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Stefan Mandić

More is Less: The Political Economy of the MiFID Revision

Master thesis

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Abstract

The thesis titled „*More is Less: The Political Economy of the MiFID Revision*" aims to reveal to what extent different preferences of individual Member States on EU financial regulation affect the increase in complexity of financial legislative acts, concretely MiFID II. Using three theoretical building-blocks in a classical framework of political economy, we argue that divergence of member states is inherent to their different capitalist environments (Varieties of Capitalism). Aligning these differences with the common, harmonized regime can create costs and cause market disadvantages. Therefore, Member States try to push for as similar legislation to their own as possible, to minimize the costs. The result is a disproportionately long legislative act, that was crafted in a way to satisfy individual preferences of Member States, through discretionary provisions, exemptions and other. We also investigate how much harmonization the original MiFID established, asking if some provision became less complicated in MiFID II, owing to gradual convergence of Member State regimes.

Abstrakt

The thesis titled „*More is Less: The Political Economy of the MiFID Revision*" aims to reveal to what extent different preferences of individual Member States on EU financial regulation affect the increase in complexity of financial legislative acts, concretely MiFID II. Using three theoretical building-blocks in a classical framework of political economy, we argue that divergence of member states is inherent to their different capitalist environments (Varieties of Capitalism). Aligning these differences with the common, harmonized regime can create costs and cause market disadvantages. Therefore, Member States try to push for as similar legislation to their own as possible, to minimize the costs. The result is a disproportionately long legislative act, that was crafted in a way to satisfy individual preferences of Member States, through discretionary provisions, exemptions and other. We also investigate how much harmonization the original MiFID established, asking if some provision became less complicated in MiFID II, owing to gradual convergence of Member State regimes.

Klíčová slova

MiFID, MiFID II, MiFIR, European Union, financial regulation, political economy

Keywords

MiFID, MiFID II, MiFIR, European Union, financial regulation, political economy

Range of thesis: 124,797 characters, 88 pages

Declaration of Authorship

1. The author hereby declares that he compiled this thesis independently, using only the listed resources and literature.

2. The author hereby declares that all the sources and literature used have been properly cited.

3. The author hereby declares that the thesis has not been used to obtain a different or the same degree.

Prague 31.07.2017 **Stefan Mandić ______________________**

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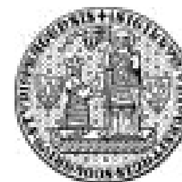
Institute of Political Studies **Master's thesis proposal**



Master Thesis Proposal

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Proposed Topic:

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The main aim of the thesis is to describe and explain the evolution of decision-making processes in the European Union with respect to financial market regulation in the previous three decades. Since financial market harmonization processes took off with Investment Services Directive in 1993, much of it has changed in the EU (along with the name of the organization itself). The ISD, especially comparing to the contemporary EU financial regulation acts, was very short (original text had 20 pages), simple and left a lot of space for Member States for interpretation and different national application. Its "offspring", Markets in Financial Instruments Directive (MiFID), that came into force in 2004, pre-crisis EU, was much longer, both in scope and in goals it set forth to achieve. However, the Financial Crisis that started in 2007, inter alia, had a profound effect on EU financial markets and had forced the EU legislators to sit down once again and negotiate a new directive, this time followed by a Regulation – MiFID II and MiFIR (Markets in Financial Instruments), respectively. The following research questions will be addressed:

RQ1: Why has the length of financial market regulatory acts severely increased in length, complexity and scope?

RQ2: What are the main actors that participated in the MiFID II negotiation process, what were the advocacy coalitions that formed during the negotiations, what were the main contesting issues they disagreed upon and how did they achieve compromise?

RQ3: What is the role of the Financial Crisis in shaping of MiFID II, and how did the EU answered the crisis issues?

Working hypotheses:

H1: The MiFID II is more complex than any of its predecessors due to the larger number of EU Member States, the greater need to give a joint, comprehensive answer to an EU-wide crisis and due to the growing complexity of the financial instruments themselves.

H2: MiFID II was followed by a Regulation to avoid asymmetry of application of the key policies of the MiFID II.

H3: The old advocacy coalitions, that were in place during the ISD and MiFID negotiations, remained in place, while the final agreement was in favor of heavier financial regulation than before the crisis.

H4: It is very difficult to control for the Financial Crisis effect in order to isolate the evolution of decision-making processes.

Methodology:

The thesis will employ theoretical framework of institutional political economy, focusing on the European Union and the mechanisms that govern decision-making in financial markets regulation. The paper will build upon and expand a chapter written by Zdeněk Kudrna "Financial Market Regulation: *A 'Lamfalussy exit' from the joint-decision trap'*, in Gerda Falkner (ed.), The EU's Decision Traps: Comparing Policies (Oxford: Oxford University Press, 2011) . A reflection on the questions raised in this chapter will be supplemented with newly introduced issues, such as the Financial Crisis in the EU, further expansion of

the EU itself, increasing complexity of financial market instruments and other. Theories that will be used mainly rely upon the work done by Niamh Moloney, Lucia Quaglia. David Howarth and others, written in the last several years, concerning the political

Outline:

1. Introduction
2. Theoretical background and the literature review
3. Methodology
4. From ISD to MiFID II
5. Initial phase of MiFID II review
6. Advocacy Coalitions and contesting issues
7. Future prospects
8. Conclusion
9. References and bibliography

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Author **Supervisor**

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Introduction

Ever since the last financial crisis reached the shores and pockets of the European Union, almost a decade ago, there has been an eruption of different compliance-related, *catchy* acronyms, abbreviations of different EU legal documents, that aimed to answer the causes and the consequences of the crisis on a European-wide, harmonized basis. Most of those – CRD IV, EMIR, AIFMD, SFTR[1], to name a few, created a major shift in the balance sheets and business strategies of almost every single financial institution in the EU (EEA), as well as a solid number of non-financial institutions, whose business operations had something to do with derivatives, which were seen as one of the major culprits of the 2007 crisis. All of those aforementioned, and many other acronyms, were, however, mainly aimed at one or, alternatively, a handful of business operations a company was performing, and remained familiar to only a limited number of business divisions. But if one were to ask an average dealer, a broker, a business analyst, a project manager, a compliance officer, a risk analyst, an investment advisor, a member of junior, middle or senior management, what acronym is currently the word of the day in the European financial market regulation due to its scope, effect, costs and brain effort necessary to internalize it, without a doubt it would be the one that is the subject of this paper - the "notorious" *MiFID*.

MiFID, or *Markets in Financial Instruments Directive*, actually refers to two different financial regulation directives of the European Union and of the Council, that are 10 years apart from each other – the *original* MiFID (also known as Directive 2004/39/EC) and the *revised* MiFID, colloquially known and often referred to as MiFID II (Directive 2014/65/EU), which repealed and updated the original Directive. At the first glance, a major difference, *inter alia,* was that the MiFID II was a package – consisting of one Directive (the MiFID),

[1] Stands for: *Capital Requirements Directives* (with *Capital Requirements Regulation* 2013 and *Credit Institutions Directive* 2013); *European Market Infrastructure Regulation* 2012; *Alternative Investment Fund Managers Directive* 2011; *Securities Financing Transactions Regulation* 2015, respectively.

and one Regulation – the MiFIR, *Markets in Financial Instruments Regulation* (Regulation 2014/600/EU). The original MiFID, enacted in 2004, has been in implementation since 2007 and it represents the linchpin of the 1999 Financial Services Action Plan (FSAP), aimed at creating a single market in financial services. Described as “The Revolution” (Casey and Lannoo, 2009) this European Union rulebook brought several ground-breaking changes to the EU financial markets, with MiFID “*passporting*” probably being the most famous one, even to laymen[2].

Despite being the most well-known endeavor of its sort on the European Union level, the original MiFID was not the first legal instrument whose purpose was the harmonization of the EU financial services and the creation of single market in those services. The ISD (*Investment Services Directive*, Directive 93/22/EEC), the 1993 predecessor of the original MiFID, was the first such harmonization attempt – much smaller in size, scope and ambition. In the meantime, the EU adopted the so-called “Lamfalussy procedure”, which increased the speed of decision-making in financial regulation, but, critics say, also led to a severe increase in complexity[3]. Without any deeper analysis, one cannot but notice a staggering disproportion – the ISD had 32 Articles (20 pages), while the original MiFID, 11 years after, had 73 Articles (44 pages). In turn, the MiFID II package, the latest enactment of its kind, has 97 Articles (148 pages) and 55 Articles (65 pages), of MiFID and MiFIR text, respectively.

But what is causing this increase in complexity? The purpose of this paper is to try to provide an answer to that question, using the framework of qualitative political economy. This theoretical framework is consisting of three building blocks upon which this thesis is constructed.

[2] One of the key topics in Brexit talks, due to the size and significance of the UK financial industry.
[3] At this point, we will understand an increase in legal complexity as an increase in the number of words and articles of the legal document. Further on in this paper, we will deal with this issue with deeper considerations

The first building block is intergovernmentalism of the EU financial regulation of Story and Walter (1997), who have investigated preferences of Germany, France and the UK, trying to explain what sort of factors caused those preferences to diverge. The second building block of this thesis is the advocacy coalition framework in EU financial regulation, given by Quaglia (2010), which introduced "belief-systems" and not just mere interests, as determinants of possible member-state coalitions. The theoretical framework is finally completed by a comparative case study of ISD – MiFID evolution, done by Kudrna (2011). In other words, we acknowledge the varieties of capitalism as the cause of different approaches to financial regulation by different member states, which in turn incentivizes them to forge alliances with like-minded member states in order to make the common regulatory framework as close as possible to their own. Investigating the joint-decision trap and asking has the Lamfalussy procedure found a way around it, Kudrna, in his comparative case study, juxtaposes the decision-making of ISD with the original MiFID.

Upon the building-blocks stated above, we construct the case that argues that increase in complexity is best understood as a result of negotiations between coalitions with differing preferences. Influential member states are not willing to cede and are trying to shape the common legislation as close as possible to their own, in an attempt to benefit from lower implementation costs and comparative advantages over other member states. Consequently, the legislation is full of exceptions, discretions and adaptations on the most contested issues, which directly leads to an increase in number of articles and length of the legislative acts. Despite certain improves in harmonization, there is a long way to go.

The two research hypotheses are:

Hypothesis 1: Controlling for the financial crisis and technological progress, MiFID II shows significant increase in complexity, due to the differing preferences of key member states, which have not substantially converged since the inception of ISD.

Hypothesis 2: However, a certain degree of convergence is present, and it manifests through the provisions existing in the original MiFID, but disappearing in the follow-up package, due to the less complexity required.

In order to prove those hypotheses, we proceed with a two-step analysis, a combination of quantitative and qualitative approach. First, we construct a correlation table, that aims to compare the length of Articles in three documents – initial Commission MiFID II proposal; the follow-up proposal of the Council and the final MiFID II solution. To test the second hypothesis, we use correlation table in Annex IV of MiFID II Directive, which shows new repealing articles and their corresponding MiFID I matches.

In the second step, we analyze this quantitative result using qualitative argumentation, that shows how different preferences of member states have shaped this increase in the number of words and articles. Due to the political sensitivity of the issue in question, and the lack of access to relevant *"off-the-record"* information, as the main source of data we have focused on the official documents of the EU created during the MiFID review. To fill for the lacunae in the negotiation process, we use information from the Financial Times, Bloomberg, The Economist and alike.

1. Theoretical Framework

This chapter presents the theoretical framework of this thesis, necessary to build the argument that the increase in legal complexity of the EU financial regulation legislation comes as a consequence of competing national preferences in financial market regulation and understanding of the role of financial services in a society. It is divided in three parts: first, it presents the dominant paradigms of interpreting various processes of financial market harmonization, integration and regulation in the EU; second, it zooms-in on the three theoretical *building blocks* of this paper and finally concludes with a case for interpreting and measuring legal complexity.

1.1 Competing paradigms

European Union is the largest and most influential project of its sort in the world, therefore it is no surprise that it is also the most scientifically scrutinized integration in the world (Wallace, Pollack and Young, 2010). Many theories have been put forward to explain different aspect of this integration, drafted by political scientist, economists, theorist of international relations. Some of these theories have, naturally, found their way into the field of financial harmonization, integration and regulation, while others came as a consequence of adaptation of these theories to that respective field. It is possible to classify these theories according to the actors they tend to put at the forefront – member states, EU governing bodies or private actors (Quaglia, 2010). In turn, we will present each.

The theory that tends to put member states as the key actors in decision-making in the financial regulation and integration and which is probably the most dominant one nowadays is intergovernmentalism. In general, the intergovernmentalist argument says that the European union integration comes as a consequence of different bargaining powers of member states with stronger or weaker positions. The outcome is determined by the

differences in their preferences, which makes them put forward their own interests first and try to shape the common policies as close as possible to their own (Ruse, 2010). Intergovernmentalist theories emerged as an answer to the predominant (neo)functionalist paradigm, during the 1970s (Mazey and Laffan, 2006) when it became obvious that this theory lacks enough explanatory power to explain somewhat weakening position of the joint European bodies (Moga, 2017). Intergovernmentalism suggests that due to conflicting preferences and individual interests of member states often leads to decision-making deadlocks, since the sides are not easily willing to cede and back down from their own priorities. Such conflicting positions then lead to suboptimal outcomes, among which the most famous is the joint-decision trap (Falkner, 2011). European governing bodies noticed that early on the EU formation process, therefore tried numerous different approaches to decision and lawmaking, among which the most important one for this paper is Lamfalussy process[4]. The theory suggests that member state could show relatively high level of cooperation on certain issues that do not violate their sovereignty in matters they see as national priorities; however, in certain respects such as foreign policy for example (Keohane and Hoffmann, 1991), those negotiations could be potentially very difficult and often in vain. Literature confirms high explanatory power of intergovernmentalism on financial regulation and integration of the EU (Sadeh, 2009). Apart from Story and Walter (1997), our first theoretical building block, we ought to mention Underhill (1997), as another author who understood the importance of triangle UK-France-Germany for improvement and harmonization of the common market in financial services. Intergovernmentalism is the main theory that supports this paper – we show that in the creation of MiFID II and the increase in complexity, the main factors that drive the process are member states and that the final outcome is a compromise shaped by competing interests of those most important ones.

[4] Lamfalussy process will be scrutinized further in the following chapters

Having large and important financial sectors, old (pre-2004) member states are more interested and have high bargaining power in this issue, while the member states that joined later have either negligible proportion of financial services in their GDP or this sector is dominated by foreign companies and are therefore not interested as much as the key states, or their interests are well represented by some of the coalitions. This is supported with our data as well – only Latvia, Czech Republic, Slovakia and Poland have answered to the Commission's call for initial consultation, while most of the responses were rather short, comparing to the key member states[5].

Another important theory, already mentioned in this paper, is the (neo)functionalist theory, used to explain the EU financial integrative processes. Arising from functionalism of David Mitrany (1966), Neofunctionalism applied to European Union predicted that due to the *spillover* effects from initial integration in technical and economic matters that benefited everyone, gradual political convergence will take place, resulting in *ever-closer* Union. In time, governments and peoples will lose their political allegiance to their national governments and will shift focus to joint bodies in phrasing and determining their common goals and policies (Haas and Dinan, 2004). This will, *ipso facto,* increase the importance of supranational bodies, surpassing individual governments and will help overcome their diverging preferences. As for the spillover effect, we could notice a twofold result. Firstly, there is a sectoral spillover – from early coal and steel agreements, to agriculture or other different economic agreements and second – a political spillover, which often led to centralization of governing bodies and committees, intended to facilitate decision-making processes (Moga, 2009). Applying this theory to financial integration of the EU, most scientists put emphasis on spillovers from the single market and European monetary integration (Howarth and Quaglia, 2016), with the EU commission as the main driver of

[5] Database is to be found at: https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp

those changes (Quaglia, 2010; Jabko, 2006; Posner, 2005). The financial crisis did put the member states more together and has certainly increased the potential and the willingness to cooperate and give a firm, harmonized answer against the crisis. Developments in the European Banking Union, as well as initiatives for European Capital Market Union are some concrete steps which have been taken in order to father harmonize and integrate the common financial services market. Legislation has been produced in other areas as well, namely with previously weakly overseen derivatives on the OTC basis, which must have had certain influence on MiFID II, due to the similarities of the instruments and the markets they cover. Although the European Commission does have an immense influence and did initiate the start of the MiFID revision, we argue that the length, the scope, the time needed to adopt the MiFID II text (especially in the European Council, where member states preferences are best scrutinized), the number of provisions and other questions, significantly impede the explanatory power of this theory, although it is not without contribution to understanding the MiFID II decision-making.

There is another group of theories, that tend to focus on private actors as the key determinants of EU financial integration (Quaglia, 2010). Bieling (2003) , using neo-Gramscian approach, talks about the transnational corporations as the key influence on the development of harmonized markets for securities, which leads to growth but could aggravate social divisions and initiate a wide European discussion on societal needs and necessities. He finds that interests of different powerful players are converging towards a big, harmonized market, which in turn pushes forward different regulatory and integrative processes in its favor. Similar approach is taken by Macartney (2011). In his book, he, like many others, scrutinizes Germany, the UK and France, trying to dismiss path-dependency as the sole reason for national preferences, while toing down the approach of VOC which overestimates the focus on the state. The main message of his work is that while there is a growing

transnational factor that influences EU integration, it is not yet detached from the "national", and therefore creates a plethora of different, *variegated* approaches. Unlike Bieling, Grossman (2004) dismisses claims of ubiquitous and omnipotent influence of private interest groups in the EU, contrasting the dominant belief both in academia and the public. Focusing on financial enterprises in France, Germany and the UK (again corroborating the influence of these three member states) he finds that these actors are often unable to act in utility-maximizing manner, due to the ever changing political climate in which they cannot easily operate and formulate their preferences. Therefore, they cling on to political actors they know the best – their respective member states and corresponding national authorities, and try to, in accordance with them, put forward their preferences. Due to high level of uncertainty and gradual learning, the economic interest groups seem rather conservative and not overly enthusiastic about changes, which bring costs and potential hindrances in the operation. Knowing this, they would either push for a complete harmonization and integration with as few steps as possible, or they will entrench themselves, trying to influence policies that aim to preserve status quo. As for the EU institutions, the author finds that for these companies, making alliances and influencing the European Commission seems natural and relatively easily achievable, after the initial learning process is finished, due to the, *inter alia*, small number of actors and relatively certain policy goals. Mügge (2006) reinforces the argument of the strength of big players in the European market, being another author that dismisses state-centric approaches to EU financial integration and liberalization. He finds that the regulatory and integrative polices are an outcome of bitter fight for influence between companies are interested parties in the conflict, that seek competitive advantages in the market, or at least to be spared from potential disadvantages. Again, using examples of the three most important member states, through case study of European securities in the 1990s, he demonstrates how

regulatory and liberalization outcomes are results of different dynamics that underpin public-private relations.

Acknowledging certain explanatory power of the two other ideas, our paper is written almost entirely within the intergovernmentalist theory, and this theory, applied through our building-block system, is expected to bring the highest explanatory gains in this research.

1.2 The three theoretical building blocks

The first building block of this paper is the "*Political Economy of Financial Integration in Europe: The Battle of the Systems",* a seminal book by Jonathan Story and Ingo Walter (1997). Although written exactly 20 years ago, when a legislative act such as MiFID II was a rather wishful thinking, the book is still very relevant, clearly showing how EU financial regulation is shaped by differences in national preferences of its biggest and most influential member states, namely the UK, France and Germany. In turn, their differences stem from the way they see financial services and position of financial institutions in a society and its relationship with industry, owing a lot to the way those institutions developed over the course of time[6]. The authors think that the (then) current and future EU financial regulation will gradually converge towards one common point, which will be the result of a long battle of those different systems. At the time of the writing, it seemed that the gradual convergence is modeled after the UK financial system, although Germany seemed very reluctant to allow for it to happen.

The second building block of this paper is of newer date (2010), an article written by an Italian academic, Lucia Quaglia – "*Completing the Single Market in Financial Services: The Politics of Competing Advocacy Coalitions"*. Using advocacy coalition framework, and acknowledging the theory of intergovernmentalism of Story & Walter, Quaglia sets out to

[6] The term often used today to describe those differences in political economy is Varieties of Capitalism (VOC).

discover were there any coalitions created during the enactment of the original MiFID (and one more politically controversial Directive), while adding a layer of its own. That layer asserts that, even though these coalitions are clearly known to exist, they do not necessarily form around bare economic interests. Instead, they might be the result of a shared belief system ("ideas") (Quaglia, 2010; p.1009), that does not only include the governments of member states, but also within those member states, including a wide array of actors, both private and public, that can also group with other actors of similar beliefs from other member states or EU actors. Where this paper borrows from Quaglia the most is her identification of two dominant coalitions that were in place during the creation of the original MiFID – the "Market-making" and "Market-shaping" coalition. The United Kingdom, Ireland, Scandinavian countries, Netherlands and Luxembourg belong to the former, while France, Belgium, Southern European countries and somewhat reluctant Germany form the latter coalition. The coalitions are formed around how capitalism and markets are understood and perceived in those societies – the market-making coalition echoes the proverbially competitive, individualistic and regulatory-sceptic system of the UK, always suspicious towards a greater role of the state in a free market economy. On the other hand, states with stronger leftist traditions, such as France and Italy, with almost anecdotal German fondness of rules, and southern states with undeveloped capital markets, form the market-shaping coalition. Quaglia gave a great contribution (often with David Howarth) to understanding EU financial integration.

Last, but not least, the third building block, that gave a direct inspiration for this paper, was a chapter written by Zdeněk Kudrna "Financial market regulation: A 'Lamfalussy exit' from the joint-decision trap" in The EU's Decision Traps: Comparing Policies (2011, ed. by Gerda Falkner). What Kudrna did was to try to assess the benefits of Lamfalussy procedure by directly comparing two directives with similar intentions, although much different in scope

– the ISD and the original MiFID, of which former was created long before the introduction of the procedure. Even though objectives of Kudrna's work do not exactly match those of this paper, the comparative methodology and the subject of his case study directly influenced the choice of case study of this thesis.

1.3 Views on legal complexity

We have previously mentioned that, with the matters of EU legal complexity and potential ways of putting a quantitative expression on it, we will deal with deeper considerations. It is important to stress that, due to the scope, topic and intentions of this paper as a piece of political economy analysis, we do not intend to get involved into elusive and complicated legal debates on a matter which has not been unanimously resolved in the sphere of legal science. Nonetheless, since this matter is of great importance and one of the key features of this paper, we will briefly present different arguments and views on the measuring of legal complexity, after which we will conclude the theoretical framework chapter by building our case for using article length as a way of measuring complexity.

One striking fact is of extreme importance to our discussion – to this date, there has not been a single, unanimously accepted and quantitatively testable *theoretical* way of testing legal complexity (Ruhl and Katz, 2015). In fact, there has not been much literature about it to begin with. Notion such as legal complexity is often invoked in policy debates, by those who must abide by the law, or those who must supervise it. Therefore, it is clear to understand how proposing a measure to decrease a complexity of a legislative act is of yet the same difficulty. Measuring legal complexity is not the only problem – monitoring it proves to be as elusive as measuring. However, it would not be honest to assume that nobody tried to tackle this issue in a theoretical manner, or tried to build some kind of framework upon which it could be possible to establish some sort of theoretical framework. Of relatively recent date, there has

been a discipline called "complexity science" (or complexity theory) (Ruhl, 2008), which precisely tries to deal with these sorts of issues, using different tools that became available with the digital age, to facilitate the creation of a quantitative metrical system.

However, it seems that discovery of a theoretical way to tackle the issue of legal complexity remains elusive, at least without using an empirical approach. Ruhl and Katz (2015) propose a "yardstick" which is to be used when measuring the complexity of the US legal tax code. Among possible ways to measure this complexity empirically, they propose a few reasonable options: measuring the complexity of the Tax code by measuring how much time and money is required to comply with the new law, in comparison with the old one; or, measuring the complexity of the new software used to calculate the tax liability in comparison with the old software – a proxy measure, since there are several ways of measuring IT complexity, for example using syntax; or, measuring "readability" of a law (Morrison, 2014); or the number of different special provisions, especially in terms of scope and exemptions.

Here, we start building our case for using article length as a way of measuring legal complexity. We have clearly established that there is no single, unanimously accepted way of measuring legal complexity, at least not in a theoretical way. Therefore, we appeal not to the positivistic way of interpretation of our intention, but to the principle of falsifiability – using article length as a method of measuring legal complexity is just as legitimate way of measurement as is the next one – it has not been refuted by the legal scholarship. In other words, our method is yet another approach in a relatively unexplored dimension, whose results might reveal potential benefits and shortcomings and provide future guidance on how to proceed with the issue of theoretical legal complexity measurement. Empirically, we have two aforementioned "yardsticks" – ISD and the original MiFID. Kudrna (2011) already used such principle of comparison, when he tried to put forward the argument of Lamfalussy

process bypassing the joint-decision trap. Katz and Bommarito, in trying to develop a way to measure the United States code, state the following:

"*Observed legal complexity may be driven by a genuine effort to keep pace with ongoing developments in society. Alternatively, it may only be the by-product of politicians' efforts to deliver particularized benefits to specific individuals or interest groups*[7]" (Katz and Bommarito II, 2013, p. 4)

The argument above is exactly the one that we have been trying to put forward with this thesis – legal complexity, measured as an increase in article length (wordcount) in the EU financial market regulation, concretely MiFID II, comes as an attempt by the lawmaker to satisfy a multitude of interests and preferences of different members states. The lawmaker succeeds in reaching a compromise that moves the issue beyond *status quo*, but at a cost of raising complexity, which in turn causes increases in, above else, compliance costs, but also leads to differences in interpretation (Baratta, 2014) which national authorities tend to use to their advantage to protect their own markets and market participants and lower their own adaptation costs. Therefore, being aware of potential limitations of our approach, we firmly believe it provides certain explanatory power, credible enough to be applied in our case study.

[7] Underlined by author

2. Literature Review

This chapter presents the main literature and sources used during the writing of this paper. We have already mentioned the three building-blocks that this paper is constructed upon. We will briefly, in turn, present each three. Furthermore, we will present the main works we used to understand and expand our knowledge on our case study. We conclude the chapter by referring to key sources of data from which we extract the necessary information, in order to test the two hypotheses stated in the introduction.

2.1 Literature on MiFID

In writing on MiFID, as well as gaining a nice, comprehensive overview, a book by Casey and Lannoo (2009) turned out to be indispensable, although read with caution, due to affiliation of its authors with the Commission. Calling the original MiFID, a “revolution”, the authors wrote during the outbreak of financial crisis, when the effects of MiFID were not easy to gauge, due to its short existence and crisis effects, that were already visible in Europe. Furthermore, being a Directive, it took some time for Member States to transpose it into their national laws, which most of the states did with hesitation and not without a warning from the Commission. Authors find the Lamfalussy procedure a success, enabling the enactment of MiFIDs highly technical provisions in a smooth and less politicized way, though not completely void of influx of national politics. MiFID revolutionized the market structure – by introducing an entire new universe of trade execution and transaction reporting, but also abolishing concentration rules, setting a level-playing field for trading venues and striking a decisive blow to national monopolies. Praising the improvement in harmonization and liberalization of the EU-wide financial markets, the authors find MiFID as a valuable measure that increased investor protection, influenced and enabled further technical development and significantly lowered cost of capital, while strengthening competition in the process. Another

upside of MiFID was the increase in transparency and classification and standardization of EU financial products, which became more available to retail clients, while protecting them from a long list of market abuses and misconducts of investment firms and other financial institutions. Though claiming that MiFID did react to the crisis in a fairly constructive way, the authors do admit its inefficiencies, such as substantial possibilities for gold-platting, fragmentation of the market, liquidity problems, dark-pools and over-the-counter transactions. Further consolidation of firms, due to the compliance costs, severe decrease in OTC opacity, growing presence of algorithmic trading and other are some of the correct predictions made by the authors, anticipating MiFID II.

However, before the book press even cooled down, the talks on MiFID review started, as many of its flaws became clearer (vis-à-vis, *inter alia*, investor protection and conflict of interest) and as the crisis advanced deeper into the EU financial markets, causing banking and eventually sovereign debt crisis. A good starting point in understanding the possible directions of the review was *"MiFID 2.0: Casting New Light on Europe's Capital Markets"* by CEPS (2011). Again, read with caution, the main added value of this piece lies in the fact that in its creation, participation was taken by a plethora of market participants, thus giving a perspective previously unattained, due to the low penetrative power of practitioners into the academia. The book was neatly divided into three main spheres of discussion – transparency, market structure and provision of investment services, proving essential in understanding contested issues among those core areas. Furthermore, the views on several key issues were often differing between the authors, who did not opt for a balanced, "we agree to disagree" approach, but decided to present all of the angles, enabling the readers to understand what issues were at stake and thus giving valuable guidance in conducting research on MiFID review. Authors clearly anticipate a more prescriptive approach of the new legislation, in line with the G20 financial crisis meeting conclusions.

A truly impressive endeavor by Busch and Ferrarini (2017) – "*Regulation of the EU Financial Markets: MiFID II and MiFIR*" was unavoidable in gaining a comprehensive view on the seemingly impregnable MiFID II package. Written from a judicial point of view, due to the legal background of its authors, the book juxtaposes legislative provisions of both MiFIDs and provides a comprehensive evolution of those legal documents. Apart from helping with navigating through complex issues of financial technology, this book was yet another source of inspiration and guidance in trying to pinpoint the main issues of contestation between various member states, revealing differences in national preferences. The book devoted an entire section, quite deservingly, to problems of supervision and enforcement, predicting and anticipating the potential problems of the MiFID II package. Naming financial crisis as the main culprit that caused the MiFID review, Busch finds that the increase in costs due to new package provisions are justified by the social costs incurred otherwise, in the lack of product transparency and marketing misconduct. As for the introduction of the "independent advice", a new provision previously unattained in MiFID, authors agree with the direction of the intention of the lawmaker, but show some reserves towards the true definition of "independent". On the issue of inducements, authors give valuable insight into what were the preferences of different member states and how difficult the negotiations were, singling out Dutch gold-platting intentions. Finally, this book helped in understanding one political and one technical issue were agreement was either difficult to achieve or was not even made. Third-country access seems to have been one of the most contested problems during the negotiations, a problem of a longer date, previously not resolved in the original MiFID. Even though MiFID II package did take a lot of discretionary power from the member states, it still required a good deal of compromising, which, according to Busch and Louisse, resulted in an overly complex solution, short of full harmonization. In the area of high frequency trading (HFT), a very contested issue in business

circles (not only in Europe), member states will continue to be allowed to have their own policy towards it, which will probably result in HFT being banned in some member states, creating sub-optimal solutions in terms of harmonization intended. Finally, MiFID II was also analyzed in the context of Brexit.

As for understanding different provisions of both MiFIDs, a bulk of relevant academic journals and other literature was used. One of the key authors who devoted much of her time to legal and political consequences of the MiFIDs is Niamh Moloney, a professor at London School of Economics. Professor Moloney observes lack of academic attention for retail investors, to which she devotes several works (see Moloney, 2005). Moloney also devoted a lot of her research to the shift in the understanding of EU market regulation, by changing the agenda from liberalization to prescription, as a mean to answer the crisis and centralize and harmonize decision-making in EU financial regulation see (Moloney, 2011; 2010). An article of great importance in understanding the political economy of the MiFID review, Moloney and Ferrarini (2012) shows the relevance and importance of equities in national preferences and depicts a bitter battle between regulated markets and OTC/brokerage, which continued well into the MiFID II package, although with further nuances and complexities, echoing the market evolution since the original MiFID. Article also discuss the position of different EU regulatory bodies and most important member states. Finally, Moloney's overview of EU financial regulation (*EU Securities and Financial Markets Regulation,* 2014) proved valuable in filling some blanks in knowledge of legal issues.

Being so over-encompassing in its effects, it is natural that many other authors dealt with different provisions of MiFID in depth. Inducements (Papaconstantinou, 2016), algorithmic trading and HFT (Busch, 2016)), market fragmentation (Gentile and Fioravanti, 2011), effects of MiFID on EU capital markets (Panagopoulos, Chatzigagios and Dokas,

2015), effects on private law (Busch, 2017); trade transparency (Hautcœur, Lagneau-Ymonet and Riva, 2010; Majois, 2008; Ferrarini and Wymeersch, 2009); investment research (O'Halloran, 2015); instrument complexity (Vandenbroucke, 2013), compliance costs (Musile Tanzi et al., 2013; Prorokowski, 2015) and other.

2.2 Literature on EU financial market integration

One big chunk of literature devoted to the EU financial market integration (in general) and its regulation (in specific) came within the last few years from Lucia Quaglia and David Howarth. Those two authors, writing either independently, or collaborating with each other or other academics, gave immense contribution in understanding European financial integration. Their area of interest includes, but is not limited to, post-crisis reforms, European Banking Union, European Capital Markets Union, sovereign debt crisis, Single Supervisory Mechanism, European Monetary Union and other[8]. The authors mostly dealt with issues of political economy, public policy and European governance, trying to explain what mechanisms drive and what obstacles stand in the way of full harmonization in the common market in financial services. Of particular value is the amount of data collected "off-the-work", dealing with sensitive political issues, where member states do not want to reveal their national preferences in public, and where the sources of data do not come from academia. Despite the fact that authors did not deal with MiFID II in great depth[9], Quaglia's work on MiFID I and their work on the issues mentioned above do provide valuable guidelines in understanding how the biggest and most important member states see the European market integration. Authors also have, on several occasions, pointed out the importance of the EU presidency of a member state; that comes especially important when a member state presiding has strong financial sectors and tends to use its presidency to influence certain policy

[8] See "References" in Howarth and Quaglia (2016) for their full bibliography.
[9] Email correspondence between Lucia Quaglia and the author

decisions (Ft.com, 2017). Division between the North and South of the EU, that causes different views of the common currency, fiscal policy, supervisory mechanisms, sovereign debt, competition and protection and other themes are also often explored by Howarth and Quaglia.

We deal with different theories of EU financial integration and the role of member states, EU bodies and other actors with deeper consideration in the Theoretical framework chapter, while here we briefly present other valuable papers and insightful theories. Grossman and Leblond, acknowledging an improvement in integration (2011), call for caution, claiming that integration is still lagging behind regulation. O Broin (2012) examines the role of the EU Parliament in financial market integration in the EU and the level of responsiveness to the crisis. Blavoukos and Pagoulatos (2008) are interested in bargaining and negotiations of member states. Bieling et al (2015) advocate an alternative, regulation theory approach. Colaert (2015) notices blurring lines between three core areas of finance – banking, securities and insurance, and analyzes EU financial regulation and supervision in light of the need to acknowledge those changes. One interesting account of MiFID review, and, broadly, place of securities and regulated markets in the EU, treats market information as public good (Lagneau-Ymonet and Riva, 2012), advocating a stronger presence of regulated markets, claiming that private information and opaqueness will ultimately lead to another crisis. Finally, a lot has been written recently about interactions of (soon-to-be) non-EU and EU actors, with Brexit (De la Pena, 2016) and EU-USA comparison often in focus (Bošković, Cerruti and Noël, 2010). US financial system is often seen as an ideal of harmonized and integrated market, a role which it fulfils with more success and less costs than the EU.

2.3 Sources of data

As we have already mentioned, the secretive nature of the data necessary to build up a case on national preferences of EU member states, and due to the constraints in accessing

officials of member states (ministries of finance, NCAs or central banks), we have opted for a different approach, using 2010 EU Commission MiFID review proposal and the responses from national authorities[10], as well as European Council progress reports during Danish and Cypriot presidency (ECOFIN 11536, 2012; ECOFIN 16523/12). After initiation of public debate on MiFID revision, in December 2011, different market participants were given a bit less than two months to provide its stance on different aspects of the revision, most of which is publicly available. We have decided to focus exclusively on responses from governing bodies of member states (Section "National authorities) due to two simple reasons - the nature of the topic, which sees member states as key actors and length constraints of this paper[11]. Some of the member states, such as France or Germany, sent their opinion on MiFID review from several bodies; however, no relevant differences in preferences are found. Some countries did not provide (or it was not made public) an answer to the consultation paper, among which Luxembourg stands out as an important country with a high proportion of financial services in the GDP.

Therefore, what we have as a primary source of data is, in two words – starting position, of the Commission and of the member states in the Council (ECOFIN). It is important to stress that we are most certainly aware of potential difficulties of this approach – mainly that the official preferences were not truly stated due to the public nature of these consultations. Noteworthy is that in those days, expectations of both general public and professionals, almost everywhere in the world, were aimed at politicians, seeking from them the resolution of crisis and implementation of new regulatory measures. Therefore, if any country had certain reserves towards stronger regulation, it could have hesitated to reveal them to the public. In 2011, parliamentary or general elections were held in Denmark, Spain,

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[10] Commission, Public Consultation. Review of the Markets in Financial Instruments Directive (the Commission 2010 Consultation). Database of responses is to be found at: http://ec.europa.eu/internal_market/consultations/2010/mifid_en.htm.

[11] That does not mean, however, that other actors had no or limited influence in decision-making – the City had several lobby groups focused on MiFID II.

Sweden and Ireland, to name a few most important member states, which could have produced not only political conflict, but also raise issues of legitimacy (mandate). Moreover, in some countries, like Germany, banking sector is divided into two camps – two biggest banks (Deutsche Bank and Commerzbank, as worldwide players) on one side, and coalition of smaller banks on the other (Howarth and Quaglia, 2010). There could have been some other, more trivial problems, such as lack of enough time to properly asses the revision (less than 2 months[12]). Finally, it is indicative that the format and the length of the responses differ drastically between member states – the former could have been due to politically skillful way of avoiding answering sensitive questions (the questions not answered are also valuable as indication that sometimes tells much) while the former could be explained by lack of interest of countries not very famous as exporters of financial services. Nonetheless, having all that in mind, we firmly believe that these documents present a *par excellence* source for determining initial member state preferences. By complementing this information with *insiders* such as Financial Times or The Economist (and different academics), above all to fill information lacunae for the negotiations on Level 1 measures, we feel certain that accurate representation of true member state preferences will be achieved

Finally, the ultimate and indispensable source of information for this case study will be the original EU documents – Commission proposal, Council proposal and the revised MiFID package.

[12] And also, the fact that responses had to be sent around the transition months between two years.

3. Methodology and research hypotheses

This chapter provides a brief overview of methodology that we will use in order to tackle the research hypotheses in question. The methodology builds upon assumptions previously stated in theoretical framework and is a combination of rather simple and straightforward quantitative methods, to which we will provide a qualitative explanation within the framework of political economy.

3.1 Data overview

To follow and compare increase in legal complexity between two version of MiFID, but also within the same version (Commission proposal – Council proposal – Final solution), we rely heavily on the original documents (Commission 652/4[13]; Council 11006/13[14]). Tackling a growth in complexity between two version of document of MiFID could be a good starting strategy, but the bias of the crisis and the heavy increase in overall scope might skew any conclusion we could infer from that. Therefore, in order to follow the increase in legal complexity due to potential meddling and disagreements of member states that come as a result of differing preferences, we have decided to follow the evolution of the document from the European Commission, through the Council to the final approved version. The documents in question are the Commission 2011 proposal, the Council 2013 proposal and the final version approved in the spring of 2014. The data collection was severely impeded by the provisional character of the first two documents, since they were proposal that were planned to be amended in the first place. Some articles were completely missing by the time they reached final Directive, some being incorporated, while others being completely discarded. Some articles changed names. We encountered serious difficulties while collecting information from the initial Commission proposal (101 article), due to the fact that entire

[13]Available at http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_656_en.pdf
[14]Available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011006%202013%20INIT

articles were crossed out, making the proposal rather unintelligible. Nonetheless, main traits were captured, and the crossing served as yet another insight to the intentions of the lawmaker. The proposal made by the Council in 2013 (100 articles) is completely legible, but it was made almost two years after the initial proposal and after numerous sessions and discussions. The final MiFID II Directive has 97 articles[15].

To tackle the second hypothesis that, due to flow of time in "living" under the common regime, the convergence that took place made some provisions obsolete and redundant, which should be reflected in substantial decrease of word count of an article, or the entire regulatory chapter. The main source of data for testing the second hypothesis is the correlation table given in the Annex IV of the MiFID II Directive document, that shows what articles from the original MiFID are being repealed by which provisions from the new package (articles that repeal the old Directive are to be found in both MiFID II and MiFIR). The correlation table features a total of 369 correlating comparisons, some of which go into depth (provision by provision) while others compare article. To our surprise, the correlation table features as much as 28 provisions that are not present in the original MiFID document. After going through original and amended version of MiFID I, including browsing it in several languages, we were unable to discover those provisions. There were nowhere to be found neither in scientific literature nor in financial magazines. Therefore, we have decided to exclude those provision from the calculations. Other provisions whose repeal was not accounted for were provision of legal nature, with no relation to the content of the Directive. Due to enormous quantity of provisions that were paired, we will only analyze the ones that show the biggest difference in magnitude of the change, either being positive (more text) or negative (less text). The latter are indicative for the second hypothesis, while the former

[15] Directive 2014/65/EU can be found at:
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN

provide an overview of the regulatory evolution, but due to many factors (i.e. crisis, as we mentioned) will not be enough to provide us with unbiased information.

Finally, we are basing our conclusion upon the data grouped in two different comparison tables – one made by the author (COM-CON-MiFID II), while the other is the tables slightly modified by the other, which can be found in MiFID II Annex IV. Both documents are to be found in the Appendices section of this paper.

3.2 Hypothesis 1 – more complexity due to conflicting preferences

Based on the theory that conflicting member state preferences on key regulatory issues cause these member states to influence regulatory bodies in order to produce legal acts that are as close as possible to their national legislative systems, and that these conflicts create final provisions that are lengthy and elusive compromises, we construct an argument, a research hypothesis, that provisions which are politically sensitive and heavily debated during negotiations, tend to be, on average, lengthier in the final document, than they were in the initial proposal. It is perfectly clear that initial Commission proposal, made almost three years before the final solution, will have to be heavily amended. However, if the theory holds, those articles will be, on average, longer than those that were not heavily politically debated. The potential problems we see with this methodology is the influence of the European Parliament legislative bargaining, which has significantly increased since the crisis started (Moloney, 2012). We plan to control for that influence by following the evolution of the legislative proposals from the Commission through the Council – if there was substantial increase of length in the Council, but not (as) much between Council proposal and final solution, the influence of the Parliament was clearly not decisive. Due to the high number of provisions and provisional character of proposals (which we addressed already in this chapter), we were not able to group provisions with provisions – we grouped articles. This does create a bit less

preciseness than if it were to be done otherwise. However, this problem can be addressed either consulting with literature and financial magazines (some provisions were heavily debated and therefore are relatively well-addressed in the sources). Another issue worth explaining is the decision to use only MiFID II Directive for comparison, but not MiFIR. Being a Regulation (MiFIR), its provisions automatically apply to all member states without the need for national transposition. Therefore, the room for compromise was not large and the full harmonization of such decision would not be made on contested issues. Furthermore, sources suggest that there was no significant debate on MiFIR provisions – at least not as much as in the case of MiFID II. The very nature of MiFIR – it is dealing mainly with technical provisions such as data management, transaction reporting and other, clearly shows that it is addressing the issues with less political weight. Finally, MiFIR does not allow for gold-platting, and possibilities for gold-platting is exactly what we are looking for to discover. In other words – MiFIR comparison would not tell us much; what it would do is harm the scope and the length of this thesis without providing substantial insights.

Finally, in order for the theoretical assumption to have predictive, as well as explanatory power, we will here state what key provisions we are hoping to find as disproportionately lengthier in relation to their proposal predecessors. Upon meticulously reviewing the literature, we have decided that the provisions that we are looking for will be those related to OTFs, third-country regime, clearing (especially access discrimination), inducements, publication of sanctions and provisions related to commodity derivatives[16].

Therefore, the stated first hypothesis is:

[16] For more information see : Busch and Ferrarini (2017); Moloney (2010, 2011, 2014); ECOFIN progress reports 11536/12 and 16523/12; FT and the Economist articles in the literature review at the end.

H1: Articles related to the issues stated above will be, on average, lengthier in the final MiFID Directive, than other provisions that did not cause conflict of member state preferences.

3.3 Hypothesis 2 – decrease in length due to convergence

Original MiFID was introduced in 2004 – the MiFID II package was approved in 2014. Since the application period for MiFID one started on 2007, that gave seven years to markets of member states to gradually implement the Directive into their national legislation. Therefore, a common wisdom might suggest that, since the initial MiFID was a harmonization of previously unprecedented scale, that the new MiFID did not have to face such groundbreaking changes. Moreover, since the increase of number of provisions and the scope of the new MiFID is likely to bring only increase in length, a potential decrease could easily lead us to assume that some waivers, exemptions and exceptions made have been abolished due to convergence of financial and regulatory systems. While the added value of the first hypothesis probably lies in its quantitative part, the potential added value of this hypothesis lies in an argument that has not been put through in the literature so far. Due to the enormous increase in scope and complexity of MiFID II, not many have talked about decreases due to convergence. However, anticipating possible criticism to our approach, we do find that there is a possibility that decrease in complexity comes as a result of some other factors. One that comes to our mind is abolishment of some practices due to technological change, which rendered certain instruments obsolete. Furthermore, this decrease might have a legal background, but not of same nature as the one we are inspecting – some practices might have become illegal in the meantime, due to the crisis. Literature does not provide us a clue and there is not much mention of this phenomenon – but it does not mean that it is not happening. Therefore, it is very difficult to predict any possible outcome – upon obtaining

data results, we will select several provisions that are significantly and substantially shorter in size (MiFID II/MiFIR provision shorter than MiFID I). Alternatively, one possible hint that might suggest some convergence is the shift from using a Directive (in 2004) to using a Regulation (MiFIR) – some provisions have experienced enough harmonization and convergence in practice, that they became non-controversial enough to be included in an effective-immediately legal instrument.

With regards to aforementioned we state the second hypothesis:

H2: Due to the convergence that came as a consequence of the effect of gradual harmonization, initiated by the original MiFID, some provisions require less exemptions, exceptions and discretionary opportunities and can be, therefore, phrased using less words.

4 Introduction to the case study – from ISD to MiFID review

The purpose of this chapter is to introduce the reader into our case study. We will provide an overview of financial market integration and regulation, from the early 1990s and introduction of Investment Services Directive (ISD), through the original MiFID, all the way up to the MiFID revision, or what eventually came to be known as MiFID II. Having in mind the scope and the intention of this paper, we will not go into too many details and we will try to provide information necessary to understand the problems that MiFID revision had to face.

4.1 From ISD to MiFID (2004)

One of the intentions of the common market was the introduction of common market in financial services and gradual harmonization of financial products and practices. One always needs to keep in focus how difficult and time and energy consuming were early European integrative processes, so it is no wonder that it took around 4 years for the ISD to be finished (Kudrna, 2011). Even though some harmonization process did take off in the 1980s, only as the decade approached its end, a favorable climate appeared for creation of such a framework. There were many incentives behind the creation of ISD, but most of them focused on providing such a harmonization that would lead to: increase in competition; establishment of a common level playing field; establishment of equal or similar conduct of business rules; decrease of financial opacity (both for retail and wholesale clients); increase in pre as well as post-trade transparency; increase in quality and quantity of liquidity; classification and standardization of markets; provisions related to brokerage; proliferation of equity financing and other (Casey and Lannoo, 2009; CEPS, 2011; Moloney, 2014).

Economic activity of the European markets (apart from the UK) unlike the US, was heavily dependent on bank-financing and much less developed in terms of equity and other financing that might come from securities such as bonds. Therefore, one of the main goals of

the ISD was to try to change it, in order to diversify means of financing, which would lower the cost of capital and provide further possibilities for the European SME sector. Another objective we mentioned was the creation of the level playing field. This was a huge problem and it remained as an issue during the creation of MiFID II. One investor from, say, Italy, had to go through thick and thin in order to be able to invest in, say, Irish financial system. This hypothetical Italian investor had to apply for a license in this country and to get to know all the specific provisions different from Italian ones. The costs, in time, energy, money and human capital are therefore substantial – not to mention the entry barrier, since he will be severely hindered by the learning process and the knowledge that the market players in Ireland already possess. He would be authorized by Irish national authority, which creates further barriers. Moreover, many countries had *concentration rule* in place, which meant that execution of stocks could be only done via national stock exchange[17], which gave those *national champions* quite an advantage over other players and had been securing them a rather lucrative monopoly. Therefore, all the incentives behind the ISD proposal were to somehow create a common market which would, if not complete obliviate the national differences, then at least lower them to a reasonable level, which would substantially boost cross-border investment and provide further impetus for growth in European economies. Of course, given the difficulty of intended goals, the differences between the markets, political sensitivity of the issues in question, lack of common currency, in the times before and immediately after the Maastricht treaty, one does not have to be a financial genius to predict how successful this piece of legislation could turn out to be.

Creation of ISD caused bitter political tensions. Kudrna (2011) mentions three main issues[18] during the negotiations between member states: different approaches to banks and investment firms in issues of competition; conduct of business rules in the domain of investor

[17] A well know example is Bourse de Paris, a national champion in France.
[18] The second and the third arising from different preferences of member states.

protection and the concentration rule (competition between stock exchanges) previously mentioned. Fearing the race to the bottom, due to the harmonization of supervision issues that could lead to relocation of investment providers to countries which applied less strict rules, the final compromise allowed for significant opportunities for member states to gold-plat the initial legislation. Furthermore, southern state coalition preferred less liberalizing measures. It seems that the most persistent country was France – it bitterly fought with the UK, protecting the rights of Parisian stock exchange (Moloney and Ferrarini, 2012). Finally, in 1993, a compromise was made, but it proved to be a Pyrrhic victory. Certain level of harmonization was certainly achieved and it was a move in the right direction. However, the shortness of the legislative act, the vagueness of its provisions, the heavy compromises that had to be made and its format as a principle-based legislation, all led to strong opportunities for gold-platting, which was then ruthlessly used by almost every country, which in turn did not bring intended level of harmonization (Casey and Lannoo, 2009). Another problem was that the ISD, and this does not have to do much with the decision making, is that it could not keep up with the improvement in financial engineering (CEPS, 2011). Considering that the next document in the line, the original MiFID, was created eleven years later, after common currency kicked in, in a completely different setting, with the victory of Western capitalism and integrative strivings of the former Eastern bloc, it is no wonder that the ISD was long overdue and that it needed a brand-new legislation. However, it would not be fair not to mention that the ISD introduced the idea of servicing "passports", a predecessor of the famous MiFID passports; it gave further guidelines and showed implementation problems that ought to be tackled in the MiFID proposal. While the initial intentions were to review the original ISD, it was finally agreed to devise a brand-new legislation, that was to be the original MiFID. The initial draft was proposed in 2002 (Casey and Lannoo, 2009), and it turn out to be a major harmonization endeavor by the European Union.

4.2 FSAP and Lamfalussy procedure – the MiFID context

Before going about the provisions and contested issues of the original MiFID, it is necessary to present the context in which it was produced and the Lamfalussy procedure which enabled it.

Being aware of the need to create a single market in financial services, encouraged by the creating of the European Monetary Union, the European Commission created a document titled Financial Services Action Plan (FSAP), in 1999, which proclaimed three goals: the formation of single market in wholesale financial services, opening and securing retail markets and strengthening the prudential supervision (FSAP, 1999)[19]. Common market in securities, but also derivatives, became a must, for all those reasons we stated above, when we discussed the goals of ISD, whose review is called for in the document. Furthermore, the need for facilitation of cross-border investment services proliferation and increase and harmonization of supervision is required. Differing member-state regulation is seen as a high cost and significant hindrance in pan European activities. Finally, when it comes to wholesale, the FSAP calls for harmonization of accounting principles, protection and standardization of EU pension schemes, mutual recognition of collateral provision and enforcement rules and improvement of environment for cross-border restructuring (FSAP, 1999).

When it comes to retail issues, the Commission recognizes that there has been less consideration in the past (in comparison to wholesale markets), which in turn led to all sorts of difficulties, which severely affected investor's confidence in the markets. Therefore, the Commission is seeking a creation of a strong, European wide framework of regulation, related to the establishment of harmonized rules of conduct. Transparency and information

[19] To be found at:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al24210

availability is key to overcome fear of cross-border investors, since riskiness of such actions often leads to investors decision not to proceed with the investment. Furthermore, enforcement of rules needs to be guaranteed, again in order to boost investor's confidence, knowing that whoever is willing to go about deceiving investors, will be prosecuted for these actions, fully protecting potential cross-border investors. Next, Commission calls for alignment of consumer protection rules of different member states, while the remaining provisions deal with matters such as electronic commerce, insurance intermediaries and cross-border retail payments (FSAP, 1999).

Finally, remaining provisions deal with regulatory and supervisory matters, where it is calling for strengthening of the regulatory framework, closer monitoring of the tendencies of the day, tackling the issue of capital adequacy and solvency, enhancing the monitoring and supervision of financial conglomerates that provide a wide set of services and products (banking, securities and insurance) and the creation of a common supervisory body for securities (FSAP, 1999).

All those high-level principles were sketched in the FSAP. During the next five years, a total number of astonishing 42 directives (Kudrna, 2011) were approved, with some of the most familiar being the Prospectus directive, Market Abuse Directive (MAD) and Transparency Directive (CEPS, 2011). However, by far the most famous and the most important one was the original MiFID, approved in 2004.

Even though the original MiFID was not the first attempt to harmonize investment services industry and markets in the EU, it was the first one made under the new legislative procedure – the "*Lamfalussy procedure*"[20]. Named after Alexandre Lamfalussy, the chairman of the committee who devised it, it set out to define a clear set of rules to be followed to facilitate and speed up the process of financial regulation lawmaking in the EU. The

[20] Also called Lamfalussy architecture, Lamfalussy process.

procedure foresees four institutional levels. In the Level 1, the European Parliament and the Council adopt the measures which are proposed by the Commission, in a classical EU decision-making procedure. This level, however, is providing a general framework, sketching out high-level policy measures, preferably without going into too many technical details. The Level 2 measures are within the competency of the Commission, which empowers special committees, filled by EU member states representatives, whose task is to delve into technical measures, leaving the Parliament and the Council to deal only with matters of highly political importance (de Visscher, Maiscocq and Varone, 2007). Level 3 mobilizes national regulatory authorities, which aid the commission in "pushing" the legislation further down the regulatory chain, while Level 4 consists mainly in monitoring of compliance with the legal provisions. This technocratic procedure was first introduced in securities legislation, followed by provisions applied to banking, insurance, pensions and other[21].

However, following the outbreak of financial crisis, the EU restructured the original procedure by creating independent supervisory authorities[22], empowered by the Commission, that completely took over the Level 3, with a mandate to devise regulatory and implementing technical standards, formerly belonging to the Level 2 part. This reform, devised as crisis-absorbing mechanism, was also supposed to further dilute the involvement of politics into the regulatory process.

The Lamfalussy procedure definitely did enhance the speed and flexibility of approving the new EU financial regulation, creating, faster than ever, an unprecedented amount of regulatory provisions, measured in thousands of pages of ITS and RTS[23] text. However, this led to several serious practical issues that had an impact on the entire financial

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[21] https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services/regulatory-process-financial-services_en ; also http://ec.europa.eu/internal_market/finances/docs/committees/071120_final_report_en.pdf

[22] The three European Supervisory Authorities created in 2011 (the ESAs) are – European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA)

[23] Implementing Technical Standards and Regulatory Technical Standards, respectively.

sector, also hitting non-financial counterparties. The critics say that, due to the colossal increase in length and complexity, recent legal provisions in financial regulation create an enormous burden on the balance sheet of the companies, forcing them to allocate a lion's share of its time, money and human capital to be able to comply with the new norms. Therefore, not only that they will have to spend millions on compliance (Ferrarini and Moloney, 2012), but their focus on improving business will be narrowed, potentially causing the shifting of costs to the end-users. Furthermore, the argument goes, such an onerous workload will inevitably lead to inabilities to comply with the original intentions of the lawmaker, while misuses and arbitrage cannot be ruled out. Finally, latest regulatory wave, with gigantic and all-encompassing legislative acts, will not be easy to monitor, which already causes headache to National Competent Authorities (NCAs[24]) of EU member states, in charge of this ungrateful duty. Even the European Union itself sometimes has to admit, unwillingly (Ft.com, 2015), that the scope and the demands (especially related to IT and data management issues) are so complex to understand and internalize, that it often postpones the initial implementation dates (for MiFID II, for example, the implementation date moved from January 3rd, 2017 to the same date a year later[25]).

4.3 Markets in Financial Instruments Directive 2004

We have already mentioned how much has been written on MiFID. It is not always easy to avoid getting lost in its lengthy provisions and very broad scope. Therefore, it is not in our intention, nor is that the topic of this paper, to elaborate on the original MiFID in too much depth; instead, we will provide necessary information for a reader to be able to follow the regulatory evolution from ISD and to understand the key issues that remained in its following review.

[24] Nadia Manzari, a high-ranking member of CSSF(NCA of Luxembourg) complained about increasing legal complexity, at ICT Spring conference on Regtech.
[25] http://www.consilium.europa.eu/en/press/press-releases/2016/05/18-markets-financial-instruments/

MiFID, when it was approved in 2004, was a giant leap forward in the attempts of the Union to harmonize its investment services and markets. Due to its length and scope, it created a debate without precedent, caused numerous controversies and changed financial market landscape in Europe forever (Economist.com, 2014). Key provisions of MiFID could be divided in four parts (Casey and Lannoo, 2009): client suitability and appropriateness, best execution policies, conflict of interest provisions and price transparency issues. We shall, in turn, briefly present them.

Introduction of client suitability and appropriateness test were one of the key measures aimed at significant enhancement of the investor protection. The directive brought classification into retail, professional and eligible counterparties (ECP). The classification depends of the level of knowledge of the counterparties, their asset value, experience, intended activity and other. Some clients can, under certain conditions, switch between the classifications, if they satisfy certain tests. These KYC (Know your customer) provisions were made to facilitate the level of protection a company is obliged to provide – a client with less knowledge (a retail client) must be treated differently than an ECP, which creates different business strategies, approaches and marketing. These provisions either did not exist in the ISD at all or they were not that detailed and remained largely unspecified.

MiFID introduced something that sparked a lot of debate and that had numerous different approaches in other continents and markets, like the US – the best execution policy. Recital 33[26] says (Directive 2004/39/EC):

"It is necessary to impose an effective 'best execution' obligation to ensure that investment firms execute client orders on terms <u>*that are most favorable to the client*[27]</u>*. This obligation should apply to the firm which owes contractual or agency obligations to the client."*

[26] Mifid I original document available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN
[27] Underlined by the author

Acknowledging that the intention of a portfolio manager is a bit difficult to quantify, MiFID offers other, more flexible ways of determining what is in the best interest of a client, in the context of its demands and guidelines, where it introduces a lot of other criteria, such as speed, availability, liquidity, nature of the trading venue and of the instrument and other.

Conflict of interest policies aimed to ensure that investment firms are taking all the possible and reasonable steps to ensure that there will not be a conflict of interest, or, in case there is a chance of having one, to inform their client about it and let the client decide on execution of the order. However, an investment firm must do whatever is in their power before consulting the client, so that client consultation is the ultimate measure, but should not be used with ease.

Finally, measures that aimed to interact with the market infrastructure is transparency. MiFID introduced the classification to regulated markets, Multilateral Trading Facilities (MTFs) and Systematic Internalizers (SI)[28], effectively abolishing the concentration rule. In this division, the regulated markets represent what were before the national stock markets of EU member states, while the MTFs were new, competing platforms, that were not too different in the nature of operation, but with a bit less strict rules applying to the latter (Ferrarini and Moloney, 2012). This was intended to diversify the market, provide more liquidity and deconcentrate the market to avoid issues related to the systemic risk. In this way, a client can choose where to execute its orders, with higher pre-trade and post-trade transparency – both aimed to decrease the spreads, provide more liquidity, give enough information on volume and price and prevent market manipulation (Kudrna, 2011). However, this only applied to shares, while application to other instruments, such as bonds, was foreseen possible, but not mandatory (Ferrarini and Wymersch, 2006).

[28] MiFID Article 4: "means an investment firm which,on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF"

Quaglia finds two main contested issues: concentration rule and adequate pre-trade and post-trade requirements, around which two coalitions have formed – the Northern and the Southern (Quaglia, 2010). The former advocated more liberalization of trading venues, embodied in the cancelation of the concentration rule and proliferation of trading platforms, while the former mainly defended the concentration rule as a mean to keep the equities market regulated and monitored. On the other hand, the Northern coalition advocated less strict and less onerous rules when it comes to trade transparency, due to its prescriptive nature, that influenced the market too much – in other words, it was going against their view on the role of the regulatory bodies in economic activity. The position of main advocate of the Northern coalition, the UK, and the position of the main advocate of the Southern coalition, France, was rather well-known. The mystery was the position of Germany, which was somewhere in between (Quaglia, 2010).

Initial consultations were put through by the Commission in late 2000; in the fall of 2003, both documents reached European Parliament and the Council. Italian president of the EU Commission, Romani Prodi, used his position to influence the initial proposal, which was very much in line with the Southern coalition preferences. It got approved the Council, in October of 2003, by a sudden vote with qualified majority, a move not very usual for such important issues, with most of the members of the Northern coalition voting against. However, when the proposal went back to the EP, the UK and the UK-based American firms with their lobbying groups succeeded in reshaping the proposal, withdrawing many of the more stringent provisions, that were more in line with the Southern coalition. Finally, in the spring of 2004, all sides (the Commission, the EP and the Council) agreed and the MiFID was approved, with final provisions very similar to the wishes of the Northern coalition.

Finally, on 1st of November 2007, MiFID replaced the ISD, and the new era in European financial markets had begun.

5 The MiFID revision

Not long ago after the MiFID kick-started with the implementation, European continent found itself in the midst of the worst financial crisis in decades. Started as a subprime-mortgage crisis in the USA, it the world so interconnected as the world of today is, it quickly spread to other developed areas of the world. Collapse of the Lehman Brothers in September 2008 showed the potential scale of disaster, with all the fundamentals plummeted in an unprecedented manner. World leaders quickly gathered in 2009, on a G20 summit in Pittsburgh, where they discussed how to change the economic and financial landscape to alleviate the consequences of the crisis. Recognizing numerous malfunctions and misuses of modern financial system, it was stated that one of the major culprits of the crisis was financial opacity, in principle, and financial derivative products traded OTC, as a concrete function and direct consequence of the transparency. Therefore, the world leaders reached an agreement to propose measures which would bring as much as possible of these trades onto the trading platforms and venues, in order to be able to monitor financial activity and spot dangerous market movements on time. In relation to that, obligation of trade reporting was introduced to some other instruments (mainly derivatives and all sorts of structured products), while the reporting regime for other products got significantly stricter. The main idea was to demand reporting OTC derivatives to trade repositories, bringing standardized OTC contracts to regulated and organized trading venues and markets, clearing through central counterparties in order to reduce counterparty default risk, increase capital requirements for bilateral and other non-centrally cleared contracts and establish effective measures to oversee the implementation process (ECB, 2016)[29].

[29] More at: https://www.ecb.europa.eu/pub/pdf/other/eb201608_article02.en.pdf

5.1 Initial Consultations

European Union, as one of the key world players, was at the forefront of the discussion and inception of anti-crisis measures. The MiFID regime did not have enough time to show its full potential and provide enough data for an assessment, but it already had to be changed. Although it did show significant resilience in the times of the outbreak of the crisis, it quickly revealed potential problems. Even though there is a distance of only several years, when the MiFID was approved, back in 2004, financial landscape was a completely different dimension. Equity markets were booming, trust among actors and in the markets, was very high, there were no liquidity problems. We could say that the original MiFID was a child of its epoch – it was a liberalizing and competition increasing package, that aimed to promote financial cooperation and impact growth. A few years later, when the financial institutions were labeled as main culprits worldwide, nobody called for further liberalization – even the proverbially competitive, US public, called for more regulation, more transparency and less opacity (Dodd-Frank, 2010)[30]. Furthermore, due to the massive collapses and the need for bailouts of big American and European banks, there was a major mistrust and investors were very skeptical to move their capital – instead, they started hoarding it and looking for safe investments, buying American and German government bonds. In the world of quick and substantial progress of financial products, a legislative act such as MiFID is always doomed to be late – by the time it passes complicated and lengthy lawmaking procedure, some of its measure already become either obsolete or they do not account for progress in the meantime. Having all that in mind, European Commission initiated consultation process in the middle of 2010, drafted a Consultation paper and published it in December 2010, calling for member states and all other stakeholders to send their responses to the proposal (Commission, 2010).

[30] More at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN

The prelude to this Commission proposal was the famous de Larosière report(2009)[31], which highlighted, among other things mentioned above, the need for further harmonization, that would leave much less discretionary space for Member States. Acknowledging this, European Commission drafted the Consultation paper with such considerations. The MiFID review, or what came to be known as the MiFID II, was to push beyond the level of harmonization of the original MiFID, which showed early on that it leaves enough space for gold platting, causing arbitrage opportunities and hampering the functioning of the integrated market (Casey and Lannoo, 2009). Therefore, Commission addressed several issues that needed to be tackled. New definitions were proposed to replace old ones, which proved to be insufficient. Scope and exemption list was to be seriously addressed in order to account for recent market developments. In the area of trading venues and market infrastructure, a new term – Organized Trading Facility (OTF) was to be introduced, with the aim to move as much as OTC trading possible to some sort of organized venue which could have been supervised. One of the key contested issues since the age of ISD negotiation, pre-trade and post-trade transparency, was also addressed – MiFID introduced important measures, but they were almost entirely focused on equities – MiFID II, on the other hand, was supposed to be applied to other important instruments, such as bonds, and with markets such as dark pools. Introduction of Central Counterparties (CCP) was to lower the systematic risk of intertwined counterparties default chain, and therefore a counter-cyclical measure. Furthermore, Commission proposed to address commodity derivatives, which have proved to be very dangerous during the crisis and caused a lot of harmful speculation and volatility, especially with commodities such as wheat. As for technological improvements, the Commission recognizes the need to address two main questions – Algorithmic Trading, in general, and High Frequency Trading (HFT)[32], as a special sort of it. Acknowledging principal-agent

[31] http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf
[32] Using computers to execute orders.

problems that became evident during the early application of MiFID, the Commission introduced several measures in the area of investor protection, know-your-customer (KYC) provisions, investment advice, inducements, improvement of best execution definition and other. Finally, new supervisory measures, to support the new regulation package are proposed (Commission, 2010)

The consultation process was to last until early February 2011. If one understands what an increase in scope would such a proposal assume, it does not wonder that the commission received a staggering amount of more than 4.200 answers (Commission, 2010), ranging from institutions like national governments and central banks, to all sorts of private organizations and other interested market participants.

5.2 Position of Member States

As the main interest of this thesis is to analyze the position of member states, we shall focus on that aspect of the MiFID review consultations. First and foremost, it is important to stress that, unlike the previous ISD and MiFID negotiations, it is clearly noticeable that a paradigm shift occurred. Understanding the need to provide a joint response to the crisis, there was a willingness to increase transparency, investor protection and other measures, and less opposition coming from countries from the former Northern coalition. What seemed as unnecessary meddling od authorities into free markets domain a few years ago, was greeted and welcomed in the review process – the paradigm shifted from market-making to market-shaping, from liberalizing to prescribing (Moloney, 2014). Nonetheless, a few years in the common MiFID regime did leave some winners and losers, brought some major changes of the European market infrastructure and some particular interests had to be satisfied. We do not have enough space, nor it is necessary, to present the position of each member state;

previous literature focused mostly on Germany, France, and the UK, and we shall, in turn, present briefly each.

As we have mentioned previously, German position during the previous negotiations was not very clear – it was somewhere between the Northern and the Southern coalition. Their banking system has specificities like no other in Europe, with two massive market players and a plethora of smaller ones, with conflicting preferences. Answering the call for consultations, German Ministry of Finance addressed several issues. When it comes to changes in definition of admission to trading, Germany finds that the new harmonized definition should not create additional requirements for admission to trading, due to existence of participants who do not interact on the regular basis, but also small and medium sized enterprises. They are against creation of OTFs, finding that the current regime of regulated markets, MTFs and SIs is enough to satisfy the needs of the market if modified to satisfy new market movements. German Ministry of Finance welcomes the need to transfer standardized OTC contracts to regulated markets and to fight the OTC opacity, in line with G20 commitments and the new EMIR regulation. As for HFT, they call for further caution in terms of liquidity provision and consequences HFT can have on the market. In principle, they agree with pre-trade and post-trade transparency guidelines, while they call for cost-benefit analysis. Regulation of commodity derivatives is welcomed. When it comes to data reporting, German Ministry of Finance finds seriously problems with full harmonization of reporting, due to differences in financial markets of Member states, finding that proposed regime might not be able to provide adequate data for monitoring. Echoing the position and the role small and medium sized financial services play in German market, the Ministry is calling for the future framework to provide exemptions and waivers for those entities that would differ from the requirements otherwise applicable by MiFID. One of the key contested issues, the matter of separation between investment advice that is independent and neutral, on the one hand, and

sales on the other, is supported by German, with objection to the wording (Consultation – German Ministry of Finance, 2011)

France is much more focused on OTC, as a country that has put the advocacy of fighting the OTC markets at the forefront (Economist.com, 2014b)[33]. They welcome the increase in transparency, new transaction reporting regime. With regards to admission to trading, France does not want it to effectively eliminate the difference between regulated markets and MTFs. This difference has been gradually decreasing over the years, as old stock exchanges (which are mostly regulated markets nowadays) have faced serious competition from the MTFs. It is no wonder that France is advocating this issue, knowing that they were the biggest advocates of the former concentration rule, trying to protect Paris Stock Exchange; also, most of the MTFs are coming from the UK, and is clearly visible that their introduction has seriously threatened and diminished the margins of the former stock exchanges (Ferrarini and Moloney, 2012). In similar fashion, France does not want the introduction of OTFs to blur the lines between that venue, on the one hand, and all the other previously used under MiFID, on the other. As for the types of instruments, they prefer to have as many derivatives as possible traded on a trading venue, in a standardized contract. Apart from fighting OTC opacity, France has been putting forward a lot of legislation related to limitation of HFT (IFLR, 2014)[34]. To level the playing field, they fall for a minimum tick[35] size to be prescribed, as it was known that HFT is potentially very destabilizing in certain market conditions and that they can seriously affect liquidity supply in stressful times. Unlike Germany, France does not welcome differences in treating SME institutions with a waiver from rules that apply to standard ones. Regarding transparency, France is continuing its position from the times of the ISD, strongly supporting improvements in both, such as reducing the delay to publish trade data, reinforcement and harmonization of rules for equity

[33] Available at: https://www.economist.com/blogs/schumpeter/2014/01/regulating-capital-markets
[34] Available at: http://www.iflr.com/Article/3408545/French-HFT-rules-wont-clash-with-Mifid-II.html
[35] A HFT frequency terminology.

trading on RMs and MTFs, inclusion of non-equity instruments in transparency regimes. Finally, France supports a common third-country EU regime, which will be yet another contestation point, as we shall see further (Consultation – FR Authorities; AMF; 2011[36])

Finally, the United Kingdom has been always seen as the key player in the EU financial matters, therefore it is not surprising that the answer to consultation from the UK Treasury and their NCA was by far the longest one. It is important to keep in mind that the negotiation on MiFID (2011-2014), was the time of fierce bargaining between the government of David Cameron and the EU, on giving benefits to the UK in order to avoid Brexit (Ft.com, 2013b).

It seems that, along the lines of general discussion on MiFID, comparing to other member states, the position of the UK is not that different in terms of final goals, or principles – it is more of a matter of calibration. However, due to the amount of financial companies and their role in London, this country could not have ignored their interest in the time of Franco-German convergence on most of the EU financial regulation matters (Ft.com, 2011). For example, when it comes to commodity derivatives, the UK is strongly against setting any kind of position limit on trading in this area. They oppose such classification of financial instruments that will enable exemption of certain energy trading deals, while it will heavily strike their oil market that heavily uses derivatives (Ft.com, 2013c) . Prior to MiFID, the UK made its own law addressing investment protection, to meet the problems created by the crisis (Ft.com, 2013d). Retail Distribution Review (RDR) as is the name of this measure has banned any commission for independent advice. Furthermore, the UK has strongly advocated and implemented prior to MiFID the unbundling of investment advice from the rest of the service, as it was shown that there have been serious misuses and clients did not know how much they actually had to pay for the service (Ft.com, 2013e). In line with their previous policies, they

[36] All can be found in the consultation response database.

advocate further opening of the EU markets for third-countries, although they are against "*exemptive relief for equivalent jurisdictions*" (Consultation - Joint Response - UK Treasury & FSA, 2011), that could undermine free movement of capital from and to EU. As for HFT, they support robust risk measure, but are against any potential limitations that stem from the automatic assumption that HFT are inherently bad. Proposal to include OTF category is not very welcome, which is of no wonder, since it is aiming to curb dark pools, which are in proliferation in the UK (Ft.com, 2013f). In principle, the UK has nothing against increased transparency, but the word "calibration" shows up every now and then, echoing their proverbially reservation to heavily prescriptive regulation.

We have already mentioned the potential problems with assessing preferences of these states by using a response to consultation paper, which did not have an Article-like structure and was more principle based document, without thoroughly devised, concrete provisions. Therefore, of much more concrete importance and research value is the progress report document of ECOFIN (Economic and Financial Affairs Council), a configuration of the Council of the European Union, made in June 2012 (ECOFIN 11536, 2012)[37], with the intention to discuss the MiFID II proposal received from the Commission. Apart from acquiring a general understanding, we decided not to include the minutes of the European Parliament sessions for a very straightforward reason – the nature of political engagement in the EP differs from the one in the Council. Using Council as the source, where individual member state interests are best reflected and most visible, we would more profoundly tackle our problem, which is the individual state preferences. That does not mean that these interests are not reflected in the EP, but the very nature of cross-border political grouping and the influence of different lobby groups prevents us from localizing and identifying individual member state preferences.

[37] Document has a factual error in the heading. It shows the date of June 20 2011; however, it mentions Danish presidency, a period between January and June 2012). To be found at : http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011536%202012%20INIT

5.3 Negotiations and agreement on MiFID II

In October 2011, the European Commission issued the first MiFID II package proposal, with 101 Article (Commission, 2011). It was the result of the initial intentions, published in the consolations and featured feedback provided by the member states and other market participants. Following the procedure, it was sent to the European Parliament and to the Council, which started debating on the proposal in November, during the Polish presidency (ECOFIN 11536, 2012). The debate continued in January, when Denmark assumed presidency role and continued long throughout the year, finishing in early June, when the Danish collected individual member state positions in order to make a summary. The discussion was done in three stages – the first one debated, inter alia, on scope, OTFs, SI, post-trade transparency, investor protection and algorithmic trading. The subject of the second debate was third-country regime, while the third one covered a multitude of topics, among the most important being MTFs and RMs, clearing, standardized derivatives, position limits and other. Council ascertained that there is a general principle agreement, but many provisions remain to be discussed (ECOFIN 11536, 2012).

In the matters of scope and exemptions, it seems that several member states had problems with certain exemptions and the phrasing of those. They are mostly related to joint-ventures in energy – namely electricity and gas, and are concerned with emission allowances classified as a financial instrument. Another contesting issue was the how to properly delineate between primary and ancillary services an investment firm provides; however, the Presidency finds that the agreement on that issue is of technical rather than political nature. Yet another technical issue was the oversight of structured products under MiFID II – it was welcomed by most member states, which also support finding a legal definition of structured products.

In the matters of OTF, it seems that the agreement was easily achieved only in the matters of management of conflict of interest and on restriction on using trade discretion. Presidency has found two divided camps, unable to strike a deal. One camp advocates the creation of OTFs, but would like to see the rules applicable to them lenient. The other camp is, however, asking either to abolish the OTF category and move organized trading to already existent markets, or to create the OTF category but to make it much stricter. Presidency acknowledges that this issue is of high importance for Member states and that it tried to find a balance between their proposals, by accepting equal amount of amendments from both sides, but the issue is still far from an agreement (ECOFIN 11536, 2012).

. Systematic Internalizers (SI), a category introduced by the previous MiFID, was in probably one of the worst provisions of the original directive, since at the time of the revision process, there were only 12 of those in the entire EU (Ferrarini and Moloney, 2012). During the consultation period, almost all member states have agreed that the regime is not performing well and that it needs change. Therefore, it is no wonder that the general agreement on SIs was achieved early on; the only problem was the size of the quotes that will determine a SI status (ECOFIN 11536, 2012).

The part of the proposal regarding trading venue transparency was meet with sympathies, while the Presidency amended provision related to pre-trade waivers for equity instruments. Still, there was a lack of consensus on pre-trade waivers of non-equity instruments, mainly in terms of thresholds and reference prices. Mandating ESMA to determine both pre-trade and post trade transparency waivers, from a technical point of view, was proposed, but the agreement was not reached. Still, it seems that this issue and the issue of corporate governance were not one of the most contested ones (ECOFIN 11536, 2012).

What was a very contested issue, and literature confirms, was the issue of inducements and investment advice (Busch and Ferrarini, 2017). A larger group of states were of opinion

that the inducements should not be banned if the client is fully aware of them and he receives the monetary benefits. However, a smaller group of states seemed “firmly committed” (ECOFIN 11536, 2012, p.7) to completely ban any sort of inducements. The Presidency seems to favor some kind of compromise in which the proposal would allow certain member state discretion and therefore provide a less harmonized solution. One last issue related to investor protection was the issue of UCITS, to which most of member states agreed that some of them are too complex to be traded as “execution only” for retailers. The matter was agreed in principle, with the issue of definition had to be resolved (ECOFIN 11536, 2012).

One of the least problematic area was the regulation of MTF, Regulated markets and SME growth markets – namely transparency, harmonization and issues of registration and authorization. Where some problems arose was the provision of MiFID II that obliges firms to record telephone conversations when giving investment advice or in other situations, in order to increase investor protection and tackle moral hazard. One member state was explicitly against the proposal framed in the way Commission did, while others requested further clarification. Algorithmic trading provisions caused concerns, after which Presidency adopted certain amendments. Most countries agree on the regime, while asking for more work to be done in the area of liquidity provision in particular moments (ECOFIN 11536, 2012).

A more technical issue, such as transaction reporting and data reporting services, there seems to be a general agreement; the Council finds that the final solution is near to be made. The Regulation part of the package, MiFIR, mostly deals with technical and reporting issues and it seems that nature of the regulation (directly applicable in national laws, without the need to transpose), reflects this harmonizing attitude of member states. Derivatives and clearing provisions did not cause too much controversy, although one member state was asking for a non-discriminatory clearing provision to be deleted. Another member state, on the contrary, wanted less restrictions in that area. It is an educated guess of the author that the

first one is Germany, while the other is highly likely to be the UK, due to the relations between London Stock Exchange and Deutsche Börse (Ft.com, 2016a, 2016b, 2012a; Economist.com, 2014b) euro clearing is one of the most contested issues in Brexit nowadays (Rankin, 2017). Presidency concludes that political solution will have to be made, instead of a technical one (ECOFIN 11536, 2012).

Commodity derivatives' position management was one of the most important tenets of MiFID II. The document does not mention any major political issues – it mentions that one state is concerned with the legality of the proposal. However, Presidency finds that after some further clarification, a qualified majority would be possible to achieve. Even though not necessarily, invoking qualified majority, used whenever there is no possibility of unanimous agreement, does hint some political quarrels; financial magazines do say that issue of position limits of commodity derivatives was a contested issue during the entire negotiations, causing a lot of amendments in the European Parliament (Ft.com, 2012).

When it comes to competent authorities and sanctions, an agreement was likely to be achieved; however, provision related to publication of sanctions caused "strong concerns" (ECOFIN 11536, 2012, p.12) with some member states.

One of the most contested issues, as literature confirms (Bursch and Ferrarini, 2017), was the access and provision of services by third-country firms in the EU, regardless of establishment of a branch. The gravity of this issue best illustrates that "several Member States have expressed serious concerns and have strong reservations regarding the Commission proposal introducing a third country regime" (ECOFIN 11536, 2012, p.13). Those who object do not want the third-country regime to be in place and would prefer to retain their domestic rules. In the original MiFID, there were no calls for harmonized third-country regime; the Commission was now pushing for its establishment. Presidency tried to circumvent this problem by demanding that a third-country firm would still have to establish

a branch in the country in which it wants to operate with retail clients (unlike MiFID member state passport, where this is not required). At the time of creation of the document, the agreement was far from being achieved (ECOFIN 11536, 2012). Delegated acts and final provisions were not discussed in detail, though the legal and technical nature of these provision rarely causes any heated debate.

During the MiFID negotiations, 6 countries presided over the Council – Poland, Denmark, Cyprus, Ireland, Lithuania and Greece. Following Danish ECOFIN progress report, we have another one, crafted during the presiding of Cyprus. The talks have intensified during this presidency – the working group met 15 times, in comparison to 6 times during Danish presidency (ECOFIN 16523/12, 2012). The issues on which a broad consensus and a likely agreement were: scope including exemptions (joint-venture exemptions, that were in question during Danish presiding, were agreed upon); issues of SI and post-trade transparency investment rules; Transparency for trading venues (while the problem of general waivers from pre-trade transparency in non-equity instruments remained); corporate governance; MTF, RMs and SME growth markets; authorization and operating conditions for investment firms (with the exception of telephone recording, which has not been resolved); algorithmic trading, HFT and direct electronic access (ECOFIN 16523/12, 2012).

During discussion on Data reporting services and transaction reporting, an issue came up that was not present during the previous talks – the consolidated tape. Basically, it is a system were price and volumes of publicly traded equities could be tracked by the investors. It has been a wish of European regulators for a long time to create a central consolidated tape for the EU. In the Council, two groups formed – one asking for single CT, and another one asking a standard market model of multiple providers. The compromise made by Cypriote presidency was to allow a multiple model, while enabling interference of public authorities in case of a market malfunction. An agreement seemed to be near (ECOFIN 16523/12, 2012).

On the other hand, several previous problems continue, some without even moving from initial debates. Provisions related to OTFs; inducement; clearing (one group favoring allowing CCPs to refuse to clear trades executed in another trading venue, while the other groups strongly advocate non-discriminatory approach); position management (one member state still concern with legality issues). Publication of sanctions still considered to be a very contested issue, due to interference with legal traditions of individual member states (ECOFIN 16523/12, 2012). Finally, the issue that created heavy debate, third-country regime, continues to plague the negotiations, although there has been some progress, owing to the branch-establishment requirement approach.

After Cyprus, Ireland assumed presidency over the Council, putting MiFID talks among its top priorities (ECOFIN 11005/13, 2013) . After months of debating, in June 2013 an agreement was reached and the proposal of the Council was promoted, while the Parliament agreed on its own in October 2012 (EP, 2012)[38]. Finally, after fierce negotiations (The Economist.com, 2014) and alignment of national preferences and political interests, in January 2014 an agreement was reached between the Commission, the Parliament and the Council (The Economist.com, 2014). European Parliament approved MiFID in April 2014, only weeks before EP elections (which might have been one reason that has speed up the compromise), while the Council approved it in May (Council, 2014)[39]. The initial effective date of implementation was to be January 3rd, 2017, but it was postponed a year later, as we have already mentioned.

6 Data Analysis and Discussion

[38]Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0303+0+DOC+PDF+V0//EN

[39] Available at: http://www.consilium.europa.eu/en/press/press-releases/2014/05/pdf/markets-in-financial-instruments-council-adopts-new-rules/

After building up the case through previous chapters, this section finally presents data analysis results, which will be followed by concrete discussion of the outcome and its possible interpretations, followed by a principle discussion on the approach and the results at the end.

6.1 Intra-document MiFID II analysis

In order to compare MiFID II Commission proposal, its adaptation by the Council and the final version, we have created 89 comparative articles, that correspond to their name and form in the final solution. We have discarded final provisions that were related to the legal aspects of application of the document, which are not of immediate interest for us. Initial Commission proposal, initiated in late 2011, has 33811 words; Council proposal, that came almost two years after, has 39655 words (increase of 17%), while the final solution that was adopted has 48715 words (an increase of staggering 44% in comparison to the initial proposal, and 23% increase comparing to the proposal of the Council). On average, an article changed from Commission proposal to Council proposal at the rate of 25%; from Council to the final solution at staggering 69%, while the growth of an article, from the initial proposal, to the final solution, was at the rate of 46%, which roughly corresponds to the overall increase as the proposal was approaching its final solution.

In the same time, a total of 42 (that means almost a half of all articles) article did not change more than 11% in both direction (being larger in size or smaller in size), when comparing the Commission proposal and the Council proposal. A total of 54 (more than half) of all articles did not change more than 15% (in both directions) between the Council proposal and the final solution. Finally, 44 articles (close to a half) did not change more than 15% between the initial proposal and the final solution.

What are the key drivers of this change? Top 10 articles drive the change ranging from 86% to staggering 336% percent (Commission – Council proposal). These articles are:

Table 1 Top 10 increase (Commission - Council proposal)

Article name	% increase
Publication of decisions	+336%
Specific requirements for OTFs	+256%
Exercise of supervisory powers and powers to impose sanctions	+176%
Suspension and removal of financial instruments from trading on a regulated market	+119%
Membership of an authorized investor compensation scheme	+113%
Scope	+111%
Monitoring of compliance with the rules of the regulated market and with other legal obligations	+101%
Algorithmic trading	+100%
Monitoring of compliance with the rules of the MTF or the OTF and with other legal obligations	+95%
Organizational requirements – investment firms	+86%

We see that, in the TOP10 changes, the first two, with the highest magnitude, are provisions that we have anticipated as likely to increase, due to differences in preferences of member states. In ECOFIN report, the first two provisions were highlighted as those that have caused serious quarrels between member states – publication of decisions due to possible conflicts of EU law with the national law, while the other one due to differing views as to what should constitute an OTF. It is important to stress that this is direct comparison between initial proposal and the influence of Council, where the preferences of member states are best visible and best represented. Increase in scope is significant, but due to its nature, very hard to interpret. Article "Membership of an authorized investor compensation scheme" has only 40 words, therefore its increase in relative size probably does create a bias of its influence. Article 17 (Organizational requirements for investment firms), also mentions inducements and telephone conversation recording, which according to ECOFIN were another point of contestation. Hence, in the Top10, our theory has predicted correctly at least 2 out of 10, with some argumentation that could stretch to some other provisions. Furthermore, those provisions drive change the most (the publications of sanctions increased the proposal more than threefold, while the additional OTF requirements have increased the initial proposal by 2.5). What seems to contradict our theory are provisions on algorithmic trading. However, even though ECOFIN mentioned that the general

agreement does exist, it did mention that member states are expecting streamlining of proposals and further clarification on them. Another point worth thinking about are the changes related to regulated markets – according to ECOFIN documents, there were no significant misunderstanding on the issue of regulated markets. Again, this could be related to streamlining of the initial Commission proposal, but at this point it is difficult to determine.

Top 10 articles driving the change from Council proposal to final solution are:

Table 2 Top 10 increase (Council – MiFID II Directive)

Article name	% increase
Sanctions for infringements	160%
Definitions	133%
Position limits and position management controls in commodity derivatives	112%
Publication of decisions	102%
Specific requirements for MTFs	73%
Systems resilience, circuit breakers and electronic trading	69%
Provision of services at the exclusive initiative of the client	69%
General principles and information to clients	65%
Requirements for the management body of a market operator	51%
Optional Exemptions	40%

Before analyzing this table above, it is important to give a general remark to what is being assessed in this case. Since the legislative power in the EU lies jointly on the Council of the EU and the European Parliament, it is necessary for these two bodies to find an agreement, often in cooperation with the Commission. Therefore, when talking about the document above, it is clear that a lot of difference between Council proposal and the final solution could be attributed to the influence of the European Parliament. Among the Top10 articles above, the third and the fourth directly correspond to the issues that were put forward by individual member states, while Definitions and Optional Exemptions could fit a stretched definition. All the other articles are roughly corresponding to the area of investor protection and market supervision. This could be interpreted by the influence of the European Parliament – it has been noticed that since the crisis, the overall mood of the Parliament has

been shifted towards a stricter regulatory position, and the EP has put itself to the forefront of advocating for further regulatory burden to be imposed on financial sector (Ferrarini and Moloney, 2012). Issues like commodity positions were also seen by the EP as important, so the influence of the Parliament may have exacerbated the inclusion of additional provisions, which could explain long negotiations between three parties (Commission, Council, EP).

Finally, top ten articles driving positive change from initial proposal to the final solution, are:

Table 3 Top 10 increase (Commission – MiFID II)

Article name	% increase
Publication of decisions	780%
Specific requirements for OTFs	355%
Sanctions for infringements	260%
Position limits and position management controls in commodity derivatives	248%
General principles and information to clients	191%
Suspension and removal of financial instruments from trading on a regulated market	181%
Systems resilience, circuit breakers and electronic trading	168%
Organizational requirements – investment firms	142%
Algorithmic trading	133%
Scope	106%

Among the Top5 drivers of the change from Commission to final solution, four correspond to our theoretical predictions (1st, 2nd, 4th and the 5th, which includes the inducement provision[40]). Other provisions mainly deal with supervisory issues and investor protection, echoing the need for a sound financial system, an agenda often put forward by the EP. This table might suggest that the interests of the Council and the EP are equally or relatively equally represented in the final proposal. Even though the percentage share is more driven by the Council preferences, the provisions that are usually seen as those under EP jurisdiction are quite long (in absolute numbers), and the fact that the increase percentage is

[40] Furthermore, it contains another famous provision – Article 24 (12) "Member States may, in exceptional cases, impose additional requirements on investment firms in respect of the matters covered by this Article" (MiFID II Directive)

not very high, does not have to reflect lack of bargaining power. We will turn now to analysis of the second hypothesis, after which we will address both in the final discussion part.

6.2 MiFID I – MiFID II table analysis

When it comes to comparison between MiFID I and MiFID II provisions in order to infer some information related to gradual increase in harmonization and convergence, it is important to stress that, due to the official character of the repeals, that need to correctly correspond to each other, we should expect more valuable information, due to the possibility to extrapolate from more concrete data. In other words, in previous comparison, we were comparing between Articles, which often rendered comparison of articles that deal with scope or definition meaningless – because we could not easily determine where the change was coming from. On the other hand, however, we cannot provide a proper general overview in change between articles length, due to the comparison often being on a provision-against-provision basis, often comparing parts of a provision.

That being said, we can inform that, out of 369 provision comparisons, a total of 167 (more than a half) bring change within 20% (positive or negative) to the original provision, with a total of 56 provisions (around 1/6) bringing no change at all. This is interesting because it could be used as an argument that the original MiFID was in fact an excellent basis to begin with, since more than a half of its provisions did not change substantially. Furthermore, the biggest increases lie in the area that have been recognized as those that did not prove best in the crisis or that became obsolete by the flow of time. Some of the biggest changes were made on issues like organizational requirements, conduct of business, transaction reporting details (done through MiFIR, echoing the more technical nature of the Regulation), Systematic Internalizer (SI) definition (which increased almost six-fold,

reflecting the acknowledgment that this part of market infrastructure was one of the biggest failures of the original MiFID (Ferrarini and Moloney, 2012), pre-trade waivers, ancillary activities definition and other. On the other hand, there are 20 provisions which have decreased by more than 20% (with 4 completely abolished).

Finally, we shall present the Top 10 provisions that have decreased the most and provide a comment on that.

Table 4 Top 10 decrease (MiFID I – MiFID II package)

Provision and Article name	% decrease
Article 17(2) General obligation in respect of on-going supervision	-100%
Article 16(3) Regular review of conditions for initial authorization	-100%
Article 15 Relations with third countries	-100%
Article 5 (5) Requirement for Authorization	-100%
Article 41(1) Suspension and removal of instruments from trading	-94%
Article 48(3) Designation of competent authorities	-65%
Article 2(1)(k) Exemptions	-65%
Article 40(5) Admission of financial instruments to trading	-62%
Article 12 Initial capital endowment	-36%
Article 24(5) Transactions executed with eligible counterparties	-36%

First, we will address the first four provisions that are completely missing from the later MiFID II package. Relation with third countries is probably the easiest one to interpret – the third-country regime was created on completely different assumptions than in the MiFID II, which in turn reflects the deletion. Second provision is related to the investment advice, which again has a completely different regime than in the first MiFID. In fact, all four

missing provisions have completely different regimes in the new package. Therefore, it does not make much sense to infer anything about harmonization, since the intended idea and regime related to it were set on completely different assumptions.

However, an interesting information comes from the Article 41(1) in the original MiFID, which deals with the right of the operator of the regulated market to suspend an instrument which no longer complies with certain rules. In MiFID II this article finishes on that. However, original article supposes that a Member state shall require that the operator informs competent authorities, which shall inform other Member states. It is difficult to address this issue. Since the repeal of the provision is done by only one provision, this obligation of member states does not exist anymore. One interoperation could be that certain harmonization has been achieved – another one could be that this provision has become obsolete, due to increased level of competencies afforded to supervisory authorities after the crisis.

Article 48(3) has been changed to reflect ESMA's role in determining competent authorities, while that competence previously belonged to Commission. Article 2(1)(k) is related to commodity derivatives, of which a completely new regime has been established. However, when comparing provision between two MiFIDs, there seems to be an error – a provision related to commodity derivatives is repealed by a provision related to pension funds and UCITS. Be as it is, we abandon this provision in hope of inspecting the last three provisions.

Difference between word length of Article 40(5) and its successor is just a matter of semantics – a regulation that is being called upon has changed. Similar is with Article 12 – it is referring to a provision that was expecting a revision, hence the longer sentence. As the final nail into the coffin of our hypothesis, the decrease of Article 24(5) is yet another result of referred provision wording.

Faced with such an undisputable defeat, we conclude that using the aforementioned methodology, it is not possible neither to confirm nor to disprove the second hypothesis. Clearly, investigating convergence demands different approach. Possible problems to make any logical inference are the influence of crisis and the prescriptive nature of the second MiFID, which clearly disturbs the comparative balance.

6.3 Closing discussion

In this chapter, we have analyzed data relevant for our two hypotheses. Since the second hypotheses leaves no space for debating, we will in turn here focus on the first hypothesis.

Judging from the results, we have successfully anticipated that the contested issues from the European Council will be reflected in the enlargement of the document. However, there are several issues with this prediction. Even though these provisions were the biggest drivers of movement, there were still in minority, comparing to the issues that were known to be relevant to the European Parliament. When we controlled for the Parliament influence (second comparison) we could clearly see how the number of driving provisions is decreasing, to accommodate for the proposals that were identified in the financial press and literature as those of the interest of the Parliament. One of the key concerns are the provisions related to clearing and third-country regime – the increase in proportion of these provisions was negligible. This could lead to the intention that some kind of bargaining might have been achieved, in which one (group) member state backed down from its interests, in order to receive some other benefits.

With this thought, we anticipate probably the biggest criticism to our paper - accuracy of member state preferences. We have addressed that issue at length during initial chapters. ECOFIN is a political configuration of high level and high importance and likely susceptible

to phrasing which do not adequately represent the reality. Furthermore, financial press is often a credible source – but at the end of the day, its objectives differ from an academic piece of literature, which has reviewers, who can criticize its methodology and data. Therefore, an academic author would restrain himself from speculation; that cannot be applied to a journalist with same considerations. However, we strongly believe that, considering the scope of this paper, the constraints that laid ahead of the author, the highly secretive and politically sensitive nature of the topic, we have presented a relatively accurate picture of member state preferences.

Another potential problem of our method lies in comparing proposals by the Commission with the same scrutiny as the one of the Council. The Commission does not only have member state disagreements in mind – it is also concerned how the European Parliament will welcome the proposal. Therefore, it might have purposefully created a short, principle based document, knowing that it will receive heavy amount of amendments, therefore disincentivizing the Commission to go too much in-depth. Therefore, the increase in the number of words does not come from conflict preferences, but it comes due to the unpolished nature of the initial proposal. On the other hand, an argument could claim that Commission proposal aims to provide the highest possible harmonization at the lowest possible level of complexity. Therefore, the initial document is what it would have been approved if the Commission was an executive power of a standard country, unlike the EU, with too many stakeholders. Having that in mind, the increase of a text length might be signalizing bargaining.

Addressing the predictive and explanatory power of our theories, we should state several points. We find predictive power of the theory of conflict preferences to be reasonably high when comparing the influence of the Council on the final proposal. It seems that we can clearly state that conflicting preferences tend to create long, ambiguous laws, with a lot of

discretionary possibilities for member states to gold plat. There was a clear match between Top10 provisions that showed the highest increase and the issues that were the most debated in the Council. However, the theory does not say that conflict preferences *only* influence Council proposal – its states that conflicting preferences of member states influence the *final* proposal, as the determinant, key factor. Comparing Council proposals and final proposals, we clearly see that the influence of the European Parliament is significant. Therefore, we might claim that conflict preferences of member states are just one of the determinants, maybe the most important one, but certainly not the only one out there. One could claim, however, that member state preferences are also very much alive and well in the Parliament, but are more difficult to extract. We find it unlikely. European Parliament decision-making works in a different political manner than the Council – lobby groups, issues of left-right political spectrum, the fact that MEPs are not necessarily reflecting the position of their government are just one of those problems. Another one could be that there are conflicting preferences within some member states, such as Germany, or even UK, whose investment banks were not very happy with new investor protection regime (Papaconstantinou, 2016).

Another problem this research has faced is the influence of the financial crisis. It is clearly impossible to contemplate on what would have happened without the crisis. As we have mentioned on several occasions, the crises shifted the regulatory paradigm in favor of more stringent rules, with the EP emerging as an important advocate. Side by side with the crisis is the technological progress in financial markets, which is becoming more and more difficult to track. Therefore, the enormous scope of the MiFID II package can still come as a consequence of improvement in financial technology, which certainly cannot be followed the same way in the UK and a post-2004 member state. This can seriously hamper the intentions of regulators to create a common, harmonized market – member states will be quicker than the EU to fight new practices, which will in turn exacerbate the conflict preferences problem

due to the need of member states to create a regime as closer to their own as possible. One example came from the UK, where inducements were tackled as a post-crisis reform, with the UK showing strong reservations to agreeing to some kind of commission being allowed (Bursch and Ferrarini, 2017).

The findings of this paper, however, partially support the initial argument – that even though European Union states have been living under the “same roof” for quite a long time, old national discrepancies are pretty much alive and well. However, one should not underestimate the effects of European Parliament and lobby groups – which can also affect the European Commission. Long negotiations (almost three years) testify to the problematic procedure of negotiating a deal of such scale and effect. Still, it seems that member states are less divided on the old North-South lines od division – the crisis has been a cohesive factor, shifting the paradigm in favor of what was known to be the position of southern member states. The quarrels during the MiFID II negotiations indeed seem benign, in comparison to those during MiFID I, not to mention the ISD. There was not a single issue in MiFID II negotiations that could measure in relevance with the controversial concentration rule. The original MiFID did put forward a lot of harmonization changes, to which the best proof is the number of provisions that did not substantially change. MiFID II, “a bigger bang” (The Economist.com, 2014) has yet to prove the ambitious effort of its creators.

Conclusion

The aim of this thesis was to address the increasing complexity of EU financial market regulation using the example of MiFID II package of reforms. The theoretical framework consists of three building-blocks, that build upon the long strand of literature on intergovernmentalism as the determinant factor that is shaping European Union integration, in general, and financial market integration, in particular.

This paper understands increase in complexity as an increase in article length and wordcount, maintaining that, due to differing preferences of member states, each of them will try to push for as similar legislation to their own as possible, to decrease the costs, short the learning period and provide competitive advantages for its firms.

Two hypotheses were tackled – that financial legislation in the EU is still increasing, even controlling for the financial crisis and improvements in the technology; and that due to previous harmonization achievements, some provisions are actually shorter than in preceding regulatory frameworks.

First hypothesis, that claimed that conflicting member state preferences cause increase in the length of legal text, to accommodate exemptions, discretions and other, showed significant explanatory and predictive power. Initial legal provisions that caused a heated debate between member states, showed disproportionately high increase relative to their size in the final document, confirming the theory of member states preferences that shape the EU regulation. However, the findings of this paper are showing that other actors deserve to be credited as well; among them the European Parliament being the most important one.

The second hypothesis, that claimed that albeit increasing complexity, a relevant number of provisions decrease in size due to previous convergence, proved impossible to test, due to methodological issues. However, the number of provisions that remains unchanged in the MiFID II, might testify to the same objective.

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Appendices

1) Table addressing H1 (Evolution of MiFID II proposal – Commission – Council – MiFID II)

Article name	Commission (I)	Remarks	Council (II)	Remarks	MiFID II (III)	% change I-II	% change II-III	% change I-III
Scope	200		421		411	111%	-2%	106%
Exemptions	884		1346		1266	52%	-6%	43%
Optional Exemptions	522		616		865	18%	40%	66%
Definitions	2200		1527		3556	-31%	133%	62%
Requirement for Authorization	380		290		292	-24%	1%	-23%
Scope of authorization	145		141		143	-3%	1%	-1%
Procedures for granting and refusing requests for authorization	320		333		330	4%	-1%	3%
Withdrawal of authorization	146		151		158	3%	5%	8%
Management body	1130		1200		707	6%	-41%	-37%
Shareholders and members with qualifying holdings	234		265		268	13%	1%	15%
Notification of proposed acquisitions	800		815		802	2%	-2%	0%
Assessment period	650		654		649	1%	-1%	0%
Assessment	478		544		477	14%	-12%	0%
Membership of an authorised Investor Compensation Scheme	40		85		64	113%	-25%	60%
Initial capital	43		43		43	0%	0%	0%

endowment								
Organisationa l requirements	650		1211		1576	86%	30%	142%
Algorithmic trading	622		1245		1452	100%	17%	133%
Trading process and finalisation of transactions in an MTF and an OTF	550		680		776	24%	14%	41%
Specific requirements for MTFs	239		184		319	-23%	73%	33%
Specific requirements for OTFs	164		584		746	256%	28%	355%
Regular review of conditions for initial authorisation	87		87		84	0%	-3%	-3%
General obligation in respect of on-going supervision	59		59		59	0%	0%	0%
Conflicts of interest	205		262		296	28%	13%	44%
General principles and information to clients	700		1238		2037	77%	65%	191%
Assessment of suitability and appropriatene ss and reporting to clients	935		1238		1564	32%	26%	67%
Provision of services through the medium of another investment firm	165		165		166	0%	1%	1%
Obligation to execute	813		813		1137	0%	40%	40%

orders on terms most favourable to the client								
Client order handling rules	306		306		306	0%	0%	0%
Obligations of investment firms when appointing tied agents	789		552		578	-30%	5%	-27%
Transactions executed with eligible counterparties	511		495		503	-3%	2%	-2%
Monitoring of compliance with the rules of the MTF or the OTF and with other legal obligations	188		367		358	95%	-2%	90%
Suspension and removal of financial instruments from trading on an MTF or an OTF	574	Two Article s	673		881	17%	31%	53%
SME growth markets	590		672		707	14%	5%	20%
Freedom to provide investment services and activities	880		937		939	6%	0%	7%
Establishment of a branch	1130		1293		1297	14%	0%	15%
Access to regulated markets	141		141		141	0%	0%	0%
Access to CCP, clearing and settlement facilities and right to designate	285		299		301	5%	1%	6%

settlement system								
Provisions regarding CCPs, clearing and settlement arrangements in respect of MTFs	161		166		163	3%	-2%	1%
Establishment of a branch - Third country firms	618		360		362	-42%	1%	-41%
Obligation to provide information	176		177		184	1%	4%	5%
Granting of the authorisation	190		211		202	11%	-4%	6%
Provision of services at the exclusive initiative of the client	(non-existent, there is another one with 545)		72	Common standards for third country arrangements (deleted) 290	122		69%	
Withdrawal of authorisations	172		172	Registration (deleted) 108	144	0%	-16%	-16%
Authorisation and applicable law	463		457		461	-1%	1%	0%
Requirements for the management body of a market operator	819		791		1192	-3%	51%	46%

Requirements relating to persons exercising significant influence over the management of the regulated market	170		170		170	0%	0%	0%
Organisational requirements - regulated market	244		273		279	12%	2%	14%
Systems resilience, circuit breakers and electronic trading	573		907		1537	58%	69%	168%
Tick sizes	Non-Existent			Non-Existent	307			
Synchronisation of business clocks	Non-Existent			Non-Existent	101			
Admission of financial instruments to trading	501		535		507	7%	-5%	1%
Suspension and removal of financial instruments from trading on a regulated market	300		658		843	119%	28%	181%
Access to a regulated market	518		505		515	-3%	2%	-1%
Monitoring of compliance with the rules of the regulated market and with other legal	162		326		302	101%	-7%	86%

obligations								
Provisions regarding CCP and clearing and settlement arrangements	150		180		178	20%	-1%	19%
List of regulated markets	61		93		113	52%	22%	85%
Position limits and position management controls in commodity derivatives	523		858		1820	64%	112%	248%
Position reporting by categories of position holders	529	Name slightly altered	631		855	19%	35%	62%
Requirement for authorisation	232		311		302	34%	-3%	30%
Scope of authorisation	80		80		80	0%	0%	0%
Procedures for granting and refusing requests for authorisation	292		284		287	-3%	1%	-2%
Withdrawal of authorisations	95		95		102	0%	7%	7%
Requirements for the management body of a data reporting services provider	357		319		407	-11%	28%	14%
Organisationa l requirements - APA	403		474		613	18%	29%	52%
Organisationa l	915		1043		1077	14%	3%	18%

requirements - CTP								
Organisational requirements - ARM	237		386		412	63%	7%	74%
Designation of competent authorities	342		342		341	0%	0%	0%
Cooperation between authorities in the same Member State	101		101		113	0%	12%	12%
Supervisory powers	348		597		633	72%	6%	82%
Sanctions for infringements	422	Name slightly altered	585	Name slightly altered	1520	39%	160%	260%
Publication of decisions	92	Name slightly altered	401	Name slightly altered	810	336%	102%	780%
Exercise of supervisory powers and powers to impose sanctions	181	Name slightly altered	500	Name slightly altered	283	176%	-43%	56%
Reporting of infringements	124		164	Name slightly altered	210	32%	28%	69%
Right of appeal	183			Deleted	167	-100%		-9%
Extra-judicial mechanism for consumers complaints	108		129		123	19%	-5%	14%
Professional secrecy	405		402		440	-1%	9%	9%
Relations with auditors	281		281		260	0%	-7%	-7%
Data protection		Non-Existent		Non-Existent	43			
Obligation to cooperate	768		872		1045	14%	20%	36%

Cooperation between competent authorities in supervisory activities, for on-site verifications or investigations	305		331		323	9%	-2%	6%
Exchange of information	501		501		532	0%	6%	6%
Binding mediation	120		118		122	-2%	3%	2%
Refusal to cooperate	112		112		112	0%	0%	0%
Consultation prior to authorisation	352		352		351	0%	0%	0%
Powers for host Member States	117		117		117	0%	0%	0%
Precautionary measures to be taken by host Member States	772		781		768	1%	-2%	-1%
Cooperation and exchange of information with ESMA	53		54		62	2%	15%	17%
Exchange of information with third countries	428		449		449	5%	0%	5%

2) Table addressing H2 (MiFID I – MiFID II/MiFIR)

MiFID (2004)	Count	MiFID II	Count	MiFIR	Count	% change
Scope						
Article 1(1)	11	Article 1(1)	33			200%
Article 1(2)	69	Article 1(3)	78			13%
Exemptions						
Article 2(1)(a)	36	Article 2(1)(a)	34			-6%
Article 2(1)(b)	22	Article 2(1)(b)	21			-5%

Article 2(1)(c)	49	Article 2(1)(c)	49			0%
Article 2(1)(d)	57	Article 2(1)(d)	116			104%
Article 2(1)e	14	Article 2(1)(f)	13			-7%
Article 2(1)(f)	36	Article 2(1)(g)	36			0%
Article 2(1)(g)	32	Article 2(1)(h)	70			119%
Article 2(1)(h)	22	Article 2(1)(i)	22			0%
Article 2(1)(i)	37	Article 2(1)(j)	174			370%
Article 2(1)(j)	29	Article 2(1)(k)	29			0%
Article 2(1)(k)	63	Article 2(1)(i)	22			-65%
Article 2(1)(l)	91	—				
Article 2(1)(m)	27	Article 2(1)(l)	27			0%
Article 2(1)(n)	23	Article 2(1)(m)	23			0%
Article 2(2)	70	Article 2(2)	71			1%
Article 2(3)	78	Article 2(4)	313			301%
Optional Exemptions						
Article 3(1)	307	Article 3(1)	436			42%
Article 3(2)	36	Article 3(3)	36			0%
Definitions						
Article 4(1)(1)	299	Article 4(1)(1)	287			-4%
Article 4(1)(2)	139	Article 4(1)(2)	135			-3%
Article 4(1)(3)	14	Article 4(1)(3)	15			7%
Article 4(1)(4)	35	Article 4(1)(4)	35			0%
Article 4(1)(5)	26	Article 4(1)(5)	51			96%
Article 4(1)(6)	22	Article 4(1)(6)	22			0%
Article 4(1)(7)	30	Article 4(1)(20)	171			470%
Article 4(1)(8)	41	Article 4(1)(7)	43			5%
Article 4(1)(9)	27	Article 4(1)(8)	27			0%
Article 4(1)(10)	18	Article 4(1)(9)	18			0%
Article 4(1)(11)	14	Article 4(1)(10)	14			0%
Article 4(1)(12)	12	Article 4(1)(11)	12			0%
Article 4(1)(13)	27	Article 4(1)(18)	25			-7%
Article 4(1)(14)	80	Article 4(1)(21)	80			0%
Article 4(1)(15)	55	Article 4(1)(22)	56			2%
Article 4(1)(16)	25	Article 4(1)(14)	25			0%
Article 4(1)(17)	13	Article 4(1)(15)	13			0%
Article 4(1)(18)	102	Article 4(1)(44)	102			0%
Article 4(1)(19)	32	Article	32			0%

		4(1)(17)				
Article 4(1)(20)	118	Article 4(1)(55)	197			67%
Article 4(1)(21)	60	Article 4(1)(56)	61			2%
Article 4(1)(22)	22	Article 4(1)(26)	22			0%
Article 4(1)(23)	11	Article 4(1)(27)	20			82%
Article 4(1)(24)	40	Article 4(1)(28)	29			-28%
Article 4(1)(25)	72	Article 4(1)(29)	72			0%
Article 4(1)(26)	76	Article 4(1)(30)	76			0%
Article 4(1)(27)	57	Article 4(1)(31)	89			56%
Article 4(1)(28)	27	Article 4(1)(32)	28			4%
Article 4(1)(29)	28	Article 4(1)(33)	29			4%
Article 4(1)(30)	12	Article 4(1)(35)(b)	66			450%
Article 4(1)(31)	143	Article 4(1)(35)	128			-10%
Article 4(2)	45	Article 4(2)	57			27%
Requirement for Authorization						
Article 5(1)	55	Article 5(1)	56			2%
Article 5(2)	38	Article 5(2)	33			-13%
Article 5(3)	41	Article 5(3)	127			210%
Article 5(4)	71	Article 5(4)	73			3%
Article 5(5)	59					-100%
Scope of authorization						
Article 6(1)	57	Article 6(1)	57			0%
Article 6(2)	36	Article 6(2)	36			0%
Article 6(3)	46	Article 6(3)	50			9%
Procedures for granting and refusing requests for authorisation						
Article 7(1)	33	Article 7(1)	33			0%
Article 7(2)	61	Article 7(2)	58			-5%
Article 7(3)	23	Article 7(3)	23			0%
Article 7(4)	Missing	Article 7(4) and (5)	208			
Withdrawal of authorisation						
Article 8(a)	45	Article 8(a)	45			0%

Article 8(b)	15	Article 8(b)	15			0%
Article 8(c)	22	Article 8(c)	24			9%
Article 8(d)	20	Article 8(d)	25			25%
Article 8(e)	23	Article 8(e)	23			0%
Persons who effectively direct the business						
Article 9(1)	88	Article 9(1) and (3)	366			316%
Article 9(2)	43	Article 9(5)	44			2%
Article 9(3)	61	Article 9(4)	91			49%
Article 9(4)	91	Article 9(6)	132			45%
Shareholders and members with qualifying holdings						
Article 10(1)	127	Article 10(1)	130			2%
Article 10(2)	47	Article 10(2)	47			0%
Article 10(3)	190	Article 11(1)	358			88%
Article 10(4)	112	Article 11(2)	228			104%
Article 10(5)	132	Article 11(3)	122			-8%
Article 10(6)	173	Article 10(3), 11(4)	185			7%
Article 10a(1)	Missing	Article 12(1)	136			
Article 10a(2)	Missing	Article 12(2)	118			
Article 10a(3)	Missing	Article 12(3)	62			
Article 10a(4)	Missing	Article 12(4)	94			
Article 10a(5)	Missing	Article 12(5)	24			
Article 10a(6)	Missing	Article 12(6)	19			
Article 10a(7)	Missing	Article 12(7)	38			
Article 10a(8)	Missing	Article 12(8) and (9)	158			
Article 10b(1)	Missing	Article 13(1)	285			
Article 10b(2)	Missing	Article 13(2)	40			
Article 10b(3)	Missing	Article 13(3)	39			
Article 10b(4)	Missing	Article 13(4)	72			
Article 10b(5)	Missing	Article 13(5)	41			
Membership of an authorised Investor Compensation Scheme						
Article 11	41	Article 14	64			56%
Initial capital endowment						
Article 12	67	Article 15	43			-36%
Organisational requirements						
Article 13(1)	22	Article 16(1)	29			32%
Article 13(2)	44	Article 16(2)	41			-7%
Article 13(3)	40	Article 16(3)	308			670%
Article 13(4)	36	Article 16(4)	36			0%
Article 13(5)	119	Article 16(5)	188			58%

Article 13(6)	58	Article 16(6)	84			45%
Article 13(7)	49	Article 16(8)	52			6%
Article 13(8)	37	Article 16(9)	38			3%
Article 13(9)	64	Article 16(11)	306			378%
Article 13(10)	63	Article 16(12)	61			-3%
Trading process and finalisation of transactions in an MTF						
Article 14(1)	47	Article 18(1), Article 19(1)	119			153%
Article 14(2)	84	Article 18(2)	90			7%
Article 14(3)	90	Article 19(4)	99			10%
Article 14(4)	39	Article 18(3), Article 19(2)	62			59%
Article 14(5)	67	Article 18(6), Article 19(3)	201			200%
Article 14(6)	50	Article 18(8)	56			12%
Article 14(7)	37	Article 18(9)	40			8%
Relations with third countries						
Article 15	502	—				-100%
Regular review of conditions for initial authorisation						
Article 16(1)	30	Article 21(1)	27			-10%
Article 16(2)	44	Article 21(2)	44			0%
Article 16(3)	46	—				-100%
General obligation in respect of on-going supervision						
Article 17(1)	60	Article 22	59			-2%
Article 17(2)	44	—				-100%
Conflicts of Interest						
Article 18(1)	61	Article 23(1)	88			44%
Article 18(2)	63	Article 23(2)	79			25%
Article 18(3)	99	Article 23(4)	76			-23%
Conduct of business obligations when providing invest-ment services to clients						
Article 19(1)	48	Article 24(1)	50			4%
Article 19(2)	31	Article 24(3)	31			0%
Article 19(3)	106	Article 24(4)	370			249%
Article 19(4)	71	Article 25(2)	127			79%
Article 19(5)	192	Article 25(3)	208			8%
Article 19(6)	237	Article 25(4)	411			73%
Article 19(7)	66	Article 25(5)	68			3%
Article 19(8)	38	Article 25(6)	259			582%

Article 19(9)	61	Article 24(6), Article 25(7)	153			151%
Article 19(10)	113	Article 24(13), Article 24(14), Article 25(8)	430			281%
Provision of services through the medium of another investment firm						
Article 20	165	Article 26	166			1%
Obligation to execute orders on terms most favourable to the client						
Article 21(1)	69	Article 27(1)	247			258%
Article 21(2)	52	Article 27(4)	52			0%
Article 21(3)	187	Article 27(5)	214			14%
Article 21(4)	89	Article 27(7)	114			28%
Article 21(5)	31	Article 27(8)	47			52%
Article 21(6)	168	Article 27(9)	139			-17%
Client order handling rules						
Article 22(1)	71	Article 28(1)	71			0%
Article 22(2)	130	Article 28(2)	139			7%
Article 22(3)	134	Article 28(3)	95			-29%
Obligations of investment firms when appointing tied agents						
Article 23(1)	57	Article 29(1)	55			-4%
Article 23(2)	180	Article 29(2)	184			2%
Article 23(3)	198	Article 29(3)	172			-13%
Article 23(4)	115	Article 29(4)	115			0%
Article 23(5)	22	Article 29(5)	22			0%
Article 23(6)	23	Article 29(6)	30			30%
Transactions executed with eligible counterparties						
Article 24(1)	69	Article 30(1)	131			90%
Article 24(2)	128	Article 30(2)	120			-6%
Article 24(3)	127	Article 30(3)	128			1%
Article 24(4)	56	Article 30(4)	22			-61%
Article 24(5)	97	Article 30(5)	66			-32%
Obligation to uphold integrity of markets, report transac-tions and maintain records						
Article 25(1)	78			Article 24	55	-29%
Article 25(2)	75			Article 25(1)	112	49%
Article 25(3)	100			Article 26(1)	200	100%

				and (2)		
Article 25(4)	39			Article 26(3)	192	392%
Article 25(5)	96			Article 26(7)	418	335%
Article 25(6)	54			Article 26(8)	64	19%
Article 25(7)	81			Article 26(9)	475	486%
Monitoring of compliance with the rules of the MTF and with other legal obligations						
Article 26(1)	75	Article 31(1)	124			
Article 26(2)	87	Article 31(2) and (3)	139			
Obligation for investment firms to make public firm quotes						
Article 27(1)	261			Article 14(1) to (5)	372	43%
Article 27(2)	64			Article 14(6)	84	31%
Article 27(3)	379			Article 15(1) to (4)	367	-3%
Article 27(4)	51			Article 16	48	-6%
Article 27(5)	80			Article 17(1)	80	0%
Article 27(6)	97			Article 17(2)	92	-5%
Article 27(7)	251			Article 17(3)	235	-6%
Post-trade disclosure by investment firms						
Article 28(1)	83			Article 20(1)	58	-30%
Article 28(2)	69			Article 20(2)	90	30%
Article 28(3)	141			Article 20(3)	161	14%
Pre-trade transparency requirements for MTFs						
Article 29(1)	76			Article 3(1), (2) and (3)	173	128%
Article 29(2)	91			Article	484	432%

				4(1), (2) and (3)		
Article 29(3)	156			Article 4(6)	226	45%
Post-trade transparency requirements for MTFs						
Article 30(1)	91			Article 6(1) and (2)	131	44%
Article 30(2)	102			Article 7(1)	203	99%
Article 30(3)	138			Article 7(2)	276	100%
Freedom to provide investment services and activities						
Article 31(1)	100	Article 34(1)	102			2%
Article 31(2)	171	Article 34(2)	263			35%
Article 31(3)	56	Article 34(3)	56			0%
Article 31(4)	66	Article 34(4)	66			0%
Article 31(5)	49	Article 34(6)	52			6%
Article 31(6)	113	Article 34(7)	119			5%
Article 31(7)	Missing	Article 34(8) and (9)	141			
Establishment of a branch						
Article 32(1)	104	Article 35(1)	130			20%
Article 32(2)	193	Article 35(2)	271			29%
Article 32(3)	72	Article 35(3)	72			0%
Article 32(4)	77	Article 35(4)	77			0%
Article 32(5)	44	Article 35(5)	44			0%
Article 32(6)	53	Article 35(6)	54			2%
Article 32(7)	117	Article 35(8)	149			21%
Article 32(8)	60	Article 35(9)	60			0%
Article 32(9)	69	Article 35(10)	69			0%
Article 32(10)	Missing	Article 35(11) and (12)	141			
Access to regulated markets						
Article 33(1)	111	Article 36(1)	111			0%
Article 33(2)	30	Article 36(2)	30			0%
Access to central counterparty, clearing and settlement facilities and right to designate settlement system						
Article 34(1)	99	Article 37(1)	118			16%
Article 34(2)	177	Article 37(2)	183			3%

Article 34(3)	40	—				
Provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs						
Article 35(1)	56	Article 38(1)	57			2%
Article 35(2)	107	Article 38(2)	106			-1%
Authorisation and applicable law						
Article 36(1)	178	Article 44(1)	106			-68%
Article 36(2)	78	Article 44(2)	72			-8%
Article 36(3)	56	Article 44(3)	58			3%
Article 36(4)	36	Article 44(4)	42			14%
Article 36(5)	105	Article 44(5)	110			5%
Article 36(6)	Missing	Article 44(6)	10			
Requirements for the management of the regulated mar-ket						
Article 37(1)	117	Article 45(1) and (8)	97			-21%
Article 37(2)	53	Article 45(7) second subparagraph	49			-8%
Requirements relating to persons exercising significant influence over the management of the regulated market						
Article 38(1)	29	Article 46(1)	29			0%
Article 38(2)	93	Article 46(2)	94			1%
Article 38(3)	47	Article 46(3)	47			0%
Organisational requirements						
Article 39	244	Article 47(1)	249			2%
Admission of financial instruments to trading						
Article 40(1)	58	Article 51(1)	58			0%
Article 40(2)	34	Article 51(2)	39			13%
Article 40(3)	88	Article 51(3)	88			0%
Article 40(4)	31	Article 51(4)	31			0%
Article 40(5)	125	Article 51(5)	77			-62%
Article 40(6)	170	Article 51(6)	197			14%
Suspension and removal of instruments from trading						
Article 41(1)	136	Article 52(1)	70			-94%
Article 41(2)	87	Article 52(2)	663			87%
Access to the regulated market						

Article 42(1)	29	Article 53(1)	31			6%
Article 42(2)	99	Article 53(2)	91			-9%
Article 42(3)	77	Article 53(3)	79			3%
Article 42(4)	76	Article 53(4)	78			3%
Article 42(5)	30	Article 53(5)	33			9%
Article 42(6)	145	Article 53(6)	170			15%
Article 42(7)	36	Article 53(7)	33			-9%
Monitoring of compliance with the rules of the regulated market and with other legal obligations						
Article 43(1)	63	Article 54(1)	88			28%
Article 43(2)	95	Article 54(2) and (3)	181			48%
Pre-trade transparency requirements for regulated markets						
Article 44(1)	107			Article 3(1), (2) and (3)	173	62%
Article 44(2)	86			Article 4(1), (2) and (3)	484	463%
Article 44(3)	120			Article 4(6)	226	88%
Post-trade transparency requirements for regulated mar-kets						
Article 45(1)	100			Article 6(1) and (2)	131	31%
Article 45(2)	97			Article 7(1)	203	109%
Article 45(3)	100			Article 7(2)	276	176%
Provisions regarding central counterparty and clearing and settlement arrangements						
Article 46(1)	50	Article 55(1)	62			19%
Article 46(2)	104	Article 55(2)	116			10%
List of regulated markets						
Article 47	95	Article 56	113			16%
Designation of competent authorities						
Article 48(1)	63	Article 67(1)	70			10%
Article 48(2)	254	Article 67(2)	248			-2%

Article 48(3)	38	Article 67(3)	23			-65%
Cooperation between authorities in the same Member State						
Article 49	101	Article 68	113			11%
Powers to be made available to competent authorities						
Article 50(1)	72	Article 69(1), 72(1)	105			31%
Article 50(2)	191	Article 69(2)	599			68%
Administrative sanctions						
Article 51(1)	76	Article 70(1) and (2)	301			75%
Article 51(2)	21	Article 70(5)	29			28%
Article 51(3)	51	Article 71(1)	335			85%
Article 51(4)	Missing	Article 71(4)	101			
Article 51(5)	Missing	Article 71(5)	28			
Article 51(6)	Missing	Article 71(6)	56			
Right of appeal						
Article 52(1)	69	Article 74(1)	78			12%
Article 52(2)	82	Article 74(2)	89			8%
Extra-judicial mechanism for investors' complaints						
Article 53(1)	39	Article 75(1)	61			36%
Article 53(2)	25	Article 75(2)	23			-9%
Article 53(3)	Missing	Article 75(3)	39			
Professional secrecy						
Article 54(1)	109	Article 76(1)	112			3%
Article 54(2)	43	Article 76(2)	44			2%
Article 54(3)	127	Article 76(3)	141			10%
Article 54(4)	93	Article 76(4)	110			15%
Article 54(5)	33	Article 76(5)	33			0%
Relations with auditors						
Article 55(1)	263	Article 77(1)	205			-28%
Article 55(2)	45	Article 77(2)	55			18%
Obligation to cooperate						
Article 56(1)	132	Article 79(1)	292			55%
Article 56(2)	69	Article 79(2)	69			0%
Article 56(3)	53	Article 79(3)	51			-4%
Article 56(4)	109	Article 79(4)	115			5%
Article 56(5)	69	Article 79(8)	58			-19%
Article 56(6)	Missing	Article 79(9)	67			
Cooperation in supervisory activities, on-the-spot verifica-tions or in investigations						

Article 57(1)	136	Article 80(1)	139			2%
Article 57(2)	Missing	Article 80(2)	43			
Article 57(3)	Missing	Article 80(3) and (4)	141			
Exchange of information						
Article 58(1)	107	Article 81(1)	130			18%
Article 58(2)	90	Article 81(2)	99			9%
Article 58(3)	143	Article 81(3)	142			-1%
Article 58(4)	27	Article 81(4)	63			57%
Article 58(5)	90	Article 81(5)	98			8%
Article 58a	Missing	Article 82	122			
Refusal to cooperate						
Article 59	135	Article 83	112			-21%
Inter-authority consultation prior to authorisation						
Article 60(1)	81	Article 84(1)	86			6%
Article 60(2)	88	Article 84(2)	93			5%
Article 60(3)	102	Article 84(3)	102			0%
Article 60(4)	Missing	Article 84(4)	70			
Powers for host Member States						
Article 61(1)	28	Article 85(1)	34			18%
Article 61(2)	77	Article 85(2)	83			7%
Precautionary measures to be taken by host Member States						
Article 62(1)	213	Article 86(1)	250			15%
Article 62(2)	209	Article 86(2)	240			13%
Article 62(3)	194	Article 86(3)	235			17%
Article 62(4)	43	Article 86(4)	43			0%
Article 62a(1)	Missing	Article 87(1)	21			
Article 62a(2)	Missing	Article 87(2)	41			
Exchange of information with third countries						
Article 63(1)	252	Article 88(1)	397			37%
Article 63(2)	52	Article 88(2)	52			0%
Article 64		—				
Article 64a		—				
Article 65		—				
Article 66		—				
Article 67		—				
Article 68		—				
Article 69		—				
Article 70		—				
Article 71		—				
Article 72		—				

Article 73		—				
Annex I - LIST OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS	572	Annex I	603			5%
Annex II - PROFESSIONAL CLIENTS FOR THE PURPOSE OF THIS DIRECTIVE	1067	Annex II	1120			5%