

Briefing note

ESMA Q&A updates on MiFID II/R transparency and investor protection and intermediaries topics (12 July 2018)

ESMA has issued on 12 July Q&A updates with regard to [transparency](#) and [investor protection and intermediaries](#) topics under the Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR). Below is an executive summary, followed by a more detailed briefing.

Executive summary:

I. MiFID II/R transparency topics:

- a. **Publication of systematic internaliser (SI) regime calculations:** As planned, **ESMA will publish EU-wide data** on the total number and the volume of transactions for **bonds**, equity and equity-like instruments on **1 August 2018**. Investment firms will have to perform their first assessment and, where appropriate, **comply with the systematic internaliser obligation by 1 September 2018**.

However, the publication of data for exchange-traded commodities (ETCs), exchange-traded notes (ETNs), structured finance products (SFPs), securitised derivatives, emission allowances and derivatives has been postponed to 1 February 2019. Accordingly, SIs will be required to comply with the obligations from 1 March 2019.

- b. **Technical reporting requirements of a new ISIN in FIRDS and FITRS following a corporate action:** The ISIN being replaced should be reported as terminated and the new ISIN should be reported as a newly admitted to trading or newly traded financial instrument.

II. MiFID II/R investor protection and intermediaries topics:

- a. **Inducements (research) – Free trial periods:** ESMA is of the view that free trial periods of research services may qualify as minor non-monetary benefits (MNMBs) provided a number of conditions are met.
- b. **Provision of investment services and activities by third-country firms – Reverse solicitation:** Following the Q&A updates issued on 25 May 2018, ESMA has provided a non-exhaustive list of pairs of investment products which should not be considered as belonging to the same category for the purpose of the reverse solicitation regime as set out by Article 42 of MiFID II and Article 46 of MiFIR.

I. MiFID II/R transparency topics

Section 7 The systematic internaliser regime:

a. Publication of systematic internaliser (SI) regime calculations

- (i) In its press release, ESMA stated it had to “amend its original action plan **as data completeness for the various asset classes had not reached adequate levels** when ESMA conducted its completeness analyses. Given the complexity and size of the task, ESMA then decided to focus on improving completeness for a select number of asset classes while postponing the publication for others.
- (ii) The **updated implementation schedule** means **ESMA will publish the necessary EU-wide data, for the first time by:**
 - **1 August 2018** - covering a period from 3 January 2018 to 30 June 2018 for **bonds**, equity, and equity-like instruments. **Investment firms will then have to perform their first assessment and, where appropriate, comply with the SI obligations by 1 September 2018.**
 - **1 February 2019** - covering a period from 1 July 2018 to 31 December 2018 for ETCs, ETNs, SFPs, securitised derivatives, emission allowances and derivatives. SI’s will have to eventually comply with the obligations from 1 March 2019.
- (iii) **ESMA will publish results only if trading venues have submitted data for at least 95% of all trading days** and will not trigger publication if the quality of the data received for an instrument is not considered sufficient. The data publications will also incorporate OTC trading to the extent it has been reported to ESMA.
- (iv) Following this, **ESMA publications will be updated on a quarterly basis** in respect of a rolling six months assessment period and **investment firms are expected to self-assess and comply after a reduced two week period**. ESMA notes that for the SI calculations having a high level of completeness in the reported information is crucial.”
- (v) The exact amendments of Q&A 1 of section 7 on the systematic internaliser regime are highlighted on p. 50-51 of the [ESMQ Q&A document](#).

Section 2 General Q&As on transparency topics:

b. **In case of a corporate action where a traded ISIN is replaced with a new ISIN, how should the new ISIN be reported to FIRDS and FITRS?** [Question 13]

- (i) In case of a corporate action where a traded ISIN is replaced with a new ISIN, **the ISIN being replaced should be reported as terminated and the new ISIN should be reported as a newly admitted to trading or newly traded financial instrument** in the ESMA IT systems (both in FIRDS and FITRS).
- (ii) In particular, **reporting entities are required to provide under field 11 of RTS 23** (“Date of first admission to trading or date of first trade”) the date when the new ISIN was first admitted to trading or first traded on their platform, i.e. following the corporate action. The relevant competent authority for this financial instrument will be determined on this basis.

- (iii) Submitting entities are required to make, where necessary, corrections in FIRDS by 31 July 2018 at the latest.

II. MiFID II/R investor protection and intermediaries

Section 7 Inducements (research):

a. Is a free trial period of research services acceptable when it is provided in relation to portfolio management or advice on an independent basis? [Question 12]

(i) [...] ESMA is of the view that free trial periods of research services (i.e. research that is received so that the firm may evaluate the research provider's research service before deciding whether or not to enter into a contract or arrangement for the provision of research services for a fee) **may qualify as minor non-monetary benefits** under Article 12(3)(e) of the [MiFID II Delegated Directive](#) [(EU) 2017/593] **provided that:**

- the trial period must be offered and agreed upon prior to the decision to enter into a contract or arrangement relating to the provision of research services for a fee;
- the scope and extent of the research services offered during the trial period must be agreed upon by the parties prior to the start of the trial period;
- the trial period must be strictly defined and limited in time and, in any case, shall not last for longer than three months;
- no monetary or non-monetary consideration is due by the research recipient during the trial period (this includes implicit benefits such as abnormally high order flows with the research provider compared to volumes normally carried out with the research provider or an entity part of the same group);
- the trial period is not commenced within twelve months from the termination of an arrangement for the provision of research (including any previous trial period) with the same research provider;
- the firm has controls in place to ensure that the research received during the trial period is not billed to its clients; and the firm makes and retains a record of how the conditions above were satisfied for each such trial period.

Section 13 Provision of investment services and activities by third-country firms:

b. What are practical examples of investment products belonging to different categories within the meaning of Article 42 of MiFID II and Article 46 of MiFIR and [Q&A 2](#) [p. 96]? [Question 3]

(i) This answer complements Q&A 2 on reverse solicitation and aims at providing a non-exhaustive list of pairs of investment products which should not be considered as belonging to the same category for the purpose of the reverse solicitation regime as set out by Article 42 of MiFID II and Article 46 of MiFIR [see below]:

- a non-complex debt instrument (as referred to under point (a) of Article 25(4) of MiFID II), and a debt instrument embedding a derivative or incorporating a structure which makes it difficult for the client to understand the risk involved (see Sections V.I. and V.II. of the ESMA guidelines on complex debt instruments and structured deposits)

- a debt instrument admitted to trading on a regulated market or on an equivalent third-country market or on a MTF and a debt instrument not admitted to trading on a regulated market or on an equivalent third-country market or on a MTF;
- a non-complex money-market instrument(as referred to under (a) of Article 25(4)), and a money-market instrument embedding a derivative or incorporating a structure which makes it difficult for the client to understand the risk involved (see Sections V.I. and V.II. of the ESMA guidelines on complex debt instruments and structured deposits);
- a non-complex structured deposit (as referred to under point (a) of Article 25(4) of MiFID II), and a structured deposit incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term (see Sections V.III. and V.IV. of the ESMA guidelines on complex debt instruments and structured deposits);
- a subordinated debt instrument and a senior debt instrument;
- a common share issued by a company and a unit or share issued by an ETF;
- two shares belonging to two different stock-exchange segments;
- a share admitted to trading on a regulated market or on an equivalent third-country market or on a MTF and a share not admitted to trading on a regulated market or on an equivalent third-country market or on a MTF;
- a share embedding a derivative and a share that does not embed a derivative;
- a share or unit in a UCITS and a share or unit in an AIF;
- two AIFs applying two different types of investment strategies as referred to in Annex 4 of Commission Delegated Regulation No 231/2013;
- two packaged retail investment products with different features such as a different summary risk indicator, as featured in their respective key information documents according to Regulation (EU) N° 1286/2014;
- a share or unit in a non-structured UCITS and a structured UCITS as referred to in the second subparagraph of Article 36(1) of Regulation (EU) No 583/2010;
- two financial instruments with different underlying asset classes (e.g. government bonds vs high yield corporate bonds).

For financial instruments, it is reminded that two instruments belonging to a different category of Annex C (1) to (11) are considered as different investment products for the purpose of Article 42 of MiFID 2 and 46 of MiFIR.

MiFIR – Article 42

Product intervention by competent authorities

1. A competent authority may prohibit or restrict the following in or from that Member State:

- (a) the marketing, distribution or sale of certain financial instruments or structured deposits or financial instruments or structured deposits with certain specified features; or
- (b) a type of financial activity or practice.

2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that:

- (a) either
 - (i) a financial instrument, structured deposit or activity or practice gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or

commodity markets or to the stability of whole or part of the financial system within at least one Member State; or

- (ii) a derivative has a detrimental effect on the price formation mechanism in the underlying market;
- (b) existing regulatory requirements under Union law applicable to the financial instrument, structured deposit or activity or practice do not sufficiently address the risks referred to in point (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;
- (c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument, structured deposit or activity or practice;
- (d) the competent authority has properly consulted competent authorities in other Member States that may be significantly affected by the action;
- (e) the action does not have a discriminatory effect on services or activities provided from another Member State; and
- (f) it has properly consulted public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, where a financial instrument or activity or practice poses a serious threat to the orderly functioning and integrity of the physical agricultural market.

Where the conditions set out in the first subparagraph are fulfilled, the competent authority may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a financial instrument or structured deposit has been marketed, distributed or sold to clients.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority.

3. The competent authority shall not impose a prohibition or restriction under this Article unless, not less than one month before the measure is intended to take effect, it has notified all other competent authorities and ESMA in writing or through another medium agreed between the authorities the details of:

- (a) the financial instrument or activity or practice to which the proposed action relates;
- (b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and
- (c) the evidence upon which it has based its decision and upon which it is satisfied that each of the conditions in paragraph 2 are met.

4. In exceptional cases where the competent authority deems it necessary to take urgent action under this Article in order to prevent detriment arising from the financial instruments, structured deposits, practices or activities referred to in paragraph 1, the competent authority may take action on a provisional basis with no less than 24 hours' written notice, before the measure is intended to take effect, to all other competent authorities and ESMA or, for structured deposits, EBA, provided that all the criteria in this Article are met and that, in addition, it is clearly established that a one month notification period would not adequately address the specific concern or threat. The competent authority shall not take action on a provisional basis for a period exceeding three months.

5. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 2 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice.

6. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 2 no longer apply.

7. The Commission shall adopt delegated acts in accordance with Article 50 specifying criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the of the financial system within at least one Member State referred to in paragraph 2(a).

Those criteria and factors shall include:

- (d) the degree of complexity of a financial instrument or structured deposit and the relation to the type of client to whom it is marketed, distributed and sold;
- (e) the degree of innovation of a financial instrument or structured deposit, an activity or a practice;
- (f) the leverage a financial instrument or structured deposit or practice provides;
- (g) in relation to the orderly functioning and integrity of financial markets or commodity markets, the size or the notional value of an issuance of financial instruments or structured deposits.

MiFIR – Article 46

General provisions

1. A third-country firm may provide investment services or perform investment activities with or without any ancillary services to eligible counterparties and to professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU established throughout the Union without the establishment of a branch where it is registered in the register of third-country firms kept by ESMA in accordance with Article 47.
2. ESMA shall register a third-country firm that has applied for the provision of investment services or performance of activities throughout the Union in accordance with paragraph 1 only where the following conditions are met:
 - (a) the Commission has adopted a decision in accordance with Article 47(1);
 - (b) the firm is authorised in the jurisdiction where its head office is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country;
 - (c) cooperation arrangements have been established pursuant to Article 47(2).
3. Where a third-country firm is registered in accordance with this Article, Member States shall not impose any additional requirements on the third-country firm in respect of matters covered by this Regulation or by Directive 2014/65/EU and shall not treat third-country firms more favourably than Union firms.
4. The third-country firm referred to in paragraph 1 shall submit its application to ESMA after the adoption by the Commission of the decision referred to in Article 47 determining that the legal and supervisory framework of the third country in which the third-country firm is authorised is equivalent to the requirements described in Article 47(1).

The applicant third-country firm shall provide ESMA with all information necessary for its registration. Within 30 working days of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant thirdcountry firm is to provide additional information.

The registration decision shall be based on the conditions set out in paragraph 2.

Within 180 working days of the submission of a complete application, ESMA shall inform the applicant third-country firm in writing with a fully reasoned explanation whether the registration has been granted or refused.

Member States may allow third-country firms to provide investment services or perform investment activities together with ancillary services to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in their territories in accordance with national regimes in the absence of the Commission decision in accordance with Article 47(1) or where such decision is no longer in effect.

5. Third-country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country.

The information in the first subparagraph shall be provided in writing and in a prominent way.

Member States shall ensure that where an eligible counterparty or professional client within the meaning of Section I of Annex II to Directive 2014/65/EU established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, this Article does not apply to the provision of that service or activity by the third-country firm to that person including a relationship specifically related to the provision of that service or activity. An initiative by such clients shall not entitle the third-country firm to market new categories of investment product or investment service to that individual.

6. Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State.
7. ESMA shall develop draft regulatory technical standards to specify the information that the applicant third-country firm shall provide to ESMA in its application for registration in accordance with paragraph 4 and the format of information to be provided in accordance with paragraph 5.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

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