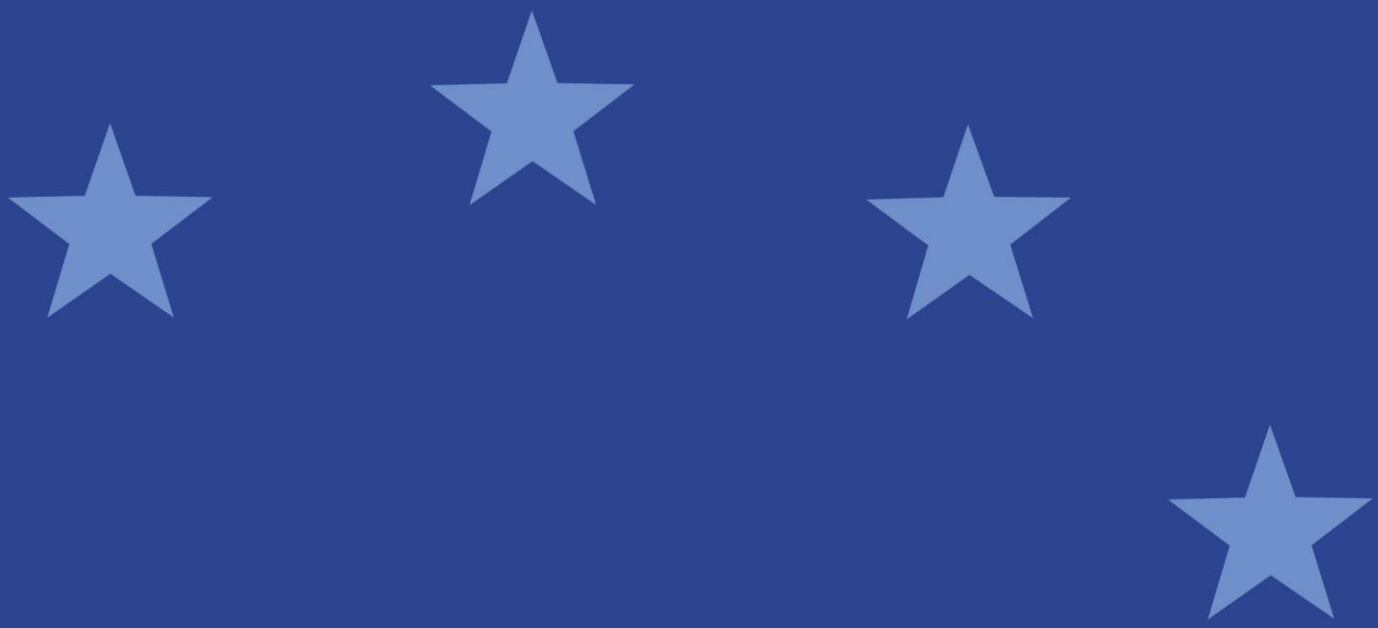
esma European Securities and Markets Authority

Questions and Answers

On MiFID II and MiFIR transparency topics



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Acronyms and definitions used

AOR	Automated Order Router
DVC	Double Volume Cap
ESMA	The European Markets and Securities Authority
ETF	Exchange Traded Fund
MiFID I	Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and of the Council
MiFID II	Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU of the European Parliament and of the Council
MiFIR	Markets in Financial Instruments Regulation – Regulation 600/2014 of the European Parliament and of the Council
MTF	Multilateral Trading Facility
NCA	National Competent Authority
Q&A	Question and answer
RTS	Regulatory Technical Standards
RM	Regulated Market

Table of questions

		Topic of the Question	Level 1/Level 2 issue	Last Updated
Pre-trade transparency waivers	1	Pre-trade transparency waivers under MiFID I	Article 4(7) of MiFIR	18/11/2016
	2	Waiver procedure for illiquid non-equity financial instruments	Article 9(1)(c) of MiFIR	18/11/2016
	3	Implementation schedule 2017	Article 3(1) and Article 8(1) of MiFIR	19/12/2016
	4	Substantial and non-substantial amendments to MiFID I waivers	Article 3(1) and Article 8(1) of MiFIR	19/12/2016
Double volume cap	1	First calculations to be published on 3 January 2018 - shares admitted to trading on RM	Article 5(4) of MiFIR	03/10/2016
	2	First calculations to be published on 3 January 2018 - MTF only shares, depositary receipts, certificates	Article 5(4) of MiFIR	03/10/2016
	3	Application of the double volume mechanism to newly issued instruments	Article 5(4) of MiFIR	03/10/2016
	4	Mid-month reports	Article 5(6) of MiFIR	03/10/2016
Systematic internaliser regime	1	Schedule for the initial implementation of the systematic internaliser regime	Article 17 of the Commission Delegated Regulation (EU) No XXX/2016	03/11/2016
	2	Level at which the firm must perform the calculation where it is part of a group or operates EU branches	Articles 12 to 16 of the Commission Delegated Regulation (EU) No XXX/2016	31/01/2017
	3	Transactions that should be exempted from, and included in, the calculation	Articles 12 to 16 of the Commission Delegated Regulation (EU) No XXX/2016	31/01/2017
	4	Level of asset class at which the calculation should be performed for derivatives, bonds and structured finance products	Articles 13 to 15 of the Commission Delegated	31/01/2017

		Regulation (EU) No XXX/2016	
5	Compliance with the quoting obligations for SIs in non-equity instruments	Article 18 of MiFIR	31/01/2017

1 Introduction

Background

The final legislative texts of Directive 2014/65/EU[1] (MiFID II) and Regulation (EU) No 600/2014[2] (MiFIR) were approved by the European Parliament on 15 April 2014 and by the European Council on 13 May 2014. The two texts were published in the Official Journal on 12 June 2014 and entered into force on the twentieth day following this publication – i.e. 2 July 2014.

Many of the obligations under MiFID II and MiFIR were further specified in the Commission Delegated Directive[3] and two Commission Delegated Regulations[4] [5], as well as regulatory and implementing technical standards developed by the European Securities and Markets Authority (ESMA).

MiFID II and MiFIR, together with the Commission delegated acts as well as regulatory and implementing technical standards will be applicable from 3 January 2018.

Purpose

The purpose of this document is to promote common supervisory approaches and practices in the application of MiFID II and MiFIR in relation to transparency topics. It provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of MiFID II and MiFIR.

The content of this document is aimed at competent authorities and firms by providing clarity on the application of the MiFID II and MiFIR requirements.

The content of this document is not exhaustive and it does not constitute new policy.

Status

[1] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.
[2] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) N0 648/2012.
[3] Commission Delegated Directive of 7.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits. The Commission Delegated Directive was published on 7 April 2016 and no objection has been expressed by the European Parliament or the Council on the MiFID II Delegate Directive and Delegated Regulation within the period set in Article 89 of MiFID II.
[4] Commission Delegated Regulation of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. The Commission Delegated Regulation was published on 25 April 2016 and no objection has been expressed by the European Parliament or the Council on the MiFID II Delegate Directive and Delegated Regulation within the period set in Article 89 of MiFID II.
[5] Commission Delegated Regulation of 18.5.2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions. The Commission Delegated Regulation was published on 18 May 2016 and no objection has been expressed by the European Parliament or the Council on the MiFID II Delegate Directive and Delegated Regulation within the period set in Article 50 of MiFIR.

The question and answer (Q&A) mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation[6].

Due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if Q&As are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties.

ESMA will periodically review these Q&As on a regular basis to update them where required and to identify if, in a certain area, there is a need to convert some of the material into ESMA Guidelines and recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.

The Q&As in this document cover only activities of EU investment firms in the EU, unless specifically mentioned otherwise. Third country related issues, and in particular the treatment of non-EU branches of EU investment firms, will be addressed in a dedicated third country section.

Questions and answers

This document is intended to be continually edited and updated as and when new questions are received. The date on which each section was last amended is included for ease of reference.

[6] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

2 Pre-trade transparency waivers [Last update: 19/12/2016]

Question 1 [Last update: 18/11/2016]

Does paragraph 7 of Article 4 of MiFIR allow competent authorities to grandfather waivers granted under MiFID I for a period of 2 years after the application of MiFIR on 3 January 2018?

Answer 1

Paragraph 7 of Article 4 of MiFIR provides for a review of the waivers granted in accordance with MiFID I (i.e. before 3 January 2018) to be carried out by relevant national competent authorities (NCAs) in order to assess the continued compatibility of those waivers with MiFIR. ESMA must conclude the review and issue an opinion on each of the waivers to the relevant NCA by 3 January 2020. As clarified under Recital 13 of MiFIR the review should be carried out in accordance with Article 29 of ESMA Regulation 1095/2010 to foster consistency in supervisory practices and, therefore, ensure uniform application of MiFIR. The 2-year period following the application of MiFIR aims to alleviate the possible operational challenges involved in reviewing all of the waivers already granted across the Union to ensure a smooth convergence process in the supervisory practices between NCAs.

The 2-year period following application of MiFIR should not be interpreted as a grandfathering of waivers granted in accordance with MiFID I. MiFIR applies from 3 January 2018 and trading venues are required to comply with the new requirements from that date. That means that trading venues must, depending on the type of waiver used, implement the necessary technical modifications to their systems and regulatory changes to their rules to ensure compliance when MiFIR applies. NCAs remain responsible for the granting of waivers and to supervise how they are used, in advance of 3 January 2018, to ensure proper transition to MiFIR in their jurisdictions.

Question 2 [Last update: 18/11/2016]

Which procedure applies to granting a waiver from pre-trade transparency obligations for non-equity financial instruments for which there is not a liquid market under Article 9(1)(c) of MiFIR?

Answer 2

All waivers from pre-trade transparency under Article 9(1) of MiFIR originate with an application for a waiver by a trading venue which may then be granted by the relevant NCA. Each waiver also has to go through an ESMA opinion process as described in Article 9(2) of MiFIR.

The waiver for illiquid instruments described in Article 9(1)(c) of MiFIR is special in that it does not apply to specific order types or sizes, but that it renders all non-equity instruments deemed

illiquid under MiFIR and RTS 2[7] for non-equity transparency eligible for a waiver from pre-trade transparency. ESMA expects an extremely large number of instruments will be eligible for this waiver, and considers that it would not be possible operationally for this waiver to be granted on a per-instrument basis. Furthermore, ESMA does not understand the legal text to impose an obligation to grant the waiver on a per instrument basis.

Instead ESMA considers that the asset classes of instruments as categorised in Annex III of RTS 2 (examples for asset classes are bonds, interest rate derivatives, commodity derivatives, credit derivatives, etc.) should be the basis for applying for the "illiquid waiver". This means that trading venues should apply for the waiver on an asset class basis and all illiquid instruments that fall within those asset classes which are already traded on the venue or in the process of being admitted to trading, or that will be traded on the venue at a later point in time would be eligible to benefit from the waiver, if granted. Also instruments within the specified asset classes which move from liquid to illiquid following the calculations as per RTS 2 would be eligible to benefit from the same waiver.

Each waiver application can comprise different asset classes so that trading venues would only have to apply for the illiquid waiver once in the run-up to MiFID II application. A new waiver application would only be necessary in case the trading venue intends to start trading a new asset class based on the categorisation in RTS 2.

Question 3 [Last update: 19/12/2016]

How are applications by operators of trading venues for waivers from pre-trade transparency requirements pursuant to MiFIR processed by ESMA before the entry into application of MiFIR on 3 January 2018?

Answer 3

The obligation to make public current bid and offer prices and the depth of trading interests pursuant to Article 3(1) and Article 8(1) of MiFIR as well as the procedure for granting a waiver from the respective requirements apply from 3 January 2018.

Under MiFIR, ESMA shall issue an opinion to the NCA in question assessing the compatibility of each waiver notification with MiFIR and its regulatory technical standards.

In order to avoid a "bottleneck" of waiver applications on the basis of the requirements pursuant to MiFIR at the date of application and in order to enable waivers to be used by the application date of MiFIR, ESMA plans to process waiver notifications submitted by the NCAs designated to grant a waiver pursuant to MiFIR already in 2017.

[7] Please note that, for ease of reference, RTS have been numbered in this document in accordance with the numbering used in the package sent by ESMA to the Commission in September 2015 (ESMA/2015/1464). Readers are nevertheless invited to consult the Commission and European Parliament websites for updated versions of those RTS.

ESMA will undertake its review in two ”waves” for the purposes of issuing its non-binding opinions: first covering all equity and equity-like instruments and second non-equity instruments. Consistent with the procedure laid down in Article 4(4) and Article 9(2) of MiFIR, waiver applications shall be reviewed first by the relevant NCA and afterwards relevant waiver notifications shall go through an ESMA opinion process.

Trading venues: Trading venues are asked to submit their waiver applications for:

- Equity and equity-like instruments: by 1 February 2017 at the latest.
- Bonds and derivatives: by 1 June 2017 at the latest.

National review: Each NCA should review the waiver applications it receives and submit only to ESMA those notifications that they consider as MiFIR compliant unless there are exceptional circumstances that render an ESMA analysis beneficial. NCA should submit waiver notifications to ESMA for:

- Equity and equity-like instruments: by 28 February 2017.
- Bonds and derivatives: by 31 July 2017.

ESMA review: ESMA will conduct its review as per below for:

- Equity and equity-like instruments: by 31 May 2017.
- Bonds and derivatives: by 30 November 2017.

NCAs[8] and ESMA undertake to complete the reviews of waiver applications submitted by the dates set above for trading venues ahead of the MiFIR application date of 3 January 2018. Waiver applications can be submitted after those deadlines (i.e. 1 February 2017 and 1 June 2017) but will only be processed on a best effort basis.

Question 4 [Last update: 19/12/2016]

When a modification is required to a trading venue system that benefits from a waiver granted in accordance with MiFID I in order to make it compliant with MiFIR, what is the appropriate process?

Answer 4

There will be varying degrees of modifications that will need to be made to existing waivers granted in accordance with MiFID I in order to make them compliant with MiFIR. Trading venues should consider whether modifications to their systems that benefit from waivers

[8] Finansinspektionen will only be able to formally accept applications from trading venues after 3 July 2017, therefore the timetable described above does not apply to venues authorised in Sweden.

granted in accordance with MiFID I are necessary to make them MiFIR compliant. In some cases, the modifications could constitute a new waiver and consequently go through the ESMA opinion process before MiFIR applies. Systems for which waivers were granted in accordance with MiFID I that only require non-substantial modifications to be MiFIR compliant are not expected to go through a waiver application process, however they will be subject to the review that ESMA is required to conclude by 3 January 2020. In this regard, non-substantial modifications may include, but are not limited to, the following examples:

- For reference price waivers: when the reference price currently based on best bid, best offer or mid-price is modified to utilise only the midpoint within the bid and offer prices (or, when it is not available, the opening or closing price of the relevant trading session), in accordance with Article 4(2) of MiFIR;

- For order management facility waivers: when they are modified by introducing a minimum order size for orders held in an order management facility pending disclosure, in accordance with Article 8(2) of RTS 1;

- For large in scale waivers: when the minimum size is modified to be in accordance with table 1 of Annex II of RTS 1.

Combination of waivers will be assessed on an individual basis and amendments may qualify as non-substantial depending on the circumstances.

3 The double volume cap mechanism [Last update: 03/10/2016]

Question 1 [Last update:03/10/2016]

What are the necessary adjustments to data on MiFID I waivers (shares traded only on regulated markets/shares traded on regulated markets and MTFs) in respect of the DVC? What is the volume traded under the waivers to be reported in the year before the application of MiFIR?

Answer 1

According to recital 11 of draft RTS 3 trading venues should base their report on the adjusted volumes of trading executed under equivalent waivers granted under Directive 2004/39/EC of the European Parliament and of the Council and Commission Regulation (EC) No 1287/2006 (MiFID I).

In particular, Article 5 of MiFIR caps the trading executed under:

i. systems matching orders based on a trading methodology by which the price is determined in accordance with a reference price; and

ii. negotiated transactions in liquid instruments carried out under limb (i) of Article 4(1)(b) of MiFIR.

With regard to the reference price waiver, the requirement under MiFID I that the reference price must be widely published and regarded as reliable has been maintained under MiFIR. The only difference is that such elements are codified as an implementing measure under MiFID I (in Article 18(1)(a) of MiFID I implementing regulation[9]) whereas they are part of the Level 1 text of MiFIR.

Furthermore, compared to MiFID I, MiFIR narrows down the set of eligible prices that can be used by those reference price systems in two different ways.

First, any reference price can only be either:

[9] Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive.

i. the midpoint within the current bid and offer prices of the most relevant market in terms of liquidity or the market where the financial instrument in question was first admitted to trading; or

ii. the opening or closing price of the relevant trading session if the trading occurs outside the continuous trading phase.

Second, any reference price can only be derived from the most relevant market in terms of liquidity or the market of first admission of the financial instrument.

Taking note of those differences ESMA considers that for properly implementing the double volume cap from 3 January 2018 all transactions executed in 2017 in accordance with reference price waivers granted under MiFID I should be included in the numerator for the purposes of the double volume cap calculations as per Article 5 of MiFIR.

With regard to the negotiated transactions waivers, in comparison to MiFID I, negotiated transactions are subject to some restrictions on admissible execution prices depending on the type of the transaction and the trading characteristics of the financial instrument being traded. In particular:

i. Negotiated transactions which are subject to conditions other than the current market price can be executed at any price in accordance with the rules of the trading venue.

ii. Negotiated transactions which are subject to the current market price must instead comply with price conditions as specified below:

    a. for liquid financial instruments negotiated transactions must be executed within the spread - negotiated transactions falling under this limb are subject to the double volume cap (DVC) mechanism.

    b. for illiquid financial instruments negotiated transactions can be executed at any price falling within a certain percentage of a suitable reference price provided both the reference price and the percentage are set in advance by the system operator.

With respect to the negotiated transactions trading venues are required to properly identify, to the extent possible, transactions under the negotiated transaction waiver volume comparable to point (a) above which are the only negotiated transactions covered by the DVC mechanism. Therefore, ESMA considers that all transactions executed under the MiFID I negotiated trade waivers in liquid shares should count towards the double volume cap and should be reported by trading venues for the purpose of the double volume cap calculations. However, the calculation should exclude negotiated transactions in liquid shares subject to conditions other than the current market price executed in accordance with Article 18(b)(ii) of MiFID I implementing regulation.

Transactions executed on the basis of two orders benefitting from the large in scale waiver should not count towards the volumes calculated under the reference price and the negotiated trade waiver.

Question 2 [Last update:03/10/2016]

How would the double volume cap be applied from January 2018 in relation to financial instruments (shares traded only on MTFs, depositary receipts, ETFs, certificates) which currently do not operate under any waiver?

Answer 2

Article 5(4) of MiFIR requires ESMA to publish the total volume of Union trading per financial instrument and the percentage of trading in a financial instrument carried out under the reference price waiver and for negotiated transactions under Article 4(1)(b)(i) in the previous 12 months.

Concerning the total volume of Union trading per financial instrument, ESMA will publish the volume traded on all EU venues over the last 12 months.

Concerning the percentage of trading in a financial instrument carried out under the reference price waiver and the negotiated transactions waiver, two scenarios need to be distinguished:

i. Prior to the date of application of MiFID II/MiFIR: The pre-trade transparency requirements of MiFID I, and therefore also the possibility to benefit from MiFID waivers, apply only to shares admitted to trading on regulated markets. While MiFID II/MiFIR extend the transparency regime to other equity-like instruments and to shares traded only on MTFs, these instruments until the date of application of MiFID II/MiFIR do not have any formally approved waivers. Therefore, the volume traded under MiFID waivers for those instruments not covered by the scope of the MiFID I pre-trade transparency regime (the numerator) will be zero for the monitoring period starting one year before the date of application of MiFID II/MiFIR.

ii. After the date of application of MiFID II/MiFIR: With the application of MiFID II/MiFIR equity and equity-like instruments newly covered by the MiFIR transparency provisions can have formally approved waivers. For the purpose of performing the calculations for determining the percentage of trading in a financial instrument under the relevant waivers, ESMA will accumulate for the volume traded under any waivers on a venue/all EU venues (the numerator) the trading under the reference price and negotiated transactions waivers over the first 12 months. This means that at the end of the first month after the date of the application of MiFID II/MiFIR in 2018, the trading under the waivers will cover a period of one month. At the end of the second month after the date of application of MiFID II/MiFIR, the trading under the waivers will cover a period of two months, and so forth until a 12-month period is covered.

The applicable denominator (volume traded on all EU venues) will be based on the traded volumes of the previous 12 months at each point in time.

ESMA considers that this calculation method reflects the co-legislators' intention to at all points in time cover the actual volumes traded under MiFID approved waivers in the numerator and compare it to total trading in the denominator over the previous 12 months.

Question 3 [Last update:03/10/2016]

How will the DVC be applied to newly issued shares?

Answer 3

ESMA will publish the percentage of trading in a financial instrument carried out under the reference price waiver and the negotiated transactions waiver under Article 4(1)(b)(i) of MiFIR for shares newly admitted to trading or traded from the start of trading.

However, since according to Article 5(1) of MiFIR the double volume cap mechanism can only apply where the relevant thresholds are breached over the previous 12 months, the suspension of waivers when the thresholds are breached can only be triggered when at least 12 months of data for the volume of total trading and the percentage carried out under the waivers is available.

Question 4 [Last update:03/10/2016]

What are the implications of exceeding a relevant threshold in a mid-month report?

Answer 4

Pursuant to Article 5(4) of MiFIR ESMA shall publish within five working days of the end of each calendar month, the total volume of Union trading per financial instrument in the previous 12 months, the percentage of trading in a financial instrument carried out across the Union under the waivers and on each trading venue in the previous 12 months, and the methodology that is used to derive at those percentages.

In the event that the report referred to in Article 5(4) of MiFIR identifies any trading venue where trading in any financial instrument carried out under the waivers has exceeded 3,75 % of the total trading in the Union in that financial instrument or that overall Union trading in any financial instrument carried out under the waivers has exceeded 7,75 % based on the previous 12 months' trading, respectively, ESMA shall publish an additional report within five working days of the 15th day of the calendar month in which the report referred to in Article 5(4) of MiFIR is published. That report shall contain the information specified in Article 5(4) in respect of those financial instruments where 3,75 % has been exceeded or in respect of those financial instruments where 7,75 % has been exceeded, respectively (see Article 5(5) and (6) of MiFIR).

The question is what the consequences are if according to the aforementioned “mid-month reports” one or more of the respective thresholds (the 3,75%, the 7,75%, the 4% or the 8%) are exceeded.

Pursuant to Article 5(2) of MiFIR, the NCA that authorised the use of the respective waivers shall within two working days suspend their use on that venue in that financial instrument based on the data published by ESMA referred to in Article 5(4) of MiFIR, for a period of six months when the percentage of trading in a financial instrument carried out on a trading venue under the waivers has exceeded the limit referred to in Article 5(1)(a) of MiFIR. When the percentage of trading in a financial instrument carried out on all trading venues across the Union under those waivers has exceeded the limit referred to in Article 5(1)(b) of MiFIR, all NCAs shall within two working days suspend the use of those waivers across the Union for a period of six months.

On this basis the obligation to suspend trading derives from the thresholds as laid down in Article 5(1) of MiFIR. However, factually, suspension for a period of six months is ordered by the NCA on the basis of the ESMA report pursuant to Article 5(4) of MiFIR, as explicitly stated in Article 5(2) and (3), respectively. As a trading suspension is ordered on the basis of the report pursuant to Article 5(4) and as the legal hook for a trading suspension does not cross-refer to the mid-months reports pursuant to Article 5(5) and (6), there is no direct legal consequence of these reports even if they were to state that trading has exceeded 4 % or 8 %, respectively.

4 The systematic internaliser regime [Last update: 31/01/2017]

Question 1 [Last update: 03/11/2016]

By when will ESMA publish information about the total number and the volume of transactions executed in the Union and when do investment firms have to perform the assessment whether they should be considered as systematic internalisers for the first time in 2018 as well as for subsequent periods?

Answer 1

Commission Delegated Regulation (EU) No XXX/2016[10] does not provide for any transitional provision which would allow the systematic internaliser regime to be fully applicable as of 3 January 2018. In the absence of such provisions, the first calculations are expected to be performed only when, in accordance with Article 17 of the Commission Delegated Regulation (EU) No XXX/2016, there will be 6 months of data available.

In accordance with the clarifications provided below:

i. ESMA will publish the necessary data (EU wide data) for the first time by 1 August 2018 covering a period from 3 January 2018 to 30 June 2018.

ii. Investment firms will have to perform their first assessment and, where appropriate, comply with the systematic internaliser obligations (including notifying their NCA) by 1 September 2018.

This timeline applies also to investment firms trading in illiquid instruments. While it is possible for those firms to carry out part of the test based on data at their disposal, the complete determination of the SI activity necessitates an assessment of the investment firms OTC-trading activity in a particular instrument in relation to overall trading in the Union. In order to ensure a consistent assessment and to ensure that all investment firms are treated in the same manner, for all instruments, irrespective of their liquidity status, the assessment should therefore be performed by 1 September 2018.

Similarly, although Commission Delegated Regulation (EU) No XXX/2016 allows shorter look-back periods for newly issued instruments compared to the six months described above, ESMA considers that it is important to ensure a level playing field between all instruments and, therefore, suggests to apply the schedule proposed above also to newly issued instruments -

[10] Commission Delegated Regulation (EU) No XXX/2016 of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

i.e. first publication by ESMA of the necessary EU-wide data by 1 August 2018 and earliest deadline to comply, where necessary, with the SI regime set on 1 September 2018.

It is nevertheless important to stress that investment firms should be able to opt-in to the systematic internaliser regime for all financial instruments from 3 January 2018, for example, as a means to comply with the trading obligation for shares.

In accordance with Article 94 of MiFID II, the systematic internaliser definition and the transparency regime applicable to internalisers in shares admitted to trading on a regulated market under MiFID I will be repealed by MiFID II by 3 January 2018. Those firms, following the publication of the data of the first six months from 3 January 2018, will also have to determine whether their activity is frequent, systematic and substantial on the basis of the available data published in accordance with this note.

For subsequent assessments, ESMA intends to publish the necessary information within a month after the end of each assessment period as defined under Article 17 of the Commission Delegated Regulation (EU) No XXX/2016 – i.e. by the first calendar day of months of February, May, August and November every year. After the first assessment, investment firms are expected to perform the calculations and comply with the systematic internaliser regime (including notification to their NCA) no later than two weeks after the publication by ESMA – i.e. by the fifteenth calendar day of the months of February, May, August and November every year.

Question 2 [Last update: 31/01/2017]

Do the calculations to identify if an investment firm is systematic internaliser have to be carried out at legal entity level or a group level? How are branches of investment firms being treated?

Answer 2

The definition of systematic internaliser under Article 4(1)(20) of MiFID II refers to “investment firms” established in the EU and, therefore, the calculations should be carried out at legal entity level. For EU investment firms operating branches in the Union, the activity of those branches would need to be consolidated for the purpose of the systematic internaliser calculations.

Question 3 [Last update: 31/01/2017]

i. Should investment firms, when determining if they are a systematic internaliser, include (i) transactions that are not contributing to the price formation process and/or are not reportable and (ii) primary market transactions?

ii. Should investment firms, when determining if they are a systematic internaliser, include trades executed on own account on a trading venue but following an order from the client?

iii. Are off order book trades that are reported to a regulated market, MTF or OTF under its rules excluded from the quantitative thresholds for determining when an investment firm is a systematic internaliser?

Answer 3

i. Article 13 of RTS 1 and Article 12 of RTS 2 exempt investment firms from reporting certain types of transactions for the purposes of post-trade transparency. ESMA is of the view that those types of transactions should not be part of the calculations for the purposes of the definition of the systematic internaliser regime, both for the numerator and the denominator of the quantitative thresholds specified in the Commission delegated regulation [add reference number once published on the OJEU]. The types of transactions included in Articles 13 of RTS 1 and 12 of RTS 2 are technical and cannot be characterised as transactions where an investment firm is executing a client order by dealing on own account. More importantly, the lack of a reporting obligation for those types of transactions would be a considerable challenge for competent authorities to supervise and for investment firms to comply with the systematic internaliser regime.

   Primary market transactions in securities as well as creation and redemption of ETFs' units should not be included in the calculations.

ii. Article 12(6) of RTS 1 and in Article 7(7) of RTS 2 clarify that two matching trades entered at the same time and for the same price with a single party interposed are considered as a single transaction. An investment firm may, on the back of a client order, execute a trade on own account on a trading venue and back it immediately to the original client. While the trade can be broken down into two transactions - the first transaction executed on own account by the investment firm on the trading venue and the second transaction executed between the investment firm and the client - such transactions should be considered economically as one trade. ESMA is of the view that where the market leg is executed on a trading venue and immediately backed to the client at the same price, the investment firm is not deemed to execute a client trade outside a regulated market, an MTF or an OTF. Therefore, only one trade should be counted for the denominator for determining the systematic internaliser activity (total trading in the EU), and no trade should be included in the numerator when determining whether an investment firms is a systematic internaliser.

   However, in case the market leg transaction is not immediately backed to the client or in case the price is not the same, the trades should be counted as two for the denominator and the trade with the client should be counted for the numerator.

iii. An investment firm dealing on a trading venue is not deemed to act as a systematic internaliser. A trading venue is a multilateral system that operates in accordance with the provisions of Title II of MiFID II concerning MTFs and OTFs or the provisions of Title III concerning regulated markets. According to recital (7) of MiFIR a market which is composed by a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF.

A transaction is deemed to be executed on a trading venue if it is carried out through the systems or under the rules of that trading venue. There is no requirement for the transactions to be executed on an electronic order book for the trade to be subject to the trading venue's rules. Therefore, only off order book transactions that benefit from a waiver from pre-trade transparency should be considered as executed on a trading venue, and should not count for the numerator when determining whether an investment firm is a systematic internaliser.

Question 4 [Last update: 31/01/2017]

i. On which level is the systematic internaliser threshold to be calculated for derivatives? On a sub-class level or on a more granular level?

ii. On which level is the systematic internaliser threshold to be calculated for structured finance products (SFPs)?

iii. What constitutes a 'class of bonds' under Article 13 of Commission Delegated Regulation …/2016 of 25 April 2016[11]? Do senior, subordinated or convertible bonds from the same issuer constitute different classes?

Answer 4

i. The calculation should be performed at the most granular class level as identified in RTS 2. Where an investment firm meets the thresholds for such a class, it should be considered as a systematic internaliser for all derivatives within that most granular class.

With respect to equity derivatives, the sub-classes as defined in Table 6.2 of Annex III of RTS 2 for LIS and SSTI should be used.

ii. For SFPs, calculations should be performed at ISIN level and where, for a specific ISIN, an investment firm is above the thresholds prescribed, it should be considered a systematic internaliser for all SFPs issued by the same entity or by any entity within the same group.

iii. A class of bonds issued by the same entity, or by any entity within the same group is a subset of a class of bonds in table 2.2 of Annex III of RTS 2 (sovereign bond, other public bond, convertible bond, covered bond, corporate bond, other bond). Hence, where an investment firm passes the relevant thresholds in a bond it will be considered to be a systematic internaliser in all bonds belonging to the same class of bonds according to table 2.2. of Annex III of RTS 2 issued by the same entity, or by any entity within the same group.

[11] Commission Delegated Regulation of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

It is therefore possible to distinguish between, for instance, corporate bonds and convertible bonds as different classes of bonds, but the debt seniority of a bond does not constitute a different class.

Question 5 [Last update: 31/01/2017]

i. Can systematic internalisers meet their quoting obligations under Article 18(1) of MiFIR for liquid instruments by providing executable quotes on a continuous basis?

ii. 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?

iii. For how long should quotes provided by systematic internalisers be firm, or executable?

Answer 5

i. The systematic internaliser regime for non-equity instruments is predicated around a protocol whereby the systematic internaliser provides a quote or quotes to a client on request. However, nothing prevents the systematic internaliser, especially in the most liquid instruments, to stream prices to clients. 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 systematic internaliser would be deemed to have complied with the quoting obligation under Article 18(1) of MiFIR. The systematic internaliser can, in justified cases, execute orders at a better price than the streaming quote.

ii. 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.

iii. 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.