

Briefing note

ESMA update on MiFID II Q&As on transparency and market structure (7 February 2018)

The European Securities and Markets Authority (ESMA) has published on 7 February 2018 the following clarifications addressing (I) pre-arranged/negotiated transactions for non-equity instruments; and (II) the calculation of the minimum size of orders held in an order management facility of a trading venue pending disclosure in the context of MiFID II/R transparency requirements.

I. Are “pre-arranged” or “negotiated” transactions permitted for transactions in non-equity instruments and in particular for derivatives that are subject to the MiFIR trading obligation? [Question 11]

- (i) MiFIR provides for the possibility to formalise negotiated transactions in equity instruments on trading venues subject to a waiver under Article 4(1)(b). Furthermore, ESMA considers that pre-arranged transactions in equity instruments may also be formalised under the large in scale (LIS) waiver under Article 4(1)(c) of MiFIR as long as the conditions for an LIS waiver are met.
- (ii) While MiFIR does not have specific provisions for negotiated or pre-arranged transactions for non-equity instruments, **ESMA considers it nevertheless possible to formalise negotiated or pre-arranged transactions on a trading venue subject to meeting the conditions for the respective waivers from pre-trade transparency set out in Article 9(1) of MiFIR.**
- (iii) **Concerning non-equity instruments that are not subject to the trading obligation for derivatives pre-arranged transactions are possible under:**
 - a. **the LIS-waiver** (first part of the sentence in Article 9(1)(a) of MiFIR),

MiFIR – Article 9

Waivers for non-equity instruments

1. **Competent authorities shall be able to waive the obligation** for market operators and investment firms operating a trading venue **to make public the information referred to in Article 8(1) for:**
- (a) **orders that are large in scale** compared with normal market size and orders held in an order management facility of the trading venue pending disclosure;
 - (b) **actionable indications of interest** in request-for-quote and voice trading systems **that are above a size specific to the financial instrument**, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors;
 - (c) derivatives which are not subject to the trading obligation specified in Article 28 and other financial instruments for which there is not a liquid market;
 - (d) orders for the purpose of executing an exchange for physical;
 - (e) **package orders that meet one of the following conditions:**
 - (i) **at least one of its components is a financial instrument for which there is not a liquid market**, unless there is a liquid market for the package order as a whole;
 - (ii) **at least one of its components is large in scale** compared with the normal market size, unless there is a liquid market for the package order as a whole;
 - (iii) **all of its components** are executed on a request-for-quote or voice system and **are above the size specific to the instrument.**

- b. **the waiver for instruments that do not have a liquid market** (Article 9(1)(c) of MiFIR),
 - c. **the EFP** [exchange for physical] **waiver** (Article 9(1)(d) of MiFIR) and
 - d. **the package order waiver** (Article 9(1)(e) of MiFIR).
 - e. **Pre-arranged transactions may not be executed using the order management facility waiver** (second part of Article 9(1)(a) of MiFIR) **or the size-specific-to-theinstrument (SSTI)-waiver** (Article 9(1)(b) of MiFIR).
- (iv) **Concerning derivatives subject to the trading obligation, pre-arranged transactions are only possible under:**
- a. **the LIS-waiver** (Article 9(1)(a) of MiFIR) and
 - b. **the package order waiver** (Article 9(1)(e) of MiFIR).
- (v) Finally, concerning pre-arranged transactions on cleared derivatives that are concluded on a trading venue, the pre-trade checks specified in the Commission Delegated Regulation (EU) 2017/582 (Article 2) do also apply [see below].
- (vi) **ESMA emphasizes that when trading venues execute pre-arranged transactions under the rules of their system, they must ensure that these transactions comply with the regulations**, including those concerning market abuse and disorderly trading. Venues have an obligation to monitor these trades on possible violations of the rules.

RTS 26 (Commission Delegated Regulation (EU) 2017/582)

Specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP)

Article 2 – Pre-trade check for cleared derivative transactions concluded on a trading venue

1. **Trading venues and clearing members shall subject orders for the conclusion of cleared derivative transactions on a trading venue to the requirements set out in paragraphs 2, 3 and 4, except where all the conditions set out in points (a), (b) and (c) of this paragraph are satisfied:**
 - (a) the rules of the trading venue require that each member or participant of the trading venue, which is not a clearing member of a CCP through which the cleared derivative transaction is cleared, has a contractual arrangement with a clearing member of the CCP under which the clearing member automatically becomes counterparty to the cleared derivative transaction;
 - (b) the rules of the CCP provide that the cleared derivative transaction concluded on a trading venue is cleared automatically and immediately, with the clearing member referred to in point (a) becoming the counterparty to the CCP;
 - (c) the rules of the trading venue provide that the member or participant of the trading venue or its client becomes counterparty to the cleared derivative transaction, after the cleared derivative transaction is cleared, pursuant to direct or indirect clearing arrangements entered into with the clearing member.
2. **A trading venue shall provide tools to ensure pre-conclusion screening on an order-by-order basis by each clearing member of the limits set** and maintained by that clearing member for its client pursuant to Commission Delegated Regulation (EU) 2017/589 (3).
3. **A trading venue shall ensure before the conclusion of the order that the order of the client is within the limits applicable to this client** in accordance with paragraph 2:
 - (a) within 60 seconds from the receipt of the order when the order is entered into electronically;
 - (b) within 10 minutes from the receipt of the order when the order is not entered into electronically.
4. **When the order is not within the limits applicable to the client in accordance with paragraph 2, the trading venue shall inform the client and the clearing member that the order cannot be concluded** in accordance with the following timelines:
 - (a) where the order is entered into electronically, on a real-time basis;
 - (b) where the order is not entered into electronically, within 5 minutes as from the moment when the order was checked against the applicable limits.

II. How should the minimum size of orders held in an order management facility of a trading venue pending disclosure be calculated for non-equity instruments? [Question 12]

- (i) For the purpose of Article 4(2)(a) of RTS 2 the minimum size of orders held in an order management facility of a trading venue pending disclosure should be calculated according to Table 4 of Annex II of RTS 2 except for emission allowances and emission allowance derivatives for which the notional amount of traded contracts should be used.
- (ii) Please also refer to Question 11 in the Non-equity transparency section of this document [see above].

RTS 2 (Commission Delegated Regulation (EU) 2017/583)

Transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives.

Article 4 – Type and minimum size of orders held in an order management facility (Article 9(1)(a) of Regulation (EU) No 600/2014)

2. The minimum size of orders held in an order management facility of a trading venue pending disclosure for which pre-trade transparency obligations may be waived shall, at the point of entry and following any amendment, be one of the following:

- (a) in the case of a reserve order, greater than or equal to EUR 10 000;
- (b) for all other orders, a size that is greater than or equal to the minimum tradable quantity set in advance by the system operator under its rules and protocols.

ANNEX II -Details of transactions to be made available to the public

Table 4 – Measure of volume

Type of instrument	Volume
All bonds except ETCs and ETNs and structured finance products	Total nominal value of debt instruments traded
Interest rate derivatives	Notional amount of traded contracts
Credit derivatives	Notional amount of traded contracts
[...]	[...]

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