Monitor and Manage: MiFID and Power in the Regulation of EU Financial Markets

*Larry Catá Backer**

Abstract: MiFID, the Market in Financial Instruments Directive, came into force on 1 November 2007, and is hailed as the next great step toward market integration within the European Union (EU). It is grounded in two key traditional policies of market regulation: surveillance and management. MiFID will exact a greater degree of transparency—paralleling American principles of market regulation. It will also require adherence to a 'best execution' standard for all clients. Most analyses have focused on the costs and implementation of these requirements. Transparency is viewed as either a burden (or opportunity) because of the need to produce, keep, and manage more data. Markets in information will surely grow. The 'best execution' standards provide a greater means of standardizing industry practices—with the potential benefit to regulators to which power over market behavior should flow. This article will focus on the potential ramifications of the surveillance and regulatory aspects of MiFID in terms of the nature of the character of the regulatory power in the financial products sector. Specifically the article examines the effects of the creation of the markets for information elaborated or augmented through MiFID in terms of the regulation of the behavior of participants in financial markets and the entities they serve. Particular attention will be paid to the effects of MiFID on public and private anti-corruption campaigns, the use of these regulations to influence the behavior of issuers and market middlemen, and the potential utility of these regulations to elements of civil society and the media in their campaigns for corporate and capital social responsibility.

* Professor of Law, Pennsylvania State University; Director, Coalition for Peace and Ethics (see: <http://www.peaceethics.org>), visiting Professor of Law, Tulane University Law School 2007–08 (where much of the work on this article was completed). The author may be contacted at: lcb11@psu.edu. An earlier version of this paper was presented at the Conference: EU Financial Services Regulation: Completing the Internal Market. Institute of Advanced Legal Studies, London, United Kingdom, 26 October 2006 (organized by the Academy of European Law and the Centre for Commercial Law Studies, Queen Mary, University of London). My thanks to my research assistant, Nicholas Fernez, and to the conference participants for their very helpful comments and suggestions.

I. Introduction

The Market in Financial Instruments Directive (MiFID),[1] came into force on 1 November 2007,[2] replacing the Investment Services Directive (ISD).[3] The European Commission has proclaimed, 'MiFID and its implementing measures together establish a comprehensive legislative framework at European level relating to the establishment and conduct of investment firms, multilateral trading facilities and regulated markets.'[4] As the Financial Service Authority (FSA) explains it to its Internet audience, 'MiFID extends the coverage of the current ISD and introduces new and more extensive requirements that firms will have to adapt to, in particular for their conduct of business and internal organisation.'[5] MiFID's implementation, businesses are warned, 'will significantly alter financial services regulation in the UK, how firms operate their businesses, and the way they interact with their clients.'[6]

MiFID is meant to accomplish several goals. Among the most important is to broaden the market for financial services across the territories of EU Member States by extending the range of core financial services subject to 'passporting' rules,[7] principally by introducing the Multilateral Trading Facility (MTF) as a core cluster of services subject to passporting.[8] The requirements of the Capital Requirements Directive[9] will be extended to firms that fall within the scope of

[1] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, ([2004] OJ L145/1 (30.04.04)), available at: <http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_145/l_14520040430en00010044.pdf> (hereafter 'MiFID').

[2] Directive 2006/31/EC of the European Parliament and of the Council amending directive 2004/39/EC on markets in financial instruments, as regards certain deadlines, at Article 1(4).

[3] Directive 93/22 ([1993] OJ L141/27). The Commission has published a report on transposition. See European Commission, Internal Market, Securities and Investment, Investment Services and Regulated Markets, MiFID Transposition State of Play, last updated 23 April 2008, available online at: <http://ec.europa.eu/internal_market/securities/isd/mifid_implementation_en.htm>.

[4] European Commission, Internal Market, Securities and Investment, Investment Services and Regulated Markets (MiFID), Your Questions on MiFID, Markets in Financial Instruments Directive and Implementing Measures, available online at: <http://ec.europa.eu/internal_market/securities/isd/questions/index_en.htm>.

[5] FSA, Markets in Financial Instruments Directive (MiFID), available online at: <http://www.fsa.gov.uk/Pages/About/What/International/EU/fsap/mifid/index.shtml>.

[6] FSA, Planning for MiFID, November 2005, available online at: <http://www.fsa.gov.uk/pubs/international/planning_mifid.pdf>, at 3.

[7] On passporting under MiFID, see The Committee of European Securities Regulators (CESR), Public Consultation, The Passport Under MiFID, Ref 06–669 (December 2006), available online at: <http://www.mifidconnect.org/content/1/c4/81/67/cesr_passport.pdf>.

[8] See, eg MiFID, Art 31. For a discussion, see, eg E Avgouleas, 'A Critical Evaluation Of The New EC Financial-Market Regulation: Peaks, Troughs, And The Road Ahead' 18 Transnational Law (2005) 179, 193–195.

[9] The Capital Requirements Directive is comprised of two Directives: Directive 2006/48/EC ([2006] OJ L177/1) (available online at: <http://eur-lex.europa.eu/LexUriServ/site/en/

MiFID.[10] MiFID will also exact a greater degree of transparency in the operation of financial markets—echoing American principles of market regulation.[11] These include the generation of pre- and post-trade data, the extension of transparency, and reporting requirements for 'Systematic Internalisers' (SI).[12] It will also require adherence by investment firms to a 'best execution' standard for all clients.[13]

MiFID is one of a batch of harmonizing legislation growing out of the Financial Services Action Plan[14] and the associated 'Lamfalussy process'.[15] The

oj/2006/l_177/l_17720060630en00010200.pdf>) and Directive 2006/49/EC ([2006] OJ L177/201) (available online at: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_177/l_17720060630en02010255.pdf>).

10 See, eg FSA, Markets in Financial Instruments Directive (MiFID), available online at: <http://www.fsa.gov.uk/Pages/About/What/International/EU/fsap/mifid/index.shtml>.

11 Compare the American effort legislated as Reg NMS, Securities and Exchange Commission, Final Regulation: Regulation NMS, Release No 34–51808; File No S7–10-04 (2005). This focus on transparency extends from earlier regulatory efforts on disclosure by companies seeking to participate in the financial markets such as the Prospectus Directive 2003/71 ([2003] OJ L345/64), the Prospectus Regulation Commission Regulation 2004/809 ([2004] OJ L149/1), and the Transparency Directive 2004/109 ([2004] OJ L390/38). Harmonization in communication within financial markets has been advanced through efforts of the International Accounting Standards/International Financial Reporting Standards (IAS/IFRS) to harmonize financial reporting through, for example, IAS Regulation 1606/2002 ([2002] OJ L243/1)).

12 Systematic internalisers are defined in MiFID as 'investment firms which, on an organized and frequent basis, deals on own account by executing client orders outside a regulated market or an MTF': MiFID, Art 4(7). 'Firms that routinely cross buy and sell orders are deemed to be "systematic internalisers" and must provide definite bid and offer quotes in liquid shares for orders below 'standard market size': A Jenkins, 'Preparing for MiFID: On Your Marks! Get Se! Go!, Bearing Point, Inc.', White Paper: Strategy, Process and Transformation (July 2005, updated March 2006) available online at: <http://www.bearingpoint.fr/media/Library/MIFID_PREP.pdf>.

13 MiFID, Arts 19(1) and 21(1).

14 Financial Services Action Plan (FSAP), Commission Communication of 11 May 1999 entitled 'Implementing the framework for financial markets: action plan' (COM(1999) 232 final—not published in the Official Journal), available online at: <http://europa.eu/scadplus/leg/en/lvb/l24210.htm> (including progress reports from 1999). 'Disparities between Member States' rules on corporate governance can give rise to legal and administrative barriers which hinder the efficient operation of the EU financial market. However, the term "corporate governance" covers a wide range of issues whose ramifications for the single financial market are at present unclear. Any Community initiative in this area should therefore initially be confined to reviewing national codes of corporate governance applied in the different Member States in order to identify any barriers which could frustrate the development of a single EU financial market.' Ibid, at General Conditions.

15 'The core of the EC's regulatory and supervisory approach in financial services is now founded on the 4-level Lamfalussy process.': Commission of the European Communities, White Paper: Financial Services Policy 2005–2010, SEC(2005) 1574, COM(2005) 629 FINAL, Brussels, 1 December 2005, 3.1, at 9. For a general description, see Financial Markets: Commission Welcomes Parliament's Agreement On Lamfalussy Proposals For Reform IP/02/195, Brussels, 5 February 2002 available online at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/195&format=HTML&aged=1&language=EN&guiLanguage=en>. For a more detailed discussion, see EC Commission, Commission Staff Working Document The Application of The Lamfalussy Process To EU Securities Markets Legislation—A Preliminary Assessment by the Commission Services SEC(2004) 1459 (15 November 2004). Available online at: <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/sec-2004–1459_en.pdf>. As the UK Government explained:

'Given the scale of the task involved in adopting and implementing such a large programme of FSAP Regulations and Directives, ECOFIN decided in July 2000, as its top priority, to complete a process involves the enactment of framework legislation (Level 1) to be followed by more detailed implementing legislation based on the framework adopted (Level 2). This is eventually to be followed by a comitological process among regulators for greater integration in fact (Level 3)[16] and strengthening enforcement (Level 4). MiFID, the core of the framework provisions in this aspect of financial services integration, and constituting the 'Level 1' text, came into force on 30 April 2004.[17] Level 2 legislation has started coming down the regulatory pike in the form of an Implementing Regulation[18] and an additional Directive.[19] Level 3 will focus on implementation and enforcement of Levels 1 and 2 requirements through 'supervisory convergence' among the regulatory authorities of the Member States and has been advanced in two influential reports of the EU's Financial Services Committee.[20]

This article considers MiFID in the context of the EU's regulatory project for markets, specifically, and for the 'single market' in general. The paper starts with a view of MiFID from the inside. It lays out MiFID's complexity, order, comity, and direction in the context of the substantive policy advanced and the methodology embraced.[21] That substantive policy is grounded in the value of

single EU capital market by 2003. A Committee of Wise Men chaired by Baron Alexandre Lamfalussy was appointed. The Lamfalussy Committee recommended a new decision-making procedure for the adoption of EU legislation affecting the securities markets, which was endorsed by the Stockholm European Council in March 2001.' (HM Treasury, FSA and the Bank of England, The EU Financial Services Action Plan: A Guide (31 July 2003), at p 12, 16, available online at: <http://www.fsa.gov.uk/pubs/other/fsap_guide.pdf>.)

[16] See G Ferrarini, 'The Harmonisation of Capital Markets Law in the EU: Assessments and Prospects,' paper presented at the Conference: EU Financial Services Regulation: Completing the Internal Market (London, 27 October 2006).

[17] Directive on Markets and Financial Instruments 2004.

[18] See Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive ([2006] OJ L241/1 (09.02.06)), available online at: <http://ec.europa.eu/internal_market/securities/isd/mifid2_en.htm>, (hereafter 'Implementing Regulation 2006'). This Regulation focuses on investment firm record keeping obligations, transaction reporting rules, market transparency requirements, rules for the admission of financial instruments to trading, and deferred terms.

[19] See Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive ([2006] OJ L241/26 (09.02.06)), available online at: <http://ec.europa.eu/internal_market/securities/isd/mifid2_en.htm> (hereafter 'Implementing Directive 2006').

[20] See, Financial Services Committee (FSC) (2006), Report on Financial Supervision ('Francq Report II'), February 2006; and Financial Services Committee (FSC) (2005), Report on Financial Supervision ('Francq Report I'), July 2005.

[21] That complexity has generated enough confusion to produce a Commission document organizing and answering the most commonly put to it, a document weighing in at 135 pages. More will likely be generated. See European Commission, Internal Market, Securities and investment, Investment in Services and Regulated Markets, Your Questions on MiFID, available online at: <http://ec.europa.eu/internal_market/securities/docs/isd/questions/questions_en.pdf> (last updated 23 April 2008).

surveillance for controlling behavior and in an understanding of an objective of control as focused on the management of a situation rather than on the eradication of a problem.

With the surveillance and reporting aspects of MiFID firmly in mind, this article then turns to a consideration of the most interesting ramifications of MiFID raised within the context of the broader issues with respect to which MiFID appears to be largely concerned. These ramifications can be divided into seven broad but related themes that MiFID raises, and that will be worth sustained review as this new broad attempt at regulating financial markets is implemented. Together, these themes suggest both the power and limits of regulatory attempts like MiFID to control markets, or to privatize monitoring and redirect it for the benefit of the political community, or to reinforce the State system in the context of behavior that jumps borders, or to achieve broader policy goals, principally criminal enforcement and control of political activity.

II. MiFID From the Inside and on its Own Terms

MiFID presents an institutionally complex set of modifications of the Financial Services Directive.[22] As a regulatory document, MiFID is divided into five main components. The first sets forth key definitions and the regulatory scope of MiFID. Its provisions are to a substantial extent, also framed by an Annex to the Directive. The second sets out substantive requirements for authorization and operating conditions. The third focuses on rules governing regulated markets. The fourth lays out the public institutional framework for regulation within the multi-tiered structure of the EU. The last includes a variety of important housekeeping provisions. The requirements of MiFID are further elaborated in both an implementing directive[23] and an Implementing Regulation.[24] The complexity of its provisions is matched only by that of the justifications advanced for its structure and limitations.

This section is divided into two parts. The first untangles the regulatory framework, at least in broad strokes. The second considers the web of justification of that structure and the administrative response of the UK public authorities. Both serve as the foundation for the analysis that follows in section III.

The document is important if only to suggest the difficulties, even for the Commission, of understanding the important of this regulatory scheme. See, ibid, at 45 (question 167) (providing a modified answer to definition of the term 'money market instrument' in Article 4(1)(19) of MiFID).

[22] Investment Services Directive 93/22 ([1993] OJ L141/27).

[23] See Implementing Directive 2006, n 18 above.

[24] See Implementing Regulation 2006, n 17 above.

A. The Regulatory Framework of MiFID

MiFID applies fully to 'investment firms'[25] and 'regulated markets'[26] to which separate but related authorization regimes are applied.[27] It is only partially applicable to credit institutions otherwise authorized to provide one or more investment services or activities.[28] MiFID provides the by now standard list of exemptions from regulation,[29] and permits Member States the authority to exempt further classes of investment actors.[30] The most important scope additions that MiFID makes to its predecessor are regulation of investment advice and the operation of multilateral trading facilities as a specific component of 'regulated markets'.[31] Covered investment firms are subject to regulation with respect to their investment services and activities. Investment services and activities are defined as those services and activities listed in MiFID's Annex I.[32] Annex I lists eight covered services or activities in its scope provision, including investment advice and operation of multilateral trading facilities.[33] Investment advice is defined as 'the provision of personal recommendations to a client, either upon its request, or at the initiative of the investment firm'.[34] But that advice must be given 'in respect of one or more transactions relating to financial instruments'.[35] Multilateral trading facilities is defined as a multilateral *system* 'operated by an investment form

[25] MiFID, Title I, Art 1(1). An investment firm is defined as 'any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis'. Ibid, at Title I, Art 4(1)(1).

[26] Ibid. A regulated market is defined in MiFID, Art 4(13).

[27] The authorization requirements scheme for investment firms is set forth in Title II (Arts 5–35) and the regulated markets authorization requirements scheme is set forth in Title III (Arts 36–47) of MiFID.

[28] MiFID, Title I, Art 1(2).

[29] MiFID, Title I, Art. 2. Noteworthy, though, is the exception for certain firms engaged in commodities transactions through other financial intermediaries. See MiFID, Art 2(1)(i) and 2(1)(k).

[30] MiFID, Title I, Art 3. The exemption covers a variety of financial services intermediaries. The exemption provided is important for two reasons. The first is that it covers a large number of market participants. The second is that the exemption may significantly affect the harmonization of the regulatory framework.

[31] HM Treasury, Consultation Document: UK Implementation of the EU Markets in Financial Instruments Directive (Directive 2004/39/EC) (December 2005), available online at: <http://www.hm-treasury.gov.uk/media/2E0/CA/ukimplementationeumarkets151205.pdf>, at 10. 'Regulated markets' are defined as 'a multilateral system operated and/or managed by a market operator, which bring together or facilitates the bringing together of multiple third party buying and selling interests in financial instruments': MiFD, Title I, Art 4(1)(14). The market operator itself 'may be the regulated market itself.': MiFID, Title I, Art 4(1), (13).

[32] MiFID, Title I, Art 4(1)(2). The Commission is given some latitude with respect to derivatives, otherwise covered as a financial instrument subject to regulation. See ibid. The Implementing Regulations added a bit of detail to trading in derivatives on regulated markets. See Implementing Regulation 2006, Arts 37–39.

[33] MiFID, Annex I, Section A(1)–(8). Annex A also provides a list of covered 'ancillary services' (ibid, at Section B) and forms of covered 'financial instruments' (ibid, at Section C).

[34] MiFID, Title I, Art 4(1)(4),

[35] Ibid. Financial instruments are limited to those described in MiFID, Annex I, Section C. See, MiFID, Title I, Art 4(1), (17). The kinds of financial instruments now included within the regulatory

or a market operator' which essentially operates like a 'regulated market' as that term is itself defined in MiFID.[36] The Commission may clarify, but not change, the scope definitions of Article 1.[37]

Like the prior rules, a central element of MiFID consists of the vesting, in the governmental apparatus of each Member State, of authority to authorize the provision of 'investment services' by those eligible to engage in such a business, in accordance with the framework specified in MiFID.[38] That framework builds on the good practices and governance frameworks of the ISD.[39] These provisions are meant to provide protection to investors by maintaining a basic system of harmonized good governance standards. These include initial capital endowment,[40] organizational requirements,[41] and qualifications for owners and operators of investment firms.[42] Additional rules are provided for the governance, trading practices and finalization of transactions of operators of multilateral trading facilities,[43] and in the relationship between registered investment forms and third countries.[44]

The core of the governance provisions of MiFID center on the conduct of the business of regulated firms.[45] Member States are required to monitor for compliance.[46] The conflict of interest rules represent a significant expansion over the old rules.[47] Title II, Chapter II, Section 2 of MiFID sets out the core of investor protection provisions.[48] The investor protection measures are more extensively developed than under the old ISO and cover a number of important areas, including conduct of business obligations,[49] the provision of services through

ambit include non-financial derivatives (principally commodity and more exotic derivatives). See MiFID , Annex I, Section C (4)–(10).

36 MiFID, Title I, Art 4(1), (15).

37 MiFID, Art 4(2).

38 See MiFID, Title II, Arts 5–10.

39 See MiFID, Arts 11–15.

40 See MiFID, Arts 11–12. Minimum capital requirements are only indirectly regulated by MiFID. The actual mandatory levels are set forth as a specific part of the general Capital Requirements Directive. See Capital Requirements Directive (Directive 2006/48/EC and Directive 2006/49/EC), adopted on 14 June 2006. It will apply to all credit institutions and investment firms in the EU.

41 MiFID, Art 13. MiFID's governance provisions are more extensive than those in ISD. These provisions were extensively fleshed out in the MiFID Implementing Directive. See Implementing Directive 2006, Arts 5–25. The record keeping requirements are specified in the Implementing Regulation. See Implementing Regulation 2006, above note [18] at Arts 7–8. The organizational and good governance provisions of MiFID and in the Implementing Directive and Implementing Regulation are worth study in their own right, but that analysis is beyond the scope of this article.

42 MiFID, Arts 9–10.

43 MiFID, Art 14. These requirements are meant to bring MTF practice into conformity with those of other regulated markets. The focus of these rules is on transparency (Article 14(2) and (4)), issuer information (Article 14(6)), and regulatory compliance with State agents (Article 14(7)).

44 MiFID, Art 15.

45 MiFID, Arts 16–35.

46 MiFID, Arts 16–17.

47 See especially MiFID, Art 18(2). The 2006 Implementing Directive specifies the development and publication of conflict of interest rules appropriate to the nature of the business of the regulated entity. See Implementing Directive 2006, Art 22. These provisions are also meant to expand and harmonize investor protection.

48 MiFID, Arts 19–24.

49 MiFID, Art 19. Firms are required to 'act honestly, fairly and professionally in accordance with the best interests of its clients' (ibid). Minimum requirements for investor communication are also

the medium of another investment firm,[50] best execution policies,[51] client order handling rules,[52] tied agents,[53] and eligible counterparties rules.[54]

Title II, Chapter II, Section 3, sets forth an expanded group of market transparency and integrity rules.[55] This is another section in which the prior rules have been substantially expanded. Investment forms 'which execute transactions in any financial instruments admitted to trading on a regulated market must report details of such transactions' to Member State regulatory agencies within a working day of execution.[56] The most important set of innovations involve pre-trade transparency rules.[57] One set of these new rules applies only to transactions in shares by systemic internalizers and requires them to 'publish a firm quote in those shares admitted to trading on a regulated market for which they are systemic internalisers, and for which there is a liquid market'.[58] Investment firms have a

specified, focusing on conveying an understanding of the nature and risks of the investment service and the specific instruments offered to clients (Article 19(3)). The Directive also provides for obtaining client information and experience relevant to the investment (Article 19(4) and (5)) recordkeeping (Article 19(7)) and reporting (Article 19(8)). The 2006 Implementing Directive fleshed out these requirements. See Implementing Directive 2006, Arts 24, 26–45.

[50] MiFID, Art 20. This provision establishes rules for liability in the context of the appropriateness and accuracy of information, and for proper performance of the services rendered.

[51] MiFID, Art 21. MiFID, Art 21(1) imposes on Member States the obligation to require investment firms to take all reasonable steps to obtain 'the best possible result of their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of that order'. These rules apply in the absence of specific instructions from clients. Still, the best execution policies under which such efforts are to be undertaken is framed as a general obligation, rather than one that requires modification with respect to each individual order (Articles 21(2) and (3)). However, best execution criteria are elaborated in the Implementing Directive. See Implementing Directive 2006, Art 44. The criteria focus more precisely on client characteristics.

[52] MiFID, Art 22. This is essentially an equal treatment rule for clients. But the rule is targeted for the small order client. Larger clients with larger orders may be exempted from these provisions at the option of any Member State (Article 22(2)) and a Member State may determine that transmission to a regulated market or MTF satisfies the requirements of the rule (ibid).

[53] MiFID, Art 23. MiFID imposes a rule of unconditional responsibility. Id.

[54] MiFID, Art 24. The rules provide an exception to the investor protection rules where the counterparty is otherwise responsible.

[55] MiFID, Arts 25–30. These provisions are to be implemented without prejudice to the allocation of responsibility under the Market Abuse Directive, Commission Directive 2003/6/EC ([2003] OJ L96/16 (04.12.03)). In December 2006, the FSA published FSA 2006/70 Transparency Obligations Directive (Disclosure and Transparency Rules) Instrument 2006, which amended the FSA's rules and implemented the TD in the UK, effective from 20 January 2007. See FSA 2006/70, available at <http://www.fsa.gov.uk/pages/handbook>.

[56] MiFID, Art 25(3). The Implementing Regulation defines 'the most relevant market in terms of liquidity' for purposes of making such reports. See Implementing Regulation 2006, Arts 9–10. It also fleshes out a number of other reporting requirements (ibid, at Arts 11–14).

[57] MiFID, Art 27.

[58] MiFID, Art 27(1). These provisions do not apply where there is no liquid market (in which case the systemic internaliser must disclose quotes to clients on demand) or when dealing 'in sizes above standard market size' (Article 27(1)). The market for each share is measured against all orders executed in the EU (Article 27(1)). These quotes are to be made public 'in a manner which is easily accessible to other market participants on a reasonable commercial basis' (Article 27(3)). Systemic internalizers are bound by these quotes on orders they receive from retail clients and professional clients with an exception for orders larger than one of a size larger than one 'customarily undertaken by a retail

post-trade transparency obligation with respect to 'shares admitted to trading on a regulated market, outside a regulated market or MTF'.[59] Another set imposes similar rules on MTF transactions.[60] The Implementing Regulation provides criteria for determining whether an investment firm is a systematic internaliser (and thus subject to the reporting and transparency rules).[61]

The cross-border trading provisions of MiFID were meant to clarify the establishment rules of the ISD. Article 31 permits an investment firm authorized in one Member State to provide investment services in other Member States on compliance with certain notification rules.[62] Branches may be established without having to proceed with additional authorization procedures in the host State.[63] And investment firms are granted access to regulated markets established in the territory of any Member State.[64] Similar rules apply to regulated markets and MTFs.[65]

Regulated markets themselves are the regulatory subject of the comparatively less extensive Title III of MiFID. Paralleling the regulatory framework applied to investment firms, MiFID seeks to create a harmonized approach to principles of regulating markets while allowing a certain measure of flexibility in the implementation of those principles. 'The provisions governing regulated markets are aimed at providing high-level principles of regulation in order to allow for flexibility in the development of such markets.'[66] MiFID provides for a public

investor' and may execute orders for professional clients at prices different from their quoted ones (Article 27(3)). The Implementing Regulations specify the manner of determining market liquidity for purposes of the application of MiFID, Art 27. See Implementing Regulation 2006, Art 22. The Implementing Regulation also elaborates a number of other requirements with respect to systematic internaliser pre transaction transparency. See Implementing Regulation 2006, at Arts 23 (standard market size definition), 24 (maintenance of record of quotes reflecting prevailing market conditions), 25 (order execution), and 26 (retail size).

[59] MiFID, Art 28. Systematic internalisers thus have an obligation to make public the details of transactions in shares as if they had been traded in regulated markets.

[60] MiFID, Arts 29–30. The Implementing Regulation describes the sort of information that an investment firm or market operator operating an MTF (or a regulated market pursuant to the requirements of MiFID, Art 44) must make public. See Implementing Regulation 2006, Arts 17 (information to be provided) and 18 (waiver criteria). Private transaction waivers are also treated (MiFID, Art 19).

[61] See Implementing Regulation 2006, Art 21. Investment firms who deal on their own account outside a regulated market or MTF will be treated as a systematic internaliser if such trading takes on the characteristics of a market. The Implementing Regulation specifies three criteria in that respect: (1) activity that has a material commercial role for the firm that is carried out under an institutionalized set of procedures, (2) the activity is carried out through an automated technical system, and (3) the activity is regularly and continuously available to clients of the firm (ibid).

[62] MiFID, Art 31 (imposing State-to-State system of notification).

[63] MiFID, Art 32. The provisions do give host State authorities some leeway where there may be evidence of inadequacy. See, eg MiFID, Art 32(3).

[64] MiFID, Art 33. No additional regulatory requirements can be imposed if the investment firm chooses to gain access by becoming a remote member of or having remote access to the regulated market, or otherwise by setting up a branch in the host State (Article 33). Investment firms are also provided with access to central counterparty, clearing, and settlement facilities (Article 34).

[65] MiFID, Art 35.

[66] HM Treasury, Consultation Document: UK Implementation of the EU Markets in Financial Instruments Directive (Directive 2004/39/EC) (December 2005), available online at: <http://www.hm-treasury.gov.uk/media/2E0/CA/ukimplementationeumarkets151205.pdf>, at 16.

registration of regulated markets, and prohibits the operation of unauthorized markets.[67] Authorization requires 'good reputation' and 'sufficient experience' requirements for operators.[68] 'The Commission shall publish a list of all regulated markets in the Official Journal of the European Union.'[69] MiFID imposes organizational requirements,[70] rules relating to admission of financial instruments to trading,[71] access to regulated markets,[72] the implementation of monitoring systems,[73] and provisions for pre- and post-trade transparency.[74] The transparency rules are fleshed out in the 2006 Implementing Regulation.[75]

The Implementing Regulations under MiFID elaborated rules with respect to the publication and availability of pre- and post-trade information applicable to the transparency obligations of regulated markets, MTFs and systematic internalisers.[76] The regulation emphasizes a focus on real time publication as the standard, with necessary modifications depending on transaction type.[77] Of great importance are the rules for channels of publication. The Implementing Regulation

[67] MiFID, Title III, Art 36(1). Ownership information, among other things, would be public (Article 38(2)(a)), and ownership transfers would be subject to public approval (Article 38(3)).

[68] MiFID, Art 37(1). The standard for refusal to approve authorization is 'objective and demonstrable grounds' (Article 37(1)). In addition, people who 'are in a position to exercise, directly or indirectly, significant influence over the management of the regulated market to be suitable' (Article 38(1)).

[69] MiFID, Art 47 (to be updated once a year).

[70] MiFID, Art 39. These include managing potential adverse consequences of conflicts of interest (Article 39(a)), managing significant operational risk (Article 39(b)), developing sound management of technical operations (Article 39(c)), development of 'transparent and non-discretionary rules and procedures that provide for fair and orderly trading' and the establishment of objective criteria for efficient execution of orders (Article 39(d)), effective arrangements to facilitate finalization of transactions (Article 39(e)), and to ensure that the regulated market to have 'sufficient financial resources to facilitate its orderly functioning' (Article 39(f)).

[71] MiFID, Art 40 (requiring the development of 'clear and transparent rules regarding the admission of financial instruments to trading'). Financial instruments admitted are subject to a 'fair, orderly and efficient' trading standard and that such instruments are freely negotiable. Derivatives are also subject to an 'orderly pricing' and 'effective settlement' standards (Article 40(2)). Suspension and removal of instruments is treated at Article 41 of MiFID.

[72] MiFID, Art 42. The access rules are subject to transparency and non-discrimination standards (Article 42(1)), specify who, beside investment firms, may be admitted (Article 42(3)), and to provide 'appropriate arrangements on their territory so as to facilitate access to and trading on those markets by remote members or participants established in their territory' (Article 42(6)).

[73] MiFID, Art 43 ('regulated markets shall monitor the transactions undertaken by their members or participants under their systems in order to identify breaches of [regulated market] rules, disorderly trading conditions or conduct that may involve market abuse'). Significant breaches must be reported to the State (Article 43(2)).

[74] MiFID, Arts 44 (current bid and offer prices and the depth of trading interests at those prices) and 45 ((price, volume and time of transactions executed in respect of shares). Member States may waive the publication of pre-trade information under certain circumstances (Article 44(2)). Member States may also provide for deferred publication of post trade information (Article 45(2)).

[75] See Implementing Regulation 2006. For example, see at Article 27, which elaborates MiFID's post-trade transparency rules to investment forms and regulated markets and operators of MTFs, specifies the sort of information that must be made public with respect to transactions in shares admitted to trading on regulated markets and MTFs.

[76] Implementing Regulation 2006, Arts 29–34.

[77] See Implementing Regulation 2006, Art 29.

permits public dissemination within the meaning of the relevant provisions of the information if 'investors located within the Community' may obtain the information from one of three sources: (1) the facilities of a regulated market or MTF, (2) the facilities of a third party (whether or not located within the Community), and (3) other proprietary arrangements otherwise unspecified.[78]

MiFID also touches on the regulatory structure within the legal orders of the Member States. Article 48 of MiFID requires each Member State to designate a 'competent authority' in which the administrative requirements of MiFID will fall,[79] and to cooperate with peer authorities.[80] MiFID encourages the resolution of consumer complaints by non-judicial alternatives.[81] Finally, in a series of transitional provisions, the ISD[82] is repealed and minimum capital rules are provided for firms which would be exempt from MiFID under Article 3's optional exemption provisions.[83]

B. The Framework of Regulatory Justification

The EU has portrayed MiFID as a multi-objective innovation in legislation. In a June 2006 press release, Internal Market Commissioner Charlie McCreevy was quoted describing MiFID as 'a ground-breaking piece of legislation. It will transform the landscape for the trading of securities and introduce much needed competition and efficiency.'[84] Its virtues for investors rested on the provision of greater protection for investors and greater choice.[85] All this choice and protection pro-

[78] Implementing Regulation 2006, Art 30. Arrangements to make information public must satisfy an additional three conditions under the Implementing Regulation. First, there is a reliability assessment, continuous monitoring and correction standard imposed on such arrangements. Second, the arrangement 'must facilitate the consolidation of data with similar data form other sources'. And lastly, information generated through such arrangements must be made available on a 'non-discriminatory commercial basis at a reasonable cost' (Article 32).

[79] MiFID, Art 48. These entities must be public authorities, but 'without prejudice to the possibility of delegating tasks to other entities where that is expressly provided for' (Article 48(2)). Delegations are possible with respect to Articles 5(5) (delegation of administrative, preparatory and ancillary tasks relating to the granting of authorization of investment forms providing only advice or transmission services), 16(3) (same with respect to initial authorization), 17(2) (same with respect to monitoring), and 23(4) (allowing collaboration with investment firms and credit institutions in registering and monitoring tied agents). Designated authorities must be vested with certain powers, sufficient to carry out the requirements of MiFID and its Implementing Directive and regulation. See Article 50. These powers are extensive, touching on broad authority to gain access to information, to suspend trading, and to ensure compliance by elements to the regulated industries. These powers are coupled with extensive sanctioning powers (Articles 51–52).

[80] MiFID, Arts 49, 62. In addition, Member States may conclude cooperation agreements with non-EU States. The focus is on the exchange of information (Article 63(1)), but only to the extent protected by the professional secrecy rules in MiFID. See MiFID, Art 54.

[81] MiFID, Art 53. [82] MiFID, Art 69. [83] MiFID, Art 67.

[84] See EC Commission, Markets in Financial Instruments Directive ('MiFID'): Implementing Measures Close to Adoption, Brussels, 26 June 2006 (IP/06/846), available online at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/846&format=HTML&aged=0&language=EN&guiLanguage=fr>.

[85] Ibid.

duced an additional benefit: It should drive down the cost of capital, generate growth and boost our competitiveness.'[86]

'The implementing (or 'level 2') measures develop a number of the provisions set out in the framework (or 'level 1') Directive adopted in April 2004. Having emerged from a lengthy consultation and negotiation phase, they are balanced, proportionate and sensible. They will protect investors and consumers without imposing unnecessary compliance burdens on firms.'[87]

The EC Commission offered seven reasons for pushing MiFID as a necessary replacement to the Investment Services Directive (ISD).[88] The Commission argued that ISD: (1) failed to provide sufficient harmonization to prevent dual/multiple regulation of firms doing cross-border business; (2) offered little consumer protection with respect to business models and market structures that emerged after adoption of ISD; (3) failed to regulate the full range of investment services; (4) did not provide a satisfactory framework for competition between exchanges and other marketplaces; (5) fragmented liquidity and created barriers to cross border transactions through its failure to adequately harmonize the regulation of exchanges and other marketplaces; (6) failed to provide an adequate level of supervisory cooperation within and between Member States; and (7) was generally otherwise out of date and inflexible.[89] But the FSA remained dubious of the financial integration potential of MiFID, especially in light of the uneven application of its rules to investment firms, markets and financial instruments.[90]

Of special concern was the perceived need to control and harmonize regulation of alternative markets, and in particular: (i) multilateral trading facilities (MTF), (ii) other over the counter facilities and particularly systematic internalisers (SI), firms executing orders from their own account. 'The MiFID requirements on transaction reporting aim to ensure that firms report details of transactions in any financial instruments admitted to trading on a regulated market quickly and accurately to the appropriate competent authority.'[91]

With respect to MTFs, the Treasury had this to say in its December 2005 Report: 'Since the mid-1990s there has been a growth in organised marketplaces

[86] Ibid. For the Commissioner, there were additional benefits to the MiFID system: 'MiFID will remove obstacles to firms' use of the EU-wide investment "passport", foster competition and a level playing field between Europe's trading venues, and ensure a high level of protection for investors across Europe.'

[87] Ibid.

[88] Investment Services Directive, Commission Directive 93/22/EEC repealed by MiFID, Art 69, as amended by Directive 2006/31/EC of the European Parliament of the Council ([2004] OJ L114/60 (27.04.04)), Art 1(1).

[89] HM Treasury, Consultation Document: UK Implementation of the EU Markets in Financial Instruments Directive (Directive 2004/39/EC) (December 2005), available online at: <http://www.hm-treasury.gov.uk/media/2E0/CA/ukimplementationeumarkets151205.pdf>, at 2.2 (at 9).

[90] 'The linking of MiFID to the benefits of financial integration also begs the question of how the directive is likely to facilitate greater financial integration.' (HM Treasury, ibid, at 7.17 (at 61)).

[91] FSA, Implementing MiFID for Firms and Markets (July 2006), CP06/14, available online at: <http://www.fsa.gov.uk/pubs/cp/cp06_14.pdf>, at 17.1 (at 119) (hereafter 'FSA 2006').

which have not sought designation as exchanges. These have been run by investment firms and banks using a wide variety of business models and trading a wide variety of financial instruments. MiFID defines such markets as MTFs and establishes a EU-wide set of regulatory standards for them. The purpose is to help facilitate competition between venues for the execution of orders, at the same time as guaranteeing that all market places are governed by standards which seek to protect market integrity.'[92] Some commentators have agreed that MiFID will contribute to increasing competition among exchanges, for example, as competitive markets are changed as a result of regulation of this type on both sides of the Atlantic, but remain sceptical that the additional competition is entirely to the better.[93]

The Treasury report extracts two objectives that may not be as compatible as one might like. The setting of uniform regulatory standards is not necessarily competition enhancing, especially if regulatory competition has economic and market efficiency effects. If one views the development of off regulatory markets as evidence of the opinion of the markets on the efficacy of the current regulatory framework (and its potential privileging of some forms of market making over others), then the effort may well have perverse effects. Moreover, the elaboration of a vast system of private information gathering, storage, and retrieval systems is not cheap, and may have the effect of limiting rather than increasing competition, as the costs of compliance reduce the profitability of the industry.[94] Moreover, expansion of coverage to 'investment advice' was meant to serve consumer protection concerns, rather than market efficiency concerns. Indeed, there was a sense that efficiency might have to take a back seat to consumer protection to enhance the integrity of the markets.[95] Yet, MiFID also permits Member States to exempt financial services intermediaries from MiFID coverage, even those who provide 'investment advice'.[96]

[92] FSA, Consultation Document: UK Implementation of the EU Markets in Financial Instruments Directive (Directive 2004/39/EC) (December 2005), available online at: <http://www.hm-treasury.gov.uk/media/2E0/CA/ukimplementationeumarkets151205.pdf>, at 10.

[93] See, eg I Kokkoris and R Olivares-Caminal, *Some Issues on Cross Border Stock Exchange Mergers*, 29 U Pa J Int'l L 455 (2007) ('Some permutations of mergers may induce competitive harm and thus lead to a post-merger market characterized by a lower degree of competition. This would lower the degree of innovation as well as the improvement of exchange services' (ibid, at 526).

[94] The views from industry are well known and were widely published through trade media in the years leading up to the effective date of MiFID. See, eg, Steve Ranger, MiFID: Cheat Sheet: Banks Get Miffed at New Regulation, Silicon.com, Financial Services (31 October 2005), available online at: <http://www.silicon.com/financialservices/0,3800010322,39153793,00.htm>.

[95] See FSA, Consultation Document: UK Implementation of the EU Markets in Financial Instruments Directive (Directive 2004/39/EC) (December 2005), available online at: <http://www.hm-treasury.gov.uk/media/2E0/CA/ukimplementationeumarkets151205.pdf>, at 10. A recent Commission Green Paper emphasized the value of consumer protection in the construction of integrated markets for financial services in its ongoing regulatory efforts. See EC Commission, Green Paper on Retail Financial Services in the Single Market, COM(2007) 226 Final (Brussels, April 30, 2007) (emphasizing lower prices and more choices for consumers, at 19–23). The Green Paper suggested that MiFID's foundational objective 'is to protect consumers by enhancing responsible behaviour by firms.' (ibid, at 33).

[96] MiFID, Art 3(1).

Like MTFs, SIs present a unique regulatory opportunity from which MiFID does not shy. And indeed, the case of the SI is emblematic of the overarching purposes of MiFID, which is to construct a comprehensive regulatory regime over markets as they have metastasized since the good old days of markets as physical spaces in which people (licensed by the State) traded specific instruments (controlled by the State). The FSA agreed in its July 2006 Report about this aspect of the MiFID regulatory scheme, an aspect it sought to embrace.[97] Referring to MiFID, the FSA was quick to agree with it EU counterparts about the theoretical extent of the scope of MiFID: 'It creates a new, comprehensive EU-wide pre- and post-trade transparency regime for trades in any share admitted to trading on an EU RM, whether those trades are executed on an RM, an MTF or by an investment firm operating outside those systems—ie Over-the-Counter (OTC).'[98] And it agreed that MiFID ended the sort of discretionary loopholes that had made harmonization difficult under the old ISD.[99] Still, the FSA was also quite aware of the limitations built into that comprehensiveness. 'The details of the pre-trade requirements differ according to type of trading venue and trading methodology. They will apply to transactions on RMs and MTFs and also to trading undertaken by investment firms—designated as "systematic internalisers" (SIs)—which, on an organised, frequent and systematic basis, deal on own account by executing client orders outside RMs and MTFs. The details of the post-trade transparency requirements are the same across all trading venues.'[100]

Yet no amount of regulatory enthusiasm can cover the difficulties and contradictions of the actual regulatory scheme. Comprehensiveness might well be an object—but the universe within which comprehensiveness is sought is quite constructed indeed. Thus for example, this wholly regulated world (at least for the moment) is restricted to financial instruments admitted for trading on an EU regulated market (including MTFs). While those financial instruments are broadly defined for purposes of admission to trading, the actual scope of reporting is much more severely limited to equity securities. Thus though regulated markets are indeed regulated, the extent of the regulation is neither uniform nor complete as to the securities admitted to trading. There are good and sufficient reasons for these limitations, but they produce consequences in the aggregate. Among the most important are the creation of incentives to trade in forms that might reduce the compliance costs of the regulatory scheme to the operators of

[97] 'The main purpose of these changes is to help regulators uphold the integrity of markets by enabling them to obtain a more complete picture of their firms' trading activities than they can at present.' (FSA 2006, n 91 above.)

[98] FSA 2006, n 91 above: 'MiFID ends the discretion which Member States had under the ISD to require certain transactions to be executed on an RM (the so-called "concentration" rule). The UK had not exercised this discretion.'

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[100] FSA 2006, n 91 above.

regulated markets as well as to investment firms. That there appears to remain a large unregulated space still in the securities markets suggests the contours of the space within which these changes in behavior will occur.

Lastly, it is clear to all regulators, at least in Britain, that the new transparency obligations can lead to new markets in the provision of information. With respect to the growth industry in private information services that MiFID creates, the FSA appears eager to facilitate growth on a robust global market. In a widely circulated document, the FSA proposed that MiFID firms be permitted to use their choice of 'FSA-approved Trade Data Monitor/s (TDM) to meet their MiFID post-trade publication obligations. Firms could choose on a per trade basis which TDM they want to use.'[101] But more importantly, the FSA announced an intention to refrain from regulating 'the number of TDMs. RMs, MTFs, data publishers and new service providers could choose to be TDMs and be admitted to our list of approved entities. This could include non-UK RMs and other non-UK entities.'[102]

It is possible that some TDMs may choose to outsource some of their services. It is important to note that TDMs would still remain ultimately responsible for meeting their obligations irrespective of whether there are separate outsourcing or other agreements in place (FSA 2006, at 107).

MiFID thus appears to serve as both a market creating and a market regulating vehicle.

In addition, MiFID carries over certain ISD exemptions under MiFID, Art 3,[103] that permit Member States to exempt investment firms providing only investment advice and/or receiving and transmitting orders otherwise brought within the scope of the regulation for the first time. Exemptions are only available where those firms are otherwise regulated at the national level, are not allowed to hold clients' funds or securities, and only transmit orders to a limited list of entities. Moreover, there is a significant consequence to exemption: Where a Member State exercises this exemption the exempted firm cannot take advantage of the free movement provisions in MiFID. It cannot provide cross-border services or establish a branch in another Member State without applying for separate authorizations in the country or countries concerned.

With the possible exception of the new markets in information, the U.K. Treasury's response to MiFID has been guarded. It has expressed the view that:

1.7 The Treasury and FSA have both committed to only go beyond the minimum necessary in implementing EU financial services directives where this is consistent with better regulation. This means where there is a market failure which requires correcting and the benefits of doing so demonstrably exceeds the costs. This approach will be applied to the implementation of MiFID.[104]

[101] FSA 2006, n 91 above, at 106. FSA indicated that it 'would publish a list of TDMs on our website so data consolidators would know where to source the trade information' (n 91 above, at 107.)

[102] FSA 2006, n 91 above, at 107.

[103] MiFID, Art 3.

[104] FSA, Consultation Document: UK Implementation of the EU Markets in Financial Instruments Directive (Directive 2004/39/EC) (December 2005), available online at: <http://www.hm-treasury.gov.uk/media/2E0/CA/ukimplementationeumarkets151205.pdf>, at 4.

The FSA has taken a similar approach. In a 2005 speech, posted to the FSA website, Hector Sants, then Managing Director, Wholesale and Institutional Markets at the FSA stated its position as follows: 'Our approach to implementation is intelligent "copy-out" of the MiFID text, with requirements tougher than the Directive only where this can be justified by on cost benefit analysis.'[105] Commentators, like Niamh Maloney, have picked up on this language, describing the FAS's approach as a 'light touch' method of transposition.[106]

The enthusiasm of HM Treasury and the FSA for MiFID and the regulatory project to be undertaken in light of the need to transpose MiFID into national law might be explainable. Other than a change in vocabulary, and perhaps the form of certain processes, MiFID does little violence to the normative regulatory universe within which the FSA has been comfortable and UK financial services sector regulation has developed. And MiFID offers a bonanza of sorts to the industry facilitators—at least from a cynical perspective. It will take a tremendous amount of effort to learn and incorporate the new vocabulary and make the dozens of small but significant changes to operations that the new MiFID language might require.

So there you have it. From the EU's perspective, the MiFID solves any number of problems. Even problems that are essentially conflicting in nature—for example consumer protection, efficiency, and competitiveness within Europe. From the UK's perspective, there is little to MiFID that is earth shattering—the vocabulary is different but the changes might be more or less marginal. It is hard to believe that either institution has it quite right. The EU may overestimate the aggregate benefits of MiFID in particular. It is possible to see in MiFID not so much the solution of old problems as the crafting of categories of new problems (or perhaps better put—of new opportunities for making money from regulatory market distortions) it creates or at least facilitates.[107] And the FSA might

[105] See Hetor Sants, Speech by Hector Sants, FSA Annual Public Meeting, 21 July 2005, available online at: <http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2005/0721_hs.shtml>.

[106] N Maloney, 'Financial Market Regulation in the Post-Financial Services Action Plan Era' 55 Int'l & Comp LQ 982 (2006). The article suggests:

'It appears that the new agenda will be characterized by: consolidation and reflection; greater transparency and market consultation; limited legislative intervention; a focus on cost-benefit analysis and more "joined-up" regulation; reliance on softer techniques such as investor education and the integration of market mechanisms and self regulation; and, most importantly, a driving concern to ensure effective implementation and robust supervision of the new regulatory regime in the post-FSAP environment.' (Ibid, at 985.)

Id., at 985.

[107] For example, Compliance LLC offers, through its website, packages for training in financial service sector compliance, including MiFID compliance, and developing methods for taking strategic advantage of the provisions of these new regulations starting at about $10,000. See Compliance LLC, available at: <http://www.mifid-training.net/>. 'SunGard is a global leader in software and processing solutions for financial services, higher education and the public sector' (Sungard, About Sungard, available online at: <http://www3.sungard.com/sungard/default.aspx?id=4>) offers a number of products and facilities to aid its customer base in MiFID compliance. See Sungard, The Markets in Financial Instruments (MiFID) and Sungard, available online at: <http://www3.sungard.com/financial/default.aspx?id=272>.

have to deal with many more changes that are more than skin deep. Both points appear to be at the heart of the financial services sector's reaction to the impending changes to be brought on by MiFID, at least in the UK.[108]

Looking at the totality of that extremely complex project that is MiFID, it is possible to discern two very broad issues with which the entire project is effused. The first is the relationship between regulating States and markets. MiFID broadens the definition of markets (this is a key objective of the new framework) by including two substantially new players in cross-border market regulation: the MTF (multilateral trading facility), and SI (systematic internalizers). MiFID looks to the creation of (or more complete correspondence between) markets and regulators or regulatory units. But at the same time it preserves the EU traditional segmentation approach to markets and securities regulation (one not unknown in the United States).

This focus on the connection between States, markets, and regulation serves to reinforce the policy of functional differentiation among segments of the financial markets—markets or trading in different forms of securities merit distinct regulatory frameworks. The issue is only in conceptualizing the differences and constructing the categories. But there is controversy with respect to both. In the case of MiFID, that means that MiFID regulation is substantially limited to markets in equity securities. Coupled with a willingness in the statutory framework to consider extension to other forms of securities markets after a trial run in equities regulation.

But the embrace of functional differentiation, while segmenting aggregate regulation, tends also to increase the scope and breadth of regulation within each regulated segment. MiFID, within the scope of its regulatory reach thus imposes a more focused regulatory regime targeting information generation and an enhanced power in the State (and its regulators) to intervene in the management of covered markets. The basic objective is to broaden and deepen governmental power to directly intervene in the functioning of capital markets through the medium of 'transactions in shares.'

[108] Parsing through the websites of stakeholders in the financial services sector this conclusion becomes more rather than less apparent. Thus, for example, MiFID Connect, a joint program established by The Association of British Insurers (ABI), The Association of Private Client Investment Managers and Stockbrokers (APCIMS), Association of Foreign Banks (AFB), The Bond Market Association, the British Bankers' Association (BBA), Building Societies Association (BSA), the Futures and Options Association (FOA), The International Capital Market Association (ICMA), Investment Management Association (IMA), The International Swaps and Derivatives Association (ISDA) and the London Investment Banking Association (LIBA), has created an extensive network of information for the purpose of 'reducing the legal risk and simplifying the implementation of' MiFID. See MiFID Connect, About MiFID Connect, available online at: <http://mifidconnect.com/bba/jsp/polopoly.jsp?d=569&a=7552>. They argue that MiFID 'will have a major impact on current market and trading practice as well as upon the way in which the financial service sector is currently regulated'. Id. And so have 'embarked on a five-stage programme of work for establishing an industry approach towards implementing MiFID'.

Most analyses have focused on the costs and implementation of these requirements.[109] Transparency is viewed as either a burden (or opportunity) because of the need to produce, keep, and manage more data.[110] Markets in information will surely grow. The 'best execution' standards provide a greater means of standardizing industry practices—with the potential benefit to regulators to which power over market behavior should flow. The focus of this article lies in an equally important but more often neglected aspect of financial services regulation: the potential ramifications of the surveillance and reporting aspects of MiFID as a critical aspect of the character of regulatory power in the financial products sector.[111] Specifically the analysis here will concentrate on the effects of the creation of the markets for information created or augmented through MiFID in terms of the regulation of financial markets and the entities they serve. Particular attention will be paid to the effects of MiFID on consequences in terms of public and private anti-corruption campaigns, the use of these regulations to influence the behavior of issuers and market middlemen, and the potential utility of these regulations to elements of civil society and the media in their campaigns for corporate and capital social responsibility.

III. The Consequences of Monitoring and Managing Markets; Seven Variations on a Theme

The picture presented by MiFID, complexity, order, comity, and direction, all grounded in a proper and legitimate substantive policy, transparency and equality of opportunity for all participants in the regulated market, is what those

[109] For some interesting efforts, see, eg E Avgouleas, 'A Critical Evaluation Of The New EC Financial-Market Regulation: Peaks, Troughs, And The Road Ahead' 18 Transnational Law, 179, 188–199 (2005); Mark Tilden et al., MiFID Implementation: Cost Survey of the UK Investment Industry (LECG Ltd, 31 October 2005) available online at: <http://www.fsa.gov.uk/pubs/international/mifid_cost_survey.pdf>. LECG describes itself as 'a global expert services firm, provides independent expert testimony and analysis, original authoritative studies, and strategic consulting services to clients including Fortune Global 500 corporations, major law firms, and local, State, and federal governments and agencies around the world.' LECG, *About LECG*, available online at: <http://www.lecg.com/website%5Chome.nsf/OpenPage/AboutLECG>.

[110] FSA reports that UK financial services providers already subject to FSA transparency and best execution rules tend to welcome the harmonization provisions of MiFID because they see these changes as bringing continental firms up to UK standards. However, the UK financial sector was less sure of aggregate benefits through this form of harmonization. 'Though great majority of companies thought that the best execution requirement in MiFID will level the playing field in terms of reputation costs and costs of execution, only about two fifths thought that this would create material new opportunities for them as compared to current UK supply.' See FSA, The Overall Impact of MiFID (November 2006), App 2 at 77, available online at: <http://www.fsa.gov.uk/pubs/international/mifid_impact.pdf>.

[111] For a discussion of the character of surveillance as governance, see LC Backer, 'Global Panopticism: Surveillance Lawmaking by Corporations, States, and Other Entities' 15 Indiana Journal of Global Legal Studies (forthcoming, 2008).

who develop, implement, oversee, monitor, and critique, these regulatory frameworks have grown to expect. The quibbles, even the major critiques, as has been suggested, all accept the foundational assumptions on which MiFID is built—information and management overseen by the State. Yet MiFID is far more than that, and its consequences beyond the obvious, might be worth a bit of exploration. This section suggests seven broad but related consequences that MiFID raises, and that will be worth sustained review as this new broad, if segmented, attempt at regulating financial markets is implemented. Together, these themes suggest both the power and limits of regulatory attempts like MiFID to control markets, or to privatize monitoring and redirect it for the benefit of the political community, or to reinforce the State system in the context of behavior that jumps borders, or to achieve broader policy goals, principally criminal enforcement and control of political activity.

A. The Ability of the Private Sector to Organize Markets Beyond the Regulatory Powers/Purview of the State will always Outpace the Ability of the Regulating Entity (the State/EU/etc) to Extend its Regulatory Matrix

The move over 15 years or so from the ISD to MiFID provides a template for the future. The regulation of securities, whether at the framework or detail level, will remain incomplete as long as the markets to be regulated operate beyond the regulatory reach of the State. Market regulation tends to serve as a partial intervention in an area of economic activity that is inherently dynamic and that develops along the lines of its own logic. Regulation, then, is not market defining. Rather, it tends to reduce itself to another factor affecting a dynamic equilibrium to which the market tends.[112]

Given this essential character of the relationship between public regulation private markets, in which no single State (or grouping of States) can contain capital flows and transactions, MiFID itself must be understood as both partial and temporary. There is likely to be a MiFID II in the next decade.[113] This is something that ought to be well understood by regulators.[114] MiFID itself recognises

[112] For a useful discussion, see AM Corcoran, 'The Future is Now—Are We Ready?', 26 No 10 Futures & Derivatives L Rep 1 (November 2006) ('Technology typically precedes the law, but technology should not get so far ahead of the authorities that they are without the resources (either in-house or through contract) to deliver on the financial integrity/customer protection mandate delegated to them. Regulators must recognize when the structure of regulation itself may also need to evolve', ibid).

[113] Already in 2005, the Commission 'identified two areas where carefully targeted, evidence-based initiatives might bring benefits to the EU economy: investment funds and retail financial services'. (EC Commission, White Paper: Financial Services Policy 2005–2010 COM(2005) 629 final, at para 4.4.)

[114] Indeed, the FSA continues to commission studies of future behavior from significant regulatory stakeholders. See, eg KPMG, Financial Advisory Services, The future of advice A report for the

the need for further study and elaboration built into the Directive itself. Still, this is not an argument against MiFID's project. It merely reminds that law, in this case certainly, is attempting the control of a moving target. Regulatory efforts will always inevitably lag behind actual practice, in part because the pace of regulation is generally slower than that of market or individual behavior, and in because individuals (and markets) will tend to change their behavior in light of perceived costs of compliance with regulatory efforts and availability of substitutes or alternatives. Regulation and market behavior thus produce a synergy in which regulation sometimes acts as a catalyst for innovation—if only to avoid or profit, from regulation.[115] MiFID will not deviate form this pattern, and its most interesting consequences may well be the way it forces innovation in markets for financial instruments and in the structure of markets for such instruments in a global context.

The partial and temporary nature of MiFID as currently enacted can be understood in three aspects. First, MiFID is structurally partial. It does not purport to regulate the entire field in which the market understands itself as operating. Second, even in those areas of market activity it does purport to regulate, MiFID does not regulate completely. Because markets tend to change over time, it is possible that MiFID might actually regulate itself either into irrelevance or obstruction. Third, MiFID is geographically partial. MiFID cannot reach related activity outside of the enforcement territory of the European Union and does not seek to prevent the free movement of capital abroad. The first two aspects are discussed below. The last is taken up in the following section.

The structural partiality of MiFID is both deliberate and well understood. It represents both a political compromise and a realization that a more comprehensive regulatory structure might have been institutionally impossible to implement. The segmentation of regulation takes two forms with respect to MiFID. First, MiFID carves out a number of financial instruments and transactions from its coverage, and applied unevenly to those financial instruments or transactions covered by the regulatory scheme. Thus, for example, MiFID's critical

FSA—GI personal lines (May 2006), available online at: http://www.fsa.gov.uk/pubs/other/future_advice_gi.pdf> ('Mindful of its statutory goals and concerned to minimise risk of future regulatory failures, the FSA asked KPMG to build scenarios of what the retail landscape might look like in five or more years time', ibid, at 3). The purpose of these efforts are well known to regulators and stakeholders. 'Like any business, the Regulator plans to use the scenarios to stimulate internal and external debate on the future of retail distribution and use this to inform development of its own regulatory strategy' (ibid, at 3). For the justification in theory, see eg, R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy, and Practice* (OUP, 1999).

[115] For a discussion of this synergy in the context of a discussion of self regulation, from an American perspective, see eg, OH Dombalagian, 'Self And Self-Regulation: Resolving the SRO Identity Crisis' 1 Brook J Corp Fin. & Com L 317 (2007) ('there are many SROs that provide the critical infrastructure needed to ensure fair and efficient markets while sparing the SEC and the public the cost of securities oversight. SROs are also best positioned to debate and promulgate the ethical norms that govern the industry, as long as such responsibilities are confined to those spheres of activity where they work best', ibid, at 318).

transparency rules were drafted to initially concentrate on equities markets, the EU signaling early an unwillingness to extend the transparency regimes even to bonds.[116] Moreover, certain commodities and exotic derivatives, and certain investment firms fall within regulatory exemptions that can be tricky to apply.[117] This may result in market distortion (or at least have a market effect). It may create incentives to other forms of financial instruments by people seeking to avoid regulatory burdens of MiFID, or even by States.[118] But that is unlikely, given the size and centrality of equity markets in global finance. Or it may induce changes in investment firm behavior in light of the form of regulatory exemptions for firms, instruments, or transactions. Still, at the margin, it may increase incentives to innovate in financial instrument products, at least at the margin—producing potential new sources of regulatory interest.[119]

Second, MiFID represents only a partial attempt to regulate the new forms of market internalization in the hands of brokers and other market participants. As Andrea Corcoran rightly notes, broker market internalization initiatives:

> have the potential to fundamentally alter market structure in as yet unforeseen ways. To some it may seem as if brokers are purchasing a new governance stake in markets to address their previous concerns about equitable representation within the typical exchange structure. If successful, the apparent consequence could be a "remutualization", around an intermediary, investment bank user base. Whether these changes will result in fragmentation, more or less transparency, or consolidation, depends on their success and collateral effects, as do any regulatory implications.[120]

MiFID thus can change character entirely, from a process-oriented scheme to a scheme with significant substantive value.

[116] See eg, EU's McCreevy Rules Out Mandatory Bond Transparency, Reuters, available online at: <http://about.reuters.com/productinfo/compliance/MiFID/news/mandatory_bond_transparency.aspx>. But Member States remain free to regulate in this area. On the FSA's consideration of transparency in secondary bond trading, see eg, FSA, Trading Transparency in the UK Secondary Bond Markets, DP05/5, available online at: <http://www.fsa.gov.uk/pubs/discussion/dp05_05.pdf>.

[117] For an example of the approach of the FSA to this complexity in exemption regimes, see FSA, MiFID and Commodity Derivatives: Update on Scope and Exemption Issues (presentation by Nick Bertram, 26 April 2007), available online at: <http://www.fsa.gov.uk/pubs/international/26apr07_mifid.pdf>, with further guidance to follow.

[118] Consider, at its extreme, the for the moment abortive efforts by elements of the US Government to create a virtual futures market in the likelihood of terror attacks. See M Spann and B Skiera, 'Taking Stock of Virtual Markets' OR/MS Today (October 2003), available online at: <http://www.lionhrtpub.com/orms/orms-10–03/frfutures.html>.

[119] It is no surprise, then, that regulators and the primary stakeholder communities, view extension of transparency rules as troubling. In considering an extension of transparency rules to secondary trading in bonds, the FSA concluded that 'Extreme caution would need to be exercised in mandating greater transparency in the UK and Europe. In particular, we agree with many respondents, and with the conclusions of the CEPR research, that mandating pre-trade transparency is likely to impact on the existing complex market structures, in potentially significant but unknown ways.' (FSA, Trading Transparency in the UK Secondary Bond Markets, Feedback on DP05/5, DP06/04, available online at: <http://www.fsa.gov.uk/pubs/discussion/fs06_04.pdf>, at 5.)

[120] AM Corcoran, 'The Future is Now—Are We Ready?' 26 No 10 Futures & Derivatives L Rep 1 (November 2006).

There are parallels with similar American efforts in this regard. Compare, for example, the recent American efforts in regulation through Regulation NMS;[121] another attempt to recapture regulatory monopoly over markets by extending traditional forms of market regulation to markets that have evolved to avoid either the inefficiencies of those forms of markets or the burdens of the regulations over them. Like its EU counterparts, American regulators are seeking to recapture regulatory control of markets that have evolved beyond the forms reflected in traditional regulatory regimes. As one market analyst suggested in the American context: 'connectivity providers, such as extranet, direct market access, and FIX engine vendors, are the biggest beneficiaries of Reg NMS. Connectivity becomes increasingly important as the markets become more electronic and more formally linked. While the SEC's intention was for investors to reap the biggest benefits, this unfortunately is not the case. The typical retail investor will likely see no difference in the way he or she participates in the equity markets, and the typical institutional investor's job just got harder.'[122] It is possible that a similar result will be produced through MiFID.[123]

The partial nature of MiFID is not merely formal and structural, but is temporally partial as well. Because the market is a moving target, even that portion of it that MiFID purports to regulate will not likely remain regulated to the extent supposed for very long. MIFID does little (nor could it without actually co-opting the market itself) to prevent a market reaction to its rules that produces changes in market focus, norms or structures. It is possible for the market to move beyond MIFID by developing mechanisms not covered by the current regulatory reach. Indeed, it is already possible to point to those areas in which the market has already seeped beyond MIFID and with respect to which regulatory action is likely in the future. Two examples can be illustrated:

[121] See Securities and Exchange Commission, Regulation NMS (effective 29 August 2005), Release No 34–51808; File No. S7–10-04, RIN 3235-AJ18, available online at: <http://www.sec.gov/rules/final/34–51808.pdf>.

[122] See Celent Communications, Press Release: Regulation NMS: One Rule to Bind Them All, Report Published by Velent, New York, 18 April 2005, available online at: <http://www.celent.com/PressReleases/20050418/RegulationNMS.htm>. The American approach to alternative trading systems (ATS) generally has been subject to some criticism:

> '[T]he American approach is both incremental and bifurcated, building on the existing regulatory framework for brokers and exchanges. This approach has been broadly criticized as insufficiently cognizant of the unique characteristics of an ATS, and as an attempt to pigeonhole ATSs as enhanced brokers or exchanges that merely delays the acceptance of new understandings of the ATS. [fn 47] Commentators have also criticized the Regulation for allowing ATSs to self-identify as either brokers or exchanges, as those that register as exchanges may then regulate the brokers against whom they are competing. Moreover, many ATSs lack the requisite size and depth to register as exchanges, and must thus adopt the broker regime.'

See I H-Y Chiu, 'Securities Intermediaries In The Internet Age And The Traditional Principal-Agent Model Of Regulation: Some Observations From European Union Securities Regulation' 2 Va L & Bus Rev 307, 321 (2007).

[123] See C Kentouris, 'Regulations Rule: Despite Differences Reg. NMS and MiFID Converge on Best Execution and Require Metrics' Security Industry News (4 September 2006), available online at: <http://www.rblt.com/documents/SIN09–06-06.pdf>.

The first focuses on the evolution of over and under thresholds markets. SI markets below current trading thresholds (this one is particularly interesting for the politics it has generated on the eve of the transposition of MiFID). In 2005, there were press reports of the problems to be created when the EC Commission indicated a desire to set the SI threshold at trading 15% of their own shares, with predictions of the addition of 400 new 'markets' adding an additional compliance burdens in the tens of billions of Euro.[124] By the summer of 2006, the Commission had retreated: 'However, the European Commission dropped the 15% rule in early September. As a result, the compliance costs of MiFID for European securities firms have reduced significantly to a total spending of $1 billion, estimates TowerGroup.'[125]

The second focuses on the evolution of non-traditional markets and market mechanisms. These include virtual markets,[126] and Internet markets (including games and simulations, virtual securities and the like).[127] These venues essentially obsolete a regulatory framework grounded in investment firms trading securities invariably authorized for sale on a regulated market in the traditional sense.

Moreover, and quite perversely, the regulatory framework—comprehensiveness within a limited universe of market trading in securities—invites avoidance to the extent that transactions costs are raised by the regulations and cheaper substitutes are available.[128] The hunt for these cheaper (and perhaps more efficient alternatives will likely shape the character of the market and market behavior to some extent. MiFID will increase incentives for the creation of additional new forms of investment vehicles. More importantly, it may adversely affect competitiveness by enhancing incentives for the creation of new (unregulated or differently regulated) fora in which to trade regulated and unregulated (or differently regulated) securities. At the same time, regulatory fragmentation encourages an appetite for expansion, even as the objects of regulation scurry elsewhere.[129]

[124] See City Compass, 'Estimates of 400 new Exchanges from Brussels for MiFID' (27 July 2005), available online at: <http://www.citycompass.org/newsarchivefullarticle.asp?msg=41>.

[125] See FinExtra, 'MiFID Compliance Bill Could Reach $1 billion' (4 October 2006), available online at: <http://www.finextra.com/fullstory.asp?id=14339>.

[126] See SL Murphy, 'Momentum Takes Trading Into Virtual Market Setting' Austin Business Journal (13 March 1998), available online at: <http://www.bizjournals.com/austin/stories/1998/03/16/focus6.html> (describing programs developed by Momentum Securities Management Corp that allows consumers to seek the best execution price themselves. See generally, HG Manne, 'Insider Trading: Hayek, Virtual Markets, and the Dog that Did Not Bark' (2005) 31(1) Journal of Corporation Law 167–185, available at SSRN: <http://ssrn.com/abstract=679662>, but see GL Clark, London's Place in the World of Finance: A Supply-side Approach' (25 October 2001), *Working Paper No 01–17*, available at SSRN website: <http://ssrn.com/abstract=288388>.

[127] See eg, P Eckersley, 'Virtual Markets for Virtual Goods', available online at: <http://www.cs.mu.oz.au/~pde/writing/virtualmarkets-revised.pdf> (on virtual markets and copyright).

[128] This point is elaborated at section IV of this article.

[129] Article 65(1) of MiFID, requires the Commission to report on the adequacy of the level of pre- and post-trade transparency in classes of financial instrument other than shares. See eg, European Commission, Internal Market and Services DG, Markets in Financial Instruments Directive (MiFID), Public Hearing on Non-equities Markets Transparency, Brussels, Background Paper (11 September 2007), available online at: <http://ec.europa.eu/internal_market/securities/

The partial nature of MiFID is to be understood both in terms of its comprehensiveness (a point well illustrated above) but also in terms of its geographical limitations. At the margin, it may create incentives for moving markets abroad. As the Americans learned after the paroxysm of burdensome regulation from Sarbanes-Oxley through the terrorism and surveillance provisions post 11 September 2001, markets are global and securities (and capital generally) easily translatable.[130] As a consequence, capital may be hard to regulate from within one territorial space. This is a lesson that American market regulators have been learning, as they discover the difficulties of applying provisions of the Sarbanes-Oxley Act fully, that is, to the actions of firms and their agents without the territory of the United States.[131]

B. Governmental Regulatory Systems Remain Inefficient and Incapable of a Comprehensive Extension of their Control/Coercion Frameworks as Long as Regulation is Limited by the Territorial Principle—However Broadly Applied

Regulation works best when the object regulated is wholly contained within the territorial jurisdiction of the political community seeking to assert regulatory authority. This is the core of arguments that have been asserted for centuries to justify transfers of power from a more local to a more general level of government.[132] It is at the heart of the American constitutional Commerce Power,[133]

docs/isd/hearing_en.pdf>. The most recent report was published as European Commission, Internal Market and Services DG, Markets in Financial Instruments Directive (MiFID), Report on Non-Equities Market Transparency Pursuant to Article 65(1) of the Directive 2004/39/EC on Markets in Financial Instruments ('MiFID'), Brussels (3 April 2008), available online at: <http://ec.europa.eu/internal_market/securities/docs/isd/nemt_report_en.pdf>. The Commission concluded that while there was not yet a need for Community regulation of all such instruments, there might well be a need for transparency regulation 'in the context of retail access to the market prices of bind' (ibid, at 6, p 12).

130 See R Karmel, 'Reform of Public Company Disclosure in Europe' (2005) 26 University of Pennsylvania Journal of International Economics Law 379.

131 On the extraterritorial application of the Sabanes Oxley Act of 2002 and its travails, see eg, MD Vancea, 'Exporting U.S. Corporate Governance Standards through the Sarbanes-Oxley Act: Unilateralism or Cooperation?' 53 Duke LJ (2003). See also E Greene and P Boury, 'Post-Sarbanes-Oxley Corporate Governance in Europe and the USA: Americanisation or Convergence?' (2003) 1(1) International J of Disclosure & Governance 21–34.

132 See eg, the essays in R Howse and K Nicolaidis (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001). The modern criticisms of this sort of centralization are of long pedigree in the United States. See eg, W Thompson, *Federal Centralization: A Study and Criticism of the Expanding Scope of Congressional Legislation* (Harcourt Brace and Company, 1923). For a discussion of federalism and the construction of new centralizing global communities, see eg, essays in R Gibbins and SJ Randall (eds), *Federalism and the New World Order* (University of Calgary Press, 1994). Cf F Beasley, *Power in Business and the State: An Historical Analysis of Its Concentration* (Routledge, 2001).

133 For a critical analysis, see RH Bork and DE Troy, 'Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce' 25 Harvard Journal of Law & Public Policy (2002).

as well as the internal market of what has become the European Union,[134] and underlies the limiting policy of Subsidiarity as both a principle of EU law[135] and as a generalized principle of governance.[136]

MiFID is based on the same sorts of regulatory justifications: the directives are meant to respond to a problem for which individual Member States cannot adequately regulate, and so regulation (in this case by means of directives functioning as framework regulation) at the more general level of governance is appropriate to resolve the problem. And so it may be, centering on 'yardstick competition' that may lead to harmonization.[137]

Still, while the efficiencies of breaking through Member State regulatory barriers are positive, capital is no longer confined, even within the borders of the EU[138] And so, what appears at first blush to be an attempt at comprehensiveness, may actually also point to the limitations of the regulatory framework. As academic commentators have recently rightly argued:

> the traditional methods that the SEC and its foreign counterparts use to oversee cross-border market activity have lost some of their historical efficacy. Our markets are now interconnected and viewing them in isolation—as we have for so long—is no longer the best approach to protecting our investors, promoting an efficient and transparent U.S. market, or facilitating capital formation for U.S. issuers.'[139]

Territoriality tends to foster the sort of regulatory competition that also can also impede harmonization beyond borders, a problem especially where the reality of economic activity belies the limits of territory.[140]

[134] See Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council, COM (85) 310 Final (June 1985).

[135] See eg, A Estella, *The EU Principle of Subsidiarity and Its Critique* (2002).

[136] See eg, Y Blank, 'Localism in the Legal Global Order' (2006) 47 Harv Int'l LJ 263.

[137] See, eg, P Salmon, 'Political Yardstick Competition and Corporate Governance', in G Ferrarini and E Wymeersch (eds), *The European Union, in Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond* (2006) 31, 41–44.

[138] See EF Greene, 'Beyond Borders: Time To Tear Down The Barriers To Global Investing' (2007) 48 Harv Int'l LJ 85 ('There can be no argument that the securities markets are now global and that the dominance of the United States as the leading player in the global marketplace is being challenged' ibid, at 85). The author, General Counsel, Citigroup Corporate & Investment Banking in 2007, makes a point that can be generalized. For just as the global nature of securities markets challenges the dominance of the Americans, it will challenge the power of the EU to create a contained regulatory framework through MiFID.

[139] E Tafara and RJ Peterson, 'A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework' (2007) 48 Harv Int'l LJ 31, 32.

[140] 'Since the SEC's Concept Release discussing foreign exchange access, the problems involved in allowing foreign exchanges into the United States have become even more intractable because the SEC has passed Regulation NMS, and the EU has passed the Markets in Financial Instruments Directive (MiFID).' (R Karmel, 'The Once and Future New York Stock Exchange: The Regulation of Global Exchanges' (2007) 1 Brook J Corp Fin & Com L 355, 370–371. The problem is not merely one of the arrogance of territorially based power but of ideas. 'Although both laws are to some extent aimed at enforcing best execution obligations in the face of the threat of internalization and fragmentation of securities price discovery mechanisms, they are based on different legal systems, and they are not necessarily compatible' (ibid). Clearly, this poses the traditionally central problem of legal

Considered in this light, the nature of MiFID as both expansive within the scope of its regulatory mandate but limiting in the scope of that mandate becomes clearer. The FSA was clear that the MiFID would apply broadly even if only to a limited universe of financial instruments. They offered as an example the execution of a trade of a share traded on both the London and New York markets. Even if the trade was effected in New York, if the shares were also listed in London, MiFID would apply. However, if the shares are listed only abroad, MiFID might not extend to domestic execution.

As a consequence, MiFID's broadly stated principles are substantially reduced in scope in the application of its technical provisions. And, indeed, what MiFID produces is a host of technical questions on the extent of the limitations to the broad application promised in its purpose. There will be much work for lawyers and regulators with respect to these technical limitations. Here is but one example: will shares traded only by EU MTFs and SIs now qualify as shares admitted to trading on EU regulated markets, including covered MTFs? Or better put, will such shares if not otherwise registered for trading on regulated markets now be required to so register? The effects on trading may be significant.

And more importantly, the constraints of territorially based regulation might create certain perverse incentives. First, is outsourcing. Outsourcing of trading, and the constriction of complex multinational corporate trading enterprises to take advantage of territorially distinct trading environments. Second is emigration of 'citizenship'. If simple emigration is possible and reduces the regulatory burden without affecting business, emigration of 'citizenship' of trading vehicles might prove a hard incentive to resist under the right circumstances, with a consequential incentive to move capital transactions outside the EU. Third, is intensification of a certain drift toward a *movement to a global free movement of capital model.* In this effort the Europeans will be aiding efforts already (inadvertently enhanced by American regulatory effects). Firms may seek to lower transaction costs in trading within unregulated (or differently regulated) global markets (or national markets) beyond the reach of EU regulators and MiFID. This effect may be especially useful with respect to multi-listed shares when regulatory transaction costs are lower elsewhere.

There is an irony here: to the extent that MiFID does not apply to certain investment advisors (because they may be exempted), certain financial instruments (because the transparency rules do not apply to them, for example, or because they are not described in the descriptive Annexes), and certain markets (because they remain unnamed or exempted) regulatory authority remains with the Member States to the extent authorized in their national legal orders.[141] In this

harmonization, a problem has proven increasingly less intractable over the last century. But for all that, it remains a potent force, especially in cases, such as this, where territory may reinforce tendencies to divergence rather than harmonization.

[141] See eg, MiFID, Art 3.

sense, MiFID also compounds the problems of territorially induced regulatory fracture downward as well as upward. This may enhance regulatory competitiveness[142] but works against market transactional efficiencies.[143]

The limits of territorial jurisdiction is a hard lesson for any State. It is, perhaps, a harder one for a supra-national quasi constitutional entity like the EU. It follows, that MiFID will not be able to reach all activity with effects in the EU, or worse, coerce appropriate behavior from actors who might, instead, respond by moving. These constraints have been recognized in the legal academic literature, which increasingly calls for the adoption of frameworks to avoid the limits of territorially based rules.[144]

C. MiFID Builds in a Certain Tension Between the Traditional Regulatory Approach, which Focuses on Transactions, and the Policy Focus of the Regulatory Framework, which Focuses on Consumers

MiFID essentially attempts that old legislative trick—new wine in old bottles. But it manages to perpetuate the foundational regulatory difficulty of the American approach (an approach that made sense perhaps in the 1930s but that increasingly appears more of an impediment than an enhancement to the attainment of policy goals in a global environment), which focuses on securities transactions and not on consumers. From the perspective of protecting markets, the American approach, now three quarters of a century old, makes a certain amount of sense. Focusing on transparency and equal access to information, it leaves every person free to engage in market activities with whatever intelligence and resources she might have. This system might be optimal in a market populated by a set of relatively equally endowed individuals. But financial markets have been substantially segmented

[142] See the essays in W Bratton, J McCahery, S Picciotto, and C Scott (eds), *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (OUP, 1996).

[143] For an interesting reflection on a related issue, see C Bradley, 'Private International Law Making for the Financial Markets' 29 Fordham Int'l LJ 127 (2005) ('International banking organizations need to focus not only on the Basel committee's work on capital adequacy, but on the EU's implementation of the Basel standards—in addition to domestic implementation in the different jurisdictions where they are licensed. Some lobbying energy is focused on persuading harmonizers to use the same approaches to particular issues that have been adopted elsewhere. For example, in commenting on CESR proposals, the SIA has urged CESR to copy the approach of U.S. regulators.' (Ibid, at 152–153.)

[144] See eg, E Tafara and RJ Peterson, 'A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework' (2007) 48 Harv Int'l LJ 31, 45 (proposing a system of substituted compliance with SEC registration and reporting rules); EF Greene, 'A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework' (2007) 48 Harv Int'l LJ 85 (arguing that 'SEC should also pursue a substituted compliance framework for issuers. A non-U.S. issuer subject to a robust offering registration regime in its home jurisdiction … should not also be required to comply with U.S. securities registration requirements if it wishes to sell securities to U.S. investors' and vice versa (ibid, at 97)).

for a while.[145] More importantly, securities regulatory agencies have increasingly focused on substantive issues—from shareholder rights,[146] to the composition of the board of directors of public companies[147]—that depart substantially from the no-substance foundation of the traditional securities informatics regime.

The approach confirmed by MiFID does not advance consumer protection beyond the framework adopted nearly a century ago in the United States, but does contribute to the costs of corporate and governmental compliance. It reinforces a managerial relationship between the State and the market for management's sake (that is, for the purpose of keeping active the practice of exercising authority). It increases the costs of business but may also facilitate avoidance through a strategy of careful compliance with increasingly complex statutory norms. MiFID may thus unintentionally provide the appearance of protection but avoids its substantive effects to any appreciable degree.

The transactions approach additionally spawns a related and quite troublesome issue: the resulting complexity of regulation appears to create the sort of markets in avoidance that tends to benefit the middleman classes—principally lawyers and regulators. It is thus possible to characterize MiFID as a regulator's scheme rather than a consumer or market efficiency program. There is a sense that MiFID, like the earlier MAD (the Market Abuse Directive),[148] is a regulator's undertaking.[149] This sense is deepened by the nature of MiFID itself. MiFID is nothing if not (perhaps necessarily) complex. Complexity requires interpretation and usually increases the need for further regulation. The cycle, and the necessary dependency it creates, is well understood.[150]

145 For a discussion in the context of the construction of a global economic order, see H Siebert, *The World Economy* (Routledge, 1999).

146 For a discussion in the American context, see LA Bebchuk, 'The Myth of the Shareholder Franchise' (2007) 93 Va L Rev 675.

147 For a critical commentary in light of the changes to US law after the enactment of the Sarbanes Oxley Act of 2002, see R Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance' (2005) 114 Yale Law Journal.

148 Commission Directive 2003/6/EC [2003] OJ L96/16 (12.04.03). There were a number of implementing provisions as well. See Commission Directive 2003/124/EC [2003] OJ L339/70, (24.12.03); Directive 2003/125/EC [2003] OJ L339/73 (24.12.03); Directive 2004/72/EC, [2004] OJ L162/70 (30.4.04); Commission Regulation (EC) No 2273/2003 [2003] OJ L336/33, (23.12.03), 33. For the response of the UK, see discussion in FSA, UK Implementation of the EU Market Abuse Directive (Directive 2003/6/EC): A Consultation Document, June 2004, available online at: <http://www.hm-treasury.gov.uk/media/1/B/market_abuse_parts1and2_180604.pdf>.

149 See JA Gomez-Ibanez, *Regulating Infrastructure: Monopoly, Contracts, and Discretion* (2003) ('the effort to substitute competition for regulation may actually increase the complexity and importance of the regulator's task', ibid, at 249). Regulators are said to be subject to certain institutional incentives, which to some extent, affects the nature of their relationship, as a class, to regulation and its implementation. Thus, for example, regulators may prefer a regulatory stance that increases their independence from direct and substantial legislative control, and that requires substantial specialization (thus making regulators more remote from both the class of people affected by regulation and the public in general). See eg, WA Niskanen, Jr, *Bureaucracy And Representative Government* (1971); JQ Wilson, *Bureaucracy: What Government Agencies Do And Why They Do It* (1989) 244–48.

150 See, M Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (OUP, 2003).

MiFID benefits the *political classes* as well.[151] Regulatory complexities in the purported service of the populace increase the modalities of popular dependence on regulators and other professional classes of 'protectors'.[152] A cynical interpretation, perhaps, this sort of dependency analysis is not less potent for that. In some respects, MiFID joins those large framework regulations that draw power from private relations or other communities, and redirect it to the State (or in this case, a supra-national entity). The dependency model of the relationship of individuals to the State has only increased in the last century.[153] This is not to suggest that the regulatory thrust of MiFID is necessarily wrong, or that regulation will inevitable morph into an uncontrolled complexity.[154] It does suggest, however, that the movement of regulation from private to public, from industry to the State, from providers (or consumers) to political organizations, does tend to shift power generally, and that power concentrations can tend to produce a certain dependency among those regulated.

This last point is not necessarily a policy objective that has been fully aired or resolved. For some, MiFID might suggest another step in the construction of a new sort of feudalism, grounded in dependencies based on regulatory power and complexity. Indeed, Level 3 of the Lamfalussy Process[155] is substantially focused on regulator interaction. Its term of art 'supervisory convergence' appears as the 'great buzzword of all Level 3 Committees, and also of the European Commission White Paper on the post FSAP [Financial Services Action Plan]',[156] though its precise parameters have yet to be determined.

[151] Peter Schuck's observations on power incentives in legislation may be useful here: 'Legislators and Their Staff. Legislators might prefer legal complexity for four self-interested, electorally related reasons. Complexity can help them to (1) confer divisible policy benefits on constituents; (2) confer divisible non-policy benefits; (3) enhance their power over bureaucrats; and (4) ease the legislature's collective action problem.' See PH Schuck, 'Legal Complexity: Some Causes, Consequences and Cures' (1992) 42 Duke LJ 1, 27.

[152] At its worst, and following Weberian theories of bureaucratization, see M Schulz, 'Limits To Bureaucratic Growth: The Density Dependence Of Organizational Rule Births' Administrative Science Quarterly (December 1998): 'Bureaucratization is regarded as a rule generation process turned loose. Bureaucracy theorists—as well as much of the general public, including government officials who promise to reinvent government—assume that bureaucracies frantically breed rules, and frequently they imply that rule breeding intensifies as bureaucratization proceeds.' And this process suggests a shift of authority from networks of private organizations (economic, religious, social, ethnic and the like) to a consolidating set of public networks.

[153] For the classic statement, see M Weber, Economy and Society (University of California Press, 1978); M Weber, *The Protestant Ethic and the Spirit of Capitalism* (Peter Smith, 1988).

[154] See eg, B Levitt and JG March, 'Organizational Learning' (1988) 14 Annual Review of Sociology 319–340 (bureaucratization as an aggregation of rules that represent organizational learning); X Zhou, 'The Dynamics Of Organizational Rules' (1993) 98 American Journal of Sociology 98: 1134–1166 (organic theory of bureaucratization and rule growth).

[155] See EC Commission, Commission Staff Working Document, The Application Of The Lamfalussy Process To EU Securities Markets Legislation: A Preliminary Assessment by the Commission Services (SEC(2004) 1459, 15 November 2004), available online at: <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/sec-2004–1459_en.pdf>.

[156] See K Lannoo, 'European Financial Systems Governance' *CEPS Policy Brief* 106:1–7. Brussels: Centre for European Policy Studies Paper (July 2006), available online at: <http://shop.ceps.be/

Still, these observations ought not to be read as any sort of endorsement for a redirection of regulatory focus from transactions to consumer protection by the State and its apparatus. Even a focus on consumers would not necessarily produce perfect, or even perfectly targeted, regulation. This appears to be an unavoidable difficulty of protection based on consumer education in markets characterized by a drive toward perfect information, a point elaborated below.

D. The Transaction Costs of Regulation Create Great Incentives to Avoidance as Capital Seeks its Most Efficient Modality on a Global Basis

As anyone engaged in economic criminal activity can attest, governmental regulation is sometimes best understood as a sort of tax on the activity subject to regulation. Its effects are rarely as straightforward as the thrust of a statute might suggest. Regulation, then, is sometimes better understood as a cost of production, rather than as a normative framework within which human activity occurs. MiFID is, to a large extent, something like a large set of transaction costs, as well as the expression of policies designed to change substantive behavior norms.

The 'tax' or 'transaction' costs of regulation cannot be understated. It is a necessary result of attempted regulatory monopoly (at least within a political territory); though on a global scale segment market monopolies (to the extent that regulatory monopolists compete) disfavors monopolist power. The generated costs of these effects are inevitably reflected in the market and the pricing of its products. If these costs generate comparative inefficiencies they can: (a) reduce profits on an individual or aggregate scale or at the limit; (b) reduce the size and power of the market.

There are several important considerations in this context. In the context of enforcement, the issue of domestic bias arises. MiFID presents large issues of enforcement across borders, not just within the EU but beyond as well. As American commentators have noted in respect of the extra-territorial enforcement of American securities laws against foreign issuers seeking funds in American securities markets, there might well be a domestic bias in enforcement.[157] For one, such enforcement is easier, requires less bargaining with other sovereigns and strengthens domestic institutional power within the borders of its jurisdiction. Still, American commentators have suggested MiFID's traditionally European mutual recognition mechanism as a valuable platform for integration of American and European financial services.[158]

downfree.php?item_id=1340> See generally, T Padoa-Schioppa, *Regulating Finance: Balancing Freedom and Risk* (OUP, 2004) ('a market-friendly response to the globalisation of financial markets calls for closer cooperation between banking, insurance, and securities supervisors.' (ibid, at 2).

157 See eg, DC Langevoort, 'Structuring Securities Regulation in the European Union: Lessons from the U.S. Experience', *in* G Ferrarini and E Wymeersch (eds), *Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond* (2006) 485, 496–501.

158 See EJ Pan, 'A European Solution to the Regulation Of Cross-Border Markets' (2007) 2 Brook J Corp Fin & Com L 133, 138.

But the most important effect, in the case of MiFID, might well be the character of the 'leakages' it produces. In this case the leakages work principally to the benefit of middlemen including the usual cast of characters—lawyers, information purveyors, and consulting firms. In this sense, the institutional mechanics of MiFID themselves serve as a market regulator in the sense that the complexity of those mechanics makes it difficult for any investment firm or regulated market to operate without hiring specialists.[159] And to the investor, the system remains substantially opaque—giving rise to another set of specialists who target the consumer end of the regulatory scheme for when 'things go wrong'. But regulatory leakage may extend the application of MiFID beyond its mandatory scope. For example, the FSA has indicated that its particular approach to the transposition of the Directive will likely bring firms within the ambit of MiFID's requirements that otherwise would fall wholly or partially outside the scope of that Directive.[160]

Still, it is unclear if aggregate welfare is increased. Substantial empirical study is required.[161] Thus, for example, if the bulk of the costs of compliance are front loaded, and continuous compliance can take advantage of economies of scale or regularization and routinization of compliance actions, then compliance costs may actually help current players by acting as a regulatory barrier to entry of competitor firms.[162] On the other hand, this regulatory barrier may send more innovative firms unable to successfully compete to other, unregulated markets.

[159] Regulatory complexity has spawned a rich area of research in law. See eg, PH Schuck, 'Legal Complexity: Some Causes, Consequences and Cures' (1992) 42 Duke LJ 1. He notes, rightly, that:

'Complexity-induced costs can be both inefficient and unfair. In fields as diverse as agency regulation, trusts and estates, and torts, complexity can inhibit beneficial transactions, impose dead-weight losses, create frustrating delays, consume the energies of talented individuals, breed new and difficult-to-resolve disputes, and discourage compliance. Promoting passivity and entrenching the status quo, legal complexity can stultify a society that often depends on vigorous action in solving problems. Complexity's costs, moreover, impose disproportionate burdens on the poor by raising prices and necessitating the services of lawyers and other professionals trained in the management of complexity.' (Ibid, at 19 (footnotes omitted.)

[160] See FSA, Planning for MiFID (November 2005), at 5 (identifying operators of collective investment schemes, occupational pension scheme firms, life companies and friendly societies, financial advisors that do not hold client assets ands authorized professional firms).

[161] The FSA has considered undertaking some research in this area, especially with respect to transparency and consumer protection. The FSA has proposed a study to 'investigate ways of understanding the market impact of measures used to disclose the price of retail investment products'. See FSA, The Effect of Transparency of Charges on Consumer Welfare, 21 February 2007, available online at: <http://www.fsa.gov.uk/Pages/Library/research/economic/interest/transparency.shtml>. There are additional avenues from the theoretical literature that may prove useful here—for example, complexity theory. See DT Hornstein, 'Complexity Theory, Adaptation and Administrative Law' (2005) 54 Duke LJ.

[162] For example, the FSA, in its popularizing literature speaks of the changes as essentially front loaded in terms of costs. It suggests, for example, to businesses, that '[o]rganization structure, governance oversight, policies and procedures and trading and infrastructure are of critical importance, but MiFID will have an impact on many other functions in firms.' (FSA, Planning for MiFID (November 2005), at 7 (identifying the need to consider institutional and operational changes in IT systems, client services, client management, data capture and retention, branch structure, legal, internal audit, trading execution, compliance, risk management, marketing and human resources recruitment and

E. The Greatest Effect of MiFID is the Creation (Potentially at Least) of Robust Markets in Information

Like many recent legislative efforts, MiFID produces unanticipated regulatory consequences. In this case one such consequence is particularly interesting from a markets point of view. MiFID's legislative requirements effectively advance the creation of a new and potentially large contribution to a dynamic market—the market for information. More specifically, MiFID may serve to invigorate markets in the information required to be produced by the legislation.

In this regard, consider, for example, the new Trade Data Monitoring regimes described in the FSA 2006 report.[163] The FSA was concerned about the effect of the new rules on its regulatory framework.[164] As a consequence of MiFID's flexibility rules, 'the number of providers of trade processing services for transactions executed away from RMs and MTFs is likely to increase. While we recognise the benefits and opportunities that competition could bring in this area, it also poses risks for the overall quality of market data.'[165] Among the greatest risks, the FSA feared data fragmentation as a consequence of the 'ability for firms to assert ownership rights over their trade data' in more fractured markets,[166] and a deterioration of the integrity of market data.[167] The solution might be more regulation,[168] a regulated market in data in which approved trade data monitors (TDMs) 'would check the trade publications in real-time for potential inaccuracies and arrange for the information to be made publicly available in a way that facilitates its consolidation with similar data from other sources'.[169] The FSA's proposal is meant to recognize both the commercial value of trade information, and to manage a market in such information consistent with its traditional regulatory goals and the framework rules of MiFID.[170]

MiFID's new regime will thus produce significant competitive pressure on traditional information sources—especially on traditional regulated markets,

training.) But these changes tend to be of a type that requires a large initial investment of resources, the marginal cost of compliance with which will decrease over time as changes become routinized and internalized within firm culture. Indeed, the FSA has estimated a broad range of costs, from small to fairly significant to both the State and affected firms depending on the extensiveness of the transposition necessary. See HM Treasury, Consultation Document: UK Implementation of the EU Markets in Financial Instruments Directive (Directive 2004/39/EC) (December 2005), at 7.59–7.99, available online at: <http://www.hm-treasury.gov.uk/media/2E0/CA/ukimplementatio-neumarkets151205.pdf>.

163 See FSA, Implementing MiFID for Firms and Markets (July 2006), CP06/14, available online at: <http://www.fsa.gov.uk/pubs/cp/cp06_14.pdf>.

164 'MiFID allows investment firms a choice over the means by which they make public their post-trade information. In principle, this creates a risk of fragmentation of post-trade data, which could undermine the efficiency of UK equity markets.' (Ibid, 13.10, at 74.)

165 Ibid, 16.64 at 105. 166 Ibid, 16.65 at 105. 167 Ibid, 16.66 at 105.

168 Ibid, 16.69, at 105–106. 169 Ibid, 16.71, at 106.

170 'We recognise there may be commercial value in trade information, and investment firms would be entitled to realise that value. This is in keeping with the overall objective of enhancing competition in the provision of trade information.' (Ibid, 16.74, at 106.) For an elaboration of the proposal itself, see ibid, 16.71–16.87.

which had enjoyed substantial information monopolies. And here is a potential perversity of MiFID, by extending regulation of securities markets in traditional form it may hasten the elaboration of nontraditional market structures for securities. Adding a layer of regulation and transaction (information) costs within a structure in which the markets affected may not be able to capture the income from the added transactions (in information), may substantially and negatively affect those markets. Might it be relevant to ask now: are the Exchanges now closer to obsolescence? The recent merger activity among traditional exchanges suggests that they are conscious of this effect.

The extent of the effect will be a function of the success of MiFID in *disaggregating* markets in transactions for securities (the traditional primary activity of markets) from markets for information on transactions in securities (a new product that MiFID enhances). Disaggregation is the key here to industry creation (information) and regulatory segmentation.

Lastly, it will be important to remember that the emerging *markets for information on transactions in securities* will generate its own regulatory distortions and interventions. The FSA's 2006 Report already points in that direction.[171] And one of those distortions may well affect the character of fiduciary duty standards in Europe.[172] Another suggests that the devolution of mandatory disclosure and publication requirements effects a privatization of public functions that both coopts the regulated to some extent, and devolves sovereign authority as well.[173] The issue of managed self-regulation on the fundamental character of private enterprises has still to be satisfactorily explored. But its implications for both public and private governance may be significant.[174]

It is also important to remember that even robust markets in information would not necessarily guarantee any level of the sort of consumer protection heralded by the drafters of MiFID.[175] This complicates any effort to reform the focus of markets regulation.[176] Gabaix and Laibson argue that 'informational shrouding flourishes even in highly competitive markets, even in markets with costless advertising, and even where the shrouding generates allocational inefficiencies.'[177]

[171] See discussion, at nn 152–159 above.

[172] See AF Loke, 'From the Fiduciary Theory to Information Abuse: The Changing Fabric of Insider Trading Law in the U.K., Australia and Singapore' (2006) 54 Am J Comp Law 123 (examining the way in which a 'parity of information norm' grounding securities regulation in the UK has substituted for traditional fiduciary theory).

[173] For an elaboration of this argument, see I H-Y Chiu, 'Delegated Regulatory Administration In Mandatory Disclosure—Some Observations From EU Securities Regulation' (2006) 40 Int'l Law 737.

[174] For a discussion in the context of corporate social responsibility, see LC Backer, 'Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law' (2006) 37 Columbia Human Rights Law Review 287.

[175] See X Gabaix and D Laibson, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets' (2006) 12 The Quarterly Journal of Economics 505–540.

[176] See discussion, above, at text and nn 145–156.

[177] Ibid.

These tendencies are especially apparent where product markets have close substitutes. The securities markets of course are replete with substitutes. In the case of MiFID, the focus on equities within a larger but less comprehensive regulatory framework provides venues for the development of regulation avoiding substitute markets and instruments.

F. MiFID Deepens a Surveillance Culture in the Construction of Governance Institutions

MiFID continues and deepens a global process of privatizing surveillance. In this sense, MiFID may be not only a regulators' undertaking, but also more precisely an undertaking for the benefit of the police authority of the State.[178] As government power has become more total, as it has asserted a superior authority and the right to govern in those areas once left to other social, cultural, and economic communities within the State, the nature of governance has had to evolve to fit the new boundaries of governance. Government power has evolved from limited scope statutes to vast amorphous systems of governance mimicking the complex web of relations once evolving outside of its control.[179] With respect to the governance of economic activity in particular, that broadening has sought to mimic within governmental functions the networks of regulation once asserted by self-regulating stakeholders (for their own benefit).

Since the last quarter of the twentieth century, the State (at least in the West) has sought to do two things simultaneously. First, it has sought to gather more and more information on all operations within its territory (and beyond to the extent relevant). The information has a variety of uses. Information is a critical component of law enforcement. Information is also vital to the ongoing development of policy. Its availability also benefits the various sectors of the stakeholders in the particular market for information (the disclosure regimes of the American Securities laws for the benefit of the investor class is a classic example). At its

178 See LC Backer, 'Surveillance and Control: Internal, External and Governmental Monitoring of Corporate Insiders After Sarbanes-Oxley' (2004) Michigan State Law Review 327.

179 Thus, for example, I have explained how recent American securities law changes memorialized in the Sarbanes-Oxley Act of 2002:

'sought to legislate an architecture of corporate discipline, and from that discipline, to develop and impose substantive behavior norms tied to the forms of externally imposed self-discipline. That architecture of corporate discipline—essentially hierarchical, continuous, and integrated within the core of the institutional governance architecture, like Jeremy Bentham's Panopticon, defines a structure of information gathering centrally focused on corporate directors who are required to "see" everything. Yet these seers are themselves "seen" by the ultimate regulator. That ultimate regulator, the federal government, selects the data to be gathered, deploys corporate outsiders to monitor internal surveillance efficiencies, defines the boundaries of effective analysis (that is of analysis with legal effects), and selects the judgment to be made from certain clusters of information, but not from others.' (LC Backer, 'Global Panopticism: Surveillance Lawmaking by Corporations, States, and Other Entities' 15 Indiana Journal of Global Legal Studies (forthcoming, 2008), citing in part, J Bentham, *Panopticon, or, The Inspection House, & C* (1787), reprinted in Miran Bozovic (ed), *The Panopticon Writings* (1791) (Verso 1995) 29–95.

broadest scope, information can serve in the development and influence on (in totalitarian regimes control of) political, social, economic, and other respects of culture (that is information gathering has normative consequences well exploited by the State).[180]

Second, States have sought to privatize information gathering for its own use in the disciplining of social organization. Government has sought to make surveillance a reflex. It is organized as a 'multiple, automatic and anonymous power; for although surveillance rests on individuals, its functioning is that of a network of relations from top to bottom, but also to a certain extent from bottom to top and laterally; this network "holds" the whole together and traverses it in its entirety with effects of power that derive from one another: supervisors, perpetually supervised.'[181]

MiFID represents another step in the implementation of systems of '[h]ierarchized, continuous and functional surveillance'[182] through which 'disciplinary power became an "integrated" system, linked from the inside to the economy and to the aims of the mechanism in which it was practiced.'[183] To a great degree, MiFID is about the spreading of information. But not all information, just those pieces of information selected by the government (and by that selection privileged) required to be gathered, dispersed, by whom, to whom and when. The system has the benefit of being driven by those who are meant to be regulated by it, with the State sitting in the background monitoring the monitors.

The nature of the information to be gathered itself will produce both compliance and reaction. The population itself embraces systems through which it serves as the very instrument of its discipline, but with a twist—resistance to participation in surveillance itself becomes a transgression. The emphasis is so great because the stakes have become so high—stability and the management of the State and its relations both domestic and international. This leads to the last point.

G. MiFID Adds another Element to the Global Efforts to Manage Conflict and Crime

MiFID is important not only in its own right, but also in its role as an element in the global efforts to manage conflict and crime. It serves as a nexus point for the regulation of economic activity, crime, and political conflict. MiFID's multiple objectives thus add a layer of additional complexity, the resolution of which is deferred.

[180] See M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trans) (Vintage Books, 1977), at 170–177; M Foucault, T*he History of Sexuality; Vol I: An Introduction* (R Hurley, trans) (Random House, 1978), at 89–91.

[181] M Foucault, *The History of Sexuality; Vol I: An Introduction* (R Hurley, trans) (Random House, 1978), at 176–177.

[182] M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trans) (Vintage Books, 1977), at 176.

[183] Ibid.

While the direct objectives of MiFID are to benefit consumers and the market (efficiency, competitiveness, protection), its more potent beneficiaries may be the police, military, and secret service sectors of governments. Information, like munitions in an earlier age, appears to have become among the most important components of war. And war, like any other activity, is difficult enough to maintain without capital. In this case, information gathering both shapes the nature of efforts to produce it (thus privileging those matters with respect to which information is gathered) and suggests the diffusion of power among the State and those who are responsible for gathering these goods. Where markets become part of the battlefield (in this case against the financing of illegal activity, whether political or economic) both direct regulation, and the co-opting of private entities in the war effort follow. But this suggests a distortion of purpose (no longer fixated on consumer protection directly) and those distortions (or expansions of purpose) will affect the utility of the regulation for all of its beneficiaries. Confusion in this case is likely to follow as stakeholders compete for maximization of benefit from the regulatory scheme. MiFID, in this sense, evidences the move to governmentality nicely described by Foucault.[184] 'One of the most notable features of governmentality research has been its investigation of power "beyond the state," that is, with the tactics, techniques and technologies which configure apparently "non-political" sites like the firm or the school as spaces of power.'[185] And so it is with MiFID.

Market regulation, of which MiFID is representative, also can be understood as a method for the management of crime in three respects. First, it serves in the expanding global movement to identify and suppress corruption. Anti-corruption campaigns have become a focal point of global governance efforts in hard and soft law. For example, both the World Bank and the Chinese Communist Parties are at the forefront of these at the moment.[186] Related to anti-corruption campaigns are efforts to prevent organized money laundering. Governments, in particular, have been targeting criminal gang activity because of its use as a principal form of banking for political and military campaigns waged by insurgent and anarchist groups. Third, and more generally, are efforts against financial fraud. This

[184] See M Foucault, 'Governmentality', in G Burchell, Colin Gordon, and P Miller (eds) *The Foucault Effect: Studies in Governmentality* (1991) 87.

[185] M Foucault, 'Security, Territory, and Population', in M Foucault, *Ethics: Subjectivity and Truth* (P Rabinow, ed) (1997) 67–71.

[186] The World Bank has 'identified corruption as among the greatest obstacles to economic and social development. It undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends.' See World Bank, Anti-Corruption, available online at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,menuPK:384461~pagePK:149018~piPK:149093~theSitePK:384455,00.html>. The Chinese Government's increased emphasis on anti-corruption campaigns was nicely expressed in a January 2007 speech by Chinese President Hu Jintao. See 'Hu Charts Path in Anti-Corruption Drive' *People's Daily Online* 10 January 2007, available online at: <http://english.peopledaily.com.cn/200701/10/text20070110_339797.htm>.

reflects what appears to be a growing conflation between banditry and politically motivated violence.[187] Consider the reluctance of the House of Lords to approve the extradition treaty with the United States[188] in the wake of the use of anti-terrorism based extradition powers on English bankers and other financial types for violation of US financial fraud or securities laws.[189]

Market regulation that is, the management and control of the vehicle through which vast amounts of wealth are negotiated, has acquired a military and national defense character as well, especially as a weapon in the political and economic aspects of modern warfare. These include the financing of terrorist or politically violent movements,[190] attempts at market disruptions as a tactic of war by combatant organizations,[191] and criminal financial activity with politically destabilizing effects. Where these activities are conflated there is a necessary convergence of the need for market surveillance and for the use of markets as a source for data gathering and the needs of the police and military wings of the State apparatus.

Putting all of this together, the fundamental character of MiFID might be better understood. Indeed, it is impossible to understand MiFID except in its broader context. MiFID is at once about market regulation, the creation of new industry (information production), the privatization of governmental functions (surveillance and data gathering), and also the management of crime and of political conflict. Ironically, as a means of subsidizing traditional exchanges (by bringing competitors within the regulatory matrix within which they operate), MiFID's utility is doubtful at best. Yet, it will have substantial effect. And perhaps there is a substantial sort of utility in that.

[187] See eg, MG Manwaring, *Street Gangs: The New Urban Insurgency* (Strategic Studies Institute, 2005) ('more than half of the countries in the world are struggling to maintain their political, economic, and territorial integrity in the face of diverse direct and indirect non-state—including criminal gang—challenges').

[188] In 2006, the UK House of Lords in 'a vote of 189–152, Parliament's upper house approved a measure demanding an end to the streamlined extraditions to the United States. By a vote of 171–138, the Lords backed another measure which would restrict the ability to extradite to America if the alleged offense was partly committed in Britain.' See House of Lords Vote Against British-US Extradition Rules, San Diego Union Tribune, 1 November 2006, available online at: <http://www.signonsandiego.com/news/world/20061101–1527-britain-us-extradition.html>. The House of Lords later relented. See 'House of Lords Backs Down in Amending US Extradition Treaty' Islamic Republic News Agency, 25 August 2007, available online at: <http://www.irna.ir/en/news/view/line-20/0611083829182031.htm>.

[189] 'Three British bankers have already been extradited under the treaty to face fraud charges in the US connected to the collapse of Enron, while two Muslims are in the process of appealing against being sent to face US trials on alleged terrorism charges.' ('House of Lords Backs Down in Amending US Extradition Treaty', ibid.)

[190] See eg, B Zagaris, 'The Merging of the Counter-Terrorism and Anti-Money Laundering Regimes' (2002) 34 Law and Policy in International Business 45; Z Abuza, 'Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiya' (2003) 25(2) Contemporary Southeast Asia 169; Cf S Biddle, *Afghanistan and the Future of Warfare: Implications for Army and Defense Policy* (Strategic Studies Institute, 2002).

[191] See eg, J Robb, *Brave New War* (Wiley, 2007).

IV. Conclusion

MiFID presents an interesting picture. On the whole it represents a positive development for Europe; it is a signal that Europe is ready to compete on an equal basis with the United States for control of the cultural understanding of the norms applicable to transactions in securities from which global harmonization will eventually arise. Yet it is not without certain peculiarities consonant with the form of regulation undertaken. On the one hand, it ties in nicely with current common understandings of the most appropriate communal approaches to the regulation of securities markets. That common understanding increasingly emphasizes surveillance and monitoring as both enforcement technique and substantive objective. But it also accepts, to some extent, the imperfect nature of regulation. And thus MiFID tends to focus regulation on problem management rather than on their control or eradication. But partial regulation will produce other than the intended effect. That is the nature of markets—in this case markets for regulation. Where MiFID fails to regulate, others will step in, and States will eventually follow. This article examines the potential consequences of MiFID in this regulatory context. It has suggested that MiFID may be as important for the markets in information that it spawns than for the market defects it seeks to manage.