



ADVICE TO ESMA

Trading Venues Aspects of the Consultation Paper on MiFID II and MiFIR

I. Executive summary

MiFID II and MiFIR will contribute to improve efficiency, transparency, integrity, and orderly functioning of financial markets. Towards this end, ESMA is expected to provide a sound, effective and consistent level of regulation and supervision, and to prevent regulatory arbitrage and promote equal conditions of competition among trading venues.

Given the short timeframe available to provide advice to ESMA on the Trading Venues aspects included in the Consultation Paper (section 6), the SMSG has decided not to go through all the questions included in the section. Instead, the SMSG concentrates on what it considers to be the most relevant issues: firstly, the definition of SME Growth Markets; secondly, the suspension or removal from trading when it affects different markets; and finally, the concept of substantial importance in relation to trading venues as a necessary trigger for cooperation agreements among national competent authorities.

One of the aims of MiFID II is to facilitate access to capital for SMEs. To that end a regime is envisaged for the registration of MTFs offering facilities to SMEs as SME growth markets (SME-GM). The objective is to raise the visibility and profile of specialized SME markets and to establish common European standards, while at the same time providing flexibility to incorporate existing SME markets within the newly created label.

In the context of these objectives the SMSG supports all ESMA proposals included in the CP regarding requirements to be considered an SME-GM. The majority (over 50%) of SMEs in a market should be measured in terms of number of listed companies; and sufficient flexibility, up to three years, should be given before a market is deprived of the SME-GM label. For non-equity issuers to count as SMEs where their debt is traded on such market, a similar approach as the one applied for equities is supported.

In terms of the operating model for SME-GM, as well as admission and disclosure requirements, sufficient flexibility should be given to market operators, under the supervision of corresponding NCAs. Flexibility should also be given regarding the detailed disclosures required for an SME-GM admission document, so long as it meets the general principle of containing sufficient information for an investor to make an informed assessment of the financial position and prospects of the issuer.

In order to achieve the right balance between appropriate investor protection and not overly burdensome obligations on issuers, the SMSG believes that issuers in SME-GM should be required to publish annual and half yearly reports, with six and four month deadlines respectively. While the natural place to publish these reports is considered to be the issuer's website, a market operator website could provide a better

homogeneity in presentation of such reporting wherefore the two should be linked. Additionally, acknowledging the international nature of many new SMEs (markets, products/services, customers, composition of board, management and key personnel as well as potential investor base) and hence their choice of English as working language, the use of English language is encouraged, alongside local language, in the admission documents as well as on-going reporting.

Regarding trading suspension or removals, and the chain effect on other trading venues, the SMSG recommends to differentiate between causes related to the issue/issuer and those related to a specific market - the former being a cause for automatic suspension. The group supports taking into consideration, when contemplating a suspension or removal, the potential knock-on effects on instruments serving as underlying or constituent of derivatives, indices or benchmarks.

An issue that is of growing importance, in terms of achieving a consistent level of supervision and preventing regulatory arbitrage, relates to the trading venue in a Host Country State, and in particular the trigger of cooperation agreements among NCAs. In order not to cause an excessive regulatory burden on small trading venues, the SMSG supports ESMA's view that the trigger should apply only when trading venues are significant (over 10% market share), and always when it relates to an SME-GM.]

II. Background

1. On May 22, 2014 ESMA published a consultation paper relating to technical advice to be proposed by ESMA to assist the Commission with the possible content of the delegated acts required by several provisions of MiFID II and MiFIR. The requested responses must reach ESMA by 1 August 2014, ie a very short deadline in view of the magnitude and complexity of matters covered.
2. Within the general scope of the SMSG Group, a Working Group was formed to provide advice on Trading Venues' Organizational Requirements. Given the tight schedule, the group decided to focus its advice on what were considered the most significant topics covered in section 6 of the Consultation Paper, entitled "Requirements applying on and to trading venues".
3. The issues on which advice is given are listed below:
 1. SME Growth Markets
 - 1.1 Composition of issuers
 - 1.2 Access of issuers : criteria and transparency levels
 - 1.3 On-going reporting requirements
 - 1.4 Market abuse prevention
 2. Suspension or removal from Trading
 3. Trading Venue in Host Member State : substantial importance

III General comments of the Group on those selected issues

1. SME Growth Markets

1.1 Composition of issuers

4. *ESMA is invited to provide its technical advice on the different options provided with regard to each of the requirements that a SME growth market will need to meet in accordance with Article 33(3) of the Directive. With respect to requirements enacted in Article 33(3)(a) ESMA is notably invited to provide technical advice to specify how to apply the 50% criterion to various potential scenarios including where no track record is available for newly created markets or issuers or in case of issuers of non-equity securities only.*
5. *In addition, ESMA is also invited to provide technical advice to specify the rules governing the registration and the deregistration of the SME growth markets, it being specified that pursuant to Article 33(8) these measures shall ensure that refusal to register or de-registration do not occur as a result of a merely temporary failure to meet the SME growth markets eligibility criteria.*

Article 33(3)(a), MiFID II

at least 50 % of the issuers whose financial instruments are admitted to trading on the MTF are SMEs at the time when the MTF is registered as an SME growth market and in any calendar year thereafter;

Questions 176 to 180 (pages 241-242)

6. The SMSG supports the view that the 50% criterion to be considered an SME-GM should be based on number of issuers only, and assessment done on an annual basis, based on an the average of each month of the calendar year.
7. When an SME-GM falls below the 50% mark, we support the proposal that there must be some flexibility in deciding to deregister as SME-GM, insofar as volatility in valuation could cause excessive swings in the number of companies moving up or down the 200 million market cap.
8. The SMSG considers that a too short period of assessment might cause too many companies –especially successful ones- to be penalized, and therefore supports a three year period as appropriate.
9. We also support the view that falling below the 50% mark for a short period –less than two years- should not be made public, as this could be seen as a potential threat to future deregistration, and, as such, accelerate the loss of SMEs otherwise contemplating a listing.
10. Regarding non-equity issuers, the SMSG supports the view that they should be taken into account for the 50% mark. If the issuer has listed shares, then the market cap definition for SME should be the relevant one. Otherwise, a non-equity issue should be considered an SME if the overall debt of the issuer stands below 200 million euros.

1.1 Access of issuers : criteria and transparency levels

11. *With respect to requirements enacted in Article 33(3)(b) to (g), ESMA is invited to provide technical advice taking into account and ensuring consistency with other Union legislations.*

Article 33(3)(b) MiFID II

appropriate criteria are set for initial and ongoing admission to trading of financial instruments of issuers on the market;

12. *With respect to requirements enacted in Article 33(3)(b) to (g), ESMA is invited to provide technical advice taking into account and ensuring consistency with other Union legislations.*

Article 33(3)(c) MiFID II

on initial admission to trading of financial instruments on the market there is sufficient information published to enable investors to make an informed judgment about whether or not to invest in the financial instruments, either an appropriate admission document or a prospectus if the requirements laid down in Directive 2003/71/EC are applicable in respect of a public offer being made in conjunction with the initial admission to trading of the financial instrument on the MTF;

Questions 181 to 192 (pages 246-250)

13. Regarding issuer admission and disclosure requirements, the SMSG supports the preservation of an appropriate degree of flexibility for market operators under the supervision of NCAs. Additionally, the choice of the operating model should be left to the discretion of the market operator.
14. Given the particular features of SMEs from the point of view of risks to investors, the SMSG supports the view that an appropriate level of requirements should be placed on the management and the board so as to fulfil the responsibilities of a listed company, as well as to have in place the necessary systems and controls to comply with continuing obligations under the rules of the market.
15. Additionally, the SMSG considers that an SME-GM issuer should be required to disclose whether or not it has sufficient working capital and if not how it proposes to obtain the appropriate level.
16. Despite this general principle, however, we support the proposal that requirements in terms of corporate governance, systems/controls, or working capital, be sensitive to local factors, and therefore market operators could implement a range of different approaches, under supervision of the corresponding NCA.
17. We also support the view that the general principle of the Prospectus Directive should be met by SME-GM issuers, and therefore the admission document should contain sufficient information for an investor to make an informed assessment of the financial position and prospects of the issuer.
18. The detailed disclosures required for an SME-GM admission document, however, should be left as a matter for market operators under the direct supervision of their NCAs. With due regard to the international nature of many new SMEs today (markets, products, services, customers as well as composition of board, management and key personnel) and hence their choice of English as working language, the SMSG would like to propose that also English be allowed in parallel with the local language.
19. It should also be left to each market operator to decide whether it carries out an appropriate review to ensure that the admission document is complete. Regardless of this decision, responsibility for ensuring that the information contained in an admission document is accurate should lie unequivocally with the issuer.

1.2 On going reporting requirements

20. *With respect to requirements enacted in Article 33(3)(b) to (g), ESMA is invited to provide technical advice taking into account and ensuring consistency with other Union legislations.*

Article 33(3)(d) MiFID II

there is appropriate ongoing periodic financial reporting by or on behalf of an issuer on the market, for example audited annual reports;

21. *With respect to requirements enacted in Article 33(3)(b) to (g), ESMA is invited to provide technical advice taking into account and ensuring consistency with other Union legislations.*

Article 33(3)(e) MiFID II

issuers on the market as defined in point (21) of Article 3(1) of Regulation (EU) No .../2014, persons discharging managerial responsibilities as defined in point (25) of Article 3(1) of Regulation (EU) No .../2014 and persons closely associated with them as defined in point (26) of Article 3(1) of Regulation (EU) No .../2014.* comply with relevant requirements applicable to them under Regulation (EU) No .../2014;*

Questions 193 to 200 (pages 252-255)

22. The SMSG support the view that issuers in SME-GM should be required to publish annual and half yearly reports.
23. Annual reports should be published within six months after the end of the financial year, while half-yearly reports should be published within four months after the end of the half-year period.
24. As to where the reporting requirements should be published (on the website of either the issuer or the market operator), the working group considers this should be left to each market operator to decide, in accordance with respective NCA.
25. In order to minimize the administrative burden on SMEs while ensuring adequate disclosure to investors some group members suggest that the information published (in the agreed format) on the issuers' own websites, is also accessible via a direct link from the trading venue's website, where all issuers are listed with relevant trading data.
26. Regarding language for publishing reporting requirements, the WG considers it should be left to market operators to decide.
27. Despite this general principle, and the fact that most –if not all- markets will require the use of local language, some group members consider that the use of English in addition to local language should be incentivized, acknowledging the international nature (markets, products, services, customers as well as boards, management and key personnel as well as potential investors) of many new SMEs.

1.3 Market abuse prevention

28. *With respect to requirements enacted in Article 33(3)(b) to (g), ESMA is invited to provide technical advice taking into account and ensuring consistency with other Union legislations.*

Article 33(3)(g), MiFID II

there are effective systems and controls aiming to prevent and detect market abuse on that market as required under the Regulation (EU) No .../2014.

Questions 201 (pages 255-256)

29. The SMSG considers that no additional specifications should be imposed on SME-GM beyond the rules laid down in MAR and MIFID II for MTFs.

2. Suspension or Removal from Trading

30. *ESMA is invited to provide technical advice on a non-exhaustive list of situations constituting significant damage to the investors' interests and the orderly functioning of the market which could be the basis of a decision not to follow a suspension or removal notification.*

Article 52(2) MiFID II (the provision in Article 32(2) MiFID II is worded similarly)

31. *The competent authority, in whose jurisdiction the suspension or removal originated, shall require that other regulated markets, MTFs, OTFs and systematic internalisers, which fall under its jurisdiction and trade the same financial instrument or derivatives as referred to in points (4) to (10) of Section C of Annex I to this Directive that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument infringing Articles 7 and 17 of Regulation (EU) No. .../2014 except where such suspension or removal could cause significant damage to the investors' interests or the orderly functioning of the market.*

Questions 202 to 204 (pages 260-261)

32. *The SMSG considers that, when a trading suspension or removal takes place, a distinction should be made as to whether it is due to aspects related to the issue/issuer, or to the market.*
33. *As a general rule, in the first case the suspension/removal should apply to all markets where the issue trades, whereas in the second case suspension should be limited to the market where the problems have appeared.*
34. *In order to facilitate the decision by a market operator on whether or not to follow a suspension decision taken by another, the group supports ESMA's approach based on a non-exhaustive list of examples, rather than trying to pre-specify all possible circumstances.*

Regardless of the non-exhaustive and non-deterministic character of the proposed list, the SMSG supports taking in consideration the knock-on effects of a suspension or removal of instruments serving as underlying or constituent of derivatives, indices, or benchmarks.

3. Trading Venues in Host member State : substantial importance

35. *ESMA is invited to provide advice on how to establish the criteria under which the operations of a trading venue in a host Member State could be considered as being of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State in order to determine under which circumstances proportionate cooperation arrangements are required to be put in place between the respective Member States in accordance with Article 79(2) of the Directive. These criteria should take into account the nature and scale of the impact on the securities markets and the investor protection in the other Member State. ESMA should take account of the criteria set out in Article 17 of the Commission Regulation (EC) No 1287/2006, taking into account any need to develop these standards in light of market and technological developments.*

Article 79(2), MiFID II

36. *When, taking into account the situation of the securities markets in the host Member State, the operations of a trading venue that has established arrangements in a host Member State have become of substantial importance for the functioning of the securities markets and the protection of the investors in*

that host Member State, the home and host competent authorities of the trading venue shall establish proportionate cooperation arrangements.

Questions 205 to 206 (pages 263-264)

37. The SMSG supports ESMA's approach insofar as cooperation agreements are not automatically triggered in the case of small and therefore economically not highly significant MTFs and OTFs. Otherwise it could lead to an excessive number of NCAs bound by cooperation agreements, adding excessive burdens for small and non-significant trading venues.
38. In those cases, the substantial importance necessary to trigger cooperation agreements will only be assumed if at least one of the two following criteria apply:
 - a) before being acquired the trading venue had a market share of at least 10%
 - b) the trading venue is registered as an SME growth market.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 15 August 2014



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