

MiFID II

Data reporting services

January 2017

**Hogan
Lovells**

Data publication under MiFID

MiFID I was intended to improve the quality and consistency of trading data in the EU. It established rules on pre- and post-trade transparency. In particular, MiFID I required firms to make public specific information on transactions in shares admitted to trading on a regulated market.¹ At the same time, MiFID I sought to increase competition among trading venues by breaking the monopoly of regulated markets in the EU and creating the new categories of the multilateral trading facility ("**MTF**") and the systematic internaliser ("**SI**").

MiFID I has generated greater competition among trading venues. MTFs and off-exchange trading have emerged as significant challenges to the dominance of the EU's regulated markets in the trade reporting landscape. Previously, post-trade data was routinely reported on or to regulated markets. Post-MiFID I, the greater number of trading venues has meant that market participants must aggregate data from a wider range of sources, particularly in order to meet the MiFID requirement for best execution. This fragmentation of trading data in the EU has the potential to damage price discovery and best execution.

Furthermore, MiFID I was intended to produce greater choice and reduced costs for market participants, but arguably did not back this up by ensuring the adequate monitoring and reconstruction of trading data. The European Commission's review of MiFID I in December 2010 revealed that trading data is neither consistently of adequate quality nor made available at reasonable cost throughout the EU.² Investors must be able to rely on reasonably priced trading data that can be compared across different

trading venues. Inconsistencies in quality, formatting, reliability and cost can have a detrimental effect on transparency, investor protection and market efficiency.

MiFID II is intended to resolve these issues by improving the quality and accessibility of trading data. It will do so by:

- setting a standard format for trading data that will be easy to consolidate, readily understood and available at a reasonable cost;
- requiring data providers to be authorised by their national competent authorities ("**NCA**s") and imposing formal organisational requirements on them; and
- seeking to encourage private sector providers to offer consolidated trading data that covers all trades in equities or non-equities throughout the entire EU.

¹ Articles 28 and 30, MiFID I Directive.

² European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010, Chapter 4.

Data reporting services

Key Points

- MiFID II creates a new regulatory framework for data reporting services.
- Post-trade data reporting services will need to be authorised as approved publication arrangements.
- A firm that provides a consolidated tape will need to be authorised as a consolidated tape provider.
- MiFID II will formalise reporting channels by requiring third parties that report on behalf of firms to be authorised as approved reporting mechanisms.
- Detailed regulatory technical standards on the authorisation and organizational requirements for data services reporting providers.

Under MiFID I, firms can make public their trading data through:

- the facilities of a regulated market or an MTF;
- the facilities of a third party; or
- proprietary arrangements.³

MiFID II amends this framework as follows:

- Third parties that publish trade data will be required to be authorised as approved publication arrangements ("**APAs**").
- A party that provides consolidated trading data from across the whole of the EU will need to be authorised as a consolidated tape provider ("**CTP**").
- MiFID II also provides for a further category of authorised data provider, the approved reporting mechanism ("**ARM**"). Firms can

report their transaction data via ARMs to NCAs for the purposes of market monitoring.

ARMs, CTPs and APAs are treated together in MiFID II as data reporting services providers ("**DRSPs**"), and share many of the same authorisation and organisational requirements.

Approved publication arrangements

MiFID I states that a firm trading over the counter ("**OTC**"), i.e. outside a regulated market or MTF, must use either a third party or proprietary arrangements to publish post-trade data. If a firm publishes its data via a third party, it must ensure that the third party's arrangements:

- have systems which ensure that the information is reliable, is monitored continuously for errors, and is corrected as soon as errors are detected;
- facilitates the consolidation of data with data from other sources; and
- are made available to the public on a non-discriminatory commercial basis at a reasonable cost.⁴

Under MiFID II, such third party data providers will have to be authorised by the relevant NCA.⁵

Definition

An APA is defined for the purposes of MiFID II as a person authorised to provide the service of publishing trade reports on behalf of investment firms for the purpose of post-trade disclosure.⁶

Organisational requirements

The organisational requirements for APAs are in Article 64 of the MiFID II Directive:

- APAs must have adequate policies and procedures to make the required

³ Article 30, MiFID Implementing Regulation.

⁴ Article 32, MiFID I Implementing Regulation.

⁵ Articles 20 and 21, MiFIR.

⁶ Article 4(1)(52), MiFID II Directive. The concept of an APA is a similar concept to the UK Financial Conduct Authority's existing regime for trade data monitors ("**TDMs**"). Under MiFID II, the existing TDMs would have to seek authorisation as APAs.

information available to the public as close to real time as is technically possible, at a reasonable commercial basis;

- the information shall be free of charge 15 minutes after publication;
- the APA must be able efficiently and consistently to disseminate information in such a way as to ensure fast access, on a non-discriminatory basis, and in a format that facilitates its consolidation with similar data from other services;
- the data must contain a list of minimum information specified in Article 64, which includes the instrument identifier, price, volume, and time of the transaction;
- the APA must have arrangements to avoid conflicts of interest;
- it must have sound security mechanisms, maintain adequate resources, and have back-up facilities; and
- the APA must check trade reports for completeness, omissions, and obvious errors.

APAs must meet governance requirements laid down in MiFID II. Like other categories of data reporting services provider, an APA must ensure that:

- all members of its management body are of sufficiently good repute, possess sufficient knowledge, skills and experience, and can commit sufficient time to their duties;
- together they must have the right knowledge, skills and experience to understand the activities of the APA; and
- each member of the management body has the honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary and to

effectively oversee and monitor management decision-making.⁷

ESMA has provided draft technical standards for the standard forms, templates and procedures required for APAs and other data reporting services providers. In particular these relate to the process of applying for authorisation and the notification of any subsequent changes to management bodies.⁸

Consolidated tape providers

The European Commission has described a consolidated tape as an integrated reporting system covering the essential characteristics of trades for instruments in all markets, on- or off-exchange, wherever they are traded.⁹ The aspiration to a consolidated tape that would contain EU-wide comprehensive trading data is a critical element in the MiFID II regime for data publication.

Regulatory aims

The lack of a consolidated tape is regarded as a significant lacuna in integrating a single European market in financial services. In contrast, a consolidated tape for listed securities has existed in the United States since the 1970s. According to the Commission, the regulatory aims of a consolidated tape are to:

- consolidate the entire data available in the EU and make it available to the market at a reasonable price;
- mitigate the effects of a fragmented market structure where a number of instruments are traded on a multitude of trading venues and thereby promote the creation of a single market; and

⁷ Article 63, MiFID II Directive.

⁸ The final version has not yet been published. See ESMA, Final Report: Draft implementing technical standards under MiFID II, 11 December 2015 (ESMA/2015/1858), Chapter 4, ITS 6. See also ESMA, Consultation Paper: Draft implementing technical standards under MiFID II, 31 August 2015 (ESMA/2015/1301).

⁹ European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010, Chapter 4.3.

- ensure that the trade data is recorded comprehensively and picked-up so that the quality of the data available is improved.¹⁰

Scope

Under MiFID II, the core proposal is for a consolidated tape of trade reports from across the EU for shares and "equity-like" instruments, i.e. depositary receipts, exchange-traded funds, certificates and other similar financial instruments.¹¹ MiFID II also includes a further proposal in the longer term for a consolidated tape for non-equity instruments.¹²

Authorisation and organisational requirements of CTPs

A firm that provides a consolidated tape will have to be authorised by its NCA as a CTP.¹³ A CTP will provide the consolidated tape by receiving and publishing post-trade reports from RMs, MTFs, OTFs and APAs.

The MiFID II organisational requirements for CTPs are similar but not identical to those for APAs:

- CTPs must have adequate policies and procedures to collect information that has been made public, consolidate it into a continuous electronic data stream, and make this information available to the public as close to real time as is technically possible, on a reasonable commercial basis;
- the information shall be free of charge 15 minutes after publication;
- the CTP must be able to efficiently and consistently disseminate information in such a way as to ensure fast access, on a non-discriminatory basis, and in formats that are interoperable and easy for market participants to access and use;

- the data must contain a list of minimum information, which includes the instrument identifier, price, volume, and time of the transaction;
- the CTP must have arrangements to avoid conflicts of interest;
- it must have sound security mechanisms, maintain adequate resources, and have back-up facilities; and
- the CTP should consolidate data from all RMs, APAs, MTFs and OTFs.¹⁴

In its May 2014 discussion paper, ESMA proposed that the guidelines previously issued by CESR on the organisation of APAs should be applied to CTPs in a Regulatory Technical Standard ("**RTS**").¹⁵ Following feedback, ESMA proposed that the CESR guidance for APAs will have to be amended for the particular circumstances of CTPs.¹⁶ In particular, unlike APAs, CTPs will not be obliged to detect errors or omissions in information received.

As with APAs, ESMA has provided draft technical standards for the standard forms, templates and procedures required for CTPs.¹⁷

Practical problems

The creation of an EU consolidated tape has been bedevilled by practical problems. In its review of MiFID I, the Commission proposed a number of potential solutions. The Commission suggested that it might mandate a formal consolidated tape as a single, non-profit making entity created by EU legislation. This would be similar to the arrangements in the United States, where the

¹⁰ European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010, Chapter 4.3.

¹¹ Recital 117, MiFID II Directive.

¹² Recital 118, MiFID II Directive.

¹³ Article 59, MiFID II Directive.

¹⁴ Article 65, MiFID II Directive.

¹⁵ ESMA, Discussion Paper, 22 May 2014, Chapter 5.1. The guidelines are in CESR, CESR Technical Advice to the European Commission in the Context of the MiFID Review: Equity Markets (July 2010) (CESR/10-802).

¹⁶ ESMA, Consultation Paper, 19 December 2014, Chapter 5.1.

¹⁷ ESMA, Final Report: Draft implementing technical standards under MiFID II, 11 December 2015 (ESMA/2015/1858), Chapter 4, ITS 6. See also ESMA, Consultation Paper: Draft implementing technical standards under MiFID II, 31 August 2015 (ESMA/2015/1301).

Consolidated Tape Association provides a consolidated tape for the US financial markets.¹⁸

Alternatively, the Commission mooted the idea of a public procurement process whereby the creation of a consolidated tape would be put out to tender and awarded to a single commercial entity.

Finally, the Commission's preferred solution was to allow competing commercial providers to provide the consolidated tape.¹⁹ However, due to commercial considerations, no data provider has so far created an EU-wide consolidated tape. As a result, Article 90 of the MiFID II Directive states that ESMA may have to initiate a public procurement process to appoint a consolidated tape provider.

Approved reporting mechanisms

Under MiFIR, transaction reports can be made either by:

- the investment firm itself;
- a third party reporting on the firm's behalf (known as an approved reporting mechanism ("**ARM**")); or
- the trading venue where the transaction was executed.

MiFID II introduces a regime for ARMs under which investment firms can make transaction reports through ARMs in relation to trades that are not executed through an RM, MTF, or OTF.²⁰ ARMs will have to be authorised by their NCA and will also be subject to organisational requirements to ensure that they can discharge their responsibilities properly.²¹

The organisational requirements for ARMs are in Article 66 of the MiFID II Directive, which states that an ARM must have:

- adequate policies and procedures to report the required information as quickly as possible, and no later than the close of the working day following the day on which the transaction took place;
- arrangements to avoid conflicts of interest;
- sound security mechanisms, adequate resources, and back-up facilities in place to keep its service running at all times; and
- systems that are able to check transaction reports for completeness, omissions, and obvious errors, whether caused by the investment firm or by the ARM itself.

MiFIR confirms that the general responsibility for the completeness, accuracy and timely submission of transaction reports will lie with investment firms. However, where the reports are submitted via an ARM, firms will not be responsible for failures in the completeness, accuracy and timely submission of the reports that are caused by the ARM itself. Investment firms that submit their reports via an ARM must nevertheless take reasonable steps to check that their transaction reports have been correctly made.²²

MiFID II imposes new governance requirements on the management bodies of ARMs. These requirements also apply to the other categories of DRSP. Under MiFID II, an ARM must ensure that:

- all members of its management body are of sufficiently good reputation, possess sufficient knowledge, skills and experience, and can commit sufficient time to their duties;
- together they have the right knowledge, skills and experience to understand the activities of the ARM; and
- each member of the management body has the honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary

¹⁸ See the CTA's website at <https://www.ctaplan.com/> for further information.

¹⁹ European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010.

²⁰ Article 26(7), MiFIR.

²¹ Article 59, MiFID II Directive.

²² Article 26(7), MiFIR.

and to effectively oversee and monitor management decision-making.²³

MiFID II emphasises the need for management bodies of data reporting services providers, including ARMs, to avoid group thinking and to facilitate independent opinions and critical challenge. It underlines the need for diversity and, potentially, employee representation on these management bodies.²⁴ ESMA has been requested to develop guidelines to assess the suitability of the members of management boards, which it will publish in due course.²⁵

ESMA has provided draft technical standards for the standard forms, templates and procedures required for ARMs and other data reporting services providers. In particular these relate to the process of applying for authorisation and the notification of any subsequent changes to management bodies.²⁶

Common requirements for all data reporting services providers

RTS 13 imposes similar authorisation and organisational requirements on the three categories of DRSP, although not all of the requirements will be applied to each category.²⁷

RTS 13 states that that:

- an applicant seeking authorisation as a DRSP must provide specific information to the competent authority on:
 - its organisational structure, compliance policies and procedures, outsourced functions, and any non-data services that it provides;
 - corporate governance;
 - members of its management body;
- DRSPs must meet detailed organisational requirements in relation to:
 - conflicts of interest;
 - outsourcing;
 - business continuity and back-up facilities;
 - testing and capacity;
 - security;
 - management of incomplete or potentially erroneous information;
 - (in the case of ARMs) connectivity;
 - (in the case of CTPs) providing additional services;
- publication arrangements should ensure that:
 - (for APAs and CTPs) information shall be machine readable;
 - the public data stream of CTPs includes data for all of the instruments intended for publication by CTPs;
 - APAs must identify duplicative trade reports;
 - CTPs must not consolidate duplicative trade reports;

²³ Article 63, MiFID II Directive.

²⁴ Recitals 53 and 54, MiFID II Directive.

²⁵ Article 63(2), MiFID II Directive.

²⁶ The final version has not yet been published. ESMA, Final Report: Draft implementing technical standards under MiFID II, 11 December 2015 (ESMA/2015/1858), Chapter 4, ITS 6. See also ESMA, Consultation Paper: Draft implementing technical standards under MiFID II, 31 August 2015 (ESMA/2015/1301).

²⁷ Commission Delegated Regulation (EU) of 2 June 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the authorization, organisational requirements and the publication of transactions for data reporting services providers ("RTS 13"). For an earlier draft, see RTS 13 in ESMA, Regulatory Technical and Implementing Standards – Annex I, 28 September 2015. See also ESMA, Final Report: Draft Regulatory and Implementing Technical Standards MiFID II/MiFIR, 28 September 2015, Chapter 4.1.

- APAs must publish appropriate trade flags, together with the date and time of publication;
 - (in the case of APAs and CTPs) the information is published through all distribution channels at the same time; and
 - CTPs must publish specific information in relation to particular instruments and use appropriate trade flags.
- CTPs will be allowed 6 months to begin collecting data from a new trading venue or APA (ESMA had previously proposed 3 months); and
 - APAs and CTPs must give at least 3 months' notice of any changes in instructions to the public explaining how and where to access and use the data (ESMA previously suggested one month's notice).²⁸

In its Final Report on the draft technical standards published in September 2015, ESMA stated that it had kept to its previous proposals in the December 2014 consultation paper as follows:

- periodic reconciliations should be performed by ARMs at the request of the competent authority;
- DRSPs will be permitted to set their own operating hours, rather than having these fixed;
- APAs must identify duplicate trades in order that these are not reported more than once by CTPs;
- APAs rather than CTPs should assign a trade ID for each trade;
- publication times should be assigned by APAs and trading venues rather than CTPs;
- APAs should timestamp trade reports up to the millisecond for electronic systems and up to the second for other trades; and
- CTPs will be required to publish the source of their information for each trade report.

However, ESMA stated that it had revised its previous proposals as follows:

- in the event of a disruptive incident, DRSPs will not be required to resume services within a prescribed time limit, but APAs and CTPs should aim to resume service within 6 hours, and ARMs should aim for the close of the next working day;

28

ESMA, Final Report: Draft Regulatory and Implementing Technical Standards MiFID II/MiFIR, 28 September 2015, Chapter 4.1.

Post-trade publication

Key Points

- The format and content of post-trade reports will be standardised.
- MiFID II specifies in detail what is meant by the timing of post-trade publication "as close to real time as possible" and charging on a "reasonable commercial basis".
- Trading venues must unbundle pre- and post-trade data and further disaggregate the data.

Format and content of trade reports

The lack of quality and consistency in the formatting of trading data makes data consolidation difficult and markets less efficient. MiFID II provides greater detail and clarity on the content and format of trade reports by providing for a standardised format and content. The MiFID II Directive provides a list of information required to be published by CTPs and APAs.²⁹

Timing of data publication and charging for data

MiFID I requires trade data to be published "as close to real time as possible".³⁰ A maximum limit of three minutes after the trade is only permissible in exceptional circumstances.³¹

As the European Commission has noted, there remains a perception that the costs of trading data in the EU are unnecessarily high, compared with the United States in particular.³² Currently, MiFID I requires that trade data is made available to the

public on a "reasonable commercial basis",³³ and that it is made available free of charge 15 minutes after publication. However, there remains a need to reinforce this aspect in MiFID II as MiFID I has not reduced costs down to a level that is considered optimal.

In addition, in its May 2014 consultation, ESMA considered proposals including:

- high-level principles to limit excessive charges for data;
- caps on revenue by imposing a limit on the proportion of a trading venue's data that can be derived from data charges; and
- price limits based on the cost of data to the supplier.³⁴

In the final ESMA Technical Advice issued in December 2014, ESMA rejected revenue caps and price limits based on the cost of data. Instead, it has proposed that high-level principles and greater transparency from trading venues would be more appropriate. This would for example, allow users to view price list information on a single website.³⁵

Based on the ESMA Technical Advice, the Commission adopted the MiFID II Delegated Regulation, which provides that CTPs and APAs must:

- provide market data priced on the basis of cost; and
- make market data available at the same price and on the same terms to all customers falling in the same category.³⁶

Unbundling of data

A key feature of MiFID II is that the cost of data will be reduced by requiring trading venues to

²⁹ Articles 64(8)(a) and (b), and 65(8)(a) and (b), MiFID II Directive.

³⁰ Article 28(1), MiFID I Directive; Articles 29(2) and 29(5), MiFID I Implementing Regulation.

³¹ Recital 18, MiFID I Implementing Regulation.

³² European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010.

³³ Article 28(1), MiFID I Directive.

³⁴ ESMA, Consultation Paper, 22 May 2014, Chapter 4.3.

³⁵ ESMA, Final Report, 19 December 2014, Chapter 4.3.

³⁶ Articles 85 and 86, Commission Delegated Regulation (EU) of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (the "MiFID II Delegated Regulation").

unbundle pre-trade from post-trade data. These are currently commonly sold together as part of a single package. MiFIR will require such data packages to be unbundled.³⁷

ESMA is required by MiFIR to specify the level of disaggregation of the data that will be made available to the public. Despite opposition from trading venues, ESMA proposed that the data should be unbundled further, and provided a list of proposed criteria for unbundling.

RTS 14 requires trading venues to disaggregate their data by:

- asset class (equity, equity-like, fixed income, emission allowances and various classes of derivative);
- (in relation to shares and sovereign bonds), the country of issue;
- the currency in which the instrument is traded; and
- whether the data comes from scheduled daily auctions or is from continuous trading.³⁸

ESMA has now proposed that this disaggregation should be mandatory in all cases (previously it had offered trading venues the option not to disaggregate if there was "insufficient demand"). It has however dropped two criteria: membership of a major index, and industrial sector.³⁹

The MiFID II Delegated Regulation requires CTPs and APAs to make available market data without being bundled with other services.⁴⁰

³⁷ Article 12(1), MiFIR.

³⁸ RTS 14 in ESMA, Regulatory Technical and Implementing Standards – Annex I, 28 September 2015.

³⁹ ESMA, Final Report: Draft Regulatory and Implementing Technical Standards MiFID II/MiFIR, 28 September 2015, Chapter 4.2.

⁴⁰ Article 88, MiFID II Delegated Regulation.

Timescales for implementation

Council on the availability of trading information in the EU.⁴⁴

The MiFID II Directive and MiFIR came into force on 3 July 2014, and most of their provisions will come into effect in member states from 3 January 2018. Member states have until 3 July 2017 to transpose the MiFID II Directive and the Delegated Directive into national law.

The RTS will become effective from 3 January 2018. RTS are EU Regulations having direct effect in EU law and so do not need to be transposed into the national law of member states.

In addition, there are specific provisions in MiFID II that firms should be aware of in relation to data publication and access. These deadlines, like those of the MiFID II package in general, have mostly been delayed by 12 months compared with the original MiFID II text:

- 3 January 2017: Deadline for ESMA to issue guidelines on the assessment of the suitability of the members of the management body of data reporting services providers.⁴¹
- 3 September 2019: Article 65(2) of the MiFID II Directive, which sets out some of the organisational requirements for CTPs, will become effective.⁴²
- By 3 September 2019 and 3 September 2021, the Commission must produce reports to the Parliament and Council in relation to progress in achieving an EU-wide consolidated tape.⁴³ This may lead to the initiation of a public procurement process to tender for a consolidated tape provider.
- 3 March 2020: As part of the projected MiFID II review, this will be the deadline for the Commission report to the Parliament and

⁴¹ Article 63(2), MiFID II Directive.

⁴² Article 93(1), MiFID II Directive, as amended.

⁴³ Article 90(2), MiFID II Directive.

⁴⁴ Article 52(5), MiFIR.

Alicante
Amsterdam
Baltimore
Beijing
Brussels
Budapest
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Rio de Janeiro
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb

Our offices

Associated offices

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

©Hogan Lovells 2016. All rights reserved.4342208