

21 November 2024

Joint Letter on ESMA's consultation on firms' order execution policies under MiFID II

Further to our respective separate responses to the ESMA consultation paper on firms' order execution policies under MiFID II, the joint Associations¹ are now following up with this joint letter to reinforce our shared position on this matter.

The Associations state three overarching concerns with the proposed draft Regulatory Technical Standards (RTS):

- Consolidated Tape (CT) data should not be mandatory to consume:** we have very strong concerns about the de-facto mandatory consumption of CT data pursuant to Recital 11, Articles 4(2), 6(5)(a), and 7(2)(a) of the draft RTS. We stress that Level 1 does not impose such consumption: Recital 9 of the revised MiFID states "that [i.e. the CTP] information **can** be used for proving best execution." With this in mind, we propose that the hierarchy amongst data sources and the wording in the draft RTS which implies mandatory consumption are removed. In the aforementioned articles there is also the implication that price is the only determinant of execution quality. Though price is no doubt a very important factor, the total consideration approach should not be compromised, and, depending on market circumstances other factors may also become more important.
- There are no clear benefits to clients from the proposed overly prescriptive requirements, but clear compliance costs which would ultimately be borne by the end-client:** we are concerned that ESMA did not conduct a cost-benefit analysis on the basis that they believe that the proposals would provide "significant benefits, while not creating substantial new costs" without providing evidence to support this analysis. In addition, the Associations note that the removal of RTS 28 reports was precisely due to the fact that the reports were "hardly read and did not enable investors ... to make meaningful comparisons based on the information provided in them"². While clients need to be able to compare execution brokers, order execution policies are not the appropriate place to reintroduce this overly granular comparability which goes against the burden reduction agenda of the European Commission and could ultimately lead to greater confusion for clients. Buy side firms already produce order execution policies that are regularly updated, and complemented by periodic reports to clients showing analytical data. If anything, we note that order execution policies are considered a competitive tool for

¹ The Association for Financial Markets in Europe (AFME), the Alternative Investment Management Association (AIMA), the European Fund and Asset Management Association (EFAMA), the European Forum of Securities Associations (EFSA), the International Capital Market Association (ICMA), the International Swaps and Derivatives Association (ISDA) and the Nordic Securities Association (NSA).

² [ESMA Public Statement](#) on Deprioritisation of supervisory actions on the obligation to publish RTS 28 reports in light of the agreement on the MiFID II/MiFIR review

differentiation versus competitors. The CT can help facilitate best execution, thereby improving outcomes for investors in comparing and assessing execution quality. By nature and purpose therefore, order execution policies (which are not reporting tools) have to be descriptive and are not meant to deliver analytical results. For this reason, we do not welcome the level of granularity in the specification of the criteria for establishing and assessing the effectiveness of investment firms' order execution policies. For example, the required consideration of historical prices in determining both the execution venues to include in the execution policy and the execution venue to be selected upon receipt of a client order, is overly burdensome (and we note that Article 27 (1) of MiFID II already lists the criteria to assess best execution, price being one of many others factors).

- **The draft RTS scope does not consider the differences, or provide the necessary carve outs, between client categories or asset classes, where appropriate:** we believe that several requirements would not be appropriate for professional investors, who are more sophisticated and may trade in markets such as for OTC derivative contracts, which are characterised by very little retail client participation. In addition, trading protocols in bonds and derivatives markets, such as voice and RFQ trading systems, significantly differ from order book or auction procedures used in equities (or other securities). Several suggested requirements in the draft RTS, in particular the pre-selection of execution venues may not be appropriate for these types of transactions.

Finally, as a general observation, while we recognise the legal obligation to develop draft RTS, it seems that some of the perceived shortcomings and areas for improvement outlined in section 18 of the Policy Background accompanying the draft RTS would not be fully resolved by the current proposals, and could instead be addressed through targeted supervisory or enforcement actions in relation to firms that are not meeting the current standards.

A more proportionate way to address the shortcomings ESMA has observed would be to codify existing available material, such as existing Level 2 rules (which can be found in different legal sources), into the new draft RTS. Where existing rules apply these should not be rephrased. These existing rules should be lifted and shifted into a draft RTS to ensure stable language and legal certainty. A consolidation exercise should also be carried out in relation to existing Q&As. Having all the relevant rules and guidance in a consolidated and cohesive format would facilitate ease of consumption for firms and, in turn, is likely to enhance compliance of the existing rules, which we argue continue to be fit for purpose.

We therefore urge ESMA to leverage the existing legal architecture to the greatest extent possible³.

The Associations would welcome the opportunity to speak with ESMA to better understand the concerns and to contribute to developing more targeted solutions.

³ For example, we do not support the proposed revision of the current framework in relation to the selection of execution venues. We do not believe the current wording should be amended as the criteria to determine the best possible result in existing Level 1, Level 2, and ESMA Q&As provide a comprehensive framework which is already well known and understood by the industry. Particularly, with respect to Recital 15 of the draft RTS (firms selecting only one execution venue to execute client orders), the ESMA Q&As already clarify that firms are not prohibited from selecting only one execution venue to execute client orders if they are able to demonstrate that such a choice enables them to consistently get the best results for their clients. Additionally, firms need to regularly assess the market landscape to determine whether or not there are alternative venues that they could use.

Contacts:**Giulia Pecce, AFME**

Director, Head of Secondary Capital Markets and Wholesale Investor Protection

Giulia.pecce@afme.eu

Aniqah Rao, AIMA

Associate Director, Markets Regulation

arao@aima.org

Susan Yavari, EFAMA

Deputy Director, Capital Markets and Digital

Susan.yavari@efama.org

Kirsten Hjortshøj Bederholm, EFSA

Senior Adviser

khb@fida.dk

Nina Suhaib-Wolf, ICMA

Director, Market Practice & Regulatory Policy

nina.suhaib-wolf@icmagroup.org

Kai Möritz, ISDA

Assistant Director, European Public Policy

kmoritz@isda.org

Erik Einerth, NSA

Senior Expert

erik@svpm.se