
Minutes

Minutes of the meeting of the
MIFID II IMPLEMENTATION ROUNDTABLE

Held on 17 July 2015 – 9.30am

At FCA, 25 the North Colonnade

Present: Nick Bayley - FCA
Stephen Hanks - FCA
Louise Rodger - FCA
Sarah Raisin - FCA
Richard Taylor – FCA
Karen Hender - FCA

ABI
AFME
AIC
AIMA
APFA
BBA
EFET
FESE
FIA-Europe
GAFTA
ICI-Global
ICMA
ISDA
MFA
NFU
TISA
UK Platforms Group
WMA
WMBA

MiFID II Implementing Measures

1. The FCA provided an update on the MiFID II implementing measures.
2. The FCA said that following the discussion of the bulk of the draft technical standards at the June Board of Supervisors (BoS) meeting, the European Securities and Markets Authority (ESMA) is starting to receive comments from the European Commission's (EC) legal services. These will be taken account of in revised drafts to go to the September BoS meeting prior to the drafts being sent to the European Commission. ESMA referred to the remaining MiFID II draft technical standards being completed at the end of this year when they had published on 30 June draft standards covering authorisation, passporting, third-country firms and regulatory co-operation in July. This reflected the fact that there are some outstanding implementing technical standards, on issues such as forms for regulatory co-operation, for which the deadline for providing a draft to the Commission is 3 January

2016, rather than the prospect of a delay in completing the draft standards due to be agreed in September.

3. The EC continues to work towards the adoption of the delegated acts at some point after the summer break.

Industry implementation issues

4. The FCA expressed thanks for the responses it had had to a request for trade associations to provide details of their members' key implementation concerns. The FCA said the issues raised fell into four main categories:

- **Policy concerns.** A variety of issues were raised about where Europe or the FCA might end up in relation to issues covered by the delegated acts and technical standards on the one hand, and the FCA's Discussion Paper (DP) on the other. Industry would need to wait for the adoption of the delegated acts, the publication of the draft technical standards and the publication of the FCA's consultation paper to find out where these issues had come to rest.
- **Technical challenges.** Concern was expressed about the scale and nature of the systems changes to implement various requirements, including those relating to transaction reporting, position reporting, best execution disclosures, costs and charges for disclosure and inducement restrictions on research.
- **Uncertainty over key processes.** There were indications that firms were finding it difficult to plan when they did not know when and how equivalence determinations would be made, how the process for applying for exemptions from position limits would work and how commercial firms would work through the process of applying to be authorised if that turned out to be necessary.
- **Interpretation.** There were concerns about the lack of certainty about what the legislation required in areas including the quoting obligations under the non-equity systematic internaliser regime, the boundaries between OTFs and MTFs, fields in various reporting regimes, the concept of 'target market' in product governance and aspects of the suitability regime.

5. The FCA said the various concerns had been shared with policy experts around the FCA. Given the nature of the concerns being expressed it reiterated that firms needed to plan effectively for implementation but there was an acknowledgement that they could not achieve the impossible. There was an appreciation that there would be difficulties in the transition from MiFID to MiFID II because it would only be after MiFID II had been up and running for a period that key information about the overall size of the European market and an understanding of how market structure was evolving would be available. The FCA also said that it and other ESMA members appreciated that guidance would be needed on top of the legislation to assist firms.

6. The FCA then turned to deal with some of the specific wholesale questions that had been raised:

- **Energy Market Participants (EMPs).** The FCA said that the regime for EMPs who are not MiFID firms was dependent on where the UK's regulatory boundary ended up after MiFID II was implemented. Because of uncertainty over the ancillary exemption no decision could yet be made on this. The FCA had, however, flagged in discussions with HM Treasury that this was an issue that would need to be thought about in due course.
- **Authorisation.** The FCA said that, except for applications in relation to operating an OTF and undertaking regulated activities in relation to emission allowances and structured deposits on which the Treasury had consulted on transitional provisions, any firm applying for authorisation

under MiFID II would be subject to the standard provisions in FSMA in regard of the time the FCA had to deal with such applications. It could, however, see that depending on where the RTS on the ancillary exemption comes to rest there might be a case for extending the transitional provisions to applications by commodity derivatives firms.

- **Market-wide data.** The FCA accepted that there was a specific challenge around the authorisation of commodity derivatives firms and identification of SIs linked to the need to know overall trading activity ('size of the market') in the EU in financial instruments. It said that this was an issue that ESMA was considering to see whether there was something it could do to assist firms and ensure consistency of approach across the EU.
- **Golden source.** Industry participants had expressed concern about the availability of information on instruments trading on trading venues across the EU. The FCA noted that ESMA was required to publish information on reference data. Firms would therefore have access to the same information as competent authorities.
- On the **position limit reporting regime** it was asked if the FCA intends to work with the exchanges. It was confirmed that the FCA would speak with the exchanges in relation to contracts falling within its regulatory remit.
- The issue of possible '**over reporting**' of transaction reports was raised. Due to the lack of available data it was recognised that this was a possibility and has been identified and is being considered by the FCA.
- **Legal Entity Identifiers (LEIs).** Industry had questioned the practical implications of the widespread requirement for LEIs. FCA suggested that it might be able to provide some information setting out the need for this information on its website.
- **Taping.** Some detailed questions had been raised about the taping regime, including that the requirements raised data protection issues. The FCA said that the taping rules did not require the taping of face-to-face conversations. The requirements on accessibility of the information and monitoring of calls were similar to those the FCA would expect under its existing taping rules. And firms would be expected to respond in a reasonable timeframe to reasonable requests from clients for copies of tapes without a charge. The necessary detail will be set out in the December CP.

7. The FCA then fed back on some retail issues that had been raised:

- **Product governance.** A few TAs had raised concerns about the lack of clarity about identifying a product's target market – especially where there may be a lack of consistency in approach by different firms and different jurisdictions. The FCA noted that ESMA, in its technical advice, had signalled scope for future Level 3 work in this regard. The FCA noted that consistency with PRIIPs – which also has target market requirements – also needs to be taken into account.
- **Costs & charges disclosure.** The FCA confirmed that the MiFID II costs disclosure requirement applied to execution-only business (as noted in ESMA's consultation on its technical advice), and that Article 33 of the existing implementing directive already required this disclosure. On the aggregation requirement, which does not distinguish between known and unknown (volatile) costs, the FCA noted that ESMA's technical advice set out that volatile costs should be estimated on a best efforts basis, based on reasonable assumptions. On portfolio depreciation, the FCA noted that ESMA's technical advice set out that 10% was the reporting trigger. On evidencing that clients have accessed on-line valuations, the FCA noted that ESMA's technical advice had set out that firms can generally satisfy

themselves that a client had accessed the valuation if they have a record that the client has logged on online and accessed the relevant section.

- **Trail commission.** The FCA noted it had no plans to change its current rules on trail commission. The sunset clause for platforms (no payments from providers from April 2016) is affecting the availability of trail, but the FCA has no plans to alter pre-RDR trail off-platform. Further, the FCA noted that it had always expected that trail would diminish as a % of income over time; and that a product switch where advice is given will mean moving to adviser charging, so trail is switched off.

ESMA Level 3 work

8. The FCA said that within ESMA, exchanges of views were happening about possible areas for Level 3 work, both guidelines and Q&A. At this stage the work was not sufficiently advanced to say anything of note, but the pace would pick up once the technical standards were completed. A TA expressed concern about the way that the Q&A process had worked in relation to EMIR, particularly the fact that there did not appear to have been in some cases any discussion with industry, such as the ESMA consultative working groups, before material with significant implications for how implementation took place were published. The FCA noted the concern expressed.

FCA MiFID II conference

9. The FCA said that planning was continuing for its next MiFID II conference which would be held on 19 October. There would be a 'soft launch' later in July with relevant firms being alerted to the conference and asked for views on what it should cover (they would see a list of topics the FCA was planning to cover), and then a 'hard launch' in September when people would be able to sign up. The FCA's intention is that the conference will be focused on the implementation of markets and wholesale issues, with communication on retail issues taking place through other means.
10. TAs asked about whether materials from the conference would be made available to those unable to attend or who were interested in multiple sessions taking place in parallel on the day. The FCA noted that it had posted some of the sessions from its 2014 conference to the internet and would look at doing this again for this year's event.

AOB

11. The FCA said it was trying to understand how many firms might seek authorisation as a result of the fact that firms with DEA access to regulated markets and MTFs under MiFID II will not be able to avail themselves of the own account dealing exemption in Article 2(1)(d). TAs said that there were particular concerns around commercial firms trading foreign exchange and that they would get back to the FCA with more details.
12. It was asked if the FCA could also provide an update on MAR implementation at the next roundtable discussion.