
- Pure manufacturers to assess target market on '**theoretical basis**'

Product governance / distribution

ESMA Consultation Paper (2016/1436)

Six categories to consider	ESMA's guidance
Type of clients to whom the product is targeted	at least to MiFID client categorisation; may also specify additional descriptions, e.g. 'private wealth clients' or 'sophisticated clients', but must specify criteria to be met by clients in each case.
Knowledge and experience	manufacturers should specify the knowledge clients are expected to have about the product type, product features and/or knowledge in related areas. Manufacturers must also specify the extent of practical experience target clients are expected to have (e.g. in terms of time period of activity in financial markets, or with relevant product type). The requirements are inter-related; clients with no experience but extensive knowledge may be a valid target client.
Financial situation	manufacturers should specify the amount of losses target clients should be able and willing to afford.
Risk tolerance and compatibility of product risk/reward profile	manufacturers should specify the general risk attitude of target clients, as well as setting out criteria by which firms should assess target clients to determine risk tolerance. Risk indicator required by PRIIPS Regulation to be used where applicable to fulfil this requirement.
Client's objectives	i.e. wider financial goals, or overall strategy adopted when investing, e.g. 'liquidity supply', 'retirement provision' or investment horizon.
Client's needs	these may vary from specific to generic, as relevant (e.g. age, country of tax residence, and special product features such as 'currency protection' or 'green investment' as relevant).

- Closes 5 January 2017
- Final report will be published in Q1/Q2 2017

Product governance / distribution

ESMA Consultation Paper (2016/1436)

Guidelines on product governance requirements: guidelines for distributors – key themes

Timing and relationship of target market assessment by distributor with other product governance processes

Review by manufacturer and distributor to assess whether products and services are reaching the target market

Distribution strategy of distributor: taking account of manufacturer's distribution strategy

Identification of target market: differentiation on the basis of investment service provided

Relation between product governance requirements And the assessment of suitability or appropriateness

Identification of target market: differentiation on the basis of the nature of the product distributed

Identification of “negative” target market, and sales outside the positive target market

Suitability

Suitability assessment	<ul style="list-style-type: none">• Where products are packaged or bundled, the overall package must be suitable• Responsibility for carrying out assessment lies with firms• If switching, benefits must outweigh costs• Maintain adequate and up-to-date information in an ongoing relationship• Firms need to ensure the information they obtain from clients reliable• Firms need to satisfy themselves that they have obtained sufficient information from a client to determine that the recommendation will not only meet the investment objectives of the client but also their risk tolerance• Need to consider whether alternative financial instruments are more suitable• Suitability assessments apply to simplified advice models (e.g. through automated systems) but not where a firm executes orders or transmits orders to another firm to execute where there has been pre-agreed signals• Firms should not recommend instruments where they are not suitable, regardless of whether this is derived from a firm having limited access to instruments or not• Firms providing periodic suitability assessments must provide these at least annually, with the frequency of the assessment being increased depending on the risk profile of the client and the types of financial instruments recommended• Firms need to satisfy themselves that they have obtained sufficient information from a client to determine that the recommendation will meet the investments objectives and risk tolerance of the client
Suitability reports	<ul style="list-style-type: none">• New requirement that firms must provide retail clients with a suitability report specifying how the advice meets the client's preferences, objectives and other characteristics• Contents of reports not prescribed• Must be personalised• Identify if periodic review needed (i.e. in an ongoing service) – policies and procedures needed on this item
Policies and procedures	<ul style="list-style-type: none">• Policies and procedures needed so firms understand the products being recommended taking into account whether other equivalent products could be better.• The policies and procedures must include their understanding of investment services (not just products) offered to clients and also consider whether an equivalent investment service could be better.

Suitability: Level 3

ESMA Q&A on MiFID II: Section 2

Q1 and Q5: Does the suitability report only have to be provided if the investment advice leads to a transaction?

- No.
- A report must be provided to a retail client when that client has been provided with advice regardless of whether a transaction occurs or not.
- This includes where the advice is not to buy or sell an investment.
- Although MiFID II refers to *'before the transaction is made'* this is when the report has to be made, but does not mean that the advice has to be followed by a transaction.

Q3: Can reports be made available through a website?

- Yes.
- However, provided the website is a durable medium which means:
 - Where it is included in the secured area of the firm's website
 - The website is specifically dedicated to that client
 - The client receives a notification (via email or another means of communication) of the availability of the document
 - The choice of this medium is consistent with MiFID II requirements (i.e. website conditions).

Q6: What is the obligation when a client wishes to proceed to invest in an unsuitable instrument?

- These are called 'insistent clients'
- Must clearly inform the client of the fact that the course of action that he/she wishes to undertake is not suitable for him/her

AND

- a clear explanation of the potential risks he would incur by doing so
- Firms need to have procedures to ensure they know when an investment was originated at client or firm's initiative

Q2: Should the report include the date when the advice was given?

- Yes.
- The date and time of the day when the advice was given should be included.
- Also the date and time when the report is given
- ESMA recommends a 'time stamp' on reports.

Appropriateness and non-advised sales

Whats new?

- List of non-complex products **narrowed**.
- The following are included as automatically deemed to be complex:
 - **AIFs,**
 - **Units in a structured UCITS,**
 - **Shares embedding a derivative;**
 - Debt/money market instruments
 - Structured deposits
 - any products with a structure that makes it **difficult for clients to understand risks of return** or the **cost of exiting the product**
- Instruments which are **not 'expressly specified'** in the non-complex list can go through the additional assessment criteria

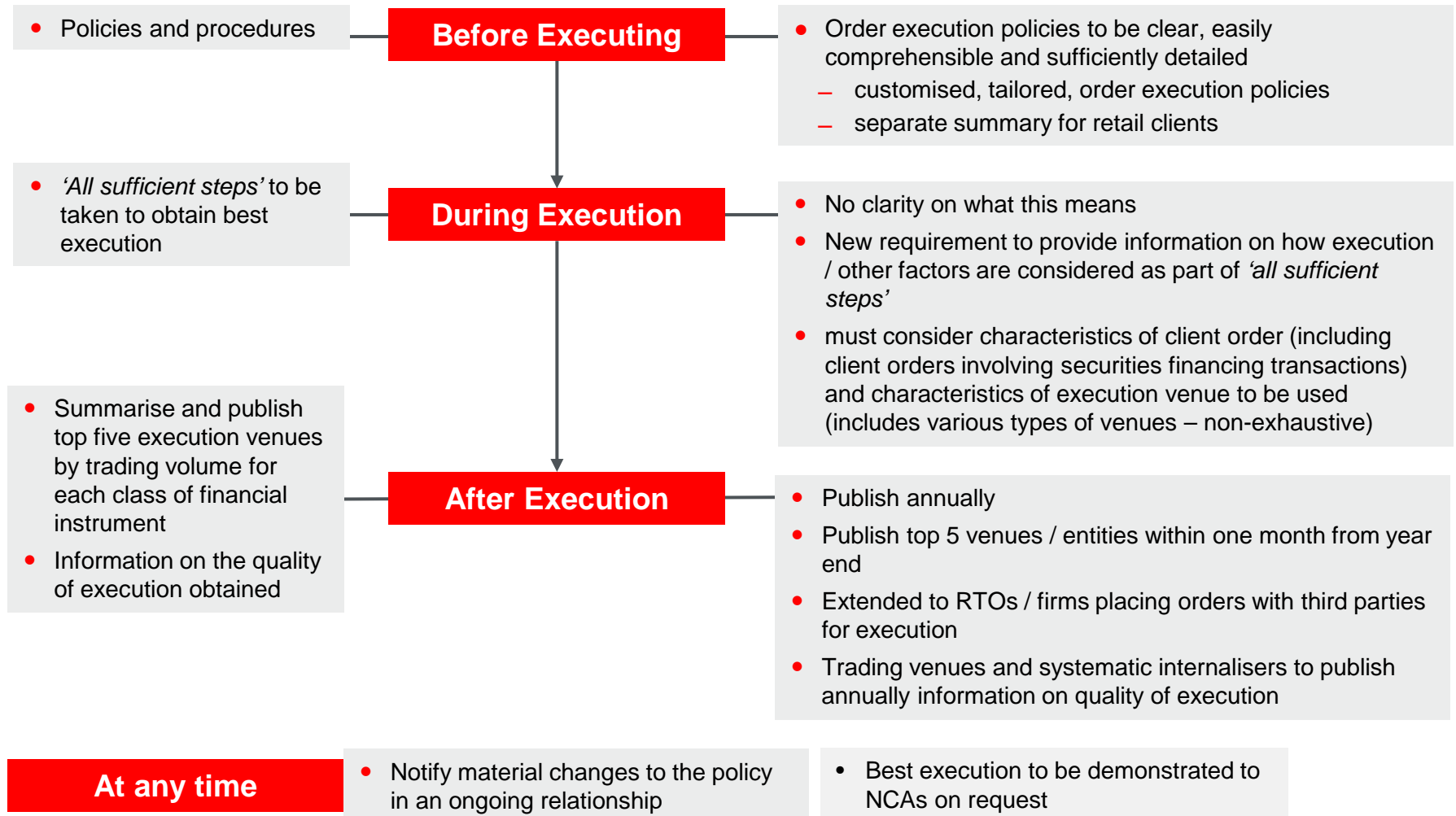
- **Change to test for non-complex products:**
 - (1) clause / condition / trigger that **fundamentally alters the nature** or **risk** of the investment or **pay out profile**
 - (2) explicit or implicit **exit charges** with the effect of making the investment illiquid
- Products not falling within the above test **are considered to be complex**
- New **record keeping requirements** in relation to the assessment of appropriateness (where appropriate, not appropriate, insufficient information, etc.)
- Appropriateness always required where **credit** is provided
- Appropriateness required on an **overall bundled package**

ESMA's Final Report: Guidelines on complex debt instruments and structured deposits
(ESMA/2015/1783)

Best execution

Requirement

Detail



Best execution: Level 3

Question 1

What is the difference between existing requirement of 'reasonable steps' and the new requirement of 'all sufficient steps'?

All sufficient steps

“Should not be interpreted to mean that a firm must obtain the best possible results for its clients on every single occasion.”

- Sets a 'higher bar for compliance than 'reasonable' steps
- Firms have to ensure the intended outcomes can be successfully achieved on an ongoing basis
- Likely to involve:
 - strengthening of front-office accountability
 - strengthening of systems and controls re: detection capabilities of potential deficiencies
 - monitoring of not only the execution quality obtained but also the quality and appropriateness of execution arrangements and policies on an ex-ante and ex-post basis to identify circumstances under which changes may be appropriate
 - processes might involve some combination of front office and compliance monitoring and could use systems that rely on random sampling or exception reporting
 - channels in place to ensure that the results of ongoing executive monitoring are escalated to senior management and/or relevant committees and fed back into the execution policies and arrangements to drive improvements

Conflicts of interest

Policies and Procedures

- Review conflicts policies – at least annually
- If having to disclose frequently, *presumption* that conflicts policy is deficient
- Procedures are required to address both how conflicts are *managed* and *prevented*
- Any risk of damage to the interests of one or more clients' needs to be considered (regardless of its materiality)

Disclosure

- Limitations on use of disclosure – disclosure is to be used as a *'last resort'*
- Prescribed content of disclosure – *tailored* and *new warning* to be included in disclosures

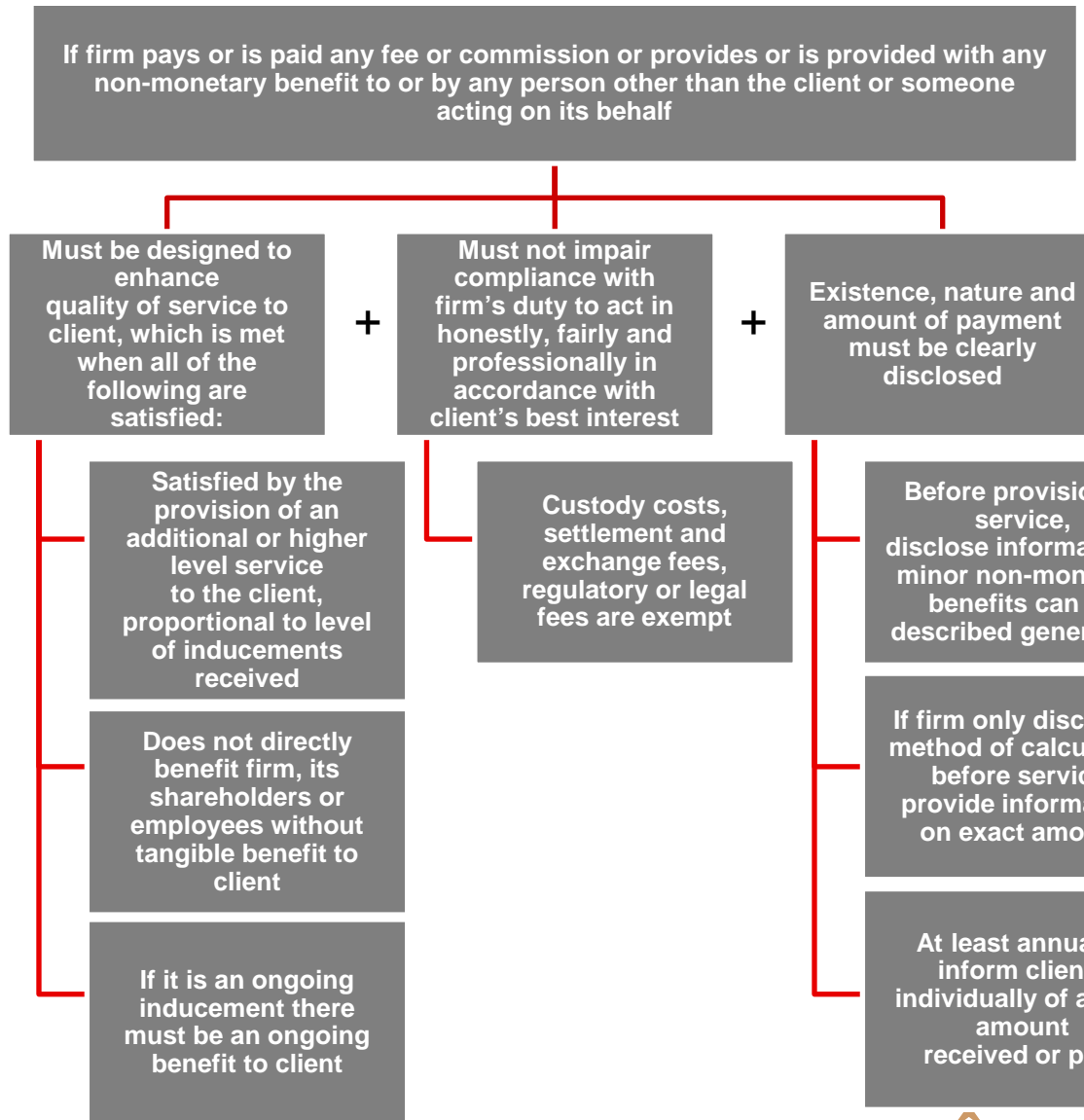
Managing techniques

- The same independence and operational separation requirements which apply to investment research now also apply to *'recommendations'* (a broader category than 'investment research')
- Requirement for physical separation of analysts producing investment research
- If physical separation is disproportionate, need alternative information barriers (potentially extremely broad)
- Senior managers are to receive frequent reports (at least annually) on conflicts recorded in the conflicts log
- **Guideline 9:** Firms that distribute tied or bundled packages to ensure suitable remuneration models and sales incentives encouraging responsible business conduct, fair treatment of clients and avoidance of conflicts of interest for staff selling packages are in place and are monitored by senior management - **3 illustrations** provided
- Detail on managing when underwriting and placing

Additional material (Level 3):

- **ESMA's Final Report: Guidelines on cross-selling practices – Guideline 9**
- **ESMA Q&A on MiFID II: Section 6**

Inducements



Why is this relevant?

- Considerable detail at level 2
- Qualitative v quantitative evidence of enhancement of quality
- How will firms demonstrate it?

Inducements: independent advisors and fund managers

- Cannot accept and keep any third party payments other than acceptable minor non-monetary benefits
- Must be reasonable and proportionate and of a scale that is unlikely to influence firm's behaviour to detriment of client's interests
- Must disclose before providing service

- Return to clients fees, commissions and monetary benefits ASAP after receipt
- Policy to ensure that amounts are allocated and transferred
- Inform clients through periodic statements

Acceptable minor non-monetary benefits:

- (a) Information or documentation relating to products or services which is generic in nature or personalised
- (b) Issuer commissioned/paid third party new issuance material provided relationship disclosed and made available at the same time to other investment firms or general public
- (c) Participation in conferences, seminars and other training events
- (d) Hospitality of a reasonable de minimis value
- (e) Other minor non-monetary benefits which a Member State deems capable of enhancing the quality of service and are of a scale and nature that are unlikely to impair compliance with duty to act in client's best interest

Why is this relevant?

- Full price unbundling mandated
- No reference to execution-related services
- Where does this leave current permissible services?
- How will the FCA exercise its power?

Inducements – research payment account

Provision of research is not an inducement if firm pays through:

Own resources

OR

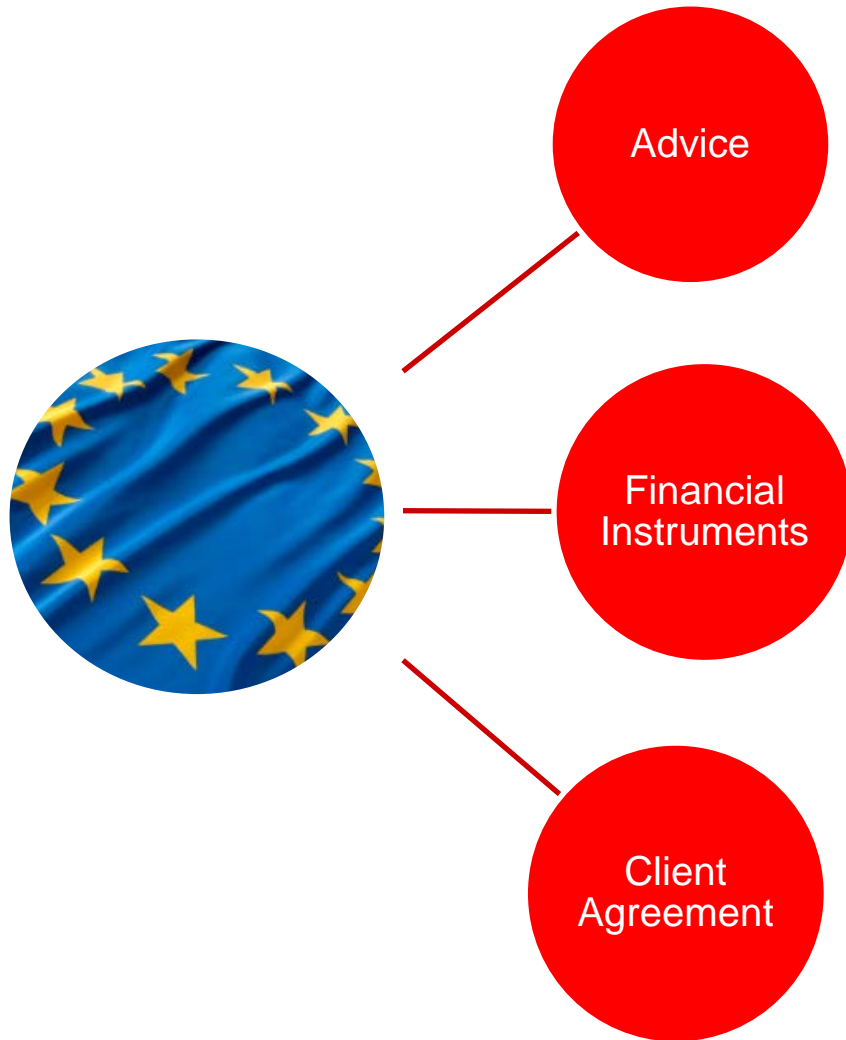
Research payment account provided:

- The account is funded by a specific research charge to client
- Set and regularly assess a research budget
- Firm is responsible for research payment account
- Firm regularly assesses quality of research against robust quality criteria set out in a policy
- Firms assesses its ability to contribute to better investment decisions
- Before providing service, tell clients of budgeted amount and charge and agree research charge and frequency in terms and conditions
- Provide annual information on total costs incurred by client for research
- If required by client or competent authority, provide further information
- All operational arrangements must identify research charge separately
- Tell clients about any increase in advance
- Any surplus at end of period must be rebated or offset against research budget for following period
- Allocation of budget is subject to appropriate controls and senior management oversight
- Cannot use to fund internal research
- Firm providing execution services must identify separate charges that only identify execution costs

Why is this relevant?

- Where does it leave the CSA model?
- How do you make a research payment account work?
- Client money account implications
- Shutting off nil value service agreement

Information to clients



- Must provide information on **investment advice**
- Detailed requirements to explain **scope** and **features** of advice
- Applies to **professional clients** as well

-
- Must provide Information on **financial instruments** – e.g. Warnings, Risks
 - Information to be tailored for the target market
 - Information on how the instrument operates in **negative** market conditions
 - Where the **risks** are being disclosed that as well as explaining leverage and its effects, firms are also required to explain risks with **insolvency** of issuer or related events such as bail-in

-
- Also applies to **professional clients**, in ongoing advisory relationships and custody relationships and scope expanded significantly
 - No **distance communicating exemption** to providing terms of business before providing a service

Information to clients



Costs and Charges

- Must provide information on **costs / charges** of **services, advice, product** and how to pay the costs and charges
- Must disclose inducements
- Costs and charges must be **aggregated** so client understands the **overall cost** and **cumulative effect** on return (with **itemised breakdown** on request) and firms are to provide their clients with an **illustration of the cumulative effect** of costs on return when providing investments (both pre and post-sale)
- Delegated Regulation has not adopted ESMA's advice that firms should be allowed to provide clients with separate figures comprising the aggregated initial costs and charges, the aggregated ongoing costs and charges and the aggregated exit costs.
- Must be provided ex-ante ("***in good time***") and ex-poste (**annually post-sale**)
- Disclosure is needed to all clients (including ECPs) but professional clients and ECPs can **agree to receive** more limited information but not:
 - For portfolio management
 - Where there is an embedded derivative
 - (for ECPs) not where a product will be on-sold
- Level 2 includes prescriptive examples

Reporting to clients

What's new?

To Retail

- **Portfolio Management Reports:**
 - minimum quarterly intervals
 - further report where portfolio depreciates by (multiples of) 10%
 - no report where client accesses online system / 'durable medium'
- **Client Asset Reports:**
 - minimum quarterly intervals
 - statements to identify protected assets, assets subject to liens, market / estimated value of assets (on a 'best efforts' bases) and indicate "***a lack of a market price is likely to be indicative of a lack of liquidity***"
 - no report where client accesses online system / 'durable medium'
 - provide ad hoc reports on request (can charge for ad hoc reports)

To Professional

- **Trade Confirmations**
 - Must provide trade confirmations at T+1
 - Must have same content as for retail confirmations
- **Portfolio Management Reports:** Do not apply to professional clients

To ECPs

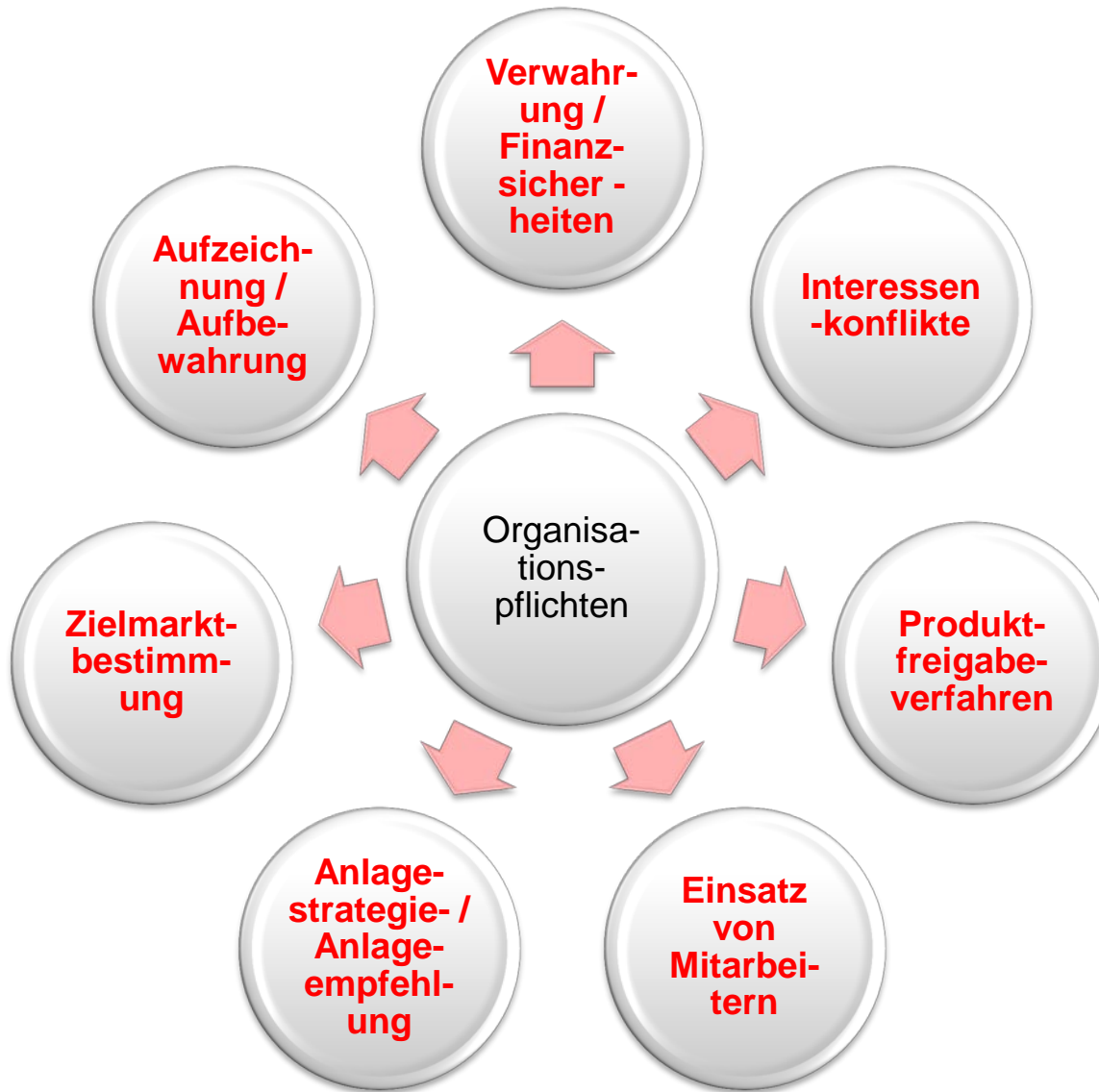
- Reporting obligations **apply to all clients** including ECPs
- However, ECPs are able to agree **different standards for content and timing** of reports

Product intervention



Investor protection: German perspective

Organisationspflichten im Überblick



Produktfreigabeverfahren

Bewertung von Risiken bei Konzeption von Finanzinstrumenten (FI) (§ 69 (9) 3 WpHG-E)

- Wortlaut: *„Dabei sind alle relevanten Risiken aus dem Finanzinstrument, insbesondere das Verlust- und Ausfallrisiko sowie das Wertschwankungsrisiko [...] zu bewerten“*
 - Stammt aus dem KleinanlegerschutzG
 - Geht über MiFID II hinaus
 - => Goldplating

Zielmarktbestimmung

Überprüfung der Zielmarktbestimmung durch Hersteller

- Formulierung „*insbesondere*“ anstatt „*zumindest*“ (§ 69 (10) 2 WphG-E)

=> Gefahr des Goldplating

Anforderung an vertreibendes Institut

- Pflicht, den Zielmarkt des Herstellers für das jeweilige FI „*näher zu bestimmen*“ (§ 12 (3) WpDVerOV-E)

=> Gefahr des Goldplating

Interessenkonflikte

Vertriebsvorgaben (§ 69 (1) 2 Nr. 3 WpHG-E)

- Vertriebsvorgaben = potentieller Interessenkonflikt
- Bereits bestehende nationale Sonderregelung (=> Goldplating)
- Beibehaltung der Regelung wurde nicht an EU-Kommission gemeldet

=> Konsequenz: Streichung?

Aufzeichnungs- und Aufbewahrungspflicht

Umfang der Aufzeichnungen (§ 72 (3) WpHG-E)

- Klarstellender Hinweis erforderlich: im beratungsfreien Geschäft ist nur die Orderaufgabe aufzuzeichnen
 - Grund:
 - Schwerwiegende Folgen bei Fehlverhalten: Ordnungswidrigkeit oder Verstoß gegen Datenschutzrecht

Nutzung der Aufzeichnungen (§ 72 (9) WpHG-E)

- Sollte auch zu anderen Zwecken, insbesondere Mitarbeiterüberprüfung nutzbar sein
- Grund:
 - Entspricht EU-Vorgabe
 - Ist sogar erforderlich, um EU-Vorgabe in Bezug auf regelmäßige Überprüfungen von Geschäfts- und Auftragsaufzeichnungen gerecht zu werden (Art. 76 (6) delegierte Verordnung MiFID II)

Vermögensverwahrung und Finanzsicherheiten

Kundenfinanzinstrumente und Kundengelder

- Deren Behandlung wird unglücklich vermischt (§ 73 (1) WpHG-E)
- Konsequenz: Rechtsunsicherheit hinsichtlich der insolvenzrechtlichen Behandlung

Wertpapierdienstleistungsunternehmen ohne Erlaubnis zum Betreiben des Depotgeschäfts

- Weiterleitung von Wertpapieren an ausländisches Institut
 - Ehemalige Voraussetzung gestrichen: Kunde wird bei dem Institut eine Rechtsstellung eingeräumt, die derjenigen nach Depotgesetz gleichwertig ist
 - Konsequenz: Kunde ist Gefahr eines geringeren Insolvenzschutzes ausgesetzt

Anlagestrategie- und Anlageempfehlungen

Begriff Unternehmen (§ 74 (1) WpHG-E)

- Könnte auch Wertpapierdienstleistungsunternehmen erfassen
 - Vorschrift soll aber gerade nicht für diese gelten
- Konsequenz: Klarstellung im Wortlaut erforderlich

Einsatz von Mitarbeitern

Anzeige von Mitarbeitern (§ 76 (1), (4), (5) WpHG-E)

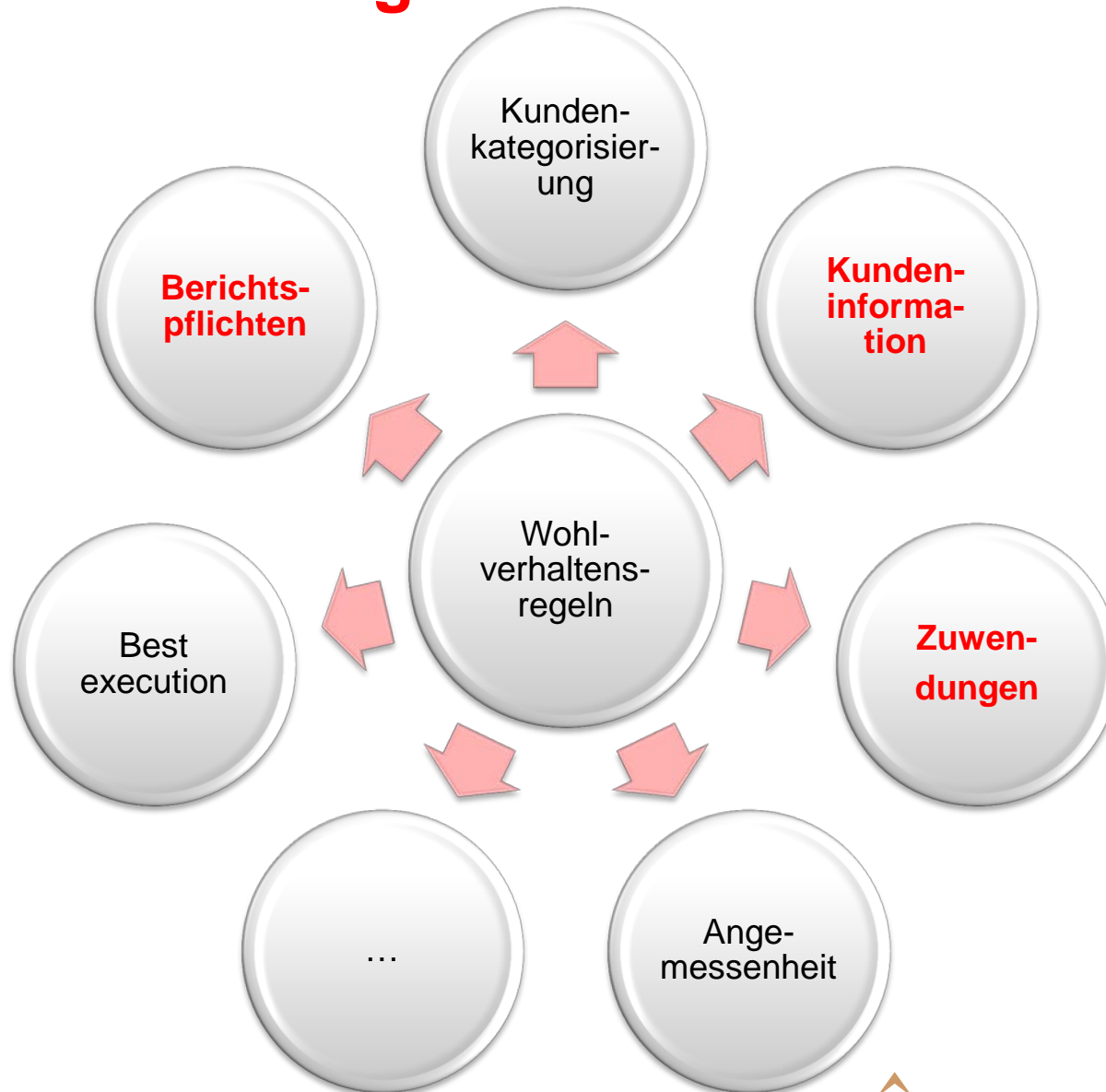
- Bereits bestehende nationale Sonderregelung (=> Goldplating)
- Beibehaltung der Regelung wurde nicht an EU-Kommission gemeldet

=> Konsequenz: Streichung?

Sachkunde von Mitarbeitern (§ 76 (3) bis (5) WpHG-E)

- Abweichend von EU-Vorgaben Sachkundeanforderungen zusätzlich für weitere Mitarbeiter wie:
 - Vertriebsbeauftragte
 - Mitarbeiter in der Vermögensverwaltung
 - Compliance-Beauftragte
- EU-Grundlage für zulässiges Goldplating fehlt

Wohilverhaltensregeln im Überblick



Anwendungsbereich

Finanzanlagenvermittler (§ 3 (1) Nr. 7 WpHG-E)

- Bisherige Ausnahme bleibt bestehen
- Entsprechen Vorgaben der FinVermV in Bezug auf Wohlverhaltensregeln den Anforderungen der MiFID II an solche Ausnahmen?

Kundeninformation

Informationen zu Finanzinstrumenten (§ 55 (6) Nr. 1 WpHG-E)

- Es wird nicht durchgängig die Formulierung „**Arten von Finanzinstrumenten**“ verwendet.
 - Unklar, ob sich die Informationspflichten auf ein spezielles FI oder nur auf die Art eines FI beziehen
 - MiFID-Anforderung: Informationen, die nicht auf ein spezielles FI abzielen
- => Gefahr des Goldplating

Kundeninformation

Kostentransparenz (§ 55 (6) Nr. 2 WpHG-E)

- Formulierung „*einschließlich etwaiger Möglichkeiten der Zahlung durch Dritte*“
 - Bedeutung unklar, weil fehlerhaft platziert und entspricht nicht dem Richtlinienwortlaut
 - Es kommt nicht zum Ausdruck, dass es sich um monetäre Zuwendungen handeln soll
 - MiFID-Formulierung ist eindeutig: „*einschließlich etwaiger Zahlungen durch Dritte*“

Kundeninformation

Informationsblatt (§ 55 (9) WpHG-E)

- Gilt auch für Aktien und einfache Anleihen
 - Auf EU-Ebene kein Informationsblatt erforderlich
- => Goldplating

Geeignetheitserklärung (§ 55 (11) WpHG-E)

- Pflicht zur Verfügungsstellung auch bei Halteempfehlung
 - Zweifelhaft
 - MiFID-Vorgabe: Dem Kunden ist die die Geeignetheitserklärung „*vor Ausführung des Geschäfts*“ zur Verfügung zu stellen.
 - Bei einer Halteempfehlung wird kein Geschäft ausgeführt!

Zuwendungen

Honoraranlageberatung (§ 55 (12) Nr. 2 WpHG-E)

- Annahme von monetären Zuwendungen
 - Nur zulässig, wenn das FI oder ein in gleicher Weise geeignetes FI ohne Zuwendung nicht erhältlich ist
- Anders bei der Finanzportfolioverwaltung (§ 55 (14) WpHG-E)
 - Annahme von monetären Zuwendungen
 - Zulässig, wenn Zuwendungen an den Kunden herausgegeben werden und damit nicht behalten werden
- Unterschiedliche Behandlung
 - Nicht von MiFID II gefordert => Goldplating
- Argument für Gleichbehandlung
 - Honorarberater wird auf die vorrangige Auswahl von provisionsfreien Produkten eingeschränkt -> Konterkariert Sinn der Honorarberatung
 - Anlegerschutz wird durch Gleichbehandlung nicht eingeschränkt

Zuwendungen

Geeignete Gegenparteien (§ 58 (1) WpHG-E)

- Regelungen über Zuwendungen sind nicht von der Anwendung ausgeschlossen
- => Steht MiFID-Vorgaben entgegen (Art. 30 (1))

Begriff Analysen (§ 60 (2) WpHG-E)

- Bedarf der Definition
 - Grund: Abgrenzung zu Begriffen
 - Anlageempfehlung
 - Anlagestrategieempfehlung
 - Finanzanalyse

Zuwendungen

Formulierung „geldwerte Vorteile“ (§ 60 (4) WpHG-E)

- Zur Vereinheitlichung ändern in „nichtmonetäre Vorteile“

Formulierung „geringfügige“ (§ 60 (4) WpHG-E)

- Zur Vereinheitlichung ändern in „kleinere“

Berichtspflichten

Bestandsbericht und Verlustmeldung

- Formulierung in § 55 (16) 2 WpHG-E missverständlich
 - Wortlaut: Pflicht stets regelmäßige Berichte erstatten zu müssen
 - EU-Vorgabe: Berichte sind nur dann erforderlich, wenn die in der Umsetzungsverordnung genannten Tatbestandsvoraussetzungen vorliegen
- => Goldplating

The third country provisions

The MiFID II / MiFIR third country regime

Article 39 MiFID II sets out certain conditions for a Member State's authorisation of a branch, which apply where a Member State chooses to require third country firms to establish a local branch in order to provide investment services or perform investment activities with or without any ancillary services to retail and/or elective professional clients in its territory

Article 46(1) MiFIR sets out a requirement for certain third country firms to register with ESMA. Subject to an equivalence assessment being undertaken by the Commission, Article 46(1) MiFIR provides that a third country firm may provide investment services or perform investment activities with or without any ancillary services to ECPs and per se professional clients established in the EU without the establishment of a branch where it is registered in the register of third country firms kept by ESMA

Third countries: Access to the EU

Professional and Eligible Counterparties

ESMA Register

- No branch
- Equivalence
- Reciprocity
- Submit to jurisdiction
- Passport

Authorised branch

- Harmonises rules across the EU
- Inter-regulator MOU
- Passport

National regime

- Maintains current position
- Rules likely to differ across EU
- No passport

Member States must permit use of the ESMA Register unless no positive equivalence decision is in effect

Retail and Opt Up Professional

Authorised branch

- Harmonises rules across the EU
- Inter-regulator MOU
- No passport

National regime

- Maintains current position
- Rules likely to differ across EU
- No passport

Member States can elect to use either MiFID authorised branch or a national regime

The third country provisions: German perspective

(1) Wertpapierdienstleistung im Inland durch Drittlandfirma

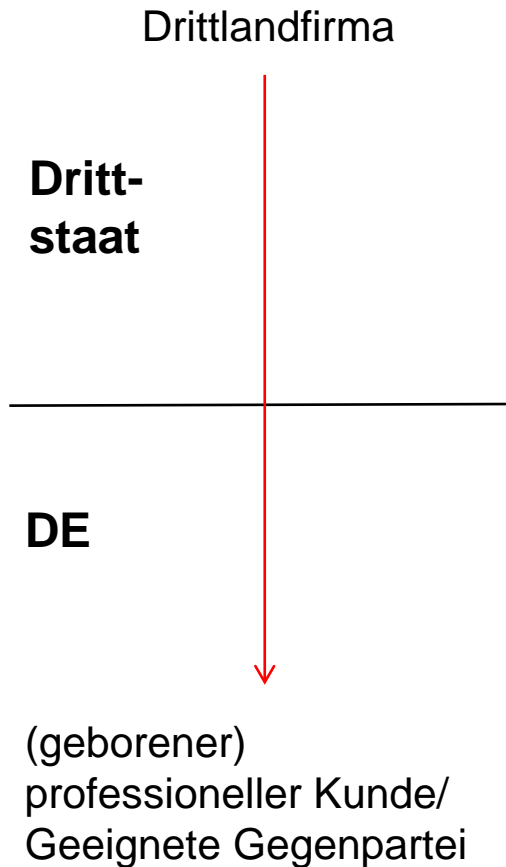
> ohne Zweigniederlassung

- Aktuelle nationale Regelungen

- Grds. nicht ohne erlaubnispflichtige(s) Tochterunternehmen oder Zweigstelle im Inland, außer
 - Verordnung nach § 53c KWG
 - Freistellungsverfahren nach § 2(4) KWG
 - Ausn. von nationalen Regelungen: Passive Dienstleistungsfreiheit

- 2. FimanoG

- Registrierungsverfahren nach MiFIR (KOM-Gleichwertigkeitsbeschluss) - § 53(2) KWG = Geltung § 53b KWG entsprechend
- Kein Gleichwertigkeitsbeschluss (bis drei Jahre danach): Anwendung der nationalen Regelungen (möglich)
 - Neu: Freistellungsverfahren nach § 2(5) KWG (BaFin-Praxis zu § 2(4) KWG)



(2) Wertpapierdienstleistung im Inland durch Drittlandfirma

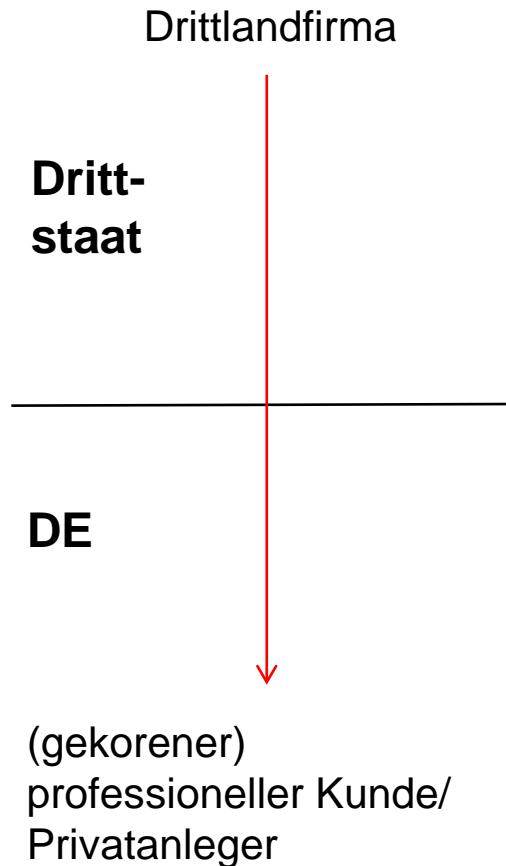
> ohne Zweigniederlassung

- Aktuelle nationale Regelungen

- Grds. nicht ohne erlaubnispflichtige(s) Tochterunternehmen oder Zweigstelle im Inland, außer
 - Verordnung nach § 53c KWG
 - Freistellungsverfahren nach § 2(4) KWG (wenn Vermittlung der Dienstleistung über inländ. Kreditinstitut oder entsprechendes EWR-Institut mit EU-Pass)
 - Ausn. von nationalen Regelungen: Passive Dienstleistungsfreiheit (eher Ausnahme)

- 2. FimanoG

- MiFIR-Registrierungsverfahren nicht anwendbar
- Anwendung der nationalen Regelungen
 - Neu: Freistellungsverfahren nach § 2(5) KWG



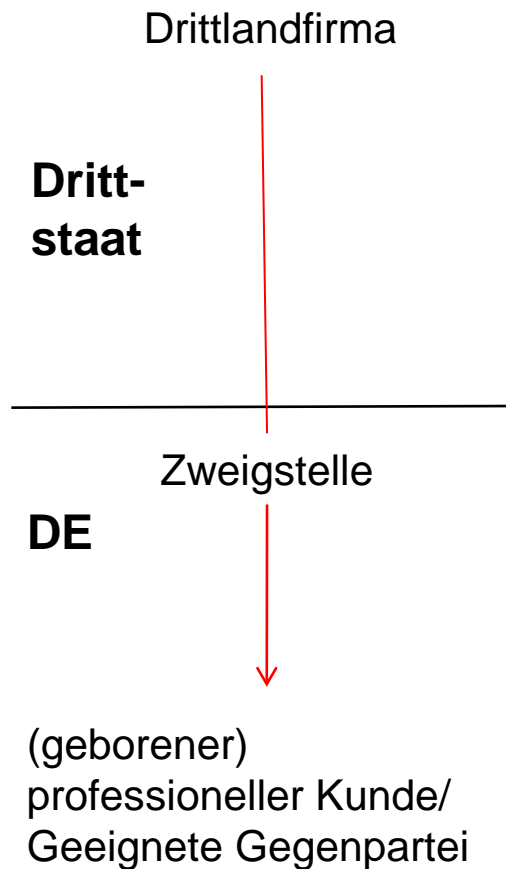
(3) Wertpapierdienstleistung im Inland durch Drittlandfirma

> mit Zweigniederlassung

- Aktuelle nationale Regelungen
 - Erlaubnispflichtige Zweigstelle im Inland
 - Ausnahme
 - Verordnung nach § 53c KWG
 - Freistellungsverfahren nach § 2(4) KWG

• 2. FimanoG

- Erlaubnispflichtige Zweigstelle im Inland
- Ausnahme
 - Verordnung nach § 53c (1) KWG
 - Freistellungsverfahren nach § 2(4) KWG



(4) Wertpapierdienstleistung im Inland durch Drittlandfirma

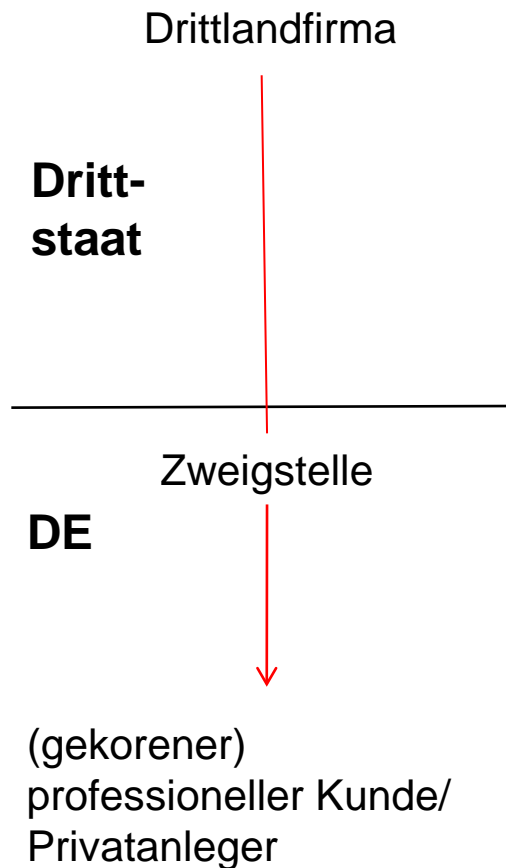
> mit Zweigniederlassung

- Aktuelle nationale Regelungen

- Erlaubnispflichtige Zweigstelle im Inland
- Ausnahme
 - Verordnung nach § 53c KWG
 - Freistellungsverfahren nach § 2(4) KWG

- 2. FimanoG

- Zweigniederlassungszulassungsverfahren nach MiFID II > optional
- Erlaubnispflichtige Zweigstelle im Inland (§ 53 KWG > unverändert > anwendbar auf Finanzdienstleistung an Privatanleger u. (gekorene) professionelle Kunden
- Ausnahme
 - Verordnung nach § 53c (1) KWG
 - Freistellungsverfahren nach § 2(4) KWG



(5) Wertpapierdienstleistung im Inland durch Drittlandfirma ohne Zweigniederlassung

> Anwendung der WpHG-Vorschriften

- Aktuelle nationale Regelungen

- § 31 (10) WpHG

- WpHG-Wohlverhaltens- und Organisationsvorschriften grds. nicht anwendbar außer Katalog aus § 31(10)
 - Keine Kundenkreisbeschränkung bzgl. Anwendung des § 31(10) WpHG

- 2. FimanoG

- § 80 WpHG

- WpHG-Wohlverhaltens- und Organisationsvorschriften grds. voll anwendbar, außer BaFin bestimmt Nichtanwendung bestimmter Vorschriften gem. Katalog in § 80
 - Solange Unternehmen bzgl. Wertpapierdienstleistung im Inland wegen Herkunftslandaufsicht insoweit nicht zusätzlicher BaFin-Aufsicht bedarf
 - Befreiung setzt Freistellung nach § 2(5) KWG voraus (Gesetzesbegründung)
 - Keine Kundenkreisbeschränkung bzgl. Anwendung des § 80 WpHG

Publications

Events

Learning and development

Online services

Technical resources

The Eurozone

Banking reform - Our guide to Banking reform

Capital Markets Union

AIFMD insight - Our guide to the AIFMD

Re:insurance - Our guide to reform affecting the insurance industry

Phoenix - Our guide to UK regulatory reform

The UK Corporate Governance Portal - access to the latest corporate governance developments

Blockchain, distributed ledgers, smart contracts and cryptocurrencies

OTC Oracle - Our guide to OTC derivatives regulatory reform

Legal privilege

UCITS insight

Pegasus - Preparing for MiFID II

Our products and experience

Legislation tracker

Legislation and

Pegasus

Preparing for MiFID II



MiFID II and MiFIR (together 'MiFID II') will underpin the provision of investment services across and into Europe, both in terms of how trading is carried on and how firms organise and conduct themselves. They will affect both the wholesale and retail sides of the industry, in relation to both securities and derivatives. Nor should MiFID II be seen as solely European, as its effect will be far reaching and influence all firms dependent on the European client base.

Recently legislation delaying the implementation of MiFID II to 3 January 2018 was published in the Official Journal of the EU. Despite the delay, firms need to continue to press ahead with their implementation work. There is still a lot to do to be ready in time for the new implementation date. In addition, the UK's referendum vote to leave the EU should not be taken as a sign for firms to stop their work as it is expected that MiFID II will be implemented before the UK concludes its exit negotiation. The FCA's statement on the EU referendum result stated: "Firms must continue to abide by their obligations under UK law, including those derived from EU law and continue with implementation plans for legislation that is still to come into effect."

To say that MiFID II / MiFIR will change the way European markets operate in the future is without doubt hugely underplaying the likely impact of this legislation and staying on top of developments will be crucial for firms. Our blog, [Regulation tomorrow](#), tracks global regulatory developments. In particular the EU pages track materials published by the European authorities, as well as various member states' regulators, including those relating to MiFID II / MiFIR. Subscription to the blog is free and updates can be received on a daily or weekly basis.

We are committed to helping firms keep on top of MiFID II

Pegasus is our dedicated online resource housing all our MiFID II know-how and links to other resources clients will need for any MiFID II project.

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The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

NORTON ROSE FULBRIGHT

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24. November 2016

EU-MARKTZUGANG VON CH-VERMÖGENSVERWALTERN

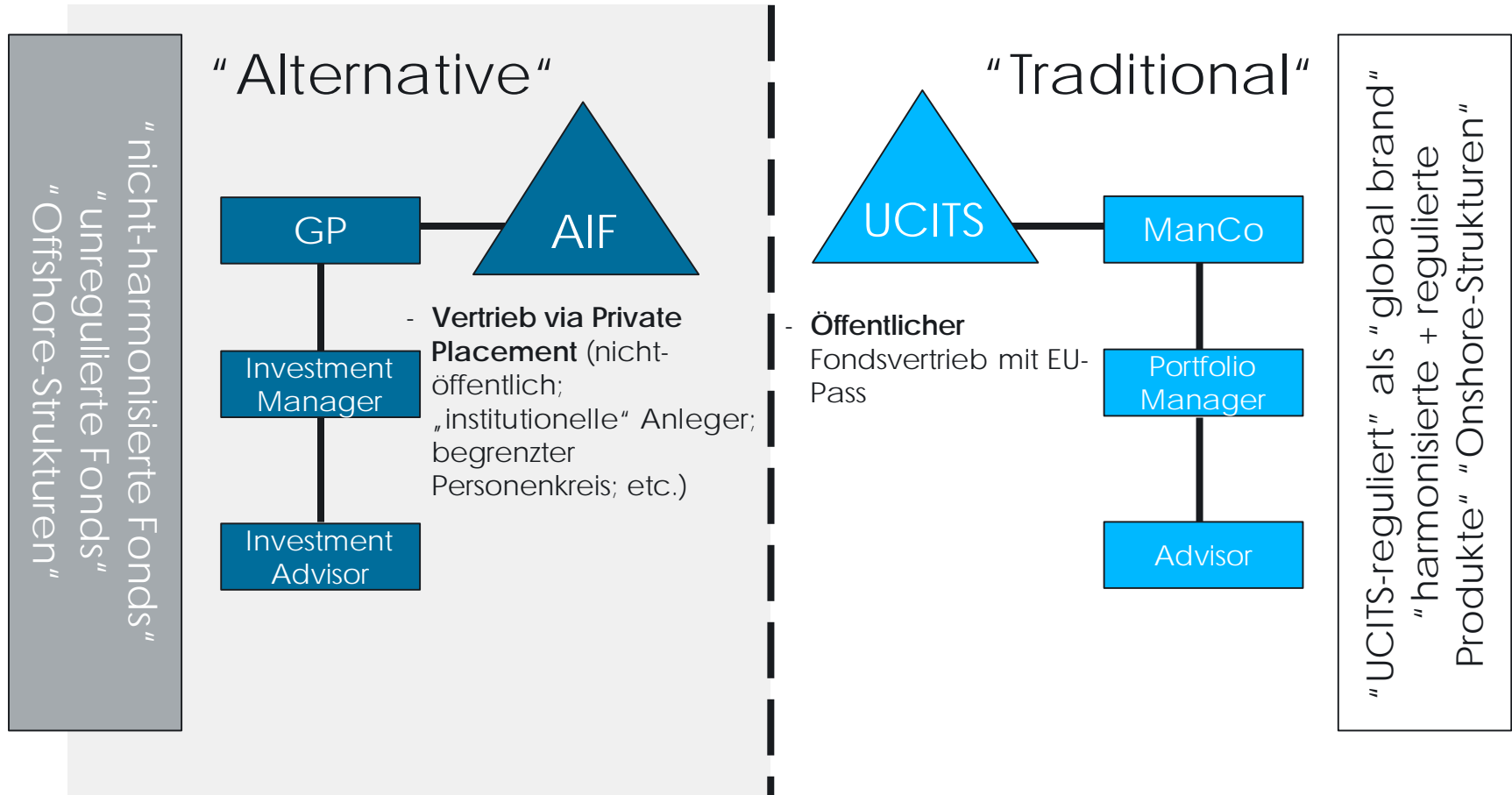
WER, WIE, WAS UND WANN?

Dr. Ulf Klebeck, General Counsel, Woodman Asset Management

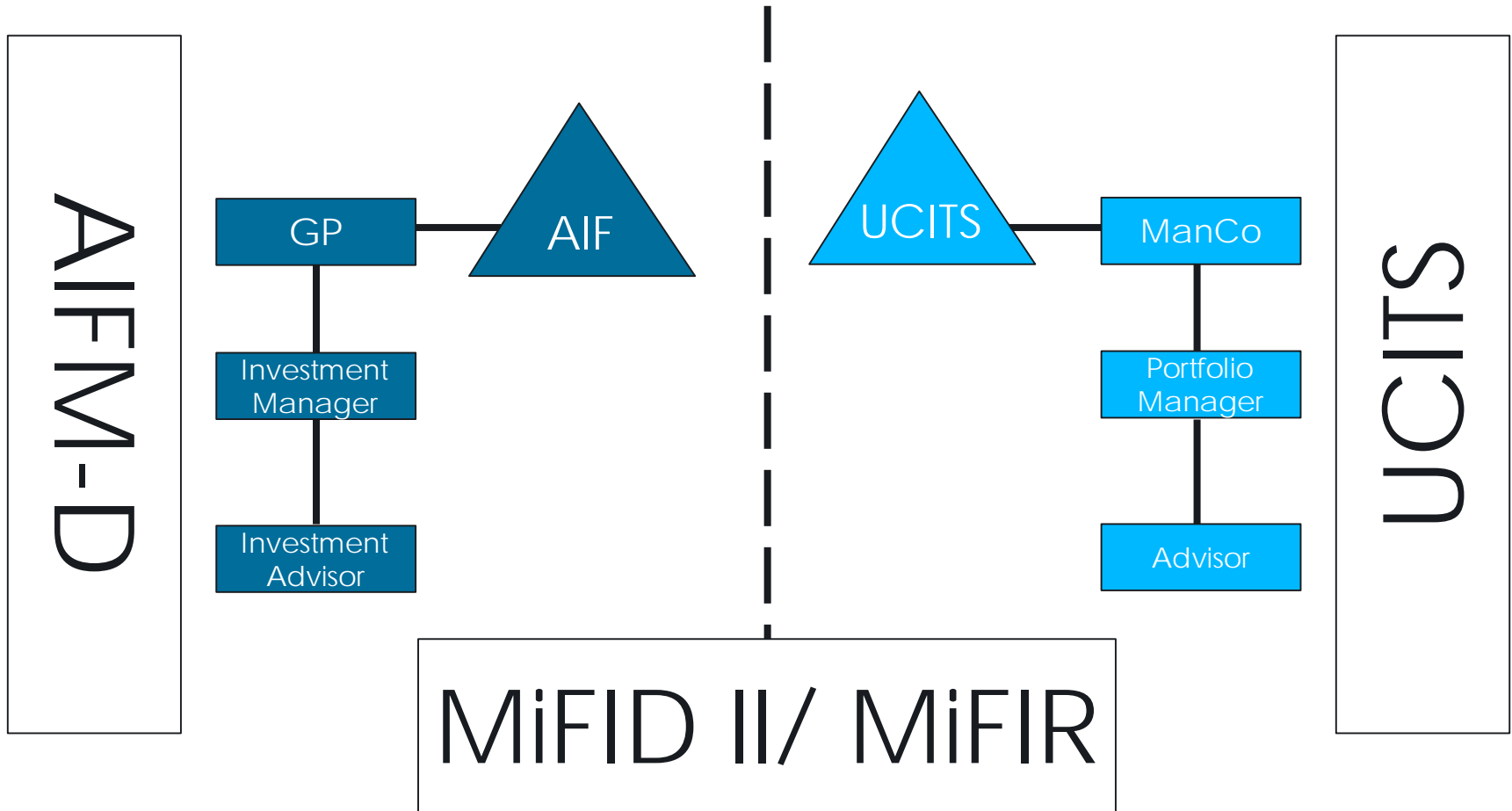
AGENDA

- 1 ■ AIFM-D im Kontext der aktuellen Finanzmarktregulierung
- 2 ■ EU-Reichweite und nationale Regulierungsspielräume
- 3 ■ Vertriebsfragen: wer vertreibt was an wen (und ab wann)?
- 4 ■ Strukturierungsoptionen – *should I stay or should I go?*

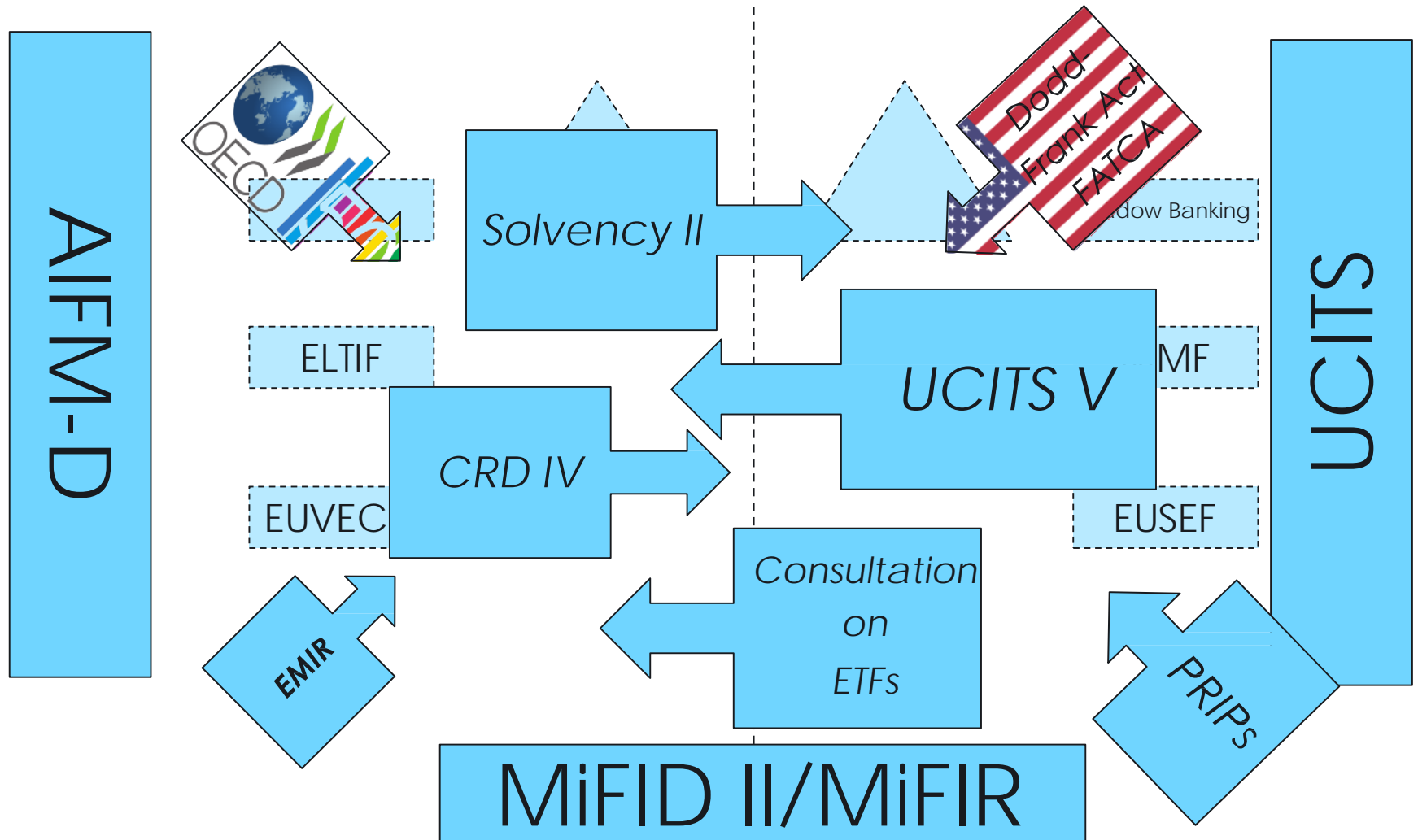
REGULATORISCHER RAHMEN – A LOOK AT THE PAST



STAND HEUTE – ON THEIR WAY TO A SINGLE RULE BOOK?



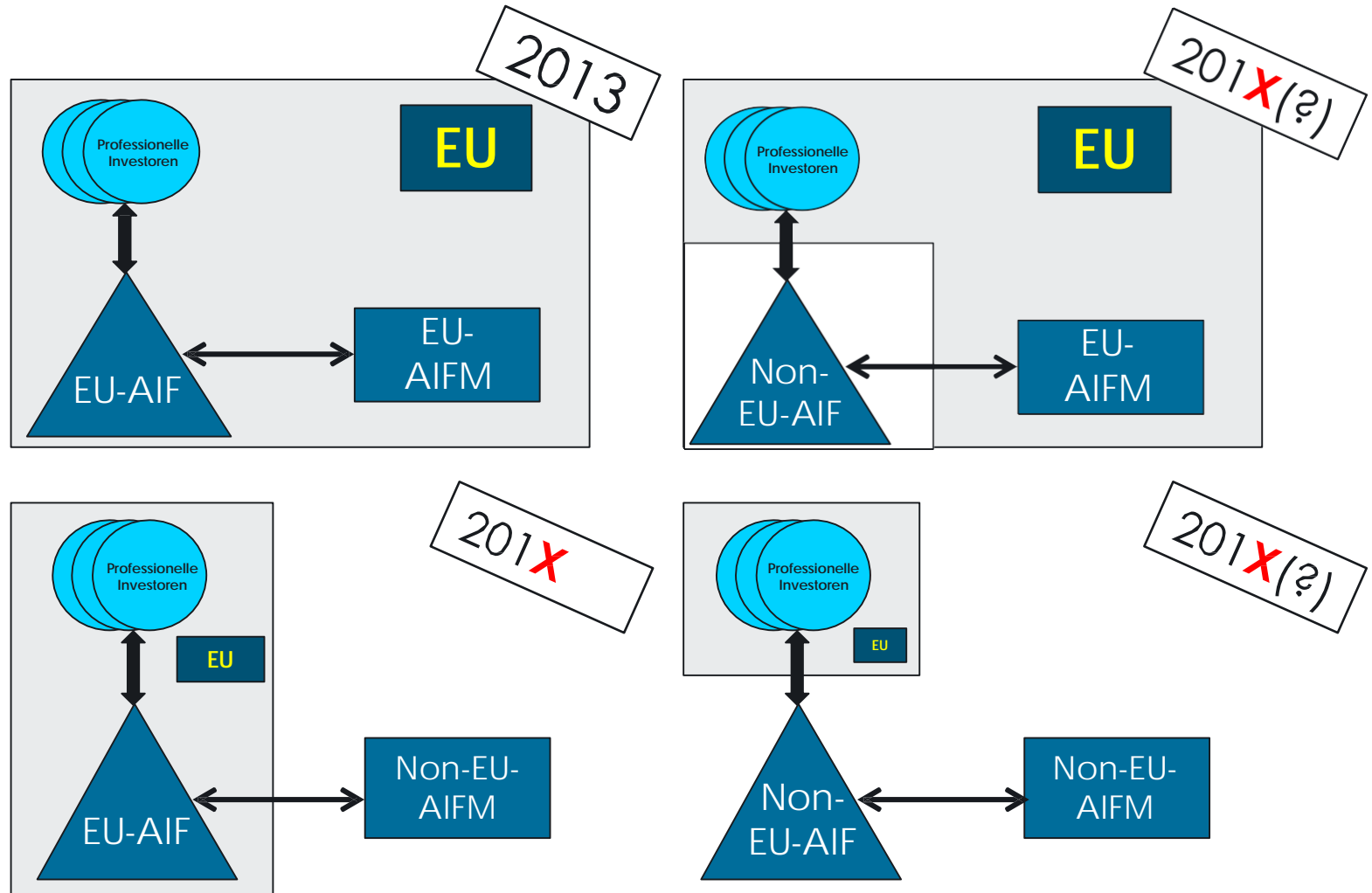
... OR TO LAWYERS' NIRVANA?



AGENDA

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ANWENDUNGSBEREICH DER AIFM-D – EU UND MEHR?

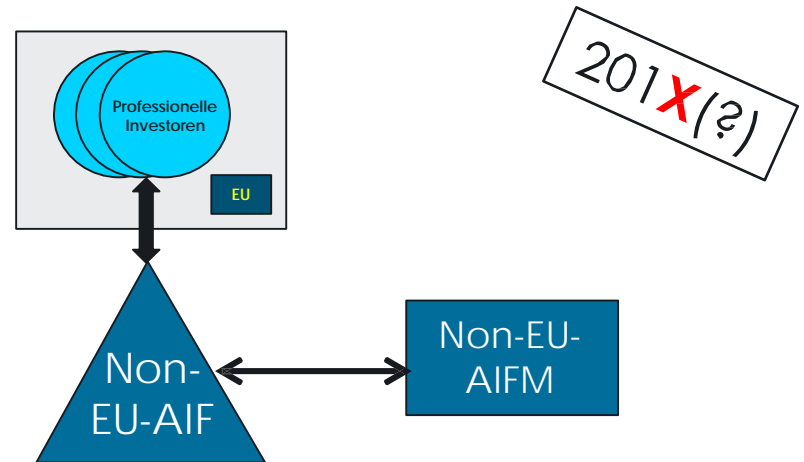
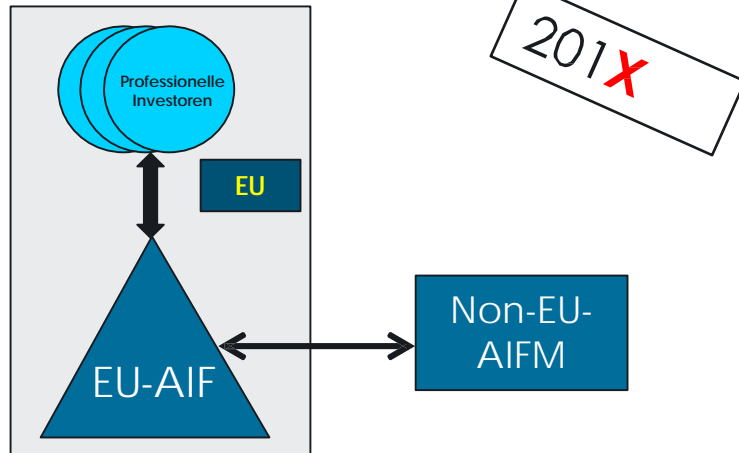
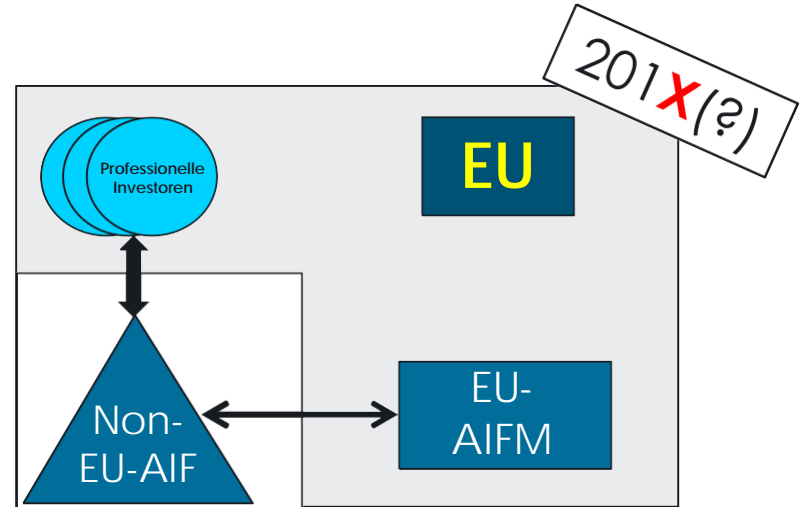


ANWENDUNGSBEREICH DER AIFM-D – EU UND MEHR?



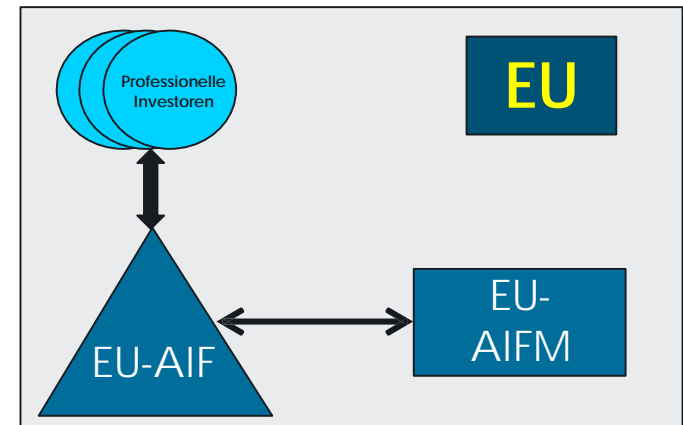
Advice

ESMA's advice to the European Parliament, the Council and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs

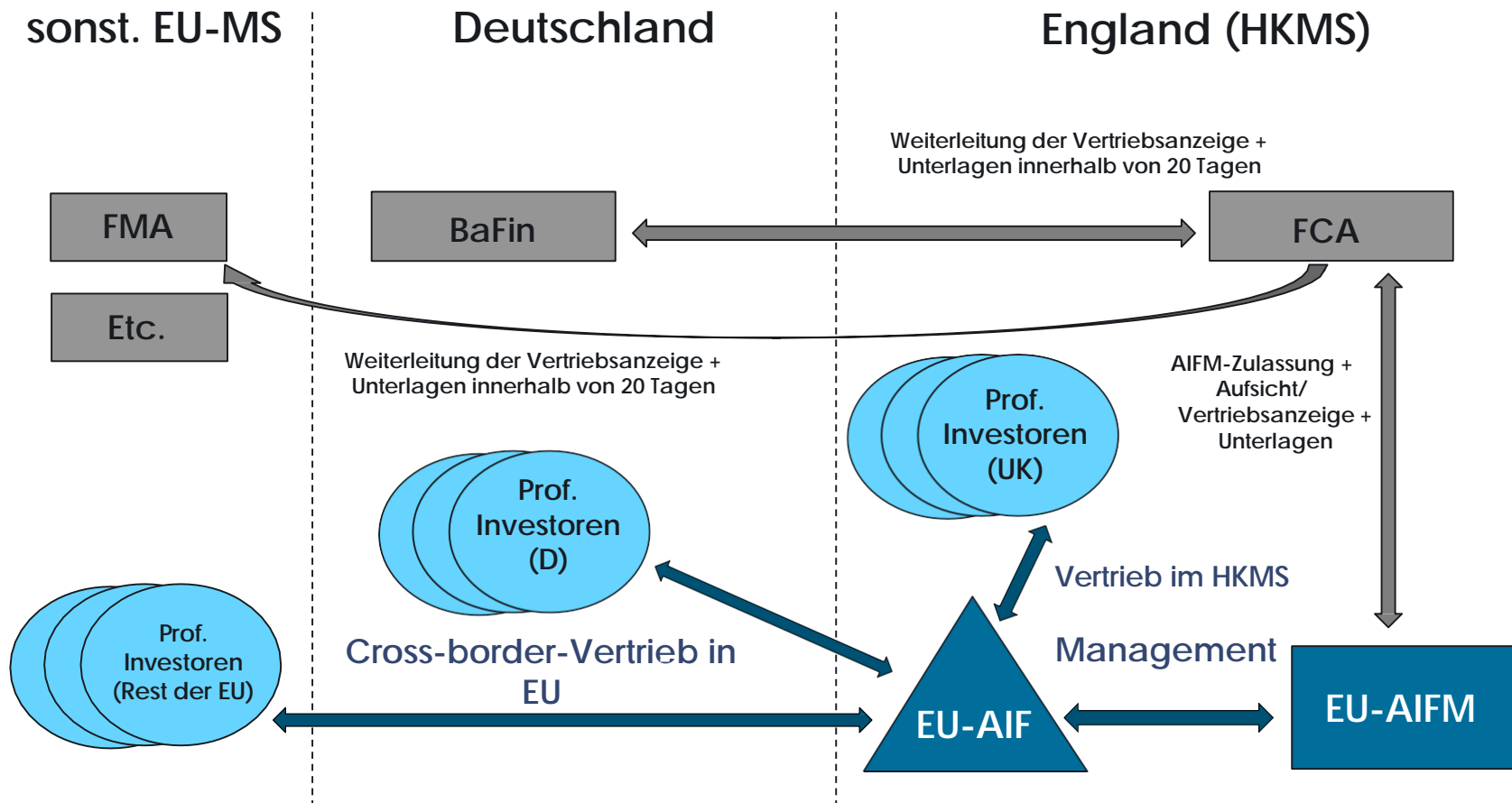


VERWALTUNG UND VERTRIEB VON EU-AIF DURCH EU-AIFM

- EU-weiter Verwaltungs- und Vertriebspass ab 2013
- **Zentral:** Zulassung als EU-AIFM (Artikel 7 ff.)
- Vertriebsanzeige mit Dokumentation – u.a.:
 - Geschäftsplan mit Angaben zu den vertreibenden AIFs
 - Anlage- u. Vertragsbedingungen/Satzung des jeweiligen AIF
 - Angaben zu Verwahrstelle
 - Beschreibung des AIF bzw. alle für Anleger verfügbaren Informationen über AIF
 - Angaben zur Verhinderung des Vertriebs an Privatkunden (Unterbindung des Retailvertriebs)
- „Zulassungs“ verfahren für Vertrieb im HKMS und/oder Cross-border-Vertrieb
 - Ausschliesslicher Vertrieb im HKMS
 - Vertriebsanzeige + Entscheidungsfrist von 20 Tagen nach Eingang der vollständigen (!) Anzeigeunterlagen
 - Vertriebsbeginn mit positivem Entscheid (Voraussetzung: AIFM-D Compliance)
 - Cross-border-Vertrieb (regulator to regulator)
 - Weiterleitung der vollständigen Anzeigeunterlagen innerhalb von 20 Tagen
 - Vertriebsbeginn mit Mitteilung der AB über Versand der Unterlagen

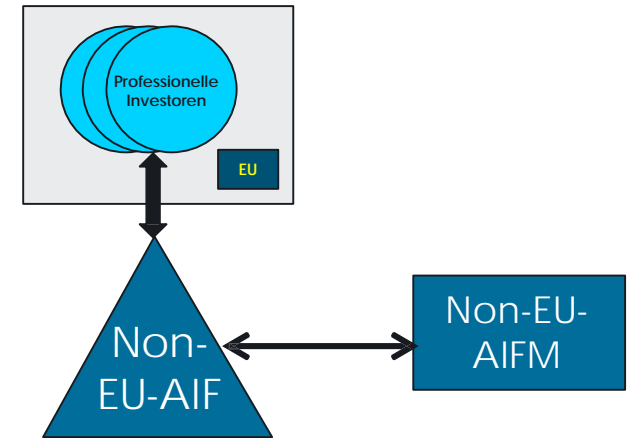


CASE STUDY: VERTRIEB VON EU-AIF DURCH EU-AIFM

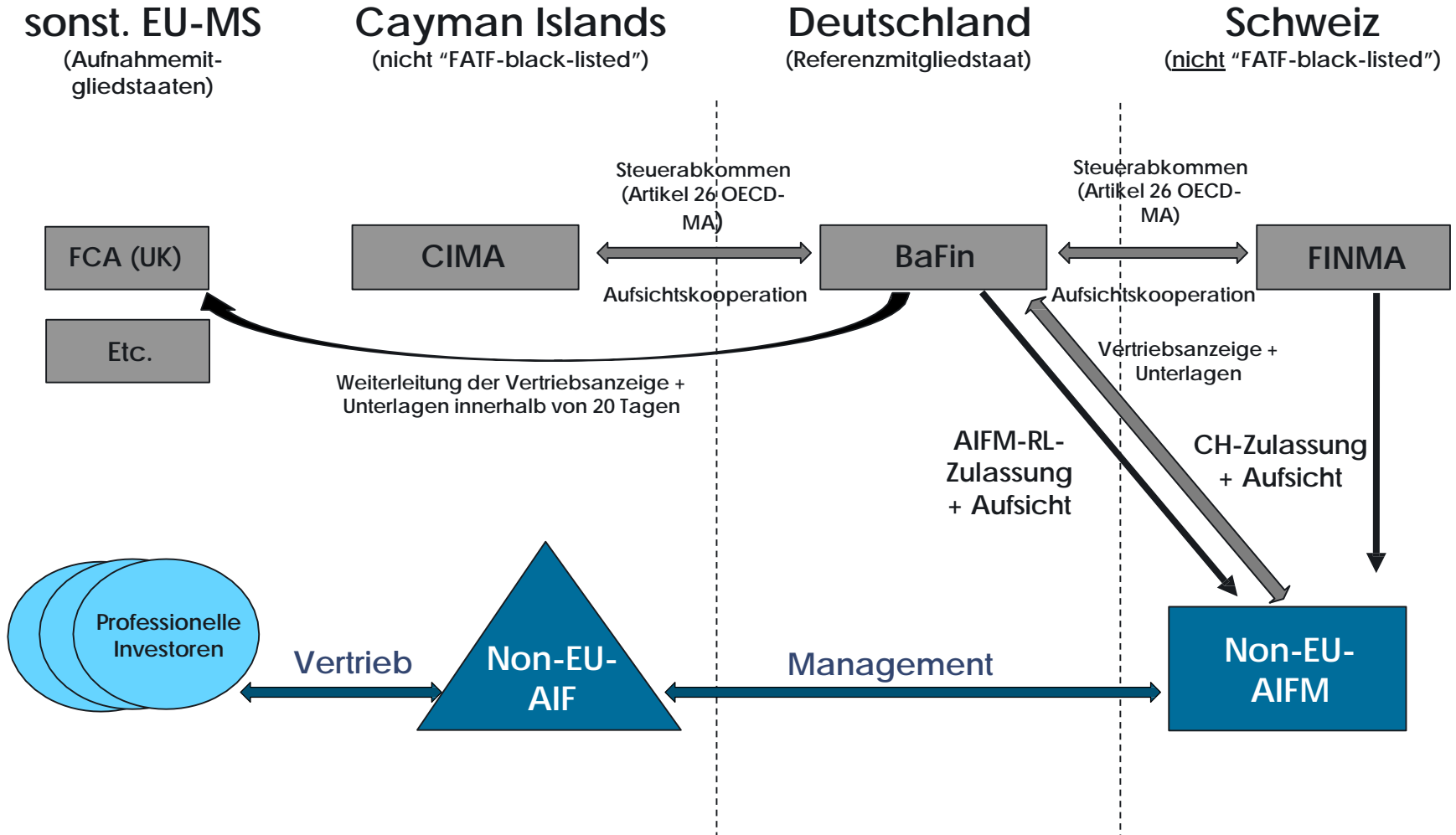


VERWALTUNG UND VERTRIEB VON NICHT-EU-AIF DURCH NICHT-EU-AIFM

- EU-weiter Verwaltungs- und Vertriebspass ab voraussichtlich 201X?
- **Zentral:** Zulassung als Nicht-EU-AIFM durch sog. Referenzmitgliedstaat (Artikel 37 AIFM-D)
 - Bestimmung des Referenzmitgliedstaates (RFMS)
 - Bestellung eines gesetzlichen Vertreters in RFMS
 - Zulassungsverfahren entsprechend Kapitel II
 - Einhaltung aller Vorgaben der AIFM-D (!)
 - **Aber:** Dispens bei Unvereinbarkeit und Bestehen gleichwertiger Vorgaben im Drittstaat
 - Drittstaat-Voraussetzungen bzgl. Nicht-EU-AIFM (Kooperation: Steuer und Aufsicht sowie nicht auf FATF-Liste)
 - Keine Behinderung der EU-Aufsicht durch Vorschriften im Drittstaat
- „Vertriebszulassung“ nach Artikel 40 AIFM-D
 - Drittstaat-Voraussetzungen bzgl. Nicht-EU-AIF (Steuer- und Aufsichtskooperation sowie nicht auf FATF-Liste)
 - Umfassende Dokumentation zu AIFM und AIF – u.a.: Geschäftsplan, Anlage- u. Vertragsbedingungen/Satzung des jeweiligen AIF, etc.
- **Achtung:** AIFM-D-Zulassung strikt zu trennen von Zulassung im Drittstaat (!)



CASE STUDY: VERTRIEB VON NICHT-EU-AIF DURCH NICHT-EU-AIFM



AIFM-D: SPIELRÄUME FÜR NATIONALE GESETZGEBER...

- **Grenzen der AIFM-D:**
 - EU-Pass („*regulator-to-regulator*“) nur für Verwaltung und Vertrieb von AIF an **professionelle Anleger** i.S.d. MiFID
 - EU-Pass für Strukturen mit Drittstaatenbezug (Nicht-EU-AIF und/oder Nicht-EU-AIFM) erst ab voraussichtlich 201X?
- **FOLGE:** Regulierungsspielräume für nationale Gesetzgeber der MS
 - Vertriebsregulierung betreffend Privatanleger („*Retail*“) ist Sache des einzelnen Mitgliedstaats (Artikel 43 AIFM-D)
 - strengere, aber diskriminierungsfreie (!) Regulierung zulässig – keine „kalte“ Aussperrung von EU-AIFs
 - „Drittstaaten-Kompromiss“ nach AIFM-D: „AIFM-light“ nach Art. 42 bzw. Art. 36 AIFM-D, ansonsten Sache des einzelnen Mitgliedstaats
 - **Möglich:** Weitergeltung des nationalen Privatplatzierungs-Regimes zulässig
 - **ABER AUCH HIER:** strengere Regulierung nach AIFM-D zulässig (!)

→ **Vertriebsregulierung und -konzept in Mitgliedstaaten?**

AGENDA

- 1 ■ AIFM-D im Kontext der aktuellen Finanzmarktregulierung
- 2 ■ EU-Reichweite und nationale Regulierungsspielräume
- 3 ■ Vertriebsfragen: wer vertreibt was an wen (und ab wann)?
- 4 ■ Strukturierungsoptionen – *should I stay or should I go?*

ZENTRAL: VERTRIEBSKONZEPT NACH AIFM-D

- Vertrieb (Artikel 4 Abs. 1 lit. x) der AIFM-D) ist:
„das direkte oder indirekte, auf Initiative des AIFM oder in dessen Auftrag erfolgende Anbieten oder Platzieren von Anteilen an einem vom AIFM verwalteten AIF an Anleger oder bei Anlegern mit Wohnsitz oder Sitz in der Union“
- **Ausnahme:** passives Marketing (*“reverse solicitation”*) – nicht auf Initiative des AIFM
- **Achtung:** Wechsel des Regulierungskonzepts
 - Abschied von „öffentlicher Vertrieb vs. Privatplatzierung“ ...
 - ... hin zur Abgrenzung von „aktivem vs. passivem Vertrieb“
- **Notwendig:** Zulassung bzw. Anzeige für Vertrieb von AIF durch AIFM
- **Zentral:** EU-weiter Vertriebspass (vergleichbar OGAW-Konzept)
 - Aber: nur für Vertrieb an professionelle Anleger (i.S. MiFID)
 - Vertrieb an Privatkunden – Regulierung durch einzelne Mitgliedstaaten

BEISPIEL DEUTSCHLAND: VERTRIEBSREGULIERUNG NACH KAGB

- **ABER**: Differenzierung bei Vertriebsanforderungen nach § 295 KAGB
 - **WER?**
 - AIF-KVG (deutscher AIFM)
 - EU-AIF-VG (EU-AIFM)
 - Ausländische AIF-VG (Nicht-EU-AIFM)
 - **WAS?**
 - Publikums-AIF (deutscher AIF)
 - Spezial-AIF (deutscher AIF)
 - EU-AIF (EU-AIF)
 - Ausländische AIF (Nicht-EU-AIF)
 - **AN WEN?**
 - Professionelle Anleger – § 1 Abs. 19 Nr. 32 KAGB (Anhang II von MiFID)
 - Privatanleger – § 1 Abs. 19 Nr. 31 KAGB
 - Semi-professionelle Anleger – § 1 Abs. 19 Nr. 33 KAGB
 - **AB WANN?**
 - Zeitraum von 2013 bis (voraussichtlich) 201X?
 - Ab (voraussichtlich) 201X?

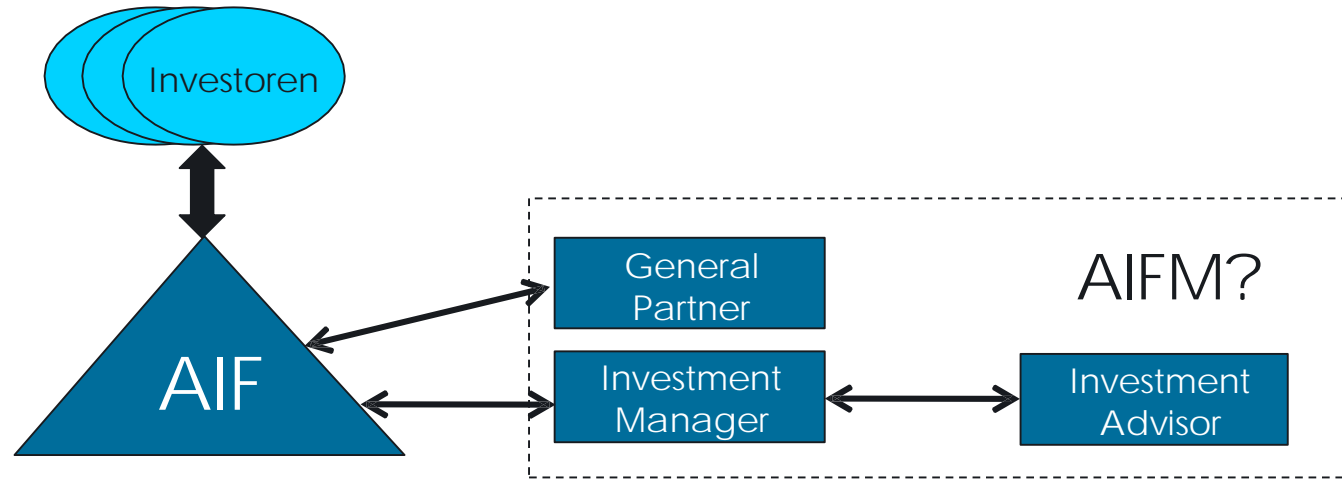
BEISPIEL DEUTSCHLAND: KAGB-VERTRIEBSMATRIX

Anzeige/ Zulassung	<i>Professionelle Anleger*</i>				<i>Privatanleger</i>			
AIF-KVG	Publik.- AIF § 316	Spezial- AIF § 321	EU-AIF § 321	Ausl. AIF § 322 (erst ab 201X)	Publik.- AIF § 316	Spezial- AIF (-)	EU-AIF (-)	Ausl. AIF (-)
EU-AIF-VG	Publik.- AIF (-)	Spezial- AIF § 323 (+ § 330a)	EU-AIF § 323 (+ § 330a)	Ausl. AIF § 324 (erst ab 201X)	Publik.- AIF (-)	Spezial- AIF (-)	EU-AIF §§ 317- 320**	Ausl. AIF (-)
Ausl. AIF- VG	Publik.- AIF (-)	Spezial- AIF § 325 (erst ab 201X)	EU-AIF § 330 (bis 201X) § 325 (ab 201X)	Ausl. AIF § 330 (bis 2015) § 326 (ab 201X)	Publik.- AIF (-)	Spezial- AIF (-)	EU-AIF (-)	Ausl. AIF §§ 317- 320**
Vertriebs- vorschriften	§§ 307 ff. (~ AIFM-D?)				§§ 297 ff. (~ OGAW?)			
Outbound- Vertrieb	§§ 331 - 334				Nationale Regelungen im Zielland			

* Ziel des KAGB: Gleichlauf beim Vertrieb an prof. und semi-profess. Anleger; für semi-prof. Anleger auch Möglichkeit, nach §§ 317-320 zu vertreiben

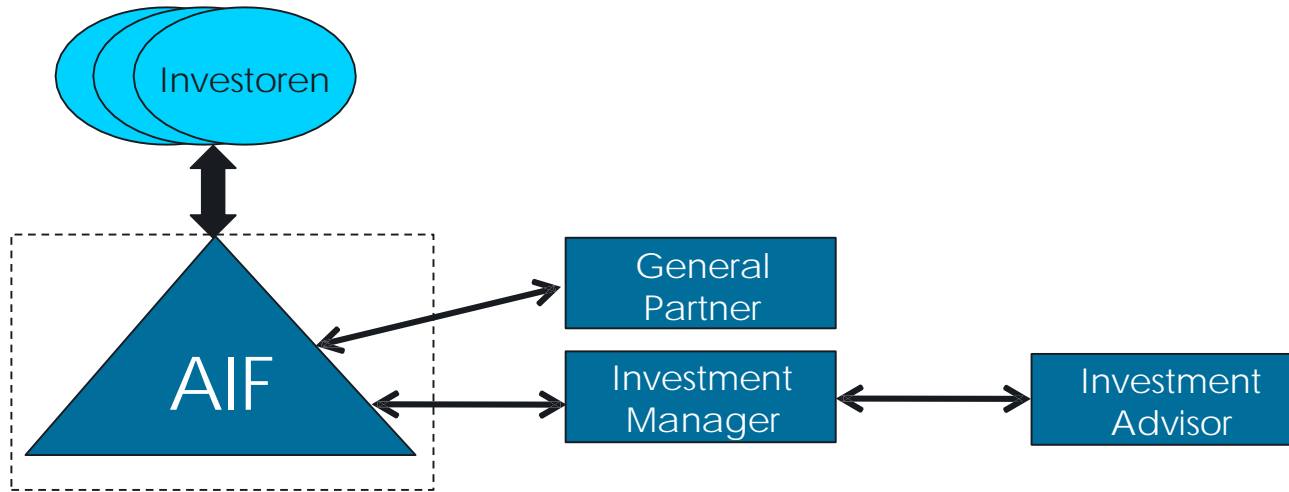
** EU-AIF und Ausl. AIF müssen letztlich die gleichen Voraussetzungen erfüllen wie Publi.-AIF

AUSGEWÄHLTE VERTRIEBSFRAGEN – WER VERTREIBT WAS AN WEN?



- Wer ist "AIFM" nach AIFM-D bzw. "AIF-KVG", "EU-AIF-VG" und "Ausl. AIF-VG" nach KAGB?
 - AIFM-D: „jede juristische Person, deren reguläre Geschäftstätigkeit darin besteht, einen oder mehrere AIF zu verwalten“
 - "Verwaltung eines AIF" umfasst mindestens die Funktionen "Portfolioverwaltung und/oder (?) Risikomanagement"
 - ESMA-Lesart: "Erbringung einer der beiden Funktionen (also Portfolioverwaltung oder Risikomanagement) soll ausreichen, um von einer Verwaltung eines AIF sprechen zu können"
- Ist Manager/Verwalter "AIF-KVG", "EU-AIF-VG" oder "Ausl. AIF-VG" nach KAGB?
 - Sitz als Abgrenzungskriterium
 - Wo ist der Sitz – satzungsmässiger Sitz oder Hauptverwaltung?

AUSGEWÄHLTE VERTRIEBSFRAGEN – WER VERTREIBT WAS AN WEN?



- AIF-Definition nach AIFM-D:
 - „jeder Organismus für gemeinsame Anlagen einschließlich seiner Teilfonds (unabhängig von Rechtsform sowie Typ – offen oder geschlossen),
 - der (i) von einer Anzahl von Anlegern Kapital einsammelt,
 - um es gemäß einer festgelegten Anlagestrategie zum Nutzen dieser Anleger zu investieren, und
 - (ii) keine Genehmigung gemäß Artikel 5 der Richtlinie 2009/65/EG (UCITS-RL) benötigt“
- Weitergehende Differenzierung nach KAGB: „Publik.-AIF“, „Spezial-AIF“, „EU-AIF“ und „Ausl. AIF“
 - Achtung: Typenzwang plus Produktregulierung für deutsche AIF (inkl. Anlagebeschränkung)
 - Reichweite des Produktregulierungsverbots?

AUSGEWÄHLTE VERTRIEBSFRAGEN – WER VERTREIBT WAS AN WEN?

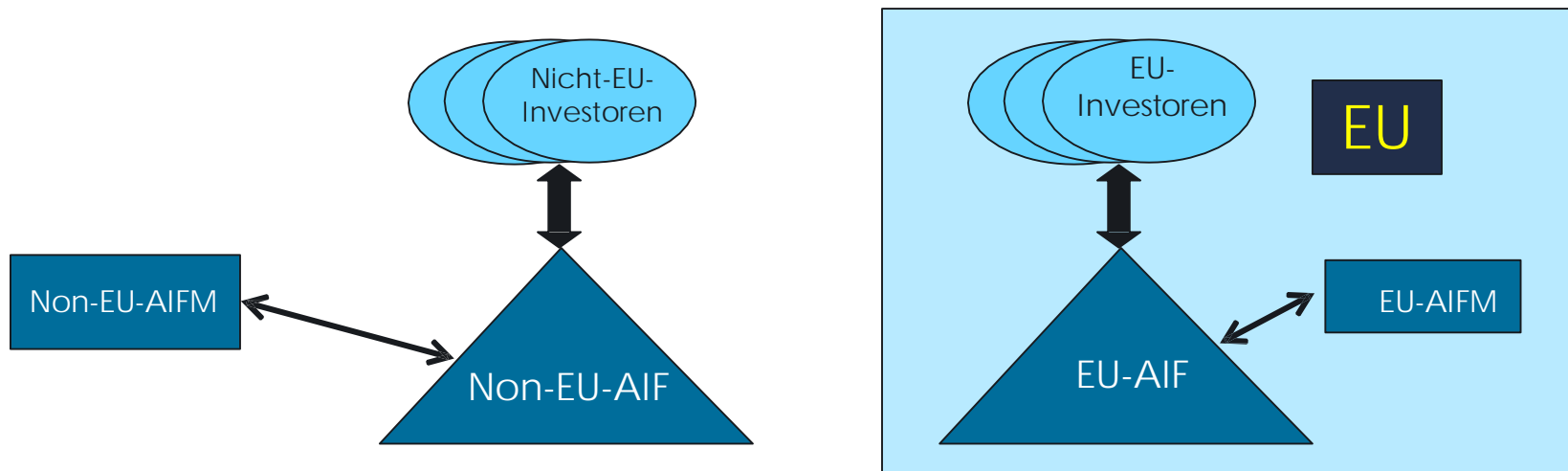
- Vertrieb an **professionelle Anleger**
- Vertrieb an **semi-professionelle Anleger**
 - Anforderungen an semi-professionellen Anleger ("*the German extra-sausage*") – vgl. § 1 Abs. 19 Nr. 33 KAGB
 - Kein EU-Passport! Konflikt mit AIFM-D-Vorgaben – „ausschliesslicher Vertrieb an prof. Anleger“?
 - **Frage:** Verhältnis zum „*regulator-to-regulator*“-Konzept der AIFM-D? Extra-Anzeige bei BaFin?
- Vertrieb an **Privatanleger**
 - Hohe Anforderungen an Vertriebszulassung, § 316 bzw. §§ 317 – 320 KAGB – v.a.
 - gemeinsamer Sitz von AIF und AIFM in einem Staat mit wirksamer Aufsicht zum Schutz der Anleger, § 317 Abs. 1 Nr. 1 KAGB
 - AIFM-D-Compliance nach § 317 Abs. 1 Nr. 3 KAGB
 - Sicherstellung der deutschen Produkt- und Anlageregulierung, § 317 Abs. 1 Nr. 8 KAGB
 - Umfangreiche Dokumentations- und Informationspflichten zu AIFM, AIF und Investments
 - Verkaufsprospekt und AIF-KIID (NB: Verhältnis zu VIB nach VermAnlG?) plus Prospekthaftung
 - Time-to-market – EU-AIF: 3 Monate und ausl. AIF: 6 Monate

AGENDA

- 1 ■ AIFM-D im Kontext der aktuellen Finanzmarktregulierung
- 2 ■ EU-Reichweite und nationale Regulierungsspielräume
- 3 ■ Vertriebsfragen: wer vertreibt was an wen (und ab wann)?
- 4 ■ Strukturierungsoptionen – *should I stay or should I go?*

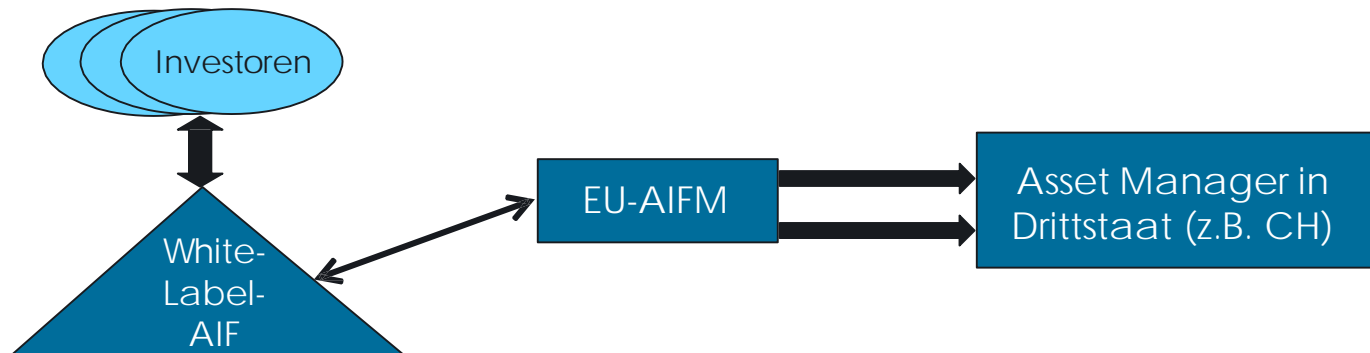
ALTERNATIVE GESTALTUNGEN UNTER AIFM-D UND KAGB (I)

- Flucht unter UCITS?
 - Begrenzte Möglichkeit von AI-Anlagestrategien unter UCITS
- Passives Marketing in EU („auf Initiative des Investors“)?
 - Riskant, da weiter Vertriebsbegriff der AIFM-D und KAGB
- Parallelfonds-Strukturen bei internationalem Investorenkreis?



- Begrenzte Anwendung der AIFM-D – unter den Schwellenwerten?
- Notwendig: klare Trennung von Aktivitäten, Funktionen und Verantwortungen in EU und Nicht-EU

ALTERNATIVE GESTALTUNGEN UNTER AIFM-D UND KAGB (II)



- Grds. Zulässigkeit der Delegation von AIFM-Funktionen unter AIFM-D(!)
- **Aber:** Strenge Anforderungen (Konkretisierung durch Level II) – v.a.
 - Rechtfertigung durch objektive Gründe
 - Hinreichende Qualifikation und Ressourcen des beauftragten Unternehmens
 - Zulassung als Vermögensverwalter oder Registrierung und Aufsicht des beauftragten Unternehmens (aber Möglichkeit des Dispens durch Aufsichtsbehörde des AIFM)
 - Kooperation zwischen Aufsichtsbehörde des EU-AIFM und Drittstaat-Aufsichtsbehörde
 - EU-AIFM darf durch Delegation nicht zu „Briefkastenunternehmen“ werden (Level II-Wording)
 - Keine Beeinträchtigung der Aufsicht über AIFM sowie Verwaltung durch AIFM im Interesse der Anleger
- **Problem:** Fondsvertrieb unter MiFID II/MiFIR!

Q&A....

...UND BEI WEITEREN FRAGEN:

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