



European Securities and
Markets Authority

Questions and Answers

On MiFID II and MiFIR transparency topics





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Acronyms and definitions used

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	Last Updated issue
Equity transparency	1	Pre-trade transparency waivers under MiFID I	Article 4(7) of MiFIR	18/11/2016
Non-equity transparency	1	Waiver procedure for illiquid non-equity financial instruments	Article 9(1)(c) of MiFIR	18/11/2016
Double volume cap	1	First calculations to be published on 3 January 2018 - shares admitted to trading on RM	Art. 5(4) of MiFIR	03/10/2016
	2	First calculations to be published on 3 January 2018 - MTF only shares, depositary receipts, certificates	Art. 5(4) of MiFIR	03/10/2016
	3	Application of the double volume mechanism to newly issued instruments	Art. 5(4) of MiFIR	03/10/2016
	4	Mid-month reports	Art. 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



1 Introduction

Background

The final legislative texts of Directive 2014/65/EU¹ (MiFID II) and Regulation (EU) No 600/2014² (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 Directive³ 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) NO 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 Regulation⁶.

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.

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 Equity transparency [Last update: 18/11/2016]

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 competent authorities 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 competent authority 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 national competent authorities.

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. Competent authorities 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.



3 Non-equity transparency [Last update: 18/11/2016]

Question 1 [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 1

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 competent authority. 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 2⁷ 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.

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.

4 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 regulation⁸) 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:

⁸ 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 competent authority 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 competent authorities 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 competent authority 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.

5 The systematic internaliser regime [Last update: 03/11/2016]

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/2016⁹ 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 National Competent Authority (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 -

⁹ 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.