

MiFID II Update – Non-EU Trading Venue Equivalence for Transparency and Position Limits

June 23, 2020

On 3 June 2020, the European Securities and Markets Authority (ESMA) published two Opinions clarifying how European Union investment firms trading financial instruments on third-country trading venues (TCTVs) should, from 3 October 2020:

1. Assess their post-trade transparency obligations under the Markets in Financial Instruments Regulation (MiFIR); Opinion available here ([link](#)) and Annex with list of equivalent TCTVs available here ([link](#)).
2. Calculate their position limits in commodity derivatives under the Markets in Financial Instruments Regulation II (MiFID II); Opinion available here ([link](#)) and Annex with list of equivalent TCTVs available here ([link](#)).

Further to ESMA's 2017 opinions,¹ investment firms were not required to treat transactions on TCTVs as within the scope of the transparency and position limit rules until such time as ESMA has concluded its assessment of TCTVs. Now that ESMA has done so, firms will need to ensure that, from 3 October 2020, their reporting arrangements are consistent with ESMA's lists of TCTVs, and monitor changes to the lists over time.²

The Opinions do not extend equivalence to other areas of MiFID II/MiFIR, such as to the trading obligation in respect of shares and derivatives,³ which remains a key item in the Brexit trade negotiations. The lists also do not yet include any United Kingdom trading venues, although these may be included at a later date. UK investment firms should note that the lists apply to UK investment firms during the Brexit transition period, which is scheduled to end on 31 December 2020.

(1) The Transparency Opinion

Background

Investment firms are required to make public, via an approved publication arrangement (APA), the volume and price of transactions and, the time at which they were concluded, where they are transactions in:

- Equity instruments, meaning “shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments traded on a trading venue.”⁴

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- Non-equity instruments, meaning, “bonds, structured finance products, emission allowances and derivatives traded on a trading venue.”⁵

ESMA Lists

MiFIR is however unclear whether the obligation to make transactions public applies to transactions which are traded on a TCTV. ESMA has now concluded its assessment of TCTVs against its criteria of a “trading venue”⁶ and has published two lists:

1. TCTVs with positive assessments for **all** asset classes traded on such venues: 120 TCTVs have been declared positive. The majority are located in the United States, and include the New York Stock Exchange, Nasdaq, ICE Futures and Bloomberg SEF.
2. TCTVs with partially positive assessments: 16 TCTVs, which have met the criteria only for certain asset classes, have received partially positive assessments. The majority of these are United States swap execution facilities (SEFs).

What do the Lists mean for Investment Firms?

- Positive List: Investment firms concluding transactions on TCTVs which have received a positive assessment for all asset classes are not required to make those transactions public via an APA as these venues are fully equivalent.
- Partially Positive List: Investment firms concluding transactions on TCTVs with a partially positive assessment are not required to make transactions public via an APA, provided that they are covered by a positive assessment. Firms are, however, required to make transactions public via an APA by 3 October 2020 to the extent that they are not covered by a positive assessment.
- Not on Lists: Investment firms concluding transactions on TCTVs not included in the lists are required to make transactions public via an APA by 3 October 2020.

Firms should carefully review the ESMA lists based on their trades and take note of any absences; for example, CME Group in the United States is not included on either list so firms trading on CME in the EU⁷ should note that transactions on CME in the United States are not equivalent and are required to be made public.

(2) The Position Limit Opinion

Background

Under MiFID II, EU member state competent authorities are required to establish and apply limits on the size of a net position which a person is permitted to hold in commodity derivatives and “economically equivalent” over-the-counter (OTC) contracts.⁸ The Financial Conduct Authority’s (FCA) position limit regime for commodity derivatives is set out on the FCA’s website ([link](#)).

MiFID II is, however, unclear as to whether a commodity derivative which is traded on a TCTV could qualify as OTC and, therefore, whether it could be considered an “economically equivalent” OTC contract.⁹ The determination is key to understanding whether such contracts count towards the EU position limit regime. ESMA has explained that contracts traded on a TCTV “which is considered a trading venue,

should not be regarded as OTC and, hence that the positions resulting from trading those contracts should not count towards the EU position limit regime.”¹⁰

ESMA Lists

Following ESMA’s review of TCTVs against its criteria of a venue that constitutes a “trading venue,”¹¹ ESMA has published a list of seven equivalent TCTVs.¹² The list may expand over time, potentially including UK commodities trading venues after 31 December 2020.

What do the Lists mean for Investment Firms?

- TCTVs included in the List: Commodity derivatives traded on TCTVs listed in the Annex to the Opinion should not be considered OTC for the purposes of the EU position limit regime and should therefore not be counted towards position limits.
- TCTVs not included in the List: Commodity derivatives traded on TCTVs which are not included in the Annex to the Opinion should be considered OTC trades for the purposes of the position limit regime from 3 October 2020 and should therefore be counted towards position limits.

¹ See ESMA’s 2017 Opinions available ([here](#)).

² TCTVs which have not yet been declared equivalent may apply to ESMA to be assessed.

³ Article 25(4)(a) of MiFID II and Article 28(4) of MiFIR.

⁴ Article 20(1) MiFIR. Data must be made public within one minute of execution for equity and equity-like products.

⁵ Article 21(1) MiFIR. Data must be made public within 15 minutes of execution for non-equity instruments, reducing to five minutes from 3 January 2021.

⁶ As set out under Paragraph 10 of the Opinion, the criteria are that the TCTV: (i) operates a multilateral system; (ii) is subject to authorisation in accordance with the legal and supervisory framework of the third country; (iii) is subject to supervision and enforcement on an on-going 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) has a post-trade transparency regime in place that ensures transactions concluded on that trading venue are published as soon as possible after the transaction was executed or after a deferral period, as defined.

⁷ That is, on the CME Amsterdam B.V. regulated market/multilateral trading facility.

⁸ Per Article 57(4) MiFID II. The position limits are set using ESMA’s methodology in Commission Delegated Regulation (EU) 2017/591 (RTS 21). The term “commodity derivatives”, defined under Article 2(1)(30) of MiFIR, cross-refers to Article 4(1)(44)(c) of MiFID II, which relate to a commodity or underlying referred to in Section C(10) of Annex I of MiFID II, or in points (5), (6), (7) and (10) of Section C of Annex I; the definition of commodity derivative is broad, covering securitized derivatives and cash-settled derivatives without a tangible underlying but excludes physical holdings. Article 57(12) MiFID II sets out the criteria to be met for an OTC contract to be considered economically equivalent to a commodity derivative which is traded on a trading venue.

⁹ Article 57 of MiFID II does not provide any indication as to whether a contract in commodity derivatives traded on a TCTV should be considered as traded OTC, and therefore whether such a contract could qualify as an economically equivalent OTC contract in accordance with Article 6 of RTS 21.

¹⁰ Paragraph 8 of the Opinion.

¹¹ As set out under Paragraph 11 of the position limit Opinion, the criteria are that the TCTV: (i) operates a multilateral system; (ii) is subject to authorisation in accordance with the legal and supervisory framework of the third country; (iii) 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 MMoU.

¹² Specifically, Matba Rofex S.A; ASX 24; EEX Asia Pte. Ltd.; ICE Futures Singapore Pte. Ltd.; Singapore Exchange Derivatives Trading Limited; ICE Futures U.S., Inc.; and ICE Swap Trade, LLC.

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