bankenverband

Consultation Paper Amendments to Commission Delegated Regulation (EU) 2017/587 (RTS 1) – ESMA70-156-275

Comments of the Association of German Banks

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Q1: Do you agree with ESMA's proposal to clarify that SIs' quotes would only reflect prevailing market conditions where the price levels could be traded on a trading venue at the time of publication?

No, because there is neither a material nor a formal legal basis for the changes to RTS 1 proposed in the consultation paper. If European lawmakers see a need for equal treatment of multilaterally operating regulated markets and bilaterally operating systematic internalisers (SIs), we consider it essential to follow the prescribed legislative process. This means mandating such a change at Level 1 by amending Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 (MiFID II) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 (MiFIR).

On top of that, we would like to stress that stakeholders need legal certainty for their decisions. There was no reason to expect amendments to RTS 1 either at this point in time (particularly given that this consultation is ending after RTS 1 entered into force) or because of any merit in changing the content.

Our reasons for disagreeing with ESMA's proposals are explained in more detail below.

1. Doubts about a material legal basis

The Association of German Banks seriously doubts that a **material** legal basis exists for ESMA's proposed amendments to RTS 1. RTS 1 in general and Article 10 of RTS 1 in particular, which spells out the criteria to be met by prices published by a systematic internaliser, are based on Article 14(7) of MiFIR.

By contrast, the de facto extension of the tick size regime to SIs now proposed in the new Article 10 of RTS 1 is based on Article 49 of MiFID II. Para 10 of the consultation paper sets out ESMA's rationale for the proposed change: "The tick size regime of Article 49 of MiFID II was introduced in order to harmonise price increments on European trading venues, prevent tick sizes being used as a tool for competition between venues and thereby remove the risk of a 'race to the bottom'." Details of the tick size regime are set out in Title III of MiFID II, which contains **specific** requirements (lex specialis) for **regulated markets** only (cf. Article 44 ff. of MiFID II).

We would like to point out in this context that the definitions of an SI (Article 4(1)(20) of MiFID II) and a regulated market (Article 4(1)(13) of MiFID II)are different. The determining factor of an SI is that it executes "client orders **outside** a regulated market, an MTF or an OTF without operating a multilateral system." It is therefore difficult to understand why rules designed specifically for regulated markets should be applied to different execution venues, such as SIs, without any corresponding change in the Level 1 legislation.

Admittedly, ESMA goes on to say in para 10 of the consultation paper that "it would appear contradictory to the general MiFID II objective of levelling the playing field between means of trading if the new tick size regime resulted in 'artificially' moving volumes from trading venues to SIs based on systematic internalisers quoting at price levels that are not available for trading venues." It then argues in para 11 of the consultation paper that this interpretation is "also supported by recital 18 of MiFIR." It should be borne in mind, however, that there is no reference whatsoever to the tick size regime in MiFIR: the requirements of the regime are elaborated only in MiFID II.

In the executive summary of the consultation paper, ESMA states that, "over recent months, it has come to ESMA's attention that the concept of 'prices reflecting prevailing market conditions' may require further clarification." As explained above, legal reasons preclude using the provisions of Article 49 of MiFID II for "clarification" purposes. Article 49 of MiFID II and the drafting and application of corresponding Level 2 measures expressly relate to regulated markets only. The use of Article 49 for ESMA's clarification purposes would require a change to the Level 1 requirements.

In the absence of a material mandate, therefore, we oppose ESMA's suggested amendments.

2. Doubts about a formal legal basis

We also have serious **procedural** doubts about a legal basis for ESMA's proposed amendments to RTS 1. These standards have already gone through the envisaged procedure in accordance with Article 14(7) of MiFIR in conjunction with Articles 10 to 14 of Regulation (EU) No 1095/2010 (ESMA Regulation). Under this procedure, ESMA was required to submit a draft RTS 1 by 3 July 2015. ESMA published its draft on 28 September 2015 (ESMA/2015/1464). The Article 10 proposed in this draft is – with the exception of a minor editorial revision – identical to the text of the RTS 1 adopted on 14 July 2016 and published in the Official Journal of the European Union on 31 March 2017 as Commission Delegated Regulation (EU) 2017/587.

It is true that after the draft RTS were issued for consultation and submitted to the European Commission in accordance with Article 10(1), subparagraph 3 of the ESMA Regulation, the European Commission then endorsed the draft later than the envisaged three months after receipt (cf. Article 10(1), subparagraph 5 of the ESMA Regulation). But there are no substantive differences between ESMA's draft and the version finally published in the Official Journal under Article 10(4) of the ESMA Regulation.

The ESMA Regulation makes no provision for amending regulatory technical standards which have been duly drafted, consulted on, adopted and published. The admissibility of changes should therefore be evaluated on the basis of general principles. Accordingly, changes should only be contemplated if the mandate for the RTS in question has been revised or if the circumstances underlying the RTS have substantially changed. There is no indication either that

the mandate for RTS 1, specifically Article 14 of MiFIR, has changed or that there has been any change in the circumstances on which ESMA's proposals for RTS 1 were originally based. Varying interpretations of the text of already published standard is not, in our view, a sound reason for modifying it.

If minor, purely editorial revisions are needed to the text of an RTS because of adjustments to the underlying Level 1 text (e.g. wording changes), these should be made along the lines of the corrigendum procedure at Level 1. The proposed amendments to Article 10 of the RTS do not, however, represent follow-up revisions of this kind.