EFAMA

European Fund and Asset Management Association

EFAMA REPLY TO ESMA's CONSULTATION PAPER ON MiFID II / MiFIR REVIEW REPORT ON THE TRANSPARENCY REGIME FOR NON-EQUITY AND THE TRADING OBLIGATIONS FOR DERIVATIVES

12 June 2020

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EU transparency register: 3373670692-24

EFAMA's reply to ESMA's consultation paper on MiFID II / MiFIR review report on the transparency regime for non-equity and the trading obligations for Derivatives

INTRODUCTION

EFAMA has always been supportive of the overarching objectives of the MiFID II/MiFIR framework to enhance the efficiency, resilience, and integrity of financial markets, and ultimately improve their functioning. For the most part, the framework is working as intended with provisions being appropriately calibrated. However, we believe that much-needed flexibility can be achieved by making targeted simplification and optimisation to the Level 2 framework and ESMA Q&As.

Implementation of MiFID II and MiFIR represented a major challenge for the financial industry as a whole and for regulators. In particular, the publication of the Level 2 measures was delayed, resulting in less time for implementation, which significantly increased complexity and cost.

In general, ESMA's current approach in the form of continuously updated Q&As is burdensome for the wider financial industry. Each new clarification can lead to necessary changes to underlying systems and be time- and resource-intensive. We would therefore strongly suggest making thematic Q&A updates every year, with enough time for the industry to implement these changes. The timing of such impending updates could also be announced in advance and would allow the involved parties to plan for these changes, thus cost-effectively adapting their systems in time.

Moreover, in accordance with the principles of good regulation and with the revised powers of the ESAs, the industry and other impacted stakeholders should be able to comment on the proposed answers to questions, before the answers are published as final. It is noted that the drafting of some Q&As is not clear or are worded in such a way that they are understandable in relation to a certain sector or product but not for others.

More specifically related to this consultation, we consider that the transparency, for pre- and post-trading, has improved and could be further improved.

However, we caution ESMA to keep in mind that transparency is not necessarily the only – nor the most important- factor to be taken into account in view of offering the best outcome for end investors (other criteria such as quality of the execution, cost or liquidity also play a significant role).

For the sake of transparency, MiFID II has forgotten to consider the role of institutional investors investing on behalf of end investors, allowing for economies of scale.
Therefore, we believe that the MiFID II/MiFIR framework would benefit from some targeted amendments and optimisations in the following areas:

- the pre-trade transparency regime for trading venues in respect of non-equity instruments,
- the post-trade transparency regime for trading venues and investment firms in respect of non-equity instruments,
- the trading obligation for derivatives (DTO), and
- the trade percentile for the determination of the pre-trade SSTI threshold.

Q1. What benefits or impacts would you see in increased pre-trade transparency in the different non-equity markets? How could the benefits/impacts of such pre-trade transparency be achieved/be mitigated via changes of the Level 1 text?

We are not in favour of any change in the pre-trade transparency regime for non-equity instruments in the Level 1 text.

It is important that the consideration of potential adjustments to the regime be based on reliable, high quality data. However, the application of the rules requiring the publication of these calculations has been postponed due to the implications of the Covid-19 pandemic.

In the absence of reliable, high quality data to support and evidence the need for regulatory changes, mandating the publication of more pre-trade data for less frequently traded asset classes, such as bonds, could have a negative impact on their market liquidity and thus increase the principal risk of those asset classes.

Therefore, we have reservations as to the appropriateness of considering changes to the pre-trade transparency regime when the regime itself is not, yet, fully functional. Additionally, we also share the reservations expressed by ESMA in paragraph 67, that there are a number of issues with respect to the quality of data on non-equity instruments, which may undermine the validity of the analysis and subsequent policy considerations.

Consequently, a prudent approach to considering potential amendments to the Level 1 text on the transparency regime for non-equity instruments would be to first allow the full suite of rules to apply (including those which have been postponed) and, thereafter, to undertake further analysis of the operation of the regime in full view of the data. Implementing changes to the regime without a reliable view of the operation of the market could be detrimental for certain non-equity instruments and bring about unintended consequences.

Q2. What proposals do you have for improving the level of pre-trade transparency available? Do you believe that the simplification of the regime for pre-trade transparency waivers would contribute to the improvement of the level of pre-trade transparency available?

As outlined in our response to Q1, we do not believe that a change in pre-transparency for non-equities will benefit investors, as we do not have the data to assess the impact of the current regime on transparency.

In the current circumstances, a prudent approach to considering potential amendments to the transparency regime for non-equity instruments would be to first allow the full suite of rules to apply (including. those which have been postponed) and, thereafter, to undertake further analysis of the operation of the regime in full view of the data.

We also hold the view that only a consolidate tape, due to its “golden source” role, could best support trading through its reliable post-trade data.

Q3. Are you supportive of ESMA's proposal to delete the pre-trade SSTI-waiver? Would you compensate for this by lowering the pre-trade LIS-thresholds across all asset classes or only for selected asset classes? What would be the appropriate level for such adjusted LIS-thresholds? If you do not support ESMA's proposal to delete the pre-trade SSTI-waiver, what should be the way forward on the SSTI-waiver in your view?

As mentioned in our reply to the question 1 of the ESMA consultation on transparency for equities, we disagree with ESMA's proposal.

The access of information to one retail investor should not come at the detriment of the revenues of a multitude only because they chose a CIS as a vehicle for their investments.

Funds and asset managers are investing for and on behalf of their clients. To efficiently do so and reduce transactions costs, our members are frequently using waivers separately or in combination with each other since they interact to safeguard and facilitate institutional investors' ability to efficiently implement substantial investment decisions.

MiFID waivers are the mechanisms through which execution choice is made possible. The use of MIFID waivers translates into the following benefits for end-investors and the "real economy":

- Increased liquidity
  The possibility of using waivers brings participants into the market that would not have otherwise been there. Likewise, the removal of the waivers will not, we believe, translate to a direct shift of liquidity from "dark" to the "lit" markets. Instead it will segment client orders into those which can benefit from crossing and those that cannot.

- Lower costs
  At present, a broker with two opposing institutional orders can automatically match the orders, or parts of them, at the same price. Without this possibility, the broker would be forced to incur spread costs on behalf of both of its clients by accessing a 'lit' order book. The buying client then pays a higher price than the selling client for no good reason.

- Less risk of the market moving against the client's interest
  Without the protection the waivers provide, the broker would force to publish orders and thus flag their clients' intent to the market. With this information the market could move against the client, which is an unnecessary risk and avoidable cost for the end-investor.

In any discussion as to the need to retain the waiver, it is important to be clear as to the trading venues to which the waiver would apply. For instance, the reference price waiver operates for MTFs and RMs and any executed transaction will always be required to be published without delay and could not qualify for any post-trade delay. In addition, the reference price waiver allows asset managers to place orders to buy or sell large blocks of equities on behalf of their clients, commonly a range of funds, life pools and pension schemes. These long-term investing clients are vulnerable to the risk that other market participants will identify their need to trade in large size and move the price against them. The suppression of the reference price waiver would limit the capacity of long-term investors to invest in the SME market because of important execution cost and impact finally the potential growth of the global economy.

Therefore, all waivers should remain, at least until a full-fledged Consolidated Tape for all financial instruments is in place. Should ESMA decide to delete the pre-trade SSTI waiver, we would urge ESMA to set the pre-trade LIS threshold proportionately across all asset classes.

If ESMA imposes a threshold, we consider that it should be at or above €30,000. This would increase the number of quotes of the lit market and allow private investors the ability to trade in their size on the same terms as institutional investors. Limiting the ability to cross stock to this threshold and above will also automatically increase the average size of dark trades. Market integrity is maintained, and transparency enhanced. ESMA should also remember that instant trade reporting also makes an important and substantial contribution to pre-trade transparency.

Lastly, and regarding alternatives to improve transparency available to market participants, we suggest ESMA to introduce a maximum of four order types a trading venue may offer. Our view is that the exchanges offer too many order types that are not for the benefit of the end-investor.

Q4. What are your views on the use of the SSTI for the SI-quoting obligations? Should it remain (Option 1) or be replaced by linking the quoting obligation to another threshold (e.g. a certain percentage of the LIS-threshold) (Option 2)? Please explain.

We support option 1.

As per our reply to question 3, we want all waivers to remain fully accessible.
Secondly, we wish to remind ESMA that SIs have a crucial role in the financial industry that venues cannot cover, and we consider that the current regime works relatively well.

We observe that SI pre-trade transparency for OTC derivatives remains limited to instruments classified as "traded on a trading venue" (ToTV) reflecting the fact that SIs have generally opted-in for ToTV instruments only. Technically, there is truly little trading that qualifies as SI trading activity in certain asset classes due to the overly granular approach to assessing ToTV. This may be an underlying cause explaining why virtually all volumes are reported as ToTV in certain asset classes. For instance, regarding interest rate derivatives, data indicates that only ~5% of off-venue trading activity qualifies as ToTV. For SI pre-trade transparency to be dependable the concept of ToTV should be refined.

Moreover, in its assessment of the SI transparency regime, ESMA should attempt to determine total ToTV trading volumes relative to total off-venue trading volumes on an asset class by asset class basis.

Also, ESMA does not appear to account for or assess the level of pre-trade transparency of package transactions involving SIs. Specifically, as per Section 4, Question 4(c) of ESMA's Q&A on MiFID II MiFIR transparency topics, ESMA specifies that – "Where an investment firm is prompted for a quote for a package order for which it is a systematic internaliser only for some components, the investment firm can decide either to provide a firm quote for the whole package or only for the components for which it is a systematic internaliser." Certain SIs are interpreting this as meaning that quoting requirements about package transactions are entirely discretionary even where it is a systematic internaliser for components of the package.

Accordingly, we recommend that ESMA amend the wording of the Q&A from "can decide either to" to "must either". This would render the pre-trade transparency regime applicable to SIs more robust and guarantee that firms provide quotes for instruments even where those instruments are executed as part of a package.

We also encourage ESMA to keep in mind that SI are important liquidity providers and that they have a role of support to entrepreneurship that venues do not provide.

From our perspective, the most immediate tool to foster pre-trade transparency for all types of instruments is to develop and implement a consolidated tape for all financial instruments.

Q6. Do you agree with ESMA's observations on the emergence of new trading systems and the proposed way forward requiring a Level 1 change and ESMA to issue an Opinion for each new trading system defining its characteristics and the transparency requirements? Would you have suggestions for the timeline and process of such Opinions? Please explain.

MiFID II's implementation has further opened the market for new liquidity providers and new methods of trading beside the "historical ones" and has defined the different avenues to execute transactions.

ESMA should not issue an Opinion for each new trading system and types of venues and market participants, including Systematic Internalisers, should rather be subject to rules that:

- Are coordinated but not necessarily identical,
- Foster market access and market competition, and
- Offer the largest range of product offering to facilitate market liquidity, regardless of the size of the orders.

A variety of types of execution, e.g. trading venues, periodic auctions and systematic internalisers' organisation should best serve the interest of the industry to maintain flexibility in innovation and different options when trading. It would be fair to ensure level playing field, also to be future proof for fully digital venues. Therefore, the current definitions of trading systems and their respective transparency requirements, as set out in Annex 1 of RTS 2, are sufficient in respect of the systems used to trade in fixed income instruments. Consequently, we do not agree with ESMA's proposal as set out in paragraph 94 of the consultation.

Q7. Do you agree with the proposal for the definition of hybrid system? Are there in your view trading systems currently not or not appropriately covered in RTS 2 on which ESMA should provide further guidance? Please explain.

In line with our response to Q6, we believe that the current definitions of trading systems and their respective transparency requirements are sufficient, and we do not agree with ESMA's proposal as set out in paragraph 95 of the consultation.

Q8. Do you agree with ESMA's proposal to require SIs to make available data free of charge 15 minutes after publication? Please explain.

We agree with ESMA's conclusion (paragraph 105 of this consultation) that market participants challenge the assertion that vendors are providing data on a reasonable commercial basis (RCB) and that some trading venues and APAs are potentially not complying with their regulatory obligations to make pre-trade data available free of charge 15 minutes after publication.

We also agree with ESMA's conclusion that the absence of a common standard results in a patchwork of pre-trade information that is difficult to read and compare.

As such, we would agree with ESMA's proposal to require SIs and to enforce the legal requirement to make data available free of charge 15 minutes after publication on SIs and all other venues.

Q9. Would you see value in further standardising the pre-trade transparency information to increase the usability and comparability of the information? Please explain.

EFAMA strongly encourages regulatory clarity, coherence, and consistency at all levels of policymaking and, therefore, we can see some merit in further standardising pre-trade transparency information to increase the usability and comparability of said information.

We are supportive of further standardisation in the pre-trade transparency, especially through:

- The use of ISINs for derivatives (see ANNA-DSB work)
- The use of UTIs,
- The creation of a Consolidated Tape, as the first level of pre-trade transparency rely on high-quality post-trade data.

Q10. Do you agree with ESMA's assessment of the level of post-trade transparency and with the need of a more streamlined and uniform post-trade regime which does not include options at the discretion of the different jurisdictions? If not, please explain why and, where available, support your assessment with data.

We agree with ESMA's assessment, also from a level playing field's perspective.

However, and in the experience of our members, the current post-trade transparency deferral rules have been key to protecting the competitive liquidity and pricing of bonds. As such, we believe that any amendments, including for example the shortening the current deferral periods, could be detrimental to execution.

Against that experience, where discrepancies exist in Member States' transposition or application of the post-trade transparency deferral rules, we would encourage ESMA to pursue harmonisation to reduce complexity.

The supervisory agencies at EU level, especially ESMA, and National Competent Authorities (NCA) could already help the buy-side data user community if they were actively engaging in more detailed and coherent enforcement actions of existing cost regulation in MiFID/ MiFIR, CRAR and BMR. As a starting point ESMA and the NCAs should step up their efforts to ensure that TVs and CRAS are complying with the RCB requirement. In this respect, EFAMA like several other buy-side associations, supports the following approach:

- With respect to MiFID II, we welcome the fact that ESMA is looking at RM's practices when it comes to the provision of market data. In considering the potential role for the Level 3 process to address any identified shortcomings, we encourage ESMA to coordinate in the short term a formal supervisory review work by the NCAs responsible for the supervision of the most significant trading venues in the EU.

- Where NCA's identify that RM's approaches are not compliant with MiFIR provisions, we would encourage them to consider robust enforcement action to encourage swift and meaningful change in behaviour.

- EFAMA encourages ESMA to reconsider possible policy approaches to market data and to take a more explicit approach of examining fees relative to revenue or costs. Copenhagen Economics proposes a guideline describing how ESMA, based on the authorization provided by MIFID II, could already today set up a cost benchmark for market data.

- ESMA could also examine the structure of market data pricing agreements to consider how rules could support greater standardization in terms of definitions and other terminology or practices employed in those agreements.

- With respect to other legislations, EFAMA encourages ESMA to look broadly at similar challenges that arise in respect of index licensing and use of credit ratings data, given that similar problems are evident in this space. Indeed, we welcome ESMA's recent report on ratings data[1] and the fact that ESMA is actively addressing the lack of transparency of activities of CRA-related data providers.[2]

- ESMA is not addressing the question of cost limits and cost transparency with respect to Benchmark (fixings, index) data. However, in the recent revision of BMR, the EP rapporteur (MEP N. Gill) introduced an amendment (no.18, on art 114 (c) BMR – not adopted) to empower ESMA in cooperation with the NCAs to produce a report analysing whether fees are totally transparent, non-discriminatory and based on actual cost. Based on the finding of such report, the European Commission would have been empowered to ensure that the fees charged by benchmark providers to their clients for the provision of benchmarks meet these criteria. A more active role for ESMA and the NCA's with respect to BM data cost is possible following a future BMR amendment.

- EFAMA notes as well that this problem is global in nature and that the US Securities and Exchange Commission has addressed similar concerns. Considering this, we believe that ESMA could helpfully work with national regulators through IOSCO to develop guidance with respect to market data licensing practices and terminology used by exchanges for basic market data products.

- Finally, with respect to reference data, the FSB LEI Regulatory Oversight Committee (ROC) applies strict oversight over the LEI system and ensures that LEI data is available license and fee free for all users. This LEI supervisory standard should be extended to other (ISO based) identifiers such as UPI, ISIN and CFI going forward.

Q11. Do you agree with this proposal? What would be the appropriate level of such a revised LIS-threshold in your view?

As already mentioned in our reply to the Question 1 of the ESMA consultation paper MiFID II/MiFIR review report on the transparency regime for equity, ETFs, and other related instruments, we disagree with ESMA's proposal. We consider that the transparency and the information available to one investor should not come at the detriment of the return of a multitude of other investors.

Funds and asset managers are investing for and on behalf of their clients. To efficiently do so and reduce transactions costs, our members are frequently using waivers separately or in combination with each other since they interact to safeguard and facilitate institutional investors' ability to efficiently implement substantial investment decisions.
We think that current deferrals and waivers should be kept unchanged as they work well to protect the end-investors' benefits.

MiFID waivers are the mechanisms through which execution choice is made possible. The use of MIFID waivers translate into the following benefits for end-investors and the "real economy":

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[1] ESMA Thematic Report on fees charged by Credit Rating Agencies (CRAs) and Trade Repositories (TRs), 11 January 2018, p.17 para. 61 et seq. Available online at: https://www.esma.europa.eu/press-news/esma-news/esma-raises-concerns-fees-charged-cras-and-trade-repositories.

[2] Final Report Guidelines on the submission of periodic information to ESMA by Credit Rating Agencies – 2nd Edition February 2019 | ESMA33-9-295, Q24 at p. 25 et seq. Available online at: https://www.esma.europa.eu/press-news/esma-news/esma-publishes-guidelines-supervisory-reporting-credit-rating-agencies

- Increased liquidity
  The possibility to use waivers brings participants into the market that would not have otherwise been there. Likewise, the removal of the waivers will not, we believe, translate to a direct shift of liquidity from "dark" to the "lit" markets. Instead it will segment client orders into those which can benefit from crossing and those that cannot.

- Lower costs
  At present, a broker with two opposing institutional orders can automatically match the orders, or parts of them, at the same price. Without this possibility, the broker would be forced to incur spread costs on behalf of both of its clients by accessing a 'lit' order book. The buying client then pays a higher price than the selling client for no good reason.

- Less risk of the market moving against the client's interest
  Without the protection the waivers provide, the broker would force to publish orders and thus flag their clients' intent to the market. With this information the market could move against the client, which is an unnecessary risk and avoidable cost for the end-investor.

In any discussion as to the need to retain the waiver, it is important to be clear as to the trading venues to which the waiver would apply. For instance, the reference price waiver operates for MTFs and RMs and any executed transaction will always be required to be published without delay and could not qualify for any post-trade delay. In addition, the reference price waiver allows asset managers to place orders to buy or sell large blocks of equities on behalf of their clients, commonly a range of funds, life pools and pension schemes. These long-term investing clients are vulnerable to the risk that other market participants will identify their need to trade in large size and move the price against them. The suppression of the reference price waiver would limit the capacity of long-term investors to invest in the SME market because of important execution cost and impact finally the potential growth of the global economy.

Therefore, all waivers should remain, at least until a full-fledged Consolidated Tape for all financial instruments is in place.

If ESMA imposes a threshold, it should be at or above €30,000. This would increase the number of quotes of the lit market and allow private investors the ability to trade in their size on the same terms as institutional investors. Limiting the ability to cross stock to this threshold and above will also automatically increase the average size of dark trades. Market integrity is maintained, and transparency enhanced. ESMA should also remember that instant trade reporting also makes an important and substantial contribution to pre-trade transparency.

Finally, we would like deferral regimes to be harmonised, to facilitate our trading activity as compared to today where we must cope with various national deferral regimes.

Q12. In your view, should the real time publication of volume masking transactions apply to transactions in illiquid instruments and above LIS waiver (Option 1) or to transactions above LIS only (Option 2 and Option 3). Please elaborate. If you support another alternative, please explain which one and why.

We agree with Option 1.

We remind ESMA that we consider that the access to information made available to one investor should not come at the detriment of the revenues of a several investors investing in a CIS and that waivers should be preserved for that reason.

Forcing real time publication would be an issue to finalise the settlement of large transactions, other market participants being able to place their orders ahead of us.

Q13. Do you agree with the publication of the price and volume of all transactions after a certain period of time, such as two calendar weeks (Option 1 and 2) or do you support the two-steps approach for LIS transactions (Option 3)? Please explain why and provide any alternative you would support. Which is the optimal option in case a consolidated tape would emerge in the future?

We agree with Option 3.

Q14. Do you agree with ESMA's proposed way forward to issue further guidance and put a stronger focus on enforcement to improve the quality of post-trade data? Are there any other measures necessary at the legislative level to improve the quality of post-trade data? What changes to the transparency regime in Level 1 could lead to a substantial improvement of data quality?

We agree with the need to improve quality of data, at reasonable cost. As alluded to in our response to Q10, we agree with ESMA's proposals to issue further guidance and put a stronger focus on enforcement to improve the quality of post-trade data. In particular, where discrepancies exist in Member States' transposition or application of the post-trade transparency deferral rules (which we believe should remain intact as outlined in our response to Q10), we would encourage the ESMA to pursue harmonisation so as to reduce complexity.

- **Impose a Cost Based Licensing mechanism.**

  Any FMD data license cost should in principle be based only on **the incremental/ marginal cost of providing and distributing a given data service.** Specifically:

  - **FMD providers should be required in principle to set fees only based on the cost recovery principle**[3] as for example specified in the Financial Stability Board (FSB) principles for (LEI) reference data.[4]

  - Unlike in MiFID today, the FMD vendor should only be **able to charge the incremental cost, which originates from additional effort of the vendor to provide and distribute the data product or service to a (new) client.** Conversely, the data provider / MDD **should not be allowed to charge the cost of other business operations indirectly related to data production** and distribution on the user **without any check on the adequacy of such cost**. For example, a RTV venue should not charge the cost of operation of the trading systems and general exchange overhead expenditure as part of the market data costs.[5] EFAMA

[3] We investigated the benefit of the implementation of a revenue cap, as envisaged by ESMA in its recent consultation. We reached the conclusion that any form of cap should only be used as a last resort measure in case of monopolistic situation and provided that not all our proposed improvements have delivered the expected results. (see also our reply to ESMA consultation on the MiFID II/MiFIR review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments)

[4] See FSB LEI ROC Charter "Recommendation 20" and Art 9 GLEIF Statutes: https://www.gleif.org/en/about/governance/statutes# and in MiFID/MiFIR (Art 7 Abs .1 und Art 11e MiFIR Supplementary Regulation (EU) 2017/567 dd. 18. May 2016).

[5] For details on a long run incremental cost model (LRIC) please see Copenhagen Economics, The Pricing of Market Data, 28 November 2018, https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/6/466/1543587169/pricing-of-market-data.pdf. See also the CE reply on the Oxera report: "The design of equity trading-markets in Europe"

supports the idea of exploring cost based revenue caps as the most efficient and easy to implement measure, , in case of absence of sufficient results delivered by the implementation of our recommendations.[6]

- o In the context of a principally cost recovery-based pricing of FMD the data sources and MDD's may be allowed to charge **a reasonable (inflation adjustment based) profit margin** e.g. for provision of price feeds under MIFID. In addition, prices increase should also be framed to ensure that they are not excessive.

- **Impose Transparency on Cost.**

  In order to reduce disputes on license fees, supervisory agencies (ESA's and NCA's) and users should receive **meaningful written information, which enables the reader to recalculate the true costs based on the applicable pricing methods, including cost calculation methods as well as the guidelines on the allocation of fixed and variable cost, including the cost of third parties** and the costs of the provision and distribution of FMD offerings.

  Today, for example, the cost information obligation made available currently by exchanges under Art 11e and Recital 5 MiFIR Supplementary Regulation (EU) 2017/567 often is limited to restating the text of the law.[7] In contrast, the market data cost report of the US based IEX trading venue details all market data cost incurred and charged by this exchange.[8] The IEX report could serve as a benchmark for developing EU market data cost transparency standards, as is suggested by Copenhagen Economics.

  Secondly, the **adherence to the cost recovery principle should be explained in writing by the vendor and be approved by the statutory auditor of the company.** As is the case in the LEI system, overcharged profits in principle should be paid back to user.[9]

- **Impose best practices on High Impact Data License.**

  In this context, certain high-impact data license practices, which have significant negative consequences for end clients and financial markets discouraged in MiFID/MiFIR, CRAR, BMR, should be subject to stricter controls

  - o **Data cut-offs before a binding court or arbitration decision in data license disputes should be prohibited in financial markets laws** at least in situations in which the data cut-off would harm the stability of financial services firms, markets and/or end user clients. In practice, data users may not enforce their rights as the data provider / vendor frequently terminate the contract unilaterally in case of dispute and the user has no right of continuation of service. The data user, however, very rarely may not accept the loss of data provided by dominant data providers without endangering business continuity. Therefore, most data users

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https://www.copenhageneconomics.com/publications/publication/response-of-copenhagen-economics-to-the-report-the-design-of-equity-trading-markets-in-europe

[6] For the design of a revenue-based cost cap, please see Copenhagen Economics, A Guideline to a Cost Benchmark for Market Data, 4 July 2019.

[7] See e.g. Deutsche Börse AG, Transparenzverpflichtungen für Marktdaten unter MiFIR, Stand 3. Jan. 2018, p.6; http://www.mds.deutsche-boerse.com/blob/14640/8c045431715d38733cb8290457c53585/mifir-rcb-documentation---deutsch-v0-1-data.pdf.

[8] IEX, "The Cost of Exchange Services Disclosing the Cost of Offering Market Data and Connectivity as a National Securities Exchange", January 2019.

[9] See the rules of the FSB approved LOU Master Agreement of the Global Legal Entity Foundation, Appendix 10 which provides for a yearly review of the LEI provider cost basis and fees: https://www.gleif.org/en/about-lei/gleif-accreditation-of-lei-issuers/required-documents#

will accept excessive price increases without engaging in a legal dispute with the data provider.10

- o **Sector specific rules should ensure that regulated data providers are not allowed to escape their regulatory obligations through outsourcing of FMD business on unregulated (group) companies**. As shown above, in case of credit rating agencies, ESMA tried without success to obtain detailed rating cost and product information from the unregulated ratings data companies within the CRA groups. Similar situations may arise with data companies associated with regulated trading venues or benchmark providers.

Q15. What would be the optimal transparency regime to help with the potential creation of a CTP?

To date, the requirement for trading venues to provide post-trade data on a "reasonable commercial basis" has been largely ignored.

Properly enforced, this requirement could lead to buy-side market participants benefitting from better market data license terms & conditions as well as improved cost transparency and eventually fairer pricing. Giving access to a unique source of data would reduce reporting errors, avoid duplication of data feeds, and provide the necessary transparency.

EFAMA is supportive of a voluntary use-based consolidated tape to the extent that it is properly constructed and governed. EFAMA would expect that the first step to CTP implementation is controlling the cost and access to market data. In this respect, we support the principle of sharing the cost of tape among sell-side; buy-side and vendors (see EFAMA position paper on CTP).

A second updated post trade equity CTP helps on a low-cost basis (revenue sharing model - no market data fees for data sources) for trade preparation, market analysis and research, valuations, best-execution, compliance, and client reporting. It also means that there would be no need for delayed data anymore.

Additionally, a second updated fixed income CTP covering all venues and all counterparties with more timely disclosure of large trades, has the same use case as above plus effectively having a quasi-pre-trade CTP for RFQ based FI trades.

In practice, we consider that the enforcement of a consolidated tape for all financial instruments is a key component to bring transparency in markets, as:

- post-trade data is the first level of pre-trade and price determination information,
- a CT constitutes a "unique centralised data source".

From our perspective, a successful CT should be implemented very carefully and in phases:

- Phase 1, focusing first on post-trade
    - o covering all asset classes
    - o streamlined through
        - ▪ The use of ISIN codes
        - ▪ ISO 20022
    - o based on existing reporting (MiFID II, SFTR, EMIR Refit)
    - o using existing infrastructures (CCPs, exchanges and venues)

[10] Please see. EU Com Decision dated 1st Feb. 2012, case no. COMP/6166 - Deutsche Börse/NYSE Euronext, para. 1015. Only in exceptional cases, a firm will "accept" a data cut-off. For an example, please see the case of US-ISIN- cut-off by Bloomberg in order management system TOMS of a Swiss bank, cf. Rudolf Siebel, Bruno Schütterle, "Pay or Die" - The Use of Standardised Identification Codes and Reference Data in Financial Services Regulatory reporting in Europe, in Handbuch der Finanzinformationen, p. 167 ff (p. 190 et seq.).

    - managed and operated by ESMA
    - with a tender on the IT development and the data management process.
- Phase 2, adding pre-trade data disclosed,
- Conditional upon the positive outcome of phase 2, phase 3 could entail pre-trade data on a real time basis (on the assumption that latency and costs issues have been positively dealt with and that phases 1 and 2 are fully developed with smooth functioning).

Giving access to a unique source of data would reduce reporting errors, avoid duplication of data feeds, and provide the necessary transparency.

However, EFAMA cautions that it could actually worsen the market data problems considerably if the Consolidated Tape Providers' (CTP) governance and operations requirements are not calibrated adequately, as data consumers would use inadequate CTP data and therefore may be forced to continue to use the other market data sources as well. In addition, European authorities should keep in mind that a Consolidated Tape (CT) as such would not solve the market data's market failure – as is obvious when looking at the current problems in the US.

In our response to the European Commission's February 2020 consultation on the MiFID II/MiFIR framework, we set out in detail how we believe an EU CT can be realised.

For example, we believe an EU CT should cover the full suite of asset classes listed in the Commission consultation (i.e. shares, ETFs, corporate bonds, government bonds, interest rate swaps and credit default swaps) in terms of post-trade data. With respect to pre-trade data, we believe a more targeted approach is necessary, and that the EU CT should cover shares and all ETPs. Sharing pre-trade data in respect of other asset classes, such as bonds, could have a detrimental impact on market liquidity for those asset classes, and thus increase the principal risk of those asset classes.

Q16. Do you agree with ESMA's above assessment? If not, please explain.

We do not believe that TOTV will provide more transparency and disintermediating SIs in the current circumstances, with the Covid-19 pandemic requiring funding, would be detrimental to the real economy.

We rather insist on the creation of a CT for all financial instruments.

Q17. Are you of the view that the interpretation of TOTV should remained aligned for both transparency and transaction reporting? If not, please explain why.

Should TOTV be maintained, transparency and transaction reporting must be aligned.

Q18. Which of the three options proposed, would you recommend (Option 1, Option 2 or Option 3)? In case you recommend an alternative way forward, please explain.

We strongly support option 3

This will establish a comprehensive post-trade transparency regime that covers both on-venue and off-venue trading activity, levels the playing field between trading venues and SIs, and increases harmonisation with US rules. In addition, we believe eliminating the concept of ToTV can reduce operational costs, as members will not have to assess compliance with an unclear standard on an ongoing basis.

In any scenario chosen, ESMA should at all time support and foster the use of ISINs on all instruments.

Q19. What is your view on the proposal to delete the possibility for temporarily suspending the transparency provisions? Please explain.

We ask for a regime applicable at EU level that has sufficient regulatory flexibility to ensure the continued functioning of financial markets, during periods of stress, as has been proven during recent market volatility brought about by the Covid-19 pandemic.

As such, we do not support ESMA's recommendation to remove the possibility to temporarily suspend the transparency obligations, and instead would advise that the supervisory powers provided under Articles 9(4), 11(2) and 21(4) of MiFIR are retained.

Q20. Do you have any remarks on the assessment of Article 28 of MiFIR? Please explain.

We have fundamental reservations against the DTO, as mentioned in our reply to question 78 of the EC consultation on the review of MIFID II.

In our reply to that consultation, we encourage the Commission to remove the DTO before it becomes enforceable while guaranteeing equivalence with other countries (especially the US). We consider that maintaining a misalignment would be contradictory with the goal of EMIR Refit of achieving more proportionate, less burdensome regulation.

Should the DTO be maintained, we would insist on improving at least four aspects of the existing regime:

- Aligning trading and clearing regimes and scopes,
- Ensuring equivalence with the UK's and US' regime applicable to derivatives.
- Suppressing the DTO for SFC and NFC, to ensure alignment with EMIR Refit, and
- Suspending automatically the DTO when the CO is suspended.

We also consider that, should CO lead to DTO, CCPs would have to either become a trading venue or members of venues. We do not believe that this is in line with the objectives of EMIR and MiFIR. We would, here again, challenge the consistency of imposing a DTO and would recommend authorities to abolish this obligation during the revision of MiFIR.

Regarding the application of the DTO, we consider that the extension of the CO as modified by EMIR Refit should be automatically applicable to the DTO. This would support legal consistency and would be consistent with G20 requirement as the FSB recognizes the relevance of having a different treatment for counterparties carrying a lower systemic risk. This approach would also respect the principle of proportionality in implementation of the legislation.

As the products subject to the DTO are the same as some of the products subject to the CO, the DTO should automatically be suspended when the CO is. Nevertheless, it is also coherent to create a standalone DTO suspension to align it with what applies to CO, e.g. in case of disappearance of an electronic platform.

We support the introduction of standalone DTO suspension provisions in MiFIR as consistent with and contributing to the goal of EMIR Refit of achieving more proportionate, less burdensome regulation.

The suspension of the CO defined in EMIR should automatically trigger the suspension of the DTO in MiFID II, as the sine qua non condition of the DTO is the clearing obligation. Consequently, the suspension of the CO should suspend the DTO. The sole communication of the suspension by the CCP or the CM should suspend immediately and automatically CO and DTO. In addition, should a FC become SFC or should an NFC+ fall below a clearing threshold, both CO and DTO should be suspended. This mechanism should be automatic to ensure legal consistency. Relying on the adoption of RTS to achieve this result would not be fast enough.

Lastly, we urge ESMA to:

- Align the trading scope on the clearing scope. Should the DTO be applied, FC-/SFCs and NFC+ should be exempted from the DTO, in application of EMIR Refit,
- Ensure the equivalence with the UK.

Should the DTO be maintained, we insist on the need to align MiFIR and EMIR Refit, therefore not applying it to SFCs.

Q21. Do you have any views on the above-mentioned criteria and whether the criteria are sufficient and appropriate for assessing the liquidity of derivatives? Do you consider it necessary to include further criteria (e.g. currency)? Do you consider that ESMA should make use of the provision in Article 32(4) for asset classes currently not subject to the trading obligations? Please explain.

As explained in our reply to question 20, we ask for the deletion of the DTO.

Alternatively, should ESMA decide to maintain the existing regime, we insist on the need to align MiFIR and EMIR Refit.

Q22. Do you agree that a procedure for the swift suspension of the trading obligation for derivatives is needed? Do you agree with the proposed procedure? Please explain.

As explained in our reply to Q20 and Q21, we do not believe that trading centrally cleared derivatives on a venue will protect investors nor improve transparency nor liquidity. Therefore, we ask for the deletion of the DTO.

Alternatively, should ESMA decide to maintain the existing regime, we urge ESMA to:

- align MiFIR and EMIR Refit
- develop an immediate (and not “swift”) suspension mechanism.

ESMA may wish to reconsider the appropriateness of limiting the potential extension of any temporary suspension to 12 months, if the market conditions which led to the application of a temporary suspension cannot be suitably remedied.

Q23. Do you have a view on this, or any other issues related to the application of the DTO?

Please refer to our replies to Q20 – 22

We ask ESMA and EC to remove DTO, and TO globally

Should the DTO be maintained, we would insist on improving at least four aspects of the existing regime:

- Aligning trading and clearing regimes and scopes,
- Ensuring equivalence with the UK’s and US’ regime applicable to derivatives or applying it only on EU securities,
- Suppressing the DTO for SFC and NFC, to ensure alignment with EMIR Refit, and
- Suspending automatically the DTO when the CO is suspended.

Q24. Do you have any views on the functioning of the register? Please explain.

Should the DTO be maintained, we would agree with ESMA's assessment that the publication and maintenance of a register, on its website, specifying the derivatives subject to the DTO, the venues where they are admitted to trading or traded, and the dates from which the obligation takes effect remains valid and that there should be no amendment to Article 34 of MiFIR in this regard.

Q25. Do you agree that the current quarterly liquidity calculation for bonds is appropriate or would you be of the view that the liquidity determination of bonds should be simplified and provide for more stable results? Please explain.

We consider the current quarterly liquidity calculation for bonds to be unrepresentative of the true liquidity of bonds, and we would welcome the introduction of a simpler framework.

Q26. Do you agree with ESMA proposal to move to stage 2 for the determination of the liquidity assessment of bonds? Please explain.

In line with our response to question 25, we consider the current quarterly liquidity calculation for bonds to be unrepresentative of the true liquidity of those bonds.

Q27. Do you agree with ESMA proposal not to move to stage 2 for the determination of the pre-trade SSTI thresholds for all non-equity instruments except bonds? Please explain.

We agree with ESMA's assessment, as set out in Paragraph 293 of the consultation, that "considering that ESMA will provide the first annual transparency calculation for all non-equity instruments other than bonds in the following months, it is considered premature to assess whether it is appropriate to move to stage 2 for those instruments at this point in time."

Q28. Do you agree with ESMA proposal to move to stage 2 for the determination of the pre-trade SSTI thresholds for bonds (except ETCs and ETNs)? Please explain.

We are against changes in the regime of the pre-trade SSTI thresholds for bonds. Should ESMA decide to proceed with the review of the thresholds, we encourage ESMA to consider provisions relating to SSTI holistically.

Q29. What is your view on the current calibration of the ADNA and ADNT for commodity derivatives? Are there specific sub-asset classes for which the current calibration is problematic? Please justify your views and proposals with quantitative elements where available.

Not applicable

Q30. In relation to the segmentation criteria used for commodity derivatives: what is your view on the segmentation criteria currently used? Do you have suggestions to amend them? What is your view on ESMA's proposals SC1 to SC3? In your view, for which sub-asset classes the "delivery/cash settlement location" parameter is relevant.

Not applicable

Q31. What is your view on the analysis and proposals related to the pre-trade LIS thresholds for commodity derivatives? Which proposal to mitigate the counterintuitive effect of the current percentile approach do you prefer (i.e. keep the current methodology but modify its parameters, or change the methodology e.g. using a different metric for the liquidity criteria)? Please justify your views and proposals with quantitative elements where available.

Not applicable

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