

June 15, 2017

MiFID II: What is new for the buy side? Trade and Transaction Reporting

Topic 1, Update 1

Newly inserted text is underlined.

Level 1 offered little clarity around trade reporting obligations for firms trading on 3rd country venues. Recent ESMA [opinion](#) provides the criteria they will use to determine comparable 3rd country trading venues for the purposes of post trade transparency; in turn carving out the apparent trade reporting obligations for investment firms trading on such venues.

This document incorporates changes pursuant to ESMA's opinion and replaces previously published document on Topic 1.

Transaction Reporting

What is new here for buy side?

Buy side institutions that perform investment services or activities will find their transaction reporting obligations become more onerous as reporting requirements will be significantly expanded both in terms of required fields and the types of instruments in scope. These additional details would also include confidential data such as the details of the investment decision maker. To avoid sending all this data to each of their brokers many buy side firms are revisiting their transaction reporting arrangements with a working assumption is that instead of reporting via all their executing brokers they will instead be centralising their reporting via an Approved Reporting Mechanism (ARM).

Where is the legislation?

The obligation to undertake transaction reporting arises from Article 26(1)¹ of MiFIR, which is supplemented by RTS 22.

Which transactions are covered?

The legislators decided to keep the definition of covered transactions broad with a specific list of exceptions. Accordingly, the RTS sets out 15 exceptions, including the last addition of 'collateral transfers'. As defined in the RTS, transaction means basic purchase and sale but extends to other forms of acquisition and disposal of reportable instruments. For example for derivative

¹ Article 26(1) MiFIR: Investment firms which execute transactions in financial instruments shall report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day.



transactions, changes to notional amount are also considered as transactions.

The term also includes simultaneous acquisition and disposal of financial instruments where there is no change in ownership provided post trade publication is mandatory. All transactions, whether or not carried out on a venue have to be reported.

What are reportable financial instruments?

Obligations under Article 26(1) are applicable in respect of the following:

- Financial instruments which are admitted to trading or traded on a trading venue (TOTV)
- Financial instruments for which a request for admission to trading has been made
- Financial instruments where the underlying is a financial instrument which is traded on a trading venue
- Financial instruments where the underlying is an index or a basket composed of instruments, at least one of which is traded on a venue

What information is required to be reported?

The same data as under MiFID 1 i.e., information pertaining to name, price, quantity, date and time of the executed transaction is required to be reported. Additionally short sale transactions have to be flagged.

More data than previous is required in relation to identifying the investment firms, investment decision makers, execution decision makers and any algorithms involved in the transaction. For firms this means Legal Entity Identifiers (LEIs), while for individuals identifying data such as date of birth, passport or national ID numbers are required.

Further details are enumerated in Annex 1, Table 2 of RTS 22.

Who shall report to the competent authority?

The reports may be made to the national competent authority (NCA) by the investment firm itself, an Approved Reporting Mechanism (ARM) acting on the firms' behalf, or the trading venue on which the transactions were executed. While the primary obligation to make complete, timely and accurate reports to the competent authority is on the investment firm, the ARM / trading venue will be responsible where the investment firm utilises such services.

A transaction report for each execution must also be supplied to the competent authority of the most relevant market in terms of liquidity for the instrument traded. The NCAs bear the responsibility to forward relevant reports.

What is meant by 'execution' of transaction?

Given that Article 26(1) places the obligation to report transactions upon the investment firm that 'executes', the transaction, it is imperative to examine the scope of the term. The following activities/ services performed by an investment firm which result in a transaction, will be construed as 'execution' for the purposes of reporting:

- Reception and transmission of orders in relation to one or more financial instruments
- Execution of orders on behalf of clients
- Making an investment decision in accordance with a discretionary mandate given by a client
- Dealing on own account, and
- Transfer of financial instruments to or from accounts

Transmission of orders to other investment firms will not be considered 'execution' if done in accordance with the provisions of Article 4 of RTS 22.

Trade Reporting

What is new here for buy side?

Under MiFID I, parties to an OTC transaction in an equity could mutually decide which party would make arrangements for trade reporting. In practice this meant that most buy side firms agreed with their sell side counterparties that the sell side firm would take on the reporting obligation. However, under MiFID II this option to transfer the onus of reporting by mutual agreement has been removed. Rules under MiFID II place the obligation to report on the investment firm that sells the financial instrument when the transaction between two investment firms relates to instruments traded on a trading venue, but is executed outside the rules of a trading venue. However, if only the buying firm is a systematic internaliser in the given instrument, then the obligation to report is on the buying firm. It remains open to the parties to the trade to agree between themselves that the buyer will arrange for the trade to be reported but if the buyer breaks that agreement then the strict interpretation is that the agreement between the parties did not transfer the regulatory responsibility to effect a report and the seller may be in breach of the regulations. We are unaware neither of any legislative debate or detailed consultation on this apparent change in the rules nor of any policy desire to change the rules. It will be for buy side firms, informed by their regulators' Level 3 guidance, to decide whether there is a risk in asking their broker to continue with the current arrangements should that broker fail to effect the report.

The alternative, whereby buy side take on the responsibility of establishing when they have to initiate the trade report, would require each buy side firm to establish and maintain daily lists of which brokers are SI in which instruments, then compare this list to their trading activity "as close to real-time as is technically possible" to ensure that the trade has been reported. This is likely to require development of complex and expensive new systems all reports relating to trades for instruments traded on a trading venue, but executed outside the rules of a trading venue, have to be made public through an Approved Publication Arrangement (APA). Further, the obligation to publish trade reports under MiFID II has been extended to a wider array of asset classes. Unlike MiFID I which is limited to equity and similar instruments, MiFID II will be applicable to fixed income instruments, derivatives and commodities as well.

Where is the legislation?

The obligation on investment firms to report trades relating to instruments traded on a trading venue but executed outside the rules of a trading venue in near real time is placed by Article 20(1) and 21(1) of MiFIR; supplemented by RTS 1 (for shares, depositary receipts, ETFs, certificates and other similar financial instruments) and 2 (for derivatives).

What are the rules?

Investment firms have to publish the price, volume and time of the transactions to facilitate price discovery and transparency as well as assisting firms' in fulfilment of their best execution obligations.

Transactions in shares, depositary receipts, ETFs and other similar financial instruments traded on a venue are covered. Whether or not such transactions are concluded on a trading venue, they have to be reported. Transactions concluded under the rules of a trading venue will be reported by market operators and transactions concluded by investment firms outside a trading venue have to be reported by them through an APA.

Transactions in respect of which the competent authorities have authorised deferred publication will not be required to comply with 'real time' publication requirements. Deferred publication is granted on the basis of the size and type of the transaction and may also be sought in respect of transactions concluded outside trading venues.

What changes are there to the flagging of trade types?

A flag indicating the trade type is included in the report. In theory this allows for those looking at the resultant data feeds to exclude from their consideration trades that do not directly inform the

price formation for the instrument. An example would be a trade in a stock resulting from the exercise of an option where the price is dictated by the strike price of the option rather than prevailing market conditions. At present the taxonomy that classifies order types makes accurate identification of price forming trades very hard as there are large buckets of trades making indistinguishable trades of quite different nature. For example on the "OTC" category there is data reflecting the information rich trades where a broker has committed capital to a trade but these are categorised in the same way as "Give-ins" whereby a trade done via one broker is transferred later in the day at same price to a second broker at the execution price, which has only coincidental relationship to price of instrument in the market at the time the trade report prints. In order to address this issue and improve the quality of reporting and data the industry developed a new taxonomy for trade classification which makes separating price forming from non pricing forming more achievable. ESMA has adapted that taxonomy and made its own version. As a result, all trades in equity and equity-related products will have to be flagged by type in accordance with Article 20(3)(a), read with Annex I Table 4 of RTS 1 (recreated on the following pages). These flags should help in distinguishing between trades which are determined by factors linked to the valuation of financial instruments and those which are determined by other factors.

Will firms have to report in EU those trades concluded on 3rd country venues?

ESMA in their recently published opinion describe the parameters they will use to assess 3rd country venues for the purposes of post trade transparency. ESMA acknowledge that requiring EU firms to republish trades executed by them on 3rd country venues does not serve the purpose of transparency obligations set out in MiFIR - moreover, such a requirement would drive up compliance costs and hurt their competitiveness.

ESMA state that firms will not be required to publish trades in the EU if such trades are executed on a venue that has features similar to those common to all EU trading venues. ESMA will consider a 3rd country venue similar/ comparable if it exhibits the following characteristics:

- I) 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;
- II) It is subject to authorisation in accordance with the legal and supervisory framework of the third-country;
- III) 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); and.
- IV) 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.

ESMA have clarified that they will publish a list of 3rd country venues that meet these requirements and have invited firms to nominate venues for inclusion. Trades on 3rd country venues that are not on the list will have to be published in EU by the firm via an APA; as if they were concluded outside the rules of a trading venue.

ESMA's determination of such 'similar' or 'comparable' 3rd country venues for the purposes of post trade transparency² is an independent process and the opinion states that it will not prejudice EC's equivalence determination of 3rd country venues for share and derivatives trading obligations. We expect some overlap in the outcomes of the 2 processes; however it will be interesting to see the extent of it.

² Articles 20 and 21, MiFIR

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Appendix 1

RTS 1: Annex 1: Table 4: List of flags for the purpose of post-trade transparency

Flag	Flag Name	Type of venue			Description
		RM/ MTF	APA	CTP	
BENC	Benchmark transactions	✓	✓	✓	Transactions executed in reference to a price that is calculated over multiple time instances according to a given benchmark, such as volume-weighted average price or time-weighted average price.
ACTX	Agency cross transactions	✗	✓	✓	Transactions where an investment firm has brought together clients' orders with the purchase and the sale conducted as one transaction and involving the same volume and price.
NPFT	Non-price forming transactions	✓	✗	✓	Transactions where the exchange of financial instruments is determined by factors other than the current market valuation of the financial instrument as listed under Article 13.
TNCP	Transactions not contributing to the price discovery process *	✓	✓	✓	Transaction not contributing to the price discovery process for the purposes of Article 23 of Regulation (EU) No 600/2014 and as set out in Article 2.
SDIV	Special dividend transaction	✓	✓	✓	Transactions that are either: a) executed during the ex-dividend period where the dividend or other form of distribution accrues to the buyer instead of the seller; or b) executed during the cum-dividend period where the dividend or other form of distribution accrues to the seller instead of the buyer.
LRGS	Post-trade large in scale transaction	✓	✓	✓	Transactions that are large in scale compared with normal market size for which deferred publication is permitted under Article 14.
RFPT	Reference price transaction	✓	✗	✓	Transactions which are executed under systems operating in accordance with Article 4(1)(a) of Regulation (EU) No 600/2014.
NLIQ	Negotiated transaction in liquid financial instruments	✓	✗	✓	Transactions executed in accordance with Article 4(1)(b)(i) of Regulation (EU) No 600/2014.
OILQ	Negotiated transaction in illiquid financial instruments	✓	✗	✓	Transactions executed in accordance with Article 4(1)(b)(ii) of Regulation (EU) No 600/2014.

Flag	Flag Name	Type of venue			Description
		RM/ MTF	APA	CTP	
PRIC	Negotiated transaction subject to conditions other than the current market price	✓	✗	✓	Transactions executed in accordance with Article 4(1)(b)(iii) of Regulation (EU) No 600/2014 and as set out in Article 6.
ALGO	Algorithmic transaction	✓	✗	✓	Transactions executed as a result of an investment firm engaging in algorithmic trading as defined in Article 4(1)(39) of Directive 2014/65/EU.
SIZE	Transaction above the standard market size	✗	✓	✓	Transactions executed on a systematic internaliser where the size of the incoming order was above the standard market size as determined in accordance with Article 11.
ILQD	Illiquid instrument transaction	✗	✓	✓	Transactions in illiquid instruments as determined in accordance with Articles 1 to 9 of Commission Delegated Regulation [MiFIR Level 2] executed on a systematic internaliser.
RPRI	Transactions which have received price improvement	✗	✓	✓	Transactions executed on a systematic internaliser with a price improvement in accordance with Article 15(2) of Regulation (EU) No 600/2014.
CANC	Cancellation	✓	✓	✓	When a previously published transaction is cancelled.
AMND	Amendment	✓	✓	✓	When a previously published transaction is amended.
DUPL	Duplicative trade reports	✗	✓	✗	When a transaction is reported to more than one APA in accordance with Article 17(1) of Commission Delegated Regulation (EU) on [DRSP RTS}

* for the purposes of Article 23 of Regulation (EU) No 600/2014

Appendix 2

Thresholds for Large in Scale Orders and Deferred Publication

		Average daily turnover (ADT) in EUR								
		>100m	50m-100m	25m-50m	5m-25m	1m-5m	500k-1m	100k-500k	50k-100k	<50k
Allowable delay	60 mins	10,000,000	7,000,000	5,000,000	2,500,000	450,000	75,000	30,000	15,000	7,500
	120 mins	20,000,000	15,000,000	10,000,000	4,000,000	750,000	150,000	80,000	30,000	15,000
	EOD or Midday T+1	35,000,000	25,000,000	12,000,000	5,000,000	1,000,000	225,000	120,000	50,000	n/a
	EOD T+1	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	25,000
LIS Threshold		650k	500k	400k	300k	200k	100k	60k	30k	15k

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