European Forum of
Securities Associations

jointly with

NORDIC SECURITIES ASSOCIATION

Trade Associations' Positions on Trilogue for MiFIDII/MiFIR Review

6 April 2023

The European Commission presented the MiFIDII/MiFIR Review in November 2021 as a part of the further development of the Capital Markets Union. The proposal is of critical importance with respect to the competitiveness of financial market actors operating in the EU-27 and the attractiveness of the Union's regulatory framework. The Council finalised its position 20 December 2022 and the European Parliament finalised its position 15 March 2023, the formal trilogue is set to start 18 April 2023.

This note highlights the abovementioned associations1 core priorities in relation to the upcoming trilogue and underlines the goal to strengthen the EU's competitive edge and to contribute to an efficient Capital Markets Union which benefits companies and investors.

First and foremost, we acknowledge that both the Council and the Parliament proposed some important improvements of parts of the European Commission's initial proposals, i.e., on the recognition of the challenges with increasing market data costs as also stressed by ESMA. However, we still see significant challenges with respect to other parts of the proposal, in particular with transparency in the equities markets and the role of SIs. We support the Council approach which generally embraces the competitive environment, whereas the European Parliament seems to intend to partly rewind the liberalisation introduced by MiFID I. If the EP's position would be adopted, it may result in less choices for clients and unfair competition, mainly in relation to incumbent exchanges and

[1] EFSA is a forum of European Securities Associations gathering, the French Association of Financial Markets (AMAFI), the Spanish Asociación de Mercados Financieros (AMF), the Italian Association of Financial Markets Intermediaries (ASSOSIM), Capital Market Denmark (CMD), the Bundesverband der Wertpapierfirmen (bwf), the Belgian Association of Stock Exchange Members (ABMB-BVBL), the Polish Securities Dealers Association (IDM) and the Swedish Securities Markets Association (SSMA). ID-number in the Transparency Register is 038014348035-13.

The Nordic Securities Association (NSA) is a Nordic cooperation that works to promote a sound securities market primarily in the Nordic region. The NSA is formed by Capital Market Denmark (Kapitalmarked Danmark), Finance Finland (Finanssiala), the Norwegian Securities Dealers Association (Verdipapirforetakenes Forbund) and the Swedish Securities Markets Association (Svensk Värdepappersmarknad). Nordic Securities Association's public ID number in the Transparency Register is: 622921012417-15

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could raise level-playing field concerns with respect to other execution venues. This could potentially weaken the EU competitive position towards the UK and lead to drawbacks for companies and investors.

It should not be underestimated that the EU is facing an unprecedented challenge with the UK as a strong competitor which is very agile from a legislative/regulatory perspective and has already shown concrete proof of its willingness to diverge from EU rulebook through the Wholesale Markets Review (*e.g*. end of the share trading obligation and double volume cap, lighter transparency requirements for non-equity market).

1. Creating an EU consolidated tape to bridge EU capital markets

An appropriately constructed Consolidated Tape (CT) as close to real-time as possible could help building deeper and more open capital markets in Europe. However, some points need to be addressed to achieve this goal:

- **Consumption of the CT tape must be voluntary – with no direct nor indirect requirements to consume**. First, it is impossible at this time to predict the pricing of the tape, the quality of the data, and the speed of delivery. Additionally, CT data cannot replace proprietary data from the trading venues. Market participants should therefore be free to choose to use it or not or to subscribe to part of the data, as long as they continue to fulfill their best execution requirements vis-à-vis their clients. Second. As a CT consist of data from most trading venues its usefulness to document best execution will necessarily remain limited as no intermediary will and can be connected to all venues contributing to the CT. A requirement to do so, would imply that intermediaries lose control of their order execution policy. Third, best execution is not only about price, but also costs, speed of execution etc.

⇒ ***Both the EC, the Council and the EP have included a link between CT and best execution (recital 7 in the directive) which should be removed because there is a danger that this would de facto undermine the voluntary consumption principle. In reverse, if a CT delivers a quality product at a reasonable price, there will be a natural demand for the CT data.***

- **Appropriate governance framework of the CTP is essential for confidence and quality**. It is of significant importance for building the confidence in the CT that the governance framework allows for a broad representation of market participants and that the governance entity is empowered to make decisions on setting policies and fees on market data. ESMA should play a key role.

⇒ ***Neither the EC, the Council nor the EP have been explicit about the exact governance model of the CT. We support granting powers to ESMA to ensure neutral governance including an independent body consisting of elected experts representing various views with a proven record. Each term should be no***

longer than 5-7 years. Also, no trading venue can be allowed to acquire (at a later stage) the CTP, nor become unduly engaged in the CTP's activities to administer the policy, licensing, reporting, collecting of fees, etc.

- **Revenue sharing systems should cover all contributors and support competitively priced offering, subject to a comprehensible and credible interpretation of the Reasonable Commercial Basis principle.** The current provisions for the equities tape appear to support this. Any additional language around loss of revenue for the bond CT is profoundly misguided and could be open to abuse.

⇒ ***The EC is focusing on Regulated Markets whereas the Council has trading venues in scope and the EP is taking all contributors into account. All contributors should be a part of the revenue scheme and where reference to contribution is linked to i.e. price discovery, exact and quantifiable mechanisms to measures contribution to price discovery must be developed. If this is not feasible, another reliable and quantifiable approach must be chosen, i.e., market share in trading in a given instrument. Such approach would also be a useful tool in measuring the actual competition in trading.***

2. Market Data cost must be properly addressed at level 1 and level 2

A CT does not and cannot solve the issue of increasing market data costs as the requirement for proprietary data from the trading venues is indispensable for market participants to conduct their business and to comply with regulatory requirements.

- **The challenge with high and increasing market data costs must be addressed at level 1 and 2**. In this context, a cost-based approach at level 1 (MiFIR, art. 13) and the clear recognition that market data is a by-product of the trading activity and that trading venues (as "natural monopolies" in this respect) must refrain from value-based pricing are paramount. Furthermore, the work with standardisation of pricelists, policies, audit procedures, etc., regardless of the existence of a CT, must be continued within ESMA. There must not be exemptions for CTs.

⇒ ***We welcome the approach from both the Council and the EP to outline in the level 1 text that the price of market data should be based on the cost of producing and disseminating the information, with reasonable margin as recommended in the Final Report from ESMA from 2019. Furthermore, we strongly support the approach from the EP which has adopted the recommendations from ESMA and included a regular review and a possibility to strengthen the requirement in case on non- compliance and recognize market data as a by-product of the***

trading activity. We urge to ensure that the price of market data shall not be based on the value generated by the data use[2] due to the contradiction with the cost-based approach as also stressed by ESMA.

3. Reforming the transparency regime for equity in a way which support competition and liquidity

Competition is key – and should be a fundamental principle in the framework for creating an efficient Capital Markets Union. Therefore, all market players should face a level playing field and a framework which allow for a range of options and choices for clients and companies. Preferably, to ensure a level playing field with the UK, the approach chosen should not widen the regulatory gap between the EU and the UK to avoid transfers of liquidity, whereby the length of the EU legislative process creates an additional challenge when aiming to ensure the EU's competitiveness.

- **We support the Designated Reporting Entity (DRE)/Designated Publishing Entity (DPE). However, for the DRE/DPE to work, the Negotiated Trade Waiver (NTW) must be used freely as a Volume Cap (VC) on the NTW prevent investment firms to refrain being a Systematic Internaliser (SI) due to the Share Trading Obligation (STO).** The DRE/DPE is a result of the policy objective from both the Council and the EP to reduce the number of SIs (MiFIR, art. 14 and 18) by enabling the new facility in the publishing hierarchy instead of the SIs. However, for this to work, there should be an actual choice for investment firms to refrain becoming an SIs, which is not the case today due to the STO (MiFIR, art. 23). This is because the STO requires that trades in equities shall take place on a Regulated Market (RM), Multilateral Trading Facility (MTF) or via SI unless certain conditions apply. Firms can "avoid" becoming SIs but still fulfilling the STO by using the NTW (negotiating a trade outside a trading venue within the rules of the trading venue, report it to the trading venue, whereby the trade is labelled as an on-venue trading, i.e. on RM or MTF, MiFIR, art. 4). Therefore, free use of NTW is important as a VC (MiFIR, art. 5) on the NTW will imply operational uncertainty which prevent firms from opting out as SIs as they do not know when the VC hits. In short, if the NTW cannot be used freely, there is no alternative to becoming an SI due to the STO. Hence, the DRE/DPE would be ineffective in this respect, and the number of SIs would, in all likelihood, not decrease.

[2] *ESMA also highlight a necessity to delete Article 86(2) of CDR 2017/565 and Article 8(2) of CDR 2017/567 allowing trading venues, APAs, CTPs and SIs to charge for market data proportionate to the value the market data represents to users as these Articles undermines the main principle that market data should be priced- based on the costs for producing and disseminating the information.*

- **All execution venues must face similar rules and any restrictions for a subset of execution venues is a no-go in a competitive environment.** SIs play a key role as liquidity providers for clients and should not be limited in trading below certain thresholds or at mid-point. If there is a wish to reduce the number of SIs, i.e. the SIs which have been forced to become SIs due to the STO, please note our input on the link between SIs, STO and NTW above. There must be a level playing field for all execution venues in order to facilitate clients' orders and requests the best possible way with minimal market impact.

⇒ ***We welcome the forward-thinking approach from the Council which has suggests a VC on RPW only and suggests removing restrictions on NTW and SIs in respect of the STO. We do not support the restraining approach from the EP with a VC on both RPW and NTW, which reflect a missed point regarding the link between the DRE/DPE, SI, STO and NTW. On top of this, the EP has also suggested a threshold for allowing the use of RPW which is similar to the quoting obligation for SIs and the threshold for allowing SIs to provide midpoint prices. The level is unspecified and to be determined by ESMA. We see the EP approach as limiting clients' choices and as a step towards introducing a concentration rule in EU.***

- **Exceptions for normal business activities must be covered by the STO.** As such, derogations from applying the STO should also cover shares that are traded on a "*non-systemic, ad-hoc, irregular and infrequent basis*".

- **The exemption from the STO for shares traded on a third country venue based on the currency used for the transaction should be extended to all non-EEA currencies**. In fact, instead of the domestic currency of the market where the transaction takes place, extending the exemption to all non-EEA currencies would cover a larger range of entities such as the ones whose transactions are mainly in one non-EEA currency.

⇒ ***We consider that the exemption to apply STO for "non-systemic, ad-hoc, irregular and infrequent basis", which has been deleted from the EC proposal and was provided through MiFIR, art 23.1 a), should be reintroduced in the MiFIR Review. Furthermore, we welcome the EP's approach that introduces the fact that the exemption from STO regarding shares that are traded on a third country venue should apply to shares traded in a non-EEA currency.***

4. Ensuring a sensible balance of the transparency regime for non-equity

We consider it is of paramount importance to take into account the specificities of the bonds and derivatives markets to enable market makers to (i) hedge their risks as well as (ii) to unwind their positions and hence to

ensure their ability and willingness to enter into transactions of significant sizes or on illiquid instruments. Besides, we believe the EU should adopt a pragmatic approach, to avoid potential transfers of liquidity, considering a more flexible deferral regime for liquidity providers in the UK.

- **Pre-trade transparency requirement should be abolished for SIs (MiFIR, art. 18) and not only for RFQ or voice trading (MiFIR, art. 9)** to ensure a level playing field among different types of liquidity providers.

- **Post-trade transparency requirements, and the framework for efficient deferral regimes (MiFIR, art. 11), should be harmonised and leave room for adequate protection of liquidity providers.** This would create a more supportive framework for liquidity provision and be a recognition of the trade-off between liquidity and transparency. Additionally, it should be considered to introduce a separate regime for derivatives.

⇒ ***We welcome the constructive approaches from both the Council and the EP which both include some improvements of the EC proposals. In particular the Council leaves more room for protection of liquidity providers than the EP. We support the separate and more flexible regime for derivatives. However, both the Council and the EP leave much room to ESMA to determine the relevant deferral thresholds for both bonds and derivatives, so it is key to ensure that (i) the mandate given to ESMA is wide enough to ensure that appropriate calibrations can take place on level 2 (ii) a thorough involvement of the market participants before setting the thresholds. It also should be considered to leave it for ESMA to set the maximum level of the deferral at level 2, with an explicit mandate to take into account the evolution of rules in other jurisdictions and the impact on competitiveness of EU markets and liquidity providers. We welcome the Councils approach to remove the SI obligation for non-equities and urge the EP to support this approach in order to ensure a level playing field with other systems where pre-trade requirements are suggested abolished by both the Council and EP (voice trading and RFQ).***

5. Alleviating investment firms' best-execution reporting constraints

Reporting on best execution is relevant when the information creates value for users. The present requirements materialized in the so-called RTS 27 and RTS 28 reports are examples of information which, at best, is useless.

- **The requirement in MiFIDII, art. 27, resulting in RTS 27 and RTS 28 at level 2, should be repealed** as the information does not create any value for potential users.

⇒ ***We support the proposal from both EC, the Council and EP to repeal the requirements in MiFIR, art. 27 to produce the RTS 27***

report. Furthermore, we support the proposal by EP also to repeal of RTS 28.

6. Payment for order flow (PFOF): defining precisely scope in practices

PFOF is a complex and political issues that requires careful consideration. It should only be allowed if considerable measures are taken to address transparency, conflicts of interests and best execution issues.

⇒ ***We call for coherent supervisory practices whether there is a ban on PFOF or not.***

7. Modification of the transaction reporting regime

The present transaction reporting regime (MiFIR, art. 26) requiring investment firms to report transactions in financial instruments to the competent authority is sensible and the reporting requirements should not be extended to other types of firms.

- **The present reporting regime enables competent authorities to efficient surveillance of the securities markets in EU**. The goal is to ensuring confidence as this is a key premise for efficient markets.

⇒ ***We are strongly against the proposal of the EP to investigate whether AIFM/UCITS firms should be added to the scope of entities obligated to report transactions to NCAs. We assume this would have huge detrimental impact on the current regime of the reporting mechanism for investment firms. It would place a disproportionate burden on firms without targeting any regulatory rationale.***

8. DTO – Standalone suspension

It has become urgent with regards to the application of the Derivative Trading Obligation (DTO) to enable EU firms not to apply anymore the EU DTO when trading with non-EU clients.

- **There is an urgency to solve the overlapping DTO issue**. Given the time before "MiFIR 2" is applicable, interim measures must be taken now: Once a client has moved to a non-EU dealer to seek liquidity, it is extremely difficult to establish or re-establish a trading relationship for EU market makers.

⇒ ***We support the proposal for the standalone suspension. As this issue is neither controversial in the Parliament, nor in the Council, we call for ESMA to issue a forbearance statement to suspend the DTO until the level 1 text of the MiFIR review is implemented.***