

## Briefing note

### ***Q&A on Best Execution under MiFID II and MiFIR investor protection topics published by ESMA on 4 April 2017***

The European Securities and Markets Authority (ESMA) has published a [Q&A](#) on 4 April 2017 providing further guidance on Best Execution requirements under MiFID II. Below is a summary of key points. Previous updates are included in the Q&A.

#### **MiFID II and timing of publication of reports under RTS 27 and RTS 28 [Question 6]:**

- **RTS 27:** ESMA considers that the **first report** published under RTS 27 should cover a reporting period that is **representative of the first quarter of 2018** and should be published **by 30 June 2018**.
- **RTS 28:** ESMA considers that firms should release the **first annual report** (covering a **full calendar year period**) under RTS 28 by the end of the fourth month of the calendar year during which the legislation enters into force (i.e. **April 2018**).
- However, ESMA recognises that for the first set of RTS 28 reports, **investment firms may not be able to fully report on information which is not available or applicable** in relation to the preceding year e.g. where it is tied to new provisions stemming from MiFID II or MiFIR.
- Specifically, ESMA wishes to clarify that unless the firm is using a specific tool or the services of a third party data provider to assess execution quality, it will most likely be unable to provide, in the first annual report, any information required under Article 3(3)(g) of RTS 28.

#### **Information to be published on entities within a group [Question 11]:**

- ESMA is of the view that, in line with Article 65(6) of the Delegated Regulation, the annual report on the top five entities chosen for execution should be provided **at the level of the individual firm and not be aggregated or consolidated at the group level** if portfolio managers or receivers and transmitters of orders use different brokers or entities within a common legal or corporate group.

#### **Transactions with eligible counterparties and RTS 27 [Question 12]:**

- In accordance with Article 27(3) of MiFID II, execution venues must publish quarterly reports on execution quality containing information on transactions executed on that venue, **irrespective of the category of clients** to which those transactions relate.
- Where an investment firm is also acting as an execution venue, Article 27(3) explicitly requires investment firms to publish its RTS 27 report in its capacity as an execution venue (rather than as an investment firm). This means that the client category is not relevant in this respect and that **all transactions need to be included** for the purposes of complying with RTS 27.

- In this respect, the **RTS 27 reporting obligation differs from the requirement concerning data to be published by investment firms under Article 27(6) of MiFID II or RTS 28** which requires reports on orders relating to retail and professional clients, but not eligible counterparties.

#### **Execution policies for investment firms or market operators operating OTFs [Question 13]:**

- Where an investment firm operates an OTF, ESMA is of the view that the **investment firm's best execution policy should cover how orders are executed both at the level of the investment firm and at the level of the OTF** and, in particular, how discretion is exercised at each stage.
- *Firstly*, an **investment firm operating an OTF** should, in the same way as other investment firms that execute client orders, have a **firm-level execution policy** setting out the various execution venues, including its own OTF, that it will be considering when receiving a client order and explain in which circumstances an execution venue would prevail over the others.
- *Secondly*, the investment firm should have either a **separate policy or an additional section** in the firm-level execution policy governing how, **when a client order is then sent to the OTF**, the best possible result for the client is achieved taking into account the trading interests in the system and the different execution mechanisms that may be available on the OTF, such as voice execution, electronic RFQ or order book.
- As the exercise of discretion by the investment firm in its OTF operator capacity is to be in compliance with its execution policy, **the document should also set out in detail, the area(s) in which the OTF operator intends to exercise discretion and the basis on which such discretion will be exercised** (Article 20(6) of MiFID II).
- Equivalent requirements apply to a market operator operating an OTF.

#### **Information on passive and aggressive orders in the context of portfolio management and RTO [Question 14]:**

- If a portfolio manager, or a receiver and transmitter of orders (RTO), sends an **order to an entity for execution (broker)**, the **distinction between passive and aggressive orders** as defined in Article 2 of RTS 28 is **likely not relevant** and will not need to be disclosed in the report [...].
- An **exception** to this is where the portfolio manager or transmitter of orders has attached a **specific instruction to an order**, and that instruction is understood to mean that the broker will execute the order in a fashion that is either passive or aggressive within the meaning of the definition provided under RTS 28.
- If a portfolio manager is **executing orders directly** on an execution venue then Article 27 of MiFID II and RTS 28 apply and the **distinction between passive and aggressive will be relevant** and should be disclosed in the report, where applicable.

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