

OPINION

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

1 Legal basis

1. ESMA's competence to deliver an opinion to competent authorities (CAs) is based on Article 29(1)(a) of 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)¹ (ESMA Regulation).
2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to CAs for the purpose of building a common supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.

2 Background

3. The post-trade transparency requirements in Articles 20 and 21 of Regulation (EU) No 600/2014 (MiFIR)² require EU investment firms to make information on transactions in financial instruments traded on a trading venue public through approved publication arrangements (APA). However, Articles 20 and 21 of MiFIR do not clarify whether this obligation applies also to transactions concluded on a third-country trading venue.
4. Market participants and CAs have therefore called upon ESMA to provide guidance on the treatment of those transactions, in particular, on those third-country trading venues that are subject to transparency provisions that are similar to the post-trade transparency requirements applicable to EU trading venues as set out in Articles 6(1) and 10(1) of MiFIR.
5. ESMA is concerned that the lack of clarity regarding the treatment of those transactions is likely to result in different supervisory approaches across CAs in the application of the new transparency provisions and may undermine the establishment of a level playing field in the EU. ESMA therefore considers it necessary to provide guidance on the matter to prevent the development of inconsistent supervisory practices across CAs and thereby

¹ OJ L 331, 15.12.2010, p. 48

² Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Regulation (EU) No 648/2012

contribute to supervisory convergence and strengthen the legal certainty required for the application of MiFID II/MiFIR. As a result, ESMA has decided to publish this opinion.

3 Opinion

6. To ensure that the objectives of the transparency provisions set out in MiFIR are achieved, ESMA believes that information on transactions concluded by EU investment firms that are truly OTC, i.e. bilateral transactions with non-EU firms, or that are concluded on third country trading venues that would not be subject to a certain level of post-trade transparency should be made public in the EU through an APA as set out in Articles 20 and 21 of MiFIR .
7. At the same time, ESMA is of the view that the post-trade transparency requirements set out in Articles 20 and 21 of MiFIR should not be interpreted as requiring EU investment firms to systematically republish information in the EU about transactions concluded on third-country trading venues, which are subject to transparency provisions similar to those applicable to EU trading venues under the MiFID II/MiFIR framework. ESMA does not consider that requiring investment firms to make those transactions public in the EU would contribute to the achievement of the transparency objectives set out in MiFIR. Indeed, such duplicate transparency reports are not likely to add value for EU financial markets and may provide misleading information to the EU public. Finally, ESMA takes into consideration that duplicate transparency reporting is likely to increase EU investment firms' compliance costs and to harm the level playing field with non-EU firms.
8. In this context, ESMA is aware that the correct application of the post-trade transparency requirements would require the identification of third-country trading venues, which are subject to similar post-trade transparency requirements as EU trading venues. ESMA believes that such third-country trading venues should have features similar to the features common to all EU trading venues.
9. Any identification of trading venues for the purposes of the consistent application of the post-trade transparency requirements set out in MiFIR proposed by this Opinion does not in any way prejudice an equivalence assessment performed by the European Commission under MiFID II/MiFIR and, in particular, any equivalence assessment of third-country trading venues for the purposes of the trading obligations for shares and derivatives, in accordance with Article 25(4)(a) of MiFID II and Article 28(4) of MiFIR.
10. ESMA considers that only a third-country trading venue that meets all the following objective criteria should be considered as a trading venue for the purposes of the MiFIR post-trade transparency regime:
 - a. it operates a multilateral system, i.e. a system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact;
 - b. it is subject to authorisation in accordance with the legal and supervisory framework of the third-country;

- c. it is subject to supervision and enforcement on an ongoing basis in accordance with the legal and supervisory framework of the third-country by a competent authority that is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)³; and,
 - d. it has a post-trade transparency regime in place which ensures that transactions concluded on that trading venue are published as soon as possible after the transaction was executed or, in clearly defined situations, after a deferral period.
11. Therefore, ESMA considers that for the purposes of Articles 20 and 21 of MiFIR EU investment firms should not be required to publish information about transactions that are concluded on third-country trading venues that meet the criteria considered above through APAs.
12. In order to ensure legal certainty and a high degree of supervisory convergence in the EU, ESMA will publish a list of trading venues that meet the criteria stated in paragraph 10 as well as a list of trading venues not meeting these criteria. Those lists will be published in an Annex to this Opinion and will be updated on an ongoing basis.
13. In order to contribute to the smooth implementation of MiFID II/MiFIR as of 3 January 2018 and to maintain a level playing field between third country trading venues, transactions on third country trading venues should not be required to be made post-trade transparent under Articles 20 and 21 of MiFIR pending the publication of the outcome of the assessment of the criteria stated in paragraph 10.

³ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>