

**Formal request to ESMA for technical advice on the reports to be submitted by the Commission under Article 90 of Directive 2014/65/EU and Article 52 of Regulation (EU) No 600/2014.**

With this formal mandate to ESMA, the Commission seeks ESMA's technical advice on certain aspects of the functioning of Directive 2014/65/EU<sup>1</sup> ("MiFID II") and of Regulation (EU) No 600/2014 ("MiFIR").<sup>2</sup>

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

This request for technical advice will be made available on DG FISMA's website once it has been sent to ESMA.

The formal mandate focuses on technical issues stemming from MiFID II and MiFIR.

According to Article 90 of MiFID II and Article 52 of MiFIR, the Commission is under an obligation to submit a number of reports to the European Parliament and to the Council between March 2020 and July 2022.

The European Parliament and the Council have been duly informed about this mandate.

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<sup>1</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU; OJ L 173 12.6.2014, p. 349.

<sup>2</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012; OJ L 173, 12.6.2014, p. 84.

## **1. Context**

### **1.1. Scope**

MiFID II and MiFIR form the legal framework governing securities markets in the European Union. Adopted in 2014, MiFID II and MiFIR entered into application on 3 January 2018. The MiFID II / MiFIR framework represents a significant overhaul of the original MiFID that had been in force since 2004.

Under Article 90 of MiFID II, the Commission must submit to the European Parliament and to the Council a number of reports by dates between 3 March 2020 and 3 July 2022. Similarly, under Article 52 of MiFIR, the Commission has to submit various reports to the European Parliament and to the Council over the same period.

All of the review provisions in Article 90 of MiFID II and in Article 52 of MiFIR specify that the Commission needs to consult ESMA before drawing up these reports. The present mandate constitutes a formal request for input from ESMA by the Commission.

### **1.2. Principles that ESMA should take into account**

In determining its approach to this task, ESMA is invited to take account of the following principles:

- The proper functioning of the internal market, in particular with regard to future changes of the EU financial markets' organisation;
- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objectives of the Directive and the Regulation. It should be simple and avoid creating divergent practices by national competent authorities in the application of the Directive and the Regulation;
- The advice should be comprehensive and should address all subject matter covered by the mandate;
- Coherence within the regulatory framework of the Union;
- ESMA should determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, cross-cutting questions should be dealt with in such a way as to ensure coherence between different works being carried out by ESMA;
- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants and stakeholders in an open and transparent manner. In doing so, ESMA's advice should take account of different opinions expressed by the market participants and stakeholders during the consultation;
- The technical advice should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting legal terminology used in the field of securities markets law at European level;
- ESMA is invited to provide sufficient empirical evidence and factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data available;

- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the relevant Commission request included in this mandate.

## 2. Areas on which ESMA's technical advice is sought

Article 90 of MiFID stipulates that the Commission, before 3 March 2020 and after consulting ESMA, needs to prepare a report covering the topics below. ESMA is therefore invited to provide technical input to the Commission on each of the following topics.

Subject	Deadline (EC)
(a) <b>the functioning of OTFs</b> , including their specific use of matched principal trading, taking into account supervisory experience acquired by competent authorities, the number of OTFs authorised in the Union and their market share and in particular examining whether any adjustments are needed to the definition of an OTF and whether the range of financial instruments covered by the OTF category remains appropriate;	3 March 2020
(b) <b>the functioning of the regime for SME growth markets</b> , taking into account the number of MTFs registered as SME growth markets, numbers of issuers present thereon, and relevant trading volumes;  In particular, the report shall assess whether the threshold in point (a) of Article 33(3) remains an appropriate minimum to pursue the objectives for SME growth markets as stated in this Directive;	3 March 2020
(c) <b>the impact of requirements regarding algorithmic trading</b> including high-frequency algorithmic trading;	3 March 2020
(d) <b>the experience with the mechanism for banning certain products or practices</b> , taking into account the number of times the mechanisms have been triggered and their effects;  The Commission has followed the procedure leading to the adoption of temporary product intervention measures on binary options and Contracts For Differences (CFDs) by ESMA. As these measures first became applicable in summer 2018, it is due time to have a closer look at the practical effects of the measures on market participants and clients. On this basis, ESMA should not only refer to the measures it has taken but also provide a clear and complete overview of the measures taken at national level, be it those replicating ESMA's as well as other measures that may go beyond ESMA's actions at European level. In light of the upcoming changes on product intervention rules due to review of the European System of Financial Supervision, ESMA is also invited to inform the Commission on other areas in which ESMA might consider adopting more product intervention measures in the near future or in the long term.	3 March 2020
(e) <b>the application of the administrative and criminal sanctions</b> and in particular the need to further harmonise the administrative sanctions	3 March 2020

set out for the infringement of the requirements set out in this Directive and in Regulation (EU) No 600/2014;	
(f) <b>the impact of the application of position limits and position management</b> on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets;	3 March 2020
(g) <b>the development in prices for pre and post trade transparency data</b> from regulated markets, MTFs, OTFs and APAs;	3 March 2020
(h) <b>the impact of the requirement to disclose any fees, commissions and non-monetary benefits</b> in connection with the provision of an investment service or an ancillary service to the client in accordance with Article 24(9), including its impact on the proper functioning of the internal market on cross-border investment advice.  The Commission invites ESMA to assess together with the NCAs whether firms comply with inducement and cost disclosure rules in practice, whether the application varies across Member States and, if positive, how. During this process, the Commission invites ESMA to analyse and provide an assessment of the effects of these rules for both professional and retail clients. ESMA's analysis should be guided by the broader consideration of the extent to which investors have benefited from the new rules thus far.	3 March 2020

Article 52 of MiFIR tasks the Commission with delivering the following reports to the European Parliament and the Council. Therefore, ESMA is invited to provide technical advice on these topics. The deadlines for the reports by the European Commission set out in the regulation are also set out in the table below.

Subject	Deadline (EC)
<p>1. Report on <b>the impact in practice of the transparency obligations</b> established pursuant to Articles 3 to 13, in particular on the impact of the <b>volume cap mechanism</b> described in Article 5, including on the cost of trading for eligible counterparties and professional clients and on trading of shares of small and mid-cap companies, and its effectiveness in ensuring that the use of the relevant waivers does not harm price formation and how any appropriate mechanism for imposing sanctions for infringements of the volume cap might operate, and on the application and continued appropriateness of the waivers to pre-trade transparency obligations established pursuant to Article 4(2) and (3) and Article 9(2) to (5).</p> <p>The report [...] shall include <b>the impact on European equity markets of the use of the waiver</b> under Article 4(1)(a) and (b)(i) and the volume cap mechanism under Article 5, with particular reference to:</p> <p>(a) the level and trend of non-lit order book trading within the Union since the introduction of this Regulation;</p> <p>(b) the impact on the pre-trade transparent quoted spreads;</p> <p>(c) the impact on the depth of liquidity on lit order books;</p> <p>(d) the impact on competition and on investors within the Union;</p> <p>(e) the impact on trading of shares of small and mid-cap companies;</p> <p>(f) developments at international level and discussions with third countries and international organisations.</p>	3 March 2020
<p>2. Report on <b>the functioning of Article 26</b>, including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article 26(1).</p>	3 March 2020
<p>3. Report on <b>appropriate solutions to reduce information asymmetries between market participants</b> as well as tools for regulators to better monitor quotation activities on trading venues.</p> <p>That report shall at least assess the feasibility of developing a European best bid and offer system for consolidated quotes to fulfil those objectives.</p>	3 March 2020
<p>4. Report on the <b>progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms</b></p>	3 March 2020

pursuant to Articles 25 and 28.	
5. Report on <b>the development in prices for pre-trade and post-trade transparency data from regulated markets, MTFs, OTFs, APAs and CTPs.</b>	3 July 2020
6. Report reviewing <b>the interoperability provisions in Article 36 of this Regulation and of Article 8 of Regulation (EU) No 648/2012.</b>	3 July 2020
7. Report on <b>the application of Articles 35 and 36 of this Regulation and of Articles 7 and 8 of Regulation (EU) No 648/2012.</b>	3 July 2020
8. Report on <b>the application of Article 37.</b>	3 July 2022
9. Report on <b>the impact of Article 35 and 36 of this Regulation on newly established and authorised CCPs</b> as referred to in Article 35(5) and trading venues connected to those CCPs by close links and whether the transitional arrangement provided for in Article 35(5) shall be extended, weighing the possible benefits to consumers of improving competition and the degree of choice available to market participants against the possible disproportionate effect of those provisions on newly established and authorised CCPs and the constraints of local market participants in accessing global CCPs and the smooth functioning of the market.	3 July 2020
10. Report on <b>whether the threshold laid down in Article 36(5) remains appropriate</b> and whether the opt out mechanism in respect of exchange-traded derivatives is to remain available.	3 July 2020