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Pre-trade transparency on third-country trading venues

Executive Summary

AFME is of the view that when an investment firm, which may have systematic internaliser ("SI") status in certain instruments, trades on a third-country venue, this should not bring about pre-trade transparency as the SI is not acting in that capacity and is subject to the trading venue rules on which it operates. While we recognise that post-trade transparency is applicable in those cases, unless the third-country trading venue is deemed equivalent per ESMA, there should be a clear distinction made between pre- and post-trade transparency as pre-trade transparency is only applicable to the investment firm when that firm is acting in its SI capacity – which is not the case for post-trade transparency.

Background

ESMA has provided guidance in the past on the treatment of third-country trading venues for the purpose of transparency under MiFID II/MiFIR. Indeed, in its Opinion date 31 May 2017, ESMA noted that it was necessary to clarify that bilateral transactions with non-EU firms, or concluded on third-country trading venues that would not be subject to a certain level of post-trade transparency should be made public in the EU through an APA as set out in Articles 20 and 21 of MiFIR. In doing so, ESMA carefully refers throughout its Opinion to the post-trade transparency regime.

AFME supports this approach and has been working on providing ESMA with a list of third-country venues which it considers equivalent for those purposes.

On the other hand, AFME believes it is important to clarify the treatment of quotes and actionable IOIs under the pre-trade transparency regime when outside the EEA.

Rationale

AFME Members have identified three main scenarios which should be considered when looking at pre-trade transparency in an extraterritorial context.

1. Where a quote is provided by a non-EEA branch of an SI, it is our understanding that the quote would be in scope for pre-trade transparency given this applies at the legal entity level and the investment firm is acting in its SI capacity.
2. Where a quote is provided by a third country firm that is acting as an agent for an EEA SI, it is our position that, given in this scenario the SI is neither directly prompted for a quote by the client or agent (i.e. the SI Sales are not involved, although the SI's pricing engine could be accessed) nor involved in execution of the client order, this activity should be out of scope for the SI pre-trade transparency obligations.
3. Where a firm that is an SI is participating on a third country trading venue - this does not constitute OTC activity as the firm is not acting in the capacity of an SI when participating on the third country venue. Pre-trade transparency should therefore not apply. Article 18(1) MiFIR provides that the SI obligations apply where a firm is prompted for a quote by a client, and agrees to provide a quote. When participating on any venue (whether EEA or third country), a participant is acting in accordance with the rules of that venue. It is not directly prompted for a quote, and its responses must be provided in accordance with the rules of the venue, which may

include the venue's own prescriptions around pricing, including minimum ticks, pricing within range of a certain market standard etc.