

Briefing note

ESMA Q&A updates on MiFID II/R market structure and transparency (28 March 2018) and investor protection topics (23 March 2018)
&
ESMA publication of trading venues and CCPs benefiting from a transitional exemption from the access provisions for exchange-traded derivatives under MiFIR (26 March 2018)

The European Securities and Markets Authority (ESMA) has published on 23 and 28 March 2018 further Q&A updates in relation to MiFID II / MiFIR.

The Q&As provide guidance on (i) Market structure topics: Systematic internalisers, matched principal trading, and other types of riskless back-to-back transactions; (ii) Transparency topics: The scope of the derivatives trading obligation and non-par swaps; (iii) Investor protection topics: Macro-economic analysis and FICC research in the context of inducements; post-sale reporting in relation to retail client accounts; information on costs and charges, and the use of product costs as presented in the PRIIPs KID by investment firms; inducements and the provision of portfolio management services; and clarifications with respect to the term “ongoing relationship” within MiFID II/R and related legal texts.

Furthermore, ESMA published on 26 March 2018 the lists of trading venues and CCPs benefiting from a transitional exemption from the access provisions for exchange-traded derivatives under Article 36(5) and Article 54(2) of MiFIR.

Summary of ESMA Q&A updates:

(i) Market structure: Systematic internalisers, matched principal trading, and other types of riskless back-to-back transactions;

On 28 March, ESMA issued an additional clarification in regards to SIs, matched principal trading, and other types of riskless back-to-back transactions. ESMA originally published on 5 April 2017 [Section 5, Question 22] its interpretation of “arrangements operated by an SI [which] would be functionally similar to a trading venue”, and hence are not permissible.

Amongst other criteria, this would be the case where “arrangements would extend beyond a bilateral interaction between the SI and a client, with a view to ensuring that the SI de facto does not undertake risk-facing transactions.” ESMA further stated on 28 March the following:

“The concept of de facto riskless back-to-back transactions is not confined to pairs of transactions in the same financial instrument. Other arrangements, for example where one leg is a securities transaction and the other is a derivative which references that security, could also be deemed as having the objective or consequence of carrying out de facto riskless back-to-back transactions.”

However, ESMA's conclusion outlined in Question 22, Section 5, remains unchanged:

“ESMA highlights that the above does not prevent SIs from hedging the positions arising from the execution of client orders as long as it does not lead to the SI de facto executing non risk-facing transactions and bringing together multiple third party buying and selling interests. ESMA is of the view that an SI would not be bringing together multiple third party buying and selling interests as foreseen in Recital 19 [of the [Commission Delegated Regulation \(EU\) 2017/565](#)] where hedging transactions would be executed on a trading venue.”

(ii) Transparency: The scope of the derivatives trading obligation and non-par swaps

On 28 March, ESMA [published](#) a further Q&A update regarding the derivatives trading obligation (DTO), stating that the DTO “only applies to interest rate swaps as specified in table 1-3 of [Commission Delegated Regulation 2017/2417](#) that are traded at par. Non-par swaps, including swaps traded at market-agreed-coupon (MAC), are currently not subject to the trading obligation for derivatives” [Section 4, Question 12].

(iii) Investor protection: Research, inducements, information on costs and charges and other topics

On 23 March 2018, ESMA issued further Q&A updates in relation to MiFID II/R [investor protection topics](#). With respect to research in the context of inducements [Section 7, Questions 8 & 9, pp. 55-58], ESMA provided the following clarifications:

- Macro-economic analysis: ESMA considers that ‘openly available’ in the context of written material should mean that there are no conditions or barriers to accessing it, for example a necessary log-in or sign-up, or the submission of user information by a firm or a member of the public, in order to access material;
- FICC research: ESMA specifies that where FICC material is made openly available to all investment firms or the general public, it should be made so on the same basis as in Question 8 [macro-economic analysis], ie there are no conditions or barriers to accessing it.

Other questions and answers include:

- a. Post-sale reporting in relation to retail clients accounts [Section 8, Question 11 & 12, pp. 65-66];
- b. Information on costs and charges, and the use of product costs as presented in the PRIIPs KID by investment firms [Section 9, Question 7, pp. 69-70];
- c. Inducements and the provision of portfolio management services [Section 12, Question 6, pp. 86-87];
- d. Clarifications regarding the term “ongoing relationship” within MiFID II/R and related legal texts [Section 15, Question 1, pp. 92-93].

Summary of ESMA publication related to Article 36(5) and Articles 54(2) under MiFIR

On 26 March 2018, ESMA published the lists of trading venues and CCPs benefiting from a transitional exemption from the access provisions for exchange-traded derivatives:

- a. Under **Article 36(5) of MiFIR**:

Article 36 of MiFIR provides that trading venues shall provide trade feeds upon request to central counterparties (CCPs) that wish to clear transactions in financial instruments concluded on that trading venue. A trading venue may notify ESMA and its CA of its intention to temporarily opt-out from the

access provisions for exchange-traded derivatives (ETDs) provided its annual notional amount traded of ETDs falls below a certain threshold.

b. Under [Article 54\(2\) of MiFIR](#)

A similar possibility for a transitional exemption from the application of the access provisions is also available to CCPs and trading venues, under certain conditions, under Article 54(2) of MiFIR. For transparency purposes only, ESMA has published the list of entities benefiting from that transitional exemption from the access provisions under Article 54(2) of MiFIR.

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