

## Briefing note

### ***ESMA Q&A updates on MiFID II/R transparency and market structure topics*** (29 May 2018)

ESMA has issued on 29 May 2018 Q&A updates with regard to [transparency](#) and [market structures](#) topics under the Market in Financial Instruments Directive (MiFID II) and Regulation (MiFIR). The Q&A addresses the following pre- and post-trade transparency topics:

- 1) The requirements to publish information on **post-trade data 15 minutes after publication** free of charge. **ESMA has set out practices that “are not compatible with the requirement to make data available free of charge and ensure non-discriminatory access to the information”**, including:
  - a. Imposing restrictions on access to the published post-trade data
  - b. Publishing information in a format that prevents users to read, use and copy the information
  - c. Requiring market participants to submit search queries in order to access data
  - d. Deleting data shortly after publication
  - e. No publication of post-trade data on transactions benefitting from a deferral
- 2) The **publication of transactions** and how to populate the field ‘publication date and time’ **in the case of deferrals or for amendments** to trade reports;
- 3) **Pre-trade transparency** requirements for **voice trading systems**;
- 4) **Pre-trade transparency** requirements for **RFQ systems**;

Regarding market structure topics, ESMA provided clarification on the below scenario:

- 5) **OTFs** arranging trading in strategies which include an **equity leg**.

#### **I. ESMA Q&A update on MiFID II and MiFIR [transparency](#) topics**

[General Q&As on transparency topics, Section 2]

- 1) **How should trading venues, APAs and CTPs make data available free of charge 15 minutes after publication and ensure non-discriminatory access to the information?**  
**What practices are not compatible with the requirement to make data available free of charge and ensure non-discriminatory access to the information?** [Question 10]
  - (i) **ESMA expects trading venues, APAs and CTPs to make post-trade data available free of charge 15 minutes after publication in an easily accessible manner for all potential users using a format that can be easily read, used and copied.** Furthermore, trading venues, APAs and CTPs are required to

ensure the **non-discriminatory access to post-trade data**, including for data made available free of charge.

- (ii) Article 14 of RTS 13 requires APAs and CTPs to publish data in a machine readable way. In order to ensure that CTPs can effectively consolidate information published by APAs and trading venues, ESMA expects that trading venues follow similar publication standards and publish data in a machine-readable way.

**RTS 13 – Article 14**

***Machine readability***

1. APAs and CTPs shall publish the information which has to be made public in accordance with Articles 64(1) and 65(1) of Directive 2014/65/EU in a machine readable way.
2. CTPs shall publish the information which has to be made in accordance with Article 65(2) of Directive 2014/65/EU in a machine readable way.
3. Information shall only be considered published in a machine readable way where all of the following conditions are met:
  - (a) it is in an electronic format designed to be directly and automatically read by a computer;
  - (b) it is stored in an appropriate IT architecture in accordance with Article 8(7) that enables automatic access;
  - (c) it is robust enough to ensure continuity and regularity in the performance of the services provided and ensures adequate access in terms of speed;
  - (d) it can be accessed, read, used and copied by computer software that is free of charge and publicly available.

For the purposes of point (a) of the first subparagraph, the electronic format shall be specified by free, non-proprietary and open standards.

4. For the purposes of paragraph 3(a), electronic format shall include the type of files or messages, the rules to identify them, and the name and data type of the fields they contain.
5. APAs and CTPs shall:
  - (a) make instructions available to the public, explaining how and where to easily access and use the data, including identification of the electronic format;
  - (b) make public any changes to the instructions referred to in point (a) at least three months before they come into effect, unless there is an urgent and duly justified need for changes in instructions to take effect more quickly;
  - (c) include a link to the instructions referred to in point (a) on the homepage of their website.

- (iii) ESMA considers that any practice designed to circumvent the provisions in Article 13(1) of MiFIR and Articles 64(1) and 65(1) and (2) of MiFID II **[see details at the bottom]** is not compatible with the requirement to make data available free of charge 15 minutes after publication and ensure non-discriminatory access to the information. **This includes, but is not limited to, the following practices:**

**a. Imposing restrictions on access to the published post-trade data**

- In order to ensure that all potential users can access the information made available free of charge 15 minutes after publication, **trading venues, APAs and CTPs should make clear instructions to the public on their website on how and where to access the data.** The post-trade data should be available to anybody free of charge and in a format which can be understood by the average reader.
- **ESMA considers that publishing information on a website that is not accessible to everybody imposes restrictions on access to the data and does not meet the requirement for making information available free of charge.** Similarly, the publication of post-trade data through third

parties that do not charge specific fees for the relevant post-trade data but raise regular, for instance monthly or yearly, fees for subscribing to their services, does not meet the requirement to make information available free of charge. **Furthermore, ESMA is of the view that allowing access to post-trade data only from ex ante registered IP addresses does not meet the requirement to make information available to the public free of charge.**

**b. Publishing information in a format that prevents users to read, use and copy the information**

- Trading venues, APAs and CTPs should publish information in an **electronic format that can be directly and automatically read by a computer**, and that can be accessed, read, used and copied by any potential user through computer software that is free of charge and publicly available.
- **ESMA does not consider that publishing post-trade data as an image (i.e. in such a way that the user cannot copy the data in a format that can be read by a computer) or requiring the purchase of a specific software for downloading, processing or reading the information meets the requirement of making data available free of charge.**

**c. Requiring market participants to submit search queries in order to access data**

- The data made available free of charge should be published in a similar format as real-time data published on a reasonable commercial basis.
- **ESMA does not consider that publication arrangements whereby market participants are required to submit search queries in order to access limited portions of the data (e.g. ISIN-by ISIN searches, limited time periods) meet the requirement of making data available free of charge.**

**d. Deleting data shortly after publication**

- The data made available free of charge should replicate the information published on a reasonable commercial basis but with a 15 minutes delay. **ESMA is of the view that the information should be available for a reasonable time and at least for 24 hours.**

**e. No publication of post-trade data on transactions benefitting from a deferral**

- ESMA recalls that the obligation to make available post-trade data free of charge 15 minutes after publication applies also to transactions benefitting from a deferral. **ESMA therefore expects that information on those transactions is made available on the same conditions as information on transactions not subject to deferred publication.**

**2) How should the field 'publication date and time' be populated in the case of the use of deferrals or for amendments to trade reports? [Question 11]**

- (i) The field 'publication date and time' in table 3 of Annex I of RTS 1 and table 2 of Annex II of RTS 2 **should always refer to the effective date and time of the publication of the transaction.** In the case of the use of deferrals, the field 'publication date and time' should be populated with the effective date of the publication of information on that transaction, i.e. after the lapse of the deferral.
- (ii) Concerning non-equity instruments benefitting from a **supplementary deferral**, this implies that for the first publication of limited information the **field 'publication date and time', should be populated with the effective date and time of the publication of limited information** on the transaction. Once the deferral period has lapsed, the information in the field 'publication date and time' should reflect the effective time of publication of the full information. ESMA does not expect trading venues, APAs and CTPs to use the flags 'CANC' and 'AMND' when publishing details of a transaction after a supplementary deferral has lapsed.

(iii) In case the trading venue, APA or CTP made an error when populating the field 'publication date and time', should the flags 'CANC' and 'AMND', as provided in Article 12(3) of RTS 1 and Article 7(3) of RTS 2, be used.

**3) When should the operator of an RFQ system provide pre-trade transparency?** [Question 7, changes are highlighted in red]

(i) Trading venues are responsible for designing their RFQ systems in compliance with the pre-trade transparency requirements defined in MiFIR and specified in Annex I of RTS 1 and RTS 2. The arrangements used may differ depending on the approach chosen by individual trading venues.

(ii) Such approaches might include arrangements where trading interests become executable after a pre-defined period of time but would, in any circumstances, require the indications of interest to be disclosed no later than when they become actionable and in any case before the conclusion of a transaction.

(iii) However, the conclusion of a transaction is not a condition for the publication of pre-trade transparency. Therefore, pre-trade transparency should also apply where a quote provided on request, including actionable indications of interest, is not acted upon.

(iv) The disclosure of the pre-trade quotes or actionable indications of interest only at the time of execution would not be consistent with the obligations set in Annex I of RTS 1 and 2.

**4) How should voice trading systems apply the pre-trade transparency requirements of Article 8 of MiFIR?** [Question 12]

(i) Trading venues operating voice trading systems should ensure that pre-trade information is promptly made public through electronic means on a continuous basis during normal trading hours. The technical arrangements used by the trading venue should ensure that the pre-trade information advertised through its systems is current and that it is published as soon as it becomes actionable and in any case before the possible matching of the quotes occurs.

(ii) However, the conclusion of a transaction is not a condition for the publication of pre-trade transparency. Therefore, pre-trade transparency should also apply where a quote provided on request, including actionable indications of interest, is not acted upon.

(iii) The voice system must be effectively operated by the trading venue to qualify as a trading protocol under Annex I of RTS 2.

(iv) For example, an open outcry system maintained by a trading venue would qualify as a voice trading system. The venue would provide the facility where members can interact and conclude transactions through voice negotiation. The venue, by operating the voice trading system, would have access to and oversight over how trading interest is broadcasted, which will make possible the immediate publication of bids and offers and the attaching volumes and in any case before the possible matching of the quotes occurs.

## II. ESMA Q&A update on MiFID II and MiFIR [market structures](#) topics

[Section 5: Multilateral and bilateral systems]

**5) OTFs arranging trading in strategies which include an equity leg: Can an OTF arrange or trade strategies including an equity leg?** [Question 22]

(i) Strategies that include futures contracts, the contingent trade of a basket of equities or delta one financial instruments can be arranged by an investment firm, as a provider of investment services

listed under points (1), (2) or (3) in section A of Annex I of MiFID II. This includes a strategy in which one party agrees to buy an equity and to execute a short derivative in the equity and the other party agrees to sell the equity and to execute the long derivative.

- (ii) **ESMA considers that an investment firm operating an OTF could arrange such strategies provided that the equity leg is not executed on the OTF system, since Article 4(1)(23) of MiFID II defines OTFs as multilateral systems where only non-equity instruments can be traded.** This restriction also applies to strategies composed of a look-alike equity leg, including a forward trade.
- (iii) In addition, for the purpose of market integrity, ESMA recalls that double counting should be avoided. Thus, **an OTF should only provide transparency information, transaction and best execution reports for transactions that are concluded on its system and considered as taking place under the rules of its system.** In case of a strategy composed of an equity leg concluded on another venue while the derivative is concluded on the OTF system, the OTF is subject to reporting requirements for the derivatives' leg.

## Relevant articles referred to in the ESMA Q&A:

**Point 1) (iii) :** Article 13(1) of MiFIR and Articles 64(1) and 65(1) and (2) of MiFID II

### **MiFIR – Article 13 (1)**

#### **Obligation to make pre-trade and post-trade data available on a reasonable commercial basis**

1. Market operators and investment firms operating a trading venue shall make the information published in accordance with Articles 3, 4 and 6 to 11 available to the public on a reasonable commercial basis and ensure non-discriminatory access to the information. Such information shall be made available free of charge 15 minutes after publication.

### **MiFID II – Article 64 (1)**

#### **Organisational requirements**

1. The home Member State shall require an APA to have adequate policies and arrangements in place to make public the information required under Articles 20 and 21 of Regulation (EU) No 600/2014 as close to real time as is technically possible, on a reasonable commercial basis. The information shall be made available free of charge 15 minutes after the APA has published it. The home Member State shall require the APA to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in a format that facilitates the consolidation of the information with similar data from other sources.

### **MiFID II – Article 65 (1) and (2)**

#### **Organisational requirements**

1. The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 6 and 20 of Regulation (EU) No 600/2014, consolidate it into a continuous electronic data stream and make the information available to the public as close to real time as is technically possible, on a reasonable commercial basis. [...]

The information shall be made available free of charge 15 minutes after the CTP has published it. The home Member State shall require the CTP to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in formats that are easily accessible and utilisable for market participants.

2. The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 10 and 21 of Regulation (EU) No 600/2014, consolidate it into a continuous electronic data stream and make following information available to the public as close to real time as is technically possible, on a reasonable commercial basis including, at least, the following details: [...]

The information shall be made available free of charge 15 minutes after the CTP has published it. The home Member State shall require the CTP to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in generally accepted formats that are interoperable and easily accessible and utilisable for market participants.

#### Point 4): MiFIR Article 8

##### MiFIR – Article 8 (1)

##### Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives

1. Market operators and investment firms operating a trading venue shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for bonds, and structured finance products, emission allowances and derivatives traded on a trading venue. That requirement shall also apply to actionable indication of interests. Market operators and investment firms operating a trading venue shall make that information available to the public on a continuous basis during normal trading hours. That publication obligation does not apply to those derivative transactions of non-financial counterparties which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.
2. The transparency requirements referred to in paragraph 1 shall be calibrated for different types of trading systems, including order-book, quote-driven, hybrid, periodic auction trading and voice trading systems.
3. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information referred to in paragraph 1 to investment firms which are obliged to publish their quotes in bonds, structured finance products, emission allowances and derivatives pursuant to Article 18.
4. Market operators and investment firms operating a trading venue shall, where a waiver is granted in accordance with Article 9(1)(b), make public at least indicative pre-trade bid and offer prices which are close to the price of the trading interests advertised through their systems in bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue shall make that information available to the public through appropriate electronic means on a continuous basis during normal trading hours. Those arrangements shall ensure that information is provided on reasonable commercial terms and on a non-discriminatory basis.

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