



**Financial Services
Commission**

Guidance Note

Transparency Requirements

Markets in Financial Instruments Directive [MiFID]

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Published by:

Financial Services Commission
 PO Box 940, Suite 943, Europort, Gibraltar
 Tel (+350) 40283
 Fax (+350) 40282
 E-Mail: info@fsc.gi
www.fsc.gi

1 Introduction

The Markets in Financial Instruments Directive (MiFID) came into effect on 01 November 2007, when it replaced the Investment Services Directive (ISD). MiFID has been implemented in Gibraltar via the Financial Services (Markets in Financial Instruments) Act 2006 ('the Act') and the Financial Services (Markets in Financial Instruments) Regulations 2007 ('the Regulations').

The aim of this Guidance Note is to supplement the legislation in regard to Transparency Requirements.

2 Transparency Requirements

MiFID has laid down transparency provisions ('the Provisions') in general terms which are clarified and specified in the Regulations. The Provisions have, as their principal focus, the equal treatment (as far as possible) of all trading/execution venues for the enhancement of competition across said venues whilst ensuring the ultimate benefit and objective of improving and enhancing the protection the ISD had, thus far, afforded the investor.

The Provisions set out the post-trade and pre-trade reporting/publishing requirements in respect of all four sectors of the industry, namely regulated markets ('RMs'), multilateral trading facilities ('MTFs'), systematic internalisers ('SIs') and investment firms trading bilaterally, otherwise known as 'Over the Counter' trades ('OTCs'). MiFID requires compliance with new measures designed to treat all trading/execution venues equally and directs its focus to seeking minimum standards of reliability in relation to the information published, as well as the format of and accessibility to the information required for compliance with the Provisions.

MiFID supports price formation and investor protection in a potentially more fragmented trading environment and also introduces universal transparency requirements across EEA states to help facilitate price formation. The intention being that an adequate level of pre-and post-trade information contributes to the effective operation of a market and to investor protection. Greater transparency also helps to minimise the potential consequences of fragmentation in trading, such as inefficient price formation.

In addition to opening up competition among trading venues, MiFID introduces competition in trade publication services by giving firms, when trading OTC, choice in the manner in which they publish their transparency information.

It is noted for general purposes that at the time of publication of this Guidance Note, particular aspects of the Provisions currently do not and cannot, necessarily, apply to the Industry in Gibraltar. The more notable amongst these being those relating to the regulation of the activity of RMs and MTFs as currently none exist in Gibraltar.

2.1 Post-trade Transparency

2.1.1 Requirements for RMs and MTFs

MiFID requires¹ that a RM or MTF make public the price, volume and time of the trade executed on its market and/or system(s) in respect of shares admitted to trading on a regulated market. This information is to be made available on a 'reasonable commercial basis' and 'as close to real time as possible.' MiFID

¹ Sections 45 and 30 of the Act respectively.

also allows for deferred publication mechanisms based on the type or size of the trade.

The Regulations² provide further definition on the scope of information to be made available as well as the conditions under which deferred publication may be possible. These state that the *trading day, time, instrument, price and quantity*, as well as the *trading venue* need to be made public.

Deferred publication is permissible according to the size of the trade compared to the average daily turnover. The delay might be as short as 60 minutes but could in cases of very large trades be as long as three days.

2.1.2 Timing of post-trade publication – ‘as close to real time as possible.’

The Regulations³ also provide an interpretation to the phrase “as close to real time as possible”. It should be interpreted as meaning that during normal trading hours the information should be made available within three minutes of the relevant transaction. Since this timeframe is expressed in terms of the absolute longest it should take an RM or MTF to publish the information, it is expected that it should be much faster than three minutes, often in a matter of seconds in light of the technologies available and in use today. If a trade takes place outside normal working hours, information is to be made available before the start of the next trading day.

When assessing whether RMs, MTFs or investment firms fulfil the obligation to publish the post-trade information “as close to real time as possible” and no later than 3 minutes, the FSC considers that RMs, MTFs and investment firms taking up to 3 minutes for publication on a frequent basis should be able to explain the reason why this is the case.

The FSC considers that a RM, MTF or investment firm fails to meet its requirements under MiFID if it chooses a publication mechanism which does not allow for real-time publication of completed trades. The use of inadequate technology will not be an acceptable reason for publication taking close to three minutes on a frequent basis where other available technology can provide for publication in a shorter period of time, and where such technology is available at reasonable costs.

Notwithstanding the above, and specifically in relation to portfolio trades, due to the need to allocate prices to particular shares, the FSC recognises that the process used to allocate prices to each share of the portfolio may not be instantaneous.

2.1.3 Post Trade transparency requirements for investment firms

As is the case for RMs and MTFs (see 2.1.1 above), investment firms are required to publish the *trading day, time, instrument, price and quantity*, as well as the *trading venue* as close to real time as possible.

For investment firms, where trades qualify for deferred reporting under the provisions for RMs and MTFs, they should also be allowed to be deferred if the trade is undertaken outside a RM or MTF.

² Section 27 of the schedule to the Regulations.

³ Section 29 of the schedule to the Regulations.

2.1.4 Mechanisms for the Publication of post trade transparency information outside RMs and MTFs

MiFID allows three routes for investment firms to make their transactions post-trade transparent:

- (a) through the facilities of a RM or a MTF
- (b) through the facilities of a third party
- (c) through proprietary arrangements

In order for the firm to comply with the requirements of MiFID, in respect of the publication of transparency information, the firm must ensure that the information it publishes is reliable, that it is in a standard/universal format and that the information is made available on a reasonable commercial basis.

The Regulations establish that parties trading away from a RM or MTF should agree which party shall have the responsibility for publishing the post-trade information. In the absence of an agreement, the Regulations⁴ state that responsibility will fall in the first instance upon the seller or (if represented by an investment firm) the investment firm acting for the seller. If none of these apply then the responsibility would fall on the investment firm that acts on behalf of or arranges the transaction for the buyer, or the investment firm that buys the share concerned.

The FSC considers that ultimate responsibility for complying with the MiFID publication requirements resides with the relevant RM, MTF or investment firm subject to the publication obligations in the absence of specific publication arrangements recognised by the FSC.

2.1.5 Availability of transparency information in the EEA states

The FSC considers that any investor in an EEA state should be able to access the information on a non-discriminatory commercial basis, whether or not they are located in the same Member State as the publishing entity.

The FSC considers that the information should be made available to all interested parties, wishing to see such, at a reasonable price.

2.1.6 Inaccurate pre- and post-trade publication

The FSC considers that for the purposes of ensuring that published information is reliable, monitored continuously for errors, and corrected as soon as errors are detected⁵, a verification process should be established. This process does not need to be external from the organisation of the publishing entity, but should be an independent cross-check of the accuracy of the information generated by the trading process.

This process should have the capability to at least identify price and volume anomalies, be systematic and be conducted in real-time.

The chosen process should be reasonable and proportionate in relation to the business of the firm.

⁴ Section 27 of the schedule of the Regulations.

⁵ Section 32 of the schedule of the Regulations.

2.1.7 Duplication of post-trade transparency information

The FSC considers that for the purposes of facilitating the consolidation of transparency data with similar data from other sources, investment firms trading away from a RM or MTF, RMs and MTFs that publish each trade via only one primary publication channel will be in compliance with the Provisions.

Additionally, in order to enhance the effectiveness of using a single primary channel for publication of transparency information, the FSC considers it useful for parties acting on behalf of publishing entities to flag a trade, where they are the original publication channel, as a 'primary publication' as opposed to information obtained from other publication sources. This should enable data consolidators to delineate between primary and secondary publications and so limit the possibility of duplication. The FSC considers a primary publication channel to be a regulated market, MTF, or a third party chosen by the investment firm to publish its post-trade transparency information. Proprietary systems of the investment firm, the regulated market or the MTF used for trades conducted by the respective investment firm or on the respective trading platform, are considered to be 'primary publication' channels by default.

The FSC considers a secondary publication channel to be a data provider, including regulated markets and MTFs when acting as such, which re-publishes or distributes already published information, including that presented in a consolidated form (i.e. aggregating information from several investment firms, MTFs or regulated markets).

2.1.8 Contingency arrangements for pre- and post-trade publication arrangements

The FSC considers that firms have adequate contingency arrangements where such arrangements include a policy and procedure outlining how they will continue to meet their transparency obligations if their arrangement ever became unavailable. If the publication arrangement of the firm has its own back-up facility or recovery plans, the FSC considers this as being sufficient.

2.1.9 The use of websites as a pre- and post-trade publication arrangement

In respect of arrangements facilitating the consolidation of data as required in the Regulations⁶, the FSC considers information as being made public if it:

- i) is accessible by automated electronic means in a machine readable way;
- ii) utilises technology that facilitates consolidation of the data and permits commercially viable usage; and
- iii) is accompanied by instructions outlining how users can access the information.

The FSC considers that an arrangement fulfils the 'machine-readable' criteria where the data:

- i) is in a physical form that is designed to be read by a computer;
- ii) is located on a computer storage device where that location is known in advance by the party wishing to access the data; and
- iii) is in a format that is known in advance by the party wishing to access the data.

⁶ Section 32(b) of the schedule to the Regulations

2.1.10 The point at which a trade is considered concluded/ executed for post-trade transparency purposes

For order book and other automated trades, the FSC considers that a trade is concluded and executed as soon as a buy and sell order is automatically matched and confirmed.

For trades conducted outside RMs and MTFs or trades executed under the rules of RMs or MTFs but outside a central order book or automated trading systems (e.g. negotiated trades, "telephoned" market-making trades), the FSC considers that the trade is concluded/executed as soon as the terms of the trade with regard to the price and volume are agreed between the buyer and the seller.

Where a trade includes multiple legs and where an agreement on the terms of each of the legs is a pre-condition to the completion of the trade, the FSC considers that the trade is completed when all the legs have been put in place and agreed.

2.1.11 Bundling of pre- and post-trade information

The FSC considers that RMs, MTFs, and investment firms should not make the supply of pre- and post-trade information conditional on the purchase of other bundled services. Information should be provided on a reasonable commercial basis to ensure that market participants and end users can readily access transparency information and obtain a complete picture of trading activity.

2.1.12 Structure of pre- and post-trade transparency information

The FSC considers that information that is made public in accordance with the requirements of the Regulations⁷ should conform to a consistent and structured format, based on industry standards. RMs, MTFs and investment firms trading away from a RM and MTF, can choose the structure to be used.

2.1.13 Publication Standards

The FSC notes with interest references made by CESR on the issue of publication standards and the potential way forward in this regard. The FSC recommends that investment firms review CESR's recommendations in this regard and that said recommendations be taken on board by the relevant investment firm.⁸ The format which firms should endeavour to use is outlined in Appendix A.

2.2 Pre-Trade Transparency

2.2.1 Pre-Trade Transparency for RMs and MTFs

RMs and MTFs are required to make public any current bid and offer prices and the depth of trading interests for those shares that are advertised through their system.

Regulation 17 establishes the full extent of the requirement to publish pre-trade transparency information and details the items by reference to the type of trading system in use by the relevant RM/MTF. A constant thread throughout all trading systems is that the relevant information is required to be published continuously throughout normal trading hours. Table 1 of the

⁷ Section 32 of the schedule of the Regulations.

⁸ Part 5, Publication and Consolidation of MiFID Market Transparency Data, The Committee of European Securities Regulators, CESR/07-043, February 2007

Commission Regulation No 1287/2006, (known as 'the Implementing Regulations') sets out detailed requirements. This is set out in Table 1 of Appendix B.

Similar to the provisions relating to post-trade transparency for large transactions, Section 20 of the schedule to the Regulations exempts large transactions from the pre-trade publishing of the information required by the Regulations. It states that 'an order shall be considered to be large in scale compared with normal market size if it is equal to or larger than the minimum size of order specified in Table 2 of Appendix B. For the purposes of determining whether an order is large in scale compared to normal market size, all shares admitted to trading on a regulated market shall be classified in accordance with the calculations set out in Section 33 of the schedule to the Regulations.'

In addition to the waiver made available for large trades, the pre-trade transparency requirements can also be waived in respect of trading models/systems where the pre-trade information emanating from said systems is of little or no consequence to the market's level of overall knowledge of trading intentions. An example of a system that will attract a waiver is one where the price determination mechanism is based on the price determination mechanism of another trading system which is widely published and regarded by market participants as reliable. Furthermore, a waiver may be granted where a RM/MTF is merely formalising negotiated transactions which are concluded at, or within, the current volume weighted spread reflected on the order book, or by the market maker quotes, of the RM/MTF.

2.2.2 Pre-Trade Transparency for Investment Firms

During the negotiations leading to the drafting of MiFID there were two camps proffering opposing views as to the pre-trade transparency that should be required of investment firms away from RMs and MTFs. The proponents of full transparency and an extension of the requirements made in respect of RMs and MTFs to SIs claimed that a lack of pre-trade transparency from investment firms, in addition to the possibility of price-improvement for clients of the investment firms would ultimately be detrimental to the investor. Advocates of reduced pre-trade transparency contended that to require all trading intentions to be made transparent would damage the liquidity and efficiency of the market.

As a result of extended negotiations, compromise solutions were agreed and the concept of the SI was established to distinguish an investment firm which would systematically conduct trades on its own account or for clients and those investment firms who would only occasionally conduct trades and generally pass the transactions on to RMs or MTFs.

SIs are defined in MiFID as 'an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a RM or MTF.'

The Regulations⁹ set out further criteria by way of clarification on what activity could constitute as being 'on an organised, frequent and systematic basis.' This includes where the activity is:

- (a) playing a serious commercial role for the investment firm;
- (b) being conducted in accordance with non-discretionary rules/procedures;

⁹ Section 21 of the schedule to the Regulations.

- (c) using dedicated staff/systems; and
- (d) being made available to clients on a regular or continuous basis.

It further provides for activities which will not represent being 'on an organised, frequent and systematic basis' and requires all competent authorities to maintain a list of SIs. The FSC notes that the provisions of MiFID allow investment firms that satisfy the criteria for SIs in respect of part of their business to continue to conduct other bilateral relationships. The conditions that need to be met for them to continue these relationships include that they consist of ad hoc, irregular dealings above standard market size, without those trades falling within the SI definition.

2.2.3 Systematic Internaliser obligations

SIs are required to publish definite quotes reflecting prevailing market rates in liquid shares for which they are SIs. The term 'liquid' is defined by the Regulations which state that for a share to be 'liquid' it must have a free float of no less than EUR 500 million (to be determined by the competent authority of the most relevant market). Furthermore it must comply with one of two further conditions, namely that there is a minimum average number of daily transactions in that share of 500 or that the average daily turnover for the share is not less than EUR 2,000,000.

In the case of a share for which an investment firm is an SI, it will only be required to quote, in the case of a share that does not have a liquid market, to its own clients and upon request. The FSC recommends that investment firms consider the full scope and nature of the calculations and the discretions granted to Member States to denominate a small number of shares within the 'liquid' market category without necessarily complying with the calculation requirements set out therein.

Similar to the terms relating to the deferral of publication of post-trade transparency information, so too the requirement for publication of information is restricted to trades of standard market size. The standard market size is determined in accordance with Table 3 of Appendix B and by reference to the class of share set out therein. The classes of shares are established by reference to the average value of transactions in the relevant market. Where the share falls into the class of shares having an average value of transactions in the relevant market of up to EUR 10,000, the standard market size is deemed to be EUR 7,500. SIs are therefore not required to quote in instances where the contemplated trade in the share exceeds EUR 7,500.

SIs are allowed to price improve the quotes published for their professional clients (only on trades above standard market size) but are not allowed to price improve on quotes for retail investors (at or below standard market size as set out above). The SIs ability to price improve on trades larger than standard market size is, however, further curtailed and can only be applied where the ultimate price falls within a public range close to market conditions.

SIs may improve quotes to professional clients without complying with the provisos set out above where the trade is part of a portfolio trade consisting of more than 10 individual trades on securities, or is a trade subject to conditions other than the current market price, for example, an order for execution at the prevailing market rate.

Quotes made by SIs need to be published on a regular and continuous basis, whilst retaining the ability under exceptional circumstances to withdraw information published. Such information needs to be offered on a reasonable commercial basis although SIs may choose, on the basis of specific policies, who may or may not access the information, with such determination to be made in

an objective and non-discriminatory way. SIs may further limit, in a similar way, the number of trades from the same or different clients – to avoid their position being abused.

Complete details on the above and further obligations of SIs should be considered by referring to Section 27 of the Act, in addition to all further guidance found in relation thereto in the relevant parts of the Regulations such as Sections 21, 24, 25 and 27 (where relevant) of the schedule to the Regulations.

2.2.4 Publication of Pre-Trade Transparency information

The FSC notes that the provisions for publication of post-trade publication as stated in section 2.1.2 above apply equally to the issue of publication of pre-trade transparency information.

2.2.5 Disclosure of Client limit orders

A 'Limit Order' is defined as an order with a price limit or other condition attached to it. Such an order is only executable when its stated conditions are matched by the investment firm.

The provisions of Section 22 of the Act require that where a client limit order is not immediately executable by the investment firm, whether or not it is classified as SI and unless the client specifically instructs that the order should not be made public, the investment firm will publish the limit order immediately in a manner accessible to other market participants if it is not large in scale.

2.2.6 Instruments covered by MiFID Transparency provisions

The provisions of the Act apply exclusively to shares admitted to trading on a regulated market. For the avoidance of doubt the Act's provisions do not apply to shares which are only admitted to trading on MTFs.

3 Action Required

Firms should give consideration to the following action points in order to ensure that they are compliant in relation to the transparency requirements:

- Firms should review existing business practices in order to determine whether the firm is a "systematic internaliser" which is therefore, potentially, caught by the pre-trade transparency requirements.
- Firms should consider and decide whether they intend to operate a business model which will be caught by the pre-trade transparency requirements or whether, for example, the firm will re-design its business practices in order to avoid these requirements by, for example, only dealing as agent below standard market size or declining to deal below standard market size.
- If firms do not intend to operate as a SI they need to put in place the necessary system changes to ensure that they do not deal in a way that would make it appear as a SI.
- If firms intend to operate as a SI they should determine the basis upon which prices will be made available to the public and review the relevant systems and procedures to ensure that they are able to meet the pre-trade transparency requirements.

Appendix A

International Standards Organisation (ISO) standard format

Transparency publication fields	Formats
Day	ISO 8601 – 8 character numeric code YYYYMMDD
Time	ISO 8601 - 6 character numeric code HHMMSS.
Instrument identification	ISO 6166 - ISIN - 12-character alpha-numerical code. Where ISIN is available, it should always be used.
Unit price	An integer in cent (or other as appropriate) units to the appropriate number of decimal places.
Price notation	ISO 4217 - 3 character alpha currency code. This standard also covers content, so ISO content should be used e.g. EUR for Euros.
Quantity	An integer expressing the number of whole units.
Venue identification	ISO 10383 - MIC for RMs and MTFs. ISO 9362 (BIC) for an SI or the acronym 'SI' if the SI publishes quarterly statistics. The acronym 'OTC' for investment firms other than SI.

Appendix B

Table 1 - Information to be made public in accordance with Section 17 of the schedule to the Regulations

Type of System	Description of System	Summary of information to be made public, in accordance with Section 17
Continuous auction order book trading system	A system that by means of an order book and a trading algorithm operated without human intervention matches sell orders with matching buy orders on the basis of the best available price on a continuous basis	The aggregate number of orders and the shares they represent at each price level, for at least the five best bid and offer price levels.
Quote-driven trading system	A system where transactions are concluded on the basis of firm quotes that are continuously made available to participants, which requires the market makers to maintain quotes in a size that balances the needs of members and participants to deal in a commercial size and the risk to which the market maker exposes itself.	The best bid and offer by price of each market maker in that share, together with the volumes attaching to those prices.
Periodic auction trading system	A system that matches orders on the basis of a periodic auction and a trading algorithm operated without human intervention	The price at which the auction trading system would best satisfy its trading algorithm and the volume that would potentially be executable at that price.
Trading system not covered by first three rows	A hybrid system falling into two or more of the first three rows or a system where the price determination process is of a different nature than that applicable to the types of system covered by first three rows	Adequate information as to the level of orders or quotes and of trading interest; In particular, the five best bid and offer price levels and/or two-way quotes of each market maker in the share, if the characteristics of the price discovery mechanism so permit.

Table 2 - Orders large in scale compared with normal market size

(in EUR)

Class in terms of average daily turnover (ADT)	ADT < 500 000	500 000 ≤ ADT < 1 000 000	1 000 000 ≤ ADT < 25 000 000	25 000 000 ≤ ADT < 50 000 000	ADT ≤ 50 000 000
Minimum size of order qualifying as large in scale compared with normal market size	50 000	100 000	250 000	400 000	500 000

**Table 3 - Standard market sizes***(in EUR)*

Class in terms of average value of transactions (AVT)	AVT < 10 000	10 000 ≤ AVT < 20 000	20 000 ≤ AVT < 30 000	30 000 ≤ AVT < 40 000	40 000 ≤ AVT < 50 000	50 000 ≤ AVT < 70 000	70 000 ≤ AVT < 90 000	Etc.
Standard market size	7 500	15 000	25 000	35 000	45 000	60 000	80 000	Etc.