

HM Treasury's proposals for wholesale market reform

Overview

On 1 July 2021, HM Treasury (HMT) published a consultation paper for its Wholesale Markets Review (the CP).

The objectives of the CP are:

- (a) to set out and obtain feedback on specific reforms HMT is considering introducing to the MiFID II framework (as onshored into UK laws) following the UK's withdrawal from the EU (Brexit), including divergence from EU MiFID II;
- (b) to obtain market views on the functioning of particular aspects of the UK wholesale financial markets; and
- (c) to set out the general approach of HMT and the UK Government to reforms in this area post-Brexit.

The areas considered by HMT in the CP overlap in certain aspects with those being considered by the EU authorities in their ongoing programme of reviews of the MiFID II framework, although, in other areas, HMT has indicated a willingness to move ahead of the EU proposals. As indicated

in the CP, HMT does not intend to wait for review on the EU side to complete before moving forward with UK reforms, or necessarily take into account the EU position.

In this briefing, we look first at HMT's stated approach to reforms in the broad area of wholesale markets reform, before looking in detail at each set of proposals identified by HMT. We also distinguish between those proposals which are firm and those which are at this stage only tentative or open to consultation, and highlight where, if at all, current EU proposals overlap with the proposals contained in the CP. Where no equivalent proposal is being considered by the EU, we flag where their attention is currently focused.

HMT's approach to wholesale market reform

The EU's MiFID II framework came into effect on 3 January 2018, while the UK was a member state of the EU. It consists of a directive (Directive 2014/65/EU), which had to be implemented by each EU member state, a regulation (Regulation (EU) 600/2014, MiFIR), and numerous pieces of secondary legislation, together with significant volumes of guidance from the EU authorities. Together, MiFID II represents one of the most far-reaching elements of EU financial services regulation, and effectively harmonises most aspects of the regulation of wholesale markets across the EU.

HMT comments in the CP that MiFID II is not calibrated for the idiosyncratic features of markets in individual member states, and therefore that Brexit provides an opportunity to

recalibrate wholesale markets regulation as it specifically applies to the UK. In HMT's view, "given the extent and complexity of the new regulation introduced by MiFID II, some rules have not delivered their intended benefits, have led to duplication and excessive administrative burdens for firms, or have stifled innovation. The government intends to rectify this".

This represents a significant moment for firms subject to wholesale markets regulation because dramatic changes to the UK regulatory rulebook and material divergence from the EU position are likely to lead to transition costs for firms and, for many firms operating in a multinational environment, ongoing compliance issues arising from following multiple sets of non-harmonised rules.

The CP is clear that, although the proposed reforms will remove or simplify certain requirements, it is not HMT's intention to lower standards for wholesale markets. It remains to be seen, however, whether the "less prescriptive" regime HMT expresses a desire for will, if enacted in full, in practice amount to some level of de-regulation of the UK wholesale markets.

The CP sets out four objectives and principles HMT intends to follow in reforming the UK's wholesale markets regime:

- (a) Upholding high regulatory standards to ensure that the UK's regime is effectively enforced, sets an international example and allows firms and investors to operate in confidence and trust the operation of the market.
- (b) Promoting openness and competitiveness, to allow a range of participants to access domestic and overseas markets easily, appropriately and at relatively low cost, allowing for greater competition and innovation, and to cement the UK's position as a global hub for wholesale markets.
- (c) Delivering fair and proportionate regulation, to ensure that the UK's regime is underpinned by proportionate standards that are focused on outcomes rather than prescriptive rules, enabling firms and investors to operate in the market without unnecessary friction and costs.
- (d) Supporting economic growth, to ensure that the UK's regime supports growth in the real economy, innovation, entrepreneurship and wealth creation across society, and facilitates investment, both in the short term and in the long term.

The CP also reiterates the four themes expressed by the Chancellor in his speech of 1 July 2021 as guiding the Government's vision for UK financial services. As expressed there, the Government intends for the UK to be: (a) an open and global financial centre; (b) at the forefront of technology and innovation; (c) a world leader in green finance; and (d) a competitive marketplace promoting effective use of capital.

In light of these themes, the CP looks forward to further proposals the Government may bring forward in future, including on distributed ledger technology, green finance, and access to capital markets for retail investors. The CP also refers to the ongoing Future Regulatory Framework review, a consultation paper which was published in October 2020, and the UK listings review and consequent proposals as to the prospectus regime, as being relevant to the overall framework discussed in the CP.

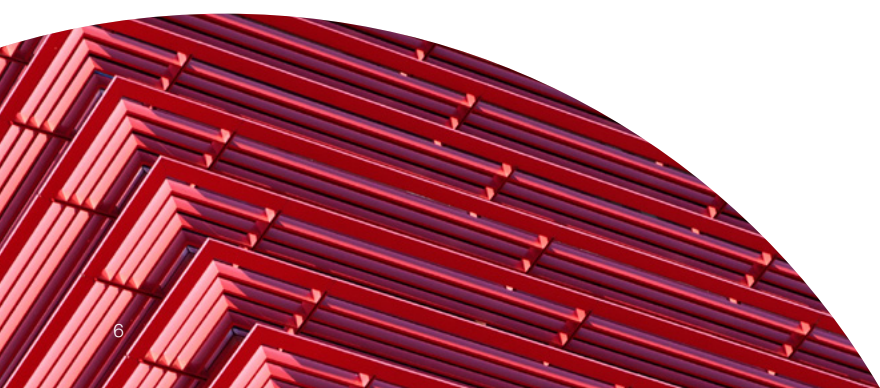
Issue	Proposal	Current EU proposals
Trading venues		
Definition of "multilateral system"	<p>MiFID II regulates "multilateral systems", defined broadly as systems in which trading interests can interact. HMT considers that the breadth of the definition in MiFID II has caused uncertainties, especially for technology providers. HMT therefore proposes to clarify the perimeter of the concept. However, in the interests of avoiding further confusion, HMT is contemplating the use of more definitive guidance rather than the use of legislation to clarify the concept.</p> <p>No firm proposals.</p>	<p>No formal proposals. ESMA Final Report on the functioning of OTFs published in April 2021 which looks at the definition of a multilateral system and the trading venue perimeter. ESMA puts forward a two-step approach aimed at clarifying the trading venue perimeter – moving Article 1(7) from MiFID II to MiFIR and the publication of an Opinion by ESMA which clarifies the boundaries of trading venue's authorisation.</p>
Restrictions on MTF and OTF activities	<p>"Multilateral trading facilities" (MTFs) authorised under MiFID II are prohibited from carrying out matched principal trading, while "organised trading facilities" (OTFs) are prohibited from acting as systematic internalisers (SIs) and from executing transactions in equities.</p> <p>HMT has questioned whether these prohibitions remain necessary, and, in particular, is considering allowing OTFs to execute transactions in equities when dealing in packages.</p> <p>No firm proposals.</p>	<p>No formal proposals. ESMA Final Report on the functioning of OTFs published in April 2021 which includes a recommendation to the Commission to add a definition of bulletin boards to MiFID II and to align the provisions regarding the prohibition of the use of MPT amongst MTFs and regulated markets.</p>

Issue	Proposal	Current EU proposals
<p>Disclosure requirements for SMEs</p>	<p>HMT is considering how best to support a proportionate framework for capital raisings by small and medium enterprises (SMEs), by reducing requirements on disclosure by issuers and/or limiting the applicability of the onshored Market Abuse Regulation (perhaps by using a separate venue or segment of a venue specifically for SMEs).</p> <p>No firm proposals.</p>	<p>No formal proposals. ESMA Final Report published March 2021 which suggests simplifying investors' access to information and promoting concentration of liquidity on SME Growth Markets.</p>
<p>Market outages</p>	<p>HMT is considering whether to introduce a regime (in guidance or legislation) setting out what occurs during an outage in a trading venue's service.</p> <p>No firm proposals.</p>	<p>No formal proposals. On 18 December 2020, ESMA published a consultation paper looking at the impact of requirements relating to algorithmic trading. Amongst other items, ESMA seeks feedback on whether improvements could be made regarding communication of incidents to the public and whether any initiative should be put forward to ensure there is more continuity on trading in case of an outage on the main market.</p>
<p>Systematic internalisers (SIs)</p>		
<p>Definition of SIs</p>	<p>An SI is defined under MiFID II as an investment firm that deals on its own account when executing clients' orders outside of a trading venue (that is, a regulated market, MTF or OTF) on an "organised, frequent, systematic and substantial basis".</p> <p>An SI is subject to particular requirements under MiFID II, such as additional transparency requirements.</p> <p>Detailed quantitative as well as qualitative rules made under MiFID II set out when the level of trading required to make a firm an SI is considered to occur, although a firm may also opt-in to the regime. An SI is classified as such in respect of a particular instrument type rather than being an SI for all purposes under the regime. In practice, to avoid undue complexity in measuring whether the firm qualifies as an SI and in which instruments, firms have opted-in to being an SI for all instruments they trade.</p> <p>HMT's view is that the quantitative calculations required to assess whether a firm is an SI for an instrument type either generate excess costs or force firms to opt-in to the SI regime unnecessarily, and that the instrument level definition of SIs creates difficulties in determining who should report transactions to regulators under MiFIR (which, under MiFIR, is the responsibility of an SI).</p> <p>HMT proposes to revert to only use the qualitative definition for SIs and to have to an entity level definition of SIs for the purposes of reporting.</p>	<p>No formal proposals or recommendations.</p> <p>In relation to pre-trade transparency obligations in relation to non-equity instruments, ESMA published a review report on 16 July 2020.</p> <p>The key recommendations in that context are:</p> <ul style="list-style-type: none"> – Allowing SIs to withdraw quotes at any time; – Simplifying the requirements applicable to quotes in liquid and illiquid non-equity instruments; and – Extending the publishing requirements for quotes to non-equity instruments.
<p>Tick size regime for SIs</p>	<p>The "tick size" regime, as it applies to SIs, limits the increments in which SIs' price quotes may be given. HMT does not consider this has benefitted price formation as it applies to SIs.</p> <p>HMT proposes to remove the tick size regime for SIs and allow SIs to carry out "mid-point" execution (where the executed price is within the SI's quote).</p>	<p>No formal proposals. ESMA Final Report published on 16 July 2020 which recommends increasing the minimum quoting obligations and a revised methodology for determining the standard market sizes relevant for quoting by SIs.</p>

Issue	Proposal	Current EU proposals
Equity markets		
Pre-trade transparency – double volume cap (DVC)	<p>MiFID II transparency requirements oblige firms to publish certain pre-trade information to the market, subject to certain waivers. Certain of the waivers are themselves subject to cap on the total trading which may be conducted under those waivers on a particular trading venue and on all trading venues (the DVC). The intention of this limit was to limit so-called “dark trading”, which the EU authorities had suggested could have an adverse effect on price formation. However, HMT comments that such effects are complex, and supporting data suggests only kick in at volumes significantly in excess of the DVC thresholds. HMT also point out that other major trading centres around the world do not have similar requirements.</p> <p>HMT proposes to repeal the DVC, subject to continuing monitoring of the use of dark trading by the Financial Conduct Authority (FCA).</p>	<p>No formal proposals. ESMA Final Report published on 16 July 2020. ESMA proposes the retention of the DVC but with a number of modifications including the transformation of the DVC mechanism into a single volume cap by deleting the 4% trading venue threshold.</p>
Pre-trade transparency – reference price waiver	<p>The “reference price waiver” allows a waiver of pre-trade transparency obligations where systems through which the relevant instruments are traded determine their prices by reference to prices generated by another system.</p> <p>MiFIR limits what this other system can be to be the trading venue where the relevant instrument was admitted to trading or from the most relevant market in terms of liquidity. HMT considers this to be too limited.</p> <p>HMT proposes to allow trading venues using the reference price waiver to derive a reference price from any trading platform that offers the best execution result, matching orders at the mid-point of bids and offers of any UK or non-UK trading venue.</p>	<p>No formal proposals. ESMA Final Report published on 16 July 2020. ESMA proposes restricting the use of the reference price waiver to large orders.</p>
Pre-trade transparency by SIs	<p>HMT is considering how best to increase the level of quotes disclosed by SIs pre-trade.</p> <p>No firm proposals.</p>	<p>No formal proposals. ESMA Final Report published on 16 July 2020 which recommends increasing the minimum quoting obligations and a revised methodology for determining the standard market sizes relevant for quoting by SIs.</p>
Post-trade transparency	<p>Firms are required to disclose matters to the market following transactions. HMT considers there are areas where standardisation of the data required to be disclosed could assist price formation, but has not identified any specific proposals at this stage.</p> <p>No firm proposals.</p>	<p>No formal proposals. ESMA Final Report published on 16 July 2020 which recommends:</p> <ul style="list-style-type: none"> – Increasing the transaction size threshold for deferred publication of ETF transactions from a size of EUR10 million to a size of EUR15m. <p>Only requiring firms to specifically flag to ESMA’s FITRS transactions in those shares which are not subject to the STO in Article 23 of MiFIR but are subject to post-trade transparency.</p>
Share trading obligation (STO)	<p>The STO requires investment firms to trade shares admitted to trading on a trading venue through one such venue (or through an SI), subject to certain exceptions for ad hoc trading. The intention of this obligation was to move more liquidity back to trading venues rather than OTC trading, but HMT does not consider that the STO has been effective in this goal or conducive to price formation of stability.</p> <p>HMT proposes to remove the share trading obligation to allow firms to trade any shares on an OTC basis.</p>	<p>No formal proposals. ESMA Final Report published on 16 July 2020 which recommends limiting the STO to those shares which have an ISIN which identifies them as being EU shares and permitting shares within the scope of the STO to be traded on third-country trading venues where they are traded in a third-country currency.</p>

Issue	Proposal	Current EU proposals
Market making agreements	<p>MiFID II requires firms involved in algorithmic trading, where they make markets, to agree obligations with trading venues as to how they carry out such market making. HMT considers that empirical evidence shows these agreements have little impact on market quality.</p> <p>HMT proposes to remove the obligation to enter into algorithmic trading market making agreements.</p>	<p>No formal proposals. On 18 December 2020, ESMA published a consultation paper looking at the impact of requirements relating to algorithmic trading. Amongst other items, ESMA seeks feedback on the current market making regime, including whether too much discretion is placed on trading venues in relation to the content of market making agreements.</p>
Tick sizes	<p>As noted above, the tick size regimes limit the prices of equity instruments that can be quoted to certain established increments. Those increments are determined differently for different instruments depending on their liquidity in relevant markets. HMT considers the current rules on determining the tick size to be too restrictive although it is supportive of a tick size regime in general terms.</p> <p>HMT is considering allowing tick sizes to be based on trading in non-UK markets and allowing trading venues as opposed to the FCA to establish the tick size, but has not yet finalised proposals.</p> <p>No firm proposals.</p>	<p>No formal proposals. On 18 December 2020, ESMA published a consultation paper looking at the impact of requirements relating to algorithmic trading. ESMA suggests that no change to the tick size regime for shares and depositary receipts is required at this time although it is seeking feedback on proposed changes to the regime applicable to ETFs.</p>
Fixed income and derivatives markets		
Derivatives trading obligation (DTO) – alignment with clearing obligation	<p>The DTO requires trading of certain classes of standardised and liquid derivatives on trading venues. The scope of the DTO was designed to align with the scope of the clearing obligation set out in Regulation 648/2012/EU (EMIR) (which is now UK onshored law). EMIR requires certain derivatives to be cleared through a central counterparty. Following recent reforms to EMIR, the DTO and the clearing obligation have become misaligned.</p> <p>HMT proposes to align the DTO with the clearing obligation in EMIR.</p>	<p>No formal proposals. ESMA Final Report published on 25 September 2020, which recommends full alignment between the EMIR clearing obligation, as amended by EMIR Refit.</p>
DTO exemption for post-trade risk reduction	<p>There are certain complex exemptions from the DTO for derivatives transactions which are intended to minimise risks arising from earlier derivatives transactions (such as portfolio compression), but these do not cover all such situations.</p> <p>HMT proposes to exempt all such post-trade risk reduction from the scope of the DTO provided they do not result in price formation. HMT is considering whether there should be a corresponding exemption from the clearing obligation in the onshored version of EMIR but has no firm proposals.</p>	<p>No formal proposals. ESMA Final Report published on 25 September 2020 which does not recommend similar changes. ESMA has proposed, in the context of the DTO:</p> <ul style="list-style-type: none"> – additional criteria for third-country trading venues to be deemed equivalent, including non-discriminatory access and equivalent transparency provisions; – more granular reporting; and – the possible alignment of the assessment of liquidity for transparency purposes for the purposes of the DTO.
DTO suspension	<p>The FCA has suspended the DTO in order to allow UK firms to use EU trading venues to comply with the DTO post-Brexit. HMT considers this suspension has allowed improved market functioning and resilience, indicating that the FCA should have a broader power to suspend the DTO where appropriate.</p> <p>HMT proposes to allow the FCA to suspend the DTO at will, provided it consults with HMT in advance.</p>	

Issue	Proposal	Current EU proposals
<p>Transparency requirements – test for application</p>	<p>Transparency requirements for fixed income and derivatives markets depend on whether the instrument or class of instrument is admitted to trading or traded on a trading venue (TOTV). HMT considers that the TOTV requirement is ambiguous when applied to certain classes of OTC derivatives that have similar characteristics to derivatives admitted to trading on a trading venue and therefore prevents transparency requirements from being applied consistently.</p> <p>HMT proposes to replace the concept of TOTV for transparency purposes with a test based on whether the instrument is centrally cleared.</p>	<p>No formal proposals. ESMA Final Report published on 25 September 2020 which recommended continuing to apply the same TOTV concept across relevant MiFIR obligations and considering further whether TOTV should include derivatives traded by SIs (but without making any firm proposals at this stage).</p> <p>On 23 March 2021, ESMA published a Final Report on the obligations to report transactions and reference data and makes recommendation for simplifying the ToTV concept by replacing it with the SI approach for OTC derivatives.</p>
<p>Transparency requirements – illiquid instruments exemption</p>	<p>Transparency requirements are subject to an exemption where the instrument is illiquid, which is determined by a series of complex calculations made on a backward-looking basis.</p> <p>HMT proposes that the illiquid instruments exemption be based on qualitative and quantitative criteria rather than the existing calculations. No firm proposals on the specific criteria to be used.</p>	<p>No formal proposals. ESMA Final Report published on 25 September 2020 which recommends, in the context of the definition of liquidity for bonds, that something should be done to increase the number of bonds deemed liquid and therefore open to pre-trade transparency. Options floated include removing the concept of liquidity entirely and replacing it with large in scale, and using different measures of liquidity.</p>
<p>Transparency requirements – scope of pre-trade transparency</p>	<p>HMT broadly considers that the extension of pre-trade transparency to fixed income and derivatives instruments (which one of the most controversial elements of MiFID II) has not worked effectively. HMT attributes this to the use of request for quote trading arrangements prevalent in these markets rather than central order books of the sort prevalent in equities markets.</p> <p>HMT proposes to limit the scope of pre-trade transparency to systems such as electronic order books and periodic auctions that operate under full transparency, and exclude bespoke trades from scope. Depending on the final position on that reform, it will then look at the waivers applicable to pre-trade transparency (within its more limited scope).</p>	<p>No formal proposals but ESMA considers that the accessibility and content of information provided as part of the pre-trade transparency regime for non-equities to be below the required standard. The Final report published on 25 September 2020 recommends harmonising to a greater extent the content and format of pre-trade transparency (with the number of fields kept to a minimum).</p> <p>In the context of waivers, the report recommends deleting the SSTI waiver.</p>
<p>Transparency requirements – deferrals for post-trade transparency</p>	<p>MiFIR allows deferral of post-trade transparency requirements in certain circumstances. HMT considers that the number and types of deferrals available are confusing and do not support transparency and price formation.</p> <p>HMT proposes to remove the “size specific to the instrument”, “package order” and “exchange for physical” deferrals, while retaining the “large in scale” deferral and “illiquid instruments” deferral (subject to certain amendments), and to allow trading venues (rather than the FCA) to calculate “large in scale” thresholds for exchange traded derivatives.</p>	<p>No formal proposals. ESMA Final Report published on 25 September 2020 which recommends streamlining the deferral regime with a simplified system based on volume masking and full publication after two weeks, and by removing the supplementary deferral options left to NCAs.</p>



Issue	Proposal	Current EU proposals
Commodity markets		

Scope of commodity derivatives regime

MiFID II applies specific requirements to “commodity derivatives”, but HMT considers the definition to be wide-ranging and complex, bringing instruments which should not be within scope of the regime.

HMT proposes to remove derivatives not based on physical commodities, securities which refer to commodities only as a pricing element, and “economically equivalent” OTC contracts from the scope of the commodity derivatives regime, although with the FCA and trading venues continuing to take account of relevant OTC contracts when monitoring markets.

Position limits

MiFID II requires the FCA to limit the maximum size of a net position that a person can hold in a commodity derivative traded on an exchange, or in “economically equivalent” OTC contracts. HMT considers the regime to be overly complex and leads to duplication between position limits set by the FCA and exchanges themselves.

HMT proposes to revoke the requirement for position limits to be applied to all exchange traded contracts, and to transfer the setting of position controls from the FCA to trading venues using broad guidelines set by the FCA and subject to FCA intervention. HMT also proposes to exempt firms from position limits where they hold the position in order to fulfil liquidity obligations, and to provide for a “pass-through hedging” exemption.

Under the EU MiFID “quick fix” amendments (which will apply from 28 February 2022), the scope of the position limits regime is being narrowed so that it will only apply to critical or significant commodity derivatives that are traded on trading venues, and to their economically equivalent OTC contracts.

There are new exemptions from the position limits regime for securitised derivatives and for positions resulting from transactions undertaken to fulfil obligations to provide liquidity. There is also a new hedging exemption for financial entities that trade on behalf of non-financial entities in a predominantly commercial group.

Deletion of concept of “same contract”.

ESMA mandated to further clarify the content of position management controls taking into account the characteristics of the relevant trading venues.

Position reporting

HMT is requesting proposals on the requirements in MiFID II for trading venue participants to report their positions in exchange traded derivatives.

No firm proposals.

Regulation of commodities firms

MiFID II exempts firms from regulation where they trade in commodity derivatives on an “ancillary” basis. Where this exemption applies, firms must confirm annually to the FCA that they are using this exemption and must demonstrate that they do not exceed activity thresholds in commodity derivatives. HMT considers this to be disproportionate given these firms are intended to be unregulated.

There is also a separate authorisation regime for oil market participants (OMP) and energy market participants (EMP). HMT considers this regime to be unnecessary when there is a general authorisation regime.

HMT proposes to have the FCA set a qualitative test to determine whether firms participating in commodity derivatives markets need to be regulated, and abolish the annual notification requirement for firms benefitting from the ancillary services exemption. HMT intends for OMP and EMP firms to become authorised or exempt.

The EU MiFID “quick fix” amendments to the ancillary activities exemption provides that NCAs should be able to rely on a combination of quantitative and qualitative elements when establishing whether an activity is considered to be an ancillary activity. The Commission has been empowered to provide guidance on this approach with the view to developing a delegated act on the criteria. The Commission is also required to review the impact of the exemption for emission allowances and their derivatives and, if appropriate, publish a legislative proposal to amend it by 31 December 2021.

Issue	Proposal	Current EU proposals
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Market data

Consolidated tape

HMT wants to support the creation of a “consolidated tape” of market data, which has not yet materialised despite provisions intended to assist in the creation of one in MiFID II.

HMT has not yet determined the measures it wishes to take post-Brexit to support this ambition. HMT’s preference is for a private sector tape to emerge. If this is the policy of HMT, HMT would propose legislation to require submission of data to a private sector tape, reduction in coverage requirements, removal of the requirement to provide data for free, changes to fixed income deferrals, and improvements in governance. An alternative suggested by HMT is to put in place a public sector tape, but this is not preferred by HMT at this stage.

No formal proposals. ESMA Final Report published December 2019 which recommends the establishment of a real-time consolidated tape for equity instruments and targeted legislative changes and supervisory guidance to improve market data transparency.

No firm proposals.

Reporting

General request for feedback

HMT has invited feedback on existing reporting regimes and their interactions with each other. For example, derivatives may need to be reported under both MiFIR and EMIR – although there are provisions so that compliance with one can be deemed compliance with the other, the dual obligation is arguably confusing given different circumstances and exemptions that may apply.

No formal proposals. On 23 March 2021, ESMA published a Final Report on the obligations to report transactions and reference data and recommended the alignment of reporting regimes such as MAR, EMIR and the BMR.

No firm proposals.

Reporting of losses to retail investors

HMT is considering whether the requirement on firms to give retail investors information on significant portfolio losses can be removed.

The EU MiFID “quick fix” amendments only introduce an exemption for eligible counterparties and professional clients with professional clients able to opt in.

No firm proposals.

Default method of communications

HMT is considering whether the default position for communications should be that they are given electronically. MiFID II provides for a paper-based default which must be expressly opted out of.

The EU MiFID “quick fix” amendments make electronic information the default for durable medium purposes, with retail clients being given the option to choose to receive paper-based information.

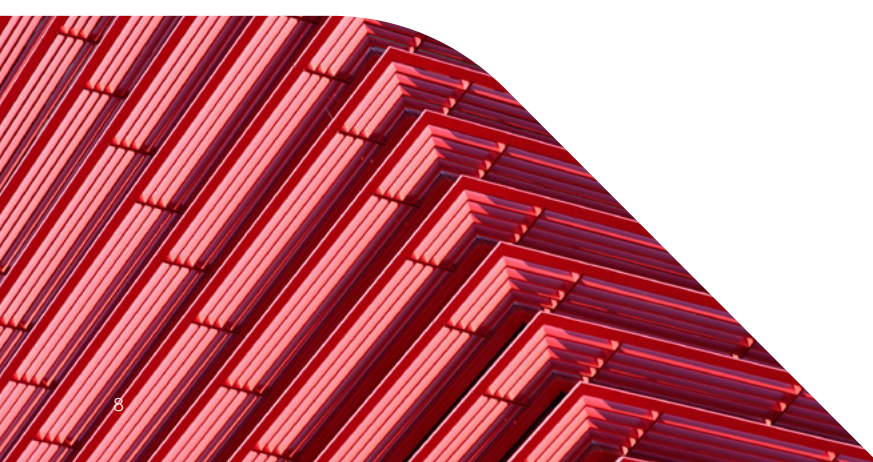
No firm proposals.

Use of ISINs for reporting derivatives

HMT is considering whether reporting of derivatives should continue to use International Securities Identification Numbers (ISINs) as data points, given that, in HMT’s view, they are less relevant in the context of derivatives.

No formal proposals. In ESMA’s Final Report on the obligations to report transactions and reference data which was published on 23 March 2021, ESMA highlights that responses were split between UPI replacing ISINs for all OTC derivatives and residual use of UPI. As a result, the Final Report simply includes a general reference to the need to *‘take into account international developments and standards agreed upon at Union or global level and their consistency with the reporting under Article 9 of EMIR’*.

No firm proposals.



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