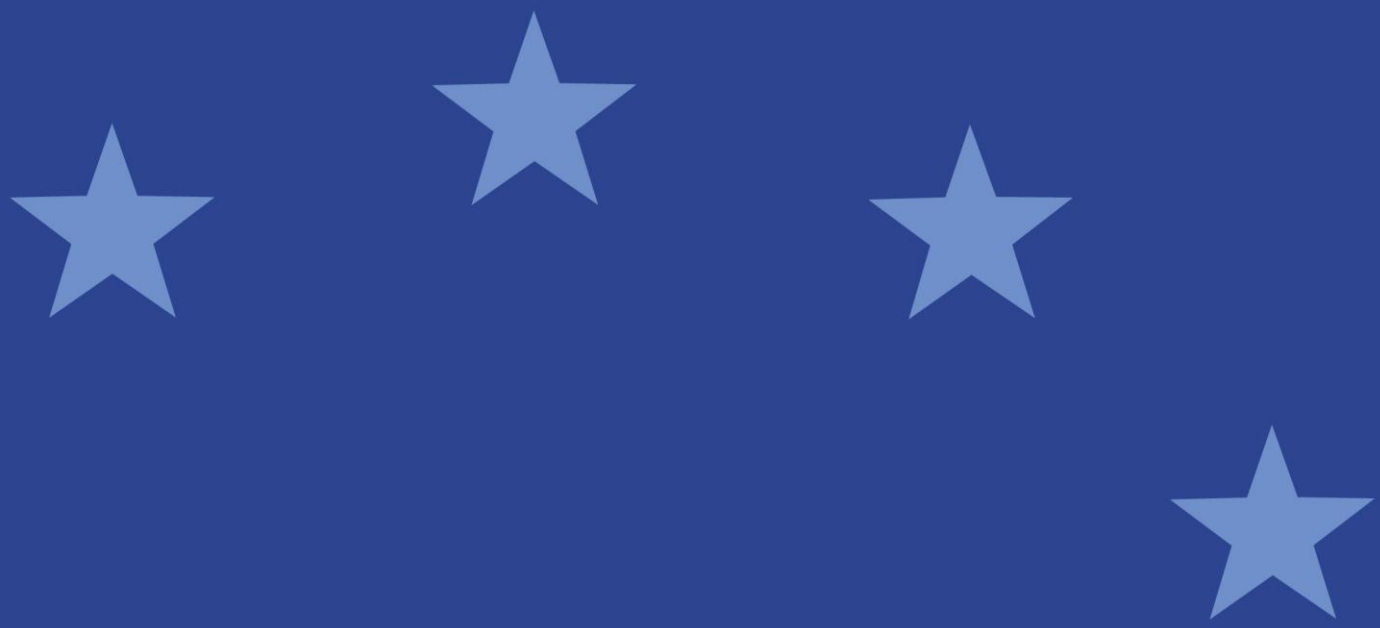
esma European Securities and Markets Authority

Questions and Answers

On MiFID II and MiFIR transparency topics



5 December 2019 | ESMA70-872942901-35

Table of Contents

Acronyms and definitions used

APA	Approved Publication Arrangement
AOR	Automated Order Router
AVT	Average Value of Transactions
CTP	Consolidated Tape Provider
DVC	Double Volume Cap
DRSP	Data reporting Services Provider
EB	Executing Broker
EFP	Exchange For Physical
ESMA	The European Securities and Markets Authority
ETF	Exchange Traded Fund
LIS	Large In Scale
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
RFMD	Request For Market Data
RTS	Regulatory Technical Standards
RTS 1	Commission Delegated Regulation (EU) 2017/587 on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser

RTS 2	Commission Delegated Regulation (EU) 2017/583 on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives
RTS 3	Commission Delegated Regulation (EU) 2017/577 on the volume cap mechanism and the provision of information for the purposes of transparency and other calculations
RTS 13	Commission Delegated Regulation (EU) 2017/571 on the authorisation, organisational requirements and the publication of transactions for data reporting services providers
RTS 22	Commission Delegated Regulation (EU) 2017/590 on the reporting of transactions to competent authorities
RTS 23	Commission Delegated Regulation (EU) 2017/585 on the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities
NAV	Net Asset Value
PB	Prime Broker
RM	Regulated Market
SFP	Structured Finance Products
SMS	Standard Market Size
TOTV	Trading On a Trading Venue in the EU

Table of questions

		Topic of the Question	Level 1/Level 2 issue	Last Updated
General Q&As on transparency topics	1	Obligation on trading venues to make available their arrangements for the publication of quotes and transactions	Articles 3(3), 6(2), 8(3) and 10(2) of MiFIR	03/04/2017
	2	Flags and details for the purpose of post-trade transparency	Tables 3 and 4 of Annex I of RTS 1; Tables 2 and 3 of Annex II of RTS 2	03/04/2017
	3	Which investment firm reports	Article 12(4), (5) and (6) of RTS 1 and Article 7(5), (6) and (7) of RTS 2	03/04/2017
	4	Application of the transparency regime for primary transactions	Title II and III of MiFIR	03/04/2017
	5	ISINs for pre-trade transparency	Articles 3 and 8 of MiFIR	03/04/2017
	6	Use of 'PNDG' as price when making transactions public	Articles 20 and 21 of MiFIR, Annex I of RTS 1, Annex II of RTS 2	03/04/2017
	7	RFQ systems	Annex I of RTS 1 and RTS 2	14/11/2018
	8	Application of post-trade transparency requirements by trading venues and SIs	Articles 6 and 10 of MiFIR	03/10/2017
	9	Obligation to make available data free of charge 15 minutes after publication	Article 13(1) of MiFIR	15/11/2017
	10	Requirements to publish information on post-trade data 15 minutes after publication free of charge	Article 13(1) of MiFIR, Articles 64(1) and 65(1) and (2) of MiFID II	14/11/2018
	11	Publication of transactions – how to populate the field 'publication date and time'	table 2 of Annex II of RTS 1 and table 3 of Annex I of RTS 2	29/05/2018
	12	Voice trading systems – guidance on the application of	Article 8 of MiFIR and annex 1 of RTS 1 and 2	29/05/2018

		pre-trade transparency requirements		
	13	Reporting of a new ISIN in FIRDS and FITRS following a corporate action	Article 1 of RTS 23 and Article 17(5) of RTS 1 and Article 13(16) of RTS 2	03/06/2019
Equity transparency	1	Trading obligation for shares	Article 23 of MiFIR	03/04/2017
	2	Scope of the trading obligation for shares	Article 23 of MiFIR	15/11/2017
	3	Default transparency regime for equity instruments	Articles 2(1)(17)(b), 4(1)(a) and (c), 7(1), 14(2) and (4) and 20(2) of MiFIR	04/01/2019
	4	Publication of request for market data (RFMD) transactions	Article 20 of MiFIR	04/01/2019
	5	Determination of the turnover to be used for the average value of transactions (AVT) calculation	Article 11 of RTS 1	02/10/2019
Non-equity transparency	1	Definition of Exchange for physical	Article 2(1)(48) of MiFIR	31/05/2017
	2	Deferred publication: application for OTC-trades	Article 21 of MiFIR	03/10/2017
	3	Supplementary deferral regime	Article 11(3)(a) of MiFIR and Article 11(1)(a)(ii) of RTS 2	03/10/2017
	4	Questions related to package orders/transactions	Article 2(1)(49) & (50) of MiFIR and Article 18 of MiFIR	15/11/2017
	5	Normal trading hours for non-equity instruments	Article 21 of MiFIR	03/10/2017
	6	Publication of transactions in an aggregated form by APAs	Article 11(3)(a), (c) and (d) of MiFIR	15/11/2017
	7	Publication of transactions in an aggregated form by APAs	Article 11(3)(a), (c) and (d) of MiFIR	15/11/2017
	8	Temporary suspension of transparency for bonds	Articles 9(4) and 11(2) of MiFIR	15/11/2017
	9	Geographical scope of the temporary suspension of transparency	Articles 9(4) and 11(2) of MiFIR	15/11/2017
	10	Default liquidity status of bonds	Article 2(1)(17)(a) of MiFIR	04/10/2018

	11	The “nominal value” of bonds	Table 4 of Annex II of RTS 2	18/12/2017
	12	Scope of the trading obligation for interest rate derivatives	Commission Delegated Regulation (CDR) 2017/2417	28/03/2018
	13	Classification of derivatives on derivatives	Annex III of RTS 2	04/10/2018
	14	Scope of Article 9(1)(c) of MiFIR	Article 9(1)(c) of MiFIR	04/10/2018
	15	Default LIS and SSTI thresholds for bonds	Articles 8, 9 and 11 of MiFIR and Articles 3,5,9 and 10 of RTS 2	04/01/2019
	16	Money Market Instruments (MMIs)	Article 11 of Commission Delegated Regulation (CDR) 2017/565	02/04/2019
	17	Reporting of prime brokerage transactions	Article 7(7) and Table 2 of Annex II of RTS 2	02/04/2019
	18	Treatment of constant maturity swaps	Article 13 and Annex III of RTS 2	12/07/2019
	19	Conversion of LIS/SSTI thresholds in lots	Article 13(9) RTS 2	05/12/2019
Pre-trade transparency waivers	1	Pre-trade transparency waivers under MiFID I	Article 4(7) of MiFIR	03/06/2019
	2	Waiver procedure for illiquid non-equity financial instruments	Article 9(1)(c) of MiFIR	18/11/2016
	3	Substantial and non-substantial amendments to MiFID I waivers	Article 3(1) and Article 8(1) of MiFIR	31/05/2017
	4	Calculation of the “current volume weighted spread reflected in the order book” for negotiated transactions	Article 4(1)(b)(i) of MiFIR	31/05/2017
	5	Maximum authorised deviation around the reference price for negotiated transactions in illiquid equity instruments	Article 4(1)(b)(ii) of MiFIR	15/11/2017

	6	Partial execution of LIS orders (Article 9(1)(a) of MiFIR) and orders above SSTI	Article 9(1)(b) of MiFIR	15/11/2017
	7	SSTI – calculation of indicative pre-trade prices	Article 8(4) of MiFIR	15/11/2017
	8	Categorisation of subscription rights	Article 4 of MiFIR	18/12/2017
	9	Process for a waiver under Article 18(2) of MiFIR	Article 18(2) of MiFIR	18/12/2017
	10	Reference price waiver and multi-listed shares	Article 4(1)(a) of MiFIR	18/12/2017
	11	Pre-arranged/negotiated transactions for non-equity instruments	Article 9 of MiFIR	12/07/2019
	11a	Hedging Exemption	Article 8(1) of MiFIR	12/07/2019
	12	Minimum size of orders held in an order management facility for non-equity financial instruments	Article 4 of RTS 2	07/02/2018
Double volume cap	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
	5	DVC and corporate actions	Article 5 of MiFIR and RTS 3	12/07/2018
Systematic internaliser regime	1	Schedule for the initial implementation of the systematic internaliser regime	Article 17 of the Commission Delegated Regulation (EU) No 2017/565	29/01/2019
	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 2017/565	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 2017/565	31/01/2017
	4	Level of asset class at which the calculation should be performed	Articles 13 to 15 of the Commission	03/10/2017

		for derivatives, bonds and structured finance products	Delegated Regulation (EU) No 2017/565	
	5	Compliance with the quoting obligations for SIs in non-equity instruments	Article 18 of MiFIR	31/05/2017
	6	Compliance with the SI regime and notification to NCAs	Articles 15(1) and 18(4) of MiFIR	03/06/2019
	7	Transactions that should be included in the calculations	Article 4(1)(20) of MiFID II	03/10/2017
	8	Commercial policy of access to quotes	Article 18(5) of MiFIR	03/10/2017
	9	Access to quotes	Article 18(7) of MiFIR	03/10/2017
	10	Price to be published by SIs in bonds and derivatives	Article 18 of MiFIR	15/11/2017
	11	Mandatory SI regime	Article 4(1)(20) of MiFID II and Articles 14 to 18 of MiFIR	03/06/2019
	11a	Voluntary SI regime	Article 4(1)(20) of MiFID II	03/06/2019
	11b	Quoting obligation for SI in non-TOTV instruments	Articles 14 to 18 of MiFIR	03/06/2019
	12	Quoting obligation for SIs in non-equity financial instruments	Article 18 of MiFIR	02/04/2019
	13	Impact for SIs of an instrument changing liquidity status in between the SI determination dates	Article 14 to 22 of MiFIR and Articles 12 to 17 of the Commission Delegated Regulation (EU) No 2017/565	02/04/2019
Data Reporting Services Providers	1	Reports from IF to APAS (time limit for sending the reports and clarification on possible disagreements between the investment firm and the APA)	Articles 7, 11, 20 and 21 of MiFIR	31/05/2017
	2	Assignment of MICs to APAs	Annex I of RTS 1 and Annex II of RTS 2	31/05/2017

	3	Timeline for approving connections to ARMs to NCAs	Article 61(3) of MiFID II	15/11/2017
	4	APA reports to competent authorities and ESMA	Article 2 of RTS 3	01/02/2019
Third country issues	1	Application of post-trade transparency requirements for transactions by EU investment firms on third-country trading venues	Articles 20 and 21 of MiFIR	31/05/2017
	2	Transactions outside the EU/ trades by non-EU firms	Articles 3,4, 6-11, 20, 21 of MiFIR as well as Article 4(1)(20) of MiFID II and 12 to 16 of the Commission Delegated Regulation (EU) No 2017/565	15/11/2017

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

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].

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[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 (EU) 2017/593 of 7 April 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 (OJ L 87, 31.3.2017, p. 500–517).
[4] Commission Delegated Regulation (EU) 2017/565 of 25 April 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 (OJ L 87, 31.3.2017, p. 1–83).
[5] Commission Delegated Regulation (EU) 2017/567 of 18 May 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 (OJ L 87, 31.3.2017, p. 90–116).
[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 (OJ L 331, 15.12.2010, p. 84).

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.

2 General Q&As on transparency topics [Last update: 03/06/2019]

Question 1 [Last update: 03/04/2017]

Do trading venues have to make available their arrangements covering asset classes beyond their current business?

Answer 1

No. Trading venues have to make available their arrangements for all asset classes for which they provide services but not beyond.

Question 2 [Last update: 15/11/2017]

a) *How are the flags specified in Table 4 of Annex I of RTS 1*[7] *and Table 3 of Annex II of RTS 2*[8] *applied? Is it possible to combine flags?*

b) *How is the trade ID used in the case of aggregation of transactions?*

c) *Tables 3 and 4 of Annex I of RTS 1 and tables 2 and 3 of Annex II of RTS 2 require the publication of some information using text fields and 4-character codes that are not suitable for binary digital feeds. How should trading venues and investment firms/ Approved Publication Arrangements (APAs) ensure that transactions are published as close to real-time as technically possible? Is it possible to transport and publish the real-time data via digital feeds or does the data have to be transported and published in the reporting format defined in Annex I of RTS 1 and Annex II of RTS 2?*

Answer 2

a) As a general approach, flags should only be applied in case the circumstances described in Table 4 of Annex 1 of RTS 1 or Table 3 of Annex II of RTS 2 apply. Where none of the specified circumstances apply, the transaction should be published without a flag.

   The flags 'CANC' and 'AMND' apply in the same way for equity and non-equity instruments as specified in Article 12(2) and (3) of RTS 1 and in Article 7(2) and (3) of RTS 2. The flags

[7] Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser (OJ L 87, 31.3.2017, p. 387–410).

[8] Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (OJ L 87, 31.3.2017, p. 229–349).

‘CANC’ and ‘AMND’ should not be used when publishing all the details of a transaction after the lapse of the supplementary deferrals for non-equity instruments.

While some of the circumstances described in Table 4 of Annex 1 of RTS 1 or Table 3 of Annex II of RTS 2 are mutually exclusive, it is possible that several circumstances apply at the same time, thereby requiring the use of more than one flag. Where a combination of flags is possible, the flags should be reported separated by commas.

Equity flags specified in Table 4 of Annex 1 of RTS 1

i. Descriptive flags: ‘BENC’, ‘ACTX’[9], ‘NPFT’, ‘TNCP’ and ‘SDIV’. They can be combined with each other, with the exception of ACTX which cannot be combined with NPFT, and with the flags under ii), iii), iv), v) and vi).

ii. Post-trade flag: ‘LRGS’. The application of the deferred publication is an option and not an obligation, therefore the ‘LRGS’ flag has to be used only in case of the effective use of the deferred publication. It can be applied alone or in combination with the flags under i), iii), iv), v) and vi)

iii. Pre-trade waiver flags: ‘RFPT’, ‘NLIQ’, ‘OILQ’ and ‘PRIC’. Those flags should only be used in case of the effective use of the reference price waiver or the negotiated transaction waiver. Transactions benefitting from a LIS waiver are not flagged as such. All pre-trade waivers flags are mutually exclusive. Pre-trade waiver flags can be combined with the flags under i), ii) and iv),

iv. Algorithmic trading flag: The ‘ALGO’ flag applies to transactions executed as a result of an investment firm engaging in algorithmic trading as defined in Article 4(1)(39) of MiFID II. The definition of algorithmic trading refers to generation of orders and not to the execution of transactions. In case an order generated automatically by an algorithm matches another order generated with human intervention and results in a transaction, the regulated market or the MTF should report the transaction with the mentioned flag. The flag can be combined with i), ii) and iii).

v. Flags related to Systematic Internalisers: ‘SIZE’, ‘ILQD’ and ‘RPRI’. They can be combined among each other and with the flags under i), ii) and vi).

vi. Flag related to reporting to APAs: ‘DUPL’. In accordance with Article 16(2) of RTS 13[10] APAs should require reporting firms that intend to make public the transaction via more than one APA to flag the original report for publication with ‘ORGN’, and all consecutive duplicative reports concerning the same transaction sent to other APAs as ‘DUPL’. The flag ‘ORGN’ is only used for the communication between the investment firm and the APA that receives the original report. APAs are not expected to use ‘ORGN’ when making a transaction public. However, in accordance with Article 16(1) of RTS 1 APAs should always use the flag ‘DUPL’ where the published trade is a duplicate, that is the

[9] ACTX should only be used when the buyer and the seller is the same investment firm acting on behalf of clients.
[10] Commission Delegated Regulation (EU) 2017/571 of 2 June 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the authorisation, organisational requirements and the publication of transactions for data reporting services providers (OJ L 87, 31.3.2017, p. 126–141).

transaction was flagged as 'DUPL' when the reporting firm sent it to the APA 'for publication. The flag can be combined with the equity flags under (i), (ii) and (v).

Non-equity flags specified in Table 3 of Annex II of RTS 2

i. Descriptive flags: 'BENC', 'ACTX'[11] and 'NPFT'. Descriptive flags can be combined with each other, with the exception of ACTX that cannot be combined with NPFT, as well as with flags under ii) and iv).

ii. Post-trade deferral flags: LRGS', 'ILQD' and 'SIZE'. The application of the deferred publication is an option and not an obligation. Post-trade deferral flags should only be used in case of the effective use of the deferred publication. In case of the use of supplementary deferrals under iv), these flags should be used after the supplementary deferral period has lapsed and all the details of the transactions on an individual basis are published. These flags can be combined among each other, except 'LRGS' + 'SIZE', and with flags under i), iii) and v).

iii. Package transaction flags: 'TPAC' and 'XFPH': These flags are mutually exclusive. In case of the use of supplementary deferral under iv), these flags should be used after the supplementary deferral period has lapsed and all the details of the transactions on an individual basis are published. These flags can be combined with flags under i), ii) and v).

iv. Supplementary deferral flags: 'LMTF', 'DATF', 'VOLO', 'FWAF', 'IDAF', 'VOLW' and 'COAF'. These flags are mutually exclusive. They cannot be combined with flags under i), ii), iii) and v). For components of a package transactions, only the supplementary deferrals providing for volume omission under Article 11(3)(a) and (b) of MiFIR should be used. In case a package transaction benefitted from a deferral, all components should use the applicable flags under ii) and iv) (except DATV, FWAF and IDAF) regardless of whether those components would have qualified for such a deferral if they had been traded outside a package.

v. Full details flags: 'FULF', 'FULA', 'FULV' and 'FULJ'. They should be reported once the deferral time period lapses and all the details of the transactions on an individual basis are published. These flags are mutually exclusive and should be combined with the post-trade deferral flags under ii). These flags can be combined with flags under i) and iii).

[11] ACTX should only be used when the buyer and the seller is the same investment firm acting on behalf of clients.

Scheme of non-equity post-trade publication

hidden information

1. Non-Equity Example: D+2 deferral (simple case Art. 8(1) of RTS 2 + Art. 11(1) of MiFIR)

Post-trade monitoring sequence (i.e. visualisation of a trading or data vendor screen)

Trade Date	Time of publication	Trading date and time	Identifier	Price	Venue ID	Price notation	Price Currency	Quantity	Notional amount	Notional currency	Venue of publication	Transaction i	Flags
17/06/2016		11:00:54	ES000000000	100	XXYY	Percentage	EUR	30	30,000,000	EUR	XXYY	A12345	
21/06/2016	no later than 19:00	17/06/16 -11:00:54	ES000000000	100	XXYY	Percentage	EUR	30	30,000,000	EUR	XXYY	A12345	applicable flags according to Article 8(1) of RTS 2: LRGS or SIZE, ILQD, TPAC or XFPH

2. Non-Equity Example: ordinary D+2 deferral (publication of limited details art. 11(1(a)(.) of RTS 2+ Art. 11(3)(a) of MiFIR)

Post-trade monitoring sequence (i.e. visualisation of a trading or data vendor screen)

Trade Date	Time of publication	Trading date and Time	Identifier	Price	Venue Identi	Price notation	Currency	Quantity	Notional amount	Notional currency	Venue of publication	Transaction id	Flags
17/06/2016	11:00:54	11:00:54	ES000000000	100	XXYY	Percentage	EUR				XXYY	A12345	LMTF
18/06/2016	no later than 19:00	17/06/16 -11:00:54	ES000000000	100	XXYY	Percentage	EUR	30	30,000,000	EUR	XXYY	A12345	FULF; LRGS, SIZE or ILQD; TPAC or XFPH

3. Non-Equity Example: ordinary D+2 deferral (daily aggregated form Art. 11(1)(a)(ii) of RTS 2 + Art. 11(3)(a) of MiFIR)

Post-trade monitoring sequence (i.e. visualisation of a trading or data vendor screen)

Trade Date	Time of publication	Trading date and Time	Identifier	Price	Venue Identi	Price notation	Currency	Quantity	Notional amount	Notional currency	Venue of publication	Transaction id	Flag
17/06/2016		11:00:54	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000			A12345	
17/06/2016		12:30:35	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000			A12346	
17/06/2016		13:45:30	ES0000000001	100	XXYY	Percentage	EUR	5	5,000,000			A12347	
17/06/2016		16:00:35	ES0000000001	100	XXYY	Percentage	EUR	7	7,000,000			A12348	
17/06/2016		17:01:15	ES0000000001	100	XXYY	Percentage	EUR	3	3,000,000			A12349	
20/06/2016	before 09:00	17/06/2016	ES0000000001	vwap =100	XXYY	Percentage	EUR	35	35,000,000	EUR	XXYY		DATF (transactions in a daily aggregated form)
21/06/2016	no later than 19:00	17/06/16- 11:00:54	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12345	FULA, LRGS
21/06/2016	no later than 19:00	17/06/16- 12:30:35	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12346	FULA, LRGS
21/06/2016	no later than 19:00	17/06/16- 13:45:30	ES0000000001	100	XXYY	Percentage	EUR	5	5,000,000	EUR	XXYY	A12347	FULA, ILQD
21/06/2016	no later than 19:00	17/06/16- 16:00:35	ES0000000001	100	XXYY	Percentage	EUR	7	7,000,000	EUR	XXYY	A12348	FULA, SIZE
21/06/2016	no later than 19:00	17/06/16- 17:01:15	ES0000000001	100	XXYY	Percentage	EUR	3	3,000,000	EUR	XXYY	A12349	FULA; ILQD

4. Non-Equity Example: extended period of deferral (Volume omission art. 11.1. b) of RTS 2 + art. 11.3 b) of MifiR Regulation)

Post-trade monitoring sequence (i.e. visualisation of a trading or data vendor screen)

Trade Date	Time of publication	Trading date and time	Identifier	Price	Venue Identi	Price notation	Price Currency	Quantity	Notional amount	Notional currency	Venue of publication	Transaction id	Flags
17/06/2016		11:00:54	ES000000000	100	XXYY	Percentage	EUR	30	30,000,000	EUR	XXYY	A12345	no publication
21/06/2016	no later than 19:00	17/06/16 -11:00:54	ES000000000	100	XXYY	Percentage	EUR				XXYY	A12345	VOLO
15/07/2016	before 09:00	17/06/16 -11:00:54	ES000000000	100	XXYY	Percentage	EUR	30	30,000,000	EUR	XXYY	A12345	FULF; LRGS, SIZE or ILQD; TPAC or XFPH

5. Non-Equity Example: extended period of deferral (weekly aggregated form Art. 11(1)(c) of RTS 2 + Art. 11(3)(c) of MiFIR)

Publication of all transactions 4 weeks after the publication of the aggregated transactions.

Trade Date	Time of publication	Trading date and Time	Identifier	Price	Venue Identi	Price notation	Currency	Quantity	Notional amount	Notional currency	Venue of publication	Transaction id	Flag
13/06/2016		11:00:54	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12345	
14/06/2016		12:30:35	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12346	
16/06/2016		13:45:30	ES0000000001	100	XXYY	Percentage	EUR	5	5,000,000	EUR	XXYY	A12347	
17/06/2016		16:00:35	ES0000000001	100	XXYY	Percentage	EUR	7	7,000,000	EUR	XXYY	A12348	
17/06/2016		17:01:15	ES0000000001	100	XXYY	Percentage	EUR	3	3,000,000	EUR	XXYY	A12349	
21/06/2016	before 09:00		ES0000000001	vwap =100	XXYY	Percentage	EUR	35	35,000,000	EUR	XXYY		FWAF (transactions in a weekly aggregated format
19/07/2016	before 09:00	13/06/16- 11:00:54	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12345	FULJ, LRGS
19/07/2016	before 09:00	14/06/16- 12:30:35	ES0000000001	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12346	FULJ, LRGS
19/07/2016	before 09:00	16/06/16- 13:45:30	ES0000000001	100	XXYY	Percentage	EUR	5	5,000,000	EUR	XXYY	A12347	FULJ, ILQD
19/07/2016	before 09:00	17/06/16- 16:00:35	ES0000000001	100	XXYY	Percentage	EUR	7	7,000,000	EUR	XXYY	A12348	FULJ, SIZE
19/07/2016	before 09:00	17/06/16- 17:01:15	ES0000000001	100	XXYY	Percentage	EUR	3	3,000,000	EUR	XXYY	A12349	FULJ, ILQD

6. Non-Equity Example: extended period of deferral (sovereign debt weekly aggregated form Art. 11(1)(d) of RTS 2 and Art. 11(3)(d) of MiFIR)

Post-trade monitoring sequence (i.e. visualisation of a trading or data vendor screen)

Trade Date	Time of publication	Trading date and Time	Identifier	Price	Venue Identi	Price notation	Currency	Quantity	Notional amount	Notional currency	Venue of publication	Transaction id	Flag
13/06/2016		11:00:54	ES0000000002	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12345	
14/06/2016		12:30:35	ES0000000002	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12346	
16/06/2016		13:45:30	ES0000000002	100	XXYY	Percentage	EUR	5	5,000,000	EUR	XXYY	A12347	
17/06/2016		16:00:35	ES0000000002	100	XXYY	Percentage	EUR	7	7,000,000	EUR	XXYY	A12348	
17/06/2016		17:01:15	ES0000000002	100	XXYY	Percentage	EUR	3	3,000,000	EUR	XXYY	A12349	
21/06/2016	before 09:00		ES0000000002	vwap =100	XXYY	Percentage	EUR	35	35,000,000	EUR	XXYY		IDAF

7. Non-Equity Example: extended period of deferral combined with volume omission (sovereign debt weekly aggregated form Art. 11(1)(b)+ (d) of RTS 2 + Art. 11(3) of MiFIR)

Trade Date	Time of publication	Trading date and Time	Identifier	Price	Venue Identi	Price notation	Currency	Quantity	Notional amount	Notional currency	Venue of publication	Transaction id	Flag
13/06/2016		11:00:54	ES0000000002	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12345	
15/06/2016	no later than 19:00	13/06/16- 11:00:54	ES0000000002	100	XXYY	Percentage	EUR				XXYY	A12345	VOLW
14/06/2016		12:30:35	ES0000000002	100	XXYY	Percentage	EUR	10	10,000,000	EUR	XXYY	A12346	
16/06/2016	no later than 19:00	14/06/16- 12:30:35	ES0000000002	100	XXYY	Percentage	EUR				XXYY	A12346	VOLW
16/06/2016		13:45:30	ES0000000002	100	XXYY	Percentage	EUR	5	5,000,000	EUR	XXYY	A12347	
20/06/2016	no later than 19:00	16/06/16- 13:45:30	ES0000000002	100	XXYY	Percentage	EUR				XXYY	A12347	VOLW
17/06/2016		16:00:35	ES0000000002	100	XXYY	Percentage	EUR	7	7,000,000	EUR	XXYY	A12348	
21/06/2016	no later than 19:00	17/06/16- 16:00:35	ES0000000002	100	XXYY	Percentage	EUR				XXYY	A12348	VOLW
17/06/2016		17:01:15	ES0000000002	100	XXYY	Percentage	EUR	3	3,000,000	EUR	XXYY	A12349	
21/06/2016	no later than 19:00	17/06/16- 17:01:15	ES0000000002	100	XXYY	Percentage	EUR				XXYY	A12349	VOLW
17/07/2016	before 09:00		ES0000000002	vwap =100	XXYY	Percentage	EUR	35	35,000,000	EUR	XXYY		COAF
the extended period of deferral would last until 15/07/16 + following Tuesday													

b) Article 11(3) of MiFIR allows competent authorities to make use of supplementary deferrals in conjunction with an authorisation for deferred publication. One of the possibilities for a supplementary deferral is the publication of transactions in an aggregated form.

Where several transactions are published in such an aggregated form, this report should not include a Transaction identification code (Trade ID) as required under Table 2 of Annex II of RTS 2 since this report is only meant to provide temporary information pending the publication of the full details of the transactions on an individual basis. Those subsequent single-transaction reports should incorporate a trade ID as required for all other transactions.

c) MiFIR and RTS 1 and RTS 2 intend to enable data-users to consume highly reliable and comparable sets of data in a fragmented market. This includes the trade flags and details defined by ESMA in Annex I of RTS 1 and Annex II of RTS 2. It is therefore important to ensure that trading venues, market operators and APAs efficiently disseminate unambiguous content.

RTS 1 and 2 do not require the use of a specific technical format (such as XML) for transporting and making data public. Encoding data feeds, including using binary digital feeds, for transportation purposes is therefore possible as long as it contributes to keeping the speed of transmission as close to real time as possible. What matters for meeting the post-trade transparency requirements in MiFIR and RTS 1 and 2 is that post-trade data is published as soon as possible and that the details and flags specified in Annex II of RTS 1 and 2 are used.

Trading venues and APAs have to make sure that at the point of converting digital real-time feed into human readable data points the details and flags as specified in Annex I of RTS 1 and Annex II of RTS 2 are used.

Question 3 [Last update: 03/04/2017]

a) Clarification on which investment firm has to report a transaction and on who is in charge of reporting back-to-back trades (Article 12(4), (5) and (6) of RTS 1 and Article 7(5), (6) and (7) of RTS 2)

b) In the case of OTC transactions that are reported to an APA by the investment firm selling the financial instrument, is it possible for the investment firm to outsource the post-transparency reporting requirement?

Answer 3

a) MiFIR requires investment firms to make public, through an APA, post-trade information in relation to financial instruments traded on a trading venue. When a transaction is executed between an investment firm and a client of the firm that is not an investment firm, the obligation rests only on the investment firm.

However, when a transaction is executed between two MiFID investment firms outside the rules of a trading venue, Article 12(4) of RTS 1 and Article 7(5) of RTS 2 clarify that only

the investment firm that sells the financial instrument concerned makes the transaction public trough an APA.

In addition, according to Article 12(5) of RTS 1 and Article 7(6) of RTS 2 if only one of the investment firms is a systematic internaliser in the given financial instrument and it is acting as the buying firm, only that firm should make the transaction public trough an APA.

The following table presents the possible constellations and clarifies who is in charge of making the transaction public via an APA:

Trade	Buyer	Seller	IF that reports to APA
Trade 1	IF A	Client of IF A	IF A
Trade 2	Client of IF A	IF A	IF A
Trade 3	IF A	IF B	IF B
Trade 4	SI A	IF B	SI A
Trade 5	IF A	Client of IF B (IF B on behalf of a client)	IF B

According to Article 12(6) of RTS 1 and Article7(7) of RTS 2 two matching trades entered at the same time and for the same price with a single party interposed should be published as a single transaction. Following the general rule, the seller should report the transaction. The party that interposes its own account should not report the trade, except if the seller is not an investment firm. The following table clarifies who is in charge of making the transaction public through an APA:

Case	Trade	Amount	Price	Buyer	Seller	IF that reports to the APA
1	Trade 1	500	20	IF A	IF B	IF B
	Trade 2	500	20	IF C	IF A	Not reported
2	Trade 1	500	20	IF A	Client of IF A	IF A
	Trade 2	500	20	Client of IF A	IF A	Not reported
3	Trade 1	500	20	IF A	IF B	IF B
	Trade 2	500	21	IF C	IF A	IF A

- Case 1: IF A is interposing its own account with no difference in prices. Trade 1 and 2 should be reported as a single transaction by IF B.

- Case 2: IF A is interposing its own account with no difference in price. Trade 1 and 2 should be reported as a single trade by IF A.

- Case 3: The price in trade 1 and 2 is not the same. The conditions for a matched trade are therefore not met and both transactions should be reported by the seller.

There are cases where the determination of the seller needs to be clarified. For the purposes of reporting the transaction to an APA the seller should be the same as specified in field 16 of Table 2 of Annex I of RTS 22[12]. Therefore:

i. In case of options and swaptions, the buyer shall be the counterparty that holds the right to exercise the option and the seller should be the counterparty that sells the option and receives a premium.

ii. In case of futures, forwards and CFDs other than futures and forwards relating to currencies, the buyer should be the counterparty buying the instrument and the seller the counterparty selling the instrument.

iii. In the case of swaps relating to securities, the buyer should be the counterparty that gets the risk of price movement of the underlying security and receives the security amount. The seller should be the counterparty paying the security amount.

iv. In the case of swaps related to interest rates or inflation indices, the buyer shall be the counterparty paying the fixed rate. The seller should be the counterparty receiving the fixed rate. In case of basis swaps (float-to-float interest rate swaps), the buyer should be the counterparty that pays the spread and the seller the counterparty that receives the spread.

v. In the case of swaps and futures and forwards related to currencies and of cross currency swaps, the buyer should be the counterparty receiving the currency which is first when sorted alphabetically by ISO 4217 standard and the seller should be the counterparty delivering this currency.

vi. In the case of swap related to dividends, the buyer should be the counterparty receiving the equivalent actual dividend payments. The seller is the counterparty paying the dividend and receiving the fixed rate.

vii. In the case of derivative instruments for the transfer of credit risk except options and swaptions, the buyer should be the counterparty buying the protection. The seller is the counterparty selling the protection.

[12] Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities (OJ L 87, 31.3.2017, p. 449–478).

viii. In case of derivative contracts related to commodities, the buyer should be the counterparty that receives the commodity specified in the report and the seller the counterparty delivering this commodity.

ix. In case of forward rate agreements, the buyer should be the counterparty paying the fixed rate and the seller the counterparty receiving the fixed rate.

b) Yes, the investment firm can outsource the reporting of OTC transactions to an APA to a third party. However, the investment firm will remain fully responsible for discharging its obligations under MiFID II/MiFIR. Moreover, in case of outsourcing the reporting of OTC transactions to a third party, the investment firm has to ensure that the third party informs the APA of the transparency regime applicable to the investment firm subject to the reporting obligation. This ensures that the APA is in a position to make the transaction public using the transparency regime applicable to the investment firm subject to the reporting obligation.

Question 4 [Last update: 03/04/2017]

Is the transparency regime in MiFIR applicable to primary market transactions?

Answer 4

The transparency obligations should not be applicable to primary market transactions such as issuance, allotment or subscription for securities and the creation and redemption of units in ETFs.

Question 5 [Last update: 03/04/2017]

Does an ISIN need to be included for pre-trade quote publication?

Answer 5

Pre-trade transparency information should allow identifying unequivocally the financial instrument to which the information published refers. ISINs are one of the available ways to ensure the unequivocal identification of a financial instrument. However, ESMA recognises that ISINs may not always be available when providing a quote. Trading venues and systematic internalisers are free to use other ways for identifying instruments for pre-trade transparency purposes as long as the financial instrument can be unequivocally identified.

Question 6 [Last update: 15/11/2017]

Where the price of a transaction is not available at the time of execution (e.g. the Net Asset Value (NAV) for ETFs), how can investment firms fulfil their post-trade transparency obligations under Articles 20 and 21 of MiFIR and their transaction reporting obligations under Article 26 of MiFIR for those transactions?

Answer 6

If the price of a transaction is not available at the time of execution, investment firms should fulfil the applicable reporting obligations using 'PNDG' as price, specified in the field 'Price' of table 3 of Annex I of RTS 1, table 2 of Annex II of RTS 2 and/or field 33 of table 2 of Annex I of RTS 22. As soon as the price of the transactions (including the NAV in the particular case of ETFs) becomes available, investment firms should cancel the original reports with the 'PNDG' price (using the cancellation flag for post-trade transparency publication purposes) and publish new reports / send new transaction reports pertaining to the given transactions using the actual price that became available (using the amendment flag for post-trade transparency publication purposes). The date and time specified in the field "Trading date and time" of table 3 of Annex I of RTS 1, table 2 of Annex II of RTS 2 and/or field 28 of table 2 of Annex I of RTS 22 should always refer to the original date and time of the execution.

Question 7 [Last update: 14/11/2018]

a) *When should the operator of an RFQ system provide pre-trade transparency?*

b) *Which quotes should be made public in a RFQ system?*

c) *Can an RFQ system be construed as a two-step process where (i) an RFQ is initiated and quotes are received in response to that RFQ, and (ii) the transactions are ultimately executed following a bilateral confirmation with one of the respondents?*

Answer 7

a) Trading venues are responsible for designing their RFQ systems in compliance with the pre-trade transparency requirements defined in MiFIR and specified in Annex I of RTS 1 and RTS 2. The arrangements used may differ depending on the approach chosen by individual trading venues. Such approaches might include arrangements where trading interests become executable after a pre-defined period of time but would, in any circumstances, require the indications of interest to be disclosed no later than when they become actionable and in any case before the conclusion of a transaction. However, the conclusion of a transaction is not a condition for the publication of pre-trade transparency. Therefore, pre-trade transparency should also apply where a quote provided on request, including actionable indications of interest, is not acted upon.

   The disclosure of the pre-trade quotes or actionable indications of interest only at the time of execution would not be consistent with the obligations set in Annex I of RTS 1 and 2.

b) A quote received in response to an RFQ that contains all the necessary information to agree on a trade and therefore complies with the definition of an actionable indication of

interest as defined in Article 2(1)(33) of MiFIR should be made pre-trade transparent. The requirement within Annex I of RTS 1 and RTS 2 that quotes should be made public "no later than when they become executable" is simply meant to ensure that all quotes are treated equally for the purpose of pre-trade transparency and can be published all at the same time. In any case the concept of executable quotes should not be interpreted in a way that would preclude quotes that qualify as A-IOIs to be made pre-trade transparent.

c) No, Annex I of RTS 1 and RTS 2 define RFQ systems as systems "where a quote or quotes are provided in response to a request for quote submitted by one or more members or participants. The quote is executable exclusively by the requesting member or participant. The requesting member or participant may conclude a transaction by accepting the quote or quotes provided to it on request". Therefore, the definition does not foresee the possibility to privately negotiate with one RFQ respondent to agree on the final details of the transaction. If such a bilateral negotiation is necessary it should be considered as a separate trading process outside the initial RFQ session.

Question 8 [Last update: 03/10/2017]

Do real time post-trade transparency requirements apply equally to trading venues and systematic internalisers?

Answer 8

Yes, the requirements in Articles 6 and 10 of MiFIR as further specified in Article 14 of RTS 1 and Article 7 of RTS 2 apply to both trading venues and investment firms. ESMA expects that trading venues and investment firms, in particular systematic internalisers, that use expedient systems publish transactions as close to real time as technically possible. In particular, since systematic internalisers are competing with trading venues over customers' order flow, it is important to provide for a level playing field. Therefore, trading venues and systematic internalisers using similar technology and systems should process transactions for post-trade publication at the same speed.

Question 9 [Last update: 15/11/2017]

a) Are trading venues, APAs and CTPs required to make data available free of charge for any length of time 15 minutes after publication?

b) 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?

Answer 9

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

b) 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. 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.

   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. 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.

   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.

Question 10 [Last update: 14/11/2018]

How should trading venues, APAs and CTPs make data (pre- and/or post-trade data) available free of charge 15 minutes after publication and ensure non-discriminatory access to the information? What practices are not compatible with the requirement to make data available free of charge and ensure non-discriminatory access to the information?

Answer 10

ESMA expects trading venues, APAs and CTPs to make post-trade data, as well as pre-trade data, available free of charge 15 minutes after publication in an easily accessible manner for all potential users using a format that can be easily read, used and copied. This is without prejudice to Q&A 9(b) which allows, in certain cases, to charge fees or other similar restrictions on data. Furthermore, trading venues, APAs and CTPs are required to ensure the non-discriminatory access to pre- and post-trade data, including for data made available free of charge.

Article 14 of RTS 13 requires APAs and CTPs to publish data in a machine readable way. In order to ensure that the information published by APAs and trading venues can be effectively and efficiently used by the public, ESMA expects that trading venues follow similar publication standards and publish data in a machine-readable way. In addition, APAs, CTPs and trading venues should also provide the data in a format that can be understood by an average reader.

ESMA considers that any practice designed to circumvent the provisions in Article 13(1) of MiFIR and Articles 64(1) and 65(1) and (2) of MiFID II is not compatible with the requirement to make data available free of charge 15 minutes after publication and ensure non-discriminatory access to the information. This includes, but is not limited to, the following practices:

- Imposing restrictions on access to the published data

In order to ensure that all potential users can access the information made available free of charge 15 minutes after publication, trading venues, APAs and CTPs should make clear instructions to the public on their website on how and where to access the data. The post-trade data should be available to anybody free of charge and in a format which can be understood by the average reader.

ESMA considers that publishing information on a website that is not accessible to everybody imposes restrictions on access to the data and does not meet the requirement for making information available free of charge. Similarly, the publication of data through third parties that do not charge specific fees for the relevant data but raise regular, for instance monthly or yearly, fees for subscribing to their services, does not meet the requirement to make information available free of charge. Furthermore, ESMA is of the view that allowing access to the data via a human interface only from ex ante registered IP addresses does not meet the requirement to make information available to the public free of charge. However, such a restriction is acceptable for data provided in a machine readable way.

- Publishing information in a format that prevents users to read, use and copy the information

Trading venues, APAs and CTPs should publish information in an electronic format that can be directly and automatically read by a computer, and that can be accessed, read, used and copied by any potential user through computer software that is free of charge and publicly available.

ESMA does not consider that publishing data as an image (i.e. in such a way that the user cannot copy the data in a format that can be read by a computer) or requiring the purchase of a specific software for downloading, processing or reading the information meets the requirement of making data available free of charge.

- Requiring market participants to submit search queries in order to access data

The data made available free of charge should be published in a similar format as real-time data published on a reasonable commercial basis.

ESMA does not consider that offering only publication arrangements whereby market participants are required to submit search queries in order to access limited portions of the data (e.g. ISIN-by-ISIN searches, limited time periods) meet the requirement of making data available free of charge, but such search queries could exist in addition.

- Deleting data shortly after publication

The data made available free of charge should replicate the information published on a reasonable commercial basis but with a 15 minutes delay. ESMA is of the view that the information should be available for any party to initiate a retrieval of the data for a period of at least 24 hours from the publication. It is not reasonable to have the data available for a period that is not long enough for it to be downloaded reliably either on an ad-hoc or in a repeatable manner

- No publication of post-trade data on transactions benefitting from a deferral

ESMA recalls that the obligation to make available post-trade data free of charge 15 minutes after publication applies also to transactions benefitting from a deferral. ESMA therefore expects that information on those transactions is made available on the same conditions as information on transactions not subject to deferred publication.

Question 11 [Last update: 29/05/2018]

How should the field 'publication date and time' be populated in the case of the use of deferrals or for amendments to trade reports?

Answer 11

The field ‘publication date and time’ in table 3 of Annex I of RTS 1 and table 2 of Annex II of RTS 2 should always refer to the effective date and time of the publication of the transaction. In the case of the use of deferrals, the field ‘publication date and time’ should be populated with the effective date of the publication of information on that transaction, i.e. after the lapse of the deferral.

Concerning non-equity instruments benefitting from a supplementary deferral, this implies that for the first publication of limited information the field ‘publication date and time’, should be populated with the effective date and time of the publication of limited information on the transaction. Once the deferral period has lapsed, the information in the field ‘publication date and time’ should reflect the effective time of publication of the full information. ESMA does not expect trading venues, APAs and CTPs to use the flags ‘CANC’ and ‘AMND’ when publishing details of a transaction after a supplementary deferral has lapsed.

In case the trading venue, APA or CTP made an error when populating the field ‘publication date and time’, should the flags ‘CANC’ and ‘AMND’, as provided in Article 12(3) of RTS 1 and Article 7(3) of RTS 2, be used.

Question 12 [Last update: 29/05/2018]

How should voice trading systems apply the pre-trade transparency requirements of Article 8 of MiFIR?

Answer 12

Trading venues operating voice trading systems should ensure that pre-trade information is promptly made public through electronic means on a continuous basis during normal trading hours. The technical arrangements used by the trading venue should ensure that the pre-trade information advertised through its systems is current and that it is published as soon as it becomes actionable and in any case before the possible matching of the quotes occurs. However, the conclusion of a transaction is not a condition for the publication of pre-trade transparency. Therefore, pre-trade transparency should also apply where a quote provided on request, including actionable indications of interest, is not acted upon.

The voice system must be effectively operated by the trading venue to qualify as a trading protocol under Annex I of RTS 2. For example, an open outcry system maintained by a trading venue would qualify as a voice trading system. The venue would provide the facility where members can interact and conclude transactions through voice negotiation. The venue, by operating the voice trading system, would have access to and oversight over how trading interest is broadcasted, which will make possible the immediate publication of bids and offers and the attaching volumes and in any case before the possible matching of the quotes occurs.

Question 13 [Last update: 03/06/2019]

In case of a corporate action where a traded ISIN is replaced with a new ISIN, how should the new ISIN be reported to FIRDS and FITRS?

Answer 13

In case of a corporate action where a traded ISIN is replaced with a new ISIN, the ISIN being replaced should be reported as terminated and the new ISIN should be reported as a newly admitted to trading or newly traded financial instrument in the ESMA IT systems (both in FIRDS and FITRS).

In particular, reporting entities are required to provide under field 11 of RTS 23[13] ("Date of first admission to trading or date of first trade") the date when the new ISIN was first admitted to trading or first traded on their platform, i.e. following the corporate action. The relevant competent authority for this financial instrument will be determined on this basis.

[13] Commission Delegated Regulation (EU) 2017/585 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the European Securities and Markets Authority and competent authorities (OJ L 87, 31.3.2017, p. 368–381).

3 Equity transparency [Last update: 02/10/2019]

Question 1 [Last update: 03/04/2017]

Are primary market transactions, block trades (accelerated book-building) and share buy-backs subject to trading obligation for shares?

Answer 1

Primary market transactions (see Q&A 4 within the section on General Q&As on transparency topics) are not subject to the MiFIR transparency requirements and the trading obligation for shares. Block trades (accelerated book-building) and share buy backs on the other hand are secondary market transactions and therefore subject to the trading obligation for shares.

Question 2 [Last update: 15/11/2017]

What is the scope of the trading obligation where there is a chain of transmission of orders?

Answer 2

Article 23(1) of MiFIR determines the scope of the trading obligation for shares admitted to trading on a regulated market or traded on a trading venue by requiring investment firms to ensure that trades they undertake in shares take place on a regulated market, MTF, systematic internaliser or equivalent third country venue. Where there is a chain of transmission of orders concerning those shares all EU investment firms that are part of the chain (either initiating the orders or acting as brokers) should ensure that the ultimate execution of the orders complies with the requirements under Article 23(1) of MiFIR.

As an example, where an EU investment firm transmits an order for a share admitted to trading on a regulated market or traded on a trading venue to an EU investment firm that subsequently passes it on to a non-EEA firm, the EU investment firms should ensure the trade is undertaken in accordance with the requirements set out in Article 23 of MiFIR, i.e. on a regulated market, MTF, systematic internaliser or equivalent third country venue.

Question 3 [Last update: 04/01/2019]

In the case the transparency parameters (i.e. the most relevant market in terms of liquidity under Article 4 of MiFIR, the determination of the liquid market under Article 2(1)(17)(b) of MiFIR, the average daily turnover (ADT) for the identification of the large in scale thresholds for pre-trade and post-trade transparency under Articles 4(1)(c), 7(1) and 20(2) of MiFIR and the standard market size – SMS under Article 14(2) and (4) of MiFIR) are not available, what are the relevant parameters to be applied until they are published by ESMA or the relevant non-delegating NCA?

Answer 3

When one or more of the parameters related to the transparency calculations are not published by ESMA or the relevant non-delegating NCA the following should be applied until the publication for all parameters is available:

- the instrument should be deemed not to have a liquid market;
- the pre-trade and post-trade LIS thresholds should be those related to the smallest ADT band, i.e. ADT < 50 000 provided in:
    - Tables 1 and 4 of Annex II of RTS 1 for shares and depositary receipts;
    - Tables 2 and 6 of Annex II of RTS 1 for certificates and other similar financial instruments;
- the standard market size (SMS) is not applicable since it should be determined only for instruments having a liquid market.

When the most relevant market in terms of liquidity under Article 4 of MiFIR is not published by ESMA or the relevant non-delegating NCA any trading venue on which the instrument is admitted to trading can be considered to be the most relevant market in terms of liquidity.

The transparency parameters should apply from the day following publication.

Question 4 [Last update: 04/01/2019]

When an executing broker executes a risk trade following the receipt of a request for market data (RFMD) from a client and then gives up that risk trade to another broker (e.g. a prime broker), how should this RFMD give-up be reported?

Answer 4

An RFMD give-up/give-in trade flow is characterised by being executed as a VWAP trade. As such, the trade should be defined as a transaction not contributing to the price discovery process as defined in Article (2)(a) of Commission Delegated Regulation 2017/587. Therefore it should be reported using 'XOFF' as the Venue of Execution field and using the 'TNCP' flag.

Question 5 [Last update: 02/10/2019]

Which LIS threshold should be used to exclude post-trade large-in-scale transactions when calculating the turnover to be used for the average value of transactions calculation, which determines the SMS?

Answer 5

Article 11 of RTS 1 specifies that:

- the SMS should be based on the average value of transactions (AVT) of a particular financial instrument. This value should be calculated by dividing the total turnover for a

financial instrument, comprising transactions executed on trading venues and OTC, by the total number of transactions executed in that financial instrument in the period considered as set out in Article 17(4);

- the transactions that are LIS and have benefitted from a deferral, should be excluded from the total turnover and the number of transactions by using the thresholds set out in Tables 4, 5 and 6 of Annex II for shares and depositary receipts, ETFs and certificates respectively. However, for shares, depositary receipts and certificates only the highest threshold for the related average daily turnover (ADT) band in Tables 4 and 6 of Annex II should be used to identify those transactions. For ETFs the highest threshold in Table 5 should be used to identify those transactions.

Reporting entities are required to report to the Financial Instruments Transparency System (FITRS) turnover and number of transactions related to transactions executed from 1 January 2019 onwards in compliance with this Q&A.

4 Non-equity transparency [Last update: 05/12/2019]

Question 1 [Last update: 31/05/2017]

How is the term "an underlying physical asset" in the context of the definition of an Exchange For Physical (EFP) to be understood? Can a financial instrument be considered as a physical asset?

Answer 1

ESMA is aware that currently many trading venues consider also financial instruments as an eligible underlying for EFPs. However, the definition of EFPs in Article 2(1)(48) MiFIR is narrow. Underlying physical assets in that sense only include truly physical assets, such as commodities, but do not include financial instruments as listed under section C of Annex I of MiFID II. In consequence, a financial instrument can never be a physical asset for the purpose of the EFPs. Orders/transactions composed of two financial instruments may meet the definition for other package orders/transactions as specified in Article 2(1)(49)(b) and (50)(b) of MiFIR and thereby be eligible for a waiver/deferral.

Question 2 [Last update: 03/10/2017]

a) *Which deferral regime applies to investment firms trading OTC?*

b) *Is it relevant in what Member State the relevant instrument is traded or admitted to trading on a trading venue?*

Answer 2

a) The deferral regime applicable to OTC trades is determined by the deferral regime applicable in the Member State where the investment firm that has to make the transaction public is established. The location of the APA through which a transaction is made public is not relevant. Where it is for an EU branch to make a transaction public, the deferral regime applicable in the Member State where that branch is located should apply.

b) No, for OTC transactions only the deferral regime applicable to the investment firm that has to make a transaction public is relevant.

Question 3 [Last update: 03/10/2017]

Publication of transactions in aggregated form (Article 11(3)(a) of MiFIR, Article 11(1)(a)(ii) of RTS 2): What happens if there are less than five transactions executed on the same day? Does this imply that no publication has to be made?

Answer 3

Article 11(3)(a) of MiFIR allows NCAs to request, in conjunction with an authorisation for deferred publication, the publication of several transactions in aggregated form during the time period of deferral. This requirement is further specified in Article 11(1)(a)(ii) of RTS 2 which requires that, where NCAs make use of this supplementary deferral requirement, transactions should be published in an aggregated form where a minimum number of 5 transactions have been executed on the same day. Therefore, in case less than five transactions were executed on the same day, no details of those transactions in an aggregated form have to be made public.

Question 4 [Last update: 15/11/2017]

a) *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?*

b) *Can package orders/transactions also include equity instruments? If yes, how is pre- and post-trade transparency applied?*

c) *When does an investment firm apply the systematic internaliser obligations on a package order level?*

d) *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?*

e) *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)?*

f) *Which party to a package transaction is required to make the transactions public via an APA?*

g) *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)?*

h) *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?*

i) *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?*

Answer 4

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.

   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.

b) 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.

c) 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. 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.

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

e) 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.

   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. 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.

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

g) 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. 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.

h) 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.

i) 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.

Question 5 [Last update: 03/10/2017]

What are normal trading hours for non-equity instruments? Are investment firms allowed to postpone publication of transactions until the opening of the next trading day in respect of trades in non-equity instruments taking place outside of normal trading hours?

Answer 5

Normal trading hours for non-equity instruments should be set on basis of the daily trading hours of trading venues trading non-equity instruments. Normal trading hours may therefore be different for different (classes of) non-equity instruments.

Transactions that take place on a given trading venue should be made public as close to real-time as possible. Transactions in a non-equity instrument that take place outside a trading venue during the normal trading hours of the trading venues trading that instrument should be published as close to real-time as possible. Where more than one trading venue trades that instrument, investment firms/APAs are expected to check whether the transaction took place within the daily trading hours of any of those trading venues. Transactions that take place outside the daily trading hours of trading venues trading that instrument should be made public before the opening of trading on those trading venues on the next trading day.

Question 6 [Last update: 15/11/2017]

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?

Answer 6

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.

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.

Question 7 [Last update: 15/11/2017]

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?

Answer 7

Where CAs 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.

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.

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. 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.

Question 8 [Last update: 15/11/2017]

How is the concept of "class of bonds" to be understood in respect of the temporary suspension of transparency?

Answer 8

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.

Question 9 [Last update: 15/11/2017]

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?

Answer 9

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.

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.

Question 10 [Last update: 04/10/2017]

In case the liquidity assessment for a bond under Article 2(1)(17)(a) of MIFIR as further specified in Article13(18), (19) and (20) of RTS 2 is not published, what is the liquidity status of the bond to be applied until it is published by ESMA or the relevant non-delegating NCA?

Answer 10

In case the necessary liquidity assessment for a bond is not published in FITRS, the bond should be considered illiquid.

More specifically, a bond should be deemed illiquid if:

- in the case the necessary liquidity assessment for the bond is the one based on issuance size under Article 2(1)(17)(a) of MIFIR (further specified under Article13 (19) and (20) of RTS 2 because the bond is newly admitted to trading or first traded and such assessment is not published in FITRS; or

- in the case the necessary liquidity assessment for the bond is the one of the latest quarterly liquidity assessment based on the trading activity defined under Article 2(1)(17)(a) of MIFIR (further specified under Article 13(18) of RTS 2) when the bond is no longer considered a newly admitted to trading or first traded bond and such assessment is not published in FITRS.

Question 11 [Last update: 18/12/2017]

How should the "nominal value" of bonds referred to in Table 4 of Annex II of RTS 2 be calculated?

Answer 11

The total "nominal value" of debt instruments traded referred to in Table 4 of Annex II of RTS 2 is relevant for the calculation of:

- the pre-trade and post-trade LIS and SSTI parameters as referred to in Article 13(8) of RTS 2; and;

- the calculation of the average daily notional amount as specified in section 1(5) of Annex III, which is one of the criteria to determine if a bond has a liquid market.

The total "nominal value" should be calculated according to the following formula: Nominal value * Number of instruments. As an example:

- Price of transaction: 90 (percentage points per 100 of bond nominal value),
- Nominal value: EUR 1000,
- Number of instruments: 50.

The nominal value should equal to EUR 1000 x 50 = EUR 50000. The price is not used for the calculation.

Question 12 [Last update: 28/03/2018]

Does the trading obligation for derivatives as specified in Commission Delegated Regulation (EU) 2017/2417[14] apply to non-par swaps?

Answer 12

No, the trading obligation for derivatives only applies to interest rate swaps as specified in table 1-3 of Commission Delegated Regulation (EU) 2017/2417 that are traded at par. Non-par swaps, including swaps traded at market-agreed-coupon (MAC), are currently not subject to the trading obligation for derivatives.

Question 13 [Last update: 04/10/2018]

How should derivatives on derivatives be treated pursuant to RTS 2 for the purpose of determining whether they have a liquid market and, accordingly, the SSTI and LIS thresholds?

Answer 13

A derivative on a derivative that is not further specified in the sub-asset classes set out in RTS 2, e.g. a future on an equity future should be classified in the same sub(-asset) class as the underlying derivative contract for the purpose of determining whether it has a liquid market as well as the relevant SSTI and LIS thresholds pursuant to RTS 2. This is without prejudice to the classification of derivatives on derivatives that are specifically identified in RTS 2, such as swaptions.

Question 14 [Last update: 04/10/2018]

[14] Commission Delegated Regulation (EU) 2017/2417 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on the trading obligation for certain derivatives, OJ L 342, 22.12.2017, p. 48.

What types of derivatives can benefit from the pre-trade transparency waiver provided under Article 9(1)(c) of MiFIR?

Answer 14

Only derivatives that are both (i) not subject to the trading obligation specified in Article 28 of MiFIR and (ii) for which there is not a liquid market can benefit from the pre-trade transparency waiver set out under Article 9(1)(c) of MiFIR.

Question 15 [Last update: 04/01/2019]

In case the large in scale (LIS) and size specific to the instrument (SSTI) thresholds for pre-trade and post-trade transparency for a bond are not published by ESMA or the relevant non-delegating NCA, what would be the applicable thresholds?

Answer 15

When:

- the LIS for pre-trade transparency under Article 9(1)(a) of MIFIR as further specified in Article 3 of RTS 2;
- the SSTI for pre-trade transparency under Articles 8(4) and 9(1)(b) of MIFIR as further specified in Article 5 of RTS 2;
- the LIS for post-trade transparency under Article 11(1)(a) of MIFIR as further specified in Article 9 of RTS 2;
- the SSTI for post-trade transparency under Article 11(1)(c) of MIFIR as further specified in Article 10 of RTS 2.

for a bond are not published in FITRS or on the ESMA website, the pre-trade transparency thresholds to be applied are the pre-trade threshold floors specified in Table 2.3 of Annex III in RTS 2 for both the pre-trade and the post-trade transparency LIS and SSTI.

This rule should be applied in all cases when one or more of the four thresholds are not published in FITRS.

The transparency parameters should apply from the day following publication.

Question 16 [Last update: 02/04/2019]

Are reverse convertible bonds (i.e bonds that can be converted to cash, debt, or equity at the discretion of the issuer at set dates), zero coupon bonds (i.e bonds issued at discount) and bonds that are issued as fixed rate with an initial coupon rate equal to 0 (that can also be increased in the course of the life of the bond) considered to be Money Market Instruments (MMIs) as per Article 11 of CDR 2017/565?

Answer 16

Zero-coupon bonds should only be considered MMIs if they have a maturity at issuance of 397 days or less.

Reverse convertible bonds and bonds which are issued as fixed rate with a coupon rate equal to 0 (that can also be increased in the course of the life of the bond) should never be considered as MMIs even if they have a maturity at issuance of 397 days or less.

Question 17 [Last update: 02/04/2019]

Regarding a non-equity transaction concluded outside the rules of a trading venue pursuant to a customary prime brokerage arrangement (PB transaction), where a client of a prime broker (PB) agrees on the terms of a PB intermediated trade with an executing broker (EB) and then the client and/or the EB gives up the trade to the PB for its acceptance,

a) who should make public the post-trade information?

b) which should be the timestamp of the transaction (field 'trading date and time' of table 2 of Annex II of RTS 2)?

Answer 17

a) Article 7(7) of RTS 2 specifies that investment firms shall take all reasonable steps to ensure that the transaction is made public as a single transaction. For that purpose, two matching trades entered at the same time and for the same price with a single party interposed shall be considered to be a single transaction.

   In this respect, ESMA considers that under a PB transaction, the PB enters into matching transactions with the PB client and with the EB and therefore the above legal provision is applicable. ESMA considers that given the structure of PB transactions the EB should always be charged with making the post-trade information public. This approach avoids double-reporting of PB transactions and reflects the current market practice.

   According to the Q&A above on "Which investment firm reports", the seller to the transaction should report the transaction. The interposing party (i.e. the PB in this case) should not report the transaction unless the seller is not an investment firm. While it may be the case that the EB is not the seller to the transaction, ESMA considers that it should be nevertheless the duty of the EB to make those transactions public. This also reflects the current practice that many clients of PBs, (where they are investment firms) or the PB (where the client is not an investment firm) outsource to the EB the reporting obligations.

   Where the EB is established outside of the EU or is not an investment firm, it should be for the PB client to report the trade, where the PB client is an investment firm. Should the PB client not be an investment firm, the reporting duty would ultimately fall to the PB.

b) The ‘trading date and time’ of the transaction as specified in table 2 of Annex II of RTS 2 should be the point of time when the agreement between the EB and the PB client is concluded.

This approach is in line with the description of the field ‘trading date and time’ which specifies that “for transactions not executed on a trading venue, the date and time shall be when the parties agree the content of the following fields: quantity, price, currencies (in fields 31, 34 and 40 as specified in Table 2 of Annex I of Delegated Regulation (EU) 2017/590), instrument identification code, instrument classification and underlying instrument code, where applicable.”

Question 18 [Last update: 12/07/2019]

How should constant maturity swaps be treated pursuant to RTS 2 for the purpose of determining whether they have a liquid market and, accordingly, the SSTI and LIS thresholds?

Answer 18

Constant Maturity Swaps (CMS) or Constant Maturity Futures (CMF) are interest rate swaps where the floating leg is pegged not to a standard benchmark interest rate but to a point on the swap curve (the other leg of swap being usually referenced to LIBOR or to a fixed rate). They are typically used by market participants as a bet on the direction of rates or for hedging purposes.

ESMA understands that those products are designed to align as closely as possible to the interest rate swap market they are referenced to. Therefore, ESMA considers that it is appropriate to treat those products similarly. For instance, a CMS where one of the legs pays (respectively receives) the ten-year swap rate and receives (respectively pays) the fixed rate should be classified and treated in the same way as a standard fixed-to-float interest rate swap with a ten-year maturity.

Question 19 [Last update: 05/12/2019]

How should trading venues convert large in scale (LIS) and size specific to the instrument (SSTI) thresholds into lots under Article 13(9) of RTS 2?

Answer 19

RTS 2 determines the LIS and the SSTI thresholds for derivatives in monetary value. Since many trading venues trade derivatives in lots, i.e. a standardized quantity as set out by the trading venue, Article 13(9) of RTS 2 allows market operators and investment firms operating a trading venue to convert the LIS and SSTI trade sizes to the corresponding number of lots.

This provision can be used where all the following conditions are met:

- irrespectively of the asset class of the derivative contract, the corresponding number of lots of the LIS and SSTI trade sizes should:

- be determined in advance by the trading venue. More specifically, the methodology to convert into lots should be made public and any change should be communicated at least 1 month in advance of the implementation date of the new methodology;

- be defined for the respective sub-class of:

    - commodity derivatives as per Table 7.1 of Annex III of RTS 2;

    - equity derivatives as per Table 6.2 of Annex III of RTS 2;

- be defined for the respective sub-class of:

- be calculated once per year, made public within 15 working days after publication of the annual transparency calculations by ESMA and be maintained until the application of the results of the next calculations performed in accordance with Article 13(17) of RTS 2. The LIS and SSTI thresholds expressed in lots may be modified during the course of the year in the case of both pre-determined ordinary, and extraordinary revisions of the lot sizes of the underlying derivative contracts communicated by the trading venue.

- In the case where a corporate event determines the creation of a new series of derivative contracts:

    - the series existing before the corporate event shall have the lot adjusted in compliance with the corporate action policy of the trading venue which should be publicly available;

    - the series created after the corporate event shall have a lot determined on the basis of the non-adjusted lot of the correspondent series before the corporate event and the adjusted prices of the relevant contracts and underlying instruments in compliance with the corporate action policy of the trading venue which should be publicly available.

- where the financial instrument is not denominated in Euros, the LIS or SSTI threshold should first be converted to the currency in which that financial instrument is denominated according to Article 13(8) of RTS 2 before applying the lot size conversion formula.

- the formulas to be used for the conversion of the monetary values of the LIS and SSTI thresholds into lots are provided in the following tables. The formulas are provided on the basis of contract types

Contract type	Formula for the conversion of the LIS/SSTI thresholds into lots
Futures/forwards	$$Threshold\ in\ lots = \frac{notional\ value\ of\ the\ threshold}{Lot\ size * Arithmetical\ average\ closing\ price\ of\ the\ underlying}$$ Where the notional value is the notional value in the trading currency of the derivative contract, the lot size is the contract size (price multiplier in the case of index futures/forwards) determined by the trading venue for that derivative contract and the arithmetical average closing price of the underlying is determined by the value resulting from the average of the available closing prices of the underlying (or, when not available, the reference value determined by the relevant market of the underlying) during the 12-months of the previous year, or in the case of corporate actions, the available actual or theoretical underlying price(s) taking account the corporate action adjustment. In all cases, the threshold in lots resulting from the division shall be rounded to the minimum tradable number of lots for orders. The value can be rounded up or down, but the type of rounding shall be determined by the end-value that is closer to the pre-rounding value.
Options	$$Threshold\ in\ lots = \frac{notional\ value\ of\ the\ threshold}{Lot\ size * Strike\ price}$$ Where the notional value is the notional value in the trading currency of the derivative contract, the lot size is the contract size (price multiplier in the case of index options) determined by the trading venue for that derivative contract and the strike price is the strike price of the at-the-money option determined on the basis of the closing price of the underlying instrument as of the trading day before the conversion is performed, or in the case of corporate actions, the available actual or theoretical underlying price taking account of the corporate action adjustment.

	In all cases, the threshold in lots resulting from the division shall be rounded to the minimum tradable number of lots for orders. The value can be rounded up or down, but the type of rounding shall be determined by the end-value that is closer to the pre-rounding value.
Other derivatives	No need for a formula/no formula provided for the time being.

5 Pre-trade transparency waivers [Last update: 12/07/2019]

Question 1 [Last update: 03/06/2019]

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.

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 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: 31/05/2017]

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 3

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 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.

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

Question 4 [Last update: 31/05/2017]

How should the "current volume weighted spread reflected in the order book" be calculated for negotiated transactions under Article 4(1)(b)(i) of MiFIR?

Answer 4

The volume weighted spread should be calculated as the spread between the volume weighted bid and offer prices of orders on the trading venue's public order book aggregated to the size of the negotiated transaction.

The volume weighted bid (offer) should be calculated considering all bid (sell) orders in the order book that would theoretically be executed if a sell (buy) order of a size equivalent to the negotiated transaction was introduced in the order book. Where the transaction size is larger than the volume of buy (sell) orders on the order book it will be the average price of the transaction assuming that a sell (buy) order is executed against all buy (sell) orders on the order book.

Orders benefitting from a pre-trade transparency waiver should not be included in the calculation.

Question 5 [Last update: 15/11/2017]

What is the maximum authorised deviation around the reference price to be used for negotiated transactions in illiquid instruments?

Answer 5

Article 4(1)(b)(ii) of MiFIR allows NCAs to grant pre-trade transparency waivers to trading venues for negotiated transactions in illiquid instruments where those negotiated transactions are dealt within a percentage of a suitable reference price.

ESMA is of the view that the parameters to be set by trading venues in accordance with Article 48(5) of MiFID II for halting trading can also be used as maximum limits for the purposes of Article 4(1)(b)(ii) of MiFIR. The parameters to be established for trading halts should be calibrated by taking into consideration the liquidity of financial instruments, the related market model and the type of users trading those instruments. A price movement beyond these limits would be considered significant enough to halt trading, therefore, ESMA considers these same parameters should be used as a proxy to assess the suitability of the reference price and the percentage deviation from it that can be used for negotiated transactions under Article 4(1)(b)(ii) of MiFIR. NCAs should not authorise trading venues to report negotiated transactions in illiquid financial instruments executed outside those limits.

Question 6 [Last update: 15/11/2017]

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?

Answer 6

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. 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.

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. 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.

Question 7 [Last update: 15/11/2017]

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?

Answer 7

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.

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.

Question 8 [Last update: 18/12/2017]

Should subscription rights be treated as equity instruments or non-equity instruments?

Answer 8

Subscription rights, including allotment rights and purchase rights, should be treated as an extension of the 'shares' category and therefore as equity instruments for the purpose of the provisions mentioned below[15]. While ESMA considers that subscription rights share some characteristics of securitised derivatives, the market practice for trading subscription rights resembles closely the trading of shares and therefore the following applies:

- Subscription rights should be subject to the pre- and post-trade transparency regime for equity instruments (Articles 3, 6, 14-17 and 20 of MiFIR) and should be eligible for waivers and deferrals from pre-trade transparency for equity instruments (Articles 4, 7, and 20(2) of MiFIR).
- The liquidity status of subscription rights should be the same as the liquidity status of the underlying share (Article 1 of Commission Delegated Regulation (EU) 2017/567).
- The standard market size (SMS) of subscription rights should be the same as the SMS of the underlying shares (Article 11 and table 3 of Annex II of RTS 1).

[15] The same approach also applies to redemption shares and unit rights traded in Scandinavian countries as well as allotment rights in Romania.

- The large in scale thresholds for waivers and deferrals for subscription rights should be determined on the basis of the average daily turnover of the underlying share (Articles 7 and 15 and tables 1 and 4 of Annex II of RTS 1).

- The most relevant market in terms of liquidity for subscription rights should be the same as the most relevant market in terms of liquidity for the underlying share (Article 4 of RTS 1).

- Subscription rights should be subject to the trading obligation for shares and the double volume cap (Articles 5 and 23 of MiFIR).

- Subscription rights should be subject to the tick size regime (Article 49 of MiFID II and as further specified in RTS 11). Subscription rights should use the same liquidity band as the underlying share (Article 2 and Annex of RTS 11).

Question 9 [Last update: 18/12/2017]

What is the process to be followed by systematic internalisers in order to waive the obligation in Article 18(2) of MiFIR?

Answer 9

Article 18(2) of MiFIR states that for non-equity instruments for which there is not a liquid market, systematic internalisers are required to disclose quotes to their clients on request if they agree to provide a quote.

However, the obligation can be waived where the conditions in Article 9(1) of MiFIR are met. The conditions in Article 9(1) are:

1. Article 9(1)(a): the order is large in scale (LIS);

2. Article 9(1)(b): actionable indications of interest which are above the size specific to the instrument (SSTI);

3. Article 9(1)(c): derivatives which are not subject to the trading obligation and other financial instruments for which there is not a liquid market;

4. Article 9(1)(d): orders for the purpose of executing an exchange for physical; and

5. Article 9(1)(e): package orders that meet one of the following criteria

    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.

An NCA may allow any systematic internaliser within its jurisdiction to waive the obligation in Article 18(2) of MiFIR provided it complies with the relevant requirements and conditions set in Article 9(1) of MiFIR. Alternatively, an NCA may allow systematic internalisers in its jurisdiction to waive the obligation on the basis of individual applications.

This waiver can be applied to all illiquid products on an asset class level rather requiring a waiver for each instrument. On the basis of an individual waiver application from an investment firm that is granted by the relevant NCA, a new waiver application would only be necessary in case the investment firm for the first time becomes a systematic internaliser in a new asset class based on the categorisation in RTS 2, for which it has not already obtained a waiver.

Question 10 [Last update: 18/12/2017]

How will the reference price waiver be applied for shares listed on multiple venues and traded in different currencies? Should those shares be regarded as separate financial instruments, which may only be traded in the currency in which they are listed?

Answer 10

The concept of financial instrument in MiFID II / MiFIR is independent of the currency that it is traded in. Therefore, instruments should not be considered as different financial instruments, just because they are traded on multiple venues and/or in multiple currencies.

According to Article 4(2) of MiFIR, the reference price is to be “derived” from the trading venue where that financial instrument was first admitted to trading or the most relevant market in terms of liquidity and not replicated. This leaves open the possibility to transact in currencies other than the currency that is used on the trading venue from which the price is derived. The methodology used for converting the reference price should be set out in the trading venue’s rule book. The exchange rate used should be derived from a reliable source (e.g. European Central Bank) and be updated regularly and at least on a daily basis.

Question 11 [Last update: 12/07/2019]

Are “pre-arranged” or “negotiated” transactions permitted for transactions in non-equity instruments and in particular for derivatives that are subject to the MiFIR trading obligation? Under which conditions can pre-arranged transactions benefit from the hedging exemption under Article 8(1) of MiFIR?

Answer 11

MiFIR provides for the possibility to formalise negotiated transactions in equity instruments on trading venues subject to a waiver under Article 4(1)(b). Furthermore, ESMA considers that pre-arranged transactions in equity instruments may also be formalised under the large in scale (LIS) waiver under Article 4(1)(c) of MiFIR as long as the conditions for an LIS waiver are met.

While MiFIR does not have specific provisions for negotiated or pre-arranged transactions for non-equity instruments, ESMA considers it nevertheless possible to formalise negotiated or pre-arranged transactions on a trading venue subject to meeting the conditions for the respective waivers from pre-trade transparency set out in Article 9(1) of MiFIR.

Concerning non-equity instruments that are not subject to the trading obligation for derivatives, pre-arranged transactions are possible under the LIS-waiver (first part of the sentence in Article 9(1)(a)) of MiFIR), the waiver for instruments that do not have a liquid market (Article 9(1)(c) of MiFIR), the EFP waiver (Article 9(1)(d) of MiFIR) and the package order waiver (Article 9(1)(e) of MIFIR). Pre-arranged transactions may not be executed using the order management facility waiver (second part of Article 9(1)(a) of MiFIR) or the size-specific-to-the-instrument (SSTI)-waiver (Article 9(1)(b) of MiFIR).

Concerning derivatives subject to the trading obligation, pre-arranged transactions are only possible under the LIS-waiver (Article 9(1)(a) of MiFIR) and the package order waiver (Article 9(1)(e) of MiFIR).

Finally, concerning pre-arranged transactions on cleared derivatives that are concluded on a trading venue, the pre-trade checks specified in the Commission Delegated Regulation (EU) 2017/582 (Article 2) do also apply.

Moreover, ESMA considers that pre-arranged transactions may benefit from the hedging exemption under Article 8(1) of MiFIR subject to meeting the following conditions: at least one of the counterparties to the transaction is a non-financial counterparty, the transaction is in derivative instruments, and the transaction has to have as a result reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.

ESMA emphasizes that when trading venues execute pre-arranged transactions under the rules of their system, they must ensure that these transactions comply with the regulations, including those concerning market abuse and disorderly trading. Venues have an obligation to monitor these trades on possible violations of the rules.

Question 11a [Last update: 12/07/2019]

Is the hedging exemption applicable to orders or quotes?

Answer 11a

No, according to Article 8(1) of MiFIR the hedging exemption applies to “derivative transactions”. ESMA is therefore of the view that the hedging exemption may only be used for the formalisation of pre-arranged derivative transactions and is not applicable to orders or quotes. For instance, orders submitted to a central limit order book or quotes provided in response to a request for quote have to be made pre-trade transparent unless they are eligible for a waiver from the pre-trade transparency obligation.

Question 12 [Last update: 07/02/2018]

How should the minimum size of orders held in an order management facility of a trading venue pending disclosure be calculated for non-equity instruments?

Answer 12

For the purpose of Article 4(2)(a) of RTS 2 the minimum size of orders held in an order management facility of a trading venue pending disclosure should be calculated according to Table 4 of Annex II of RTS 2 except for emission allowances and emission allowance derivatives for which the notional amount of traded contracts should be used. Please also refer to Question 11 in the Non-equity transparency section of this document.

6 The double volume cap mechanism [Last update: 03/06/2019]

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.

Question 5 [Last update: 12/07/2018]

In case of a corporate action where a traded ISIN is replaced with a new ISIN, how will the new ISIN be treated for the purposes of the DVC?

Answer 5

In case of a corporate action, where a traded ISIN is replaced with a new ISIN, the new ISIN will be treated as a newly admitted to trading or newly traded financial instrument and the ESMA DVC calculations and publication will not take the trading activity of the old ISIN into account.

In addition, while ESMA will publish the percentage of trading in this financial instrument carried out under the reference price waiver and the negotiated transaction waiver from the start of trading, suspensions following the breach of the thresholds set out under Article 5 of MiFIR should only be triggered when at least 12 months of data for the new ISIN is available.

ESMA is however reflecting on ways and means to ensure more continuity in the treatment of financial instruments subject to corporate actions and might decide to revisit this approach in the future.

7 The systematic internaliser regime [Last update: 03/06/2019]

Question 1 [Last update: 30/01/2019]

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 as well as for subsequent periods?

Answer 1

Commission Delegated Regulation (EU) No 2017/565[16] 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 2017/565, there will be 6 months of data available.

In accordance with the clarifications provided below:

a) ESMA will publish the necessary data (EU wide data) for the first time by:

   i. 1 August 2018 covering a period from 3 January 2018 to 30 June 2018 for equity, equity-like and bond instruments;

   ii. The EU wide data for ETCs, ETNs, SFPs, securitised derivatives, emission allowances and derivatives will not be published until at the latest 2020.

b) Investment firms will have to perform their first assessment and, where appropriate, comply with the systematic internaliser obligations (including notifying their NCA) by:

   i. 1 September 2018 for equity, equity-like and bond instruments;

   ii. No assessment has to be performed for ETCs, ETNs, SFPs securitised derivatives, emission allowances and derivatives until at the latest 2020.

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

[16] Commission Delegated Regulation (EU) 2017/565 of 25 April 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 (OJ L 87, 31.3.2017, p. 1–83).

therefore be performed by 1 September 2018 for equity, equity like and bond instruments. The assessment does not need to be performed for ETCs, ETNs, SFPs, securitised derivatives, emission allowances and derivatives until at the latest 2020.

Similarly, although Commission Delegated Regulation (EU) No 2017/565 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 - i.e. first publication by ESMA of the necessary EU-wide data by 1 August 2018 for equity, equity like and bond instruments and earliest deadline to comply, where necessary, with the SI regime set on 1 September 2018 for equity, equity like and bond instruments.

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. For equity, equity-like and bond instruments for which the overall trading in the Union will not be published, the opt-in regime will remain a possibility for investment firms to become an SI. The same is true as far as ETCs, ETNs, SFPs, securitised derivatives, emission allowances and derivatives are concerned.

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 2017/565 – 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]

a) *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?*

b) *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?*

c) *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

a) 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 (EU) No 2017/565. 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.

b) 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.

c) 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: 03/10/2017]

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

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

c) *What constitutes a 'class of bonds' under Article 13 of Commission Delegated Regulation (EU) No 2017/56517? Do senior, subordinated or convertible bonds from the same issuer constitute different classes?*

d) *On which level is the systematic internaliser threshold to be calculated for emission allowances*

Answer 4

a) 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. In particular, both the numerator and the denominator should refer to the same class of derivatives.

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.

b) 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.

c) 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

[17] 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.

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.

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.

d) The calculation should be performed at the level of the emission allowance type. In other words, both the numerator and the denominator shall refer to the same sub-asset class level as identified in RTS 2.

Question 5 [Last update: 31/05/2017]

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

b) Can client orders routed by an automated order router (AOR) system be considered as 'prompting for a quote' according to Article 18(1)(a) of MiFIR?

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

d) What are the obligations for systematic internalisers dealing in non-equity instruments for which there is no liquid market under Article 18(2) of MiFIR?

e) Which arrangements should systematic internalisers use when publishing firm quotes? Should these be the same arrangements as for equity instruments?

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

Answer 5

a) 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.

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

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

d) Where a systematic internaliser receives a request from a client for a quote for an instrument which is traded on a trading venue and for which there is not a liquid market, and the systematic internaliser agrees to provide that quote, the systematic internaliser does not have an obligation to make this quote available to other clients and to make it public. However, Article 18(2) of MiFIR requires the systematic internaliser to disclose to clients on request the quotes provided in illiquid financial instruments. That obligation can be met by allowing clients, on a systematic or on a request basis, to have access to those quotes.

   This is without prejudice to the possibility for systematic internalisers to benefit from a waiver for this obligation where, as set out in the last sentence of Article 18(2) of MiFIR, the conditions in Article 9(1) of MiFIR are met.

e) Article 13 of the Commission Delegated Regulation (EU) No 2017/567 specifies how systematic internalisers should make their quotes public and easily accessible for equity instruments. There are no corresponding provisions on the publication arrangements for systematic internalisers for non-equity instruments, but Article 18(8) of MiFIR requires the quotes to be "made public in a manner which is easily accessible to other market participants".

   ESMA considers that systematic internalisers should use the same means and arrangements when publishing firm quotes in non-equity instruments as for equity instruments as specified in Article 13 of the Commission Delegated Regulation (EU) No 2017/567. Furthermore, the quotes should be made public in a machine-readable format as specified in the above mentioned Regulation and the quotes should be time-stamped as specified in Article 9(d) of RTS 1.

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

Question 6 [Last update: 03/06/2019]

a) What information should the notification from systematic internalisers to their NCA contain?

b) For what period of time should an investment firm follow the obligations for systematic internalisers after crossing the relevant thresholds in a financial instrument?

c) When/How often do investment firms have to notify their NCAs of their systematic internaliser status?

Answer 6

a) The notification from systematic internalisers to their NCA should contain information that is at least provided at the level of the MiFIR identifier as specified in field 4 of table 2 of Annex III of RTS 1 (i.e. shares, depositary receipts, exchange traded funds, certificates and other equity-like financial instruments) and in field 3 of table 2 of Annex IV of RTS 2 (i.e. bonds, ETNs, ETCs, structured finance products, securitised derivatives, derivatives, and emission allowances) for the instruments and classes of instruments for which the

investment firm is a systematic internaliser. This is without prejudice of the possibility for CAs to require the submission of more granular information if considered appropriate.

b) The obligation will last for three months after crossing the relevant thresholds in a financial instrument at the relevant quarterly assessment.

c) Investment firms are required to notify their NCA in case of a change in status, i.e. where an investment firm passed the thresholds for an instrument with a particular MiFIR identifier in the previous period, but did not meet the thresholds for any instrument with the same MiFIR identifier in the consecutive assessment period, it should notify its CA of its change of status. Where there is no change in the systematic internaliser status from one assessment period to the next (i.e. where the investment firms is still above the threshold or decides to voluntarily opt-in as systematic internaliser for any instrument with the same MiFIR identifier), the firm does not have to notify its NCA thereof.

Question 7 [Last update: 03/10/2017]

For the purpose of the SI determination, when should an investment firm be considered as "executing client orders" when dealing on own account outside of trading venues?

Answer 7

For the purposes of the SIs' determination, ESMA considers that in all circumstances where an investment firm is dealing with a counterparty that is not a financial institution authorised or regulated under Union law or under the national law of a Member State ('financial institution'), the investment firm is deemed to be executing a client order and the transaction should count towards the calculations (both the numerator and the denominator). Where the investment firm is dealing with a financial institution, ESMA considers that one party to the transaction will always act in a client capacity. Therefore, in order to determine when an investment firm is "executing client orders" when dealing on own account outside of trading venues, investment firms need to assess which of the two parties to the transactions acts in the capacity of executing client orders.

Investment firms may determine this either on a transaction by transaction basis or by type of transactions or type of counterparties. Different indicators could be used for determining which party executed a client order: e.g. whether an investment firm has classified the counterparty as a professional client, who initiated the trade or who received the instruction to deal and the extent to which the counterparty relied on the other party to conclude the transaction.

Question 8 [Last update: 03/10/2017]

What are the limitations to the commercial policy for restricting access to quotes in accordance with Article 18(5) of MiFIR?

Answer 8

The commercial policy needs to be set out and made available to clients in advance. The commercial policy should determine meaningful categories of clients to which quotes are made available. Systematic internalisers should only be able to group clients based on non-discriminatory criteria taking into consideration the counterparty risk, or the final settlement of the transaction.

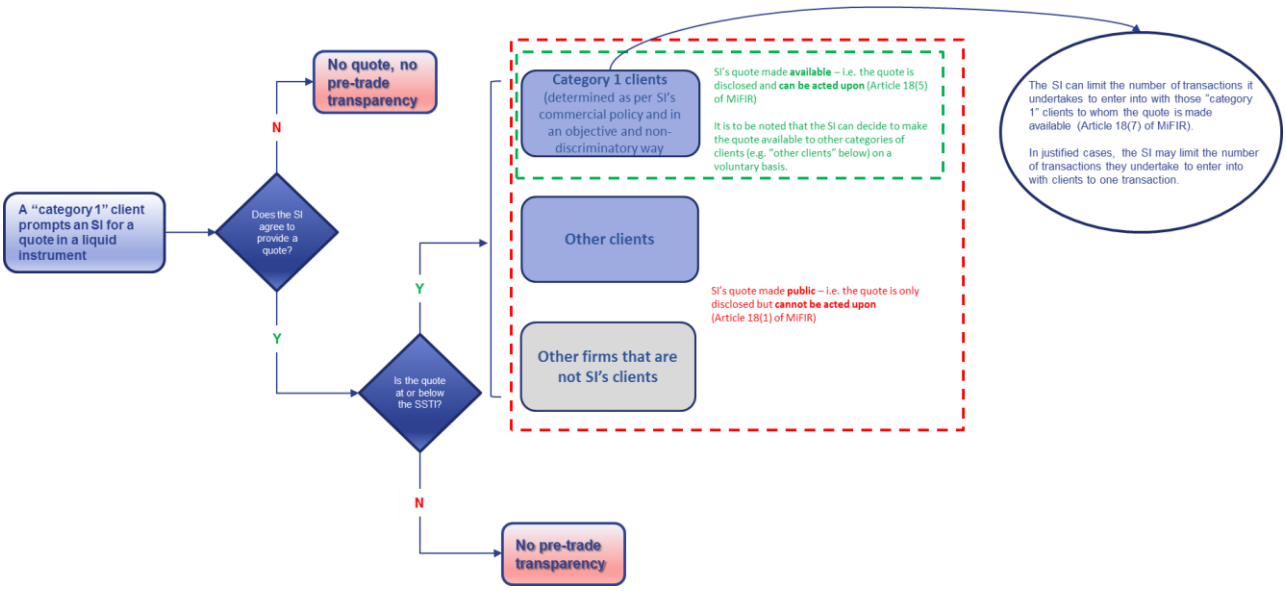
Furthermore, a number of provisions safeguard the ability of the systematic internaliser to properly manage risk. For example, a systematic internaliser may update its quotes at any time (Article 18(3) of MiFIR) and can limit the number of transactions they undertake to enter into with clients pursuant any given quote (Article 18(7) of MiFIR).

Question 9 [Last update: 03/10/2017]

Are systematic internalisers allowed to limit the number of transactions they undertake to enter into with clients pursuant to any given quote under Article 18(7) of MiFIR to one transaction?

Answer 9

Yes, Systematic internalisers may limit the number of transactions they undertake to enter into with clients to one transaction. As a minimum the quote provided to a client following the request for such a quote should be potentially executable by any other clients where for example the requesting client has decided not to trade against it (or to execute only part of it). In any case, should SIs decide to establish non-discriminatory and transparent limits on the number of transactions they undertake to enter into with clients, they should make these limits public and provide a justification.



Question 10 **[Last update: 15/11/2017]**

Which types of prices will be considered compliant as firm quotes for derivatives and bonds?

Answer 10

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.

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. 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.

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.

Question 11 **[Last update: 03/06/2019]**

Is it possible for investment firms to qualify as a systematic internaliser under the mandatory regime in instruments that are not traded on a trading venue (non-TOTV instruments)?

Answer 11

Article 4(1)(20) of MiFID II specifies that investment firms should comply with the systematic internaliser regime (mandatory systematic internaliser regime) where the pre-set limits established to be considered trading on a frequent and systematic basis and on a substantial basis are crossed.

Article 4(1)(20) of MiFID II as further specified in Articles 12-17 of Commission Delegated Regulation (EU) 2017/565 does not limit the concept of systematic internalisers to instruments that are traded on a trading venue (TOTV) but includes all financial instruments, i.e. TOTV and non-TOTV instruments. Hence, an investment firm may qualify as a systematic internaliser in any financial instrument (i.e. TOTV and non-TOTV instruments).

However, ESMA is only publishing information on TOTV instruments for determining whether an investment firm meets the thresholds to be considered as a systematic internaliser. With respect to non-TOTV instruments, ESMA therefore appreciates that it might be challenging for investment firms to access reliable and comprehensive sources of EU wide information preventing de facto the systematic internaliser test to be carried out.

There are circumstances where an investment firm may still be a systematic internaliser for non-TOTV instruments. This would notably be the case for investment firms that opt voluntarily into the systematic internaliser regime.

In addition, it is possible that an investment firm by virtue of qualifying as a systematic internaliser in a TOTV instrument automatically becomes a systematic internaliser in non-TOTV instruments. This would notably be the case in the circumstances described below.

An investment firm might be a systematic internaliser for non-TOTV instruments when it meets the threshold for a bond, since it automatically becomes an SI in all bonds (i.e. TOTV and non-TOTV) issued by the same entity or by any entity within the same group for the same bond type.

An investment firm might be a systematic internaliser for non-TOTV instruments when it meets the threshold for a structured finance product (SFP), since it automatically becomes a systematic internaliser in all SFPs (i.e. TOTV and non-TOTV) issued by the same entity or by any entity within the same group.

An investment firm might be a systematic internaliser for non-TOTV instruments when it meets the threshold for a sub-class of derivatives, since it becomes a systematic internaliser for all derivatives (i.e. TOTV and non-TOTV, if any) belonging to that sub-class.

An investment firm might be a systematic internaliser for non-TOTV instruments when it meets the threshold for an emission allowance, since it becomes a systematic internaliser for all emission allowances (i.e. TOTV and non-TOTV, if any) belonging to that emission allowance sub-asset class.

An investment firm might be a systematic internaliser for non-TOTV instruments when it meets the threshold for the asset class of securitised derivatives, since it becomes a systematic internaliser for all securitised derivatives (i.e. TOTV and non-TOTV, if any) belonging to this asset class.

Question 11a [Last update: 03/06/2019]

Can an investment firm which decides to opt-in to the systematic internaliser regime determine the instruments on which it will be an SI?

Answer 11a

Article 4(1)(20) of MiFID II specifies that investment firms can voluntarily opt-in under the systematic internaliser regime (voluntary systematic internaliser regime). Such opt-in is not limited to instruments that are TOTV but includes all financial instruments, i.e. TOTV and non-TOTV instruments.

ESMA considers that an investment firm that voluntarily opts-in under the systematic internaliser regime can decide in which specific instruments (TOTV and non-TOTV instruments) it choose to be a systematic internaliser and to comply with the related obligations.

In case an investment firm opts-in under the systematic internaliser regime for equity instruments (shares, depositary receipts, ETFs, certificates, other similar financial instruments), the investment firm can choose for which instruments to be a systematic internaliser and to comply with the related obligations.

In case an investment firm opts-in under the systematic internaliser regime for derivatives, the investment firm can choose the individual derivatives for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for the entire sub-class of derivatives to which the individual derivatives belong to.

In case an investment firm opts-in under the systematic internaliser regime for emission allowances, the investment firm can choose the individual emission allowances for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for the entire sub-asset class of emission allowances to which the individual emission allowances belong to.

In case an investment firm opts-in under the systematic internaliser regime for securitised derivatives, the investment firm can choose the individual securitised derivatives for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for the entire asset class of securitised derivatives.

In case an investment firm opts-in under the systematic internaliser regime for bonds, the investment firm can choose the individual bonds for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for all bonds issued by the same entity or by any entity within the same group for the same bond type.

In case an investment firm opts-in under the systematic internaliser regime for structured finance products (SFP), the investment firm can choose the individual SFPs for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for all SFPs issued by the same entity or by any entity within the same group.

Investment firms that voluntarily opt-in under the systematic internaliser regime in specific instruments are nevertheless expected to perform the quarterly test for those instruments and, if the pre-set limits for a frequent and systematic basis and for a substantial basis are both crossed, they qualify as systematic internalisers under the mandatory regime.

Question 11b [Last update: 03/06/2019]

Are systematic internalisers in non-TOTV instruments subject to the quoting obligations under Articles 14-18 of MiFIR?

Answer 11b

The scope of the quoting obligations under Articles 14-18 of MiFIR is limited to TOTV instruments. In consequence, systematic internalisers in non-TOTV instruments are not subject to the quoting obligations under Articles 14-18 of MiFIR. They remain however required to notify their competent authority as prescribed under the second subparagraph of Article 15(1) and Article 18(4) of MiFIR.

It is possible that the TOTV status of a financial instrument changes over time, in particular a non-TOTV instrument may become TOTV at some point. ESMA expects systematic internalisers in non-TOTV instruments to monitor the TOTV status of those instruments and comply with the quoting obligations under Articles 14-18 of MiFIR as soon as an instrument becomes TOTV.

Question 12 [Last update: 02/04/2019]

Does a systematic internaliser in non-equity financial instruments comply with its obligations under Article 18 of MiFIR by clarifying publicly that, for certain financial instruments, it will never agree to provide a quote when prompted to do so by a client?

Answer 12

Yes, under Article 18 of MiFIR, the provision of a quote is at the full discretion of systematic internalisers. ESMA therefore considers that systematic internalisers should be able to refuse ex ante to provide quotes in certain financial instruments for which they are systematic internalisers.

Question 13 [Last update: 02/04/2019]

Is a systematic internaliser in a financial instrument for which the liquidity status changes required to adapt its quoting arrangements accordingly?

Answer 13

Yes. Systematic internalisers should comply with the requirements that correspond to the current liquidity status of an instrument.

Therefore, if the liquidity status of a financial instrument changes (regular transparency calculations or amendment of the information available on the ESMA website), systematic internalisers in that instrument should adapt the quoting arrangements accordingly. Considering that quoting requirements are stricter for liquid than illiquid instruments, a

systematic internaliser can however choose to voluntarily comply at all times with the stricter requirements applicable to liquid instruments without monitoring the liquidity status of the instruments for which it is an SI.

ESMA acknowledges that the criteria and thresholds for determining whether an investment firms is considered acting as a systematic internaliser differ between liquid and illiquid instruments. Investment firms that passed the systematic internaliser test for a financial instruments which liquidity status has changed (e.g. from illiquid to liquid) are therefore allowed (but not required) to re-assess whether they still qualify as systematic internalisers using the criteria and thresholds corresponding to the new liquidity status. Where an investment firm decides to re-assess its systematic internaliser status for such a financial instrument and, under the new liquidity status of the financial instrument, no longer meets the thresholds and criteria of the test, this investment firm should notify its competent authority accordingly.

In case of bonds, the liquidity determination and data publication for the SI tests are aligned. Investment firms should use the liquidity status that has just been published by ESMA on the first day of the month to perform the SI test, although this new liquidity status will formally be applicable only on the 16th day of the month.

The table below illustrates the timeline for the publication and application of the annual or quarterly liquidity assessments and the deadlines for the SI determination.

Class of financial instruments	Publication by ESMA of EU-wide data for SI test	Deadline for IFs to perform their SI assessment and comply with SI obligations	Publication of liquidity assessments	Application of the liquidity assessments	Liquidity status to be used for SI test
Equity instruments	1st day of February 1st day of May 1st day of August 1st day of November	15th day of February 15th day of May 15th day of August 15th day of November	1 March every year	1 April following the publication	Current available liquidity status
Bonds			1st day of February 1st day of May 1st day of August 1st day of November	16th day of February 16th day of May 16th day of August 16th day of November	The liquidity status published by ESMA on the first day of month
Derivatives (and other non-equity instruments)			30 April every year	1 June following the publication	Current available liquidity status

8 Data reporting services providers [Last update: 01/02/2019]

Question 1 [Last update: 31/05/2017]

What is the time limit for investment firms to report post-trade information to APAs, in particular should information be delayed in case of deferral? Who decides on the applicable deferral period given the possibility of disagreement between the APA and the investment Firm?

Answer 1

According to Articles 7 and 20 (equity instruments) and 11 and 21 (non-equity instruments) of MiFIR, NCAs may authorise market operators and investment firms to provide for a deferred publication of certain transactions. Since the authorisation for granting the deferred publication is addressed to market operators and investment firms, it is the investment firm's responsibility to ensure that the APA is informed thereof and publishes the information no later than after the lapse of the deferral.

The investment firm should report the transaction to the APA as soon as technically possible after the execution, regardless of the application of any deferrals. The APA should be in charge of publishing the transaction in due time, according to the deferral period that applies to the specific transaction.

Question 2 [Last update: 31/05/2017]

Who will assign the identifier for the APA?

Answer 2

According to table 3 of Annex I of RTS 1 and table 2 of Annex II of RTS 2, APAs will be identified by either a MIC or a 4-character code. ESMA considers that the best way to ensure a harmonised and unequivocal identification of APAs and trading venues is to provide for a harmonised allocation of the identifier, such as MICs. While there is no legal obligation for APAs to use MICs, ESMA recommends that APAs request the MIC code from the ISO 10383 Registration Authority (SWIFT). The creation, maintenance and deactivation of MICs is free of charge.

Question 3 [Last update: 15/11/2017]

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)?

Answer 3

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. 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. 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.

Question 4 [Last update: 01/02/2019]

How should APAs report trading activity volume to competent authorities for the purpose of the transparency calculations?

Answer 4

RTS 3 requires trading venues, APAs and CTPs to provide to competent authorities the data necessary for the performance of the transparency calculations. For this purpose these reporting entities should provide trading activity volume (in terms of number of transactions and turnover/notional amount/nominal amount). Recital (12) of RTS 3 specifies that in order to provide competent authorities and ESMA with accurate data, trading venues, APAs and CTPs should ensure that their reports include single-counted transactions only.

Whereas Article 21(2) MiFIR requires each individual transaction on non-equity instruments to be made public once through a single APA, this requirement is not provided in relation to the publication of transactions in equity and equity-like instruments. In order to avoid double-reporting, Article 16 of RTS 13 provides that either investment firms certify to the APA that they report the transaction in a particular financial instrument only trough that APA, or if the transactions is reported to more than one APA, one report is flagged as the original report ('ORGN') and all other reports of the same transaction as duplicates ('DUPL').

Consequently, when reporting the necessary data for the performance of the transparency calculations to competent authorities, APAs should provide the aggregated trading activity data including only original reports for equity and equity-like instruments.

9 Third country issues [Last update: 15/11/2017]

Question 1 [Last update: 31/05/2017]

Should EU investment firms trading on a third-country trading venue make information about these transactions public through an APA in the EU (Articles 20 and 21 of MiFIR)?

Answer 1

Whether or not information on transactions in instruments traded on a trading venue by investment firms on a third-country trading venue have to be made public through an APA in accordance with Articles 20 and 21 of MiFIR depends on the characteristics of that third-country trading venue as set out in the ESMA Opinion (ESMA70-154-467).

Investment firms trading on third-country trading venues that need guidance on whether information on transactions executed on third-country trading venues have to be made public through an APA should contact their CAs to make them aware of the third-country trading venue(s) on which they are trading. The CA will then get in touch with the third-country trading venue with a request for further information. Based on the information provided, ESMA will determine whether the third-country trading venue meets the criteria set out in the ESMA Opinion. If so, the respective third-country trading venue will be listed in an Annex to the Opinion.

Only transactions concluded by investment firms on third-country trading venues that are listed in the Annex to the ESMA Opinion do not need to be made public through an APA. Investment firms trading on third country trading venues that are not included in the list in the Annex of the ESMA Opinion should make information on those transactions public through an APA.

Only notifications from EU investment firms will be processed. Third country trading venues cannot directly approach NCAs, but their cooperation will be important when determining whether the criteria set out in the ESMA opinion are met.

ESMA is aware that it is important for EU investment firms to have legal certainty as soon as possible on the treatment of their transactions on third-country trading venues for the purposes of the MiFIR transparency regime. While ESMA cannot commit to any set timeline, all notifications will be processed as expediently as possible.

Question 2 [Last update: 15/11/2017]

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)?

Answer 2

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

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. 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.

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

Detailed explanation of the table

- **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 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 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 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 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 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 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 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 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 non-comparable third country TVs, case 13 applies.

- **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).