

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CIRCULAR ON MARKETS IN FINANCIAL INSTRUMENT DIRECTIVE ('MiFID II') AND MARKETS IN FINANCIAL INSTRUMENTS REGULATION (MiFIR)

Updates relating to MiFID II and MiFIR

This circular is being addressed to investment firms, credit institutions providing investment services and/or performing investment activities, and market operators including any trading venues they operate.

This circular shall be read in conjunction with [MiFID II](#) and [MiFIR](#), the delegated regulations and previous circulars issued by the Authority.

1.0 ESMA Questions & Answers on MiFID II/ MiFIR

The Authority would like to inform market participants that the European Securities and Markets Authority ('ESMA') has, on 4 January 2019, updated its Questions and Answers ('Q&As') on MiFID II/ MiFIR.

1.1 Updates to the Questions and Answers relating to MiFID II and MiFIR Transparency Topics

The updated Q&As provide clarification on the following topics:

- Default transparency regime for equity instruments (amendment to an existing Q&A);
 - Publication of request for market data (RFMD) transactions; and
 - Default LIS and SSTI thresholds for bonds.
- ***Q&A 3 relating to the relevant transparency parameters that define the most relevant market in terms of liquidity***

ESMA has amended Q&A 3 of *Section 3: Equity Transparency*, relating to the relevant transparency parameters that define market liquidity. Q&A 3 defines the relevant parameters that are applied to identify the most relevant market in terms of liquidity when the transparency parameters are not available. The amended answer by ESMA reads as follows:

When one or more of the parameters related to the transparency calculations are not published by ESMA or the relevant non-delegating NCA the following should be applied until the publication for all parameters is available:

- *the instrument should be deemed not to have a liquid market;*
- *the pre-trade and post-trade LIS thresholds should be those related to the smallest ADT band, i.e. ADT < 50 000 provided in:*
 - o *Tables 1 and 4 of Annex II of RTS 1 for shares and depositary receipts;*
 - o *Tables 2 and 6 of Annex II of RTS 1 for certificates and other similar financial instruments;*
- *the SMS is not applicable since it should be determined only for instruments having a liquid market.*

When the most relevant market in terms of liquidity under Article 4 of MiFIR is not published by ESMA or the relevant non-delegating NCA any trading venue on which the instrument is admitted to trading can be considered to be the most relevant market in terms of liquidity.

The transparency parameters should apply from the day following publication.

· ***Q&A 4 relating to the reporting of risk trades that are given-up by the executing broker***

ESMA has included a new Q&A 4 in *Section 3: Equity Transparency* relating to risk trades that are given up by the executing broker.

The new Q&A 4 defines how a risk trade should be reported when it is given up by the initial executing broker to another broker. In this respect, the trade should be defined as a transaction that does not contribute to the price discovery process, as defined in Article (2)(a) of [Commission Delegated Regulation 2017/587](#), and therefore the venue of the execution field should be reported as 'XOFF' using the 'TNCP' flag.

· ***Q&A 15 relating to the applicable thresholds of large in scale (LIS) and size specific to the instrument (SSTI)***

Furthermore, ESMA has also included a new Q&A 15 relating to large in scale (LIS) and size specific to the instrument (SSTI) thresholds for pre-trade and post-trade transparency for bonds, in *Section 4: Non-equity transparency* of the Q&As.

Q&A 15 provides a clarification of what are the applicable thresholds of LIS and SSTI when these are not published in the Financial Instruments Transparency System (FITRS) or on the ESMA website. In this respect, the pre-trade threshold floors specified in Table 2.3 of Annex III in [RTS 2](#) for both the pre-trade and the post-trade transparency LIS and SSTI should be applied.

A copy of the updated Q&As on the transparency topics can be accessed through the following [link](#).

1.2 Updates to the Questions and Answers relating to MiFID II and MiFIR Commodity Derivatives Topics

These Q&As provide clarification on issues related to the MiFID II/MiFIR regime for commodity derivatives, including on position limits, position reporting and ancillary activity. ESMA has included a new Q&A 1 relating to electricity derivative contracts in *Section 7: Other issues* of the Q&As as follows:-

· *Q&A 1 relating to the disclosure of price multipliers for electricity derivative contracts*

Q&A 1 provides a clarification of how price multipliers for electricity derivative contracts should be populated in field 25 of Table 3 of the Annex of [RTS 23](#). In this respect, a trading venue should report values in MWh which equate to the total relevant hours of delivery during the delivery period (h), multiplied by the lot size in MW.

A copy of the updated Q&As on commodity derivatives can be accessed through the following [link](#).

2.0 Updates to the guidelines on the application of C6 and C7 of Annex 1 under MiFID II

The Authority would also like to inform market participants that ESMA has, on 21 December 2018 published amended [guidelines](#) on the application of C6 and C7 of Annex 1 of MiFID II. The amended guidelines are an update to the guidelines which were originally adopted by ESMA in October 2015 in order to ensure a common, uniform and consistent application of MiFID I in relation to commodity derivatives defined in the C6 and C7 sections of the MiFID Annex. The amended guidelines will be adapted to the new MiFID II regulatory framework without any change to the substance.

ESMA has updated the guidelines on the application of C6 and C7 of Annex 1 under MiFID II, whereby the amended text reads as follows:

2.1 Application of C6 of Annex 1 of MiFID II

1. *ESMA considers that definition C6 of Annex 1 of MiFID applies in the following way:*

- a. *C6 has a broad application, encompassing all commodity derivative contracts, including forwards but excluding wholesale energy products traded on an OTF that must be physically settled, providing that:

 - i. *they can or must be physically settled; and*
 - ii. *they are traded on a regulated market, an MTF and/or an OTF.**
- b. *“Physically settled” incorporates a broad range of delivery methods and includes:

 - i. *physical delivery of the relevant commodities themselves;*
 - ii. *delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned (such as a bill of lading or a warehouse warrant); or*
 - iii. *another method of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of commodities without physically delivering them (including notification, scheduling or nomination to the operator of an energy supply network) that entitles the recipient to the relevant quantity of the commodities.**

2.2 Application of C7 of Annex 1 of MiFID II

2. ESMA considers that definition C7 of Annex 1 applies in the following way:
 - a. C7 forms a category that is distinct from C6 and encompasses commodity derivative contracts that can be physically settled which are not traded on a regulated market, an MTF or an OTF providing that the commodity derivative contract:
 - i. is not a spot contract as defined under Article 7(2) of Regulation (EU) 2017/565;
 - ii. is not for the commercial purposes described under Article 7(4) of Regulation (EU) 2017/565; and
 - iii. meets one of the three criteria under Article 7(1)(a) and also the separate criteria under Article 7(1)(b) of Regulation (EU) 2017/565.
 - b. “Physically settled” incorporates a broad range of delivery methods and includes:
 - i. physical delivery of the relevant commodities themselves;
 - ii. delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned (such as a bill of lading or a warehouse warrant); or,
 - iii. another method of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of commodities without physically delivering them (including notification, scheduling or nomination to the operator of an energy supply network) that entitles the recipient to the relevant quantity of the commodities.
3. Physically settled commodity derivatives which do not fall within the definition of C6, i.e. are not traded on a Regulated Market, an MTF or an OTF, may fall within the definition of C7 and the definitions of C6 and C7 form two distinct categories as C7 applies to commodity derivatives “that can be physically settled not otherwise mentioned in C6”.
4. The other characteristics of commodity derivatives under C7 - “not being for commercial purposes, which have the characteristics of other derivative financial instruments” - are further defined under Article 7 of Regulation (EU) 2017/565.
5. ESMA notes that the conditions defined in Article 7 of Regulation 2017/565, are to be applied cumulatively.

A copy of the updated guidelines can be accessed through the following [link](#).

3.0 Updates to the assessment of third-country trading venues (TCTVs) for the purpose of post-trade transparency and position limits under MiFID II/MiFIR

The Authority would like to inform market participants that ESMA has, on 20 December 2018, provided an update relating to post-trade transparency and position limits of TCTVs, whereby it explained that it has received requests to assess more than 200 TCTVs following the publication of two [opinions](#) in 2017. In 2017 ESMA published two opinions on TCTVs in the context of MiFID II/MiFIR clarifying that:

- i. investment firms trading instruments within the scope of MiFID II on TCTVs meeting a set of criteria are not required to make transactions public in the EU via an APA; and
- ii. commodity derivatives contracts traded on TCTVs meeting a set of criteria are not considered as EEOTC contracts for the purpose of the position limit regime.

ESMA stated that despite originally planning to carry out the determination of third-country trading venues and publish the results in the course of 2018, it had not reviewed a sufficient number of TCTVs to publish a comprehensive list of TCTVs. Therefore, in order to maintain a level playing field between trading venues, ESMA shall delay publication of the lists until a more significant number of TCTVs have been assessed.

In this respect, ESMA added that investment firms do not have to make public their transactions concluded on TCTVs via an approved publication arrangement (APA). Also, commodity derivatives contracts traded on TCTVs are not considered as economically equivalent over-the-counter (EEOTC) contracts for the purpose of the position limit regime.

ESMA's update on the assessment of TCTVs for the purpose of post-trade transparency and position limits can be accessed through the following [link](#).

Contacts

Should you have any queries relating to the above, kindly contact the Authority on MarketInfrastructures@mfsa.com.mt.

**Communications Unit
Malta Financial Services Authority
11 January 2019**