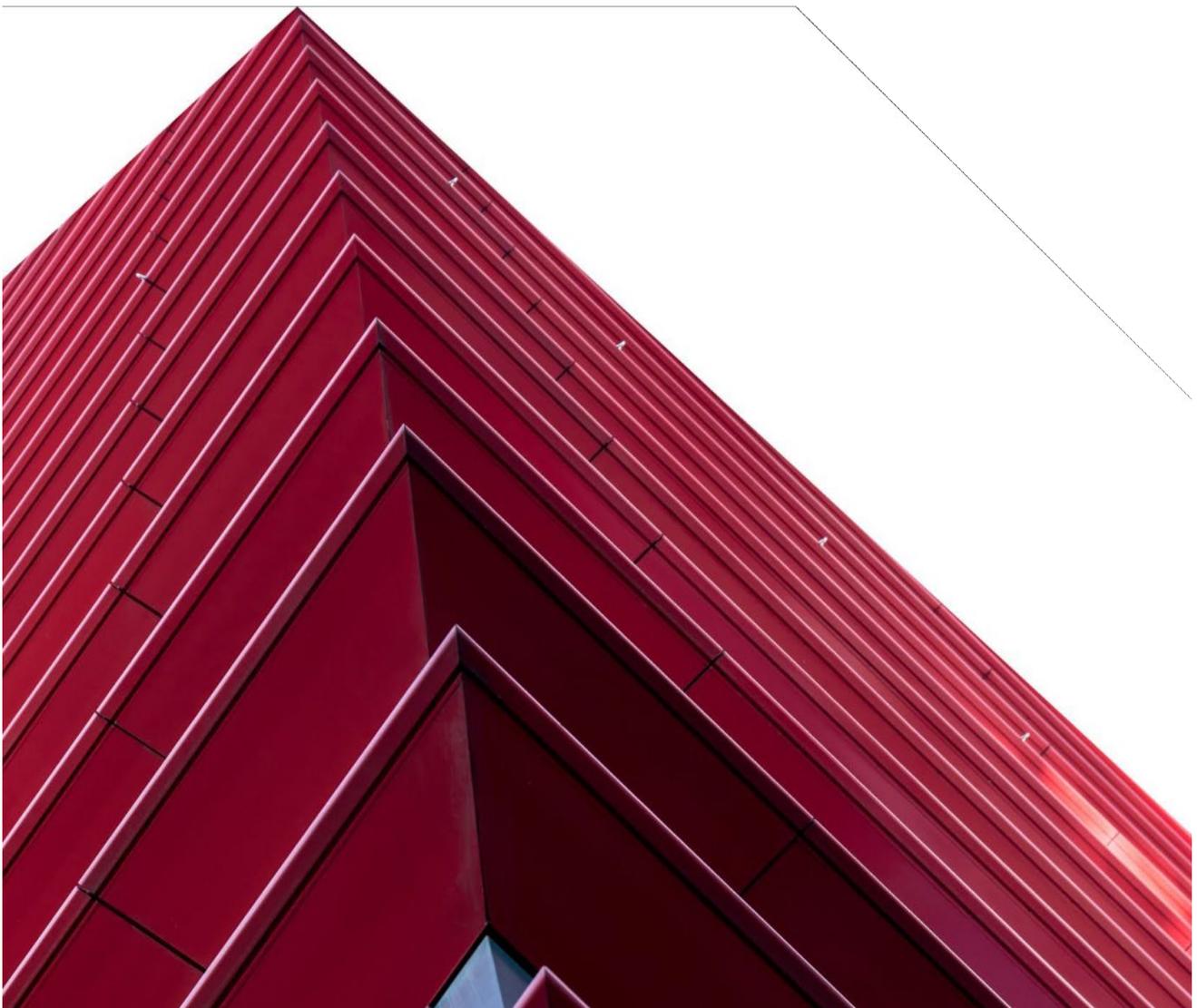


MiFID Review – MiFID 3 or simply 2.5?

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Introduction

Article 90(1) of MiFID II and Article 52 of MiFIR require the European Commission to submit reports to the European Parliament and the Council on a range of areas of MiFID II, after first obtaining technical advice from ESMA. Most of these reports were technically required by either March or July of this year, however these deadlines slipped in January last year following a letter from ESMA suggesting a revised timetable as a result of uncertainties caused by Brexit and the general clustering of deadlines under MiFID II and MiFIR.

On 17 February 2020, the Commission launched its long-awaited public **consultation** on the which takes place in parallel to ESMA's work and will also inform the Commission's reports which may, eventually, lead to legislative changes in a number of areas. The focus of the consultation is not only on areas of the framework that have been shown to be problematic since inception back in 2018 – for example, the share trading obligation (STO), it also looks to

ensure that MiFID regime can continue to develop and reflect new products and technologies. The consultation was due to run until 20 April 2020 but due to the impact of the Covid-19 pandemic, this has now been extended to 18 May 2020.

Separately, the Commission has also published for consultation an *impact assessment* on the MiFID II review. A related *webpage* explains that comments can be made on the impact assessment until 16 March 2020.

Whilst the consultation is not a review of the entirety of MiFID II or MiFIR, it is wide ranging and sets out those areas that it considers to be of priority. It is unclear at this stage whether this review will result in MiFID III or simply MiFID II Refit (or MiFID 2.5) over several stages; however, this article summarises the elements of the existing framework which are likely to draw the most attention (especially in light of the German Ministry of Finance consultation last year) and sets out timing for upcoming publications.

Executive summary – areas of priority

The table below provides a high level summary of the topics and areas considered to be priority and non-priority by the European Commission and whether this assessment aligns with other market players:

Key:

- ✓ = European Commission
- ✓ = ESMA
- ✓ = German Ministry of Finance
- ✓ = Industry

Topic	Priority?			Non-Priority?	
Consolidated tape	✓	✓		✓	
STO	✓	✓	✓		
Systematic internalisers	✓	✓		✓	
Post-trade transparency regime for non-equities	✓	✓	✓		
Investor protection					
<i>Simple & transparent products</i>	✓				
<i>Relevance & access to information</i>	✓	✓	✓		
<i>Information in a 'durable medium'</i>	✓				
<i>EU-wide database to compare products</i>	✓				
<i>Client profiling and classification</i>	✓			✓	
<i>Product Oversight, Governance and Inducements</i>	✓	✓	✓		
<i>Distance communication – taping & record-keeping</i>	✓	✓	✓		
<i>Best execution reports</i>	✓				
Research unbundling rules and SME research coverage	✓	✓			✓
Commodity markets	✓	✓	✓		
DTO	✓	✓			✓
Multilateral systems					✓
DVC	✓				✓
Non-discriminatory access	✓			✓	✓
Digitisation and new technologies				✓	
Foreign exchange				✓	✓

Background

Implementing MiFID II and MiFIR by 3 January 2018 was a significant undertaking for the industry as it overhauled existing regimes and addressed all investment services in all asset classes. Both the directive and the regulation prescribe that the Commission will review the effectiveness and impact of several requirements in relation to investor protection and market structure and transparency topics.

Coming only two years after the regime was implemented, many within the industry (including regulators) are still facing uncertainties and implementation challenges which, in a number of areas, have been compounded by Brexit. As a result, a 'refit' of the MiFID framework is arguably more appropriate at this stage rather than a complete re-write of the existing regime.

The German Ministry of Finance consulted investment firms, investors and other market participants one year after the application of MiFID II and MiFIR, on their experiences with the new

rules including investor protection and secondary market provisions. The **findings** did not reveal the need for a comprehensive review of MiFID II/MiFIR (i.e. a MiFID III) but did show a great deal of discontent with several requirements under the new regime and a desire for an early refit covering certain requirements. As a result, the German Ministry of Finance proposed a two-step approach to address these issues:

- near-term correction of minor, mainly technical deficiencies within the coming months; and
- subsequent work by the European Commission on more fundamental and contentious issues, if necessary on the basis of further in-depth analysis and studies.

This proposal is interesting principally because Germany will have the EU presidency in the second half of 2020 and it may be that the findings of the Germany Ministry determine the timing for possible near and medium term legislative changes.

European Commission Public Consultation

Similar to other recent consultation papers (for example, in relation to an EU framework for markets in crypto-assets), the MiFID Review consultation provides little detail as regards current Commission thinking in certain key areas. Framed as a questionnaire, it does, however, give an indication of what topics could be bumped up the legislative timeline. We look at those priority areas in more detail below and consider how they align with those identified by the German Ministry of Finance.

The consultation paper is divided into two main sections with a sweep up provision included at the end:

- The first section seeks views on the overall functioning of the MiFID II and MiFIR

Priority areas

The following topics have been identified by the Commission as priority areas for the review based on the experience gathered during the two years since implementation of the regime. Many of them are listed in the review clauses of MiFID II and MiFIR but others stem from issues raised by stakeholders (including public authorities), on possible shortcomings of the existing framework – for example, in relation to investor protection:

The consolidated tape (CTP)

- The MiFID II framework already provides for a CTP framework for equity and non-equity instruments but no consolidated tape has yet emerged, for the various reasons set out in the ESMA report discussed below. The Commission states that a single EU CTP would help brokers to locate liquidity at the best price available in the European markets, and increase investors' capacity to evaluate the quality of their broker's performance in executing an order. A European CTP could also be one major step towards "democratising" access to "market data" so that all investors can see what the best price is to buy or sell a particular share. The Commission also asserts that a CTP may not only prove useful for equities but also for exchange-traded funds (ETFs), bond or other non-equity instruments and draws on the practical experience highlighted by the existing American model for shares (consolidating pre- and post-trade data) and bonds (post-trade data).
- The Commission draws heavily on the recommendations of ESMA (see summary below) and for almost a quarter of the consultation paper sets out a range of questions seeking views on how a European CTP should be designed – namely, looking at what information it should consolidate (e.g. pre- and/or post-trade transparency), what financial instruments should be included (e.g. shares,

framework. The Commission states that the aim of this section is to gather feedback on whether a targeted review of MiFID II/MiFIR with an ambitious timeline would be appropriate to address the most urgent shortcomings.

- The second section focuses on a number of well-defined issues and asks specific questions on the existing regime. Those questions are divided into priority and non-priority areas.
- The third section includes one sweep up question where the Commission asks stakeholders to identify any additional issues not addressed in other sections of the consultation and which would "merit further consideration in the context of the review of MiFID II/MiFIR framework".

bonds, derivatives) and, what characteristics should be retained for its optimal functioning (e.g. funding, governance, technical specifications). Finally, the last subsection analyses possible amendments to certain MiFID II/MiFIR provisions (for example, the STO and transparency requirements) with a possible link to the CT. In relation to the STO, the Commission asks whether there is sufficient clarity on the scope of transactions included or exempted from the STO. There is also the opportunity for stakeholders to suggest that the STO is repealed altogether which would be in line with some of the responses received by the German Ministry of Finance as part of their

consultation which is discussed in the context of ESMA consultation papers below.

- Interestingly, the German Ministry of Finance views the CTP issue as a topic that should be considered in the medium term rather than the short term. However, in line with the process now being undertaken by the Commission, the consultation concluded that given the lack of CTPs, a thorough assessment is needed to determine the effects of the lack of CTPs and the potential benefits of and a need for recognising or establishing a CTP for equities and possibly non-equities.

Investor protection

- Investor protection provisions are a key focus of the consultation not only due to the review requirements set out in Article 90(1) of MiFID II but also as a result of issues being raised by stakeholders (including regulators) in the two years since implementation, new initiatives (for example, the Sustainable Finance Agenda) and the Council (in its December 2019 conclusions on the Deepening of the Capital Markets Union) inviting the Commission to consider introducing new categories of clients and optimising requirements for simple financial instruments where this is proportionate and justified, as well as ensuring that the information available to investors is not excessive or overlapping in quantity and content.
- The Commission is therefore seeking views on which requirements might be amended to facilitate direct access to simple financial instruments – for example, in the context of product governance, costs and charges requirements and conduct requirements. The consultation also explores whether the product governance regime prevents retail clients from

accessing products that would be appropriate for them and whether the obligations of the regime should be simplified.

- In addition to considering the introduction of a new client category of “semi-professional” (which would capture high net worth or sophisticated investor types), the Commission also asks whether ex-ante cost disclosures are useful in the context of professional and ECP clients. The usefulness of best execution reports (in their current form) has also been queried following significant criticism from the industry about the lack of benefit the reports provide to investors.
- The focus on sustainability raises the possibility of a phase-out of paper based information in the context of the provision of information in a “durable medium” and the question of whether telephone taping is a necessary tool to reduce the risk of mis-selling has also been raised – the German Ministry of Finance is in favour of deleting the provision or (at a minimum) allowing clients to waive the requirement.

Research

- The information received by the German Ministry of Finance during their consultation showed that reactions are divided with regard to the impact of MiFID II's rules on research fees. Some market participants stated that these rules have had positive effects on research costs (especially for research relating to large companies), while others claimed that these rules have had negative effects on SME research. The Ministry therefore concluded that a thorough review should be conducted on the impact that these rules have had on the costs and availability of research relating to SME businesses. It was suggested that any amendments to the legislation should ensure that incentives for providing an adequate amount of research on SMEs are set.
- The Commission acknowledges the declining research coverage for SMEs and proposes a number of policy options to relax the requirements, including removing the inducement restrictions on providers of SME research.

Commodity markets

- The German Ministry of Finance views position limits as a priority area – in concluding its consultation, it found that in general the current provisions on position limits work sufficiently well and contain speculation in the area of commodity derivatives. However, in relation to the development and growth of new and illiquid contracts, the requirements have proven to be a substantial barrier. It therefore suggested that for those contracts the requirements should be reviewed with the aim of allowing nascent markets to develop for niche instruments and preventing contracts from being shifted to OTC trading or to third country venues.
- This section of the Commission's consultation is intended to run in parallel to ESMA's on-going work on topic (discussed below) which is intended to be more technical in nature. The Commission's main concern also relates to nascent and illiquid markets where the Commission suggests that the rules on pre-trade transparency and on position limits could be recalibrated (to establish for instance higher levels of open interest before the limit is triggered) to facilitate nascent euro-denominated commodity derivatives contracts. The other option proposed would be to allow for trades negotiated over the counter to be brought to an electronic exchange in order to gradually familiarise commodity traders with the beneficial features of "on venue" electronic trading.

Non-priority areas

In part two of section 2 of the consultation, the Commission identifies areas which it does not consider priority and therefore does not believe that the legislation currently in place needs to be reviewed. As a result, that section does not contain policy options, although the Commission notes that if sufficient evidence demonstrates the need to introduce certain adjustments, the Commission may decide to put forward proposals on the following topics:

- **Derivatives trading obligation (DTO)** – MiFIR reflected G20 commitments in the context of moving trading in standardised OTC derivative contracts to exchanges and electronic trading platforms. ESMA determined two classes of derivatives that are subject to the DTO, namely IRS and CDS. These classes are a subset of the EMIR clearing obligation. The Commission invites market participants to share any issues relevant with regard to the functioning of the DTO regime, the scope of the obligation and the access to the relevant trading venues for DTO products.

- **Multilateral systems** – The consultation recognises the concerns raised by some trading venues as regards the emerging trend which allows alternative types of electronic platforms to offer very similar functionality to a multilateral system for the matching of multiple buying and selling interests. These electronic platforms are not authorised as regulated trading venues and therefore do not comply with associated regulatory requirements. The Commission states that the main argument advanced against regulation of these electronic systems is that they match trading interests on a bilateral basis and not via a multilateral system. However, this approach is seen as causing competitive distortions so the Commission is querying whether define the operation of a trading facility in broader terms than the current definition of trading venues or multilateral system so as to encompass these systems and ensure fair treatment for market players.
- **Double volume cap (DVC)** – running in parallel to the ESMA consultation in this area (which is discussed below), the Commission is seeking views on whether the regime is overly complex and failing the objective to reduce pure OTC trading in the EU. The German Ministry of Finance consultation suggested that recent developments in equity markets show that the DVC, as currently calibrated, leads to a shifting of trading volumes from order- book trading towards auction-based trading, thereby calling into question the original purpose of the DVC mechanism to ensure price formation. Against this backdrop, the Ministry has suggested that the DVC mechanism should be subject to a general re-assessment and that at a minimum, the DVC thresholds should be reviewed on short notice.
- **Non-discriminatory access** – The Commission is requesting feedback on whether the requirements of the open access regime (which is intended to allow market participants to trade and clear instruments on a non-discriminatory and transparent basis) have caused any operational or technical issues as well as giving rise to any benefits, such as cost efficiencies.
- **Digitisation and new technologies** – in addition to reiterating the Commission’s commitment to the principle of tech neutrality and seeking to understand where elements of the regime may be at odds with that principle and thereby blocking financial innovation, the consultation is also seeking to understand how EU financial regulation should cater for the impact on financial services of such innovations in the future.
- **Foreign exchange** – ESMA has already queried whether spot FX contracts should be brought within the scope of MAR as part of the MAR Review and highlights that one route to achieving that would be through the inclusion of spot FX within the definition of MiFID “financial instruments”. The Commission now raises the question of whether that term should be widened to include spot FX. A number of industry trade associations and other stakeholders pointed out the substantial flaws in this approach as part of the MAR Review – it is unclear from the wording of this consultation what the Commission view may be, but it was clear from the ESMA MAR Review paper that ESMA is reluctant to suggest such an approach.

ESMA consultations and review reports

In line with the revised time table published in January 2019 (as set out in the letter linked at the start of this article), ESMA began publishing calls for evidence and consultation papers in May 2019. The following section summarises some of the key publications before considering the timing for subsequent reports. It should be noted that due to the disruption that the Covid-19 pandemic has caused, ESMA has revised the timing for a number of its consultations and these are reflected below.

Commodity derivatives position limits and position management

On 5 November 2019, ESMA published a **consultation paper** which provided an initial assessment of the impact of position limits and position management on commodity derivatives markets and sought stakeholders' views on the amendments it was proposing to the existing Level 1 text – for example, in relation to reducing the scope of commodity derivatives under the position limit regime. Given the time it will take to make any Level 1 change to MiFID II, ESMA confirmed that it would also look at whether some amendments to the Level 2 measures on position limits may be appropriate in the meantime.

The paper also sought views on ESMA's proposal to revise the Technical Advice provided to the Commission on the delegated acts to be adopted under Article 58(6) of MiFID II on position reporting by categories of position holders. ESMA has suggested revising the minimum number and size of open positions to be met by commodity derivatives and emission allowances (and derivatives thereof) to be subject to weekly position reports by the relevant trading venue.

On 1 April, ESMA published its final **Review Report** on position limits and position management in commodity derivatives. In relation to levelling the

ESMA has also recently published additional papers relevant to the MiFID II regime – for example, in respect of the changes that the directive and regulation for the prudential supervision of investment firms make to the third country market access provisions; however, this section only focusing on those publications which relate specifically to the MiFID review.

playing field for commodity derivatives with the same physical underlying that are traded on different trading venues, ESMA suggests amending the Level 1 text by deleting the concept of “same contract” and replacing it with “a more cooperative approach” between national competent authorities and to set the baseline for the other months' limit for competing contracts based on the same underlying and sharing the same characteristics using the open interest of the most liquid contract.

Following feedback from stakeholders' regarding an extension of the hedging exemption from position limits to financial counterparties providing liquidity to trading venues, ESMA proposes to introduce in the Level 1 text “a narrowly defined hedging exemption” for such counterparties. In relation to position management, ESMA suggests that the examples of position management measures included in the consultation (for example, accountability levels and expiry and delivery limits), could be further considered in the context of amendments to Level 2 text. It also considers that the Level 1 text could be amended to ensure that trading venues have the power to obtain information from its members or participants on “related positions entered by a person on other trading venues or OTC, where

appropriate, to the benefit of efficient position management controls”.

ESMA also published revised **Technical Advice** on weekly position reports published by trading venues on open positions per category of stakeholders. ESMA suggests amending certain provisions of Commission Delegated Regulation (EU) 2017/565 setting out an obligation for trading venues to publish weekly reports on open positions per category of stakeholders, by replacing the condition

of a ratio of open interest compared to deliverable supply to assess the size of open interest triggering the publication of weekly reports with a threshold of 10,000 lots in open interest. In addition, and in order to protect confidentiality of individual positions, ESMA suggests that for contracts where a category of persons would include less than five active position holders, the weekly position report published would include no information for that category of persons.

Review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments.

On 5 December 2019, ESMA published its first review report regarding the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments – this incorporated responses received to the consultation paper published in July 2019.

ESMA’s review found that, to date, MiFID II has not delivered on its objective to reduce the cost of market data charged by trading venues and approved publication arrangements (**APAs**). As a result, it has proposed a mix of legislative changes and supervisory guidance to improve transparency and to ensure that market data is provided on a reasonable commercial basis. In addition, ESMA is recommending the establishment of an EU-wide

real-time consolidated tape for equity instruments. This is because no consolidated tape has materialised due to the “limited commercial rewards to potential providers within the current regulatory framework, as well as possible competition by non-regulated entities such as data vendors”.

The Report will feed into the Commission’s review of MiFID II on the development in prices for pre-and post-trade transparency data and on the consolidated tape for equity instruments. ESMA is going to start working on supervisory guidance on the application of the provision to provide market data on a reasonable commercial basis and towards improving the quality of OTC data.

Transparency consultation papers

Under MiFIR, ESMA is required to submit a report to the European Parliament and to the Council on the impact

(in practice) of the transparency obligations and in particular on the impact of the DVC mechanism. In order to provide for a comprehensive and meaningful assessment, ESMA decided, at its own initiative, to also include an assessment of other key transparency provisions, namely the STO and the transparency provisions applicable to systematic internalisers (SIs). For practical reasons, these topics have been split over two papers:

- On 3 February, ESMA published its consultation paper on systematic internalisers in non-equity

instruments. Responses were due on 18 March 2020 but ESMA has extended this until 15 April due to the Covid-19 pandemic.

- On 4 February, ESMA published its consultation paper on the transparency regime for equity and equity-like instruments, the double volume cap mechanism and the trading obligations for shares. Responses were due on 17 March 2020 but this deadline has been subsequently updated to 14 April.

In relation to the STO, the German Ministry of Finance consultation found that the scope of the STO is overly broad and leads to legal uncertainties and unintended consequences. As a result, the intended benefits and the shortcomings of the obligation should be thoroughly analysed with the requirement being recalibrated or repealed if necessary. At the very least it was suggested that Article 23 of MiFIR should be modified to focus its application on shares that are listed in the EU. Shares listed in third countries should become subject to the obligation only in very limited and clearly defined cases. In addition, equivalence decisions should be principle-based focusing on an overall assessment of the requirements in third countries.

In the consultation paper, ESMA acknowledges that the wide scope of application and its practical application have created challenges, particularly in relation to the application of the STO to third country shares (i.e. shares with the main pool of liquidity located outside the EU) which has proved challenging in practice for three main reasons: (i) the lack of liquidity in those shares on EU trading venues, (ii) the equivalence regime used for the purposes of the STO, and (iii) overlap with equivalent trading obligations applicable in other third countries with respect to third country shares. This issue is clearly compounded by Brexit where the lack of any equivalence determination prior to the end of the transition period would result in the UK and EU operating mutually exclusive STOs, thereby causing issues for UK branches of EU firms and EU branches of UK firms. ESMA is clearly trying to identify a pragmatic way forward for resolving this tension as well looking at whether SIs should remain eligible execution venues under the STO and whether the exemptions to the STO should be maintained.

Product intervention measures

On 3 February, ESMA published its final technical advice to the Commission on the effects of product intervention measures under MiFIR and makes a number of recommendations in relation to the

On 10 March, ESMA commenced the process for obtaining industry feedback on the transparency regime for non-equities. Whilst ESMA makes clear in the consultation paper that it does not intend to redefine the general objectives and goals that were set by co-legislators when designing the regime, it does propose legislative amendments aimed at simplifying a regime that has proved to be rather complex to apply and supervise in practice – for example, in relation to post trade transparency, the deferral regime which is subject to national discretion and therefore the application of different rules across the EU.

The consultation also includes:

- ESMA's report on the impact of the DTO and the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms; and
- the level 2 review of the transparency regime set out in RTS 2 (Commission Delegated Regulation (EU) 2017/583) for non-equity instruments. ESMA is also taking this opportunity to review the commodity derivatives transparency regime embedded in RTS 2.

In relation to the DTO, in addition to concluding that it sees no need to amend the provisions in Article 28 of MiFIR (other than in order to align MiFIR with the EMIR Refit changes), ESMA also recommends that a process to suspend the DTO should be established (which closely mirrors the process set out in EMIR Refit for the suspension of the clearing obligation) before requesting market input on “any other issues with the application of the DTO”. Both alignment and a process to suspend form the basis of policy recommendations from industry participants and key trade associations.

The consultation was due to close on 19 April but ESMA subsequently extended this deadline until 14 June.

product intervention framework – for example, extending the framework to introduce a level playing field between MiFID firms and alternative investment fund managers and UCITS management

companies. ESMA also stated that it will be monitoring the markets in financial instruments linked to crypto assets as it is aware that some national competent authorities are consulting on

C6 energy derivative contracts

On 3 March, ESMA published its report on C6 energy derivative contracts which it submitted to the Commission at the end of January. ESMA developed this report on these contracts in relation to some of the EMIR obligations as an input to the European Commission's own report on this same topic as part of the MiFID Review. The report was required to look into the impact, cost, adequacy and feasibility of C6 energy derivative contracts being made subject to the following under EMIR:

- the clearing obligation;
- the risk mitigation techniques; and
- their inclusion in calculating the clearing threshold

ESMA concludes the report by stating that it does not see a need to change the regulatory framework now with regards to C6 energy derivative contracts and some of the EMIR requirements. Consequently, it recommends extending the temporary regime for

potential product intervention measures concerning these products. If necessary, ESMA will consider exercising its intervention powers in this area.

C6 energy derivative contracts as is foreseen in MiFID. This is because:

- the findings of the report suggest that there does not seem to be an urgency to change the regulatory regime for C6 energy derivatives with regards to EMIR from a systemic risk perspective;
- changing the regime for C6 energy derivatives with regards to the clearing obligation, the requirement to exchange collateral and the calculation towards the clearing thresholds is not expected to have an immediate major impact, thus questioning the actual benefits of changing the regime now; and
- in light of Brexit, given an important share of the C6 energy derivatives contracts are either traded or cleared in the UK and that there is some uncertainty on how the regulatory framework might evolve there, it would be more prudent to wait before considering a change in the regime.

Inducements and costs & charges disclosure requirements

On 31 March, ESMA published its final Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under the regime. The advice follows on from the call for evidence that ESMA published in July 2019.

In the advice, ESMA encourages the Commission to conduct further analysis on the topic of inducements and proposes some changes to the regime mainly aimed at improving the clients' understanding of inducements. In relation to costs and charges disclosure, ESMA has found that the MiFID II disclosure regime generally works well and that it helps investors make informed investment decisions; however, ESMA advises that some disclosure obligations vis-à-vis eligible

counterparties and professional investors are scaled back.

Other elements of the report relate to trading by telephone, the provision of information to clients in a durable medium and to the possibility to create new categories of clients; however, in the context of the inducements regime, ESMA concludes that it is not appropriate to create a new category of clients – sophisticated retail clients. Issues raised regarding the application of the regime to more sophisticated retail clients should be addressed through the possibility for retail clients to be treated as professional clients on request, provided they meet the conditions described in Section II of Annex II of MiFID II.

What to expect next

The time line below outlines upcoming milestones and expected publication dates (as revised by ESMA back in January 2019):



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