



Jornadas CNMV

NUEVA REGULACIÓN DE LOS MERCADOS DE VALORES Últimos desarrollos europeos

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The impact of MiFID II for the intermediaries

FSMA

FINANCIAL
SERVICES
AND
MARKETS
AUTHORITY

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Outline

1. The general context
2. The legal framework and ESMA's role
3. MiFID II/MiFIR new requirements regarding investment firms
4. MiFID II/MiFIR new requirements regarding conduct of business rules

1. The general context

- **Lessons to be learned** from the 2008 Financial Crisis
- **Increasing complexity** of financial instruments and **incentives** to distribute some instruments
- Investor protection **cannot be based solely on** disclosures and conduct of business rules (point-of-sale rules)
- Besides disclosures and conduct of business rules, **new rules and powers are needed: product governance, product monitoring and product intervention**
- Be aware about what is coming on the market to be able to **anticipate** risks and investor protection issues

2. The legal framework and ESMA's role

- MiFID II/MiFIR (15 may 2014) (level 1)
- MiFID II – implementing measures (level 2)
- ESMA guidelines, etc. (level 3)
- Entry into application: **3 January 2017**
- ESMA plays a crucial role regarding the level 2 measures:
 - Technical advice to the European Commission
→ Final Report – 19 December 2014
 - Technical standards
- Within ESMA, two standing committees (SC) more especially involved in these matters:
 - Investor Protection and Intermediaries SC (IPISC)
 - Secondary markets SC

2. MiFID II impact?

- See scope of ESMA's Technical advice to illustrate MiFID II's impact:

- | | |
|--|--|
| <ul style="list-style-type: none">▪ Exemption from the applicability of MiFID▪ Investment advice and the use of distribution channels▪ Compliance function▪ Complaints-handling▪ Record-keeping▪ Recording of telephone and electronic communications▪ Product governance▪ Safeguarding of client assets▪ Conflicts of interest▪ Underwriting and placing▪ Remuneration▪ Fair, clear and not misleading information | <ul style="list-style-type: none">▪ Information to clients about investment advice and financial instruments▪ Information to clients on costs and charges▪ Inducements▪ Investment advice on an independent basis▪ Suitability▪ Appropriateness▪ Client agreement▪ Reporting to clients▪ Best execution▪ Clients order-handling▪ Transactions executed with eligible counterparties▪ Product intervention |
|--|--|

2. MiFID II impact?

- Technical standards:

- **Autorisation of investment firms**
- **Freedom to provide investment services and activities / Establishment of a branch**

- **Best execution (publication of quality execution data by trading venues)**
- **Best execution (publication of data by investment firms)**

3. New requirements regarding investment firms (1/3)

- Enhancement of the requirements regarding the **management body and the share-holders with qualifying holdings** (// with rules applicable to banks)
- Recording of **telephone conversations and electronic communications** (regarding transactions concluded when dealing on own account or in case of reception/transmission of orders or execution)

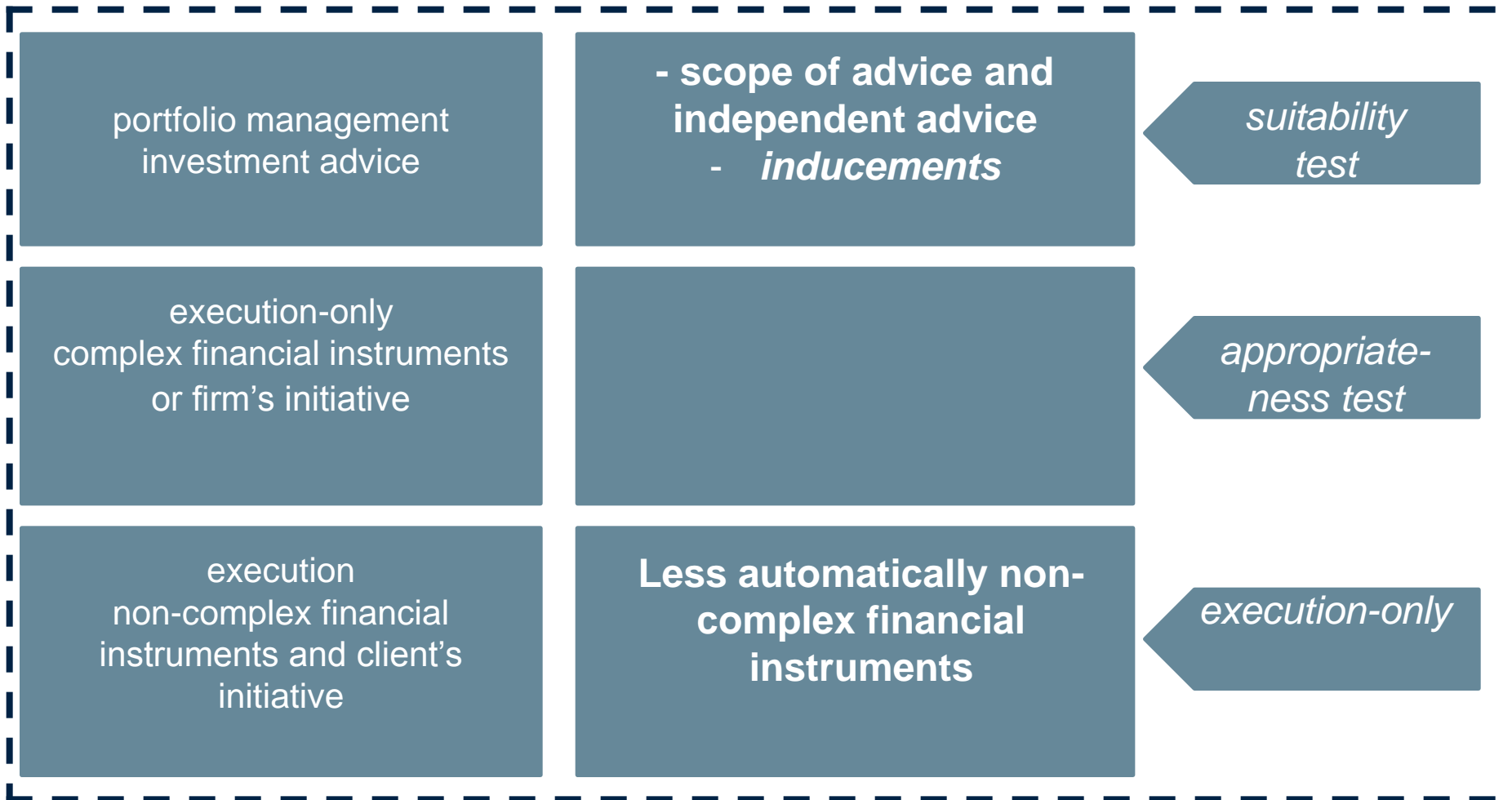
3. New requirements regarding investment firms (2/3)

- **Further harmonisation (a.o.)** of information regarding authorisation as an investment firm or passporting: standard procedures and forms
→see ESMA's Final Report on MiFID II/MiFIR draft Technical Standards on authorisation, passporting, registration of third country firms and cooperation between competent authorities (29 June 2015)

3. New requirements regarding investment firms (3/3)

- Non-EU firms regime:
 - If a non-EU firm **intends to provide investment or ancillary services** to **retail or professional clients** in a Member State, that Member State may require that firm to establish a branch in the Member State;
 - Specific conditions: authorisation and supervision in the non-EU country where the firm is established, compliance with the FATF recommendations, cooperation arrangements with the competent supervisory authorities of the non-EU country where the firm is established, etc.
 - No authorisation/establishment of a branch required if the provision of a service is done at the **exclusive initiative of the client**

4. New requirements regarding conduct of business rules (in a nutshell)



governance (products, remuneration), best execution, investment research, costs and charges, product intervention

4. Impact on conduct of business rules

- **Inducements**
- **Research**
- **Product governance**
- **Investment advice**
- **Execution-only**
- **Costs and charges**
- **Product intervention**

4. Europe's agenda regarding payments: 3 pillars

Investment firms (selling directly their products) and their tied agents	Portfolio management and independent advice	Other services
Inducements regime not applicable Comply with conflicts of interest requirements	Ban on inducements Minor non-monetary benefits are possible (under certain conditions: disclosure to the client, quality enhancement, no conflicts of interest)	No ban on inducements Inducements possible <u>as long as</u> they comply with the following conditions: <ul style="list-style-type: none">▪ disclosure to the client▪ quality enhancement▪ no conflicts of interest

4. Inducements under MiFID II

- Few years after the entry into application of MiFID I, **inducements remain an issue**
- Several national initiatives to ban inducements: see UK and the Netherlands, for example
- Inducements and MiFID II: **probably more an evolution than a revolution**
 - **strengthen further the requirements**
 - **limit the scope for interpretation**
 - **enhance investor protection**

4. Inducements - ESMA's technical advice – the possible level 2 requirements

- ESMA's technical advice regarding quality enhancement:
 - the **conditions** under which inducements may be provided or accepted (article 24(9) of MiFID II) should be regarded as being **cumulative and should be met on a case-by-case basis**
 - proposal to introduce a non-exhaustive list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met

4. Inducements - ESMA's technical advice – the possible level 2 requirements

- ESMA's technical advice: the **possible non-exhaustive list**
 - inducements may **not** be regarded as designed to **enhance the quality of the relevant service to the client** if
 - it is not justified by the provision of an **additional or higher level service** to the relevant client, proportional to the level of inducements received
 - it **directly benefits the recipient firm**, its shareholders or employees without tangible benefit to the relevant client, or
 - in relation to an on-going inducement, it is **not justified by the provision of an on-going benefit** to the relevant client

4. Inducements - ESMA's technical advice – the possible level 2 requirements

- ESMA's technical advice: additional or higher level service to the relevant client, proportional to the level of inducements received?
 - provision of **non-independent advice on and access to a wide range of suitable financial instruments** including an appropriate number of instruments from third party product providers
 - provision of **non-independent advice combined with** either an offer to the client to assess, at least on an annual basis, the continuing suitability of the financial instruments in which the client has invested or with another added-value on-going service to the client (such as suggested optimal asset allocation)
 - provision of **access, at a competitive price, to a wide range of financial instruments**, including an appropriate number of instruments from third party product providers **together with** either the provision of added-value tools (such as objective online information tools helping the relevant client to take investment decisions) or providing periodic reports of the performance and costs and charges associated with the financial instruments

4. Inducements - ESMA's technical advice – the possible level 2 requirements

- ESMA's technical advice:
 - in any case, an inducement is acceptable only if all relevant services are provided to clients **without bias or distortion** as a result of the inducement being received
 - **organisational requirements**
 - be able to demonstrate compliance of inducements paid or received with the MiFID requirements
 - keeping an internal list of inducements received
 - recording how inducements used enhance the quality of the service provided to the relevant clients

4. Research - ESMA's technical advice – the possible level 2 requirements

- The restriction on research as an inducement **does not prevent a portfolio manager or independent adviser**, who requires valuable external investment research services as part of fulfilling their duties to their clients, **from contracting and paying for such research on a distinct and separate basis** with a broker or other third party
- ESMA proposes **new requirements** regarding the purchase of investment research

4. Research - ESMA's technical advice – the possible level 2 requirements

- ESMA's technical advice regarding investment research (a.o.):
 - the provision of research by third parties (such as brokers) should **not** be regarded as **an inducement** if it is received in return for
 - **direct payments by the investment firm out of its own resources, or**
 - **payments from a separate research payment account** controlled by the investment firm and fulfilling specific conditions

4. Product governance

- **Know your products**

- define a policy as to services, activities, products, operations offered or provided **taking into account the characteristics and needs of the target clients**
- requirements for **manufacturers and for distributors**
- Level 2 measures to detail these requirements (see ESMA's Technical Advice)

- **Staff qualification**

- staff with the relevant skills, knowledge and expertise
- see also ESMA's guidelines for the assessment of knowledge and competence (for staff providing investment advice or information about financial instruments or investment or ancillary services)

4. Investment advice

- **Clarify the basis of the advice provided:**
 - advice provided on an **independent** basis or not?
 - advice based on a **broad** or on a more **restricted** analysis of the market?
 - **on-going assessment of the suitability** of the instruments recommended?
- **Independent advice?**
 - sufficiently large number of financial instruments available on the market
 - not limited to instruments issued by the firm itself or firms linked
 - no inducements
- **Suitability report**
 - specify how the advice given meets the personal characteristics of the client
 - explain the reasons of the advice provided
- Level 2 measures to detail these requirements (see ESMA's Technical Advice)

4. Execution-only

- **Limitation of the category of automatically non-complex financial instruments (execution-only)**
- Key criteria:
 - liquidity
 - does not embed a derivative
 - does not incorporate a structure which makes it difficult for the client to understand the risk involved
- A structure which makes it difficult for the client to understand the risk involved? ESMA to develop guidelines

4. Costs and charges

- **Enhanced disclosure of costs and charges**
 - disclose costs and charges as well as their aggregation, as a cash amount and as a percentage
 - disclose **cumulative effect** of costs and charges **on return**
 - information about costs and charges related to **both the financial instrument and the service**
 - ex-ante (costs and charges assumptions if and when needed) and ex-post (actual costs incurred) disclosure
 - Level 2 measures to detail these requirements (see ESMA's Technical Advice)

4. Product intervention

- Disclosures and conduct of business rules are not always sufficient
- Product intervention:
 - **prohibit or restrict**
 - the marketing, distribution or sale of certain financial instruments or instruments with certain features or
 - certain financial activities or practices
 - ESMA or competent authorities
- Level 2 measures to detail these powers (see ESMA's Technical Advice)
- Ex-ante **intervention possible: anticipate problems**

Q&A



Information: www.fsma.be

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Markets Approach in the development of MiFID II

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Financial Conduct Authority

29 October 2015

Why is there a MiFID II for markets?

- In-built reviews in existing MiFID
- G20 commitments to reform financial markets
- Addressing risks from ongoing market developments

What is the philosophy?

- Put more structure and transparency around OTC trading
- Promote competition
- Accept recent market developments, but address risks
- Ensure regulators have the tools for the job
- Align MiFID with other new legislation (eg MAR, EMIR)

Strengthening the market “macro” structure

- Bring broker crossing systems into venue regulation
- Define systematic internaliser more clearly
- Create Organised Trading Facility as a new venue type
- Best execution and access provisions to promote competition

Strengthening the market “micro” structure

- New rules on algorithmic trading
- Revised transparency regime for equities
- New transparency regime for non-equities
- Framework for data consolidation

Strengthening regulation of commodity derivatives

- Narrower “ancillary” exemption
- New regime of position reporting
- And position limits

Giving regulators the tools for the job

- More detailed transaction reports
- More information on commodity positions
- Stronger role for ESMA in promoting convergence

Questions?

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Jornadas Regulación Internacional CNMV.
MiFID II/MiFIR y MAR/CS MAD

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29 de octubre de 2015

**Nivel I (Directiva 2014/65/UE y
Reglamento 600/2014 UE)**



**Nivel II: ESMA desarrolla asesoramientos
técnicos (actos delegados) y borradores de
estándares técnicos (RTS)**

En vigor desde jul-14 y aplicación ene-17

- ✓ ESMA ha realizado dos extensas consultas públicas con representativa contribución de infraestructuras y participantes de los mercados: *Discussion Paper (2014)* y *Consultation Paper (2015)*
- ✓ La Comisión Europea trabaja en el desarrollo de actos delegados conforme a los asesoramientos técnicos entregados por ESMA en dic-14.
- ✓ ESMA ha elaborado 27 RTS que cubren los mandatos a ESMA, recogidos tanto en la Directiva MiFID II como en el Reglamento MiFIR, para las diferentes materias
- ✓ En consulta pública actualmente (hasta el 31-oct) borradores sobre tres normas técnicas de implementación: i) procedimientos relacionados con las suspensiones y exclusiones, ii) procedimientos de notificación de información de proveedores de datos (APA, ARM, CTP) y iii) procedimientos sobre notificación de posiciones en derivados sobre commodities y derechos de emisión.

MiFID II: Principales puntos de discusión en los desarrollos de nivel II



Transparencia

- Calibración de liquidez productos non-equity (renta fija, instrumentos derivados, derechos de emisión)

Microestructura de mercados

- Calibración variación mínima del precio de cotización de acciones (tick size)

Acceso

- Identificación circunstancias que justifican la denegación de acceso a una CCP o a un centro de negociación

Comunicación de operaciones, datos de instrumentos y libros de órdenes

- Volumen de información y complejidad (nuevos instrumentos y mayor nivel de detalle)

Derivados sobre commodities

- Definición de instrumento financiero (ámbito aplicación), test actividad auxiliar (actividad autorizada) y criterios para fijación del límite de posiciones

MiFID II: Principales desarrollos de implementación

❑ Normativos

- **Trasposición de la Directiva e integración en la Ley del Mercado de Valores**

❑ Trabajos de desarrollos (nivel III)

- **ESMA elaborará documentos de preguntas frecuentes (Q&A), recomendaciones (guidelines) y opiniones que contribuyan a aclarar aspectos que por la limitación de los mandatos o complejidad de las materias no hayan quedado suficientemente abordados en las propias normas técnicas**

❑ Sistemas

- **MiFID II requiere de un intenso uso de información (cálculos de transparencia, base de datos de instrumentos de referencia, obligaciones de reporting, etc.)**
- **ESMA trabaja en las especificaciones técnicas necesarias para que el sector pueda adaptar sus sistemas, principalmente, en los aspectos del transaction reporting e IRD (art. 26 y 27 MiFIR)**
- **La mayoría de Autoridades Competentes (CNMV incluida) se han integrado en el proyecto ESMA IT cuyo objetivo es desarrollar sistemas informáticos que centralicen en ESMA tareas de cálculo y publicación necesarias para articular el régimen propuesto con MiFID II**

MiFID II: Implicaciones empresas de inversión, infraestructuras de mercado y CNMV



❑ Empresas de inversión

- Análisis exposición negociación algorítmica (test proporcionalidad) y adaptación requisitos organizativos
- Monitorización actividad por cuenta propia: calificación como internalizador sistemático
- Adaptación sistemas comunicación operaciones (TR), post-transparencia OTC (APA)

❑ Infraestructuras de mercado y proveedores de servicios de información

- Aplicación régimen de pre y post transparencia en productos non-equity
- Análisis exposición negociación algorítmica (test proporcionalidad) y adaptación requisitos organizativos
- Adaptación libros de órdenes, intercambio de información (calibración liquidez)
- Solicitudes de acceso a CCP y trading venues y comercialización de datos (desagregación)

❑ CNMV

- Autorización nuevas infraestructuras (OTF, APA), participación ESMA IT project (calibración liquidez) y supervisión tareas actuales (MiFID I) y nuevas tareas (MiFID II)

Nivel I (Reglamento 596/2014/UE y Directiva 2014/57/UE en vigor desde jul-14 y aplicación julio-16



Nivel II: ESMA desarrolla asesoramientos técnicos (actos delegados) y borradores de estándares técnicos (RTS)

- **Objetivos de la MAR/CSMAD**

- Aumentar la integridad del mercado y protección a inversores.**
- Reforzar la aplicación del régimen de abuso de mercado y evitar posibilidades de arbitraje regulatorio por:**
 - a) diferentes conceptos legales,**
 - b) discrecionalidad del regulador,**
 - c) régimen sancionador desigual**
 - d) diferentes poderes de autoridades competentes.**
- Incrementar la eficacia de la regulación con reducción de cargas a las PYMES.**
- Mejorar transparencia y supervisión de los mercados de derivados.**
- Incrementar coordinación de la actuación de los reguladores nacionales.**
- Acompasar la normativa de abuso de mercado a la normativa MiFID.**

Principales novedades del Reglamento (MAR)

extensión del ámbito de aplicación:

-Nuevas plataformas de mercado (SMNs y OTFs) y negociación OTC.

-Nuevos instrumentos: derechos de emisión, derivados de materias primas (insider y manipulación) e instrumentos spot de materias primas (manipulación cruzada).

-Ampliación supuestos manipulación: órdenes, otras conductas (intento de manipulación, suministro de datos falsos para índices o desarrollar algoritmos manipulativos).

Armonización concepto de información privilegiada (materias primas) y de los requisitos para el retraso en su publicación en supuestos de emisores financieros con riesgo sistémico.

Regulación de los sondeos de mercado (i.e.; colocación de grandes paquetes accionariales)

Adaptación del régimen general a Pymes (lista de iniciados y publicación información privilegiada).

Inclusión en el ámbito de aplicación de la manipulación de índices de referencia y benchmarks

Principales novedades del Reglamento (MAR) cont.

Regulación de la figura de delator/confidente o “whistleblower”

Comunicaciones de operaciones de directivos:

- Comunicación de operaciones en renta fija y derivados del emisor (comunicación sobre acciones ya prevista en MAD2003.
- Introducción de un período restringido “cerrado” para realizar operaciones.

Refuerzo del régimen sancionador; nuevas sanciones contempladas

- Restitución beneficios obtenidos.
- Inhabilitación de funciones de dirección en ESIS.
- Cuantía mínima de sanciones pecuniarias (cuando la infracción genera beneficio cuantificable).

Asesoramiento técnico a la COM sobre actos delegados

- Especificación de indicadores de manipulación de mercado
- Umbrales mínimos de exención de divulgación de información privilegiada en derechos de emisión
- Autoridad competente para la notificación del retraso de información privilegiada
- Características de operaciones de directivos a comunicar
- Comunicación de infracciones (desarrollado por Directiva)

Normas técnicas

- Programas de recompra y estabilización
- Market Sounding (Prospección de Mercado)
- Comunicación de operaciones y órdenes sospechosas
- Lista de iniciados
- Formato y modelo de comunicación de operaciones de directivos
- Recomendaciones de inversión

- Principales novedades de la Directiva de Abuso de Mercado (CSMAD)**
- Sanciones penales obligatorias para casos “graves” (intencionalidad o cuantía beneficios).
- Definiciones comunes de conductas ilícitas –delitos- a nivel EU.
- Nuevos delitos de recomendación, inducción o tentativa de operaciones y de comunicación ilícita de información privilegiada.
- Posible responsabilidad penal de personas jurídicas.
- Competencia jurisdicción penal de tribunales españoles:
 - Cuando la infracción ha sido cometida en España.
 - Cuando la infracción ha sido cometida por español si constituye una infracción en el lugar donde se ha cometido.

- Prioridades y retos nueva regulación de Abuso de Mercado**
- Alcanzar una elevada seguridad jurídica: claridad en definiciones clave, importancia de los reglamentos de desarrollo y guías.**
- Delimitar claramente la autoridad competente en supuestos especiales y alcanzar una estrecha colaboración entre autoridades competentes.**
- Lograr una uniformidad en las condiciones de aplicación, especialmente para participantes con vocación de actuación transfronteriza y plataformas de negociación.**
- Alcanzar una mayor simplicidad, sin reducir el contenido de las normas que protegen la integridad del mercado, de las cargas administrativas que lleva aparejadas la nueva legislación.**
- Garantizar el funcionamiento “íntegro” de los mercados de derivados materias primas.**
- Luchar contra la manipulación en índices de referencia.**



Gracias

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