

PUBLIC STATEMENT

Impact of Brexit on the trading obligation for shares (Article 23 of MiFIR)

1 Introduction

The European Securities and Markets Authority (ESMA) is issuing this statement in relation to the impact of the United Kingdom (UK) leaving the European Union (EU) on 29 March 2019 at midnight without a withdrawal agreement (no-deal Brexit) on the trading obligation for shares under Article 23 of MiFIR, in the absence of an equivalence decision in respect of the UK by the European Commission (EC).

Article 23 of MiFIR requires investment firms to conclude transactions in shares admitted to trading on a regulated market (RM) or traded on an EU trading venue on: (i) RMs, (ii) multilateral trading facilities, (iii) systematic internalisers or (iv) third-country trading venues assessed as equivalent by the EC.

This requirement is, however, not deemed applicable to transactions in shares which are traded in the EU on a non-systematic, ad-hoc, irregular and infrequent basis.

ESMA is aware that the application of the trading obligation for shares in a no-deal Brexit scenario is creating uncertainty among many market participants and may lead to disruptive effects. Therefore, ESMA is informing stakeholders about its approach to the application of the trading obligation for shares after the no-deal Brexit date, and subject to the above-mentioned conditions.

ESMA's goal is to provide as much certainty as possible to market participants and to mitigate potential adverse effects of a trading obligation, within the constraints of the extraordinary circumstances of a no-deal Brexit. ESMA's approach should therefore be understood as being limited to the no-deal Brexit scenario and as being conceived for a temporary period to mitigate cliff-edge effects because of a no-deal Brexit.

2 ESMA's observations and a review of the previous guidance published on 13 November 2017

ESMA notes, as a general observation and in response to some queries by stakeholders, that the trading obligation is not limited to shares admitted to trading on EU RMs. Where a share is delisted from a RM but continues to be traded on any other EU trading venue, the trading obligation remains applicable. ESMA also notes that the trading obligation is directly addressed to EU investment firms, and branches of third-country firms to which MiFID II applies, and not to the trading venues on which they trade. On 13 November 2017, ESMA published a Q&A clarifying the application of the trading obligation for shares where there is a chain of transmission of orders. However, a chain of transmission of orders does not include General Clearing Members, the role of which concerns the post-trade processing of transactions.

Together with this Q&A, and in coordination with the EC, ESMA on 13 November 2017 also published on its website some further guidance clarifying, in particular, that *“while the Commission is preparing equivalence decisions for the non-EU jurisdictions whose shares are traded systematically and frequently in the EU, the absence of an equivalence decision taken with respect to a particular third country's trading venue indicates that the Commission has currently no evidence that the EU trading in shares admitted to trading in that third country's regulated markets can be considered as systematic, regular and frequent”*.

However, at the time of publication, this guidance did not take into account the possible complications in case of a no-deal Brexit. Considering the strong ties and interconnections between the UK and the EU27 financial markets, it cannot reasonably be assumed that all shares admitted to trading on a UK regulated market are traded on a non-systematic, ad-hoc, irregular and infrequent basis in the EU27 and are therefore out of the scope of the trading obligation. Such assumption could only be made if all those shares would be subject to a lack of liquidity in the EU27. On the contrary, ESMA's data indicates that a number of shares admitted to trading in the UK qualify as liquid under MiFID II based on trading in the EU27 only.

3 ESMA's guidance for the application of the trading obligation for shares in a no-deal Brexit scenario

To provide clarity to market participants, to mitigate adverse effects and to foster a convergent application across the EU, ESMA considers that the concept of “non-systematic, ad-hoc, irregular and infrequent” should be clarified with respect to shares admitted to trading or traded on EU as well as UK markets, in a no-deal Brexit scenario and in the absence of an equivalence decision in respect of the UK by the EC.

For this purpose for shares traded in the EU, Iceland, Liechtenstein, Norway and the UK, ESMA assumes that:

- EU27 shares i.e. ISINs starting with a country code corresponding to an EU27 Member State and, in addition, shares with an ISIN from Iceland, Liechtenstein and Norway¹ are within the scope of the trading obligation; and
- GB shares i.e. ISINs starting with the prefix “GB” are traded on a “non-systematic, ad-hoc, irregular and infrequent” basis in the EU27, unless those shares qualify as liquid in the EU27.

This approach, which was developed in close coordination with the EC, is based on the following considerations:

- the trading obligation for shares as framed in Article 23 MiFIR applies to all shares traded on a venue in the Union unless the trading is non-systematic, ad-hoc, irregular and infrequent;
- in a no-deal Brexit scenario it is necessary to provide clarity on the exact scope of the trading obligation given that one of the main financial markets is leaving the EU especially in respect of the concept of “non-systematic, ad-hoc, irregular and infrequent” trading;
- EU27 shares are deemed to have their main pool of liquidity in the EU27 and are therefore traded in a systematic, deliberate, regular and frequent way in the EU27;

¹ AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, GR, HR, HU, IE, IS, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK.

- GB shares are deemed to have their main pool of liquidity in the UK and are therefore traded in a non-systematic, ad-hoc, irregular and infrequent way in the EU27;
- however, GB shares that qualify as liquid based on trading in the EU27 only, on the basis of 2018 trading volumes excluding UK data, cannot be considered to be traded in a non-systematic, ad-hoc, irregular and infrequent way in the EU27 and are subject to the EU27 trading obligation.

ESMA is publishing, together with this statement, a list of ISINs that, following the above approach, would be subject to the trading obligation for shares. The list has been compiled based on data for the calendar year 2018. This list is only meant to clarify the application of the trading obligation for shares with an EU27 or GB ISIN. The application of the trading obligation to shares with a different ISIN should continue to be determined taking into account the previous ESMA guidance, published on 13 November 2017, and, where applicable, on the basis of equivalence decisions adopted by the EC.

With respect to GB and EU27 shares that were or will be newly admitted to trading or traded for the first time on an EU27 trading venue after 1 January 2019, ESMA is of the view that the trading obligation should be applied to them based on the ISIN country code as described above.

ESMA is mindful of the impact of a no-deal Brexit on EU market structures. Therefore, ESMA will consider, in light of possible market developments, whether to review its approach at the latest 12 months after the no-deal Brexit date.

There is still a high level of uncertainty as to the final timing and conditions of Brexit. Should these change, ESMA will assess whether its approach needs to be adjusted and will inform the public accordingly.