



European Securities and
Markets Authority

Final Report

Amendment of ESMA draft regulatory technical standards on reporting obligations under Article 26 of MiFIR





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1 Executive Summary

Reasons for publication

The draft Regulatory Technical Standards on reporting obligations under Article 26 of MiFIR (RTS 22) were submitted to the Commission on 28 September 2015¹. ESMA has identified a need to amend Article 2 of RTS 22 due to an unintentional omission in the final stage of drafting the RTS 22. Therefore, the necessary amendment to the RTS 22 has been submitted to the Commission.

Contents

The amendment introduced by ESMA relates to the list of instances that are not considered to be reportable transactions for the purpose of Article 26 of MiFIR. In particular, it relates to the use of financial instruments as collateral.

The amendment of RTS 22 resolves an unintended omission by adding acquisitions or disposals that are solely a result of a transfer of collateral to the list of exclusions from transaction reporting specified in Article 2(5) of RTS 22. The amendment ensures that investment firms do not submit transaction reports for transfers of collateral, which would be costly, and bring no supervisory benefit.

Next Steps

This Final Report has been submitted to the Commission. ESMA anticipates that the amendment will be taken into account in the context of the Commission's endorsement of RTS 22.

¹Ref. ESMA/2015/1464, available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_-_final_report_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

2 Background

- 1 The Regulatory Technical Standards on reporting obligations under Article 26 of MiFIR (RTS 22) were submitted to the Commission on 28 September 2015. ESMA has identified a need to amend Article 2 on the meaning of transaction of that RTS.
- 2 In the RTS 22, ESMA decided that the general rule for what constitutes a transaction should be drafted on a broad principle basis with a specific limited set of exclusions. Such approach was decided in order to avoid imposing unnecessary administrative burden on investment firms and ensure that actions or agreements not susceptible to market abuse are excluded from the transaction reporting obligation.
- 3 Therefore, Article 2 on the meaning of transaction of RTS 22 is based on the concept of “acquisition” or “disposal” of a financial instrument and is structured in a way to include in that concept:
 - a non-definite list of instances which are considered to be transactions for the purpose of transaction reporting under Article 26 of MiFIR, and
 - a definite list of instances that are not considered to be transactions for the purpose of Article 26 of MiFIR and, thus, should not be subject to reporting requirement.
- 4 The amendment identified by ESMA relates to the definitive list of instances that are not considered to be transactions for the purpose of Article 26 of MiFIR. In particular, it relates to the use of financial instruments as collateral.

3 Problems arising from the inclusion of transfers of collateral

1. ESMA believes that collateral transfers should not fall within the meaning of transaction and should not be reported. Including such activity within the scope of reporting would lead to a significant increase of reported data that would include transactions not susceptible to market abuse (and causing ‘white noise’ for Competent Authorities’ surveillance systems) and represent a significant burden on the market.
2. During the 2014 consultation on MiFID II/MiFIR Discussion paper ESMA stated that actions of using financial instruments as collateral shall not be reportable for the purposes of Article 26 of MiFIR². This position was sustained through the whole process of developing RTS under Article 26 of MiFIR. However, the explicit reference to exclusion of collateral transfers from the meaning of transaction was inadvertently omitted in the final stage of drafting the RTS 22.

² Ref. ESMA/2014/548 p. 442 paragraph 15(iii), available at : https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-548_discussion_paper_mifid-mifir.pdf

3. More recently, the question of whether or not transfers of collateral fall within the meaning of transaction under the RTS 22 has been raised by a number of market participants in their immediate reaction to the consultation on Guidelines on MiFIR transaction reporting, reference data, order record keeping and clock synchronisation³.
4. In summary, ESMA has introduced the amendment to RTS 22 for the following reasons: (i) the original ESMA intention was to exclude collateral transfers from the scope of transaction reported under Article 26 of MiFIR, (ii) such exclusion was omitted during the finalisation of RTS 22, (iii) the absence of this exclusion is causing confusion regarding the scope of reportable transactions among market participants, (iv) the most legally sound way of providing the necessary clarity is an amendment to current RTS 22.

³ Ref.: ESMA/2015/1909, available at: <https://www.esma.europa.eu/press-news/consultations/guidelines-transaction-reporting-reference-data-order-record-keeping-clock>

4 Annexes

4.1 Annex I

Commission mandate to develop technical standards

Article 26(9)(h) of MiFIR

ESMA shall develop draft regulatory technical standards to specify:

(h) what constitutes a transaction and execution of a transaction for the purposes of this Article

4.2 Annex II

Draft amendment to technical standards

In Article 2(5) of draft RTS 22 on reporting obligations under Article 26 MiFIR which was submitted to the Commission on 28 September 2015, the following paragraph (o) is added:

(o) An acquisition or disposal that is solely a result of a transfer of collateral.

4.3 Annex III

Feedback statement

The feedback during the 2014 consultation on MiFID II/MiFIR Discussion paper⁴ indicated support for the exclusion of transfers of collateral from the reporting obligation under Article 26 of MiFIR.

The consultation on Guidelines on MiFIR transaction reporting, reference data, order record keeping and clock synchronisation⁵ has evidenced a significant confusion caused among market participants by the omission of collateral transfers from the exclusions provided in Article 2(5) of RTS 22. The question of whether or not transfers of collateral falls within the meaning of reportable transaction under this RTS has been raised by a number of market participants in their feedback to the consultation on the Guidelines.

Based on the above, ESMA has introduced an amendment to Article 2(5) of RTS 22 to exclude collateral transfers from the reporting obligation.

⁴ Ref. ESMA/2014/548 p. 442 paragraph 15(iii), available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-548_discussion_paper_mifid-mifir.pdf

⁵ Ref. ESMA/2015/1909, available at: <https://www.esma.europa.eu/press-news/consultations/guidelines-transaction-reporting-reference-data-order-record-keeping-clock>