Svensk Värdepappersmarknad
Swedish Securities Markets Association

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SSMA response to ESMA consultation paper on the review of RTS 1 and RTS 2

The Swedish Securities Market Association ("SSMA") welcomes the opportunity to provide comments to EMSAs consultation on the review of RTS 1 and RTS 2. Before responding to the specific questions, we would like to make the following comments:

1. General comments:

- Many of the proposals in the consultation paper will involve substantive IT changes which will be very costly and operationally burdensome for investment firms to implement. It is therefore very important to ensure that all amendments are made subject to a thorough cost/benefit analysis and to avoid temporary solutions that may be overhauled by a forthcoming MiFID Review. In particular changes to waivers and deferrals should wait until after the level 1 review.

- SSMA notes that ESMA in the consultation paper refers to "EU trading venues" and "non-EU venues". To our understanding, venues established within EEA countries (such as Norway) is to be considered as an EU-venue for the purposes of ESMAs Transparency Opinion.[1] Since it is very important from a legal and operational perspective that the scope of the transparency provisions is clear we would appreciate if ESMA confirms this interpretation as regards EEA venues in the final report.

- Although not explicitly covered by the consultation paper, the SSMA wants to underline the importance of both bilateral and multilateral trading in order to serve clients needs on EU non-equity markets. We were very concerned with some of the interpretations put forward in ESMA's OTF consultation and want to underline that in our view, "multilateral systems" should only cover systems where multiple clients can interact with each other. It would have very negative impacts on the well-functioning of smaller and illiquid markets if investment firms were no longer able to provide investment services under MiFID II that consist of bilaterally trying to find an opposite trading interest on an ad hoc basis.

- SSMA is of the strong opinion that restricting Trade at Last to only "continuous auction order book systems" will have a negative impact on competition and execution performance. It is therefore important that this possibility to execute is kept unchanged.

- SSMA wants to stress the importance that whatever changes are done to the transparency regimes does not spill over to transaction reporting requirements. The systems and solutions for handling transaction reporting are completely different from transparency reporting and would therefore lead to very difficult and costly IT development projects.

[1] https://www.esma.europa.eu/sites/default/files/library/esma70-154-165_smsc_opinion_transparency_third_countries.pdf

- SSMA believes data quality and correct reporting needs to be improved to provide good and consistent trading statistics. This is important so that regulatory changes are based on analysis of correct data samples. SSMA therefore thinks it is better to first solve the data quality issue before new reporting standards are implemented. In that context SSMA recognise that quite a few questions in this consultation relates to reporting of fields and flags. SSMA has the general view that it is less problematic to remove fields or take away flags than to amend or to introduce new fields/flags. All amendments or new flags will lead to IT development costs and potentially new problems with poor reporting quality. Before such changes are made it must be certain that they have a very clear business need and lead to better data quality and reporting.

- SSMA thinks that Frequent Batch Auctions ("FBAs") is an important function to provide clients with better execution and to find liquidity. We do therefore not want to see any changes that limit the usability of FBAs. This has become even more important since UK after Brexit seem to come to a different conclusion on how FBAs contribute to the price discovery and the execution process. If EU introduce restrictions on FBAs there is a high risk that liquidity could move from EU into UK.

2. Non price forming trades – a conflict between MiFIR and MAR

The SSMA agrees that it is important to ensure that the definition of non-price forming trades is clarified in RTS 1 and 2 in order to ensure a uniform application of reporting requirements in Member States and improve the quality of data.

However, one additional aspect that should be considered by ESMA/KOM in this context is the existing "conflict" between MiFID and MAR.[2] In fact, a legal requirement in MiFID to publish a transaction post trade under MiFID II can, where it does not represent real buying and selling interests, mislead the market in terms of price, supply or demand on the market and therefore be in contravention with MAR. For less liquid instruments such as shares in SME companies there is also a risk that the same beneficial owner will be on both sides of the transaction which is also in contravention with MAR (sometimes referred to as wash trades). One way of handling this conflict where an investment firms compliance with legal requirements under one EU legislation (MiFID II) de facto leads to a breach of another EU legislation (MAR) could be through clarifying the scope of non-price forming trades in RTS 1 and 2.

A practical example from the Swedish market relates to the situation where a retail client wants to move his/her securities in or out of an insurance wrapper (Sw: kapitalförsäkring). Although it is the insurance company that formally owns the financial instruments, such "move" does not lead to a real change in ownership or control of the securities and the transaction should therefore not be made public. The problem is that a literal reading of the transparency rules in MiFIR suggests that the information must be published since there is no exemption in RTS 1 or 2 that explicitly covers this situation. Considering "the counterparty" is not an eligible or professional client, it is also uncertain if the exemption from the trading obligation in article 23.1 b MiFID II would apply.

[2] See SSMA responses
SSMA-Response-to-ESMA-CP-RTS-2-Annual-Review-June-2021.pdf (svenskvardepappersmarknad.se)
Reply form for the MiFID II/MiFIR Consultation Paper (svenskvardepappersmarknad.se)

The SSMA has been in dialogue with the Swedish Supervisory Authority (Finansinspektionen) on this issue on numerous occasions during the past years and understand that without clear guidance from ESMA or in the legal text in RTS 1 or 2, the legal requirement under MiFID II is to publish "the move". At the same time, Finansinspektionen has confirmed that such publication would in many cases be in contravention with MAR. In practice, this has created a lot of legal uncertainty and leaves investment firms with no other option than refusing their clients to move securities e.g., in order to participate in AGMs or new securities issues. This is of course very unfortunate, considering the policy objective of encouraging retail participation on EU capital markets.

According to our members there are many other situations where similar problems occur – often relating to activities by clients that are large insurance companies, pension funds or other asset managers that want to move assets from one portfolio to another within the same legal entity or simply get a market valuation on some of the assets within a portfolio. For regulatory purposes or internal code of conduct rules they need to make a transaction over the market where they sell assets from one portfolio to another portfolio usually with a back to back transaction with market maker interposing as buyer and seller of the same assets (back to the capital manager). The portfolios are not legal entities since they are managed (and often assets belonging to) the same legal entity.

Based on the above, the SSMA proposes that it is clarified that RTS 1 and 2 allow investment firms to rely on the exemption from post trade transparency for non-price forming trades in situations where there is no real change of ownership (no real buyer and seller interests) and a publication therefore would be in conflict with MAR. From a technical perspective this could either be achieved though amendments to art 12 RTS 2, article 2 (5) of RTS 22, a new recital or ESMA guidance on level 3.

3. Specific questions

Q1 : Do you agree with the proposed amendment to Article 7(2) of RTS 1? If not, please explain your concerns about the proposed increase of the threshold.

SSMA has not recognized any problem with the current threshold and do not really see any need to raise it.

Q2 : Do you agree with the proposed amendment to Table 5 of Annex II of RTS 1? If not, please explain why you are concerned about the proposed increase of the thresholds.

SSMA has not recognized problems with this level for deferred publication and do not see a need to change it.

Q3 : Do you agree with ESMA's amendments to Articles 2, 6 and 13 of RTS 1 described above? If not, please explain why.

SSMA agrees, but also want to refer to our general comment on the conflict between MiFID II and MAR in certain situations and take that into account when amendments are made.

Q4 : Do you agree with the proposed description of FBA trading systems and the updated description of periodic auction trading systems? If not, please explain why and which elements should be added to the description and/or removed.

SSMA agrees that an updated description of FBAs is good, but it is important that the description is correct and is used consequently through the whole regulation.

Q5 : Which of the two options for the pre-trade transparency requirements for FBA trading systems do you prefer? Please explain in case you are supportive of a different approach than the two options presented.

SSMA does not favour any of the 2 options and therefore we do not want any changes made. More transparency will most likely take away the incentive to use FBAs at all. UK is also coming to a completely different conclusion in their analysis. This is a question of competition and if EU introduces higher requirements for pre-trade transparency than UK there is a risk that liquidity moves from EU into UK.

Q6 : Do you agree with ESMA's proposals for 'hybrid systems'? If not, please explain why and which elements should be added and/or removed.

SSMA does not agree and do not want any changes. The closing auction is in practice the last monopoly for the incumbent primary exchanges. During the last years we have seen a trend where more and more volume is executed in the closing auction and this in combination with higher fees (as compared to other trading phases) increases the average cost for trading in Europe. Different Trade at Last mechanisms that are emerging are innovative ways to optimize execution and provide more liquidity at the closing price. Restricting Trade at Last to only "continuous auction order book systems" will have a negative impact on competition and execution performance.

Q7 : Do you agree with aligning both Table 1, Annex I of RTS 1 and Table describing the type of system and the related information to be made public in accordance with Article 2, of Annex I of RTS 2, to describe the same systems (with the exception of voice trading systems) and pre-trade transparency requirements? If not, please explain why.

SSMA has no view.

Q8 : Do you agree with ESMA's proposals to require a specific format and standardise further the pre-trade information to be disclosed? If not, please explain why. If yes, please clarify which elements should be amended, added and/or removed, if any.

SSMA agrees.

Q9 : Do you agree with the changes proposed by ESMA to amend Article 15 (3) of RTS 1? If not, please explain your rationale.

SSMA agrees

Q10 : Do you agree with the proposed amendments to Article 17? If not, please explain.

SSMA agrees.

Q11 : Do you agree with the proposed amendment of Article 11(3)(c) of RTS 1? Please explain.

SSMA does not agree. Using average daily volume instead of transaction size will potentially lead to much higher and many different SMS levels. This will have effect on several activities for example SI quotes and will be more complex to manage technically. Standardised SMS levels are preferred. It is rather a better alternative to raise the SMS levels by 50% as suggested in previous consultations.

Q12 : Do you agree with the changes proposed to Table 3 of Annex I of RTS 1 (List of details for the purpose of post-trade transparency) presented above? If not, please explain and provide any alternative proposal you might have. Are there other issues to be addressed and how?

SSMA refers to our general comment that new/amended fields or flags will lead to new implementation costs and potentially new reporting difficulties and any changes must therefore be carefully evaluated. The reference to EU-venue should for clarity refer to EEA-venue instead.

Q13 : Do you agree with ESMA's proposal not to change Tables 1 and 2 of Annex III of RTS 1? If not, and you consider that certain modifications shall be made, please explain.

SSMA agrees.

Q14 : Do you agree with ESMA's proposal on the new Tables 1 and 2 of Annex IV of RTS 1? If not, please explain and provide any alternative proposal you might have.

SSMA believes this is very technical and quantitative burdensome. We think ESMA should instead consider a qualitative approach to simplify this determination.

Q15 : Please provide concrete examples or scenarios when the price cannot be determined as described or cases of the need to set a zero price for the different types of instruments: shares, ETFs, depositary receipts, certificates, other equity-like financial instruments.

SSMA has no comment or examples.

Q16 : Do you agree with the deletion of the SI flags 'SIZE', 'ILQD' and 'RPRI'? If not, please explain what you consider to be their added value.

SSMA agrees. It is no problem to remove flags – see general comment.

Q17 : Do you agree with the deletion of the ACTX flag? If not, please explain what you consider to be its added value.

SSMA agrees. It is no problem to remove flags – see general comment.

Q18 : Do you agree with the approach suggested for non-price forming transactions? If not, please explain.

SSMA believe new and/or amended flags should be implemented very carefully so it does not lead to unnecessary IT development costs and poor reporting quality – see general comment.

Q19 : Do you agree with ESMA's proposal to introduce a pre-trade LIS waiver flag for on-book transactions? If not, please explain. Should it be limited to completely filled LIS orders?

SSMA believe new and/or amended flags should be implemented very carefully so it does not lead to unnecessary IT development costs and poor reporting quality – see general comment.

Q20 : Do you agree with ESMA's proposal to introduce a pre-trade LIS waiver for off-book transactions? If not, please explain.

SSMA believe new and/or amended flags should be implemented very carefully so it does not lead to unnecessary IT development costs and poor reporting quality – see general comment.

Q21 : Do you agree with the proposal not to add such additional flags? If not, please explain why those flags are needed in your view.

SSMA can see some merit in these flags from a CTP perspective, but we are in general negative to new flags – see general comment – and therefore we support the proposal.

Q22 : Do you recommend adding/deleting/amending any other flags? If yes, please explain.

No, SSMA do not recommend any other changes.

Q23 : Do you agree with the proposal to prescribe the order of the population of flags? If not, please explain and provide an alternative proposal.

SSMA understands the logic behind this proposal but believe it will be costly to change the order of population without any material benefits. SSMA therefore thinks the data quality and reporting standards should be solved first – see general comment.

Q24 : Do you agree with the proposed amendments above? If not, please do not reiterate the arguments made under the previous question asked for equity instruments and please rather explain why those amendments are not suitable for non-equity financial instruments.

No comments.

Q25 : Do you agree with the proposal to specify the fields to be populated for pre-trade transparency purposes? If not, please explain. In case you support the proposal, please comment on the fields proposed, in particular whether you would consider them necessary and/or whether additional information is required.

While the SSMA generally is in favor of standardising information to be disclosed, the SSMA is concerned with the proposal in point 242 which suggests that ESMA wants to extend the requirements to SIs without a legal mandate to do so. In our view, ESMA should wait for the level 1 review. In particular it is surprising to see that ESMA includes variables related to SI:s in legal text without such mandate (see e.g., field 18 where SINT is the abbreviation for systematic internaliser).

Moreover, should ESMAs proposal to encourage SI:s to apply these standards be reality, the SSMA generally is of the opinion that the attributes may make sense for trading venues, but not necessarily when it comes to pre-trade transparency as an SI. The SSMA questions if all the fields actually are relevant for pre-trade purposes. If ESMA intends to pursue this route, the information required should be limited to necessary fields. While a comprehensive set of fields is relevant in a reporting context (transaction and trade repository reporting) disclosure of quotes serve a different purpose. Market participants and customers that are the receivers of such information are primarily interested in price/rate, quantity and other quote specific components. Hence, such fields that are related to the SI (primarily fields 16-20) could be omitted. Further, the fact that streaming of quotes is a possibility to fulfil the quoting obligation, indicates that the information to be disclosed must be limited to what is necessary. There are also a field which partly can be questioned, like field 9. Quantity which should specify the types of instruments in scope, as e.g., OTC derivatives should fall outside. Finally, the fact that regarding RTS 1/equity some fields (such as 1 and 17) are not applicable for SI:s would create uncertainty for SI:s on the non-equity side and what fields they should disclose. Although the assumption here is that an SI should not disclose such fields, there is a need for clarification here.

Q26 : Please indicate, if applicable, which medium-term targeted improvements you would like to see to the threshold calibrations in RTS 2.

The SSMA is concerned with the administrative burden and costs involved in implementing targeted amendments before the upcoming MiFID Review on level 1. We are not convinced that the nature of the issues raised in item 245 is such that “medium term improvements” are suitable.

Having said that, as regards the bullets in item 245:

- The SSMA agrees that the effects of increased transparency requirements are different on smaller markets where a limited number of market makers are active, the transactions are large and the number of SIs low. This needs to be taken into consideration in the context of a review of thresholds.
- The SSMA is not in favor of deleting the SSTI threshold and replacing it with an adjusted LIS. If kept we believe that replacing percentiles with a fixed SSTI pre trade threshold could be a way of simplifying the regime. Regardless of which route the EU regulators decides to take in respect of SSTI, the most important point is to avoid creating undue risks for SI that would

make SIs less willing to provide quotes to their clients, with negative effects on the liquidity as a result.

Q27 : Do you agree with the proposed changes to Article 13? If not, please explain.

The SSMA has no objections to the proposed changes of Article 13.

Q28 : Do you agree with the proposed changes to Article 4? If not, please explain.

The SSMA has no objections to the proposed changes of Article 4.

Q29 : Do you agree with the proposed changes to Article 12? If not, please explain. Please do not reiterate the general comments made in the equity section and try to focus on arguments that are specific to non-equity financial instruments.

As mentioned under General Comments, the SSMA proposes that the definition of non-price forming transactions in RTS 1 and 2 clearly allow firms to rely on the exemption from post trade transparency for non-price forming trades in situations where there is no real exchange of ownership and publication would be in conflict with MAR. From a technical perspective this could either be achieved though amendments to art 12 RTS 2, article 2 (5) of RTS 22, a new recital or ESMA guidance on level 3.

Q36 : Do you agree with ESMA's proposal on the new Table of Annex V of RTS 2 (Details of the data to be provided for the purpose of determining a liquid market, the LIS and SSTI thresholds for non-equity financial instruments)? If not, please explain and provide any alternative proposals you may have.

Q37 : Do you agree with ESMA's proposal to delete the ACTX flag? Please explain.

SSMA agrees.

Q38 : Do you agree with ESMA's proposal to merge the current non-equity deferral flags into one general flag?

The SSMA generally considers that changes to the flags regarding waivers and deferrals should wait for MiFID Review on level 1. In our view it can add some value to be able to distinguish between different deferrals and we are concerned with temporary solutions that will be costly from an IT perspective to implement.

Q39 : Do you agree with ESMA's proposal not to change the existing flags regarding non-price forming transactions in non-equity financial instruments? If not, please explain.

As mentioned under General Comments, the SSMA proposes that the definition of non-price forming transactions in RTS 1 and 2 clearly allow firms to rely on the exemption from post trade transparency for non-price forming trades in situations where there is no real exchange of ownership and publication would be in conflict with MAR. From a technical perspective this could either be achieved though amendments to art 12 RTS 2, article 2 (5) of RTS 22, a new recital or ESMA guidance on level 3.

Provided that it can be ensured that the end-result is that transactions where publication would be in contravention with MAR is covered by “non-price forming trades”, we do not object to the proposal.

Q40 : Do stakeholders agree with ESMA’s proposal to introduce a general waiver flag for non-equity transactions benefitting from a waiver? For LIS, should it be limited to completely filled LIS orders?

The SSMA considers that changes to the flags regarding waivers and deferrals should wait for MiFID Review on level 1. In our view it can be of value to be able to distinguish between different waivers and are concerned with the risk of temporary solutions that will be costly from an IT perspective to implement.

Furthermore, it is unclear how the introduction of the suggested pre-trade waiver flag (in addition to the attributes already disclosed under post trade transparency) would provide practical benefits to market participants or increase overall market transparency, particularly when assessed against the cost of implementation

Q41 : Do you agree with ESMA’s proposal to introduce a flag for pre-arranged non-equity transactions?

The SSMA considers that so-called processed trades fulfil an important function on the EU non-equity market. In our view, a flag for pre-arranged non-equity transaction would give a clearer legal support for processed trades than ESMA Q&A, which we think is positive. It is important to recall that that processed trades are executed ”on venue” as they are carried out under the system (rulebook) of a trading venue.

Q42 : Do you agree with the proposal on the delayed implementation of certain provisions of the amended RTS 1 & 2 ? Do you have proposals to minimize the delay?

SSMA generally agree to delay implementation of certain provisions of the amended RTS 1 and 2.

Many of the proposals involve substantive IT changes which will be very costly and operationally burdensome for investment firms to implement. It is therefore very important to ensure that all amendments are made subject to a thorough cost/benefit analysis and to avoid temporary or midterm solutions that may be overhauled by a forthcoming level 1 MiFID Review.

Additionally, a minimum period of 6 months may be too short for all investment firms to conform, and we believe that the regime would benefit from increasing the minimum implementation period to 9 months.

Q43 (CBA) : Can you identify any other costs and benefits not covered in the CBA below? Please elaborate.

In addition to the above, we have no comments at this stage.

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