ISDA Safe, Efficient Markets

ISDA commentary on key issues in MIFIR trilogue

17 April 2023

A. *Executive Summary:*

- ISDA welcomes the progress made by the European Parliament and Council towards finalisation of the revised MIFID and MIFIR.
- In this paper we have focused on a short-list of the key issues for EU derivatives business that are being dealt with in the MIFID/MIFIR trilogue.
- ISDA's overarching philosophy in addressing the revision of MIFID and MIFIR is that this framework should ensure a safe and efficient legal framework which will both enable EU market participants to hedge underlying risks by accessing optimal pricing and will also give EU liquidity providers the room to provide optimal pricing (allowing liquidity providers to compete both inside and outside the EU with their peers from other jurisdictions).
- As such, our key focus remains the **MIFIR** trade transparency framework for derivatives and the Consolidated Tape (CT) for derivatives.
- ISDA believes that the Council's approach to derivatives **trade transparency** best serves the purpose of trade transparency i.e. offering investors insightful, indicative information on prices published on the largely liquid instruments that would comprise the scope of derivatives trade transparency regime under MIFIR.
- **Pre-trade transparency** for derivatives is viewed as (at best) of limited value by investors, as ESMA has acknowledged. The 'undue risk'[1] created by the combination of (attributed) pre-trade transparency and post-trade transparency with insufficient deferrals was mitigated by the so-called pre-trade 'Size Specific To An Instrument' (SSTI) threshold in MIFIR, above which quotes in liquid instruments do not have to be published. This preserved the possibility for liquidity providers to offer optimal prices to clients. Retention or expansion (by replacing the SSTI with the higher Large In Scale (LIS) threshold) of pre-trade transparency– as proposed by the European Parliament for Systematic Internalisers (SIs) – would exacerbate 'undue risk' for EU liquidity providers and negatively impact pricing for clients.
- As such, we support the Council's deletion of derivatives pre-trade transparency requirements for both trading venues and SIs. Not only will this make it easier for EU clients to access optimal pricing, this will be key for EU competitiveness (the UK authorities have signalled that they will delete pre-trade transparency requirements for derivatives and no other major jurisdiction requires comparable pre-trade disclosure to that in MIFIR for derivatives).

[1] MIFIR Article 9 explains what is meant by undue risk, *including 'whether, at such sizes, liquidity providers would be able to hedge their risks'* if details of the trades in question were subject to disclosure to the market.

- ISDA also supports the Council's approach to **post-trade transparency and deferrals** for derivatives, which will allow ESMA the flexibility to calibrate deferrals of both price and volume information for up to 8 weeks, if justified by sound data.
- In the event that the co-legislators retain the broader instrument scope adopted in the European Parliament text for derivatives instruments, it would be important to permit ESMA flexibility regarding deferrals of both price and volume information up to a maximum of 8 weeks (the maximum deferral period in the Council's post-trade transparency regime for derivatives).
- The ECON Committee has included limitation of deferrals of price information to a maximum of end of working day for any non-equities trades that benefit from deferrals apart from 'transactions of a very large size' which will benefit from a price and volume deferral of up to 4 weeks. Thus, for example, transactions of large size could have volume information deferred by 1 or 2 weeks (depending on whether the trade is in a liquid derivative class), but price information would only be delayed until end of day. This is ill-advised: opportunistic market participants will, when given the price of a derivatives trade that has been executed, but not the volume, take positions in markets that they know liquid providers need to trade in to hedge the large risk they have (clearly) assumed from their clients. This 'undue risk' for liquidity providers could have a negative impact on the price offered to clients.
- If a **Consolidated Tape (CT) for Derivatives** is pursued, it is necessary to first remedy instrument identification for derivatives (by embracing instrument identification based on the CPMI-IOSCO-developed Unique Product Identifier (UPI)). As such we we have a preference for the Council text in this regard, subject to certain minor amendments. Other preconditions to pursuit of a CT should include limiting the scope to contracts for which price information for end users would be meaningful (such as the scope of the derivatives transparency regime under he Council text) and protection of liquidity providers from undue risk (as such, attention needs to be paid to certain aspects of 'core market data' published by CT Providers).
- ISDA supports the **Designated Reporting Entity (DRE)** concept, but we warn that the complexity associated with Reporting Entities being designated at instrument level (as suggested as one potential approach by the European Parliament) would undermine the DRE concept from the point of view of DREs and their clients alike.
- We support the Council's expansion of an existing MIFIR exemption for trades resulting from portfolio compression exercises from best execution, transparency requirements and the Derivatives Trading Obligation (DTO) to apply to technical trades resulting from other **Post Trade Risk Reduction** exercises. This will result in clear benefits for EU market participants in terms of reduction of counterparty risk and margin and liquidity pressures.
- ISDA has commented in a separate joint trade association paper on **MIFID commodity (particularly energy) derivative** issues, especially as addressed in the European Parliament report. .
- Derivatives end users are sophisticated market participants who access information on execution of trades from different sources such as real-time news, rating changes and index data, in addition to data acquired from third party vendors. Market participants have access to more sophisticated data than the data provided in reports produced by investment firms and execution venues. Low download numbers confirm that best

execution reports are not valued by clients, in particular for derivatives. Compliance costs are not proportionate to the limited value provided. As such we believe that the requirements for both quarterly (RTS 27) and annual (RTS) **best execution** reports should be deleted, and we support the ECON text in this context.

B. MIFIR

1. Trade Transparency

ISDA supports the Council text regarding the scope of the MIFIR transparency regime, pre-trade transparency and post-trade transparency.

We believe that the Council's approach focuses on a specific scope of derivatives trade transparency that is meaningful i.e. where investors obtain insightful, indicative information from prices published on largely liquid instruments.

By contrast, the European Parliament maintains the existing broad scope of derivatives instruments covered by trade transparency requirements, subject to a sub-optimal system of derivatives instrument identification (meaning it is not easy for investors to discern exactly for what instrument a price is being indicated), including many illiquid instruments, and where the level at which liquidity/illiquidity determinations are applied is insufficiently granular.

The European Parliament's approach compounds these issues through an approach on pre- and post-trade transparency for derivatives that will increase 'undue risk', making it more difficult for liquidity providers in the EU to provide optimal prices for EU clients.

a) Scope:

- The Council text includes a specific *derivatives* transparency regime in Article 8a (the EP includes derivatives in a broader 'non-equity' transparency regime).
- **We support the scope of derivatives trade transparency as defined in the Council text** i.e., i) contracts subject to the clearing obligation ii) denominated in €, $, £, ¥ iii) in certain liquid whole year tenors iv) that are actually cleared.
- This scope captures derivatives contracts where there is significant liquidity, and for which transparency would be meaningful from the point of view of users of this data, particularly if a more suitable identifier (e.g. 'UPI+') can be used (rather than ISIN as implemented in the EU). The scope of transparency proposed by ECON captures many illiquid instruments (as the scope of the Clearing Obligation (CO) includes 'broken-dated tenors (e.g. a 7 year 112 day interest rate swap), and even some of the whole year tenors covered by the EU CO are illiquid (even in Euro-denominated business)), for which transparency provides little insight and (if applied without sufficient deferral) would make it hard for financial institutions to provide liquidity to clients.
- For some other asset classes, re-scoping the transparency regime would correct errors in the transparency regime as drafted in 2014-2015 (e.g. **Equity derivatives** where MIFIR RTS 2 deems all instruments within the EQD options and futures/forwards sub-asset classes as liquid, a mischaracterisation of equity derivatives, which is a highly

heterogenous asset class (largely due to failure to distinguish between exchange-traded equity derivatives and OTC equity derivatives in data used to calibrate the transparency regime at that time, and insufficient time and attention being devoted to this asset class)).

- Regulatory transparency under both texts would and should remain very similar to today through transaction reports (market integrity), while regulators would also have visibility into derivatives business through EMIR reporting requirements (for systemic risk requirements).

b) ***Pre-trade transparency:***

- **Again, ISDA supports the Council text, which maintains a level playing field between venues and SIs doing derivatives business by deleting pre-trade transparency (quote publication) requirements for liquid instruments for both of 1) trading venues using RFQ or voice protocols (typically used for OTC derivatives business) and 2) SIs.**
- MEPs have deleted pre-trade transparency only for RFQ and Voice trading on trading venues and actually (in one respect) expanded the scope of pre-trade transparency for SIs in derivatives (with quote publication required up to Large In Scale (LIS) rather than up to the lower Size Specific To An Instrument (SSTI) threshold).
- There are no level playing field concerns justifying such bifurcation: the same liquidity providers provide liquidity in each context; SIs are actually not permitted to provide liquidity to clients subject to the Derivatives Trading Obligation (DTO) in derivatives instruments that are subject to the DTO (this business – the most high volume and liquid - is required to be done on-venue) and SIs must publish their names with quotes in liquid instruments (unlike liquidity providers on-venue).
- **The latter requirement exposes SIs to 'undue risk' (as (if the client accepts a pre-trade quote) it easy for certain market participants to compare published quotes (naming the liquidity provider) with post-trade transparency reports (featuring all of the same details as found in the quote, other than the name of the liquidity provider) and to identify which SIs now (themselves) need to hedge a substantial amount of risk on the market. These opportunistic market participants will take positions in markets used by liquidity providers to hedge these risks, making it more expensive for liquidity providers to do so. This will particularly be the case if the SSTI threshold is replaced by the LIS threshold (as proposed by ECON) as quotes (in some places) two to three times the size of quotes that would previously not have had to have been published would now be disclosed to the market. Such extra risk for SIs will ultimately impact the prices they can quote clients**.
- No rationale is provided for ECON's deletion of the ability for liquidity providers to withdraw quotes, and this does not seem proportionate.
- Pre-trade transparency is not otherwise seen as valuable by clients[2].

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[2] July 2020 ESMA report: 'MIFIR report on systematic internalisers in non-equity instruments: *'The overall assessment of the non-equity SI pre-trade transparency framework for liquid instruments attracted negative feedback from most stakeholders based on multiple grounds. A large majority of respondents stressed that there is no demand for SI quotes due to the bespoke nature of each request. Therefore, there is no point in having as a regulatory objective that the quotes are accessed by other clients.'*

- Competitiveness: 1) The UK is deleting pre-trade transparency for trading venues and for SIs, having conducted its Wholesale Markets Review (WMR) and 2) No other major jurisdiction requires comparable pre-trade disclosure to that in MIFIR.

c) Post-trade transparency/deferrals

- ISDA also supports the Council's approach on deferral of price and/or volume information regarding derivatives trades. This approach (set out in Article 11a) allows ESMA to flexibly calibrate deferrals up to a period of 8 weeks as justified by 'accurate market data'.
- Although the scope of the transparency regime as proposed by the Council would mean that derivatives instruments in-scope would mostly display a high degree of liquidity, deferrals would still be necessary for trades at large volume. Levels of liquidity in derivatives instruments may also vary over time, and 'accurate market data' should allow ESMA to calibrate deferrals accordingly if illiquidity manifests.
- It makes little sense for the EC proposal and the EP text to limit price deferrals more restrictively than volume information in Level 1. If a price for a specific derivative trade is published but volume information is not, this simply alerts the market to the fact that a large trade has been done at that price, creating 'undue risk' which could ultimately affect pricing for clients.
- **The generally more liquid nature of derivatives instruments in-scope of the transparency regime in the Council text means that liquidity provision in these instruments could continue on an efficient basis with slightly shorter maximum deferrals than the 8 weeks proposed by the Council (e.g. maximum of 6 weeks for large trades, rather than 8 weeks) without overly compromising the ability of liquidity providers to offer optimal prices to clients.**
- **On the other hand, if the trilogue participants were to adopt the instrument scope for the transparency regime adopted by ECON (including a very broad range of liquid and illiquid instruments) it is vital that a maximum 8 week deferral period is permitted.**
- **If this revision of MIFIR successfully mandates reform of instrument identification (see next section), it should be possible, in due course, to expand the scope of instruments covered by MIFIR trade transparency (now adequately represented) with the confidence that transparency, where applied, will work as intended.**

2. Consolidated Tape (CT) for Derivatives and Obligation to Supply Reference Data

ISDA's views on the consolidated tape for derivatives are well understood by now.

Both the Council and EP texts envisage initiation by ESMA of a selection procedure for a CTP (Consolidated Tape Provider) for derivatives, after such procedures for other asset classes have been initiated.

What is needed for the CT for Derivatives to add any value?

ISDA sees three main preconditions to the establishment of a CT for Derivatives if the benefits of such a tape are not to be outweighed by the costs.

ISDA has been consistent in its view that if a consolidated tape for derivatives is ever to be pursued, the first of these three conditions is ***1) remediation of instrument identification issues*** (relating to the implementation of ISINs for OTC derivatives under MIFIR). We support an approach to instrument identification regarding trade transparency requirements based on the CPMI-IOSCO developed 'Unique Product Identifier (UPI)'. This 'UPI+' approach would see UPI augmented with a limited number of extra fields to ensure optimal granularity for transparency purposes.

The Council text states that initiation of the process of selection of a CTP should happen after *technical issues hampering the setup of the CT, such as those concerning ISINs, are resolved*' (recital 20) and also says (in MIFIR Article 27.1 and Article 27 da, as revised by the Council) that this should take place after an identifier (also used for transaction reporting and transparency purposes) '*has been developed and applied*', and that this identifier '*should be based on globally agreed international standard used for identifying reference data as derivative identifiers*'.[3]

If instrument identification is not remedied ahead of appointment of a CTP for derivatives, this is likely to undermine whatever benefit could be accrued from existence of a CT for derivatives.

In this context, ISDA would support incorporation of the following wording (a variation on wording appearing in the final Council text). Additions are indicated in ***bold/italics,*** deletions are ~~*struck-through*~~***:***

Recital 20, Council General Approach

(20) Competition among consolidated tape providers ensures that the consolidated tape is provided in the most efficient way and under the best conditions for users. However, no entity has, up until now, applied to act as a consolidated tape provider. It is therefore considered appropriate to empower ESMA to periodically organize a competitive selection procedure to select a single entity which is able to provide the consolidated tape for each specified asset class. Initially, ESMA should start the selection procedure concerning the consolidated tape for bonds. Within 6 months of the start of that selection ESMA should start the selection procedure for a CTP for shares and ETFs. ESMA should require the CTP for shares and ETFs to be able to consolidate and display the best bid and offer spread of each trading venue in time of executed trade as well as the European best bid and offer spread that would be derived from those data. ESMA should thirdly start the selection procedure for OTC derivatives CTP once technical issues hampering the setup of the CT, such as those concerning ISINs, are resolved ***and identifying reference data based on globally agreed international standards (for example, based on an ISO 4914 Unique Product Identifier or similar standard) have been developed for derivatives.***

[3] The European Parliament text does not indicate that development and application of such an identifier should be a precondition to initiation of the process for selection a CTP for derivatives, although it also supports adoption of a '*globally agreed international standard used for identifying reference data as derivative identifiers*'.

Article 27 of Consolidated text under Council General Approach

14) Article 27 is amended as follows:

'(a) in paragraph 1, first and second subparagraphs are replaced by the following:

'With regard to financial instruments admitted to trading or traded on a trading venue or concluded on a trading venue or where the issuer has approved trading of the issued instrument or where a request for admission to trading has been made, trading venues shall provide ESMA with identifying reference data for the purpose of transaction reporting under Article 26 and the transparency requirements under Articles 3, 6, 8, 8a, 10, 11, 11a, 14, 20 and 21. With regard to derivatives, identifying reference data shall be based and further developed on ***a*** globally agreed international standard ***for unique product identifiers,*** used for identifying reference data as derivative identifiers.''

'Article 27da of Consolidated Text under Council General Approach

Selection process for the authorisation of a single consolidated tape provider for each asset class

1. ESMA shall organise a selection procedure for the appointment of the CTP for a five year term. ESMA shall organise a separate selection procedure for a single CTP for each of the following asset classes:

(a) bonds;

(b) shares and exchange traded funds; and

(c) OTC derivatives or relevant subclasses of OTC derivatives.

ESMA shall organise a the first selection procedure under point (a) by [OP insert date 9 months as of entry into force], or if it is later, directly after publication of the delegated acts based on Article 11(4) and 22b(2) in the Official Journal of the European Union.

ESMA shall organise the first selection procedure under point (b) within 6 months after the selection procedure under point (a) or, if this is later, directly after publication of all relevant delegated acts in the Official Journal of the European Union.

ESMA shall organise the first selection procedure under point (c) within six months after the selection procedure under point (b), and ~~directly~~ ***only*** after an identifier under article 27 para 1 is developed and applied.

ESMA shall organise subsequent selection procedures under points (a), (b) and (c), in time to allow for a continuation of provision of the consolidated tape without disruption.

If co-legislators prefer to use the European Parliament's text as the basis for Article 27 in the final legislation, we believe this text should also incorporate a reference to ISO 9414, similar to the language provided above.

Another precondition of implementation of a consolidated tape for derivatives, in our view, would be ***2) ensuring that the scope is limited to contracts for which price information for end users would be meaningful*** (where the instruments covered are comparable and liquid enough to provide a representative view of market pricing). ISDA has previously indicated that derivatives instruments subject to the Derivatives Trading Obligation would meet this description. **ISDA believes that a Consolidated Tape for derivatives whose scope is aligned with the scope of derivatives trade transparency in the Council text could also meet this description as long as the other necessary conditions we cite herein (remediation of derivatives instrument identification for the purpose of transparency and the Consolidated Tape; and protection of liquidity provider from undue risk (see below)) have been met.**

The third precondition we see to pursuit of a Consolidated Tape for Derivatives is ***3) protection of liquidity providers from undue risk.*** This means that for large trades, for example, deferrals would still be needed so that liquidity providers have time to hedge their positions.

As the Presidency and the EC knows, one other concern in this (undue risk) context has been the proposed definition of 'core market data' (Article 2.1 (36b)(a)(v) of the consolidated text under the EC proposal), which includes the **Market Identifier Code (MIC)** identifying the execution venue. As such, APAs or SIs reporting trades executed by SIs to CTs would have to disclose the SIs' MIC. It appears that (under this proposal) the CT would consolidate and publish all the data provided, including the MIC identifying the SI that executed a trade (see new Article 27h(1)(d)). This would expose SIs to unnecessary risk.

This concern is partially recognised under the Council text (recital 28) but not by the EP. Recital 28 of the Council text states that the CTP should not publish the unique identifier / MIC code of an SI as part of the "core market data". It may be more prudent in terms of data management for the APA not to send the SI’s MIC code to the CT at all, and for the CTP to receive information that the transaction has been executed outside of a trading venue, without identifying the specific SI.

This could be achieved by amending the Council’s Recital 28:

Recital 28 MiFIR in Council General Approach

(28) The CTP should receive core market data as well as reported data, but it should not report all the data it receives. This is true especially for reported data where the CTP should publish the closing and opening price, but not other information that is needed for the operation of the CTP, but should not be made public. Data originating from systematic internalisers should be published on ***a*** more anonymous basis. ***The CTP should not require information on the*** unique identifier ***of systematic internalisers in order to*** protect systematic internalisers from undue risk. ***Where a transaction is executed through a systematic internaliser, it should be sufficient to identify that the transaction has been executed outside a trading venue, without identifying the specify systematic internaliser.*** Additional data, including pre-trade data and depth of order book data, may be published subject to the specific agreement between market data contributor and CTP.

Alternatively, the reference to the market identifier code in ‘core market data’ could be amended, as the current reference to identification of the ‘execution venue’ could cover SIs.

Amendments that could remedy this issue could include:

Article 2 (Definitions) under Council General Approach

'(36b) 'core market data' means:

(iii) ***the place of execution identifier represented by*** **e**

- ***either*** the market identifier code ***(MIC)*** ***~~identifying the~~*** ***for trades executed on a trading*** ***~~execution~~*** ***venue or organised trading platform outside of the Union,***
- ***or "XOFF" for trades executed outside of a trading venue, outside of an organised trading platform outside of the Union, and not on Systematic Internaliser,***
- ***or "SINT" for trades executed outside of a trading venue and on a Systematic Internaliser***

or (version based on vocabulary of MIFIR RTS 2):

'(36b) 'core market data' means:

(iii) ***the place of execution identifier represented*** **by**

- ***either the*** market identifier code ***(MIC)*** ***~~identifying the~~*** ***for trades executed on a trading*** ***~~execution~~*** venue ***or organised trading platform outside of the Union,***
- ***or "XOFF"*** for financial instruments admitted to trading or traded on a trading venue***, where the transaction on that financial instrument is not executed on a trading venue or systematic internaliser or organised trading platform outside of the Union;***
- ***or "SINT"*** for financial instrument submitted to trading or traded on a trading venue***, where the transaction on that financial instrument is executed on a Systematic Internaliser;***

We would like to highlight (in the event that the European Parliament's version of Article 27 da (Selection process for the authorisation of a single consolidated tape provider for each asset class) is chosen as the basis for this section of the final text) that the European Parliament's Article 27 da includes an erroneous reference to Article 26(1) where it should refer to Article 27(1). The intention herein was to address the timing of initiation of a selection procedure for derivatives CT provider, after an identifier is chosen. While it is Article 27(1) that actually refers to choosing such an identifier, the EP text's Article 27da refers to Article 26(1).

Revenue distribution – CT for derivatives Article 27h

The Council's MIFIR text unnecessarily proposes (in Article 27h, (Organizational Requirements for Consolidated Tape Providers), paragraph d) revenue distribution in relation to any future Consolidated Tape for derivatives, for '*the purpose of covering the costs, including loss of revenue, related to mandatory contribution, and of ensuring a fair level of participation for trading venues in the revenue generated by the consolidated tape'* (this revenue distribution would be applied to all asset classes other than shares).

It is unclear why trading venues would be singled out as beneficiaries of revenue distribution in the case of a CT for derivatives, given that much of the costs and burden of mandatory contribution would fall on investment firms.

As such we would support the European Parliament's approach on this issue. The European Parliament only focuses revenue distribution in the context of the CTs for shares and ETFs.

3. Transaction reporting (derivatives)

ISDA supports the intended scope of transaction reporting regime as set out in the Council text (which is broader than the scope of the proposed derivatives transparency regime, covering e.g. Single Name CDS and equity derivatives). Please Article 26, paragraphs 1 and 2 of that text.

However, there is one erroneous reference in the Council text, which should be corrected if the Council text is (otherwise) incorporated into the final MIFIR text, concerning the scope of derivatives transaction reporting. While paragraph 2 of the text intends to include in the scope of transaction reporting derivatives that are subject to the trade transparency regime, derivatives which refer (as underlyings) to financial instruments traded on a trading venue and derivatives which refer (as underlyings) to indices or baskets of financial instruments traded on a trading venue, the text does not actually refer to Article 21(1) – which refers to the scope of the derivatives transparency regime - but rather (mistakenly) refers to Article 20(1) which actually refers to shares, depositary receipts, ETFs, certificates and other similar financial instruments.

4. Designated Reporter Regime

The EP text states that the status of Designated Reporting Entity (DRE) could be applied at instrument level or class of instrument level.

Application at instrument level would be far too complex for market participants who would want to avail of a designated reporting service and would have to check for each instrument they want to trade whether their would-be counterparty is a DRE.

In the UK context, ISDA has supported the application of the DRE concept at asset class level.

It should not be necessary to specify the individual financial instruments for which an entity is a designated reporting entity. Each entity will only report transactions that it enters into, so it should be sufficient either simply to identify a particular entity as a designated reporting entity or, if more detail is required, to identify which classes of financial instrument the entity is a designated reporting entity for.

"Classes of financial instrument" here would be interpreted in line with the classes of financial instrument identified in RTS 1 and 2.

As such, we believe that the EP text should be amended accordingly if it is to be used (in the below sections) as the basis for the final legislation:

Recital 19a of EP text

(19a) Market participants and ESMA have shown that the existing reporting regime can create uncertainty about who should report transactions and can lead to double reporting. The problem is particularly acute when investment firms trading with each other do not know whether their counterparty is a systematic internaliser for the traded financial instrument, and as such should report transactions to the approved publication arrangement. In addition, the link between the reporting obligation and the status of systematic internaliser has led to an inflated number of systematic internalisers in the Union, distorting the picture of market participants. The link between the systematic internaliser status and the post-trade transparency and reporting requirements should be removed, introducing instead the possibility for market participants to register as a designated reporting entity. In addition, ESMA should establish a register of all designated reporting entities, specifying their identity as well as the ~~**instruments or**~~ classes of ***financial*** instruments for which they are designated reporting entities. That would eliminate uncertainty about who should report a transaction and reduce the regulatory burden on investment firms, particularly smaller ones. Such an approach would also have the advantage that only those firms that qualify or have opted in as systematic internalisers will act as liquidity providers, providing further clarity to the overall structure of the equity market.

Article 21a in Consolidated Version of EP text

9e) the following Article is inserted:

‘Article 21a

Designated Reporting entity

1. Where only one party to a transaction is a designated reporting entity in accordance with paragraph 3 of this Article, it shall be responsible for the disclosure of transactions through an APA in accordance with Article 20(1) or Article 21(1).
2. Where none of the parties to a transaction, or both of the parties to a transaction are designated reporting entities in accordance with paragraph 3, only the entity that sells the financial instrument concerned shall make the transaction public through an APA.
3. 3. Upon request to ESMA, investment firms shall obtain the status of designated reporting entity for ~~specific financial instruments or~~ classes of financial instruments. All systematic internalisers shall be considered to be designated as reporting entities for the ~~**financial instruments or**~~ classes of financial instruments for which they are systematic internaliser.
4. ESMA shall establish a register of all designated reporting entities, specifying the identity of the designated reporting entities, including the systematic internalisers, as well as the ~~**instruments or**~~ classes of ***financial*** instruments for which they are designated reporting entities

5. **Exemption for Post-Trade Risk Reduction (PTRR) technical trades from Best Execution, Transparency and DTO requirements**

The Council text (Article 31) expands an existing MIFIR exemption from best execution, transparency requirements and the DTO (that is available for portfolio compression technical trades) to apply to technical trades resulting from other PTRR exercises.

Broadening of this exemption will make it easier for EU market participants to use PTRR techniques beyond portfolio compressions. This will make EU markets safer, more resilient and more efficient.

A PTRR technique such as **Portfolio rebalancing**, for example, reduces risk exposures between counterparties by introducing new transactions into netting sets between counterparties. While not affecting market risk, these transactions reduce counterparty risk in affected netting sets. This reduction of risk has the knock-on effect of reducing liquidity strains from rapid margin demands, particularly in times of market stress. Broader use of this technique would have significantly reduced collateral demands at the time of the March 2020 ‘dash for cash’ as EU markets first felt the full impact of the COVID pandemic.

The trades resulting from PTRR techniques are non-price-forming, and only exist as the technical output of PTRR techniques. As such, there is no added value in subjecting them to best execution or transparency requirements, or the DTO, and doing so will create unnecessary impediments to their use.

An exemption from the DTO, in particular, would be important in this context as output trades resulting from PTRR exercises often fall within classes of instruments that are subject to the DTO.

A November 2020 report by ESMA (mandated under EMIR Refit) recognised the value of PTRR exercises and recommended that technical trades resulting from PTRR exercises should be exempt (subject to conditions) from the clearing obligation.

The European Parliament report on MIFIR does not propose an expansion of the existing exemption from best execution, transparency requirements and the DTO.

ISDA supports the Council text in this respect, and would welcome adoption of the expanded exemption for PTRR trades as crafted in Article 31 of the Council’s MIFIR text, in the final revised MIFIR text.

C. MIFID

1. Ancillary Activities Exemption

ISDA has commented in a separate joint trade association paper on **MIFID commodity (particularly energy) derivative** issues, especially as addressed in the European Parliament report.

2. Best Execution

End-users of derivatives are sophisticated market participants (banks, asset managers, large corporates, insurers etc), which access information on execution of trades from different sources such as real-time news, rating changes and index data, in addition to data acquired from third party vendors. Market participants have access to more sophisticated data than the data provided in reports produced by investment firms and execution venues. Very low download numbers confirm that best execution reports are not a valuable tool for clients, in particular for derivatives. Compliance costs are not proportionate to the limited value best execution reports provide.

Both the European Commission proposal and the Council text deleted quarterly (RTS 27) best execution reports by trading venues from MIFID under paragraph 3 of Article 27 in MIFID 2.

The European Parliament, by contrast, deleted both quarterly best execution reports *and* annual (RTS 28) best execution reports by investment firms (the latter was addressed in Article 27(6) of MIFID 2). The European Parliament also imposes a new requirement for investment firms to inform clients where a trade has been executed after execution of that trade.

ISDA supports the deletion of both quarterly (RTS 27) best execution reports by venues and annual (RTS 28) best execution reports by investment firms, in line with the European Parliament position.

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