

MiFIR review – EFSA priorities

Brexit, the pandemic crisis, and an unstable geopolitical environment have further underlined the necessity for the European Union to develop its open strategic autonomy and to deepen its Capital Markets Union.

The main goals should be to enable EU markets to further contribute (i) to the economic recovery at national and European levels and (ii) to the financing challenges the Union is facing, in relation to the mitigation of climate change, the ageing of the population and the development of EU champions in strategic fields such as digital and sustainable finance.

With Brexit, the Union 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 (i) to diverge as per the Wholesale Markets Review (*e.g.* end of the share trading obligation and double volume cap, lighter transparency constraints for non-equity market) as well as (ii) to create a more competitive UK financial sector which features as a core objective in the Financial Services and Markets Bill published in July.

As part of the CMU project, the MiFIR review proposal presented by the European Commission in November 2021 is of critical importance to increase the competitiveness of financial market actors operating in the EU-27 and the attractiveness of the Union's regulatory framework.

In this context, the purpose of this note is to highlight EFSA¹ core priorities in order to contribute to ongoing negotiations taking place both in the Council and in the European Parliament.

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

An appropriately constructed Consolidated Tape (CT) would help to build deeper and more open capital markets in Europe. In line with the European Commission's vision for the CMU, a key aim should be to democratise access across European markets to provide all investors regardless of resources or sophistication with a comprehensive and standardised view of European trading.

We believe that two characteristics are of the utmost importance for the success of the CT :

- (i) There should be no mandatory consumption;
- (ii) Market actors should be able to have a granular consumption of the CT depending on their needs. Consumers of the CT should be allowed to choose a subset of data from the trading venues which contribute to the CT.

We consider there is no business cases to build a CT on derivatives and hence it should be deprioritized.

We also would like to stress the establishment of a CT should not be a means to change best execution rules.

¹ [EFSA](#) is the European Forum of Securities Associations, representing the sell-side industry, for further details on its membership please refer to the end of this document

EFSA members do not believe that a CT is the solution to the concerning issue of increasing market data costs as the requirement for proprietary data 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 head-on, including through strengthening of the MiFID II and MiFIR requirements, standardisation of pricelists, policies, audit procedures, etc., regardless of the existence of a CT.

We consider as a positive step forward the proposal from the European Parliament to outline in the level 1 text that the price of market data should be based on the cost of producing and disseminating, with reasonable margin as foreseen in the recommendations featuring in ESMA 2019 December report². We also welcome the proposal from the Czech presidency to define the notion of reasonable commercial basis in the level 1 text. The approach from both European Parliament and the presidency allows for further specification at level 2 as also recommended by ESMA bearing in mind that the market data is a by-product of the trading activity. ESMA also recommends regular review of compliance and the mandate to include additional measures in case of non-compliance. We believe this recommendation should be included.

2. Preserving the precarious 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 their ability and willingness to enter into transactions of significant sizes or on illiquid instruments.

Considering pre-trade transparency regime, EFSA members support the removal of pre-trade transparency requirement for request-for-quote (RFQ) and voice systems as proposed in the ECON draft report and in the Czech presidency compromise text, since these mechanisms do not bring any clear value, while increasing the operational complexity for market participants. We also consider that the deletion of the pre-trade requirement should apply equally to multilateral venues and systematic internalisers (SI), where the latter (the SI regime for non-equities) is being proposed deleted by the Czech Presidency in the latest compromise text. We welcome this proposal.

Regarding the non-equity SI regime, we support the proposed simplifications in the ECON draft report³ as well as in the Czech presidency compromise text especially the replacement of the ToTV concept with derivatives subject to the clearing obligation and the deletion of the obligation to provide quotes in illiquid instruments on demand.

With regards to post-trade transparency, considering the different dynamics at stake in the Council with on the one hand some Member States keen to tighten the deferral regimes and “bigger” Member States sceptical towards such approach, we support for euro-denominated instruments the approach featuring both in the Czech Presidency compromise text and in the ECON draft report which introduces five categories to differentiate deferral lengths, for corporate bonds and derivatives, on the basis of

² ESMA [Final Report](#) on market data costs, points 58-65, page 26-27.

³ European Parliament, Economic and Monetary Affairs [draft report](#), amendment 46, pages 49 to 52.

transaction size and liquidity. We also welcome the six-week maximum deferrals for both price and volume permitted for trades in the “very large” category and ESMA to calibrate the deferral buckets at level 2 as proposed in the Czech presidency compromise text. Finally, we consider that the price deferral should be possible until the second working day after the date of the transaction for transactions in categories 3 and 4.

With regards to instruments denominated in other European currencies, we agree that ESMA should determine whether additional measures should be introduced.

Concerning OTC derivatives, the transparency requirements should only apply to instruments subject to EMIR clearing obligation and those effectively cleared through a CCP.

Moreover, with regards to covered and sovereign bonds, the use of issuance size may not be a good proxy to determine the actual liquidity of those bonds. As such, we would recommend to only use the issuance size as a proxy for corporate bonds, leaving other bonds to include liquidity measurement as well.

Given that, on their side, UK authorities and other third country jurisdictions show no intention to reinforce the constraints imposed on market makers, it is critical that the EU proposal, everything else being equal, does not result in dealers preferring to provide liquidity at a better price in the UK/other third country markets, rather than in the Union. Ultimately, this would result in a transfer of liquidity from the EU to the UK/other third country markets, and in a loss of attractiveness of the Union’s markets.

3. Reforming the transparency regime for equity in a pragmatic way

EFSA members are supportive of the approach taken in the ECON draft report which (i) empowers ESMA to calibrate the minimum size threshold for the use of the Reference Price Waiver (also proposed in the last FR Presidency compromise text), (ii) proposes the suspension for five years of the Double Volume Cap and (iii) gives a mandate to ESMA to calibrate minimum quoting size for equity SIs. However, the possibility for ESMA to halt the suspension yearly creates both legal as well as operational uncertainty and could negatively impact the level playing field due to the link with the SI regime. We prefer that the volume cap is removed altogether. If not doable, the possibility to halt suspension should either be removed or changed to « after 3 years » in order to create operational certainty.

Such approach is all the more pragmatic given the length of the EU legislative process which makes any swift correction of the regulatory regime extremely difficult at a time where the UK is considering reforms to its financial markets’ regulatory framework.

Moreover, concerning the SI regime, it is important to bear in mind that divergence between the EU and UK frameworks would be detrimental for EU SIs and EU clients. As the main clients of EU SIs are located outside the EU (mainly in the UK), should the EU implement a more restrictive regime (*e.g.* constraints on mid-point trading) then those clients would be less inclined to trade with an EU SI. Besides, EU investors which can only trade with EU trading venues would have access to a less liquid market.

4. Definition of systematic internaliser

We support the fact that the SI definition should not be subject to quantitative criteria and as such we support the approach proposed in the ECON draft report and in the Czech presidency latest compromise text maintaining the capacity of investment firms to opt-in as SI for any financial product.

5. Alleviating investment firms' best-execution reporting constraints

We strongly support the decision by the European Commission to repeal the RTS 27 "Best Execution" Reports. However, and as already regularly requested since the implementation of MiFID several years ago, we think that this repeal of RTS 27 "Best Execution" Reports should be accompanied by the repeal of RTS 28 "Best Execution" Reports and as such we support the approach in the ECON draft report.

6. Payment for order flow: defining precisely scoped in practices

We believe that both MEP Hübner and the Czech presidency has taken huge steps in the right direction to address this issue. That said, we are concerned that if PFOF is not properly regulated to address conflicts of interests and Best Execution, then this on one hand would favour a ban. On the other hand, we are concerned of some MEPs statements and proposed amendments making the link with the inducement regime which we believe is a misunderstanding.

However, should there be a ban, we consider there is a need for a more precise definition of the practices that would be scoped in. Currently, there is a real ambiguity which should be overcome to avoid ex-post interpretation which could be too restrictive to investors and market participants whose practices could be wrongly assimilated to PFOF. For instance, warrants should be scoped out of a potential ban given their price formation process is not order driven but rather based on the price of the underlying instrument, its volatility and its maturity.

Finally, we call for coherent supervisory practices whether there is a ban on PFOF or not.

7. Modification of the existing reporting regime

We support the creation of the status of designated reporting entities, as proposed in the European Parliament draft report and Czech presidency latest compromise text, which should remove the uncertainty of the existing SIs reporting regime and has led to duplicative reporting and higher costs for small investment firms in particular. We believe the creation of a register managed by ESMA should result in a more realistic view of market participants.

8. Modification of the transaction reporting regime

EFSA is strongly against the proposal of the European Parliament draft report to add AIFM/UCITS firms to the scope of entities obligated to report transactions to NCAs. We consider this would have huge detrimental impact on the current regime of the reporting mechanism for investment firms.

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Moreover, we consider that the ECON proposal to include a transaction identification code generated by the trading venue within the reports would, in reality, be very difficult to put in place and would demand huge investment for investment firms with no actual benefits for regulatory purposes.

About EFSA

[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](#)), the Danish Securities Dealers Association ([DSDA](#)), 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](#)).