

Minutes

Meeting:	MiFID II Implementation – Trade Association Roundtable	
Date of Meeting:	22 November 2016	
Venue:	25 The North Colonnade, Canary Wharf, London, E14 5HS	
Present:	Stephen Hanks - FCA	Catherine Crouch – FCA
	Damien Shanahan - FCA	Adam Wreglesworth – FCA
	Daniel Measor - FCA	Fazila Gauhar – FCA
	Lucas Penfold - FCA	Federico Cellurale – FCA
	Kevin Phelan – FCA	Jack Lale – FCA
	Representatives of various trade associations and firms	

1 Introduction

- 1.1 The FCA said its fourth MiFID II consultation paper (CP 16/43¹) was on schedule to be published in mid-December. In terms of policy statements, the FCA said it expected to publish one in March 2017 dealing with mainly markets issues, and a second in June 2017 dealing mainly with conduct and perimeter issues. Where possible the FCA will try to give an indication of the direction of thinking through roundtables and other industry engagement.
- 1.2 An initial question asked about the publication dates of RTS 20 and 21², which were subsequently published on the 1 December 2016. The FCA was also asked whether there was a plan to create a COBS guide, as this would be helpful for those readers without specialist legal or compliance backgrounds. The FCA stated it was considering this, and urged participants to feed back through the CP responses.

CP 16/29

- 1.3 The FCA introduced CP 16/29³, which is focused on both conduct of business issues, as well as other organisational arrangements that are not addressed in the previous two CPs. They then went through the main topics the CP covers providing a chance for questions on each of the topics.

¹ <https://www.fca.org.uk/publication/consultation/cp16-43.pdf>

² . http://ec.europa.eu/finance/securities/docs/isd/mifid/its-rtis-overview-table_en.pdf#page=3

³ <https://www.fca.org.uk/publication/consultation/cp16-29.pdf>

2 Inducements and Research

- 2.1 The FCA gave an overview of the reforms of the use of dealing commission rules.
- 2.2 A question had been sent in advance asking about how the new regime interacts with the US regime. The FCA said it was aware of industry discussions with US authorities on this issue, but there was nothing per se in the legislation that enabled a different approach to be taken in regard of research received from brokers outside the EU.
- 2.3 Discussion moved on to the application in fixed income markets. Participants noted that the AMF in its consultation on the application of the research rules had asked a question about the application of the requirements to fixed income research. The FCA said that the legislation applies to research related to all financial instruments. This might be an issue addressed in future ESMA Level 3 Q&A.
- 2.4 Questions were asked relating to the requirements when dealing with non-EU delegates of managers as well as broader extra territorial issues. It was noted that ESMA had already produced one Q&A regarding the extra territorial issues, and that with non-EU delegated managers it would depend on the precise legal structure of a company as to how it would apply. Also the organisational requirements relating to outsourcing require outsourcing agreements to ensure that the outsourced provider carries out the services in compliance with regulatory requirements.
- 2.5 Questions were asked about the VAT treatment of research. The FCA said VAT treatment was a matter for HMRC and whilst it could provide information to HMRC about the reforms, it did not have a role to play in decisions about how VAT applies to payments for research.
- 2.6 One topic of discussion that chimed with feedback received in other meetings was around the timing of sweeping research payments collected alongside transaction fees to a Research Payment Account (RPA). Attendees questioned whether it was practical or proportionate for this to occur immediately as envisaged in the CP. The FCA said it was willing to consider further this issue and said it would welcome detailed feedback on this in responses to the CP.
- 2.7 It was also asked whether macroeconomic research constituted a minor non-monetary benefit. The FCA said that this was one of the issues ESMA was considering and there might therefore be Level 3 Q&A on this subject in due course.

3 Investment Research

- 3.1 The two relevant changes were emphasised: explicit requirement for firms to introduce a physical separation given certain conditions and application of certain conflicts of interest requirements to non-independent research. No issues were raised or discussed.

4 Best Execution

- 4.1 The FCA set out the changes introduced by RTS 27 and 28. The first being the requirement for a quarterly report by trading venues and liquidity providers and the second being an annual report by brokers and portfolio managers on the top 5 execution venues plus a summary of the quality of execution achieved over the year.
- 4.2 The FCA said it expected ESMA Level 3 Q&A to clarify that the first annual report under RTS 28 would be expected four months after the implementation of MiFID II, but that it was recognised firms would have less data to compile reports in 2018 than would be the case in 2019.
- 4.3 Discussion moved on to situations where the relevant executing venue is more ambiguous and thus harder to report on. One example was the increasing use of direct electronic access, and whether for investment managers the broker providing the access should be

reported as the executing venue or whether they should be 'looked through' to the ultimate execution venue. The FCA said that ESMA might seek to clarify this in due course but its initial view was that where a portfolio manager was using direct electronic access it would be more meaningful to refer to the venue being used than the broker.

5 Record keeping requirements

- 5.1 The FCA highlighted that they were consulting on having two different sets of record keeping requirements that relate to the record keeping of client orders, decisions to deal and transactions.

6 Client categorisation

- 6.1 The FCA emphasised the proposed higher quantitative test in place if a local authority wants to opt up to elective professional client status, and the distinction in applying the categorisation tests between a local authority acting as pension fund administrator and as treasury manager.
- 6.2 A question was asked about whether the proposed new rules would apply to non-EU firms providing services to UK local authorities. It was noted that our proposed, and current, rules apply to FCA-authorised persons.
- 6.3 A further question was raised about local authorities that set up a separate legal entity to conduct certain investment business, and whether they would be captured by the changes to client categorisation. The FCA said that the relevant question was to whom the service was being provided; if it was a legally separate entity then it would not be captured.
- 6.4 It was also clarified that government agencies were not captured under the definition of a 'local authority', which instead was defined with reference to the Local Government Act 1972.
- 6.5 Discussion then moved on to who can opt local authorities up, does it have to be a UK authorised MiFID firm? It was noted that it was our intention to apply the proposal rules to firms conducting both MiFID and non-MiFID designated investment business, although when providing services to other EU local authorities, classifying clients would be subject to the relevant rules of that member state.

7 Taping

- 7.1 The FCA highlighted the key differences between the MiFID II taping regime and the current domestic regime that has been in place since 2008. The discussion focused on the introduction on new organisational requirements, specifically the retention period extending from 6 months to 5 years.
- 7.2 A question was asked about conversations that fall within the scope of the obligation. The FCA cited Question 8 in ESMA's Level 3 Q&A, which states that since at the start of a conversation one cannot know whether a conversation will lead to the conclusion of a transaction, all of the conversation should be taped to ensure nothing in scope is missed.
- 7.3 Discussion then moved to internal calls. The FCA reiterated the message in Question 1 of ESMA's Level 3 Q&A which stated that where internal calls relate to the reception, transmission and execution of client orders or dealing on own account by the firm then they need to be taped, although ordinarily this should not require the lines of staff performing back-office functions to be recorded.
- 7.4 There was discussion around the requirements that will apply to Article 3 retail financial advisers. The FCA highlighted the part of the CP which stated that it remains open to receiving and exploring suggestions on alternatives proposals to taping for smaller Article 3 financial advisers.

8 PERG

- 8.1 The FCA noted that consultation on different elements of perimeter guidance had been split across CP15/43⁴ CP16/29 and the fourth CP (CP 16/43). Most of the perimeter guidance in CP16/29 related to foreign exchange forwards. The FCA felt that it was important to try and provide assistance to firms in understanding the new perimeter in this difficult area. It was not currently aware of plans by the European Commission or ESMA to provide interpretative material on this topic.
- 8.2 A question was asked about binary bets. The FCA said that the Treasury has set out its intention to bring certain binary bets within the scope of the RAO based on interpretative material from the Commission that said they should be regarded as MiFID financial instruments.

⁴ <https://www.fca.org.uk/publication/consultation/cp15-43.pdf>