

OPINION

On the assessment of pre-trade transparency waivers for equity and non-equity instruments

1. Legal basis

1. ESMA's competence to deliver an opinion to national competent authorities (NCAs) is based on Article 29(1)(a) of Regulation (EC) 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)¹ (ESMA Regulation).
2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to NCAs for the purpose of building a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.

2. Background

3. Articles 3 and 8 of Regulation (EU) No 600/2014² (MiFIR) set out pre-trade transparency requirements for market operators and investment firms operating a trading venue concerning, respectively, equity and non-equity instruments in order to inform market participants of trading opportunities and prices and to ensure that an efficient price discovery process is not impaired by the fragmentation of liquidity.
4. MiFIR recognises that there may be circumstances where exemptions from the pre-trade transparency obligations should be provided to avoid the impairment of liquidity as an unintended consequence of obligations to disclose orders. In this respect, MiFIR allows NCAs to waive the obligation for market operators and investment firms operating a trading venue regarding pre-trade transparency requirements.
5. In respect of equity instruments, Article 4 of MiFIR, as further specified in Commission Delegated Regulation (EU) 2017/587³ (RTS 1), sets out four different types of pre-trade transparency waivers:

¹ OJ L 331, 15.12.2010, p. 84.

² 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 648/2012 (OJ L 173, 12.6.2014, p. 84).

³ Commission Delegated Regulation (EU) 2017/587 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).

- a) Reference price (RP): systems where the price is determined by reference to a price generated by another system and the reference price is widely published and regarded generally by market participants as a reliable reference price (Article 4(1)(a) of MiFIR as further specified in Article 4 of RTS 1);
 - b) Negotiated trade (NT): systems that formalise negotiated transactions, provided the transaction:
 - i. takes place at or within the current volume-weighted spread reflected on the order book or the quotes of market makers of the trading venue operating that system (Article 4(1)(b)(i) of MiFIR as further specified by Article 5 of RTS 1); or
 - ii. concerns an illiquid share, depositary receipt, ETF, certificate or other similar financial instrument that does not fall within the meaning of a liquid market and is dealt within a percentage of a suitable reference price set in advance by the system operator (Article 4(1)(b)(ii) of MiFIR as further specified by Article 5 of RTS 1); or
 - iii. is subject to conditions other than the current market price of that financial instrument (Article 4(1)(b)(iii) of MiFIR as further specified by Articles 5 and 6 of RTS 1).
 - c) Large-in-scale (LIS): for orders considered large in size compared with normal market size (Article 4(1)(c) of MiFIR as further specified by Article 7 of RTS 1).
 - d) Order management facilities (OMF): for orders that are held in an order management facility of the trading venue pending disclosure (Article 4(1)(d) of MiFIR as further specified by Article 8 of RTS 1).
6. In respect of non-equity instruments, Article 9 of MiFIR, as further specified in Commission Delegated Regulation (EU) 2017/583⁴ (RTS 2), sets out the below types of waivers:
- a) Large-in-scale (LIS): for orders considered large in size compared with normal market size (Article 9(1)(a) of MiFIR as further specified by Article 3 of RTS 2).
 - b) Order management facilities (OMF): for orders that are held in an order management facility of the trading venue pending disclosure (Article 9(1)(a) of MiFIR as further specified by Article 4 of RTS 2).
 - c) Size specific to the financial instrument (SSTI): for actionable indications of interest in request-for-quote and voice trading systems that are above a size

⁴ Commission Delegated Regulation (EU) 2017/583 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 requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives.

specific to the financial instrument (Article 9(1)(b) of MiFIR as further specified by Article 5 of RTS 2);

- d) Illiquid: for derivatives which are not subject to the trading obligation specified in Article 28 of MiFIR and any financial instrument for which there is not a liquid market (Article 9(1)(c) of MiFIR as further specified by Article 6 of RTS 2);
 - e) Exchange for physical (EFP): for orders for the purpose of executing an exchange for physical (Articles 2(1)(48) and 9(1)(d) of MiFIR);
 - f) Package orders: for orders meeting one of the following conditions:
 - i. At least one of its components 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 (Articles 2(1)(49) and (50) and 9(1)(e)(i) of MiFIR as further specified by Article 6 of RTS 2);
 - ii. At least one of its components is large in scale compared with the normal market size, unless there is a liquid market for the package order as a whole (Articles 2(1)(49) and (50) and 9(1)(e)(ii) of MiFIR as further specified by Article 3 of RTS 2);
 - iii. All of its components are executed on a request-for-quote or voice system and are above the size specific to the instrument (Articles 2(1)(49) and (50) and 9(1)(e)(iii) of MiFIR as further specified by Article 5 of RTS 2).
7. According to Articles 4(4) and 9(2) of MiFIR, before granting a waiver, and not less than four months before the waiver is intended to take effect, NCAs shall notify ESMA and other NCAs of the intended use of the waiver and explain its functioning. ESMA upon receipt of such notification shall, within two months, issue an opinion assessing the compatibility of the waiver with the requirements established in Articles 4(1) of MiFIR, as specified in RTS 1, for equity instruments and in Article 9(1) of MiFIR, as specified in RTS 2, for non-equity instruments.
8. As of 30 April 2020, ESMA has issued a total of 931 opinions, of which 361 opinions for equity waivers and 570 opinions for non-equity waivers. A detailed analysis on number and type of waivers processed is available in the annual ESMA waivers and deferral report.⁵
9. In the process of assessing the compliance of notified waivers with the MiFIR pre-trade transparency requirement for equity and non-equity instruments, ESMA noted a number of recurring issues. In order to ensure consistent supervisory practices and consistent approaches throughout the Union regarding the application of the relevant requirements by competent authorities and trading venues and to contribute to a smooth processing of waiver notifications, and being mindful that the ESMA opinions

⁵ [Annual Report 2019 on waivers and deferrals \(ESMA70-156-1010\)](#)

on pre-trade transparency waivers are not made public, ESMA considers it necessary to provide guidance on the main issues identified so far.

10. ESMA also considers that such clarification will contribute positively to consistent approaches on the use of pre-trade transparency waivers across EU trading venues and the consistent assessment of pre-trade transparency waivers across competent authorities. As a result, ESMA has decided to issue this Opinion.
11. The Opinion is meant as a clarification of the MiFIR requirements and does not create any new obligations for NCAs or market participants.
12. ESMA is aware that with the evolution of markets new trading systems and new functionalities may be developed and, with them, new issues might emerge that ESMA will analyse and address and, if necessary, update this opinion.

3. Opinion

3.1. Large-in-scale waiver – equity and non-equity instruments

13. According to Articles 4(1)(c) and 9(1)(a) of MiFIR orders that are **large in scale (LIS)** are eligible for a waiver from pre-trade transparency. Article 7 of RTS 1 and Article 3 of RTS 2 specify that an order is LIS when it is above the minimum size ('LIS threshold') compared with normal market size against which to assess the order, at the point of order entry or following any amendment to the order.
14. Throughout the assessments of waiver notifications, ESMA identified two types of orders making use of the LIS waiver: those matched on the systems of the trading venue (e.g. in the central limit order book (CLOB), within the RFQ system); and those privately negotiated outside the venue but reported under the rules of the trading venue (i.e. prearranged transactions for orders above LIS threshold).
15. With respect to different types of LIS orders, ESMA considers that the following features should be complied with when making use of the LIS waiver:
 - a) **Aggregation of orders:** Orders should not be aggregated by the trading venue applying for the waiver in order to meet the LIS thresholds. To benefit from a LIS pre-trade transparency waiver, the size of the single order should be equal to or above the LIS threshold.
 - b) **Determination of the order size:** The size of an order for equity instruments should be calculated by multiplying the number of units with the price of an order. For non-equity instruments, the volume measures specified in table 4 of Annex II of RTS 2 should be noted. In particular, for bonds, the trading venue should calculate the total nominal value of debt instruments of the order. The total nominal value corresponds to the product of the nominal value and the number of instruments traded, without using the price of the order. Similarly, for emission allowances and emission

allowance derivatives, the trading venue should calculate the tons of Carbon Dioxide to which the order is equivalent.

16. In case of **partial execution**, an order that qualified as LIS at order entry in the system, for both equity and non-equity instruments, should continue to benefit from the LIS waiver when partially executed unless the price or any other conditions are amended by the member submitting the order. In case of order modifications by the member, the amended order needs to be reassessed again against the relevant LIS thresholds.

3.1.1. Price to be used for the determination of the order size

17. The price used to determine the order size should reflect the characteristics of the order and be as close as possible to the final price of execution. The price should be checked at the point of order entry and should also be checked following any amendment of the order price by the member submitting the order or whenever other relevant conditions for the execution of an order are amended. In particular, in ESMA's view the following price should be used to determine the order size depending on the order type:
 - a) **Limit orders:** for plain limit orders (i.e. orders without any price characteristics other than the limit price), the order size should be checked against the LIS thresholds using the limit price.
 - b) **Pegged orders or reference price orders** with price protection should be checked using either the pegged/reference price or the limit price. The size of the order needs to be determined only at order entry and in case of amendments to the order. Movements in the underlying pegged/reference price should not be considered amendments to the order. For the purposes of consistency and to ensure that market participants are aware of the methodology used for determining the order size, ESMA considers that trading venues should: i) make the methodology for determining the order size transparent to market participants and use the same methodology for all the orders of the same type and, ii) supervise ex-post that the methodology used ensures that executions are consistently above the LIS threshold (using the execution price as a reference).
 - c) **At-the-close (ATC) orders:** in an ATC functionality, order entry should be understood as the start of the ATC session once the closing price has been determined. The order size check should be determined using the closing price.
18. **Requirements for Request-for-quote (RFQ) systems:** in an RFQ system, the order size check against the relevant LIS threshold should always be performed against the quote (i.e. the response to an RFQ) and not against the request as such. ESMA notes that this is a necessary condition to meet the LIS waiver size requirements, as Articles 3(1) and 8(1) of MiFIR specify that pre-trade transparency obligations apply to bids and

offers and to actionable indications of interest (AIOIs). An AIOI is defined in Article 2(1)(33) of MiFIR as a “message from one member or participant to another within a trading system in relation to available trading interest that contains all necessary information to agree on a trade”. Hence ESMA considers that a message containing side, size and price information meets the definition of an AIOI.

3.1.2. Thresholds conversion

19. **Equity instruments:** RTS 1 does not foresee the possibility to convert the LIS thresholds into an equivalent number of equity financial instruments for the purpose of assessing compliance of an order with the requirements set out in RTS 1 and trading venues should not convert LIS-size into number of equity instruments. ESMA considers that converting the LIS thresholds in a number of relevant instruments on the basis of the instrument price, which is subject to market fluctuations, may result in assessing inaccurately whether the order meets the requirements in Article 7 of RTS 1.
20. **Non-equity instruments:** Due to the different nature of trading modalities for non-equity instruments, Article 13 of RTS 2 allows the conversion of trade sizes to the corresponding number of lots. ESMA expects that such conversion should be defined in advance by the trading venue for the respective sub-class or sub-asset class⁶.

3.2. Order Management Facility Waiver – equity and non-equity instruments

3.2.1. General considerations for OMF waivers

21. **Order Management Facility (OMF)** waivers allow to waive pre-trade transparency obligations for orders for which disclosure to the order book is pending, as set out in Articles 4 and 9 of MiFIR and further specified in Article 8 of RTS 1 for equity instruments and Article 4 of RTS 2 for non-equity instruments.
22. It is possible to hold several **types of orders** in an OMF, such as:
 - a) *Iceberg or Reserve Orders*: orders which have a displayed volume (peak) available for execution relating to a portion of a quantity and a hidden volume relating to the remainder of the quantity, kept in the OMF which is capable of execution only after its release to the order book as a new disclosed order, as defined in Article 8(3) of RTS 1 and Article 4(3) of RTS 2.

⁶ See Q&A 19 on the Non-Equity Transparency Section of ESMA Transparency Q&A (ESMA70-872942901-35) which specifies the conditions that should apply for this provision and formulas to use for the conversion on the basis of contract types: https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf

b) *Stop Orders*: orders to buy or sell a prevailing quantity at the prevailing market price once the “stop limit” has been triggered. Stop orders can be market or limit orders. There are different sub- types of stop order, including:

- i. *Trailing Stop Orders*: stop orders where an absolute or percentage distance between the stop limit and the current reference price is entered.
- ii. *One-Cancels-Other (OCO)*: A “one-cancels-the-other” order usually consist of a pair of orders, a limit order displayed into the order book and a stop order resting in the OMF, to which the actual waiver is applied. When either the condition for disclosing the stop order or executing the limit order is reached and the relevant order is executed, the other order is cancelled. An OCO order can also consist of a single order which combines the behaviour of a limit order with that of a stop market order. On entry, it first behaves like a limit order and can match accordingly. If the stop order trigger condition is fulfilled, the OCO order behaves like a stop order.
- iii. *Done-If-Touched (DIT)*: users can enter DIT orders in the CLOB, consisting of interests to trade at a pre-defined level which, if touched, will generate a trade. Until that moment, the order is not published to the market. At the time of disclosure, the order can interact with other trading interests.

23. In this context, ESMA notes that an OMF waiver can cover different types of the OMF orders listed above (e.g. iceberg and stop order) within the same application.

24. With respect to different type of orders in an OMF, ESMA considers that the following features should be complied with when operating an OMF.

25. **Timestamp**: When orders benefitting from an OMF waiver are disclosed to the order book, to fulfil the requirements in Article 8(1)(c) of RTS 1 and Article 4(1)(c) of RTS 2, a new time priority should be assigned corresponding to the time of disclosure to the order book. Therefore, ESMA considers that newly disclosed orders should not retain the original timestamp.

3.2.2. Considerations for reserve (iceberg) orders

26. **Partial execution**: ESMA is of the view that the peak of iceberg orders can be refreshed, both in case of partial or full execution, i.e. when the displayed quantity is either fully or partially executed. The non-disclosed portion of the order⁷ becomes capable of execution only after its release to the order book in successive lit peaks, and

⁷ See the particular case of aggressive orders in paragraph 30.

every new peak should be entered in the book with a new timestamp, independently if the previous peak was fully filled or not.

27. **Price randomisation:** ESMA notes that it is possible to apply quantity and price randomisation to each released peak of the iceberg order. ESMA also considers consistent with the overall OMF waiver functioning, the case where the price limit of the peak changes by a specific amount each time a new portion of hidden quantity is disclosed to the market. Hence the price of the peak might differ from the price of the hidden portion.
28. Furthermore, the same rationale is applicable for quantity randomisation, as the quantity of the peak might be randomised at each disclosure. Similarly, in case of an iceberg order the price of the peak might be different due to randomisation.

3.2.2.1. Execution of aggressive orders and member preferencing in OMF

29. When assessing notifications for OMF waivers, ESMA encountered two types of functionalities for reserve orders in case of an aggressive order on the opposite size of the order book that is larger than the peak of a disclosed reserve order. In the first case, the aggressive order executes against the disclosed reserve order and other disclosed orders, with priority determined by the rules of the trading venue. If part of the aggressive order remains unexecuted, a new peak of the reserve order is disclosed in the order book and executed against the remaining aggressive order.
30. In the second case, the aggressive order executes first against the disclosed peak of the iceberg order(s) and other disclosed orders, with priority determined by the rules of the trading venue. If part of the aggressive order is left unexecuted, it may then execute against the hidden volume of existing iceberg orders. ESMA considers that the outcome of the two approaches is the same and that therefore both approaches should be eligible for an OMF waiver.
31. Trading venues may determine the priority in execution of the hidden volume either on a pro-rata basis (proportionally to the remaining non-displayed size of each iceberg order) or on a time priority basis (on the basis of the timestamp of the hidden part of the order).
32. Similarly, where trading venues allowing for member preferencing (matching logic which gives matching preference to opposing orders from the same member), when the large aggressive order is placed by the same member that has entered the iceberg order on the opposite side, this can result, in executing first the displayed part of the iceberg order from the same member, followed by the hidden part from the same member. If there is some remaining part of the aggressive order after being executed against the iceberg order from the same member, such remaining can be executed against lit orders from other members. Given the member preferencing, this approach

results in the same outcome as when the trading venue would disclose another peak of the iceberg order in the order book first.

33. In case of LIS-OMF combinations, hidden iceberg orders may be executed outside the CLOB only when the size of the two reserve orders resting in the OMF is equal or above the LIS threshold and matching is not possible in the lit book.

3.2.2.2. Disclosure to the lit order book followed by introduction of the same order in the OMF

34. ESMA considers that functionalities that allow for orders to be first sent for execution to the lit order book and only subsequently introduced to the OMF in case of failure of execution, are not eligible for an OMF waiver since such practice is not consistent with the conditions which have to be met in order to grant an OMF waiver as per Article 8 of RTS 1 and Article 4 of RTS 2.
35. More specifically, under Article 8(1)(b) of RTS 1 and Article 4(1)(b) of RTS 2, the order for which pre trade transparency may be waived cannot interact with other trading interests before disclosure to the order book. In case of reintroduction in the OMF with the purpose of further disclosure at later stage, such condition would not be met, as the order would have already interacted with other trading interests.

3.3. Negotiated Transactions (NT) Waiver – equity instruments

3.3.1. Systems that formalise negotiated trades (NT)

36. Such systems are eligible for a waiver from pre-trade transparency if they formalise negotiated transactions i.e. transactions that meet the requirements set out in Articles 4(1)(b) of MiFIR, as further specified by Articles 5 and 6 of RTS 1.
37. The first type of NT transaction provided for by Articles 4(1)(b)(i) of MiFIR are transactions that take place at or within the current volume-weighted spread reflected on the order book or the quotes of market makers of the trading venue operating that system (NT1).
38. The second type of NT transaction provided for by Articles 4(1)(b)(ii) of MiFIR are transactions in financial instruments for which there is not a liquid market and which are dealt within a percentage of a suitable reference price set in advance by the system operator (NT2).
39. The third type of NT transaction provided for by Articles 4(1)(b)(iii) of MiFIR are transactions subject to conditions other than the current market price of that financial instrument (NT3).

40. With respect to different types of NTs, ESMA considers that the following features should be complied with in order to make use of the NT waiver.

3.3.1.1. Price to be used when there is no spread available for NT1 waiver

41. ESMA considers that, when there is no spread available during normal trading hours, NTs, as per Article 4(1)(b)(i), can be executed at the last traded price, if this last traded price is not older than the closing price of the previous trading session.

3.3.1.2. Suitable “reference price” for NT2 waivers

42. Article 4(b)(ii) of MiFIR requires trading venues to set in advance the percentage range and the reference price for the purpose of the application of an NT waiver.

43. ESMA is of the view that the trading venues should specify the reference price used. In particular, for the NT2 waiver, suitable reference prices may be the current weighted spread reflected in the order book (as for NT1 waiver), but also other options, such as the last traded price, last closing price, mid of last available best bid-offer, average price of the preceding day, or the price of the initial public offering if it's the first day of trading

44. ESMA notes that there is not a pre-set time limit for assessing if a reference price is suitable but considers that this should be evaluated on the basis of the specific characteristics of the instrument. For the purposes of allowed price deviations, Q5 of the section on pre-trade transparency waivers in the Q&As on MiFID II and MiFIR transparency topics⁸ specifies that the maximum limits should be set by the trading venues in accordance with Article 48(5) of MiFID II for halting trading.

3.3.1.3. Scope of Article 6(j) of RTS 1 and equivalence to the other transactions under Article 6(a)-(i) or RTS 1

45. ESMA considers that the scope of Article 6(j) of RTS 1, referring to negotiated transactions subject to conditions other than the current market price, is to be understood narrowly and should only cover transactions that are strictly equivalent to the scenarios covered in Article 6(a) to (i).

46. Therefore, ESMA assesses the application of Article 6(j) on a case-by-case basis. For instance, ESMA considers that the use of Article 6(j) in place of Article 6(i) (buy-in of unsettled transactions) is justified until the date of entry into force of the buy-in process discipline specified under Commission Delegated Regulation (EU) 2018/1229.

⁸ <https://www.esma.europa.eu/document/qa-mifid-ii-and-mifir-transparency-topics>

3.4. SSTI waivers – non-equity instruments⁹

47. According to Article 9(1)(b) of MiFIR, AIOIs that are **above a size specific to the financial instrument (SSTI)** are eligible for a waiver from pre-trade transparency requirements. Article 5 of RTS 2 specifies that an AIOI is above the size specific to the financial instrument where, at the point of entry or following any amendment, it is equal to or larger than the minimum size of an AIOI determined in accordance with the methodology set out in Article 13 of RTS 2 with reference to the relevant tables in Annex III.
48. On the basis of the assessments of waiver notifications received so far, ESMA considers that the following features should be complied with when making use of the SSTI waiver:
49. **Multiple trading systems:** While the SSTI waiver is only available for RFQ or Voice Trading System, in accordance with Article 9(1)(b) of MiFIR, a trading venue may in parallel operate other multiple trading systems, as long as only orders in the RFQ or Voice Trading System may benefit from the SSTI waiver.
50. **Indicative pre-trade prices:** Trading venues make indicative pre-trade prices public in accordance with Article 8(4) of MiFIR. They are free to determine the calculation method used, as long as (i) it is one of the methodologies set out in Article 5(2) of RTS 2 (the best available price; or the simple average of AIOI Bid and Offer prices; or a weighted average price) and (ii) the trading venue clarifies in each publication which methodology is used.

3.5. Combination of waivers – equity and non-equity instruments

51. A combination of waivers occurs when two different waiver types are simultaneously used by the same trading venue regardless of the number of order types benefitting from them. A requested combination must always meet the requirements of all types of waivers for which it was simultaneously applied for. As previously remarked in ESMA's Q&As¹⁰, a combination of waivers will be assessed on an individual basis and amendments may qualify as non-substantial depending on the circumstances.

3.5.1. LIS-RP waivers (equity only)

52. When a trading venue operates under such a combination of waivers, it should not execute LIS orders at prices other than the corresponding reference price as specified in Article 4(1) and 4(2) of MiFIR.

⁹ Please note that for the determination of whether an order is above the SSTI, the same guidance as for the determination of LIS orders apply, in particular paragraphs 16-19a, 20 and 21b. **Large-in-scale waiver**

¹⁰ See Q&A 3 on the Pre-trade Transparency Waivers Section of ESMA Transparency Q&A (ESMA70-872942901-35): https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf

53. From the RP waiver component, all orders executed on such a system must comply with the usual RP waiver requirements. Under Article 4(1)(a) of MiFIR, a RP waiver may only be granted in respect of a system hence if a trading venue is granted a RP waiver, this waiver and the limitation of its use should apply to all orders placed into the system. An application of the waiver limited only to selected orders placed into the system is not possible based on the wording of Article 4(1)(a) of MiFIR.
54. Where a waiver request is a combination of waivers including LIS and RP, any transaction resulting from the matching of orders where at least one order is not LIS is subject to Article 5 of MiFIR and counts for the double volume cap calculations.

3.5.2. OMF-LIS waivers

55. Such a combination should be granted upon meeting the necessary requirements for both the LIS and the OMF waivers. With respect to the OMF requirements, when applied to reserve orders, the order should consist of a visible part and a hidden part and further respect the OMF requirements as per Article 8 of RTS 1 or Article 4 of RTS 2 respectively for equity and non-equity instruments. Concurrently, regarding the LIS features, size requirements are met where the order is equal to or above the thresholds set in Tables 1 and 2 of Annex II of RTS 1 for equity instruments and Article 3 in conjunction with Annex III of RTS 2 for non-equity instruments.

3.6. Applying for a pre-trade transparency waiver

56. Where a trading venue intends to benefit from a pre-trade transparency waiver, the waiver needs to be granted by the relevant competent authority in each case. NCAs shall notify ESMA and provide an explanation on the waiver's functioning, in accordance with Article 4(4) of MiFIR. ESMA shall use this information for drafting an opinion.
57. ESMA identifies some issues that could potentially delay the processing of a waiver notification and by consequence, the issuance of the relevant opinion:

3.6.1. Package waivers (non-equity)

58. When a trading venue wants to be authorised for applying a package waiver, it is necessary that it specifies how the functionality will meet the definitions of "package order" provided by Article 2(1)(49) and of "package transaction" provided by Article 2(1)(50) of MiFIR.
59. Moreover, the trading venue, should describe how it will ensure that only package orders that do not have a liquid market as a whole, as specified in the RTS on package

orders, are eligible for a waiver. As per Article 9(1)(e)(i) and (ii) of MiFIR, only package orders that are not liquid as a whole may benefit from the package waiver.

3.6.2. Other similar financial instruments (equity)

60. This category should only be used for genuinely other similar financial instruments. ESMA considers that financial instruments that are functionally similar to the categories explicitly mentioned in MiFIR (i.e. shares, depositary receipts, ETFs, certificates) should be categorised under the category of instruments which they resemble.
61. For example, subscription rights, interim shares and redemption shares should be categorised as shares¹¹.

3.6.3 Trading at close and frequent batch auction (FBA) systems

62. Market operators may opt for trading functionalities where orders are executed during a certain period of the trading day, using a price determined in a previous trading session.
63. Functionalities, such as ‘trading-at-last’ or ‘at-the-close’ (ATC) orders, should offer pre-trade transparency by disclosing the closing price, as well as the aggregated volume that can be executed at that price in real-time. Functionalities offering trading at last or ATC orders should nevertheless be eligible for a waiver from pre-trade transparency.
64. As clarified in the ESMA opinion on FBAs¹², ESMA recalls that non-price forming FBA systems (e.g. FBA systems that only allow the submission of pegged orders) should, in principle, operate under a waiver from pre-trade transparency.

¹¹ See Q&A 8 on the Pre-Trade Transparency Waivers Section of ESMA Transparency Q&A (ESMA70-872942901-35) on subscription rights:

https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf

¹² see ESMA70-156-1355. <https://www.esma.europa.eu/document/frequent-batch-auctions-fbas-and-double-volume-cap-mechanism-dvcm>

ANNEX I: Legislative references, abbreviations and definitions

Legislative references

<i>ESMA Regulation</i>	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/EC ¹³
<i>MiFID II</i>	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
<i>MiFIR</i>	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 648/2012 ¹⁴
<i>RTS 1</i>	Commission Delegated Regulation (EU) 2017/587 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 ¹⁵
<i>RTS 2</i>	Commission Delegated Regulation (EU) 2017/583 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 requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives.

¹³ OJ L 331, 15.12.2010, p. 84.

¹⁴ OJ L 173, 12.6.2014, p. 84.

¹⁵ OJ L 87, 31.3.2017, p. 387.

Abbreviations and Acronyms used

AIOI	Actionable Indication of Interest
ATC	At-the-Close
CLOB	Central Limit Order Book
DIT	Done-if-Touched
DVC	Double Volume Cap
EC	European Commission
EFP	Exchange of Futures for Physical
ESMA	European Securities and Markets Authority
ETF	Exchange Traded Fund
EU	European Union
FBA	Frequent Batch Auction
LIS	Large-in-Scale
NCA	National Competent Authority
NT	Negotiated Transaction
OCO	One-Cancels-Others
OMF	Order Management Facility
PTT	Pre-Trade Transparency
Q&A	Questions and Answers
RFQ	Request for Quote
RP	Reference Price
SSTI	Size-Specific-to-Instrument

ANNEX II – Legal References

Large in Scale (LIS)

Article 3(1) of MiFIR – Pre-trade transparency obligations affecting bids, offers and AIOIs for equity instruments:

1. Market operators and investment firms operating a trading venue shall make public current bid and offer prices and the depth of trading interest at those prices which are advertised through their systems for shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue. That requirement shall also apply to actionable indication of interests. Market operators and investment firms operating a trading venue shall make that information available to the public on a continuous basis during normal trading hours.

Article 8(1) of MiFIR – Pre-trade transparency obligations affecting bids, offers and AIOIs for non-equity instruments:

1. Market operators and investment firms operating a trading venue shall make public current bid and offer prices and the depth of trading interest at those prices which are advertised through their systems for bonds, and structured finance products, emission allowances, derivatives traded on a trading venue and package orders. That requirement shall also apply to actionable indication of interests. Market operators and investment firms operating a trading venue shall make that information available to the public on a continuous basis during normal trading hours. That publication obligation does not apply to those derivative transactions. [...]

Article 4(1)(c) of MiFIR – Waivers for equity instruments:

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 3(1) for: [...]

(c) orders that are large in scale compared with normal market size. [...]

Article 9(1)(a) of MiFIR – Waivers for non-equity instruments:

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) for: [...]

(a) orders that are large in scale compared with normal market size. [...]

Commission Delegated Regulation (EU) 2017/587 (RTS 1)

Article 7 of RTS 1 – Order that are large in scale:

1. An order in respect of a share, depositary receipt, certificate or other similar financial instrument shall be considered to be large in scale where the order is equal to or larger than the minimum size of orders set out in Tables 1 and 2 of Annex II.
2. An order in respect of an ETF shall be considered to be large in scale where the order is equal to or larger than EUR 1 000 000.
3. For the purpose of determining orders that are large in scale, competent authorities shall calculate, in accordance with paragraph 4, the average daily turnover in respect of shares, depositary receipts, certificates and other similar financial instruments traded on a trading venue.
4. The calculation referred to in paragraph 3 shall have the following characteristics:
 - (a) it shall include transactions executed in the Union in respect of the financial instrument, whether traded on or outside a trading venue;
 - (b) it shall cover the period beginning on 1 January of the preceding calendar year and ending on 31 December of the preceding calendar year or, where applicable, that part of the calendar year during which the financial instrument was admitted to trading or traded on a trading venue and was not suspended from trading.

Paragraphs 3 and 4 shall not apply to shares, depositary receipts, certificates and other similar financial instruments first admitted to trading or first traded on a trading venue four weeks or less before the end of the preceding calendar year.

5. Unless the price or other relevant conditions for the execution of an order are amended, the waiver referred to in Article 4(1) of Regulation (EU) No 600/2014 shall continue to apply in respect of an order that is large in scale when entered into an order book but that, following partial execution, falls below the threshold applicable for that financial instrument as determined in accordance with paragraphs 1 and 2.
6. Before a share, depositary receipt, certificate or other similar financial instrument is traded for the first time on a trading venue in the Union, the competent authority shall estimate the average daily turnover for that financial instrument taking into account any previous trading history of that financial instrument and of other financial instruments that are considered to have similar characteristics, and ensure publication of that estimate.

7. The estimated average daily turnover referred to in paragraph 6 shall be used for the calculation of orders that are large in scale during a six-week period following the date that the share, depositary receipt, certificate or other similar financial instrument was admitted to trading or first traded on a trading venue.
8. The competent authority shall calculate and ensure publication of the average daily turnover based on the first four weeks of trading before the end of the six-week period referred to in paragraph 7.
9. The average daily turnover referred to in paragraph 8 shall be used for the calculation of orders that are large in scale and until an average daily turnover calculated in accordance with paragraph 3 applies.
10. For the purposes of this Article, the average daily turnover shall be calculated by dividing the total turnover for a particular financial instrument as specified in Article 17(4) by the number of trading days in the period considered. The number of trading days in the period considered is the number of trading days on the most relevant market in terms of liquidity for that financial instrument as determined in accordance with Article 4.

Commission Delegated Regulation (EU) 2017/583 (RTS 2)

Article 3 of RTS 2 – Order that are large in scale:

An order is large in scale compared with normal market size where, at the point of entry of the order or following any amendment to the order, it is equal or larger than the minimum size of order which shall be determined in accordance with the methodology set out in Article 13.

Order Management Facility (OMF)

Markets in Financial Instruments Regulation

Article 4(1)(d) of MiFIR – Waivers for equity instruments:

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 3(1) for: [...]
- (d) orders held in an order management facility of the trading venue pending disclosure. [...]

Article 9(1)(a) of MiFIR – Waivers for non-equity instruments:

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) for:
 - (a) orders that are large in scale compared with normal market size and orders held in an order management facility of the trading venue pending disclosure; [...]

Commission Delegated Regulation (EU) 2017/587 (RTS 1)

Article 8 of RTS 1 – Type and minimum size of orders held in an order management facility:

1. The type of order held in an order management facility of a trading venue pending disclosure for which pre-trade transparency obligations may be waived is an order which:
 - (a) is intended to be disclosed to the order book operated by the trading venue and is contingent on objective conditions that are pre-defined by the system's protocol;
 - (b) cannot interact with other trading interests prior to disclosure to the order book operated by the trading venue;
 - (c) once disclosed to the order book, interacts with other orders in accordance with the rules applicable to orders of that kind at the time of disclosure.
2. Orders held in an order management facility of a trading venue pending disclosure for which pre-trade transparency obligations may be waived shall, at the point of entry and following any amendment, have one of the following sizes:
 - (a) in the case of a reserve order, a size that is greater than or equal to EUR 10 000;
 - (b) for all other orders, a size that is greater than or equal to the minimum tradable quantity set in advance by the system operator under its rules and protocols.
3. A reserve order as referred to in paragraph 2(a) shall be considered a limit order consisting of a disclosed order relating to a portion of a quantity and a non-disclosed order relating to the remainder of the quantity where the non-disclosed quantity is capable of execution only after its release to the order book as a new disclosed order.

Commission Delegated Regulation (EU) 2017/583 (RTS 2)

Article 4 of RTS 2 – Type and minimum size of orders held in an order management facility:

1. The type of order held in an order management facility of a trading venue pending disclosure for which pre-trade transparency obligations may be waived is an order which:

- (a) is intended to be disclosed to the order book operated by the trading venue and is contingent on objective conditions that are defined in advance by the system's protocol;
 - (b) does not interact with other trading interest prior to disclosure to the order book operated by the trading venue;
 - (c) once disclosed to the order book it interacts with other orders in accordance with the rules applicable to orders of that kind at the time of disclosure.
- 2. The minimum size of orders held in an order management facility of a trading venue pending disclosure for which pre-trade transparency obligations may be waived shall, at the point of entry and following any amendment, be one of the following:
 - (a) in the case of a reserve order, greater than or equal to EUR 10 000;
 - (b) for all other orders, a size that is greater than or equal to the minimum tradable quantity set in advance by the system operator under its rules and protocols.
- 3. A reserve order referred to in paragraph 2(a) shall be considered a limit order consisting of a disclosed order relating to a portion of the quantity and a non-disclosed order relating to the remainder of the quantity, where the non-disclosed quantity is capable of execution only after its release to the order book as a new disclosed order.

Negotiated Trades (NT)

Markets in Financial Instruments Regulation

Article 4(1)(b) of MiFIR – Waivers for equity instruments:

- 1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 3(1) for: [...]
 - (b) systems that formalise negotiated transactions which are:
 - (i) 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, subject to the conditions set out in Article 5;
 - (ii) in an illiquid share, depositary receipt, ETF certificate or other similar financial instrument that does not fall within the meaning of the liquid market, and are dealt within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator, or

(iii) subject to conditions other than the current market price of that financial instrument [...]

Article 4(3) of MiFIR – Waivers for equity instruments:

3. Where trading venues operate systems which formalise negotiated transactions in accordance with paragraph 1(b)(i):
 - (a) Those transactions shall be carried out in accordance with the rules of the trading venue;
 - (b) The trading venue shall ensure that arrangements, systems and procedures are in place to prevent and detect market abuse or attempted market abuse in relation to such negotiated transactions in accordance with Article 16 of Regulation (EU) No 596/2014;
 - (c) The trading venue shall establish, maintain and implement systems to detect any attempt to use the waiver to circumvent other requirements of this Regulation or Directive 2014/65/EU and to report attempts to the competent authority.

Where a competent authority grants a waiver in accordance with paragraph 1(b)(i) and (iii), that competent authority shall monitor the use of the waiver by the trading venue to ensure that the conditions for use of the waiver are respected.

Commission Delegated Regulation (EU) 2017/587 (RTS 1)

Article 5 of RTS 1– Specific characteristics of negotiated transactions:

A negotiated transaction in shares, depositary receipts, ETF, certificates or other similar financial instruments shall be considered to be a transaction which is negotiated privately but reported under the rules of a trading venue and where any of the following circumstances apply:

- (a) Two members or participants of that trading venue are involved in any of the following capacities:
 - (i) One is dealing on own account when the other is acting on behalf of a client;
 - (ii) Both are dealing on own account;
 - (iii) Both are acting on behalf of a client
- (b) One member or participant of that trading venue is either of the following:
 - (i) Acting on behalf of both the buyer and the seller;

- (ii) Dealing on own account against a client order.

Article 6 of RTS 1 – Negotiated transactions subject to conditions other than the current market price:

A negotiated transaction in shares, depositary receipts, ETFs, certificates and other similar financial instruments shall be subject to conditions other than the current market price of the financial instrument where any of the following circumstances applies:

- (a) The transaction is executed in reference to a price that is calculated over multiple time instances according to a given benchmark, including transactions executed by reference to a volume-weighted average price or a time-weighted average price;
- (b) The transaction is part of a portfolio trade;
- (c) The transaction is contingent on the purchase, sale, creation or redemption of a derivative contract or other financial instrument where all the components of the trade are meant to be executed as a single lot;
- (d) The transaction is executed by a management company as defined in Article 2(1)(b) of Directive 2009/65/EC or an alternative investment fund manager as defined in Article 4(1)(b) of Directive 2011/61/EU which transfers the beneficial ownership of financial instruments from one collective investment undertaking to another and where no investment firm is a party of the transaction;
- (e) The transaction is a give-up transaction or a give-in transaction;
- (f) The transaction has as its purpose the transferring of a financial instrument as collateral in bilateral transactions or in the context of a CCP margin or collateral requirements or as part of the default management process of a CCP;
- (g) The transaction results in the delivery of financial instruments in the context of the exercise of convertible bonds, options, covered warrants or other similar financial derivative;
- (h) The transaction is a securities financing transaction;
- (i) The transaction is carried out under the rules or procedures of a trading venue, a CCP or a central securities depository to effect-buy-in of unsettled transactions in accordance with Regulation (EU) No 909/2014;
- (j) Any other transaction equivalent to one of those described in points (a) to (i) in that it is contingent on technical characteristics which are unrelated to the current market valuation of the financial instrument traded.

Q&A on Transparency Topics (Pre-trade transparency waivers)

Question 5

What is the maximum authorised deviation around the reference price to be used for negotiated transactions in illiquid instruments?

Answer 5

Article 4(1)(b)(ii) of MiFIR allows NCAs to grant pre-trade transparency waivers to trading venues for negotiated transactions in illiquid instruments where those negotiated transactions are dealt within a percentage of a suitable reference price.

ESMA is of the view that the parameters to be set by trading venues in accordance with Article 48(5) of MiFID II for halting trading can also be used as maximum limits for the purposes of Article 4(1)(b)(ii) of MiFIR. The parameters to be established for trading halts should be calibrated by taking into consideration the liquidity of financial instruments, the related market model and the type of users trading those instruments. A price movement beyond these limits would be considered significant enough to halt trading, therefore, ESMA considers these same parameters should be used as a proxy to assess the suitability of the reference price and the percentage deviation from it that can be used for negotiated transactions under Article 4(1)(b)(ii) of MiFIR. NCAs should not authorise trading venues to report negotiated transactions in illiquid financial instruments executed outside those limits.

Size Specific to Instrument (SSTI)

Markets in Financial Instruments Regulation

Article 8(4) MiFIR – Transparency for non-equity instruments:

4. Market operators and investment firms operating a trading venue shall, where a waiver is granted in accordance with Article 9(1)(b), make public at least indicative pre-trade bid and offer prices which are close to the price of the trading interests advertised through their systems in bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue shall make that information available to the public through appropriate electronic means on a continuous basis during normal trading hours. Those arrangements shall ensure that information is provided on reasonable commercial terms and on a non-discriminatory basis

Article 9(1)(b) MiFIR – Waivers for non-equity instruments:

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) for: [...]
- (b) actionable indications of interest in request-for-quote and voice trading systems that are above a size specific to the financial instrument, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors; [...]

Commission Delegated Regulation (EU) 2017/583 (RTS 2)

Article 5 RTS 2 – Size specific to the financial instrument:

1. An actionable indication of interest is above the size specific to the financial instrument where, at the point of entry or following any amendment, it is equal to or larger than the minimum size of an actionable indication of interest which shall be determined in accordance with the methodology set out in Article 13.
2. Indicative pre-trade prices for actionable indications of interest that are above the size specific to the financial instrument determined in accordance with paragraph 1 and smaller than the relevant large in scale size determined in accordance with Article 3 shall be considered close to the price of the trading interests where the trading venue makes public any of the following:
 - a) the best available price;
 - b) a simple average of prices;
 - c) an average price weighted on the basis of the volume, price, time or the number of actionable indications of interest.
3. Market operators and investment firms operating a trading venue shall make public the methodology for calculating pre-trade prices and the time of publication when entering and updating indicative pre-trade prices.

LIS-RP waivers

Article 4(1)(a) of MiFIR – Waivers for equity instruments:

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 3(1) for: [...]
- (a) systems matching orders based on a trading methodology by which the price of the financial instrument referred to in Article 3(1) is derived from the trading venue

where that financial instrument was first admitted to trading or the most relevant market in terms of liquidity, where that reference price is widely published and is regarded by market participants as a reliable reference price. The continued use of that waiver shall be subject to the conditions set out in Article 5.

Article 4(2) of MiFIR – Waivers for equity instruments:

2. The reference price referred to in paragraph 1(a) shall be established by obtaining:
 - a) the midpoint within the current bid and offer prices of the trading venue where that financial instrument was first admitted to trading or the most relevant market in terms of liquidity; or
 - b) when the price referred to in point (a) is not available, the opening or closing price of the relevant trading session.

Orders shall only reference the price to in point (b) outside the continuous trading phase of the relevant trading session.

Applying for a pre-trade transparency waiver

Markets in Financial Instruments Regulation

Article 2(1)(49)(b) MiFIR – Definitions:

‘Package order’ means an order priced as single unit: [...]

- b) in two or more financial instruments for the purpose of executing a package transaction.

Article 2(1)(50)(b) MiFIR – Definitions:

‘Package transaction’ means [...]

- b) a transaction involving the execution of two or more component transactions in financial instruments and which fulfils all of the following criteria:
 - (i) the transaction is executed between two or more counterparties;
 - (ii) each component of the transaction bears meaningful economic or financial risk related to all the other components;
 - (iii) the execution of each component is simultaneous and contingent upon the execution of all the other components.

Article 4(4) of MiFIR – Waivers for equity instruments:

4. Before granting a waiver in accordance with paragraph 1, competent authorities shall notify ESMA and other competent authorities of the intended use of each individual waiver and provide an explanation regarding its functioning, including the details of the trading venue where the reference price is established as referred to in paragraph 1(a). Notification of the intention to grant a waiver shall be made not less than four months before the waiver is intended to take effect. Within two months following receipt of the notification, ESMA shall issue a non-binding opinion to the competent authority in question assessing the compatibility of each waiver with the requirements established in paragraph 1 and specified in the regulatory technical standard adopted pursuant to paragraph 6. Where that competent authority grants a waiver and a competent authority of another Member State disagrees, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and shall submit an annual report to the Commission on how they are applied in practice.

Q&A on Transparency Topics (Pre-trade transparency waivers)

Question 8

Should subscription rights be treated as equity instruments or non-equity instruments?

Answer 8

Subscription rights, including allotment rights and purchase rights, should be treated as an extension of the 'shares' category and therefore as equity instruments for the purpose of the provisions mentioned below¹⁵. While ESMA considers that subscription rights share some characteristics of securitised derivatives, the market practice for trading subscription rights resembles closely the trading of shares and therefore the following applies:

- Subscription rights should be subject to the pre- and post-trade transparency regime for equity instruments (Articles 3, 6, 14-17 and 20 of MiFIR) and should be eligible for waivers and deferrals from pre-trade transparency for equity instruments (Articles 4, 7, and 20(2) of MiFIR).
- The liquidity status of subscription rights should be the same as the liquidity status of the underlying share (Article 1 of Commission Delegated Regulation (EU) 2017/567).
- The standard market size (SMS) of subscription rights should be the same as the SMS of the underlying shares (Article 11 and table 3 of Annex II of RTS 1).

- The large in scale thresholds for waivers and deferrals for subscription rights should be determined on the basis of the average daily turnover of the underlying share (Articles 7 and 15 and tables 1 and 4 of Annex II of RTS 1).
- The most relevant market in terms of liquidity for subscription rights should be the same as the most relevant market in terms of liquidity for the underlying share (Article 4 of RTS 1).
- Subscription rights should be subject to the trading obligation for shares and the double volume cap (Articles 5 and 23 of MiFIR).
- Subscription rights should be subject to the tick size regime (Article 49 of MiFID II and as further specified in RTS 11). Subscription rights should use the same liquidity band as the underlying share (Article 2 and Annex of RTS 11).