

Briefing note

ESMA Q&A updates on MiFID II / MiFIR transparency topics

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ESMA Opinion on Determining third-country trading venues for the purpose of transparency under MiFID II / MiFIR

published on 31 May 2017

The European Securities and Markets Authority (ESMA) has published a further set of [Q&A](#) updates and issued an [opinion](#) on post-trade transparency requirements with respect to non-EU trading venues on 31 May 2017. Key topics of the Q&As include pre-trade transparency waivers, quoting obligations under the Systematic Internaliser (SI) regime, reporting deferrals and Approved Publication Arrangements (APAs) and post-trade reporting on non-EU trading venues. Below is a summary of key points.

1) Pre-trade transparency waivers [Section 5, Question 4]

- (i) The transparency and waiver regimes under MiFID I only apply to shares admitted to trading on a regulated market.
- (ii) Therefore, **where a waiver granted in accordance with MiFID I is extended to other equity-like instruments [...] as well as non-equity instruments, this is considered as granting a new waiver, and this new waiver needs to go through the ESMA opinion process.**

2) SI Regime: Quoting obligations for SIs in non-equity instruments [Section 7, Question 5]

- a) Can systematic internalisers (SI) meet their **quoting obligations** under Article 18(1) of MiFIR for **liquid instruments** by providing executable quotes on a continuous basis?
 - (i) [...] **Nothing prevents the SI, especially in the most liquid instruments, to stream prices to clients.**
 - (ii) **Where those prices are firm**, i.e. executable by clients up to the displayed size (provided the size is less than the size specific to the instrument), **the SI would be deemed to have complied [...].**
 - (iii) **The SI can, in justified cases, execute orders at a better price than the streaming quote.**
- b) Can client orders routed by an automated order router (AOR) system be considered as 'prompting for a quote' according to Article 18(1)(a) of MiFIR?

MiFIR Article 18

Obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives

1. Investment firms shall make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives traded on a trading venue for which they are systematic internalisers and **for which there is a liquid market** when the following conditions are fulfilled:

- (a) they are prompted for a quote by a client of the systematic internaliser;
- (b) they agree to provide a quote.

(i) Yes. **The provisions in Article 18 of MiFIR are neutral concerning the technology** used for prompting quotes. A systematic internaliser can be prompted for and provide quotes through any electronic system.

c) For how long should quotes provided by systematic internalisers be firm, or executable?

(i) The quote should remain valid **for a reasonable period of time** allowing clients to execute against it. A systematic internaliser may update its quotes at any time, provided at all times that the updated quotes are the consequence of, and consistent with, genuine intentions of the systematic internaliser to trade with its clients in a non-discriminatory manner.

d) Obligations for systematic internalisers dealing in non-equity instruments for which there is no liquid market under Article 18(2) of MiFIR:

(i) **The systematic internaliser does not have an obligation to make this quote available to other clients nor to make it public.**

(ii) However, Article 18(2) of MiFIR requires the SI to disclose to clients on request the quotes provided.

(iii) That obligation can be met by allowing clients, on a systematic or on a request basis, to have access to those quotes.

(iv) This is without prejudice to the possibility for SIs to benefit from a waiver for this obligation as set out in the last sentence of Article 18(2) of MiFIR.

e) Which arrangements should systematic internalisers use when publishing firm quotes?

Should these be the same arrangements as for equity instruments?

(i) **ESMA considers that SIs should use the same means and arrangements when publishing firm quotes in non-equity instruments as for equity instruments** as specified in Article 13 of the Commission Delegated Regulation (EU) No 2017/567.

(ii) Furthermore, the **quotes should be made public in a machine-readable format** as per above Regulation [...] **and the quotes should be time-stamped** as specified in Article 9(d) of RTS 1.

f) Should systematic internalisers disclose their identity when publishing firm quotes?

(i) Yes, as for equity instruments, **systematic internalisers should disclose their identity when making quotes public** through the facilities of a regulated market or an APA.

MiFIR Article 18

2. In relation to bonds, structured finance products, emission allowances and derivatives traded on a trading venue **for which there is not a liquid market**, systematic internalisers shall disclose quotes to their clients on request if they agree to provide a quote.

That obligation may be waived where the conditions specified in

Article 9(1) “Waivers for non-equity instruments” are met:

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) for:

(a) **orders that are large in scale** compared with normal market size and orders held in an order management facility of the trading venue pending disclosure;

(b) actionable indications of interest in **request-for-quote and voice trading systems that are above a size specific to the financial instrument, which would expose liquidity providers to undue risk** and takes into account whether the relevant market participants are retail or wholesale investors;

(c) **derivatives which are not subject to the trading obligation** specified in Article 28 and other financial instruments for which there is not a liquid market;

(d) orders for the purpose of executing an exchange for physical;

(e) package orders [...]

RTS 1

Article 9 Arrangements for the publication of a firm quote

(d) the arrangement includes the publication of the time the quotes have been entered or amended in accordance with Article 50 “Synchronisation of business clocks” of MiFID II (2014/65/EU) as specified in Commission Delegated Regulation (EU).

3) Compliance with the SI regime and notification to NCAs [Section 7, Question 6]

- a) What information should the notification from systematic internalisers to their NCA contain?
- (i) The **notification from systematic internalisers to their NCA should contain information that is at least provided at the level of the MiFIR identifier** as specified in:
- field 4 of table 2 of Annex III of RTS 1 (i.e. shares, depositary receipts, exchange traded funds, certificates and other equity-like financial instruments) and;
 - field 3 of table 2 of Annex IV of RTS 2 (i.e. bonds, ETNs, ETCs, structured finance products, securitised derivatives, derivatives, and emission allowances) for the instruments and classes of instruments for which the investment firm is a systematic internaliser.
- (ii) This is without prejudice of the possibility for NCAs to require the submission of more granular information if considered appropriate.
- b) **For what period of time should an investment firm follow the obligations for systematic internalisers after crossing the relevant thresholds in a financial instrument?**
- (i) The **obligation will last for three months** after crossing the relevant thresholds in a financial instrument at the relevant quarterly assessment. The obligation period will be slightly shorter for the first assessment in 2018, which covers 1 September to 15 November 2018.
- c) **When/How often do investment firms have to notify their NCAs of their systematic internaliser status?**
- (i) **Investment firms are required to notify their NCA in case of a change in status**, i.e. where an investment firm passed the thresholds for an instrument with a particular MiFIR identifier in the previous period, but did not meet the thresholds for any instrument with the same MiFIR identifier in the consecutive assessment period [...].
- (ii) **Where there is no change in the systematic internaliser status** from one assessment period to the next (i.e. where the investment firms is still above the threshold or decides to voluntarily opt-in as systematic internaliser for any instrument with the same MiFIR identifier), the firm does not have to notify its NCA thereof.

4) Post-trade reporting to Approved Publication Arrangements (APAs) [Section 8]

- a) **What is the time limit for investment firms to report post-trade information to APAs**, in particular should information be delayed in case of deferral? **Who decides on the applicable deferral period given the possibility of disagreement between the APA and the investment Firm? [Question 1]**
- (i) Since the NCA's authorisation for granting the deferred publication is addressed to market operators and investment firms, **it is the investment firm's responsibility to ensure that the APA is informed thereof and publishes the information no later than after the lapse of the deferral.**
- (ii) The investment firm should report the transaction to the APA as soon as technically possible after the execution, regardless of the application of any deferrals. **The APA should be in charge of publishing the transaction in due time, according to the deferral period that applies to the specific transaction.**
- b) **Who will assign the Market Identifier Code (MIC) for the APA? [Question 2]**
- (i) According to table 3 of Annex I of RTS 1 and table 2 of Annex II of RTS 2, **APAs will be identified by either a Market Identifier Code (MIC) or a 4-character code.** [...]
- (ii) While there is no legal obligation for APAs to use MICs, **ESMA recommends that APAs request the MIC code from the ISO 10383 Registration Authority (SWIFT).** The creation, maintenance and deactivation of MICs is free of charge.

5) Should EU investment firms trading on a third-country trading venue make information about these transactions public through an APA in the EU (Articles 20 and 21 of MiFIR)? [Section 9, Question 1]

- (i) This depends on the characteristics of that third-country trading venue as set out in the below ESMA Opinion (ESMA70-154-165, 31.05.2017).
- (ii) Investment firms [...] that need guidance [...] should contact their competent authorities to make them aware of the third-country trading venue(s) on which they are trading.
- (iii) **The competent authority will then get in touch with the third-country trading venue with a request for further information.** Third country trading venues cannot directly approach NCAs [...].
- (iv) Based on the information provided, **ESMA will determine whether the third-country trading venue meets the criteria set out in the ESMA Opinion.** If so, the respective third-country trading venue **will be listed in an Annex to the Opinion.**
- (v) **Investment firms trading on third country trading venues that are not included in the list in the Annex of the ESMA Opinion should make information on those transactions public through an APA.**
- (vi) ESMA is aware that it is important for EU investment firms to have legal certainty as soon as possible [...]. While ESMA cannot commit to any set timeline, all notifications will be processed as expediently as possible.

ESMA [Opinion](#) (ESMA70-154-165) **“Determining third-country trading venues for the purpose of transparency under MiFID II / MiFIR”** issued on 31 May 2017

Background:

- (i) Articles 20 and 21 of Regulation (EU) No 600/2014 (MiFIR) require EU investment firms to make information on transactions in financial instruments traded on a trading venue public through approved publication arrangements (APA). However, Articles 20 and 21 of MiFIR do not clarify whether this obligation applies also to transactions concluded on a third-country trading venue. **[Paragraph 3]**
- (ii) Market participants and competent authorities have therefore called upon ESMA to provide guidance on the treatment of those transactions, in particular, on those third-country trading venues that are subject to transparency provisions that are similar to the post-trade transparency requirements applicable to EU trading venues as set out in Articles 6(1) and 10(1) of MiFIR. **[Paragraph 4]**
- (iii) ESMA [...] considers it necessary to provide guidance on the matter **to prevent the development of inconsistent supervisory practices across competent authorities and thereby contribute to supervisory convergence and strengthen the legal certainty required for the application of MiFID II/MiFIR.** As a result, ESMA has decided to publish this opinion. **[Paragraph 5]**

Opinion:

- (iv) **ESMA believes that information on transactions concluded by EU investment firms that are truly OTC, i.e. bilateral transactions with non-EU firms, or that are concluded on third country trading venues that would not be subject to a certain level of post-trade transparency should be made public in the EU through an APA** as set out in Articles 20 and 21 of MiFIR. **[Paragraph 7]**
- (v) At the same time, ESMA is of the view that the post-trade transparency requirements set out in **Articles 20 and 21 of MiFIR should not be interpreted as requiring EU investment firms to systematically republish information in the EU about transactions concluded on third-country trading venues, which are subject to transparency provisions similar to those applicable to EU trading venues under the MiFID II/MiFIR framework.**[...] **[Paragraph 8]**

- (vi) ESMA is aware that the correct application of the post-trade transparency requirements would require the identification of third-country trading venues, which are subject to similar post-trade transparency requirements as EU trading venues. [...] **[Paragraph 9]**
- (vii) **Any identification of trading venues** for the purposes of the consistent application of the post-trade transparency requirements set out in MiFIR proposed by this Opinion **does not in any way prejudice an equivalence assessment performed by the European Commission under MiFID II/MiFIR** [...]. **[Paragraph 10]**
- (vii) ESMA considers that **only a third-country trading venue that meets all the following objective criteria should be considered as a trading venue for the purposes of the MiFIR post-trade transparency regime:**
- a. it operates a **multilateral system**, i.e. a system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact;
 - b. it is **subject to authorisation** in accordance with the legal and supervisory framework of the third-country;
 - c. it is **subject to supervision and enforcement** on an ongoing basis in accordance with the legal and supervisory framework of the third-country **by a competent authority that is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)**; and,
 - d. it has a **post-trade transparency regime in place** which ensures that transactions concluded on that trading venue are published as soon as possible after the transaction was executed or, in clearly defined situations, after a deferral period. **[Paragraph 11]**
- (viii) Therefore, ESMA considers that for the purposes of Articles 20 and 21 of MiFIR **EU investment firms should not be required to publish information about transactions that are concluded on third-country trading venues that meet the criteria** considered above through APAs. **[Paragraph 12]**
- (ix) **ESMA will publish a list of trading venues that meet these criteria** in an Annex to this Opinion. The list [...] will be updated on an ongoing basis. **[Paragraph 13]**

Prepared by:
Gabriel Callsen, ICMA,
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