

## EDMA Europe Position Statement

### Impact of Article 26(5) MiFIR on Trading Venues

The implementation of Article 26(5) of MiFIR is proving very problematic for EDMA Europe's members and we believe that it will result in valuable liquidity moving away from European venues to the detriment of EU markets and economies. Below is a more detailed explanation of the difficulties (many of which also apply to the order record keeping obligations under Article 26(5)), together with some suggested questions and answers for Level 3 guidance. We remain very grateful to ESMA for the considerable effort invested in producing guidelines on transaction reporting.

#### ***Key Provisions relating to Transaction Reporting***

Pursuant to Article 26 (5) of MiFIR, the operator of a trading venue is required to report to the National Competent Authority details of transactions executed through its systems by a 'non-MiFID firm', which may be an EU firm that is exempt from MiFID, e.g. collective investment schemes, pension funds, central banks, etc or firms that are based outside of the EU. The finalised RTS 22 requires participants or venues to report 65 different fields per transaction. Many of these can be populated with information readily available to the trading venue, but several are difficult, if not impossible, for the trading venue to obtain if the information is not voluntarily submitted by the non-MiFID firm in question; such as:

- if a non-MiFID firm is trading in a matched principal or agency capacity, the natural person details regarding *the client of the non-MiFID firm* are required;
- regardless of trading capacity, the natural person details of the person responsible for investment decision are also required; and
- trading venues do not routinely have access to any allocations, amongst other practical difficulties.

#### **Problem definition**

##### *(1) Sensitivity of the data*

The type of information required to be reported by non-MiFID firms is generally considered to be sensitive, in particular where it relates to the clients of the multi-lateral trading facility (MTF) participant. EDMA Europe's members have discussed the requirements extensively with their non EU MTF participants and have come to the firm conclusion that natural person and client information is highly unlikely to be obtainable from MTF participants who are non-MiFID Firms.

In some cases, members of the trading venue are prohibited under local laws from disclosing client or personal data or are not permitted to transmit it outside of their jurisdiction (e.g., in Switzerland and Israel disclosure of client information without consent is expressly prohibited). In other cases, it is commercially difficult for third country MTF participants to accept that they should be required to disclose information pursuant to MiFID rules in relation to a transaction in which the European regulatory regime is not

otherwise relevant. For example, a client in Singapore might choose to trade on a UK regulated MTF, including with a counterparty located elsewhere in Asia in a local currency bond. However, Article 26(5) would require disclosure of sensitive information in Europe. As a result, we believe that the current interpretation of Article 26(5) will result in such activity moving away from European venues to the detriment of EU markets and economies.

*(2) Technical difficulties with obtaining all the data in time*

Feedback from EDMA Europe's members' participants indicates that they do not store the additional information needed to compile a transaction report in the front office and execution systems. They therefore need to provide a separate feed of information, for example, identifying any allocations that the MTF would use to enrich the data the MTF has already received at the trading level.

We believe that ESMA's recent guidance (s2.1.4.2 of the Final Report issued on 10 October) is very helpful in indicating that the trading venue should recover and validate the information by the end of the next trading day. However, in the event that the information is not provided, there is no indication as to the how the trading venue should proceed. This is particularly difficult, given that it is not always practicable to insist on all the information being given pre-trade.

*(3) Need for guidance that "best" or "reasonable" efforts are sufficient*

In the absence of clarity that best or reasonable efforts are sufficient, EDMA Europe's MTFs may be faced with the choice of making an incomplete or incorrect report, or refusing to allow participants to participate on the venue if they are unable to provide this information. We believe ESMA should offer guidance on the reasonable steps it expects trading venues to take when a participant is unable to provide the requisite information. Similar measures have been taken in relation to the short selling flag, where an investment firm that does not know whether its client is short, need only take steps to request the information. Whilst the problems we outline are not strictly analogous, the principle is the same in the sense that the firm with the reporting obligation, but not the necessary information, was required only to make reasonable efforts to meet the requirements.

*(4) Lack of level playing field between Regulated Venues and Bilateral Trading*

There is no comparable requirement for the information at issue to be provided to regulators for non-MIFID firms when they trade off-venue with EU firms (i.e. bilaterally). The EU counterparty in the bilateral transaction therefore does not need to collect the sensitive and confidential or restricted client information from the non-MIFID firm in order to complete its report. Given this, the requirement to provide such detailed and often confidential personal data may discourage firms not authorised under MiFID from trading on-venue and we expect that they will either revert to bilateral voice trading with EU firms or, indeed, such firms will look to trade on venues outside of Europe. This would undermine the aims of MiFID II, reduce liquidity and reduce the set of trading information reportable to regulators.

## Suggested Q&A

*Q1. How should a trading venue populate fields pertaining to the client of the relevant MTF participant in circumstances where a non-MiFID Firm is unwilling or unable to provide the trading venue with the information?*

Where a trading venue reporting under MiFIR Article 26(5) requires additional information to complete the required fields, the content of which the relevant MTF participant is unable or unwilling to provide, the trading venue shall populate the field with “UNDI” to signify that the information has been requested, but not disclosed.

Alternatively, where a participant of an MTF is able or willing to provide anonymous client identifiers, but not details of the underlying client, they may be used to populate the relevant fields.

*Q2. Will a trading venue be responsible for the completeness and accuracy of a transaction report submitted by it under MiFIR Art 26(5) in circumstances where it depends entirely on its member to provide the information and cannot reasonably be independently verified by the venue?*

Trading venues should not have responsibility for the completeness or accuracy of fields in circumstances where the trading venue does not have direct independent access to the relevant information and depends on its member to provide the information.

*Q3 Can additional information not needed for the purposes of execution, but needed for transaction reporting under article 26(5), be collected post execution?*

Additional information needed by trading venues to complete transaction reports under Article 26(5), such as details of the decision-maker can be collected post execution, provided the reports are made before the end of T+1.

*Q4 Can trading venues report at block level?*

Trading venues may submit transaction reports at block level by the end of T+1 if they have been unable to secure details of any allocations.

## About EDMA Europe

Electronic Debt Markets Association represents the interests of companies whose primary business is the operation of regulated electronic fixed income multilateral trading facilities in Europe (regulated markets and/or trading venues) and act as a source of consultation between the members in their roles as operators of such venues in order to project collective views on regulatory, compliance and market structure topics for the benefit of the electronic fixed income markets