

OPINION

OTC derivatives traded on a trading venue

1 Legal basis

1. ESMA's competence to deliver an opinion to competent authorities 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 competent authorities 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. The concept of "traded on a trading venue" (TOTV hereinafter) is referred to and is relevant for the scope of application of a number of provisions of Regulation (EU) No 600/2014 (MiFIR)². In particular, these include the following provisions:
 - a. Articles 3, 6, 8, 10, 11, 14, 18, 20 and 21 imposing pre-trade and post-trade transparency requirements on market operators and investment firms operating a trading venue as well as investment firms (including systematic internalisers) operating OTC;
 - b. Articles 23 and 32 setting out trading obligations for shares and derivatives; and,
 - c. Articles 26 and 27 imposing transaction reporting and reference data obligations on investment firms and operators of trading venues.
4. The concept of TOTV is not defined in MiFID II³/MiFIR.

¹ OJ L 331, 15.12.2010, p. 48

² Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Regulation (EU) No 648/2012

³ 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 (recast)

5. However, national competent authorities and market participants have asked ESMA to clarify the meaning of this concept for the purpose of the correct application of the above-mentioned provisions in respect of OTC derivatives.
6. ESMA has considered that such clarification will contribute positively to the consistency of supervisory practices and will ensure consistent approaches throughout the Union, as a result of which, ESMA has decided to issue this Opinion.

3 Opinion

7. MiFIR significantly broadens the scope of application for the transparency and transaction reporting requirements by requiring not only instruments that are admitted to trading on a regulated market but also instruments that are traded on other trading venues - MTFs or OTFs – to be subject to the transparency and transaction reporting requirements. Articles 20 and 21 as well as recital 18 of MiFIR and recital 116 of MiFID II clarify that the transparency requirements should also apply to investment firms undertaking transactions outside of trading venues as long as the instrument is TOTV.
8. However, MiFIR does not require that all financial instruments traded OTC, including derivatives, are captured by the transparency and transaction reporting obligation. In particular, financial instruments that are only traded outside of trading venues are not included.⁴
9. While the concept of TOTV is clear for instruments that are centrally issued and that are fully standardised, such as shares and bonds as well as exchange traded derivatives, it is less clear for OTC derivatives. This is due to the fact that OTC derivatives that do not have an issuer, are less standardised and often arise from bilateral contracts between two counterparties. ESMA considers it therefore important to delineate the OTC derivatives that are within the scope of the transparency and transaction reporting requirements from those OTC derivatives that are not considered TOTV and, hence, are outside the scope of the transparency and transaction reporting requirements.
10. Regulation (EU) 2017/585⁵, stemming from the empowerment of Article 27(3) of MiFIR, specifies the relevant identifying reference data that needs to be submitted for each financial instrument admitted to trading on regulated markets or traded on MTFs or OTFs. Hence, regarding derivatives, the reference data submitted in accordance with the requirements of Article 27(1) of MiFIR will include the relevant reference data

⁴ The obligation to report transactions applies in addition to financial instruments where the underlying is a financial instrument traded on a trading venue or an index or basket composed of financial instruments traded on a trading venue

⁵ Commission delegated regulation (EU) 2017/585 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities

details which identify each derivative admitted to trading on regulated markets or traded on MTFs or OTFs.

11. **Therefore, ESMA is of the view that only OTC derivatives sharing the same reference data details as the derivatives traded on a trading venue should be considered to be TOTV and, hence, subject to the MiFIR transparency requirements and to transaction reporting according to Article 26(2)(a) of MiFIR.**
12. In this context, “sharing the same reference data details” should mean that the OTC derivatives should share the same values as the ones reported in accordance with the fields of Regulation (EU) 2017/585⁶ for derivatives admitted to trading or traded on a trading venue, except fields 5 to 12 (the trading venue and issuer-related fields).
13. Since the trading venue and issuer related fields are only applicable to trading venues when submitting reference data for derivatives but are not applicable for trading those contracts bilaterally outside of trading venues, ESMA considers it appropriate not to take into account these fields when determining whether an OTC derivative traded outside of a trading venue is to be considered TOTV.
14. ESMA believes that this approach would ensure the consistent interpretation of the concept of TOTV across the different provisions of MiFIR, would contribute to supervisory convergence in the Union and would be the most efficient way to get the MiFID II transparency and transaction reporting regime up and running.
15. Nevertheless, ESMA is aware that what is to be considered the “same” reference data details may need to be revisited by ESMA taking into account the evolution of markets post 3 January 2018. ESMA intends to ensure that such evolution does not undermine market transparency and efficiency, does not result in information asymmetries between market participants and does not create incentives to move trading to the OTC space as this would run counter to the legislative goals expressed in MiFID II/MiFIR. ESMA therefore plans to monitor the application of the concept of TOTV as described in this Opinion, and, in particular, the ratio of derivatives that are considered TOTV compared to overall OTC derivatives trading.

⁶ Commission delegated regulation (EU) 2017/585 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities