

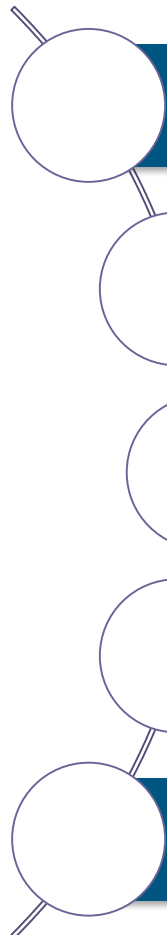
A blue-toned background image featuring a financial line chart with multiple data series and a grid. The chart shows various trends, including a sharp decline followed by a recovery and another decline.

LATHAM & WATKINS

11 March 2020

Financial Regulation Monthly Breakfast Webinar

Overview

- 
- 1 The European Commission's consultation on its review of MiFID II (the "MiFID Refit")
 - 2 Brexit: the latest on the approaches to equivalence
 - 3 The FCA's Discussion Paper on driving purposeful cultures
 - 4 The FCA's proposals to enhance climate-related disclosures by listed issuers
 - 5 The FCA's Call for Input on the use of data in wholesale markets



LATHAM & WATKINS

The European Commission's consultation on its
review of MiFID II (the "MiFID Refit")
Anne Mainwaring

European Commission public consultation on the review of the MiFID II / MiFIR regulatory framework

- The European Commission has launched a public consultation to gather views on the review of MiFID II / MiFIR
- Consultation is in questionnaire format, however it covers a broad range of MiFID topics and includes a number of policy proposals
- Complementary to work already being undertaken by ESMA in relation to reviewing MiFID II
- Consultation is open until 20 April 2020

MiFID Refit – topics covered by the consultation

- The consultation is split into “priority” and “non-priority” areas for review

Priority areas for review	Non-priority areas for review
<ul style="list-style-type: none">• The establishment of an EU consolidated tape• Investor protection<ul style="list-style-type: none">• Easier access to simple and transparent products for retail clients• Costs and charges disclosures• Client classification• Product governance• Inducements• Distance communications• Best execution• Research unbundling and SME research coverage• Commodity markets	<ul style="list-style-type: none">• Derivatives trading obligation• Multilateral systems• Double volume cap• Non-discriminatory access• Digitalisation and new technologies• Spot FX

The establishment of an EU consolidated tape

- MiFID II aim: a single price comparison tool consolidating trading data across the EU to “democratise” access to market data so that all investors can see what the best price is
- No consolidated tape has yet emerged
- Questions therefore focus on why a CT has not emerged, how a European CT should be designed and the information it should consolidate

Share trading obligation

- “The STO can pose an issue when EU investment firms wish to trade international shares admitted to a stock exchange outside the EU”
- Feedback requested on whether there is sufficient clarity on the scope of the STO and the following three policy options
 - Maintain the STO
 - Maintain the STO with adjustments
 - Repeal the STO altogether

Easier access to simple and transparent products for retail clients

- Key theme for the investor protection section of the consultation
- In line with the objectives of the CMU, the Commission is trying to improve direct access to simple investment products (e.g. certain plain vanilla bonds, index ETFs and UCITS funds) for retail clients
- Areas identified for potential amendment are product governance, conduct requirements and costs and charges

Ex-ante costs and charges disclosures

- The Commission notes that currently the ex-ante costs and charges information requirements apply to retail clients, professional clients and eligible counterparties, but that in a wholesale context a “wide range of stakeholders” consider these to be purely an administrative burden as they are already aware of current market and pricing conditions
- The Commission is therefore consulting on whether professional clients and ECPs should be exempted from these requirements and whether there should be any conditions attached to this (e.g. an opt out)

Client classification

- The Commission is consulting on the introduction of a new category of “semi-professional” clients that would be subject to lighter rules
- This would be intended to capture sophisticated investors and experienced high net worth investors
- The Commission proposes that the suitability/appropriateness test, information on costs and charges and/or the product governance rules could be mitigated or adjusted for this group of clients

Product governance

- The Commission notes that there is concern that the current application of the product governance rules might result in a further reduction of the products offered to retail clients
- The Commission is therefore consulting on a number of potential solutions to simplify the MiFID II product governance regime, including restricting the scope of the regime to carve out high denomination products and products that are only eligible for distribution to qualified investors

Distance communications

- The Commission notes that, when a client wants to place an order on the phone, the ex-ante costs and charges information must be sent before the transaction is executed, which may delay the immediate execution of the order
- The Commission highlights that this, coupled with the telephone taping requirements, has led to several banks ceasing to provide telephone banking services altogether
- The Commission therefore requests feedback on a proposal to allow the provision of costs and charges information after the execution of a transaction in the case of distance communication

Best execution

- The Commission is seeking feedback on the quality of execution reports to assess whether these are useful to investors
- There has been general criticism of the reports, which are costly to produce, as being unhelpful to end investors who ultimately bear the costs of producing them

Research unbundling rules and SME research coverage

- The Commission is concerned that, following the implementation of the MiFID II research rules, there has been an overall decline in research coverage of SMEs which it notes may lead to fewer SME investments, less secondary trading liquidity, and fewer European IPOs
- Accordingly, the Commission is consulting on what can be done to increase SME research production, facilitate its dissemination and improve its quality
- Influenced by AMF Paper “Reviving Research in the Wake of MiFID II”



LATHAM & WATKINS

Brexit: the latest on the approaches to equivalence
Rob Moulton

The EU's negotiating position

- The envisaged partnership should reaffirm the Parties' commitment to preserving financial stability, market integrity, investor and consumer protection and fair competition, while **respecting the Parties' regulatory and decision-making autonomy**, and their **ability to take equivalence decisions in their own interest**. This is without prejudice to the Parties' ability to adopt or maintain any measure for prudential reasons. The key instrument the Parties will use to regulate interactions between their financial systems will be their respective unilateral equivalence frameworks

The EU's negotiating position (cont.)

- The cooperation on financial services should establish close and **appropriately structured voluntary cooperation** on regulatory and supervisory matters, including in international bodies. This cooperation should preserve the Union's regulatory and supervisory autonomy. It should allow for informal exchange of information and bilateral discussions on regulatory initiatives and other issues of interest. It should ensure, where possible, appropriate transparency and stability of the cooperation
- **Equivalence mechanisms and decisions remain defined and implemented on a unilateral basis by the European Union.** In this framework, **transparency and appropriate consultation** between the Union and the United Kingdom in relation to equivalence decisions is important, while **preserving the Union's regulatory and supervisory autonomy**

The UK's negotiating position

- In relation to financial services, the government envisages that a free trade agreement between the EU and the UK should:
 - Promote financial stability, market integrity, and investor and consumer protection, providing a **predictable, transparent and business-friendly** environment for cross-border financial services business
 - Contain **legally binding obligations** on market access and fair competition, in line with the EU-Canada Comprehensive Economic and Trade Agreement
 - Establish regulatory co-operation arrangements intended to maintain trust and understanding between the parties' autonomous systems of regulation as they evolve. These arrangements should be based on recent precedent, such as the EU-Japan Economic Partnership Agreement, and international best practice and could **include appropriate consultation and structured processes for the withdrawal of equivalence findings**
 - Benefit from having the same rules (currently)

The UK view on equivalence

Letter from Rishi Sunak to Valdis Dombrovskis

- Both parties have agreed to start assessing equivalence with respect to each other under their respective frameworks as soon as possible, endeavouring to conclude these assessments before the end of June 2020 – the UK is committed to meeting this deadline
- Mr Sunak notes that the EU paper does not commit to the same timing, which was part of the Political Declaration
- As both sides will start from a position of regulatory alignment, the UK and the EU should be able to conclude equivalence assessments swiftly
- To help support these assessments, the UK government is ready to begin working with the EU in a structured way to progress these assessments



LATHAM & WATKINS

The FCA's Discussion Paper on driving purposeful
cultures
David Berman

Driving purposeful cultures

- 5 March 2020: FCA published a Discussion Paper on driving purposeful cultures (DP20/1)
- Follows FCA March 2018 Discussion Paper on transforming culture
- FCA expects firms to develop a more purposeful culture and the benefits this can bring
- Discussion Paper contains firm-specific, sector-specific and thematic essays to encourage broader discussion by firms
- FCA specifies four main drivers of a healthy culture:
 - A meaningful purpose
 - Effective leadership
 - Approach to rewarding and managing employees
 - Governance

Driving purposeful cultures – what is purpose?

- Defined by FCA as “what a firm is trying to achieve – the definition of what constitutes success. It is the reason why firms exist – their driving force – and the motivation for people to go to work for them day in day out”
- A firm’s individual purpose is their own responsibility
- Purpose could be related to a number of things:
 - Social
 - Ethical
 - Consumer-driven
 - People driven

Driving purposeful cultures – why purpose?

- Societal Expectation - increasingly important for future generations
- Firms need to offer meaning, not just money
- Rise in awareness of issues: climate change, diversity and inclusion, ethical use of data and acting in the best interests of customers
- “Customers who experience firms acting purely selfishly may vote with their feet”

Driving purposeful cultures – what gets in the way?

- Fear:
 - Fear of focussing on longer-term goals vs pressure of short-term profit goals
 - Fear of regulators
 - Fear of being the “first mover”

Driving purposeful cultures – how can firms become more purposeful?

- Start from the top, but also engage middle management
- Align decision-making, recruitment and internal progression with organisational purpose
- Purpose must be authentic
- Collection of essays contain a range of ideas that firms can take on board

Driving purposeful cultures – next steps

- Firms should read the Discussion Paper and try to adopt at least one new idea to create a more purposeful culture
- Regulator's focus on culture set to continue
- No request for formal feedback on the Discussion Paper
- FCA to look at how firms have considered the Discussion Paper in its ongoing supervisory work on culture
- FCA makes clear that “if a firm's purpose and associated business model is contributing to, or exacerbating, the risk of potential harm, then firms can expect increased supervisory scrutiny”



LATHAM & WATKINS

The FCA's proposals to enhance climate-related disclosures by listed issuers
Chris Horton

FCA ESG consultation paper – overview

- FCA published an ESG-related consultation paper on 6 March
- Its aim is to improve climate-related disclosures by listed companies
- The proposals build on an existing global standard set by the “Taskforce on Climate-related Financial Disclosures” (TCFD)
- Comply or explain regime for annual reports for periods post 1 January 2021
- Consultation closes on 5 June
- Policy statement in H2 2020
- First reports to be published under the new rule in 2022

FCA ESG consultation paper – who?

- Premium listed commercial companies
- Including sovereign-controlled commercial companies
- A super-equivalent requirement
- 480 issuers representing 60% of the Main Market's market capitalisation
- NOT listed investment trusts (LR Ch15 and 16)
- Asset managers and insurers with a premium listing – “enterprise level disclosures...as issuers”

FCA ESG consultation paper – what?

Recommendations and Supporting Recommended Disclosures

Governance

Disclose the organisation's governance around climate-related risks and opportunities

Recommended Disclosures

- a) Describe the board's oversight of climate-related risks and opportunities
- b) Describing management's role in assessing and managing climate-related risks and opportunities

Strategy

Disclose the actual and potential impacts of climate-related risks and opportunities on the organisation's businesses, strategy, and financial planning where such information is material

Recommended Disclosures

- a) Describe the climate-related risks and opportunities the organisation has identified over the short, medium, and long term
- b) Describe the impact of climate-related risks and opportunities on the organisation's businesses, strategy, and financial planning
- c) Describe the resilience of the organisation's strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario

Risk Management

Disclose how the organisation identifies, assesses, and manages climate-related risks

Recommended Disclosures

- a) Describe the organisation's processes for identifying and assessing climate-related risks
- b) Describe the organisation's processes for managing climate-related risks
- c) Describe how processes for identifying, assessing, and managing climate-related risks are integrated into the organisation's overall risk management

Metrics and Targets

Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material

Recommended Disclosures

- a) Disclose the metrics used by the organisation to assess climate-related risks and opportunities in line with its strategy and risk management process
- b) Disclose Scope 1, Scope 2, and, if appropriate, Scope 3 greenhouse gas (GHG) emissions, and the related risks
- c) Describe the targets used by the organisation to manage climate-related risks and opportunities and performance against targets

FCA ESG consultation paper – what?

- New LR 9 continuing obligation
 - Whether made disclosure consistent with TCFD's recommendations in annual report
 - If not made, or made in another document, must explain why
 - Where the TCFD disclosure can be found
- A new Technical Note reminding issuers where other climate change and other ESG related disclosure obligations exist (LR, PR, DTR, MAR)

FCA ESG consultation paper – why?

- Outcomes the FCA is seeking
 - Better disclosure
 - Better asset pricing
 - Support the market for green financial products
 - More efficient allocation of capital
- Studies suggest voluntary adoption of TCFD disclosures is low
- Consistent with the UK government's 2019 Green Finance Strategy - requiring listed companies to report in line with TCFD by 2022

FCA ESG consultation paper – what else?

- FCA also asking if the rule should include the TCFD guidance
- No materiality threshold for “governance” and “risk management” disclosures
- Not requiring third party assurance of climate-related disclosures
- Sponsors will be expected to consider whether companies have established procedures to comply with the new rule as part of sponsor services
- Reminder of existing obligations under UK Corporate Governance Code and CA 2006
- Other initiatives from the FRC, PRA, BofE, Department of Work and Pensions



LATHAM & WATKINS

The FCA's Call for Input on the use of data in
wholesale markets
Rob Moulton

Introduction

- It's just a Call for Input...
- It links to several other initiatives
 - Wholesale Sector Competition Review
 - Asset Management Market Study
 - Insight Article (January 2020)
- It shows post-Brexit open-mindedness around policies in MiFID, BMR and MAR
- It closes 1 May 2020, Feedback Statement to follow

Trading data

- “MiFID II sets out the framework”
 - Notes ongoing work e.g. single consolidated tape
 - ESMA’s report on Reasonable Commercial Basis, which notes MiFID has “not delivered on its objective”
 - Are similar views held in the UK?
- Notes US approach to non-discrimination rules for venues
 - Tiered pricing requires explanation of its logic
 - Would a similar approach be effective in the UK?

Benchmarks

- Currently regulatory framework set by BMR
- Asset Management Market Study suggested competition may not be working well
 - Dynamics between providers
 - Concentrated markets (quality and network effects)
- Transparency and complexity of contract terms
- BMR review ongoing...

Market data vendors

- Bundling may hinder negotiation
 - e.g. selling trade execution messaging services alongside data services
- Vertical integration may affect competition
 - e.g. different prices for competitors

Big data, data analytics and MAR

- Current framework set by MiFID and MAR
- Alternative data sources rapidly emerging
- Data may only be available to, or useable by, one (or a small group of) market participant(s)
 - Exclusive access
 - Cost
- Can information asymmetry become a form of unfair advantage?
- Risks of Machine Learning
 - Accidental (or hidden) collusion
 - Bias towards incumbents

Data use and ethics

- “Firms need suitable controls in place to monitor their data vendors. This includes making sure that these data...have not been sourced unethically or in ways that do not comply with GDPR”
- The use of client data “to inform the development, sale or distribution of products, or their proprietary trading positions...could give risk to conflicts of interest, questions around client consent or knowledge, or novel ethical issues around the fair treatment of customers”
- More closely in line with Treasury Committee comments on private polling for elections and referenda
- Is MAR the right place for ethical (rather than technical) judgments given the FCA’s use of its general principles?

London Financial Regulatory Portal

Home | London Financial Regulatory Portal

London Financial Regulatory Home

The Practice

Markets ▼

Retail ▼

Culture & Governance ▼

FinTech

Brexit

Guides

Events ▼

Monthly Breakfast Seminar
Materials

Thought Leadership



Markets



more >

Retail



more >

Culture & Governance



more >

FinTech



more >

Brexit



more >



Recent Thought Leadership

Home | London Financial Regulatory Portal | E

London Financial Regulatory Home

The Practice

Markets ▼

Retail ▼

Culture & Governance ▼

FinTech

Brexit

Guides

Events ▼

Monthly Breakfast Seminar
Materials

Thought Leadership

[FCA Calls on Firms to Develop a Purposeful Culture](#)

[Alternative Data - Regulatory and Ethical Issues for Financial Services Firms to Consider](#)

[MiFID Refit — Commission Consults on Review of MiFID II](#)

[ESMA Provides Its Input on the BMR Review](#)

[AMF Proposals to Revive the Research Industry in France](#)

[Key Takeaways from ESMA's recent MiFID Transparency Consultation Papers](#)

