3: Equivalent markets

This material is issued to assist firms by setting out how they might approach their assessment of regulated markets, to determine whether they are 'equivalent' for the purposes of the money laundering directive. Although it is not formal guidance that has been given Ministerial approval, it has been discussed with HM Treasury and reflects their input.

The material discusses markets where there may be a presumption of equivalence and those where such a presumption may not be appropriate without further investigation. It then discusses issues that a firm should consider in all cases when coming to a judgement on whether a particular market is, in its view, equivalent.

3.1 What is an "equivalent market" and why does it matter?

The Fourth European Council Directive on prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the money laundering directive) allows firms (article 15) to carry out simplified customer due diligence (SDD) in respect of customers which are assessed as posing a low risk of money laundering or terrorist financing.~~whose securities are~~

~~o listed on a regulated market, which is~~

~~o subject to specified disclosure obligations.~~

The Money Laundering Regulations 2017 (the 2017 Regulations) implement the provisions of the money laundering directive into UK law, and accordingly provide (Regulation 37) that firms may take into account~~apply SDD to~~ customers' ~~whose~~ securities being~~are~~ listed on an EEA regulated market (defined in Regulation 3) or a market outside the EEA that is subject to equivalent~~that is subject to specified~~ disclosure obligations [See section 3.2 and Annex 3-II] as a lower risk factor when determining whether it is appropriate to apply SDD.

Under the 2017 Regulations (and the money laundering directive), a "regulated market"

- within the EEA has the meaning given by point 14 of Article 4(1) of the markets in financial instruments directive (MiFID). [This definition is reproduced in Annex 3-I].
- outside the EEA, means a regulated financial market which subjects companies whose securities are admitted to trading to disclosure obligations which are equivalent to the specified disclosure obligations [see section 3.2 and Annex 3-II]

EEA and non-EEA m~~M~~arkets that meet the definition in the 2017 Regulations are described in the JMLSG Guidance as 'equivalent markets'. UK firms therefore need to determine whether a particular market is 'equivalent', in order to apply the lower risk factor as contained within Regulation 37.that they may take advantage of the SDD derogation. If a market does not qualify as 'equivalent',~~ or if a firm chooses not to determine whether the market is 'equivalent',~~ firms may have regard to the listing conditions that apply and the level of transparency and accountability to which the company is subject in determining customer risk, and whether it is appropriate to apply SDD.~~ full CDD measures must be applied to the customer.~~

'Equivalence' may also be considered under Regulation 18.5 which permits certain CDD derogations for customers whose securities are listed on equivalent markets. However, 'equivalence' ~~only provides an exemption from the application of CDD measures in respect of customer identification. It~~ does not exempt the firm from carrying out ongoing monitoring of the business relationship with the customer, nor from the need for such other procedures (such as

monitoring) as may be necessary to enable a firm to fulfil its responsibilities under the Proceeds of Crime Act 2002.

Although the judgement on equivalence of regulated markets is one to be made by each firm in the light of the particular circumstances of the market, senior management is accountable for this judgement – either to its regulator, or, if necessary, to a court. It is therefore important that the reasons for concluding that a particular market is equivalent (other than those in respect of which a presumption of equivalence may be made) are documented at the time the decision is made, and that it is made on relevant and up to date data or information.

3.2 What are the specified disclosure obligations?

The disclosure obligations that the 2017 Regulations require regulated markets to impose are those consistent with

- Articles 17 and 19 of Regulation 2014/596 [the Market Abuse Regulation];
- Articles 3, 5, 7, 8, 10, 14 and 16 of Directive 2003/71/EC [the Prospectus Directive];
- Articles 4 to 6, 14, 16 to 19 and 30 of Directive 2004/109/EC [the Transparency Directive]; and
- Community legislation made under the above provisions.

These obligations are reproduced at Annex 3-II.

3.3 Categories of market

Markets in EU/EEA member states

All Member States of the EU (which, for this purpose, includes Gibraltar as part of the UK, and Aruba as part of the Kingdom of the Netherlands) are required to enact legislation and regulations in accordance with the specified disclosure obligations. All EEA countries have undertaken to implement the directives from which the specified disclosure obligations flow.

ESMA maintains a database of regulated markets within the EU (this is not, of course, a formal list of "equivalent" markets). The list is published for the purpose of identification of the counterparty to the transaction in relation to transaction reporting. Publication of the identifiers ensures the compliance of ESMA members with Article 13 (2) of the MiFID Level 2 regulation. ESMA has collected this information from its members and will update the list on a regular basis. Some ESMA members will, in addition, publish their own information separately on their websites. Further information is available on the ESMA website at http://mifiddatabase.esma.eu/.

Generally, the *principal* markets in EU/EEA member states are likely to be able to be presumed to be 'equivalent' for the purposes of the 2017 Regulations. In the 2017 Regulations, however, it was chosen to link the derogation to the admission to listing in a regulated market within the meaning of MiFID. So listing in other markets (such as AIM[1]) would not be enough qualification for the application of the derogation.

Markets in some third countries

Outside the EEA, a regulated financial market is 'equivalent' for the purposes of the 2007 Regulations if it subjects companies whose securities are admitted to trading to disclosure obligations which are contained in international standards and are equivalent to the specified disclosure obligations. Article 19(6) of MiFID [see Annex 3-I] requires the Commission to publish a list of third country markets that are 'equivalent' under MiFID.

A firm might reasonably conclude that a regulated market that is equivalent for MiFID purposes will be equivalent for the purposes of the 2017 Regulations. Some other third country markets

[1] But see paragraph 5.3.161 in Part I of the Guidance, which suggests that the due process for admission to AIM may give equivalent comfort.

might still meet the requirements of the money laundering directive, however, even although they do not meet all those required by MiFID.

The Commission has not yet published a list of equivalent third country markets for MiFID purposes; when it does, these may reasonably be regarded as equivalent for the purposes of the 2017 Regulations, whilst leaving it open for other individual markets also to be recognised for the purposes of the 2017 Regulations.

Caveat… …

Although firms may rely on the presumption of equivalence, in respect of certain markets significant variations may exist in the precise measures (and in the timing of their introduction) that have been taken to transpose the obligations under the various directives into national laws and market regulations. Moreover, the standards of compliance monitoring in respect of particular markets will also vary. Where firms have substantive information which indicates that a presumption of equivalence cannot be sustained, either in general or for particular markets, they will need to apply full CDD measures to customers listed on these markets.

The status of implementation of the relevant directives across the EU is available at http://ec.europa.eu/internal_market/securities/transposition/index_en.htm.

Other markets

Although markets in other countries and territories cannot be presumed to be "equivalent", this does not necessarily mean that the legislation and disclosure obligations in those countries are lower than those in "equivalent markets". However, standards vary significantly, and firms will need to carry out their own assessment of the transparency and disclosure obligations in these particular markets. In addition to a firm's own knowledge and experience of the market concerned, particular attention should be paid to any evaluations or analyses of disclosure obligations that have been undertaken.

3.4 Factors to be taken into account when assessing other markets

The primary consideration that firms should address initially as part of their assessment is whether the disclosure and other obligations in a particular market meet the disclosure obligations specified in the directive.

Do the obligations in the particular market meet the specified disclosure obligations?

The money laundering directive is open on the extent to which disclosures in third countries must be sufficiently consistent with Community legislation to enable them to be regarded as 'equivalent'. On one interpretation, a firm could require that *all* provisions in the relevant directives must be faithfully reflected in the third country market obligations. However, a more workable interpretation is that it is enough to satisfy the major provisions in the relevant directives.

Commission Directive 2007/14/EC (the MiFID Implementing Directive) contains some provisions (Articles 13 to 23) on how to judge the equivalence of third country rules regarding some obligations of the Transparency Directive. Recital 18 of this directive provides a helpful definition of equivalence:

> *(18) Equivalence should be able to be declared when general disclosure rules of third countries provide users with understandable and broadly equivalent assessment of issuers' position that enable them to make similar decisions as if they were provided with the information according to requirements under Directive 2004/109/EC, even if the requirements are not identical. … ….*

It is important to note that the country of incorporation of the company is of little relevance. What counts is that it is subject to appropriate disclosure requirements in an equivalent market, which may well be in a different jurisdiction.

Other relevant matters to consider

Other relevant factors in making an assessment of 'equivalence' include:

- Membership of groups that only admit those meeting certain criteria
- Contextual factors – political stability; level of (endemic) corruption etc
- Evidence of relevant (public) criticism of a market
- Independent and public assessment of the market's overall disclosure and transparency standards
- Need for any assessment to be recent
- Implementation standards (including quality and effectiveness of supervision)

Membership of an international or regional 'group'

There are a number of international and regional 'groups' of markets that admit to membership only those markets that have demonstrated a commitment to high standards of disclosure and transparency, and which have an appropriate legal and regulatory regime to back up this commitment. Where a market is a member of such a group, there may be a presumption that the market is likely to be 'equivalent'.

Contextual factors

Such factors as the political stability of the jurisdiction within which a market is located, and where it stands in tables of corruption are relevant to whether it is likely that a market will be 'equivalent'. It will, however, seldom be easy for firms to make their own assessments of such matters, and it is likely that they will have to rely on external agencies for such evidence – whether prepared for general consumption, or specifically for the firm.

Evidence of relevant (public) criticism

Commercial agencies and the media also produce reports and lists of markets, entities and individuals that are involved, or that are alleged to be involved, in activities that cast doubt on their integrity. Such reports lists can provide some useful and relevant evidence – which may or may not be conclusive – on whether or not a particular market is likely to be equivalent.

Independent reports on disclosure and transparency standards

Particular attention should be paid to assessments of particular markets, including their disclosure and transparency standards, which have been undertaken by respected third party agencies. Where the firm looks to publicly available evidence, it will be important that it has some knowledge of the criteria that were used in making the assessment; the firm cannot rely solely on the fact that such an assessment has been independently prepared.

It should be noted that, under the Transparency Directive framework (notably Article 23(1)), declaring equivalence of third country regimes is a task for the national financial services supervisors: i.e., FCA in the UK.

Implementation standards (including effectiveness of supervision)

Information on the extent and quality of supervision of markets may be published by the competent authorities – whether in annual reports or otherwise.