

MiFID II

**Transaction reporting and financial instrument
reference data**

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Transaction reporting

Key Points

- MiFID I requires investment firms to report transactions to national competent authorities ("NCAs").
- This transaction data allows NCAs to detect and investigate market abuse, assess compliance with MiFID, and monitor wider market trends.
- MiFID II will introduce more comprehensive transaction reporting requirements by requiring greater amounts of information on transactions in a wider range of financial instruments.

Transaction reporting in MiFID I

MiFID II will expand the scope and range of transaction reporting compared with the existing MiFID I regime.

Under MiFID I, firms are required to report transactions to NCAs. This supplies regulators with the data which they need for:

- market abuse investigations and enforcement action;
- broader market surveillance, including the identification of unusual trading patterns and systemic risks; and
- the exchange of information with other NCAs in the EEA.¹

It should be noted that transaction reporting is distinct from the MiFID requirement to publish trades for purposes of pre- and post-trade transparency. Transaction reports are confidential and must be sent by investment firms to NCAs no later than the close of the working day following a

trade. In contrast, the rules on transparency relate to the requirement to make trading data publicly available to the market in real time. This trading data can then be used by market participants for the purposes of price discovery and best execution. For further information, please see our separate briefing note on Pre- and Post-Trade Transparency.

The review of MiFID I revealed several concerns over the effectiveness of the current transaction reporting regime. The European Commission's consultation in December 2010 identified the following issues:

- The MiFID transaction reporting requirements should be extended to cover the same range of financial instruments in scope for the revised Market Abuse Directive ("**MAD**") regime, known as MAD II, in order for NCAs to meet their obligation to investigate breaches under MAD II.
- Individual member states have implemented the MiFID requirements in different ways, which has led to divergent reporting obligations for firms, increased costs, and reduced efficiency in the exchange of information. The Commission concluded that the rules should be more closely harmonised between the member states.
- There are several channels by which transactions may be reported, including the firm itself, the relevant trading venue, or a third party. In addition, the European Market Infrastructure Regulation ("**EMIR**") requires trade reports to be made to trade repositories.² This multiplication of potential reporting

¹ See Recital 32, MiFIR.

² Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

channels and requirements is inefficient, and gives rise to a risk of double reporting.³

The new features of the MiFID II regime

The new features of the transaction reporting regime under MiFID II are to:

- extend the MiFID transaction reporting requirements to a broader range of financial instruments;
- harmonise the content of transaction reports by creating a common EU transaction report template;
- clarify which transactions should be reported and by which entity;
- waive MiFID reporting for firms that have already reported according to their obligations under EMIR; and
- require transaction reports to be kept for five years.

Expanded scope of transaction reporting in MiFID II

MiFID I requires that a transaction in any financial instrument admitted to trading on a regulated market ("**RM**") has to be reported to an NCA, even if the transaction takes place off-exchange.⁴

Under MiFID II, the scope of the transaction reporting regime will be extended to cover the following types of instrument:

- financial instruments that are admitted to trading or traded on an RM, multilateral trading facility ("**MTF**") or organised trading facility ("**OTF**"), or for which a request for admission has been made;

- financial instruments where the underlying is a financial instrument traded on an RM, MTF or OTF; and
- financial instruments where the underlying is an index or basket composed of financial instruments traded on an RM, MTF or OTF.⁵

This requirement applies whether or not the relevant transaction occurs on a trading venue.

Execution of transactions

The Commission's review of MiFID I found that member states had different interpretations of which part of the order process constituted a "transaction", and which would therefore trigger the reporting requirement.⁶

Because of the uncertainty among investment firms regarding which events constitute reportable transactions, the Level 2 legislation will build on the basic MiFIR requirement to provide detail on what constitutes "execution" and a "transaction" for the purposes of transaction reporting.⁷ The European Commission adopted a Commission Delegated Regulation, RTS 22, which amended its definitions of "transaction" and "execution":

- "transaction" means "the conclusion of an acquisition or disposal of a financial instrument"; and
- "execution" means any of the following services or activities that result in a transaction:
 - reception and transmission of orders;
 - execution of orders on behalf of clients;

³ European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010, Chapter 6.

⁴ Article 25(3), MiFID I Directive.

⁵ Recital 32 and Article 26(2), MiFIR.

⁶ European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010, Chapter 6.2.

⁷ For ESMA commentary, see ESMA, Final Report: Draft Regulatory and Implementing Technical Standards MiFID II/MiFIR (the "**Final Report**"), 28 September 2015, Chapter 7.1. See also ESMA Consultation Paper, December 2014, Chapter 8.2.

- dealing on own account;
- making an investment decision in accordance with a discretionary mandate;
- transfer of financial instruments to or from accounts.⁸

RTS 22 contains a list of examples of actions that do not constitute a "transaction" for the purposes of the transaction reporting regime. This will include, for example, securities financing transactions that are already subject to reporting requirements under the Securities Financing Transaction Regulation.

In addition, ESMA has provided examples of which transactions should be reported in its guidelines on transaction reporting. These guidelines are intended to provide greater detail and specificity on the transaction reporting requirements and clarify aspects that could not be included in RTS 22 due to the level of detail required.⁹

In particular, the guidelines include further details on "chains" of reporting that occur when firms do not complete transactions themselves but send orders to other firms for completion. A firm that is part of a chain is generally required to report its role in that chain, for example in transmitting orders.

Transmission of orders

The Commission, in its review of MiFID I, identified that member states had implemented

differing national interpretations of which entities should be responsible for making reports.¹⁰ MiFID II is intended to clarify which entity should report transactions.

The general rule in MiFIR is that the investment firm executing the transaction is required to make the transaction report.¹¹ This includes firms that receive orders from their clients and transmit them to other investment firms, and firms acting on a discretionary basis that place orders with other investment firms.

An investment firm that transmits an order to another investment firm may choose either:

- to transmit all of the required details to the investment firm they are passing the order to, so that the receiving firm can make the report; or
- if it does not transmit all of the specified details to the receiving firm, to report the transaction itself.¹²

Either the transmitting firm or the receiving firm will have to report the transaction. RTS 22 states that the transmitting firm should only be exempt from the reporting obligation if:

- it has received an order from its client or has decided to acquire or dispose of a financial instrument in accordance with a discretionary mandate;
- the required information has been sent to the receiving firm; and
- either (i) the receiving firm agrees in a written transmission agreement that it will make the report, or (ii) the receiving firm will transmit the order details to another investment firm.

⁸ Commission Delegated Regulation (EU) of XXX 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 ("RTS 22"). For an earlier draft, see RTS 22 in ESMA, Regulatory and Technical Implementing Standards: Annex I, 28 September 2015.

⁹ ESMA, Guidelines: Transaction reporting, order recordkeeping and clock synchronisation under MiFID II (ESMA/2016/1452) (10 October 2016). For an earlier draft, see ESMA, Consultation Paper: Guidelines on transaction reporting, reference data, order recordkeeping and clock synchronisation (ESMA/2015/1009) (23 December 2015).

¹⁰ European Commission, Public consultation: Review of the Markets in Financial Instruments Directive (MiFID), 8 December 2010, Chapter 6.2.

¹¹ Article 26(1), MiFIR.

¹² Article 26(4), MiFIR.

More extensive and harmonised content of transaction reports

MiFID II is intended to harmonise the content of transaction reports across the EU. It will also require additional information to be included in the fields of the transaction report compared with the current MiFID reporting regime.

The expansion in the number of fields required in transaction reports has been a contentious issue in the industry. ESMA has previously proposed that a total of 81 fields should be included in the draft transaction report, which would be a very significant increase compared the current UK reporting requirement of 25 fields. In September 2015, ESMA stated that in response to industry feedback, the number of fields in the transaction report would be reduced.¹³ RTS 22 now specifies a total of 65 fields in the transaction report.

The transaction reports will include fields to identify, among other items:

- individual clients;
- legal entities by using a unique legal entity identifier ("**LEI**");
- the persons responsible for a particular investment decision and for the execution of the trade (the "**Trader ID**");
- any computer algorithm which is responsible for an investment decision and execution (the "**Algo ID**");
- transactions involving short selling in shares;
- transactions involving a sovereign bond;
- the applicable waiver, if a transaction has made use of a waiver; and

- transactions that relate to a commodity derivative.¹⁴

Client identification

A transaction report must include "a designation to identify the clients on whose behalf the investment firm has executed the transaction".¹⁵ This will make client identification in transaction reports mandatory across the EU for the first time.

RTS 22 contains detailed requirements for standardised client identifiers. In its commentary on the RTS, ESMA noted that concerns had been raised by the industry in relation to this issue, especially regarding the complexity and cost of retrieving client information. Some respondents called for the requirement for a client ID to be delayed. However, ESMA confirmed in its September 2015 Final Report that this is a MiFIR requirement and cannot be delayed.

In addition, respondents to ESMA's consultation raised concerns over data protection issues. In particular they asked ESMA to consider that privacy and bank secrecy laws in non-EEA countries may forbid the disclosure of client data. ESMA stated that it will ensure that transaction reporting complies with EU data protection requirements. However ESMA noted that it had no mandate to consider the position in relation to non-EEA data protection and bank secrecy requirements, and that this is the Commission's responsibility.¹⁶

The Commission has not put forward proposals in relation to the issue of data protection especially with respect to non-EEA client data. This is a concern, especially since, unlike EMIR, MiFIR contains no provisions to give firms comfort with regard to their other legal obligations when making reports that are required by EU legislation. In contrast, Article 9(4) of EMIR states that parties

¹⁴ Recital 34 and Article 26(3), MiFIR.

¹⁵ MiFIR, Article 26(3).

¹⁶ ESMA, Final Report, 28 September 2015, chapter 7.1 (page 372); ESMA, Consultation Paper, 19 December 2014, Chapter 8.2 (page 582).

fulfilling their EMIR reporting obligations will not breach any contractual restrictions or any law or regulation by doing so.

Legal Entity Identifier

An LEI is a unique ID for legal entities or structures, including companies, charities and trusts, which must be included in the transaction report.

ESMA noted in its September 2015 Final Report that a large majority of respondents objected to the scope of clients that MiFIR requires firms to identify with an LEI. However, ESMA has reiterated that it is not empowered to amend requirements that are embedded in MiFIR.

On 2 December 2016, the FCA published an update for firms subject to MiFID II transaction reporting obligations. From 3 January 2018, such firms will not be able to execute trades for clients who are eligible for an LEI but do not have one. Firms will need to ensure that clients eligible for LEIs have one before executing a trade within the scope of MiFID II.

Trader ID and Algo ID

The use of the Trader ID and Algo ID will enable NCAs to monitor the activities of individual traders and particular algorithmic programs.

Applicable waiver

ESMA commentary in its September 2015 Final Report clarified that:

- the requirement to identify applicable waivers only applies to transactions executed on EEA trading venues, and not to non-EEA trading venues; and
- if a transaction involves multiple waivers, they must all be flagged.

Format for transaction reports

RTS 22 confirms that transaction reports and financial instrument reference data must be

submitted in accordance with ISO 20022, which is a standardisation methodology approved by the International Organization for Standardization ("ISO") for financial messages and data sets.¹⁷

Branches will report to their home state NCA

At present, the transaction reporting rules are inconsistent in relation to the branches of investment firms that operate outside their home member state. Under MiFID I, branches are required to report to the relevant NCA depending on whether or not the branch provides a service within the territory of the member state where it is located. In practice, as ESMA pointed out during the consultation period, this means that branches report some of their transactions to the host state NCA, and other transactions to their home NCA.¹⁸

Under MiFID II, transactions executed by an investment firm through its branch should be reported to the investment firm's home state NCA.¹⁹ By having this single connection point, the reporting requirements for branches will be greatly simplified.

RTS 22 also introduces new rules regarding the EEA branches of non-EEA firms. These state that, as a general rule, the branch of a non-EEA firm should submit transaction reports to the NCA that authorised the branch. However, if the non-EEA firm has branches in more than one member state, then the branches should jointly choose an NCA in one of those member states. All of the branches will then send their transaction reports to that NCA.²⁰

¹⁷ Article 2, RTS 22. See also ESMA, Final Report, 28 September 2015, Chapter 7.1.

¹⁸ ESMA Discussion Paper, 22 May 2014, Chapter 8.1, paragraphs 128-134; ESMA Consultation Paper, 19 December 2014, Chapter 8.1, paragraphs 160-177.

¹⁹ Article 14, RTS 22. For an earlier version, see RTS 22 in ESMA, Regulatory Technical and Implementing Standards: Annex I, 28 September 2015.

²⁰ Article 14, RTS 22.

Need to avoid double / triple reporting with EMIR and REMIT

MiFIR confirms that an investment firm which has already reported an over-the-counter ("**OTC**") contract to a trade repository or competent authority under EMIR will not be required to report again for the purposes of MiFID.²¹ However, trade repositories that have been registered or recognised under EMIR will also need to be approved as ARMs under the MiFID II regime. Furthermore, market participants that have already made transaction reports in relation to wholesale energy products under MiFID or EMIR will be deemed to have met the requirement to report such transactions under Article 8 of the Regulation on Wholesale Energy Market Integrity and Transparency ("**REMIT**").²²

EMIR requires counterparties to report all derivative transactions, whether OTC or on-exchange, to a trade repository. To avoid the double reporting of this transaction data, firms that have already made transaction reports to a trade repository under EMIR will be deemed to be in compliance with the MiFID reporting obligation. The trade repository will be required to forward these transaction reports to the relevant NCA.

Under REMIT, market participants will be required to report wholesale energy market transactions, including certain power and natural gas derivatives, to the Agency for the Cooperation of Energy Regulators ("**ACER**"). This raises the risk of double, or even triple, reporting relating to transactions covered by REMIT, MiFIR and/or EMIR. To avoid this, the implementing regulation on REMIT reporting provides that information in relation to wholesale energy products that has already been reported in accordance with MiFIR or EMIR may be provided to ACER by any trade repository, ARM or NCA, or ESMA. The reporting

firm will then be deemed to have complied with its REMIT reporting obligations.²³ However, the reverse is not true; if a report has been made to ACER under REMIT, then the reporting firm's obligations under MiFID or EMIR will not be fulfilled.

The REMIT reporting obligations became effective in relation to contracts admitted to trading on an organised market place from 7 October 2015, and in relation to other contracts from 7 April 2016.²⁴

ESMA is required to report to the Commission by 3 January 2020 on the functioning of the transaction reporting regime under MiFID II and in particular how it interacts with the reporting obligations under EMIR and REMIT. Depending on this outcome, this may lead to a further review and reform of MiFID II transaction reporting.²⁵

²¹ Recital 35, MiFIR.

²² Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency.

²³ Commission Implementing Regulation No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency, article 6.

²⁴ See the ACER website at http://www.acer.europa.eu/remi/REMITATACER/Data_collection/Pages/default_ORIGINAL.aspx for the REMIT reporting timeline.

²⁵ Article 26(10), MiFIR.

Financial instrument reference data

Key points

- Under MiFID I, regulated markets ("**RM**s") are required to submit identifying data to NCAs for all of the financial instruments traded on their markets. MiFID II will expand the scope of this requirement.
- Investment firms and trading venues must review whether they will be obliged to report a greater number of transactions and data and, if so, how to report the wider range of information required by MiFID II.

Financial instrument reference data in MiFID I

The obligation to supply identifying data for financial instruments is distinct from the requirement for transaction reporting. Currently, RMs are required to supply identifying data to NCAs for all of the instruments admitted to trading on their markets. However, the extension of the scope of MiFID II to new forms of trading venue and the increased demand from supervisory authorities for more granular detail on the financial markets will lead to an expansion of this requirement under MiFID II.

Requirement to report financial instrument reference data

Financial instruments admitted to trading on trading venues can be identified through a specific dataset that includes identifiers, descriptive information, and pricing. The NCAs and ESMA require this information in order to monitor the activities of investment firms. MiFID II will expand the range of instruments being reported

and the amount of data submitted in relation to each instrument.

Under MiFID I, RMs must provide this information to their home NCAs in relation to each financial instrument admitted to trading on their market. MiFIR and the Market Abuse Regulation ("**MAR**") extend this requirement to all trading venues (RMs, MTFs, and OTFs) and systematic internalisers ("**SI**s"), which will be obliged to provide NCAs with these identifying reference data.²⁶ This information must be supplied to the relevant NCA before trading commences in the instrument concerned.²⁷ A Commission Delegated Regulation, RTS 23 contains an expanded range of information fields to be included in the data.²⁸

After the NCAs have received the data, they must forward it immediately to ESMA for consolidation. ESMA is required by MiFIR to publish the data, which will comprise comprehensive data for financial instruments traded on EEA trading venues, on its website.

Obligation to update identifying data

MiFIR requires that this identifying data is updated by trading venues and SIs whenever there are changes to the data, whereas MAR requires updates only on the occurrence of specified events, such as admission to trading or cessation of trading in that instrument.²⁹ ESMA has proposed that, rather than sending updates as and when changes occur, it would be much simpler for venues and SIs

²⁶ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

²⁷ Article 27, MiFIR.

²⁸ Commission Delegated Regulation (EU) 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 ("**RTS 23**"). For an earlier version, see RTS 23 in ESMA, Regulatory Technical and Implementing Standards: Annex I MiFID II/MiFIR, 28 September 2015.

²⁹ Article 27(1), MiFIR; Article 4, MAR.

to submit on a periodic basis the complete reference data for all of the instruments admitted to the venue or traded on the SI. This "full file" approach would be much easier to implement. Furthermore, MAR appears to suggest that investment firms and trading venues must supply NCAs with the data in real time, but ESMA has proposed that the submission of the "full file" to the relevant NCA once per day would be sufficient.³⁰ This "full file" approach met with broad agreement during the ESMA consultation and has been maintained in RTS 23.³¹

No "golden source" of reference data for transaction reporting

Firms have expressed concern that under MiFIR the onus is on them to identify which financial instruments are subject to transaction reporting, and which are not. There is regarded as a significant challenge, given the complexity of the requirements.

As a solution to this issue, it has been suggested by the industry that ESMA should provide a "golden source" of data that would state clearly which financial instruments are in scope for transaction reporting. One suggestion is that the basis for a suitable "golden source" would be the complete set of EEA financial instrument reference data which ESMA must compile for regulatory purposes and publish in accordance with Article 27 of MiFIR. However, ESMA's Final Report in September 2015 stated that this list cannot be used as the basis for a golden source. According to ESMA, the criteria for determining whether an instrument is reportable are set out in MiFIR, and do not refer to the use of such a list.³²

Obligation to retain records of transaction and order data

Under MiFIR, both investment firms and trading venues will be required to keep records. Firms will be required to keep records of orders and transactions for five years, and RMs, MTFs, and OTFs must similarly retain data on orders for five years.³³ RTS 24 specifies minimum requirements for the content of the order data that trading venues will have to maintain.³⁴ This data is meant to supplement the data available to NCAs and ESMA under the transaction reporting obligation and allow for the detection of market manipulation and comprehensive analysis of the functioning of the markets.

The ESMA guidelines on order record keeping specify example scenarios and clarify aspects of RTS 24 on recordkeeping.³⁵

Timescales for implementation

The MiFID II Directive and MiFIR came into force on 3 July 2014, and most of their provisions will come into effect in member states from 3 January 2018. Member states have until 3 July 2017 to transpose the MiFID II Directive.

³⁰ Article 4(1), MAR; ESMA Consultation Paper, 19 December 2014, Chapter 8.6, paragraphs 11-21.

³¹ ESMA, Final Report, 28 September 2015, Chapter 7.2.

³² ESMA, Final Report, 28 September 2015, Chapter 7.2.

³³ Recital 34 and Article 25, MiFIR.
³⁴ Commission Delegated Regulation (EU) of 24 June 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the maintenance of relevant data relating to orders in financial instruments ("RTS 24"). For an earlier draft, see RTS 24 in ESMA, Regulatory Technical and Implementing Standards: Annex I MiFID II/MiFIR, 28 September 2015.

³⁵ ESMA, Guidelines: Transaction reporting, order recordkeeping and clock synchronisation under MiFID II (ESMA/2016/1452) (10 October 2016). For an earlier draft, see ESMA, Consultation Paper: Guidelines on transaction reporting, reference data, order recordkeeping and clock synchronisation, 23 December 2015 (ESMA/2015/1009).

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