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# Update on the new trading environment

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# Working with ambiguity and uncertainty

## Many unanswered questions

- Will further guidance be forthcoming?
- What do you do where something is ambiguous?
- How can you retain flexibility while getting ready?

## Decisions to be made

- What are the key questions that drive everything else?
- When does it make sense to make them?
- Is it better to go first or follow others?

## Dependencies on others

- Where are you dependent on what others are doing?
- How can you find out what they will do?
- Is it better to go to market first or follow others?
- What will your clients need or want?

## Impact on markets

- Are you making decisions based on the current landscape or can you determine how it might change?
- Does this present any opportunities?

**Where will you be able to trade equities and derivatives?**

# What should I be thinking about?



# Trading obligations: shares and derivatives

## Shares

- **What?** Shares admitted to trading on a regulated market or traded on an MTF
- **Where?**
  - Regulated Market, MTF, Systematic Internaliser
  - Equivalent third country trading venue
- **Who?**
  - Investment Firms
  - Only investment firms can be direct members of trading venues

- **Trading obligation does not apply to trades that are:**

- Non-systematic, ad hoc, irregular and infrequent;
- Carried out between eligible and / or professional counterparties and do not contribute to price discovery;
- In shares or equity instruments not admitted to trading on a regulated market or traded on an MTF; or
- By non-Investment Firms (only)

These parties / instruments can trade OTC

## Derivatives

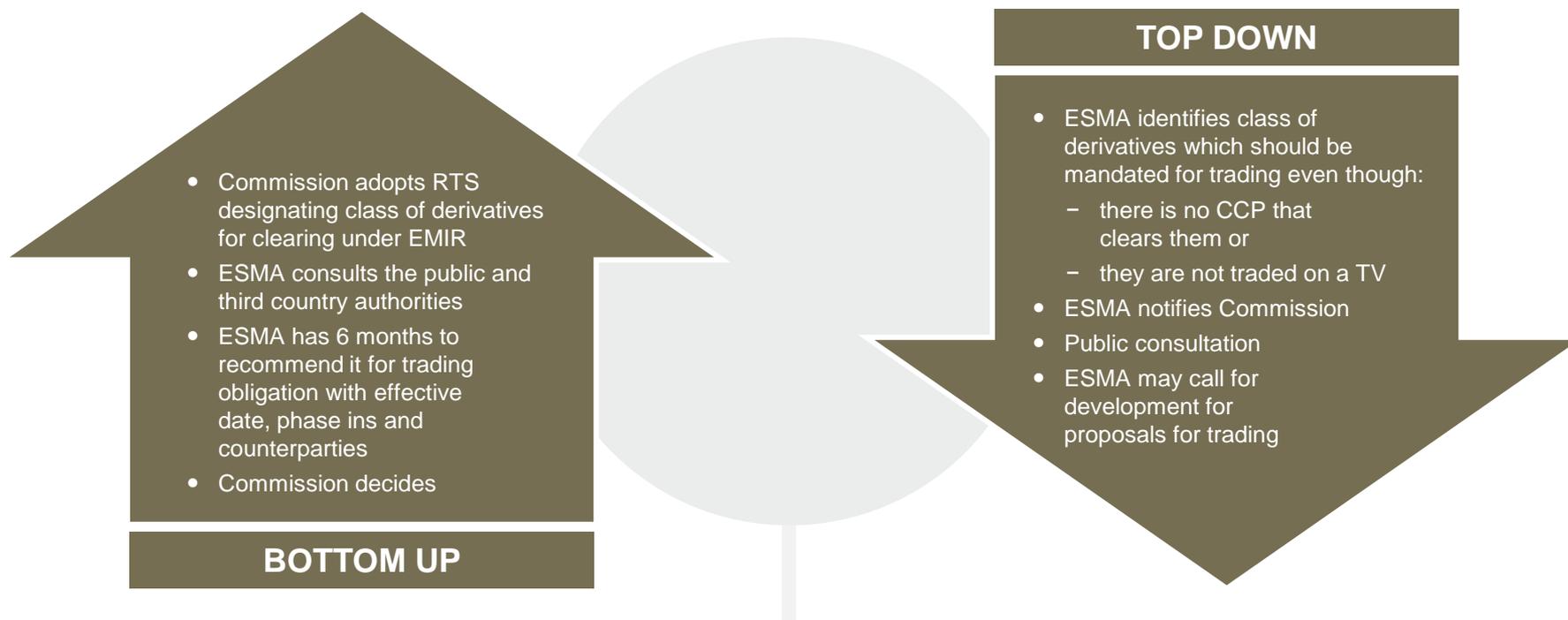
- **What?** Derivatives that are traded on a trading venue that are sufficiently liquid and declared subject to the trading obligation
- **Where?**
  - Regulated Market, MTF, OTF
  - Equivalent third country trading venue
- **Who?** Transactions between:
  - An FC and another FC
  - An FC and an NFC+
  - An NFC+ and another NFC+(and third country entities that would be subject to clearing obligation in certain cases)

- **Trading obligation does not apply to:**

- Non-equity instruments that have not been declared subject to the trading obligation
- Any trade with an NFC- (including if it trades with an FC or NFC+)

These parties / instruments can trade OTC or on an SI

# How will they decide which derivatives to mandate?



## To determine whether there is sufficient liquidity:

- ESMA must consider these criteria:
  - Average frequency and size of trades
  - Number and type of active market participants
  - Average size of spreads
  - Anticipated impact on liquidity
  - Impact on commercial activities of non-financial end users
- According to the final draft RTS, while ESMA will take into account whether a derivative class is liquid for transparency purposes, they will not automatically be deemed liquid for these purposes.
- It proposes to retain flexibility and consult on e.g.
  - Whether derivatives are only liquid below a certain size
  - How to deal with package transactions
- It also warns about moving trading into economically equivalent OTC contracts

# Traded / executed / concluded on a trading venue

When is a financial instrument traded / executed / concluded on a trading venue?

Do these words all mean the same?

Do you have to be the member or participant or does it also cover the contract between member / participant and client?

What if the transaction is subject to the rules of the trading venue but not traded on the central order book?

What about block trades and EFPs?

Will there be an equivalent of the ESMA Q&As on EMIR?

Can we use the ESMA Q&As by way of analogy?

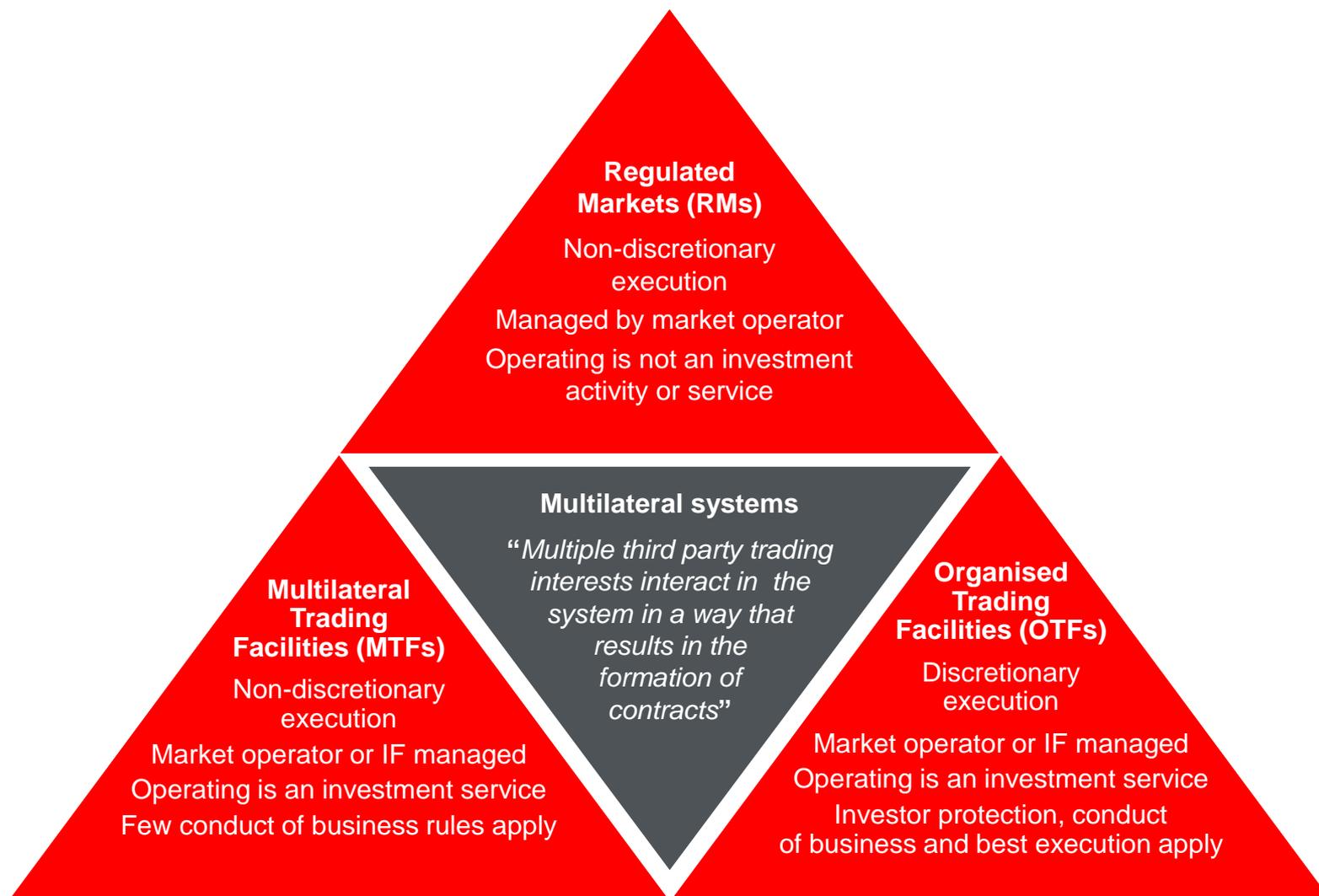
Transaction reporting  
- financial instruments that are traded on a trading venue?  
- when a firm executes a transaction

Clearing obligation for derivatives concluded on a regulated market?  
- RTS refer to transactions executed on a trading venue

Trading obligation for derivatives – 'shall conclude transactions...on a trading venue'

# What trading models will be available?

# Trading venues – new concepts and boundaries



# Interesting questions on MTFs

**MTF:** "a *multilateral system*, operated by an investment firm or a market operator, which *brings together* multiple third-party buying and selling interests in financial instruments – in the system and in accordance with *non-discretionary rules* – in a way that *results in a contract*"

## Multilateral system

- Not bilateral: can't enter into every (any) trade on own account, even as riskless principal
- Multiple third party interests can interact
- Does every order need to interact with all other orders or can there be some segmentation?
- Non-discrimination
- Could it accommodate some 1:1 trades?

## Brings together multiple interests

- To be understood in broad sense
- Includes orders, quotes and indications of interest
- User ratification does not undermine this
- What is a firm quote or an indication of interest?

## In the system

- A set of rules - no need for a technical system for matching orders
- Includes systems where users can execute against multiple quotes requested
- Bring interests together under the rules, protocols or operating procedures
- Could some parts of the functionality fall outside the system?

## In accordance with non-discretionary rules

- Rules leave the operator with no discretion as to how interests may interact
- Limited development on this
- Users can have discretion

# Some thoughts on OTFs

**OTF:** "a *multilateral system...* in which *multiple third-party buying and selling interests* in bonds, structured finance products, emission allowances or derivatives are able to *interact in the system* in a way that *results in a contract* in accordance with Title II of MiFID II"

## Markets facing requirements

- Non-discrimination and transparency
- Conflicts management
- Monitoring compliance with the rules and orderly trading
- Market surveillance
- System resilience and tick sizes
- Position reporting

## Client facing obligations

- Clients' best interests
- Appropriate information requirements
- Suitability and appropriateness
- Best execution
- Prompt and fair execution of orders
- Publication of limit orders in shares

## Other differences from MTFs

- Only for non-equities
- Must exercise discretion by deciding to place or retract orders on the OTF and / or deciding not to match an order with other available orders at a given point in time
- May facilitate negotiation between clients
- Not subject to mandatory CCP clearing – will FCA allow a bit more flexibility?

## Questions without answers (yet)

- Who might become an OTF?
- What will OTF rules look like?
- How much discretion will clients accept?

# Structural considerations

## If you operate an MTF

- You can't execute client orders against proprietary capital — you can't therefore have an SI in the same entity
- You can't engage in matched principal trading in the same entity
- It looks like you can operate an OTF as well
- If you're the operator of a regulated market, you can operate an MTF and an OTF
- There are examples in the market of firms operating an MTF and a non-regulated platform side by side in the same legal entity
- It looks like you can order route to other MTFs, OTFs and SIs, although query whether this is part of the MTF functionality

## If you operate an OTF

- You can't execute client orders against proprietary capital — you can't therefore have a SI in the same legal entity
- But you can deal on own account in non-liquid sovereign bonds
- You can't engage in matched principal trading in the same entity save for instruments other than mandatory traded derivatives but only with the client's consent
- You can't execute client orders against the proprietary capital of another member of the group – i.e. other members of the group can't act as market makers
- Orders cannot connect to or interact with orders in an SI or another OTF – so you cannot order route to SIs and OTFs
- It looks like you can operate an MTF as well (and if you're the operator of a regulated market, you can operate an MTF and OTF)

# Systematic Internalisers

## Definition:

“An investment firm which, on an organised, frequent, systematic and substantial basis deals on own account by executing client orders outside a RM, MTF or OTF ”

## Quantitative tests and opt in:

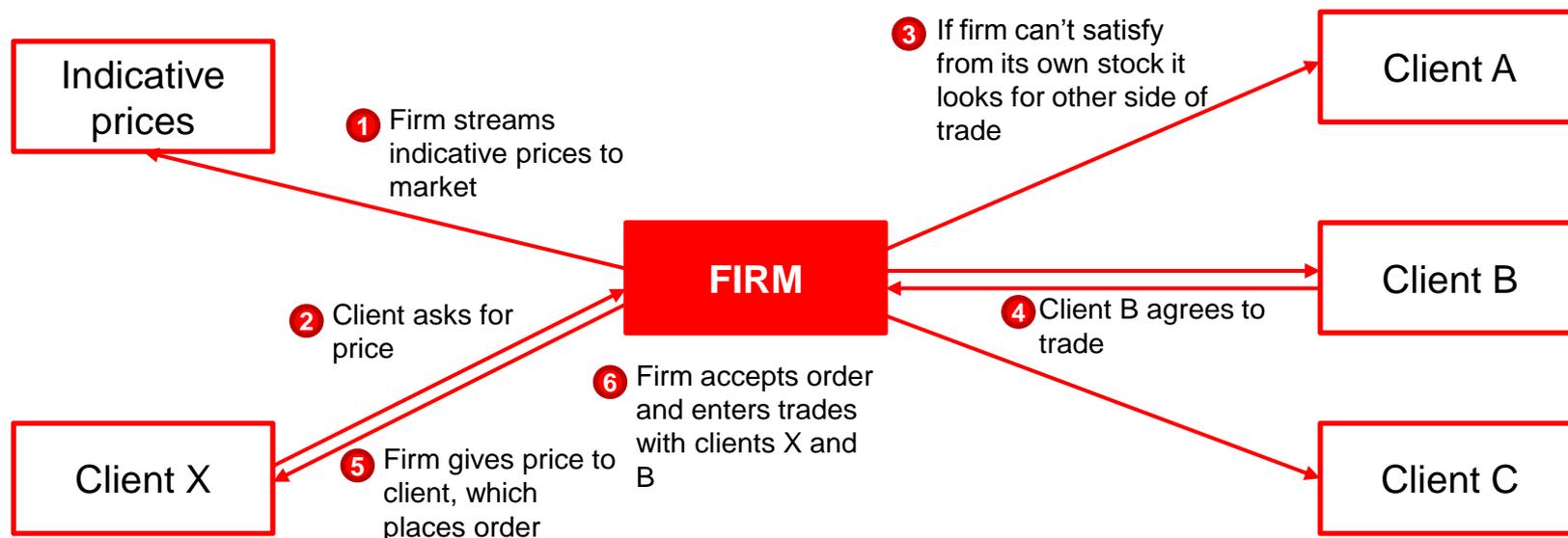
- Firms exceeding both thresholds are caught but others can opt into the regime
- Must notify competent authority
- NB. applies per instrument / ISIN

|  |   | Equities                             | Bonds                            | Structured Finance Products      | Derivatives                      | Emission allowances              |
|--|---|--------------------------------------|----------------------------------|----------------------------------|----------------------------------|----------------------------------|
| Frequent and systematic basis threshold (liquid instruments) OR    | Number of transactions executed by the investment firm on own account OTC / total number of transaction in the same financial instrument in the EU              | Equal to or more than 0.4% and daily | 2 to 3% and at least once a week | 3 to 5% and at least once a week | 2 to 3% and at least once a week | 3 to 5% and at least once a week |
| Frequent and systematic basis threshold (illiquid instruments) AND | Minimum trading frequency (average during last 6 months)  | Daily                                | At least once a week             |
| Substantial basis threshold criteria 1 OR                          | Size of OTC trading by investment firm in a financial instrument on own account / total volume in the same financial instrument executed by the investment firm | 15%                                  | 25%                              | 30%                              | 25%                              | 30%                              |
| Substantial basis threshold criteria 2                             | Size of OTC trading by investment firm in a financial instrument on own account / total volume in the same financial instrument in the EU                       | 0.4%                                 | 0.5 to 1.5%                      | 1.5 to 3%                        | 0.5 to 1.5%                      | 1.5 to 3%                        |

# The future for equities broker crossing networks

- 3 choices for an equities broker crossing network?
  - **MTF**: must be an MTF if operated on a multilateral basis
  - **SI**: must be an SI if not multilateral and exceeds SI thresholds
  - **Neither?**: if multilateral but exercise discretion or if deal on own account but below thresholds and don't opt in to SI regime – for use by exempt persons
- An investment firm that operates an internal matching system on a multilateral basis should be authorised as an MTF
- Single dealer platform (where trading is always against one firm) v multi-dealer platform, with multiple dealers interacting for same financial instrument
- How bilateral do SIs need to be?
  - Dealing on own account when executing client orders includes matching on a matched principal basis
  - Does this mean that an SI for non-equities (other than derivatives subject to mandatory trading) could look very similar to an OTF?
- SIs may have more control over access to flow and fewer markets obligations (inc. transparency) but quoting obligations are onerous

# What would this bond arrangement be?



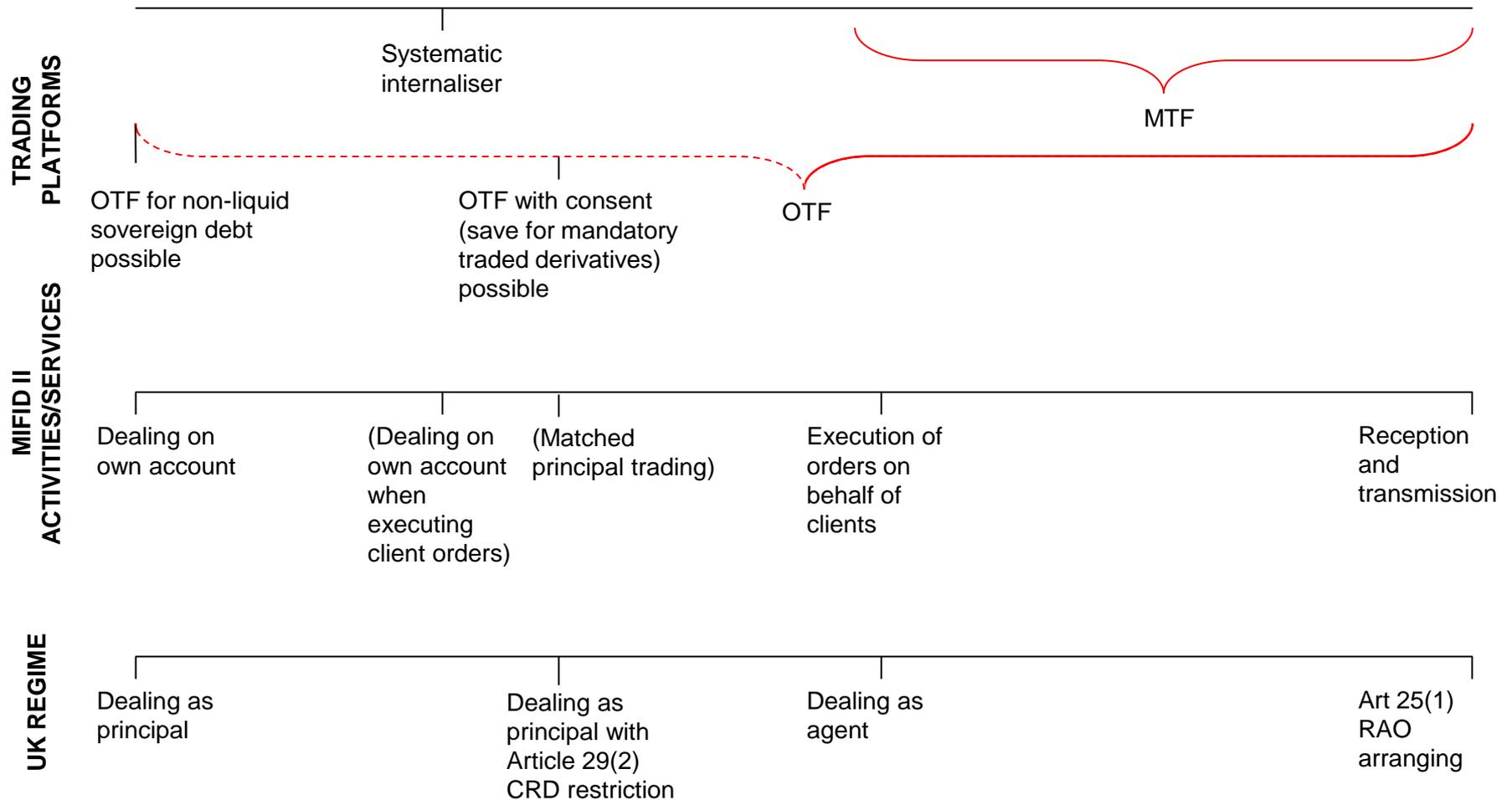
## Could it be an SI?

- Are orders executed outside a trading venue?
- Does firm deal on own account when executing client orders?
- Is it bilateral / a single dealer platform?
- Is it on an organised, frequent, systematic and substantial basis?

## Could it be an OTF?

- Is it multilateral?
- Does it bring together multiple buying and selling interests / is a multi-dealer platform?
- Is there a system?
- Do they interact in a system in a way that results in a contract?

# Mapping out the brokerage world



Map is an attempt to show correlations between different concepts in MiFID II. It should not be understood to mean that an MTF or OTF requires separate permissions for providing investment activities and services – this remains to be seen.

# Transparency, dark pools and transaction reporting

# Transparency for trading in equities

| Exception Type              | Instruments Covered    | Pre-trade Waiver                 | Post-trade Deferral          |
|-----------------------------|------------------------|----------------------------------|------------------------------|
| Large-in-scale              | All                    | Yes                              | Yes                          |
| Order management facility   | All                    | Yes                              | No                           |
| Price reference             | Equities & equity-like | Yes                              | No                           |
| Negotiated transactions     | Equities & equity-like | Yes                              | No                           |
| Size specific to instrument | Non-equities           | RFQ & voice trading systems only | Yes<br>(all trading systems) |
| Illiquid instruments        | Non-equities           | Yes                              | Yes                          |

- **Large in scale (LIS)**: for ETFs, an order is LIS if over €1m. Other equity and equity-like instruments are set against a scale measured in average daily turnover in the EU
- **Order management facility**: orders for order management facility may not be smaller than the minimum tradable quantity (as set in the trading venue's rules) and reserve orders may not be smaller than €10,000 at any stage during their lifetime
- **Price reference**: either the price for that instrument from the trading venue where the instrument was first admitted to trading, or the 'most relevant market in terms of liquidity' (market with the highest turnover in the EU in the preceding calendar year (excluding transactions concluded under a pre-trade transparency waiver))
- **Negotiated transactions**: ESMA has prescribed the scope of transactions falling within this waiver by merit of being subject to conditions other than market price (which are closely aligned with the transactions that do not contribute to price discovery, such as give-ups or give-ins): catch all category of price taking trades

# Transparency for trading in non-equities

| Exception Type              | Instruments Covered    | Pre-trade Waiver                 | Post-trade Deferral          |
|-----------------------------|------------------------|----------------------------------|------------------------------|
| Large-in-scale              | All                    | Yes                              | Yes                          |
| Order management facility   | All                    | Yes                              | No                           |
| Price reference             | Equities & equity-like | Yes                              | No                           |
| Negotiated transactions     | Equities & equity-like | Yes                              | No                           |
| Size specific to instrument | Non-equities           | RFQ & voice trading systems only | Yes<br>(all trading systems) |
| Illiquid instruments        | Non-equities           | Yes                              | Yes                          |

- **RFQ:** ESMA permits all submitted quotes to be published at the same time but rejected average price argument
- **LIS:** ESMA has set restrictive thresholds for block trades – set against either fixed or periodically recalculated thresholds depending on the type of instrument: note treatment of stubs in iceberg situation
- **Order management facility:** orders for order management facility may not be smaller than the minimum tradable quantity (as set in the trading venue's rules) and reserve orders may not be smaller than €10,000 at any stage during their lifetime
- **Size-specific-to-instrument (SSTI):** applicable only to actionable IOIs in RFQ and voice operated trading systems that are at or above a set threshold, where publication would expose liquidity providers to undue risk. Thresholds are a fixed or percentile value lower than the LIS threshold
- **Illiquid instruments:** encompasses all derivatives which are not subject to MiFIR's trading obligation; also applies to other instruments (including derivatives that are subject to the trading obligation) that ESMA has deemed at Level 2 are not sufficiently liquid to be subject to pre-trade transparency

# Update from the Level 2 consultations

## Criticism responded to

- Not enough granularity in categories of instrument
- Static liquidity thresholds not able to adapt to changing markets
- Significant misclassification of liquidity for derivatives caused by:
  - Inadequate data
  - Insufficiently granular instrument classes
- Liquidity thresholds too low
- LIS and SSTI thresholds too high
- SSTI methodology inappropriate: 50% link to LIS too high

## Liquid market definition

- More granular classes of financial instruments approach (COFIA) for derivatives
- Assessment of liquidity for derivatives will now occur annually rather than being static and liquidity thresholds have been raised in general
- Bonds to follow an instrument by instrument approach (IBIA) rather than COFIA to allow more granular treatment
- All FX derivatives classed as illiquid until better data can be collected
- Nearly all types of equity derivatives deemed liquid

## Equities waivers/ deferrals

- Increase in number of liquidity bands in general: asset class, sub-asset class and sub-class analysis
- New threshold for shares with ADT below €50,00 added to promote liquidity in SME shares
- Proposed single pre-trade LIS threshold of €1,000,000 for all ETFs regardless of underlying kept
- New post-trade deferral thresholds for ETFs set at €10m and 50m.
- Proposed cut from three to one minute delay to post-trade publication where no deferral applies kept

## Non-equities waivers/ deferrals

- Pre-trade thresholds lower than post-trade (previously equal)
- Thresholds raised in general
- SSTI no longer half of LIS; instead a lower trade percentile
- Equity derivatives methodology changed; no longer trade percentile but based on ADT (i.e. like equities)
- Deferral period now T+2BD rather than T+48h
- Supplemental deferral regime of up to 4 weeks remains with 1 week delay in aggregated reporting

# Remaining Level 2 issues

## Liquid market definition

- Buy side would prefer COFIA for bonds

## Bond thresholds

- For bonds, trades under €100,000 are excluded when measuring trade percentiles
- ESMA argues this is necessary as a large number of small trades can bias the measure and risk loss of transparency for retail investors
- Argument that many institutional trades are under €100,000 and should not be excluded otherwise thresholds biased against professional investors

## Package trades

- Examples are swap spreads or EFP
- MiFIR provides for post-trade transparency for package trades but not pre-trade
- Concern that showing quotes for each leg of a package transaction separately could be misleading: recognition that deferral to longest period of one element of package is permitted
- ESMA recognises problem but says can only be fixed at Level 1
- Level 1 can't be amended before introduction of pre-trade requirements

## Cross border convergence

- 'LIS' v 'Block' regimes; LIS thresholds generally lower
- Divergence of approaches between EU and US – fundamental scope issues remain
- Systems and monitoring convergence / updates required
- Deferral regime and NCA discretion under Article 11 MiFIR may lead to regulatory arbitrage
- Trading obligation; 'sufficiently liquid test' should be applied at a more granular level
- BUT alignment with EMIR is welcomed

# What does this all mean for dark pool trading?

## Shares

- Dark pools continue in theory but volume caps will make unlit trading unpredictable in practice for all but block trades
- Moving to another dark pool could result in a market wide suspension
- Scope for trading elsewhere is limited by trading obligation but could SIs be an alternative?
- Venues and firms will need to be ready to “light up” – will they be expected to have arrangements in place?

## Derivatives that are mandated for trading and other liquid non-equities

- Subject to transparency for first time
- Dark pools can exist if trading venues get waivers
- No volume cap
- If transparency drops, competent authorities can suspend pre-trade transparency obligations for up to 3 months but extendable

Whenever instruments are executed on trading venues

## Other equity instruments

- Subject to transparency for first time and waivers are subject to volume caps
- Volume caps do not apply to negotiated transactions in these instruments for which there is no liquid market in certain cases

## Other derivatives and non-liquid financial instruments

- Waiver from pre-trade transparency so this can remain dark
- Competent authorities can withdraw waivers where they think they are being abused

# Pre-trade transparency for systematic internalisers

|   | Equity like instruments   | Non-equity like instruments  |
|---|---|--|
| Make public quotes for liquid instruments | On a regular and continuous basis during normal trading hours   | <ul style="list-style-type: none"> <li>- When prompted by client</li> <li>- When agree to provide a quote</li> </ul> |
| Quotes requirements                       | Must achieve best execution and reflect prevailing market conditions  |  |
| Update / withdraw                         | Can update any time but can only withdraw in exceptional conditions   |  |
| Access to quotes                          | Must make available to other clients but can have commercial policy on access provided objective and non-discriminatory |  |
| Obligation                                | Execute at quoted price in sizes up to standard market size – minimum quote size  | Enter transactions under published conditions if at or below size specific to instrument                             |
| Acceptable limits                         | Number of trades with same client and total trades at same time provided non-discriminatory and transparent             | Number of trades at any quote provided non-discriminatory and transparent  |
| Price improvement                         | Same but carve out for professional clients where several securities in one trade                                       | Only in justified cases if it falls within public range close to market conditions                                   |

# Enhanced best execution

## Firms still need to be able to comply with best execution:

- Must take all sufficient (not just reasonable) steps to achieve best possible result
- Must not receive a benefit for routing client orders to a particular venue that would constitute a conflict or inducement
- Execution venues and SIs to publish information about their execution quality
- Firms to publish annually their top 5 execution venues and their quality of execution
- Order execution policies to be clear, easily comprehensible and sufficiently detailed

## Technical advice:

- Policies must be customised to class of financial instrument and service provided
- Policies should list execution venues for class of financial instrument and explain how venues are selected
- Factors used to select venues should be consistent with controls to demonstrate best execution
- For OTC products, firm should be able to check fairness of price through market data used to determine price and by comparing to other products
- Where firm charges different fees for executing on different venues, firm must explain pros and cons in a fair, clear and non-misleading way
- If firm is permitted to receive any inducement from an execution venue, they must be disclosed

# Publication of information – final draft RTS

## Execution venues

- Publication by TVIs and SIs only for financial instruments subject to the trading obligation, not all execution venues
- Publication of data for each financial instrument for each market segment it operates, rather than single report
- Reduction in the quantity and simplification of data to be published
- Frequency of publication reduced to within three months, from within one month
- Requirement to calculate and record for each trading day has been maintained

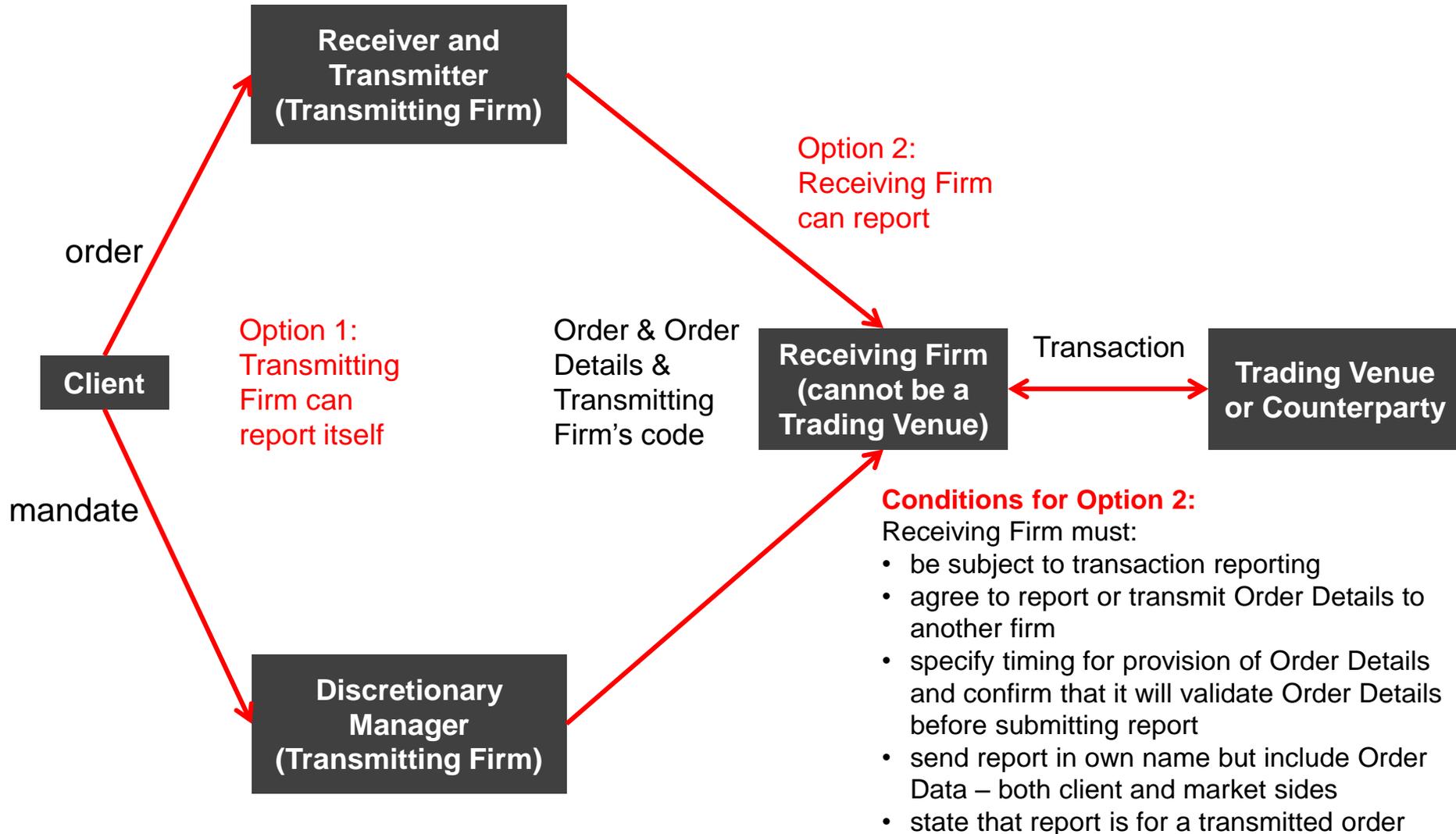
## Investment firms

- Definition of execution venue maintained to include market makers, SIs and third country entities performing a similar function
- Separation of information relating to retail clients, professional clients and securities financing transactions to prevent distortion
- To protect commercially sensitive information, number and volume is expressed as a percentage of the firm's total
- Information on order flow and quality of execution now clearly separated to ensure easy processing by users

# Transaction reporting for investment firms

|                                   |  |
|-----------------------------------|--|
| <b>Which trades?</b>              | <ul style="list-style-type: none"><li>• Investment firms that execute transactions in financial instruments:<ul style="list-style-type: none"><li>– that are admitted to trading or traded on a trading venue or for which a request has been made</li><li>– where the underlying is a financial instrument traded on a trading venue</li><li>– where the underlying is an index or basket of financial instruments traded on a trading venue</li></ul></li></ul>  |
| <b>Transactions and execution</b> | <ul style="list-style-type: none"><li>• Transaction means an acquisition or disposal subject to various exceptions</li><li>• Execute means reception and transmission, executing orders on behalf of clients, dealing on own account and making a decision in accordance with a discretionary mandate</li><li>• A firm that transmits orders can enter a transmission agreement under which receiving firm will report but, if it doesn't transmit all required information, it must report trades itself</li></ul>    |
| <b>Which information?</b>         | <ul style="list-style-type: none"><li>• ESMA has attempted to simplify the reports – now down to 65 fields</li><li>• New fields include client ID, IDs of person or committee that make decision to trade and also responsible for decision and execution</li><li>• Legal entities to be identified by LEI codes, simplified concatenation for individuals</li><li>• Codes for algos and committees must be unique, consistent and persistent</li><li>• Various new designations – e.g. waivers, short sales</li></ul> |
| <b>How?</b>                       | <ul style="list-style-type: none"><li>• Firms can report themselves or through an ARM or trading venue – they must take reasonable steps to ensure compliance where they don't report themselves and remain responsible</li><li>• Trading venues will report trades executed by firms not subject to reporting obligation</li></ul>  |
| <b>To whom and by when?</b>       | <ul style="list-style-type: none"><li>• Home competent authority of firm, even where a branch executes the transaction</li><li>• As quickly as possible and no later than end of next working day</li></ul>  |
| <b>Link to EMIR?</b>              | <ul style="list-style-type: none"><li>• Transactions reported to a trade repository under EMIR count provided:<ul style="list-style-type: none"><li>– that trade repository is also an ARM</li><li>– the report contains all the required details</li><li>– trade repository transmits information to competent authority</li></ul></li></ul>  |

# Transmission of orders



# Important points from September RTS

## Branches

Single report to home member state unless agreed otherwise with host

Branch code to be included where it:

- receives order or makes decision,
- has supervisory responsibility for person responsible for decision or execution or
- transaction is executed on trading venue outside EU using branch membership

Branch of a third country firm submits to competent authority that authorised it – where there is more than one, they agree

## LEIs

To be used for all legal entities

Must not provide service before obtaining LEI

Validate against Global LEI website at onboarding, rather than transaction by transaction

## ESMA Guidelines

ESMA still plans to replace existing framework with buyer / seller fields and a separate trading capacity field

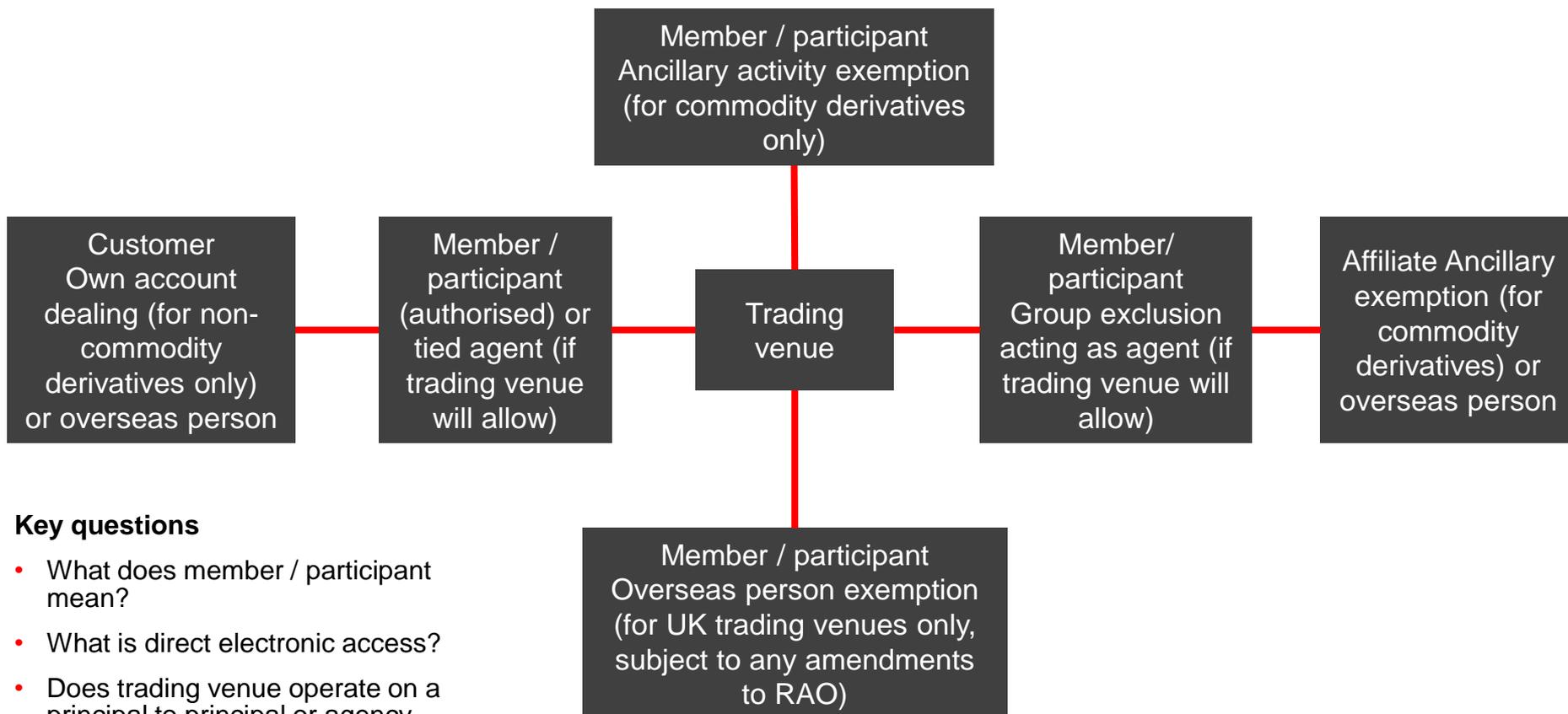
Further instructions may be provided in ESMA Guidelines

# Exemptions and the international dimension

# Remaining unauthorised: possible options

|                    | Dealing on own account  | Ancillary activity  | Overseas person  |
|--------------------|---|---|--|
| <b>Conditions</b>  | <p>Applies to dealing on own account in financial instruments other than commodity derivatives, EUAs and derivatives on EUAs</p> <p>You can't provide any other investment activities and services in financial instruments other than commodity derivatives, EUAs and derivatives or EUAs</p>  | <p>Applies to commodity derivatives, EUAs and derivatives on EUAs</p> <p>For two types of activity:</p> <ul style="list-style-type: none"> <li>dealing on own account including market making but not dealing on own account when executing client orders</li> <li>providing investment services other than dealing on own account to customers or suppliers of the main business</li> </ul>  | <p>An overseas person can enter into transactions as principal with (or through) an authorised or exempt person</p> <p>An overseas person is one which carries on certain business which would be regulated in the UK but does not do so from a permanent place of business in the UK</p>                |
| <b>Limitations</b> | <p>Can't be used by anyone who:</p> <ul style="list-style-type: none"> <li>is a market maker</li> <li>is a member / participant of a regulated market / MTF</li> <li>has direct electronic access to a trading venue</li> <li>applies a high frequency algorithmic trading technique or</li> <li>deals on own account when executive client orders</li> </ul> | <p>But only applies if:</p> <ul style="list-style-type: none"> <li>this activity is ancillary to your main business when considered on a group basis and that business is not: <ul style="list-style-type: none"> <li>MiFID investment business</li> <li>CRD IV banking activities or</li> <li>market making in relation to commodity derivatives</li> </ul> </li> <li>you don't apply a high frequency algorithmic trading technique and</li> <li>you notify the competent authority annually and report the basis on which the activity is ancillary on request.</li> </ul> | <p>May not work in other Member States</p> <p>Assumes that existing overseas person exclusion remains as currently drafted and does not become subject to the MiFID II override</p> <p>May not work for a jurisdiction which is deemed to be equivalent under MiFID II after the 3 year transitional</p> |
| <b>Benefits</b>    | <p>Can be combined with ancillary activity exemption</p> <p>Europe wide solution</p>  | <p>Could remain an exchange member</p> <p>Europe wide solution</p>  | <p>Could remain an exchange member</p> <p>Applies to all types of financial instrument</p>   |

# Can a member / participant of a trading venue remain unauthorised?



## Key questions

- What does member / participant mean?
- What is direct electronic access?
- Does trading venue operate on a principal to principal or agency basis?

All exemptions are subject to conditions

# Access to the EU by third country firms: the UK view

## Retail & Opt Up Professional

### Authorised branch

- Harmonises rules across the EU
- Inter-regulator MOU
- No passport

### National regime

- Maintains current position
- Rules likely to differ across EU
- No passport

**Member States can elect to use either MiFID authorised branch or a national regime**

## Professional & Eligible Counterparties

### ESMA Register

- No branch
- Equivalence
- Reciprocity
- Submit to jurisdiction
- Passport

### Authorised branch

- Harmonises rules across the EU
- Inter-regulator MOU
- Passport

### National regime

- Maintains current position
- Rules likely to differ across EU
- No passport

**Member States must permit use of the ESMA Register unless no positive equivalence decision is in effect**

# Unpacking the issues for firms

- A number of hot topics on the ESMA registration process:
  - Will ESMA adopt the literal equivalence approach or the EMIR style policy equivalence plus top up
  - The comparison of capital requirements is particularly sensitive as some non-EU countries have a different and lighter approach
- Pre-equivalence, will current domestic regimes continue to permit access? HMT has indicated that the overseas persons exclusion will continue to apply
- Post equivalence, can a third country firm operate an MTF or OTF and what does this mean for the concept of trading venue and equivalent third country markets?
- There is a genuine debate about when a cross border service is being provided in the markets space but in reality any dealing with an EU counterparty will bite
- Note that the regime applies even to performing investment activities with EU professional clients and ECPs

# How to determine jurisdictional scope of provisions

Is the activity carried on by a third country entity from outside the EU or from an EU branch?

If a cross border, pre-equivalence, depends on local regime

Distinction between investment firms and third country firms is an indicator

Post equivalence, depends on equivalence assessment – some countries may have to top up

If a branch, is it set up in accordance with MiFID II rather than a domestic regime?

If so, see Art 41(2) MiFID II – maximum harmonisation and non-discrimination over EU firms

However, see also scope provisions in MiFID II and MiFIR

And beware of provisions which are wider than just investment firms: trading obligation, algorithmic trading and DEA and commodity derivatives

## The long arm of the EU?

- Firms have operated a variety of follow the sun structures for global trading
- Historically there was a general view that the key was where the main business activity was carried on
- Often this meant that a single terms of business was issued and the view taken that even if trading desks executed trades elsewhere given time zone differences and trades were booked in other branches that did not impact the jurisdictional analysis
- This looks unsustainable in the MiFID II world: HMT and FCA appear to take a broad view of territorial scope and it seems likely that ESMA will share this view

# Options for structuring global businesses

A complex area but firms are looking at a number of strategies

## Option 1: Carry on doing principal trading from outside the EU

- Works for trades with professional clients and ECPs in the UK under the overseas persons exclusion
- This gives a three year transitional from an equivalence decision on that jurisdiction so depending on how quickly ESMA and the Commission work there may be some years of leeway here
- Means a jurisdiction specific analysis around EU
- Not a permanent answer

## Option 2: Is there a way of avoiding ESMA registration entirely

- Most of the action in the market is around the link between the ESMA registration regime and the availability of MiFID exemptions
- Probably only works if all EU external relationships are effected through an EU regulated firm

# Conclusions: what will it mean?

## Many unanswered questions

- Further guidance may be limited, it may take such time and it may not resolve all issues
- Take sensible interpretations to avoid having to completely re-do the work
- But be a bit flexible and track views

## Decisions to be made

- Work backwards to determine when they need to be made
- Be aware of the information you don't yet have and review when it arrives
- Allow some wiggle room if possible

## Dependencies on others

- Tricky because everyone is in the same boat
- But no harm in talking to key suppliers / relationships
- Talking to clients about the changes and their needs may be a positive

## Impact on markets

- Involves some crystal ball gazing
- However, worth considering because investment needed for MiFID II needs to last a while
- And there may well be opportunities
- Again, keep ideas under review

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