

DECISION OF THE BOARD OF SUPERVISORS

on delegation to the ESMA Chair of the assessment regarding third country trading venues for the purposes of Articles 20 and 21 of MiFIR

The Board of Supervisors

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC¹ (“ESMA” and “Regulation”),

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012² (MiFIR), and in particular Article 20 and Article 21 thereof,

Having regard to the ESMA opinion (ESMA70-154-165 of 28 May 2020 (“ESMA Opinion”),

Whereas:

- (1) Articles 20 and 21 of MiFIR require EU investment firms to make public through approved publication arrangements information on concluded transactions in financial instruments traded on a trading venue, without clarifying if transactions concluded on third-country trading venues are captured by the reporting obligation.
- (2) The ESMA Board of Supervisors adopted on 24 May 2017 an opinion in accordance with Article 29(1)(a) of the Regulation to clarify whether the post-trade transparency obligation, set out in Articles 20 and 21 of MiFIR, also applies to transactions concluded on a third-country trading venue. As expressed in the opinion, the ESMA Board of Supervisors is of the view that transactions concluded on third-country trading venues should not be subject to post-trade transparency obligation under Article 20 and Article 21 of MiFIR if the third-country trading venue meets the criteria outlined in the opinion (“Initial Opinion”).
- (3) In line with the Initial Opinion, the ESMA Board of Supervisors adopted a decision delegating to the Chair of ESMA the execution of non-controversial assessments of

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 173, 12.6.2014, p. 84.

third-country venues against the criteria established in the opinion (“Decision ESMA70-155-5775”³)

- (4) The Initial Opinion has been amended on 28 May 2020 to further clarify that a third-country trading venue could meet the criteria in respect of transactions in all asset classes or a subset of asset classes concluded on a trading venue and that this should also be taken into account for the purposes of Article 20 and Article 21 of MiFIR.
- (5) The reasons for which Decision ESMA70-155-5775 was adopted, i.e. the high number of assessments, which will have to be performed in respect of third-country trading venues for the purposes of Article 20 and Article 21 of MiFIR, the potential significant administrative burden for ESMA staff and for members of the ESMA Board of Supervisors, the increasing number of other new tasks for ESMA as a result of the amendments to the legal framework within which ESMA operates and the necessity for the ESMA Board of Supervisors to allocate more resources to the execution of some of those tasks, remain pertinent.
- (6) However, to take into account the amendments reflected in the ESMA Opinion, it is desirable that Decision ESMA70-155-5775 is repealed and replaced by this Decision for the purposes of Article 20 and Article 21 of MiFIR.
- (7) The scope of the delegation to the Chair of ESMA should also cover non-controversial negative assessments.
- (8) The delegation should be exercised in accordance with the criteria outlined in the ESMA Opinion, reflected in this Decision, and the conditions set out in this Decision.

Has adopted this Decision:

Article 1 – Delegation of powers

- (1) The ESMA Board of Supervisors (the Board of Supervisors) delegates to the Chair of ESMA (the Chair) the task to assess whether a third-country venue meets the criteria set out in Article 2 in respect of all asset classes traded on such trading venue or a subset thereof for the purposes of Article 20 and Article 21 of Regulation (EU) No 600/2014 and to reflect the result of such assessment in the relevant list of third-country trading venues.
- (2) The Board of Supervisors retains the powers to perform controversial assessments regarding third country trading venues for the purposes of Article 20 and Article 21 of Regulation (EU) No 600/2014.

³ Decision ESMA70-155-5775 of 26 September 2018.



- (3) For the purpose of this Decision, controversial assessment shall mean an assessment in respect of which either members of the Secondary Markets Standing Committee (SMSC) or ESMA staff have raised objections.

Article 2 – Exercise of the delegation

When exercising the tasks delegated under Article 1, the Chair shall assess if the third-country venue meets the following criteria:

- a. it operates a multilateral system, i.e. a system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact;
- b. it is subject to authorisation in accordance with the legal and supervisory framework of the third country;
- c. it 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 IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information⁴; and,
- d. it has a post-trade transparency regime in place which ensures that transactions concluded on that trading venue are published as soon as possible after the transaction was executed or, in clearly defined situations, after a deferral period.

Article 3 – Conditions for the delegation

- (1) The powers delegated under Article 1 are conferred on the Chair for an indeterminate period.
- (2) The Chair shall update, at least annually, the Board of Supervisors about the assessment of third-country trading venues.
- (3) The Board of Supervisors may request information in respect of any assessment performed by the Chair under this Decision.
- (4) The Board of Supervisors can reconsider and revoke at any time the delegation of powers established under this Decision. The decision of revocation shall put an end to the delegation of powers specified in this Decision.

Article 4 – Repeal

This Decision repeals Decision ESMA70-155-5775.

⁴ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>



Article 5 – Entry into force

- (1) This Decision enters into force on the day following the date of its signature.
- (2) It shall be published on ESMA's website.

Done at Paris, 5 November 2020

Steven Maijor
Chair
For the Board of Supervisors