



Council of the European Union  
General Secretariat

Brussels, 28 February 2023

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**Interinstitutional files:**

**2022/0405 (COD)**

**2022/0411 (COD)**

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**WK 2935/2023 INIT**

**LIMITE**

**EF**

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From:	Commission services
To:	Working Party on Financial Services and the Banking Union (Listing Act) Financial Services Attachés
Subject:	Article 25a of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (CROSS-MARKET ORDER BOOK SURVEILLANCE - CMOBS) proposed in the Listing Act

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WK 2935/2023 INIT

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## NON-PAPER

### Article 25a of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (CROSS-MARKET ORDER BOOK SURVEILLANCE - CMOBS) proposed in the Listing Act<sup>1</sup>

Council Working Group (CWG) – 6 March 2023

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This non-paper aims at providing clarifications on the proposal of the Commission on the creation of a tool for national competent authorities (NCAs) to **exchange order book data** in the context of market surveillance – the **cross-market order book surveillance mechanism**, as part of measures to enhance the cooperation between NCAs, contained in Articles 2(42) and (43) of the proposed Regulation amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (Amending Regulation).

#### (I) Rationale of the measure

Trading in the Union is increasingly fragmented across many venues located in different jurisdictions, which increases the risks for **potential cross-border market manipulations**. National competent authorities (NCAs) can suffer from a partial view in these cases, as the existing framework constraints NCAs from seamlessly accessing order book data<sup>2</sup> of a trading venue located in another jurisdiction for instruments on which they are competent.<sup>3</sup>

A NCA can request order book data for trading venues under its supervision under proposed Article 25(2) of Markets in Financial Instruments Regulation (MiFIR). However, when trading occurs outside its jurisdiction, the NCA would need to send an ad-hoc request with the justification to the relevant NCA (that can obtain the necessary trading data from the

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises; COM(2022) 762.

<sup>2</sup> Order book data (data about bids and asks, or quotes, submitted by market participants that display their trading interests) is an essential ingredient to detect cases of market manipulation, and the development of algorithmic and high frequency trading has opened the possibility to manipulate order books through new techniques (spoofing, layering) that can be detected through the processing of large quantities of data.

<sup>3</sup> For instance:

A share X is listed in jurisdiction Y. MiFID RTS 22 Art16, specifies which NCA is the (one) relevant competent authority (RCA)), i.e. which receives all transaction reporting. The RCA remains competent from a market abuse perspective even if the share is traded in a TV located in another jurisdiction.

trading venue). Each request is subject to a lengthy process with no guarantee that the necessary data will be obtained in full and in time.

Moreover, the current setup is not suitable for NCAs that wish to perform automatic order book surveillance to detect potential suspicious activities related to the instruments on which they are competent, when trading happens outside of their jurisdiction within the Union. This seems inopportune considering the development of high-frequency trading: the detection of sophisticated market manipulations requires the processing of voluminous data sets.

Article 38 of Market Abuse Regulation (MAR) currently requires the Commission to explore the possibility to establish a European framework for cross market order book surveillance.<sup>4</sup> The European Securities Markets Authority (ESMA) acknowledges the importance of the standardisation of order data as an essential step.<sup>5</sup> That is why the proposal introduces the standardisation of order book data from trading venues by amending Article 25 of MiFIR.

## **(II) Scope and functioning of the proposed mechanism**

The proposed mechanism was developed in a proportionate manner as to its **scope (a)** both in terms of **instruments** and **markets** to ensure it can be functional without an excessive burden. It is also based on essential **operational features (b)**, in particular the possibility to request data on an on-going basis in order to enhance the supervisory capabilities of NCAs.

### **a) Scoping issues**

#### **i) Scope of instruments**

At the start, the mechanism is proposed to be limited to the exchange of order book data on three asset classes (shares, bonds and futures). These are more likely than others to be traded on a cross-border basis and for which NCAs faced difficulties in terms of data access. In the future, if deemed relevant and appropriate, the Commission is empowered to extend the scope to other asset classes through a delegated act (Article 25a(6) of MAR). The intent is to have an agile mechanism that can be adapted to new market realities and regulators' technological abilities, if the experience and evidence from the start-up phase supports the broadening of the tool. Nevertheless, queries for data access within the mechanism would still be targeted to those instruments which give rise to market abuse concerns and for which the NCA is the relevant competent authority.<sup>6</sup>

#### **ii) Scope of markets**

Only NCAs that supervise a market with a “significant cross-border dimension” would form part of this mechanism on a mandatory basis. The objective is to include only those NCAs who, in view of the size of the market under their supervision, are likely to receive requests for access to a number of order book data. The list of markets (trading venues) with a likely

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<sup>4</sup> “assess [...] the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for the framework.” (point d)

<sup>5</sup> ESMA, report on the [Review of the Market Abuse Regulation](#), September 2020

<sup>6</sup> See note 2 above. In the proposal, it is specified that the request for ongoing data “may be submitted for a specific set of instruments”, which indicates the intention to have targeted requests for these instruments on which there are concerns.

cross-border dimension would be set out by the Commission in a delegated act and would be subject to review at least every four years.

When elaborating the list, the Commission shall at least take into account the market share of trading venues under the NCAs' supervision. The criterion for the inclusion of venues in the list may for example be established based on the minimum share of the total annual trading volume on a given trading venue out of the total EU annual trading volume (on all EU trading venues).<sup>7</sup> This metric could be further complemented by additional (qualitative and quantitative) criteria that would increase the probability that the venue is used in a significant manner for trading of securities that fall within the competence of a relevant competent authority<sup>8</sup> different from the NCA of the trading venue (such as setting out a minimum number of securities that fall within the competence of a relevant competent authority that is not the NCA of the trading venue where they are traded, with a minimal turnover of these securities on the considered venue).

### **Operational features: ongoing versus ad-hoc data access**

Currently, NCA can obtain order book data upon justification of each request on a case-by-case basis which has proved burdensome and uncertain (several pages of justifications per single request, possible refusals from an NCA to provide the data). Compared to the current framework, the proposed mechanism offers the possibility of making requests for accessing data on an ongoing basis. Automated order monitoring would require continuous and systematic data feeding.

The new mechanism would make the request process automated, with a possibility to obtain data continuously on a certain pre-defined set of instruments (of relevance to the NCA in question). This possibility would give NCAs a better means to monitor potential market manipulations with the help of data analytics technology that can process a continuous data flow.<sup>9</sup>

The tool could build on the existing IT infrastructure of the Transaction Reporting Exchange Mechanism system that was established under Article 25(3) of Directive 2004/39/EC of the European Parliament and of the Council (MiFID I) to allow NCAs to exchange transaction reports. Under that system, ESMA was entrusted by NCAs, wishing to participate in the project, to set up this tool, and has become a central hub for transaction reports to be exchanged. Combining transaction data (obtained via TREM) with order book data (via CMOBS) will allow NCAs to better identify whether market manipulative behaviour took place since data that is analysed in context can support monitoring efforts. Currently ESMA is already engaging with a number of NCAs on that project, which can lay the ground for the

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<sup>7</sup> A similar criterion was used in the Council general approach in the currently pending MiFIR/D review, in the context of a share consolidated tape, where the markets in-scope are defined as those trading venues where trading volume of shares is above 1 % of the annual trading volume of shares traded in the Union.

<sup>8</sup> See note 2 above.

<sup>9</sup> Rather than providing NCA n°1 with a real-time access to the order book of a trading venue under the supervision of NCA n°2, the CMOBS is envisaged to grant NCA n°1 access with an appropriate time lag to be determined to specific parts of the aforementioned order book, for the specific instruments which NCA n°1 is interested in monitoring for market abuse detection purposes (e.g. futures whose underlying shares are under NCA n°1's competence).

establishment of the CMOBS mechanism.<sup>10</sup> The possibility to build on the existing project would allow to set up the CMOBS mechanism within a relatively short timeline: under the proposal the mechanism should be put in place 12 months after the entry into force of the amended Regulation, with 9 months for ESMA to submit an ITS on the modalities of the mechanism. It is not expected that the data that would feed into the CMOBS mechanism would be subject to additional extensive quality checks,<sup>11</sup> hence limiting the potential impact on NCAs.

#### **b) Financial considerations**

Under the Commission's proposal, NCAs participating in the project would provide monetary contributions for the set-up and operation of the tool. The details can be set out in a delegation agreement between the ESMA and NCAs, as envisaged under Article 28 of Regulation (EU) No 1095/2010 (ESMA Founding Regulation), similarly to the arrangements used for the purpose of the set-up of the Transaction Reporting Exchange Mechanism.

ESMA estimated the one-off cost of the set-up of the CMOBS mechanism around **EUR 400,000**. Annual operation costs would depend on the number of requests and the volume of transferred data. It could amount to around **EUR 200,000 per year**. It is expected that the platform would benefit from the economies of scale, the higher the number of the participating NCAs would be.

The aforementioned costs should be seen against potential benefits that would arise from strengthened market integrity across the EU. The CMOBS mechanism would enhance the NCAs' capabilities to supervise market abuse practices and identify more effectively the instances of cross-border market abuse, potentially leading to higher sanctions imposed by NCAs.<sup>12</sup>

#### **(III) Interplay between the CMOBS mechanism, Article 25a of MAR and other cooperation enhancement tools**

Article 25a of MAR, introduced by the Amending Regulation, complements Article 25 MAR, on the one hand, by setting up a CMOBS mechanism for the exchange of order book data among the participating NCAs and, on the other hand, by setting out deadlines for the provision of order book data based on the traditional (ad-hoc) requests also for those NCAs that would not be part of the mechanism.

Furthermore, ESMA's role to foster cooperation among NCAs was further strengthened by increasing the possibility for ESMA to coordinate an investigation or inspection with a cross-border impact under new Article 25(6) of MAR.

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<sup>10</sup> Since end 2020, an informal group made up of interested competent authorities has been set up with the aim to study and launch a mechanism for order book data exchange between them. <sup>11</sup> Order book data come mainly from the matching engine of trading venues. These venues are limited in number, unlike the 6000+ investment firms that provide transaction reporting.

<sup>11</sup> Order book data come mainly from the matching engine of trading venues. These venues are limited in number, unlike the 6000+ investment firms that provide transaction reporting.

<sup>12</sup> In 2021 NCAs imposed a total of 131 administrative sanctions and measures relating to breaches of insider dealing and market manipulation rules in the EEA. In monetary terms, these penalties translated into fines with a value of approximately EUR 47 million.

Article 25b of MAR, introduced by the Amending Regulation, gives the possibility to ESMA and NCAs to set up **collaboration platforms** in the cases deemed relevant by the authorities. Such cases could, for example, concern situations of complex cross-border market abuse where active cooperation by NCAs and ESMA could contribute to more effective investigation. Furthermore, collaboration platforms could also be relevant for the follow-up of cases of market abuse identified via the CMOBS mechanism.

Article 25b is a follow-up to the Commission's objective set out in the Commission's report on the operation of the European Supervisory Authorities (ESAs)<sup>13</sup> to carefully consider the current legal framework in the course of the ongoing reviews of sectoral legislation and suggest appropriate amendments to overcome identified shortcomings. In the public consultation<sup>14</sup> that informed the Commission's report, most respondents pointed out that the ESAs play an important coordinating role within the internal market for the cross-border provision of services. In this regard, some public authorities requested more effective coordination powers for supervising cross-border services to reduce the risk of harm to consumers.

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<sup>13</sup> Commission report on the operation of the European Supervisory Authorities, May 2022.

<sup>14</sup> Targeted consultation on taking stock of the framework for supervising European capital markets, banks, insurers and pension funds: supervisory convergence and the single rulebook, March 2021.