

Supervisory Briefing

**Ensuring compliance with the MiFIR pre-trade transparency
requirements in commodity derivatives**

Obsolete



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1. Introduction and scope

1. This Supervisory Briefing is designed to provide guidance to competent authorities (CAs) as regards supervisory and enforcement actions to ensure compliance with pre-trade transparency requirements for negotiated trades in commodity derivatives under Regulation (EU) No 600/2014 (MiFIR)¹.
2. In particular, the pre-trade transparency requirements in Regulation (EU) No 600/2014 (MiFIR)² require market operators and investment firms operating a trading venue to make public current bid and offer prices, and the depth of trading interests at those prices, which are advertised through their systems for equity instruments (Article 3 of MiFIR) as well as non-equity instruments (Article 8 of MiFIR).
3. MiFIR provides CAs with the possibility to waive those pre-trade transparency requirements in specific circumstances for equity instruments (Article 4 of MiFIR) as well as non-equity instruments (Article 9 of MiFIR).
4. In particular, Article 4(1)(b) of MiFIR provides under certain conditions for the possibility for CAs to waive pre-trade transparency requirements for systems that formalise negotiated trades in equity instruments.
5. Negotiated trades are defined in the context of pre-trade transparency waivers for equity instruments in the Delegated Regulation (EU) 2017/587³ ("RTS 1") as trades that are negotiated privately but reported under the rules of the trading venue.
6. However, MiFIR does not have any specific provisions on negotiated trades in non-equity instruments, even though such negotiated trades are commonly used by market participants, in particular for commodity derivatives.
7. In view of the above, ESMA has clarified the circumstances under which negotiated trades in non-equity instruments may be undertaken in a Q&A⁴ ("the Q&A on pre-arranged/negotiated transactions for non-equity instruments") which was published on 7 February 2018.
8. The Q&A clarifies that negotiated trades in non-equity instruments can be undertaken subject to meeting the conditions for the specific waivers from pre-trade transparency set out in MiFIR, i.e. either the large in scale (LIS) waiver (Article 9(1)(a)) of MiFIR, the waiver for instruments that do not have a liquid market (ILQ waiver) (Article 9(1)(c) of MiFIR), the exchange for physical (EFP) waiver (Article 9(1)(d) of MiFIR) or the package order waiver (Article 9(1)(e) of MiFIR).

¹ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Regulation (EU) No 648/2012

² Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Regulation (EU) No 648/2012

³ Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser (OJ L 87, 31.3.2017, p. 387).

⁴ Question 11 of Section 5 of the Q&A on MiFID II and MiFIR transparency topics (ESMA70-872942901-35)

9. ESMA is aware that the MiFIR provisions on pre-trade transparency for non-equity instruments in commodity derivatives, as clarified by the Q&A on negotiated trades, are not implemented in a consistent manner in the Union. In particular, some trading venues formalise negotiated trades in commodity derivatives either without being subject to a waiver from pre-trade transparency or under waivers that ESMA considers non-compliant.
10. ESMA is examining the provisions in relation to commodity derivatives currently set in Commission Delegated Regulation (EU) No 2017/583⁵ ("RTS 2") to determine whether some of the concerns in respect of negotiated trades can be addressed via a potential change of the RTS.
11. However, any such review cannot be done in the short-term and it remains necessary to address the issue of inconsistent application of the regulation without further delay via a Supervisory Briefing.
12. The objective of this Supervisory Briefing is to increase supervisory convergence among CAs and provide a common timetable for the enforcement of the pre-trade transparency regime for negotiated trades in non-equity instruments, in particular with regard to commodity derivatives, with the overarching objective of ensuring a level playing field across EU trading venues.
13. This document is issued under Article 29(2) of the ESMA Regulation and does not intend to prescribe how CAs should act in relation to any specific situation. Decisions on supervisory/enforcement actions remain with each CA in its jurisdiction and should be based on the specific facts and circumstances of a particular case.

2. State of play

14. There are a few examples of trading venues which have adapted their rules ahead of MiFID II application to enable compliance with the pre-trade transparency regime for negotiated trades in commodity derivatives, but these either relate to contracts which are exempt from pre-trade transparency under the illiquid waiver or have not yet been used by market participants.
15. In most Member States where trading venues offering trading in commodity derivatives are established, venues are currently operating trading systems that do not comply with the pre-trade transparency requirements for negotiated trades. This can be either because (i) the venue accepts negotiated trades in these instruments in the absence of

⁵ Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (OJ L 87, 31.3.2017, p. 229).

⁶ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. In particular, Article 29(2) of ESMA Regulation states that "the Authority may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices."

a waiver, or because (ii) the CA has granted a waiver for negotiated trades which ESMA considers to be non-compliant.

16. ESMA and CAs agree that this situation, which persists since the entry into force of MiFIR in January 2018 creates an unlevel playing field, and needs to be addressed by CAs via appropriate and coordinated measures and with a common timetable with respect to those measures.

3. General approach

17. ESMA is conscious of the challenges for trading venues to comply with the pre-trade transparency requirements for negotiated trades in non-equity instruments, and in particular commodity derivatives as those trades are pre-arranged between counterparties outside the trading venue.
18. Nevertheless, ESMA considers it possible to develop functionalities that allow trading in a pre-trade transparent way and/or to formalise negotiated trades subject to meeting the conditions for the waivers from pre-trade transparency for non-equity instruments set out in MiFIR and as further clarified by the Q&A on negotiated trades.
19. As a result, ESMA is of the view that CAs should ensure that trading venues do not operate trading functionalities which allow the formalisation of negotiated trades on non-equity instruments in the absence of a waiver. This means in particular that:
 - If a system formalises negotiated trades under the LIS waiver, all negotiated trades below the LIS thresholds should be rejected.
 - If a system formalises negotiated trades under the ILQ waiver, all negotiated trades in liquid instruments should be rejected.
20. Venues trading non-equity instruments such as commodity derivatives should ensure that they offer trading facilities that comply with MiFIR pre-trade transparency requirements. This does not necessarily mean that trades have to be concluded via a central limit order book (CLOB). Indeed, as reported by market participants, the execution via a CLOB may not be suited for some instruments because of insufficient liquidity on the order book that could expose them to substantial execution risks.
21. However, MiFIR provides for a variety of different trading functionalities beside the CLOB, including request-for-quote, voice trading systems and periodic auction trading systems. The pre-trade transparency requirements have been designed to ensure that a satisfactory level of pre-trade transparency is achieved while taking into account the specificities of each type of system. ESMA is aware of many examples of trading venues in other non-equity asset classes which have designed systems ahead of MiFID II application which comply with the pre-trade transparency regime.
22. As trading venues that currently do not comply with the pre-trade transparency regime for negotiated trades in commodity derivatives are in direct competition with one another, it is important that CAs adopt a common timetable with respect to the measures to be undertaken.

23. In addition, since the compliance with the pre-trade transparency regime for negotiated trades requires a change to current market practices, it is necessary to allow sufficient time for market participants and trading venues to implement those changes. ESMA nevertheless wishes to emphasise that the pre-trade transparency regime entered into application in January 2018 and such changes could have been anticipated sufficiently in advance by market participants.
24. Considering the above, ESMA is of the view that CAs should adopt the supervisory action plan detailed in the following section and included in the Annex to this supervisory briefing. To the best of ESMA's knowledge, all the trading venues which do not currently comply with the pre-trade transparency requirements for negotiated trades are active on commodity derivatives markets. As a result, the scope of the supervisory action plan is limited to trading venues active in this asset class.

4. Common timeline and key milestones

25. ESMA recommends CAs to agree on common timelines for implementing each measure, with enforcement measures from CAs vis-à-vis the relevant trading venues being launched at the end of the two initial steps envisaged by the supervisory action plan.
26. The first step of the supervisory action plan consists of CAs gathering information about those trading venues which operate trading systems that do not comply with the pre-trade transparency requirements for negotiated trades in commodity derivatives and communicate this information to ESMA.
27. CAs should engage with each of the trading venues identified and gather information on the measures undertaken and planned by each trading venue to comply with the pre-trade transparency requirements for negotiated trades in non-equity instruments, and the timing of such measures ("the Plan").
28. CAs should submit these Plans to ESMA by the deadline set in the Annex, including a high level summary of the planning for each trading venue. ESMA should provide a compliance assessment of those plans.
29. This first phase has been completed at the time of publication of this supervisory briefing.
30. The second step of the supervisory action plan consists in CAs making sure that all the trading venues identified in Stage 1 either operate under a compliant pre-trade waiver or are pre-trade transparent within the parameters established in MiFID II. CAs should provide feedback thereon to ESMA for each of the trading venues identified in Stage 2. In the case that CAs send updated waiver notifications to ESMA to reflect changes made to trading systems as a consequence of this step, ESMA will prioritise the processing of those waiver notifications to the maximum extent possible.

31. NCAs should commit to inform each other, via the relevant ESMA fora⁷, of the progress made in relation to the first two steps on a regular basis. In particular, they should share information without undue delay when (1) their supervised trading venues have legally challenged the CAs' actions; and (2) CAs have reservations or questions on whether the new proposals made by the trading venues in their Plans comply with the regulation.
32. The third step of the supervisory plan consists in CAs taking supervisory measures in case of non-compliance. Supervisory measures may include fines and sanctions and should be taken towards trading venues which have not successfully implemented their Plan.
33. CAs should provide ESMA with a high-level summary of the supervisory measures undertaken, for each trading venue. Where CAs have not undertaken any supervisory measures, they should provide ESMA with an explanation for this decision. At the latest six months after the start of the third step, and regularly thereafter, ESMA will review the progress and measures undertaken.
34. The ESMA Board of Supervisors (BoS) will be updated regularly on the level of convergence reached in the application of the pre-trade transparency regime for commodity derivatives across the EU. Based on the BoS assessment of the status, further actions might be envisaged.

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⁷ In general, the relevant forum should be the Pre-Trade Transparency Waiver Task Force (PTWTF). It may also be the Secondary Markets Standing Committee (SMSC) in case a CA cannot or does not wish to participate in the PTWTF. In any case, the PTWTF will regularly report to the SMSC on the progress made in this context.

ANNEX 1

Supervisory action plan with regards to the pre-trade transparency regime for commodity derivatives

Stage	Steps to be undertaken	Start Date	End Date
1	CAs should identify the trading venues which operate trading systems that do not comply with the pre-trade transparency requirements for negotiated trades on non-equity instruments and communicate this information to ESMA. CAs should engage with each of those venues and gather at least information on the measures undertaken by the trading venue to comply with the pre-trade transparency for negotiated trades on non-equity instruments, and the planning of such measures ("the Plan"). CAs should provide ESMA with a high level summary of the Plan for each of the trading venue. ESMA should provide a compliance assessment of the plans.	Spring 2018	April 2019
2	CAs and ESMA remain in continuous exchange about the implementation process at national level. CAs should supervise that all the trading venues identified in Stage 1 either operate under a compliant pre-trade waiver or are fully pre-trade transparent. CAs should provide feedback thereon to ESMA for each of the trading venues identified in Stage 1.	May 2019	31 December 2019
3	CAs should take supervisory measures which may include fines and sanctions, towards trading venues which have either not provided or not successfully implemented their Plan as described in Stage 2. CAs should provide ESMA with a high level summary of the supervisory measures undertaken, for each of trading venues identified in Stage 1. Where CAs have not undertaken supervisory measures, they should provide ESMA with an explanation for this decision. After 6 months and regularly thereafter, ESMA will review the progress and measures undertaken under Stage 3.	From 1 January 2020	