

EMIR and MiFIR – Opening up silos

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C L I F F O R D
C H A N C E

EMIR and MiFIR - Opening up silos

EMIR and MiFIR aim to remove commercial barriers that can be used to prevent competition in clearing and trading of financial instruments.

They require CCPs to accept instruments for clearing regardless of the trading venue, trading venues to provide trade feeds to CCPs and benchmark proprietors to provide CCPs and trading venues with access to licences, in each case on a non-discriminatory and transparent basis.

EMIR provided access rights to CCPs and trading venues for OTC derivatives. MiFIR will extend those rights to all financial instruments and to benchmarks and will extend access rights to non-EU CCPs/trading venues (subject to equivalence/reciprocity requirements).

But MiFIR provides extensive transitional provisions for CCPs/trading venues for ETDs (in particular smaller trading venues), for newly established CCPs clearing securities/money market instruments and for benchmark proprietors (in particular regarding new benchmarks).

EMIR also allows CCPs clearing securities/money market instruments to establish inter-operability arrangements subject to certain conditions.

MiFID already required Member States to ensure that:

Investment firms from other Member States have the right of access to:

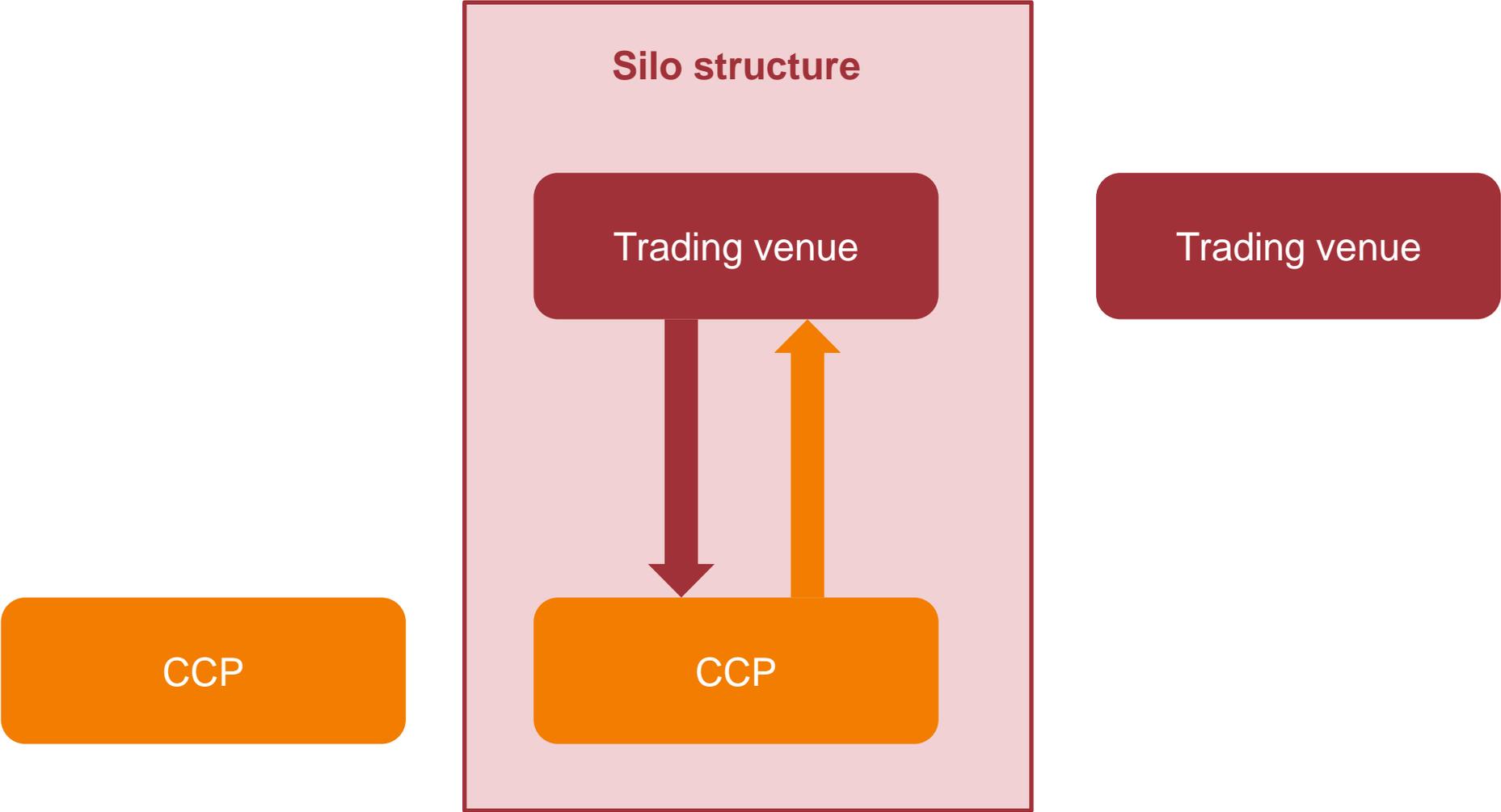
- Regulated markets in their territory (either by establishing branches or on remote basis);
- Central counterparty, clearing, settlement systems in their territory subject to same non-discriminatory, transparent and objective criteria as apply to local participants.

Regulated markets in their territory offer all members or participants the right to designate the settlement system, subject to necessary links being in place and competent authority approval based on the need to ensure smooth/orderly functioning.

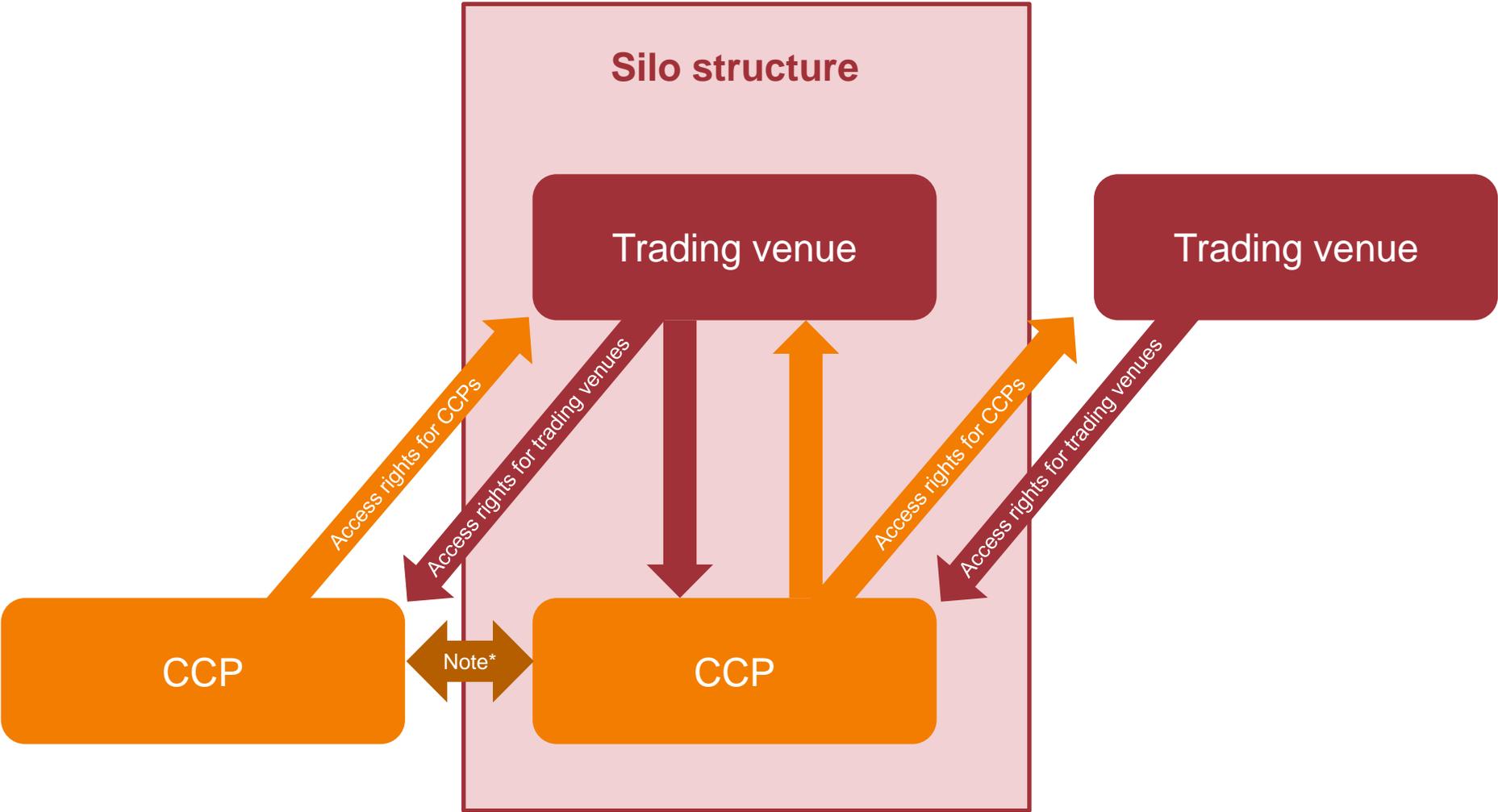
Operators of multilateral trading facilities are not prevented from using central counterparty, clearing or settlement facilities in other Member States (except where necessary to maintain orderly functioning).

MiFID2 preserves these rights and extends them to cover rights of direct and indirect access by investment firms.

Silos can create barriers to access



EMIR and MiFIR aim to remove these barriers



* Interoperability arrangements (CCPs clearing securities and money market instruments only)

New access rights for CCPs and trading venues

	EMIR	MiFIR
Products	OTC derivatives	All financial instruments*
Applies from	16 August 2012	Expected end 2016 (end 2018 for benchmarks)
Access to CCP	<ul style="list-style-type: none"> ■ A CCP authorised under EMIR to clear OTC derivative contracts must accept such contracts for clearing regardless of the trading venue on non-discriminatory and transparent basis ■ Must grant/refuse access within 3 months of request ■ Competent authority may deny access <p>Note: MiFIR amends EMIR to align conditions with those specified in MiFIR)</p>	<ul style="list-style-type: none"> ■ A CCP† must accept financial instruments for clearing regardless of the trading venue on non-discriminatory and transparent basis (including as to collateral, netting, cross-margining and fees) ■ Must respond to request from trading venue within 3 months (or 6 months for ETD), and grant access within a further 3 months (if competent authority permits) ■ Competent authority may deny access
Access to trading venue	<ul style="list-style-type: none"> ■ A trading venue must provide trade feeds to any CCP that has been authorised to clear OTC derivative contracts traded on that trading venue on non-discriminatory and transparent basis ■ Must respond to request from CCP within 3 months, and grant access within a further 3 months of a positive response ■ Competent authority may deny access 	<ul style="list-style-type: none"> ■ A trading venue must provide trade feeds to any CCP authorised or recognised under EMIR on non-discriminatory and transparent basis (including as to fees) ■ Must respond to request from CCP within 3 months (or 6 months for ETD), and grant access within a further 3 months (if competent authority permits) ■ Competent authority may deny access
Access may be refused if	<ul style="list-style-type: none"> ■ Threat to smooth and orderly markets ■ Access to CCP would adversely affect systemic risk ■ Access to trading venue would require interoperability or result in liquidity fragmentation (as specified in RTS) 	<ul style="list-style-type: none"> ■ Threat to smooth orderly markets, in particular liquidity fragmentation ■ Adverse effect on systemic risk ■ Access would require interoperability for ETDs (absent all parties' consent) ■ RTS to specify access conditions/process
Access to benchmarks	N/A	<ul style="list-style-type: none"> ■ Benchmark proprietors† must ensure that CCPs and trading venues have non-discriminatory access to information and licences at reasonable commercial price ■ Licences must be granted on fair, reasonable, non-discriminatory basis within 3 months following request ■ CCPs, trading venues and related entities must not enter into restrictive agreements with benchmark providers

* Without prejudice to the access rights in EMIR (but the access rights to trading venues do not apply to OTC derivatives subject to access obligations under EMIR).

† Territorial scope not clearly defined, but access obligations appear to apply to non-EU CCPs recognised under EMIR as well as EU CCPs authorised under EMIR.

EMIR - Conditions for interoperability arrangements

Qualification and approval

- Only CCPs clearing securities and money market instruments
- Only if CCPs authorised or recognised under EMIR (or prior national regime) for at least 3 years
- If clearing for a particular trading venue, CCPs must have non-discriminatory access to necessary data and the relevant settlement system
- Interoperability arrangements and access to necessary data feeds or settlement systems may only be rejected or restricted to control risks arising from access
- Technical conditions must allow for smooth and orderly functioning of markets and must not impede supervision
- Arrangement must be subject to prior approval of relevant competent authorities
- ESMA must provide opinion if competent authorities reject application

Risk management

- CCPs entering into arrangements must meet following conditions
- CCPs must put in place adequate risk management policies, procedures and systems
- Must agree on respective rights and obligations, including governing law and timing of entry and irrevocability of orders
- Must identify, monitor and manage credit and liquidity risk, to ensure one CCP's default does not affect other CCP (including agreement on process for managing the consequences of a default)
- Must identify, monitor and address potential interdependence and correlations that may affect credit and liquidity risks relating to clearing member concentrations and pooled financial resources (including control over re-use of clearing member collateral)
- If their risk management models differ, CCPs must identify and manage the consequences
- Costs arising from implementation of the above borne by the CCP requesting interoperability or access unless otherwise agreed

Margin

- CCP must segregate assets and positions of other CCP under interoperability arrangement
- If a CCP only receives initial margin, it shall have no right of reuse of that margin
- Collateral received in the form of financial instruments must be deposited with operators of securities settlement systems notified under the Settlement Finality Directive
- Margin received must only be available to the receiving CCP on default of the other CCP and must be readily returnable if the receiving CCP defaults

MiFIR – Transitional provisions

	CCPs clearing securities and money market instruments	Trading venues for ETDs	Benchmark proprietors
Qualifying entities	<ul style="list-style-type: none"> ■ Newly established CCPs authorised/recognised under EMIR ■ CCPs previously authorised for less than 3 years when MiFIR enters into force (except as a result of merger/acquisition) ■ If clear securities and money market instruments 	<ul style="list-style-type: none"> ■ Trading venues for ETDs below threshold in year preceding application of MiFIR ■ Threshold is €1bn annual notional amount traded (calculated on a group basis) 	<ul style="list-style-type: none"> ■ Proprietors of new benchmarks developed after MiFIR applies ■ If owned by proprietor of existing benchmark, proprietor must establish that new benchmark not mere copy/adaptation of or substitute for existing benchmark
Exemption from access obligations	<ul style="list-style-type: none"> ■ CCP must apply to competent authority before MiFIR applies ■ Competent authority may exempt CCP from access obligations for 30 months following application of MiFIR ■ Commission has power to adopt delegated act extending this transitional period for up to 30 months 	<ul style="list-style-type: none"> ■ Venue may notify ESMA and competent authority before MiFIR applies that it is not bound by access obligations for 30 months following application of MiFIR ■ If venue remains below threshold can renew opt-out for further 30 months 	<ul style="list-style-type: none"> ■ Licensing obligation starts no later than 30 months after financial instrument referencing benchmark admitted to/starts trading
Restriction on access rights	<ul style="list-style-type: none"> ■ Exempted CCP and related trading venues cannot benefit from MiFIR access rights during transitional period 	<ul style="list-style-type: none"> ■ Opted-out trading venue and related CCPs cannot benefit from MiFIR access rights during transitional period 	<ul style="list-style-type: none"> ■ N/A

Notes:

MiFIR enters into force 20 days after it is published in the Official Journal and begins to apply 30 months later (expected to be at the end of 2016). However the provisions relating to access to benchmarks do not apply until 54 months after entry into force (expected to be at the end of 2018).

The Commission is required to report to the Council of Ministers and the European Parliament on the operation of these provisions before MiFIR begins to apply.

The Commission also has power to adopt a delegated act excluding ETDs from the scope of the rights of access to CCPs and trading venues for up to 30 months after the application of MiFIR. However, if the Commission does not do so, a CCP or trading venue may apply to its competent authority to disapply the access rights in relation to ETDs for a transitional period of 30 months from the date of application of MiFIR taking into account the risks to orderly trading (but then neither it nor any related trading venue/CCP can benefit from the access rights in relation to ETDs during that period).

MiFIR – Access rights for non-EU infrastructures

	Non-EU CCPs	Non-EU trading venues
Qualifying entities	<ul style="list-style-type: none"> ■ CCPs established outside the EU ■ If CCP recognised by ESMA under EMIR (which requires prior equivalence and reciprocity determination by Commission) 	<ul style="list-style-type: none"> ■ Trading venues established outside the EU ■ If the Commission has determined that the non-EU state has equivalent regulation of trading venues under the provisions of MiFIR relating to mandatory execution of OTC derivatives
Additional equivalence and reciprocity requirement*	<ul style="list-style-type: none"> ■ Yes 	<ul style="list-style-type: none"> ■ Yes
Access rights	<ul style="list-style-type: none"> ■ Access to trading venues and benchmarks under MiFIR on same terms as EU CCPs 	<ul style="list-style-type: none"> ■ Access to CCPs and benchmarks under MiFIR on same terms as EU trading venues

* Access rights only available under MiFIR if Commission has determined that the relevant non-EU regime provides reciprocal effective equivalent access to EU CCPs and trading venues (and that trading venues in the non-EU state are subject to authorisation and effective supervision and enforcement). Non-EU CCPs and trading venues have no access rights under EMIR.

Glossary

- **CCP:** central counterparty
- **Commission:** European Commission
- **EMIR:** the EU regulation on OTC derivatives, central counterparties and trade repositories
- **ETD:** exchange traded derivatives are defined in MiFIR as derivatives traded on a regulated market (as defined in MiFIR) or on a third-country market considered as equivalent to a regulated market in accordance with Article 24 of MiFIR, and which do not fall within the definition of OTC derivative under EMIR
- **Financial instrument:** as defined in MiFID and MiFID2/MiFIR covering securities, money market instruments, units in collective investment undertakings and derivatives in relation to financial, commodity and other underlyings (both OTC derivatives and ETD)
- **MiFID:** the existing Markets in Financial Instruments Directive
- **MiFID2/MiFIR:** the proposed EU directive and regulation repealing and replacing MiFID
- **OTC derivatives:** defined in EMIR as derivative contracts the execution of which does not take place on a regulated market or on a third-country market considered as equivalent to a regulated market in accordance with Article 19(6) of MiFID
- **RTS:** regulatory technical standards adopted under EU legislation
- **Trading venue:** defined in EMIR and MiFIR so as to cover EU regulated markets, multilateral trading facilities and organised trading facilities covered by MiFID or MiFID2/MiFIR

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