

## Briefing note

### ***ESMA Opinion on the concept of “Traded on a trading venue” (TOTV) under MiFID II and MiFIR***

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The European Securities and Markets Authority (ESMA) published an [opinion](#) clarifying the concept of “traded on a trading venue” (TOTV), which is relevant for a number of provisions under MiFID II and MiFIR. ESMA states that only OTC derivatives sharing the same reference data details as the derivatives traded on a trading venue should be considered to be TOTV and, hence, subject to the MiFIR transparency requirements and to transaction reporting. Below is a summary:

#### **Background:**

- (i) The concept of “traded on a trading venue” (TOTV hereinafter) is referred to and is relevant for the scope of application of a number of provisions of Regulation (EU) No 600/2014 (MiFIR). In particular, these include the following provisions:
  - a. Articles 3, 6, 8, 10, 11, 14, 18, 20 and 21 imposing **pre-trade and post-trade transparency requirements on market operators and investment firms operating a trading venue as well as investment firms (including systematic internalisers) operating OTC;**
  - b. **Articles 23 and 32 setting out trading obligations for shares and derivatives;** and,
  - c. **Articles 26 and 27 imposing transaction reporting and reference data obligations on investment firms and operators of trading venues. [Paragraph 3]**
- (ii) **The concept of TOTV is not defined in MiFID II/MiFIR. [Paragraph 4]**
- (iii) However, national competent authorities and market participants have asked ESMA to clarify the meaning of this concept for the purpose of the correct application of the above-mentioned provisions in respect of OTC derivatives. **[Paragraph 5]**

#### **Opinion:**

- (i) MiFIR significantly broadens the scope of application for the transparency and transaction reporting requirements by requiring not only instruments that are admitted to trading on a regulated market but also instruments that are traded on other trading venues - MTFs or OTFs – to be subject to the transparency and transaction reporting requirements. **Articles 20 and 21 as well as recital 18 of MiFIR and recital 116 of MiFID II clarify that the transparency requirements should also apply to investment firms undertaking transactions outside of trading venues as long as the instrument is TOTV. [Paragraph 7]**

#### *MiFIR articles 20 and 21*

**Post-trade disclosure by investment firms, including systematic internalisers, in respect of:**

#### *Article 20*

**shares, depositary receipts, ETFs, certificates and other similar financial instruments**

#### *Article 21*

**bonds, structured finance products, emission allowances and derivatives**

- (ii) However, MiFIR does not require that all financial instruments traded OTC, including derivatives, are captured by the transparency and transaction reporting obligation. In particular, **financial instruments that are only traded outside of trading venues are not included.** [Paragraph 8]
- (iii) **ESMA considers it therefore important to delineate the OTC derivatives that are within the scope of the transparency and transaction reporting requirements from those OTC derivatives that are not considered TOTV** and, hence, are outside the scope of the transparency and transaction reporting requirements. [Paragraph 9]
- (iv) [Regulation \(EU\) 2017/585](#), stemming from the empowerment of Article 27(3) of MiFIR, **specifies the relevant identifying reference data that needs to be submitted for each financial instrument admitted to trading on regulated markets or traded on MTFs or OTFs.** [Paragraph 10]
- (v) Hence, regarding derivatives, the reference data submitted in accordance with the requirements of Article 27(1) of MiFIR will include the relevant reference data details which identify each derivative admitted to trading on regulated markets or traded on MTFs or OTFs. [Paragraph 10]
- (vi) Therefore, **ESMA is of the view that only OTC derivatives sharing the same reference data details as the derivatives traded on a trading venue should be considered to be TOTV** and, hence, **subject to the MiFIR transparency requirements and to transaction reporting** according to Article 26(2)(a) of MiFIR. [Paragraph 11]
- (vii) In this context, **“sharing the same reference data details” should mean that the OTC derivatives should share the same values as the ones reported in accordance with the fields of [Regulation \(EU\) 2017/585](#) for derivatives admitted to trading or traded on a trading venue, except fields 5 to 12 (the trading venue and issuer-related fields). See annex below.** [Paragraph 12]
- (viii) Since the trading venue and issuer related fields are only applicable to trading venues when submitting reference data for derivatives but are not applicable for trading those contracts bilaterally outside of trading venues, **ESMA considers it appropriate not to take into account these fields when determining whether an OTC derivative traded outside of a trading venue is to be considered TOTV.** [Paragraph 13]
- (ix) [...] **Nevertheless, ESMA is aware that what is to be considered the “same” reference data details may need to be revisited by ESMA taking into account the evolution of markets post 3 January 2018.** [Paragraph 15]
- (x) ESMA intends to ensure that such evolution does not undermine market transparency and efficiency, does not result in information asymmetries between market participants and does not create incentives to move trading to the OTC space as this would run counter to the legislative goals expressed in MiFID II/MiFIR. **ESMA therefore plans to monitor the application of the concept of TOTV as described in this Opinion, and, in particular, the ratio of derivatives that are considered TOTV compared to overall OTC derivatives trading.** [Paragraph 15]

*MiFIR Article 26*

**Obligation to report transactions**

2. The obligation laid down in paragraph 1 shall apply to:

- (a) financial instruments which are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made;

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**Annex:**  
[COMMISSION DELEGATED REGULATION \(EU\) 2017/585 of 14 July 2016](#)

*Table 3*

**Details to be reported as financial instrument reference data**

N.	FIELD	CONTENT TO BE REPORTED	FORMAT AND STANDARDS TO BE USED FOR REPORTING
[...]			
<b>Issuer related fields</b>			
5	Issuer or operator of the trading venue identifier	LEI of issuer or trading venue operator.	{LEI}
<b>Venue related fields</b>			
6	Trading venue	Segment MIC for the trading venue or systematic internaliser, where available, otherwise operating MIC.	{MIC}
7	Financial instrument short name	Short name of financial instrument in accordance with ISO 18774.	{FISN}
8	Request for admission to trading by issuer	Whether the issuer of the financial instrument has requested or approved the trading or admission to trading of its financial instrument on a trading venue.	'true'- Yes 'false' – No
9	Date of approval of the admission to trading	Date and time the issuer has approved admission to trading or trading in its financial instruments on a trading venue.	{DATE_TIME_FORMAT}
10	Date of request for admission to trading	Date and time of the request for admission to trading on the trading venue.	{DATE_TIME_FORMAT}
11	Date of admission to trading or date of first trade	Date and time of the admission to trading on the trading venue or the date and time when the instrument was first traded or an order or quote was first received by the trading venue.	{DATE_TIME_FORMAT}
12	Termination date	Where available, the date and time when the financial instrument ceases to be traded or to be admitted to trading on the trading venue.	{DATE_TIME_FORMAT}

[...]