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London, March 2, 2015

ESMA Consultation Paper: MiFID II / MiFIR

Dear Sirs,

We welcome the publication of ESMA's Consultation Paper *MiFID II / MiFIR*[1] (the "***Consultation Paper***" or the "***CP***") and we appreciate the opportunity to provide you with our comments.

Markit is a leading global diversified provider of financial information services. We provide products that enhance transparency, reduce risk and improve operational efficiency. By setting common standards and providing tools that facilitate firms' compliance with regulatory requirements, many of Markit's services help level the playing field between small and large firms and so foster a competitive marketplace.[2] Our customers include banks, hedge funds, asset managers, central banks, regulators, auditors, fund administrators and insurance companies. Founded in 2003, we employ over 3,500 people in 10 countries. Markit shares are listed on Nasdaq under the symbol MRKT.

Markit has been actively and constructively engaged in the debate about regulatory reform in financial markets, including topics such as the implementation of the G20 commitments for OTC derivatives and the design of a regulatory regime for benchmarks. Over the past years, we have submitted more than 120 comment letters to regulatory authorities around the world and have participated in numerous roundtables. We also regularly provide relevant authorities with our insights on current market practice, for example, in relation to valuation methodologies, the provision of scenario analysis, or the use of reliable and secure means to provide daily mid-market marks. We have also advised regulatory authorities on appropriate approaches to enabling a timely and cost-effective implementation of newly established regulatory requirements, for example through the use of multi-layered phase-in or by providing market participants with a choice of means for satisfying regulatory requirements.

Comments

We appreciate the significant amount of work that ESMA has invested into its MiFID II / MiFIR related proposals as outlined in the Consultation Paper. We believe that, in many cases, the proposals put forward in the CP are much improved compared to the Discussion Paper.[3] That said, please find below our comments on

[1] ESMA Consultation Paper: MiFID II / MiFIR. ESMA 2014/1570. 19 December 2014.
[2] For example, Markit's KYC Services provide a standardized end-to-end managed service that centralizes "Know Your Client" (KYC) data and process management.
[3] ESMA Discussion Paper MiFD II / MiFIR. 22 May 2014

ESMA's proposals in relation to the draft regulatory technical standards for (a) access to benchmarks[4] and (b) straight through processing (STP).[5]

Section 5.6 / RTS 24: Non-discriminatory access to and licensing of benchmarks

Benchmark information

Q157. Do you agree with the elements of the draft RTS that cover relevant benchmark information? If not, please explain why and, where possible, propose an alternative approach. In particular, how could information requirements reflect the different nature and characteristics of benchmarks?

Article 37(4)(a) of MiFIR requires ESMA to develop draft RTS to specify the information through licensing to be made available for the sole use of the CCP or the trading venue ("***TV***").[6] The proposed RTS list the types of information that a TV or a CCP may need to trade or clear a benchmark, and allow these venues to require such information if it is needed for trading or clearing purposes. ESMA stated that the RTS should provide for a certain degree of flexibility so that a person with proprietary rights to a benchmark can take particular considerations into account.[7] ESMA further stated that CCPs or TVs may, considering the different nature and characteristics of the benchmarks to which access is sought, need to request further information required for trading and clearing purposes. Persons with proprietary rights to a benchmark should provide this information on a non-discriminatory basis.

We are generally supportive of ESMA's analysis and proposed Articles 20 and 21 of RTS 24. Specifically, we believe it will be appropriate that TVs and CCPs, when requesting information from the benchmark IP owner, "shall also explain to that person the reasons why such information is required for clearing and trading purposes".[8] We believe that such approach will allow for flexibility to reflect the differences between the large variety of relevant benchmarks and use cases while it will also prove useful to prevent unreasonable or unnecessary requests from trading and clearing venues.

We further appreciate the fact that ESMA explicitly acknowledges the existence of situations where the person with proprietary rights to a benchmark "does not have access to relevant information" or "cannot pass such information on to TVs or CCPs due to legal or non-discriminatory contractual obligations".[9] We support ESMA's proposal that, in such cases, the TV or CCP shall request the information directly from the third party or parties who own the data. We also agree with ESMA's proposal that, where the relevant information is "available publicly or through other commercial means", the benchmark IP owner would not need to supply such information.[10]

Other conditions under which access must be granted

Q158. Do you agree with the elements of the draft RTS that cover licencing conditions? If not, please explain why and, where possible, propose an alternative approach.

[4] Section 5.6 of the CP and RTS 24
[5] Section 9.1 of the CP and RTS 37
[6] CP p. 475
[7] RTS 24, Recital 20
[8] RTS 24, Article 20.2
[9] RTS 24, Article 20.7
[10] RTS 24, Article 20.8

The proposed RTS state that the benchmark IP owner can only charge different prices to different categories of licensees where "objectively justified" having regard to reasonable commercial grounds such as "quantity, scope or field of use" demanded.[11] Further, different conditions for different TVs and CCPs would only be permitted where those differences are objectively justified based on criteria such as quantity, scope or field of use demanded and this should be applied in a non-discriminatory way and in a proportionate manner.

We welcome the fact that, in the context of access to benchmarks, ESMA aims to strike a balance between granting access and protecting intellectual property rights.[12] We believe that the appropriate protection of intellectual property rights is important in order to maintain an innovative and competitive market for benchmarks. We also welcome ESMA's recognition that any potential redistribution of information to users of a trading or a clearing venue should be left to the benchmark IP owner.[13] We believe that such approach is consistent with the Level 1 requirements and also reflective of current market practice.

However, as we have stated previously, our experience has shown that, when establishing contracts with a category of parties, such as TVs or CCPs, one cannot simply follow a "one-size-fits-all" approach. This is because there can be valid reasons for different commercial arrangements to be negotiated with individual TVs or CCPs based on their situations. Specifically, contracts could have different duration and/or payment structures.[14] We are concerned that it would be difficult to "objectively justify"[15] such differences while comparing them will also be challenging. Not allowing for such differences and forcing benchmark IP owners to only offer a standardized set of contractual terms to all users in a category would be to the detriment of individual CCPs and TVs, as they would no longer be able to receive terms that are suitable for their individual situation and preferences. We therefore encourage ESMA to further consider how this issue could be addressed, e.g., by allowing for differing licensing terms for different TVs or CCPs so long as such differences are commercially reasonable and not grossly disproportionate.

New benchmarks

Q159. Do you agree with the elements of the draft RTS that cover new benchmarks? If not, please explain why and, where possible, propose and alternative approach.

Article 37(4)(c) of MiFIR requires ESMA to develop draft RTS specifying the standards guiding how a benchmark may be proven to be new.[16]

Factors to assess whether a benchmark is new

ESMA proposed a number of factors that could be used by the person with proprietary rights to a benchmark to assess whether a benchmark is new. Such factors include the correlation between values of the relevant benchmarks and the similarity of methodologies or compositions.[17]

We support ESMA's view that the assessment whether a benchmark is new will vary on a case-by-case basis[18] and that any factors taken into consideration should be appropriately weighed against one another. We also agree with ESMA that it would not be appropriate to include an exhaustive list of factors in the RTS as MiFIR

[11] RTS 24, Article 22.2
[12] CP p.479, par. 19
[13] CP p.480, par. 30
[14] A common example would be an upfront payment of the fees vs a volume-based fee, e.g., a percentage of the transaction volume in the contracts that reference the benchmark.
[15] CP p. 480, par. 25
[16] CP p. 480
[17] RTS 24, Article 23.2
[18] RTS 24, Recital 27

captures many types of benchmarks and there would be a risk that the RTS omits certain relevant factors. We therefore support ESMA's proposal that any such assessment, in addition to the number of factors that are explicitly listed, should also consider "any other factors specific to the types of benchmarks being assessed, as appropriate".[19]

However, we believe that ESMA's general approach to how the relevant factors should be taken into account when assessing whether a benchmark is new requires some fine tuning. Specifically, proposed Article 23.2 of RTS 37 states that "a benchmark is *less likely to be new* if *any* of the following factors apply". We believe that such approach is inconsistent with how ESMA itself describes the assessment process in Recital 27[20] and could lead to many situations where a benchmark that is fundamentally "new" would not be regarded as such. For example, by their very nature, equity indices tend to be highly correlated with each other and might be created based on very similar methodologies, both across different countries and regions. Based on ESMA's proposed approach, the fact that a newly created equity benchmark was "highly correlated" with an existing one would make it "less likely" that it is regarded as new. As a result, we believe there is a risk that none of the newly created equity benchmarks could be classified as new. Similar issues might arise in other asset classes.

That said, we urge ESMA to establish a more appropriate calibration to the use of the various factors relevant to a benchmark by amending Article 23.2 of the RTS to state: "A benchmark is *more* likely to be new if one of the below factors *does not* apply …".

Newly released series

We support ESMA's view that a newly released series of a benchmark should generally not be considered a new benchmark.[21]

However, ESMA should clarify that such approach is only appropriate as long as the issuance of a new series of the benchmark was based on largely the same rules and methodology as the previous series. If, however, a significant change in methodology had been applied between index roll dates, the benchmark IP owner should not be prevented from demonstrating, based on the relevant factors, that the benchmark is new.

We therefore encourage ESMA to add the following clarification in Recital 29 and Article 23.5: "Where the newly released benchmark is simply a continuation of the previous series it should not be considered a new benchmark."

Adaptations to an existing benchmark

Proposed Article 23.4 of RTS 24 states that "any adaptation to an existing benchmark, whether material or not, shall not constitute a new benchmark".

We believe ESMA's proposed approach to "adaptation" or "variation" of a benchmark is problematic. Specifically, as we have stated previously,[22] we believe that the intention of the legislators when allowing for

[19] RTS 24, Article 23.3

[20] ESMA's discussion of several examples in Recital 27 of RTS 24 seems to suggest that, despite the existence of one factor, for example high correlation between new and existing benchmark, the newly created benchmark might be regarded as new as long as there are sufficient differences for other factors, e.g., compositions or methodologies. By providing these examples, ESMA hence seems to suggest that the newly created benchmark is more likely to be new if one of the factors does not apply, which seems to contradict the wording that ESMA proposed in Article 23.2.

[21] RTS 24, Recital 29. We note that ESMA specifically mentions "CDS benchmarks" in this context and we assume this provision might be applicable to Markit's CDS Indices iTRAXX and CDX for which new series are launched twice a year.

the protection of exclusivity for a certain period of time for a benchmark that is "new" was to apply to a newly launched *product* that is referencing a benchmark. This will also be the case where the underlying benchmark itself might not be new as a new product type will often require marketing, structuring, new legal agreements, gather liquidity, etc. Examples of newly created contracts referencing existing benchmarks could be an exchange-listed futures contract where a product referencing this benchmark might have already traded over-the-counter.

ESMA stated that "the cumulative criteria set out in MiFIR do not allow for such an exemption."[23] However, at the same time ESMA not only recognized that "other factors .. may also need to be taken into account in an assessment of a benchmark's newness"[24] but also already proposed a factor as part of Article 23.2 that references "contracts" that are based on the benchmark.[25]

We therefore believe ESMA would be in a position to recognize the relevance of the newness of the contract referencing the benchmark by adding the following factor to Article 23.2: "(f) the users of the contracts based on the newer benchmark are the same, or relatively similar to the users of the contracts based on the relevant existing benchmark and they require little or no additional effort to use contracts based on the newer benchmark".

Section 9.1 / RTS 37: Obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP)

We welcome efforts by industry and regulators to make the processing of derivatives transactions as efficient and reliable as possible. As a matter of fact, the MarkitSERV trade processing platforms (and its predecessors) were created with these objectives in mind. As of today our derivatives processing platforms facilitate confirmation, matching and processing for OTC derivatives across regions and asset classes and provide universal middleware connectivity for downstream processing such as clearing and reporting. Specifically, the MarkitSERV[26] platforms facilitate the agreement[27] between parties on the details of the transactions that they have entered into, provide them with connectivity to CCPs,[28] trading venues and inter-dealer brokers, trade repositories, and the whole range of counterparties, and report the relevant transaction and counterparty details to trade repositories under newly established regulatory requirements.[29] Such services that are also offered by various other providers are widely used by participants in the global OTC derivatives markets today and are recognized as tools to increase efficiency, secure legal certainty, and reduce cost. In 2014, MarkitSERV handled more than 90,000 OTC derivative transaction processing actions on average per day for over 2,000 customers, including sell-side firms, buy-side firms and execution venues. On that basis, our legal, operational, and technological infrastructure plays an important role in supporting the OTC derivatives markets in Europe, North America, and the Asia-Pacific region.

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[22] "Another respondent disagreed with ESMA's view that any adaptation to an existing benchmark, whether material or not, would not constitute a new benchmark because a new benchmark that is similar to, or the same as, an existing one might be created to address the launch of a new product that is targeted at a different user group." CP p. 481, par. 36

[23] CP p. 482, par. 36

[24] RTS 24, Recital 28

[25] Factor (a): "*Contracts* based on the newer benchmark are capable of being netted or substantially offset with *contracts* based on the relevant existing benchmark"

[26] MarkitSERV, a wholly owned subsidiary of Markit Group Limited, provides a single gateway for OTC derivatives trade processing. The company offers trade processing, confirmation, matching, and reconciliation services across regions and asset classes, including interest rate, credit, equity, and foreign exchange derivatives. Please see www.markitserv.com for additional information.

[27] Depending on the asset class and type of execution, different methods will be used to achieve such "agreement", including affirmation/confirmation or matching.

[28] As of today, MarkitSERV provides connectivity and trade routing to 16 central counterparties globally.

[29] Our processing platforms currently report derivatives transactions for the reporting parties to Trade Repositories in Europe, the United States, Japan, Hong Kong, Australia, and Singapore.

Based on our experience in OTC derivatives processing, we urge ESMA to recognize that, in a market structure where healthy competition exists between numerous entities on the levels of trading and clearing, competition will typically drive increases in efficiency and reduction in costs in any case. Further, with multiple parties being involved in the workflow of OTC derivatives transactions it will be of crucial importance for regulators to allow for sufficient time for the various processes to occur. ESMA should note that, if its expectations in terms of the timeliness of processing were too demanding, they could unintentionally result in increasing risk, not reducing it. Further, overly aggressive timing requirements could provide an unfair competitive advantage to potentially less competitive vertically integrated providers while the risk of non-compliance could deter market participants from using OTC derivative products. Moreover, operational efficiencies encouraged by shorter clearing timeframes can be more effectively established through pre-trade credit checks and market discipline, e.g., firms whose trades fail to clear routinely because of operational issues can be disciplined by TVs in anonymous workflows and in disclosed workflows may be required to pay for the operational risk they may introduce to a trade.

On that basis, please find below our specific recommendations in relation to the time frames that were proposed by ESMA in the CP and on how they should be applied.

Timeframe for submission to the CCP

Q240. What are your views on the categories of transactions and the proposed timeframe for submitting executed transactions to the CCP?

For derivatives that are subject to the clearing obligation, ESMA proposed several time frames post execution for the transfer of information from a TV to a CCP, hereby differentiating by the form of execution.[30] Specifically, ESMA proposed for a transaction that was electronically executed on a Trading Venue to be submitted to a CCP within 10 seconds, within 10 minutes for a transaction that was traded non-electronically on a Trading Venue, and within 30 minutes where the transaction was executed bilaterally.[31]

Based on our experience, we recommend ESMA consider the following issues in relation to the time frames it proposed in the context of straight through processing:

- We believe that the time frames proposed by ESMA are generally overly demanding and market participants would find them difficult to comply with, at least in the initial phase of the implementation. We are concerned that, if ESMA were to impose such challenging time frames today it would result in an increase in error rates, re-submissions, and ultimately increased risk and potential non-compliance. To avoid such undesirable consequences we suggest ESMA phase in the time frames over the coming years in each of the proposed categories, similar to the approach that regulators have taken in other jurisdictions for similar purposes.

- ESMA proposed the shortest time frame of submission for clearing for transactions that were "executed electronically"[32] or "concluded on a trading venue in an electronic manner".[33] However, ESMA should be aware of the existence of a multitude of execution and processing models many of which contain "electronic" elements to a varying degree which will impact how quickly transactions can be processed. For example, when a counterparty communicates non-electronically with a TV, it is reliant on the details of the executed transaction being entered into an electronic system by the TV, and for that reason the

[30] CP, Section 9.1, par. 15
[31] RTS 37, Articles 4.1, 4.2, and 5.1
[32] RTS 37, Article 4.1
[33] CP page 638, par. 15

counterparties typically rely on being able to check the transaction details recorded post-trade by the TV prior to that data being submitted to a CCP. Further, transactions could be executed on a TV in a hybrid mode, where one party communicates electronically and the other non-electronically. Our experience has shown that the details of these various execution models, specifically the overall degree and timing of "electronification", will have a significant impact on how quickly the transaction details are available in electronic format. We therefore recommend ESMA clarify that the shortest time frame for submission to clearing would solely apply to transactions that are executed and processed "wholly electronic".

- How quickly post execution the transaction details will typically be captured electronically is an important factor to determine the ability of counterparties and infrastructures to communicate such transaction details to other entities that are involved in the workflow. However, even where all pre-trade communication is electronic, TVs will typically require some time to reformat and enrich transaction data into a form that is suitable for submission to a CCP. On that basis, queues of data can sometimes form, particularly in times of high execution volumes. Our experience has shown that, while the majority of the transactions might be processed and submitted in a timely manner, there exists a range of times with a tail of transactions that might fail against the proposed deadlines. Imposing an absolute limit rather than an average or typical target would greatly raise the cost and complexity of compliance without commensurate benefit. We therefore encourage ESMA to pursue a pragmatic approach in relation to the submission of transactions within the time frames it ultimately sets. Specifically, to best reflect market realities, ESMA should require parties to comply with any set time frames for the "substantial majority" of their transactions, rather than on a transaction by transaction basis.

Based on our above comments, we recommend ESMA uses the following time frames,[34] in a phased-in manner, to be complied with for the substantial majority of the transactions of a party:

- Executed on a TV and wholly electronic:
    - 2 minutes initially;
    - 1 minute after Year 1; and
    - 30 seconds after Year 2
- Executed on a TV and partly or wholly non-electronic:
    - 240 minutes initially;
    - 120 minutes after Year 1; and
    - 60 minutes after Year 2
- Executed bilaterally:
    - 240 minutes initially; and
    - 60 minutes after Year 2

For the avoidance of doubt, ESMA should clarify that any set time frames for submission to clearing are business minutes in the location of the counterparties. Where transactions are executed cross border the time frames should be based on the cross-over of the counterparties' business hours.

[34] Our recommendations should be regarded as maximum time windows and individual TVs may decide to compress their own time frames for competitive reasons.

Timeframe for clearing member acceptance

Question 241. What are your views on the proposal that the clearing member should receive the information related to the bilateral derivative contracts submitted for clearing and the timeframe?

As time frame for clearing member acceptance[35] ESMA proposed that the clearing member should accept or reject the transaction within 60 seconds from receiving the information from the CCP.[36]

We believe that this proposed time frame is generally reasonable from a longer term perspective. However, to facilitate implementation, we recommend ESMA makes use of a phased-in approach which would allow for a 120 seconds window during Year 1, consistent with the approach taken by the CFTC in the US.[37]

Timeframe for CCP acceptance

Q242. What are your views on having a common timeframe for all categories of derivative transactions? Do you agree with the proposed timeframe?

ESMA proposed that a CCP should accept or reject a derivative transaction that was submitted to it for clearing within 10 seconds from submission or from the receipt of the clearing member acceptance.[38]

Consistent with our recommendations in relation to the setting of other relevant time frames we recommend ESMA provide for a phased-in implementation, specifically it should allow for a 60 second window in Year 1 which would be reduced to 10 seconds thereafter. Further, as stated above, we urge ESMA to be aware of specific situations where more time for CCP acceptance might always be needed. Therefore, a delay beyond the proposed time frames that is justifiable should not preclude a trade from being sent to clearing and a rejected trade should not automatically be made void ab initio.

Treatment of rejected transactions

Q243. What are your views on the proposed treatment of rejected transactions?

ESMA proposed that, where a transaction that was executed on a TV or subjected to the clearing obligation could not be submitted to or accepted for clearing in the relevant time frames, the TV rules should provide for those transactions to be void.[39] ESMA also stated that the resubmission of rejected trades would not be appropriate "in broad circumstances" and "only limited circumstances such as technical problems could justify resubmission of the transaction once."[40]

We believe that such approach would be problematic. This is because our experience has shown that there might be valid reasons other than technical problems where submission could not be achieved within the

[35] ESMA CP, Section 9.1, pars. 16 and 17
[36] RTS 37, Article 5.2
[37] "… each FCM [Futures Commission Merchant] that is a clearing member of a DCO [Derivatives Clearing Organization] or DCOs must, no later than 120 seconds (2 minutes) after a trade has been submitted to it by or for a customer: - accept or reject the trade for clearing; and - submit it to the relevant DCO for clearing…" Email from CFTC Division of Clearing and Risk Director Ananda Radhakrishnan, September 12, 2012 quoted in Dodd-Frank Rule 1.74 Open Questions, http://gmblog.sapient.com/?p=1170 (Jan. 13, 2013) and amended in CFTC Staff Guidance on Swaps Straight-Through Processing, Sept. 26, 2013, http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/stpguidance.pdf.
[38] ESMA CP, Section 9.1, pars. 18 and 19
[39] ESMA CP, Section 9.1, pars. 20 to 24
[40] ESMA CP, Section 9.1, pars. 25 and 26

proposed time frames and resubmission should be permitted as soon as practicable. Such situations could include technical or operational setup problems, mapping issues, or system issues such as bugs or outages.

ESMA should note that such issues are generally rare, particularly for existing users of CCPs. However, we have observed that these issues occur more frequently particularly during the go-live stage for new firms. We therefore encourage ESMA to allow, in situations that are justifiable, for the re-submission of rejected transactions, where appropriate also multiple times, as soon as practicable. We believe that such approach would provide market participants with sufficient flexibility and time to resolve issues of this nature, which will be particularly relevant in the implementation and onboarding stages.

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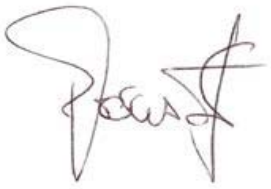
We hope that our above comments are helpful to ESMA. We would be more than happy to elaborate or further discuss any of the points addressed above in more detail. In the event you may have any questions, please do not hesitate to contact us.

Yours sincerely,



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