

DECISION OF THE BOARD OF SUPERVISORS

on delegation to the ESMA Chair of the adoption of opinions on pre-trade transparency waivers

The Board of Supervisors

Having regard to 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/EC¹ (the “Regulation” and “ESMA”), and in particular Article 43(2) and Article 44(1) thereof

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012² (MiFIR), and in particular Article 4(4) and Article 9(2) thereof

Whereas:

- (1) Article 4(4) and Article 9(2) of MiFIR require a competent authority, as defined in Article 2(1)(26) of Directive 2014/65/EU³, to notify ESMA of its intention to grant a waiver from the pre-trade transparency obligations pursuant to Article 3 and Article 8 of MiFIR.
- (2) The same provisions require ESMA to issue a non-binding opinion to the competent authority in question within two months of the notification, assessing the compatibility of each intended waiver with the requirements established, respectively, in Article 4(1) of MiFIR and in Commission Delegated Regulation (EU) 217/587⁴ and in Article 9(1) of MiFIR and in Commission Delegated Regulation (EU) 217/583⁵.

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 173, 12.6.2014, p. 84.

³ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349)

⁴ Commission Delegated Regulation (EU) 217/587 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)

⁵ Commission Delegated Regulation (EU) 217/583 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



- (3) ESMA has already issued a significant number of opinions on equity waivers and many more opinions are expected to be issued by ESMA.
- (4) However, the current adoption procedure has created significant administrative burden, not only for ESMA staff but also for competent authorities and members of the Board of Supervisors reviewing the opinions. In addition, MiFIR/MiFID II envisaged a number of other new tasks for ESMA, which often are linked to tight deadlines, as a result of which the Board of Supervisors of ESMA may need to allocate more resources to the execution of some of these tasks.
- (5) Given the significant number of opinions on waivers from pre-trade transparency obligations which will need to be adopted in the future and the rather tight deadline for such adoption, and in the light of the increased tasks of ESMA under MiFIR/MiFID II, it is desirable that the power to adopt non-controversial opinions is delegated to the Chair of ESMA.
- (6) The delegation should be exercised in accordance with the restrictions and conditions set out in this decision. The conditions should provide guidance for the exercise of the delegated powers and, therefore, should limit the discretion involved.

Has adopted this decision:

Article 1 – Delegation of powers

The Board of Supervisors of ESMA (the Board of Supervisors) delegates to the Chair of ESMA (the Chair) the task to:

- (1) assess the compatibility of each intended notified waiver with the requirements established, in Article 4(1) of MiFIR and in Commission Delegated Regulation (EU) 217/587 or in Article 9(1) of MiFIR and in Commission Delegated Regulation (EU) 217/583 and
- (2) to issue on behalf of ESMA any non-controversial opinion regarding the intended waivers.

The Board of Supervisors retains the powers to adopt controversial opinions regarding the intended waivers.

For the purpose of this decision, non-controversial opinion shall mean an opinion confirming the compatibility of an intended waiver with the relevant requirements and in respect of which neither members of the secondary market standing committee (SMSC), nor ESMA staff raise objections.

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)

Article 2 – Conditions for the delegation

- (1) The powers delegated under Article 1 are conferred on the Chair for an indeterminate period.
- (2) The Chair shall inform, at least annually, the Board of Supervisors of the opinions issued under this decision.
- (3) The Board of Supervisors may request information in respect of any opinion issued under this decision.
- (4) The Board of Supervisors can reconsider and revoke at any time the delegation of powers established under this decision. The decision of revocation shall put an end to the delegation of powers specified in this decision.

Article 3 – Exercise of the delegation

The Chair shall exercise the powers delegated under this decision in accordance with the following conditions:

- (1) He/she may only issue an opinion if it is non-controversial.
- (2) While assessing the compatibility of an intended waiver with the relevant requirements established in Article 4(1) of MiFIR and in Commission Delegated Regulation (EU) 217/587, the Chair shall ensure the following, as applicable:
 - a. in respect of systems matching orders based on a reference price, that the conditions set out in Article 4(1)(a) and (2) of MiFIR and in Article 4 of Commission Delegated Regulation (EU) 217/587 are met. In particular, the Chair shall assess whether the reference price used for matching orders is derived from the trading venue where the instrument was first admitted to trading or the most relevant market in terms of liquidity in, and the orders benefitting from the waiver are executed at the mid-point within the current bid and offer prices of the trading venue from which the reference price is derived;
 - b. in respect of systems that formalise negotiated transactions in liquid equity instruments, that the conditions set out in Article 4(1)(b)(i) and (3) of MiFIR and in Article 5 of Commission Delegated Regulation (EU) 217/587 are met. In particular, the Chair shall assess whether transactions are made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the trading venue operating that system, the trading venue has arrangements, systems and procedures in place to prevent and detect market abuse or attempted market abuse and to detect attempts to use the waiver to circumvent other MiFID II requirements, and transactions are negotiated privately and reported under the rules of the trading venue;

- c. in respect of systems that formalise negotiated transactions in illiquid equity instruments, that the conditions set out in Article 4(1)(b)(ii) of MiFIR and in Articles 5 of Commission Delegated Regulation (EU) 217/587 are met. In particular, the Chair shall assess whether the transactions only include instruments that do not have a liquid market, are effected within a percentage of a suitable reference price and are negotiated privately and reported under the rules of the trading venue;
 - d. in respect of systems that formalise negotiated transactions subject to conditions other than the current market price of that instrument, that the conditions set out in Article 4(1)(b)(iii) of MiFIR and in Articles 5 and 6 of Commission Delegated Regulation (EU) 217/587 are met. In particular, the Chair shall assess whether the transactions are negotiated privately and reported under the rules of the trading venue, and comply with one or more of the circumstances specified in Article 6 of Commission Delegated Regulation (EU) 217/587;
 - e. in respect of orders that are large in scale compared with normal market size, that the conditions set out in Article 4(1)(c) of MiFIR and in Article 7 in conjunction with Annex II of Commission Delegated Regulation (EU) 217/587 are met;
 - f. in respect of orders held in an order management facility, that the conditions set out in Article 4(1)(d) of MiFIR and in Article 8 of Commission Delegated Regulation (EU) 217/587 are met. In particular, the Chair shall assess whether the orders adhere to the minimum size, the disclosure of the orders is contingent on objective conditions that are pre-defined by the trading venue operator, the undisclosed part of the orders cannot interact with other orders and the disclosed part can interact with other orders; and
 - g. that any other guidance or interpretation, relevant to the requirements referred to in this sub-paragraph, which has been adopted or agreed by the Board of Supervisors is taken into account.
- (3) While assessing the compatibility of an intended waiver with the relevant requirements established in Article 9(1) of MiFIR and in Commission Delegated Regulation (EU) 217/583, the Chair shall take into account the following, as applicable:
- a. in respect of orders that are large in scale compared with normal market size, that the conditions set out in Article 9(1)(a) of MiFIR and in Article 3 in conjunction with Annex III of Commission Delegated Regulation (EU) 217/583 are met;
 - b. in respect of orders held in an order management facility, that the conditions set out in Article 9(1)(a) of MiFIR and in Article 4 of Commission Delegated

Regulation (EU) 217/583 are met. In particular, the Chair shall assess whether the orders adhere to the minimum size, the disclosure of the orders is contingent on objective conditions that are pre-defined by the trading venue operator, the undisclosed part of the orders cannot interact with other orders and the disclosed part can interact with other orders;

- c. in respect of actionable indications of interest that are above a size specific to the instrument (SSTI), that the conditions set out in Article 8(4) and 9(1)(b) of MiFIR as supplemented by Article 5 in conjunction with Annex III of Commission Delegated Regulation (EU) 217/583 are met. In particular, the Chair shall assess whether the trading venue requesting the waiver operates a request-for-quote or voice trading system, all orders are above the relevant SSTI-threshold, and the trading venue discloses indicative pre-trade prices on a continuous basis.
- d. in respect of orders in derivatives which are not subject the trading obligation and other financial instruments for which there is not a liquid market, that the conditions set out in Article 9(1)(c) of MiFIR and in Article 6 in conjunction with Annex III of Commission Delegated Regulation (EU) 217/583 are met.
- e. in respect of orders for the purpose of executing an exchange for physical, that the conditions set out in Articles 2(1)(48) and (49) as well as 9(1)(d) of MiFIR are met;
- f. in respect of package orders for which at least one of component is a financial instrument for which there is not a liquid market, unless there is a liquid market for the package order as a whole, that the conditions set out in Articles 2(1)(49) and (50) and 9(1)(e)(i) of MiFIR and in Article 6 in conjunction with Annex III of Commission Delegated Regulation (EU) 217/583 and Commission Delegated Regulation (EU) 2017/2194 are met;
- g. in respect of package orders for which at least one of its components is large in scale, unless there is a liquid market for the package order as a whole, that the conditions set out in Articles 2(1)(49) and (50) and 9(1)(e)(ii) of MiFIR and in Article 3 in conjunction with Annex III of Commission Delegated Regulation (EU) 217/583 and Commission Delegated Regulation (EU) 2017/2194 are met;
- h. in respect of package orders for which all of its components are executed on a request-for-quote or voice system and are above the SSTI, that the conditions set out in Articles 2(1)(49) and (50) and 9(1)(e)(iii) of MiFIR and in Article 5 in conjunction with Annex III of Commission Delegated Regulation (EU) 217/583 are met; and



- i. that any other guidance or interpretation, relevant to the requirements referred to in this sub-paragraph, which has been adopted or agreed by the Board of Supervisors is taken into account.

Article 4 – Entry into force

- (1) This decision enters into force immediately.
- (2) It shall be published on ESMA's website.

Done at Paris on 29 March 2018

Steven Maijor
Chair
For the Board of Supervisors