International
Capital
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Briefing note

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

(15 November 2017)

The European Securities and Markets Authority (ESMA) has published on 15 November 2017 further Q&A updates with respect to transparency under MiFID II / MiFIR. The Q&A provides clarification on package orders/transactions, pre-trade transparency waivers, the SI regime, third country issues, Approved Reporting Mechanisms (ARM), and technical reporting requirements for non-equities. Below is an executive summary of selected key points, followed by a more detailed overview.

Executive summary:

Package order/transactions:

- *Note: The wording of the following question is nearly identical to the one ICMA submitted on 16 August 2017 on behalf of its MiFID II working group except that it refers to pre-trade transparency and does not address the question related to hedging. Nonetheless, ESMA's reply seems to suggest that a newly issued bond and the hedge do not qualify as a package transaction and are thus not eligible for deferred publication.*

  Question: Where an investment firm buys a newly issued bond in the primary market as the result of an allocation and funds its investment by selling another bond to the lead manager of the issuance, simultaneously with and contingent upon the investment in the new issue, would this qualify as a package order for the purpose of pre-trade transparency?

  ESMA answer: No. Since primary transactions are not subject to transparency (see General Q&A 4 on transparency issues), they should not be considered when assessing whether components executed together qualify as a package order.
- ESMA expects trading venues and market participants trading packages to document how the meffroc (requirement of meaningful economic and financial risk related to all the other components) requirement is met, either in the contract specifications for packages traded on trading venues or on a package-by-package basis in case of OTC-transactions.
- All components of a package transaction should be reported by the same investment firm. Where two investment firms enter into a package transaction where neither (or both) is/are systematic internaliser(s), ESMA expects the investment firms to agree among themselves who should be reporting the transactions through an APA.
- The different components of the package can be traded on different venues or OTC. However, package orders/transactions can only be composed of instruments that are admitted to trading or traded on a trading venue.
- Further Q&As address systematic internalisers, reporting and the liquidity assessment of packages; publication by APAs, and the suspension of transparency requirements by national regulators.

Pre-trade transparency waivers:

- Partials in order books: For equities and similar instruments, the Large in Scale (LIS) waiver continues to apply in respect of an order that is LIS when entered into an order book but that, following partial execution, falls below the threshold applicable for that financial instrument, unless the price or other relevant conditions for the execution of an order are amended.
- There should be no difference in approach for equity and equity-like instruments and non-equity instruments and the same treatment should apply to the remaining portion of a partially executed LIS order in an order book in a non-equity instrument.
- Partials in RFQ and voice trading systems: Each actionable indication of interest (A-IOI) must be above the relevant SSTI threshold to be eligible for a pre-trade waiver. The waiver is not available for trading protocols other than request-for-quote and voice trading systems, which exclude order books.
- If an A-IOI above the SSTI is partially executed, the remaining amount of the A-IOI should be considered a new A-IOI and so the relevant waiver checks should be carried out again for the SSTI waiver to apply.
- Other Q&As include: calculation of indicative pre-trade prices on trading venues.

Systematic internalisers (SIs):

- Quotes for the purpose of pre-trade transparency should be aligned with the post-trade transparency publication of executed quotes.
- ESMA expects that SIs make available to their clients any relevant risk adjustments and commissions applicable to the cohort within which they (the clients) fall in order for the clients to determine with a degree of certainty the price that would be applicable to them.

Data reporting services providers:

- Approved Reporting Mechanisms (ARM): With respect to timelines for approving connections of ARMs [for transaction reporting] to national regulators, the latter are required to inform an applicant of whether or not authorisation has been granted within 6 months of the submission.

Third-country issues:

- MiFID II and MiFIR do not provide specific guidance on the treatment of transactions with a third country dimension, i.e. trades executed by EU investment firms outside the EU and trades by branches or subsidiaries of non-EU firms within the EU, for the purposes of the MiFIR transparency regime and the determination of systematic internalisers.
- ESMA therefore provides a number of clarifications and "general principles":
    1. The transparency requirements always apply to transactions concluded on EU trading venues.
    2. Transactions executed on third-country trading venues should be treated as OTC transactions and reported through an APA, unless these trading venues are deemed "comparable", see related ESMA opinion issued on 31 May 2017.
    3. If one of the parties of an OTC-transaction is an investment firm authorised in the EU, the transaction is considered as executed within the EU.
    4. Subsidiaries are independent legal entities and subject to the regulatory regime of the third country in which they are established.
    5. Transactions by non-EU branches of EU investment firms are treated as transactions of the EU parent company and, therefore, have to be made transparent under the MiFIR rules
- The Q&A further provides clarifications on 13 different scenarios.

General Q&As on transparency topics [Section 2]

(i) A number of amendments to technical questions related to reporting fields and the use of non-equity flags, for example for post-trade deferrals and package transactions, see pp. 12-17 in the ESMA Q&A document**. [Question 2]**

(ii) Are trading venues, APAs and CTPs required to make data available free of charge for any length of time 15 minutes after publication? [Question 9a, p. 23]

a) The information made available free of charge 15 minutes after its publication **should replicate the information published** on a reasonable commercial basis but with a 15 minutes delay.

b) The information should be **made available directly to end users**. Where the trading venues makes the data available via third parties, this should not impose restrictions on access to that data to end users.

c) **Trading venues are not required to make any further replication** of already published information available free of charge.

(iii) Does MiFID II/MiFIR prevent trading venues, APAs and CTPs to apply usage restrictions, licensing and redistribution fees, including fees for deriving and/or manipulating data in automated applications for internal or external distribution, and non-monetary costs to market data – such as requirements on registrations, subscriptions and usage reporting – on data which they make available free of charge 15 minutes after publication? **[Question 9b, pp. 23-24]**

a) Trading venues, APAs and CTPs may not impose redistribution fees or other similar restrictions on redistributors/third parties making available data free of charge 15 minutes after the initial publication.

b) Where a redistributor/third party charges fees for the distribution of data – including a general fee for accessing its services – **trading venues, APAs and CTPs may impose redistribution fees or other similar restrictions on this redistributor/third party.**

c) Furthermore, **trading venues, APAs and CTPs may not charge fees** or impose other similar restrictions **on added-value services created by redistributors/third parties** from data provided free of charge.

d) **Where a redistributor/third party charges** for added-value services created from such data, **trading venues, APAs and CTPs may impose fees** or other similar restrictions to this redistributor/third party.

e) However, MiFIR/MiFID II only requires data to be published after 15 minutes free of charge and therefore, **trading venues, APAs and CTPs may charge fees for the use and redistribution of historic data that is considered as an added-value service.**

Non-equity transparency [Section 4]

(i) How is the requirement for a package order/transaction that 'Each component of the transactions bears meaningful economic or financial risk related to all the other components' to be interpreted? [Question 4a, pp. 27-28]

a) The requirement of meaningful economic and financial risk related to all the other components (mefrroc) aims at ensuring that only components that are economically and financially related can constitute a package order/transaction, and to avoid that components that are not economically or financially related in a meaningful manner are declared as a package order/transaction with the main objective of benefitting from the transparency regime for package orders/transactions.

b) **ESMA expects trading venues and market participants trading packages to document how the meffroc requirement is met**, either in the contract specifications for packages traded on trading venues or on a package-by-package basis in case of OTC-transactions.

(ii) Can package orders/transactions also include equity instruments? If yes, how is pre- and post-trade transparency applied? [Question 4b, pp. 27-28]

- **No** they cannot. **Package orders/transactions have to be exclusively composed of non-equity instruments.** The waivers/deferrals for packages are available under Articles 9 and 11 of MiFIR, which cover only non-equity instruments.

(iii) When does an investment firm apply the systematic internaliser obligations on a package order level? [Question 4c, pp. 27-28]

a) **For pre-trade transparency obligations to apply at package order level**, including for an exchange for physical, **an investment firm must be a systematic internaliser in all financial instrument components** of the order.

b) **Where an investment firm is** prompted for a quote for a package order for which it is a **systematic internaliser only for some components**, **the investment firm can decide** either to provide a firm quote for the whole package or only for the components for which it is a systematic internaliser.

(iv) How should systematic internalisers determine whether package orders which are not liquid as a whole are subject to the transparency obligations in non-equity instruments under Article 18(1) or 18(2) of MiFIR? [Question 4d, pp. 27-28]

a) Article 18(2) of MiFIR allows for systematic internalisers to waive transparency obligations in non-liquid instruments provided the conditions set out in Article 9(1) of MiFIR are met.

b) **When a package order contains at least one component that does not have a liquid market** and the package order as a whole has not a liquid market, **it will be eligible for transparency waivers** under Article 18(2) of MiFIR.

c) When the package has only liquid components, the transparency obligations for liquid instruments under Article 18(1) of MiFIR will apply.

> **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.
>
> 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) are met.
>
> […]
>
> 10. Systematic internalisers shall not be subject to this Article when they deal in sizes above the size specific to the financial instrument determined in accordance with Article 9(5)(d).

(v) Do the transparency obligations for systematic internalisers in non-equity instruments apply to a package which contains a component which is above the size specific to the instrument (SSTI)? [Question 4e, pp. 27-28]

a) Article 18(10) of MiFIR exempts systematic internalisers from their transparency obligations when they deal in a size that is above the SSTI. **In the case of package orders, Article 9(1)(e)(iii) of MiFIR allows for the package order to qualify for a waiver if all of its components are above SSTI.**

b) Therefore, where the investment firm is a systematic internaliser in all components of the package order, all components of the package need to be above SSTI in order to qualify for the waiver.

c) **In case the investment firm is not a systematic internaliser in all instruments** and decides to provide a quote only for the component(s) for which it is a systematic internaliser, **the quoting obligations apply only for a quoted size of below or up to the SSTI** of the respective components.

> **MiFIR – Article 9**
> **Waivers for non-equity instruments**
>
> 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 that meet one of the following conditions:**
>
> **(i) at least one of its components is a financial instrument for which there is not a liquid market**, unless there is a liquid market for the package order as a whole;
>
> **(ii) at least one of its components is large in scale** compared with the normal market size, unless there is a liquid market for the package order as a whole;
>
> **(iii) all of its components** are executed on a request-for-quote or voice system and **are above the size specific to the instrument**.

(vi) Which party to a package transaction is required to make the transactions public via an APA? [Question 4f, pp. 27-28]

a) In order to provide meaningful information to the market **all components of a package transaction should be reported by the same investment firm.**

b) Where only one of the investment firms party to the transaction is a systematic internaliser in at least one component of the package only that investment firm should make the transaction public through an APA.

c) **Where two investment firms enter into a package transaction where neither (or both) is/are systematic internaliser(s), ESMA expects the investment firms to agree among themselves who should be reporting the transactions through an APA.** In both cases, the party that reports the transactions to the APA shall inform the other party of the action taken.

(vii) Can package orders (Article 2(1)(49)(b) of MiFIR) and package transactions (Article 2(1)(50)(b) of MiFIR) include components from more than one trading venue, i.e. packages composed of instruments traded on different venues (e.g. invoice spreads) or where one component is traded OTC (e.g. spread overs)? **[Question 4g, pp. 27-28]**

a) Yes, the definition of package orders in Article 2(1)(49)(b) of MiFIR and package transactions in Article 2(1)(50) of MiFIR, does not specify the method of execution of the different legs of the package.

b) **ESMA is therefore of the view that**, as long as the order/transaction meets all conditions under Article 2(1)(49)(b) and (50)(b) of MiFIR, **the different components of the package can be traded on different venues or OTC.**

(viii) Can package orders (Article 2(1)(49)(b) of MiFIR) and package transactions (Article 2(1)(50)(b) of MiFIR) also include instruments that are not admitted to trading or traded on a venue? [Question 4h, pp. 27-28]

- **No. Package orders** as defined in Article 2(1)(49) of MiFIR and package transactions as defined in Article 2(1)(50)(b) of MiFIR **can only be composed of instruments that are admitted to trading or traded on a trading venue.**

> **MiFIR Article 2**
>
> **Definitions**
>
> 1. **(49) 'package order' means an order priced as a single unit:**
>
> (a) for the purpose of executing an exchange for physical; or
>
> (b) in two or more financial instruments for the purpose of executing a package transaction;
>
> **(50) 'package transaction' means:**
>
> (a) an exchange for physical; or
>
> (b) a transaction involving the execution of two or more component transactions in financial instruments and which fulfils all of the following criteria:
>
> **(i)** the transaction is executed between two or more counterparties;
>
> **(ii)** each component of the transaction bears meaningful economic or financial risk related to all the other components;
>
> **(iii)** the execution of each component is simultaneous and contingent upon the execution of all the other components.

(ix) Where an investment firm buys a newly issued bond in the primary market as the result of an allocation and funds its investment by selling another bond to the lead manager of the issuance, simultaneously with and contingent upon the investment in the new issue, would this qualify as a package order for the purpose of pre-trade transparency? [Question 4i, pp. 27-28]

- **No.** Since primary transactions are not subject to transparency (see General Q&A 4 on transparency issues), they should not be considered when assessing whether components executed together qualify as a package order.

Note: *The wording of the above-mentioned question is nearly identical to the one ICMA submitted on 18 August 2017 on behalf of its MiFID II working group except that it refers to pre-trade transparency and does not address the question related to hedging. Nonetheless, ESMA's reply seems to suggest that a newly issued bond and the hedge do not qualify as a package transaction and are thus not eligible for deferred publication.*

> **Question submitted by ICMA to ESMA for clarification:**
>
> We would like to clarify how the following scenario is handled in MiFID II: *An investment firm buys a new issue in the primary markets as the result of an allocation and funds their investment by selling another bond to the lead manager of the issuance, simultaneously with and contingent upon the investment in the new issue.*
>
> *ICMA notes that the deferral conditions for a package in* ***Article 8 of RTS2*** *does not reference the scenario where one or more components is not required to be published (e.g. because they're a new issue, or not traded on a trading venue) and therefore it's unclear whether or not such a package is eligible for a deferral.*
>
> *The above scenario meets the conditions for a package (e.g. executed between two counterparties, simultaneous and contingent, etc). ICMA proposes that Q&A guidance should confirm that such new issue packages are eligible for a deferral.*
>
> *ICMA also considers that the relevant execution time stamp for the hedge is the same time as that of the new issue that is priced. Therefore, if ESMA agrees, the deferred hedge publication time should be based on the execution timestamp (as the starting point for the deferral) and the deferral regime adopted by the relevant competent authority.*

(x) How should an APA aggregate transactions in order to publish them in case it is requested/allowed by the regime applicable to the investment firm? [Question 6, pp. 29-30]

a) **APAs should aggregate all transactions in a given financial instrument reported to them.** Only transactions reported by investment firms for which the respective NCA has not requested an aggregated publication as per Article 11(3)(a) of MiFIR should not be included when the APA publishes information on transactions in an aggregated form.

b) The same approach should also apply for the aggregation of transactions by APAs where NCAs allow the publication of several transactions in an aggregated form for an extended period of deferral or for an indefinite period of time as per Article 11(3)(c) and (d) of MiFIR

> **MiFIR – Article 11**
>
> **Authorisation of deferred publication**
>
> 3. Competent authorities may, in conjunction with an authorisation of deferred publication:
>
> (a) request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, during the time period of deferral;
>
> (b) allow the omission of the publication of the volume of an individual transaction during an extended time period of deferral;
>
> (c) regarding non-equity instruments that are not sovereign debt, allow the publication of several transactions in an aggregated form during an extended time period of deferral;
>
> (d) regarding sovereign debt instruments, allow the publication of several transactions in an aggregated form for an indefinite period of time.
>
> In relation to sovereign debt instruments, points (b) and (d) may be used either separately or consecutively whereby once the volume omission extended period lapses, the volumes could then be published in aggregated form.
>
> In relation to all other financial instruments, when the deferral time period lapses, the outstanding details of the transaction and all the details of the transactions on an individual basis shall be published.

(xi) What is the minimum number of transactions in order for trading venues and APAs to publish transactions in an aggregated form under Article 11(3)(c) or 11(3)(d) of MiFIR [Question 7, p. 30]

a) Where NCAs allow the publication of transactions in an aggregated form under Article 11(3)(c) or (d) of MiFIR as supplemented by Article 11(1)(c) or (d) of RTS 2, **a minimum number of two transactions executed in the same instrument and in the course of a week is required.**

b) Concerning the aggregation under Article 11(3)(c) of MiFIR, **if there are less than two transactions in the course of one calendar week, the transactions cannot be aggregated and APAs** and trading venues only need to make public the full details of the transaction after the deferral period lapsed.

c) Concerning the aggregation under Article 11(3)(d) of MiFIR, either on a standalone basis or in conjunction with Article 11(3)(b) of MiFIR, **if there are less than two transactions in the course of one calendar week, there should be no publication in aggregated form in that calendar week**.

d) However, the transaction will be included in the count for the number of transactions executed in the following calendar week(s). Once the minimum number of two transactions has been reached, all transactions during that calendar week as well as the transaction that has not yet been published should be published in an aggregated form.

(xii) How is the concept of "class of bonds" to be understood in respect of the temporary suspension of transparency? [Question 8, p. 30]

- Since the suspension of transparency under Article 9(4) and 11(2) of MiFIR applies at a class level, with respect to bonds, the classes of bonds defined in Table 2.2 Annex III of RTS 2 should be used.

(xiii) Would the temporary suspension of transparency requirements apply to all the venues on which the class of instruments is traded or rather on venue-by-venue basis? [Question 9, pp. 30-31]

a) While the calculations to identify whether liquidity has fallen below the thresholds specified under Article 16 of RTS 2 have to be performed at EU level, the actual suspension of the transparency obligations remains under the competences of each competent authority (CA) and therefore has to be activated on a jurisdiction-by-jurisdiction basis.

RTS 2 – Article 16

Temporary suspension of transparency obligations (Article 9(5)(a) of Regulation (EU) No 600/2014)

1. For financial instruments for which there is a liquid market in accordance with the methodology set out in Article 13, a competent authority may temporarily suspend the obligations set out in Articles 8 and 10 Regulation (EU) No 600/2014 where for a class of bonds, structured finance products, emission allowances or derivatives, the total volume as defined in Table 4 of Annex II calculated for the previous 30 calendar days represents less than 40 % of the average monthly volume calculated for the 12 full calendar months preceding those 30 calendar days.
2. For financial instruments for which there is not a liquid market in accordance with the methodology set out in Article 13, a competent authority may temporarily suspend the obligations referred to in Articles 8 and 10 of Regulation (EU) No 600/2014 when for a class of bonds**,** structured finance products, emission allowances or derivatives, the total volume as defined in Table 4 of Annex II calculated for the previous 30 calendar days represents less than 20 % of the average monthly volume calculated for the 12 full calendar months preceding those 30 calendar days.
3. Competent authorities shall take into account the transactions executed on all venues in the Union for the class of bonds, structured finance products, emission allowances or derivatives concerned when performing the calculations referred to in paragraphs 1 and 2. The calculations shall be performed at the level of the class of financial instruments to which the liquidity test set out in Article 13 is applied.
4. Before competent authorities decide to suspend transparency obligations, they shall ensure that the significant decline in liquidity across all venues is not the result of seasonal effects of the relevant class of financial instruments on liquidity.

b) As a consequence, for classes of financial instruments where trading takes place on venues located in different Member States, **the CA of each of those Member States will have the possibility, where the conditions set out in Article 16 of RTS 2 are met, to activate the temporary suspension mechanism independently of the decision to be taken by others**.

<u>**Pre-trade transparency waivers [Section 5]**</u>

(i) Do the waivers under Article 9(1)(a) of MiFIR in respect of Large in Scale (LIS) orders and Article 9(1)(b) of MiFIR for actionable indications of interest (A-IOI) that are above a size specific to the financial instrument (SSTI) persist during the life of that particular order regardless of any partial execution? [Question 6, p. 35]

a) Article 7(5) of [RTS 1] allows the Large in Scale (LIS) waiver pursuant to Article 4(1)(c) of MiFIR to continue to apply in respect of an order that is LIS when entered into an order book but that, following partial execution, falls below the threshold applicable for that financial instrument, unless the price or other relevant conditions for the execution of an order are amended.

> **RTS 1 [Transparency requirements for equities] – Article 7**
> **Orders that are large in scale**
> 5.Unless the price or other relevant conditions for the execution of an order are amended, **the waiver referred to in Article 4(1) [Waivers for equity instruments, MiFIR] shall continue to apply in respect of an order that is large in scale when entered into an order book but that, following partial execution, falls below the threshold** applicable for that financial instrument as determined in accordance with paragraphs 1 and 2.

b) **There should be no difference in approach for equity and equity-like instruments and non-equity instruments** and the **same treatment should apply to the remaining portion of a partially executed LIS order in an order book in a non-equity instrument.**

c) In relation to A-IOI that may benefit from the waiver pursuant to Article 9(1)(b) of MiFIR, **each A-IOI must be above the relevant SSTI threshold** for that financial instrument specified in Annex III of RTS 2.

d) The waiver is not available for trading protocols other than request-for-quote and voice trading systems, which exclude order books. **If an A-IOI above the SSTI is partially executed, the remaining amount of the A-IOI should be considered a new A-IOI and so the relevant waiver checks should be carried out again for the SSTI waiver to apply.**

(ii) What arrangements should trading venues put in place to ensure the proper calculation of indicative pre-trade prices in relation to Article 8(4) of MiFIR? [Question 7, pp. 35-36]

a) To use the waiver pursuant to Article 9(1)(b) of MiFIR, the market operator or investment firm operating the trading venue must be capable of providing the information on indicative prices as per Article 8(4) of MiFIR and Article 5(2) of RTS 2. The following three conditions are important to ensure the requirements are correctly interpreted:

- **The voice trading/RFQ system must be a trading protocol operated by the trading venue**. That means that the venue must have access to the **actionable indications of interest (A-IOI)** that are broadcasted through that system;
- **The A-IOI must originate from within that voice trading/RFQ system;**
- **The A-IOI must be above** the relevant size specific to the financial instrument **(SSTI)** threshold for that financial instrument **but below** the Large in Scale **(LIS)** threshold for that financial instrument.

b) Furthermore, **indicative prices must be based only on A-IOI above SSTI but below LIS broadcast within the voice trading or RFQ system itself at the time there is trading interest.**

The SI regime [Section 7]

(i) Which types of prices will be considered compliant as firm quotes for derivatives and bonds? [Question 10, p. 50]

a) According to Table 2 of Annex II of Commission Delegated Regulation (EU) 2017/583, **the traded price of the transaction excluding, where applicable, commission and accrued interest, must be reported for the purpose of post-trade transparency.**

b) In regard to **quotes for the purpose of pre-trade transparency**, ESMA is of the view that they **should be aligned with post-trade transparency publication** in case the transaction was finally executed and therefore the information to be made public should be the traded quote.

c) ESMA expects that the quote published is the real traded quote established by normal market practice, including all the product features or other components of the quote such as the counterparty or liquidity risk.

d) **ESMA expects that SIs make available to their clients any relevant risk adjustments and commissions applicable to the cohort within which they (the clients) fall** in order for the clients to determine with a degree of certainty the price that would be applicable to them.

Data reporting services providers [Section 8]

(i) What is the timeline for approving connections of ARMs to CAs (both the CA granting the authorisation as well as other CAs to which the ARMs want to connect to for reporting purposes)? [Question 3, pp. 51-52]

a) As part of the organisational requirements set out in Article 12 of RTS 13, ARMs have to comply with the technical specifications for the submission of transactions reports.

b) According to the time line set out in the authorisation process under Article 61(3) of MiFID II, **CAs are required to inform an applicant of whether or not authorisation has been granted within 6 months of the submission** of a complete application. **This time line includes the time required for approving and establishing the connectivity of ARMs.**

c) ESMA considers that for approving and establishing the **connectivity of ARMs to CAs other than the CA of the home Member State**, the **same timeline of 6 months should apply**.

Third country issues [Section 9]

(i) How are transactions with a third country dimension treated for the purpose of the transparency requirements (Articles 3,4, 6-11, 20, 21 of MiFIR and as further specified in RTS 1 and 2), and for the **systematic internaliser regime** (Article 4(1)(20) of MiFID II and Articles 12-16 of Commission Delegated Regulation (EU) No 2017/565) **[Question 2, pp. 53-57]**

a) MiFID II and MiFIR do not provide specific guidance on the treatment of transactions with a third country dimension, i.e. trades executed by EU investment firms outside the EU and trades by branches or subsidiaries of non-EU firms within the EU, for the purposes of the MiFIR transparency regime and the determination of systematic internalisers.

b) ESMA considers it important to clarify how those MiFID II / MiFIR requirements should apply to transactions with a third country dimension.

c) **Transactions with a third country dimension in this context include transactions where at least one counterparty is an investment firm (IF) authorised in the EU or where the trade is executed on an EU trading venue by a non-EU firm.**

d) **Transactions where both counterparties are not authorised EU investment firms and that are executed outside the EU are in any case not subject to the MiFIR transparency requirements and do not count for the systematic internaliser determination.**

The following general principles should apply:

1. Transactions concluded on EU trading venues

The transparency requirements always apply to transactions concluded on EU trading venues, irrespective of the origin of counterparties trading on the trading venue and regardless whether the counterparties to the transaction are authorised as EU investment firm or not.

2. Transactions executed on non-EU venues

ESMA already published an Opinion (ESMA70-154-165, here) providing guidance in particular with respect to transactions concluded on third-country venues by EU investment firms. The opinion clarifies that **only transactions concluded on** third-country venues meeting the criteria established in the ESMA's opinion and listed in the Annex of the opinion (**"comparable third country trading venues"** thereafter) **should not be subject to the MiFIR transparency regime**. **Transactions concluded on other third-country trading venues should be treated as OTC transactions and reported through an APA**.

3. OTC transactions involving an EU investment firm

If one of the parties of an OTC-transaction is an IF authorised in the EU, the transaction is considered as executed within the EU: the MiFIR transparency requirements apply and the transaction will be included for the systematic internaliser determination.

4. Transactions of non-EU subsidiaries of EU IFs

Subsidiaries are independent legal entities and subject to the regulatory regime of the third country in which they are established. Therefore, **the MiFIR transparency requirements do not apply**, unless the transaction is concluded on an EU trading venue. The transactions undertaken by such subsidiaries do not count for the Systematic internaliser determination.

5. Transactions involving a non-EU branch of an EU IF

Contrary to subsidiaries, branches do not have legal personality. **Therefore, transactions by non-EU branches of EU IFs are treated as transactions of the EU parent company and, therefore, have to be made transparent under the MiFIR rules.**

e) The table below provides more details on the treatment of transactions with a third country dimension for the purpose of the MiFID transparency requirements and the determination of whether an investment firm is a systematic internaliser (SI).

Case	Investment Firm (IF)	Counterparty/ Client	Execution place	Mifir Transparency	SI determination (Articles 12-16 of Commission	
					Count for SI determination (numerator)	Count for total trading within the EU (denominator for SI calculations)
1	EU IF	EU/non-EU	Comparable third country TV	No	No	No
2	EU IF	non-EU	OTC	Yes	Yes	Yes
3	non-EU Branch of EU IF	EU/non-EU	Comparable third country TV	No	No	No
4	non-EU branch of EU IF	non-EU	OTC	Yes	Yes	Yes
5	non-EU Subsidiary of EU IF	EU/non-EU	non-EU TV/OTC	No	No	No
6	non-EU Subsidiary of EU IF	EU/non-EU	EU TV	Yes	No	Yes
7	non-EU firm	EU/non-EU	EU TV	Yes	No	Yes
8	EU branch of non-EU firm	EU/non-EU	EU TV	Yes	No	Yes
9	EU branch of non-EU firm	EU/non-EU	Comparable third country TV	No	No	No
10	EU branch of non-EU firm	non-EU	OTC	Yes	Yes	Yes
11	EU subsidiary of non-EU firm	EU/non-EU	EU TV	Yes	No	Yes
12	EU subsidiary of non-EU firm	EU/non-EU	Comparable third country TV	No	No	No
13	EU subsidiary of non-EU firm	non-EU	OTC	Yes	Yes	Yes

Source: ESMA, Question and Answers on MiFID II and MiFir transparency topics (15/11/2017), p. 55

<u>Note:</u> The order of the below explanations has been rearranged, split into two categories: (i) where MiFIR transparency requirements apply, and (ii) where they do not apply.

(i) Detailed explanation of the table <u>where MiFIR transparency requirements apply</u>:

Case 2 – EU IF trading with a non-EU counterparty/client OTC: An OTC transaction, i.e. either a transaction concluded on a non-comparable third country TV or a pure OTC-transaction, that involves an EU IF is subject to the transparency requirements and has to be published through an APA. The transaction counts for the SI-determination (both for the numerator and the denominator).

Case 4 - non-EU branch of an EU IF trading with a non-EU counterparty/client OTC: Non-EU branches of EU IF are treated like their EU parent company. Therefore, the same treatment as under case 2 applies. An OTC-transaction, i.e. either a transaction concluded on a non-comparable third country TV or a pure OTC transaction, is subject to the transparency requirements and has to be published through an APA. The transaction counts for the SI-determination of the parent company (both the numerator and the denominator).

Case 6 – non-EU subsidiary of an EU IF trading on an EU TV: The transparency requirements apply at the level of the trading venue. Therefore, the MiFIR transparency requirements will apply and the transaction will be included in the denominator (total trading in the EU) for determining the SI activity. Since subsidiaries are independent legal entities they are subject to the regulatory regime of the third country in which the subsidiary is established and do not have to perform the SI test. The transaction does hence not count for the numerator for the SI-determination.

Case 7 – non-EU firm trading on an EU TV: The transparency requirements apply at the level of the trading venue. Therefore, the transparency requirements will apply and the transaction will be included in the denominator (total trading in the EU) for determining the SI activity. However, it does not count for the numerator.

Case 8 – EU branch of a non-EU firm trading on an EU TV: The transparency requirements apply at the level of the trading venue. Therefore, the transparency requirements will apply. Transactions on trading venues do not count for the numerator for the SI-determination, but are counted in the denominator (total trading within the EU).

Case 10 – EU branch of a non-EU firm trading with a non-EU counterpart/client OTC: Where a non EU-firm is required to establish a branch in accordance with Article 39 of MiFID II, this branch has to apply, in accordance with Article 41(2) of MiFID II, with the requirements of Articles 16-20, 23-25 and 27, Article 28(1) and Articles 30-32 of MiFID II and Articles 3 to 26 of MiFIR and the measures adopted pursuant thereto. Therefore, EU branches of non-EU firms are subject to the transparency requirements and have to report their trades to APAs. Furthermore, the transactions count for the SI determination (numerator and denominator).

Case 11 – EU subsidiary of a non-EU firm trading on an EU TV: The transparency requirements apply at the level of the trading venue. Therefore, the transparency requirements will apply. Transactions on trading venues do not count for the numerator for the SI-determination, but are counted in the denominator (total trading within the EU).

Case 13 – EU subsidiary of a non-EU firm trading with a non-EU counterparty/client OTC: Subsidiaries are independent legal entities and subject to the regulatory regime of the country where they are established. Therefore, EU subsidiaries of non-EU firms are subject to the full MiFID II/MiFIR requirements. The transaction is subject to MiFIR transparency and counts for the SI-determination (both numerator and denominator).

Detailed explanation of the table where MiFIR transparency requirements DO NOT apply:

Case 1 – EU investment firm (IF) trading on a comparable third country trading venue (TV): The transaction is treated as executed “on venue”. Therefore, the MiFIR transparency requirements do not apply (to avoid double reporting) and the transaction is not counted for the SI-determination. For transactions concluded on non-compliant third country TVs, case 2 applies.

Case 3 – non-EU branch of an EU IF trading on a comparable third country TV: The trade is treated as executed “on venue”. Therefore, the same treatment as under case 1 applies, i.e. MiFIR transparency requirements do not apply and the trade is not counted for the SI-determination. For transactions concluded on non-compliant third country TVs, case 4 applies.

Case 5 – non-EU subsidiary of an EU IF trading on a non-EU TV or OTC: Subsidiaries are independent legal entities and subject to the regulatory regime of the third country in which they are established. Therefore, the MiFIR transparency requirements do not apply. The transaction does not count for the SI determination.

Case 9 – EU branch of a non-EU firm trading on a comparable third country TV: The trade is treated as executed “on venue”. Therefore, the same treatment as under case 1 applies. MiFIR transparency requirements do not apply (to avoid double reporting) and the transaction is not counted for the SI-determination (since they are executed “on venue”). For transactions concluded on a non-comparable third country TVs, case 10 applies.

Case 12 – EU subsidiary of a non-EU firm trading on a comparable third country TV: The transaction is considered as executed “on venue” i. Therefore, the same treatment as under case 1 applies; MiFIR transparency requirements do not apply and the trade is not counted for the SI-determination. For transactions concluded on noncomparable third country TVs, case 13 applies.

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November 2017