

High level summary of Nasdaq's reply to ESMA consultation on MiFID II level II

Transparency

We maintain our concern with the ambiguities in MiFIR with respect to the potential use of matched trades or riskless principal trading by systematic internalisers. As stated by ESMA in the consultation paper, we believe that the possibility of executing riskless or matched principal transactions by systematic internalisers may undermine the objective of establishing a level playing field between systematic internalisers and trading venues and possibly create arbitrage opportunities in respect of the limits to dark trading established by MiFIR. We urge ESMA to support a clarification.

Moreover, we are concerned with transparency regimes for SIs that we see too flexible when compared with the one applicable to which market-makers active on multilateral platforms. We believe the quantitative thresholds for the SMS, or at least the methodology should be aligned with that for the LIS. If the current SMS methodology is retained, the more liquid an instrument is, the less the average size of transaction is and therefore the lower the SMS threshold above which one can trade in the dark. This is actually counter-intuitive. There are no reasons why SIs should benefit from such a regime while multilateral platforms cannot, especially in an environment where, due to the OTC regulation, SIs will become increasingly used.

Fixed income

For fixed income, Nasdaq strongly supports the chosen use of the COFIA approach and the benefits it brings to market participants including operators of trading venues, investment firms, national competent authorities etc. The model proposed by ESMA clearly benefits from being operational and at the same time offers an adequate level of accuracy in determining the liquidity for different types of bonds. It is important that the regime can support further transparency while at the same time not reducing transparency in already well developed fixed income markets.

Equity derivatives

Regarding the liquid market definition for equity derivatives, we also agree using the COFIA but we oppose using maturity as a proxy for liquidity and support the idea to consider liquid equity derivative instruments available for trading on a trading venue. We nonetheless propose to introduce further granularity and proper calibration in the definition of pre- and post-trade large-in-Scale thresholds as to compensate the broad nature of ESMA's proposal for determining liquid equity derivatives products.

We have serious concerns with the proposed large-in-Scale thresholds. In many instances ESMA's proposals will actually result in a reduction in the current levels of transparency. We have made a counterproposal. Our analysis indicates two very concerning outcomes of the ESMA proposal: (1) low thresholds proposed for very liquid contracts; and, (2) high thresholds proposed for very illiquid contracts. We consider that ESMA's proposal will result in liquid contracts moving out of central order books and illiquid contracts of on-exchange trading altogether. This is counterintuitive and we therefore propose an alternative linked to the average daily turnover of the contracts.

Trading obligation for Equity derivatives

Nasdaq is concerned about the ability of MiFIR to fulfil the G20 2009 Pittsburgh summit's mandate according to which all standardized OTC derivative contract should be traded on exchanges or electronic trading platforms, where appropriate and which reiterated in recital paragraph (5) of RTS 11.

There is a regulatory inconsistency in the combined EMIR-MiFIR framework because of the MiFIR trading obligation's dependency to the EMIR clearing obligation and the current lack of an EMIR clearing obligation for standardized OTC equity derivatives classes, especially those mirroring exchange traded derivatives.

Microstructural issues

We generally question the appropriateness of market operators doing a due diligence of clients using sponsored access, which in principle resembles the one for members of the trading venue. The market operator is not better placed to do such controls than the member is. Rather the contrary, and it is an unnecessary duplication of a control which risks creating a false picture of safety in the first part of the control.

Further, on algorithms, conducting testing and due diligence of the members algorithms does not equate to a trading venue's ability to "ensure" that such algorithms cannot create or contribute to disorderly trading in a live environment.

Market data

Nasdaq wants to stress that any forced unbundling of current market data packages will increase costs for venues. Moreover as there is no requirement for a vendor to do the same, vendors would most likely just re-bundle the data, at a cost. Greater disaggregation will not only result in significantly higher costs in distributing market data, but it will also lead to confusion among investors who no longer can rely on receiving all the relevant market data. Moreover, disaggregation that separate large cap and SMEs, like the proposed requirement to disaggregate on the basis of membership in a major index, will result in a loss of visibility for SMEs in the market as data vendors are unlikely to want such data separately. This will create a barrier for SMEs to access market financing in total contradiction with the stated goals of the Capital Markets Union.

We also consider that some of the requirements imposed under the proposed consolidated tape provider regime are too strict. There should for instance be more flexibility around additional services that such providers are allowed to offer. Otherwise, regulatory requirements risk discouraging candidates to such a regime.

Access rights to CCPs and trading venues

We agree in general with ESMA's approach to the level II specifications on grounds to deny access rights. Our main concern is to ensure that the framework governing access rights is as objective and exhaustive as possible. We want to avoid that subjectivity and open criteria provide CCP's, trading venues and their competent authorities with an unreasonable opportunity to arbitrarily deny access, which will threaten the effectiveness of the provisions designed to facilitate the implementation of Level 1. We make a number of proposals towards clearer provisions that will hopefully also facilitate consistent implementation across the European Union.