Filters applied:
Legal act = Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II), Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries, Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- MDP, Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Secondary Markets

Download date: Tuesday, October 7, 2025 - 11:59

ESMA
European Securities and Markets Authority

Title	Submission Date
ESMA_QA_2618	25-07-2025
ESMA_QA_2439	13-02-2025
ESMA_QA_2436	12-02-2025
ESMA_QA_2416	27-01-2025
ESMA_QA_2415	27-01-2025
ESMA_QA_2304	11-10-2024
ESMA_QA_2286	18-09-2024
ESMA_QA_2249	12-08-2024
ESMA_QA_2247	08-08-2024
ESMA_QA_2214	10-06-2024
ESMA_QA_2172	07-05-2024
ESMA_QA_2148	03-04-2024
ESMA_QA_2137	19-03-2024
ESMA_QA_2136	18-03-2024
ESMA_QA_2104	12-02-2024
ESMA_QA_2025	13-12-2023
ESMA_QA_2024	13-12-2023
ESMA_QA_1997	26-10-2023
ESMA_QA_1966	02-10-2023
ESMA_QA_1527	09-08-2023
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ESMA_QA_662	18-01-2023
ESMA_QA_1500	05-12-2022
ESMA_QA_607	25-10-2022
ESMA_QA_1546	23-09-2022
ESMA_QA_1544	23-09-2022
ESMA_QA_1543	23-09-2022

Title	Submission Date
ESMA_QA_1317	23-09-2022
ESMA_QA_1533	23-09-2022
ESMA_QA_1311	23-09-2022
ESMA_QA_1492	23-09-2022
ESMA_QA_1289	23-09-2022
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ESMA_QA_1491	15-07-2022
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ESMA_QA_1547	04-09-2019
ESMA_QA_1068	11-07-2019
ESMA_QA_1587	03-06-2019
ESMA_QA_1839	29-05-2019
ESMA_QA_1843	29-05-2019
ESMA_QA_1842	29-05-2019
ESMA_QA_1067	29-05-2019

Title	Submission Date
ESMA_QA_1066	29-05-2019
ESMA_QA_1065	29-05-2019
ESMA_QA_1064	29-05-2019
ESMA_QA_1665	02-04-2019
ESMA_QA_1498	01-04-2019
ESMA_QA_1497	01-04-2019
ESMA_QA_1838	28-03-2019
ESMA_QA_1837	28-03-2019
ESMA_QA_1836	28-03-2019
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ESMA_QA_1818	28-03-2019
ESMA_QA_1060	28-03-2019
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ESMA_QA_1487	01-02-2019
ESMA_QA_1577	30-01-2019
ESMA_QA_1624	14-11-2018
ESMA_QA_1623	04-10-2018
ESMA_QA_1622	04-10-2018
ESMA_QA_1621	04-10-2018
ESMA_QA_1641	04-10-2018

ESMA_QA_2618

Submission Date
25/07/2025

Status: Question Rejected

Additional Information

Level 1 Regulation
Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II)

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Level 3 Regulation
ESMA35-43-869 - Guidelines - Suitability (MiFID)

Topic
Suitability

Subject Matter

Arrangements necessary to understand clients

Question

In order to comply with the duty to obtain the necessary information regarding the client's knowledge and experience, financial situation, and investment objectives, shall the Investment firms questionnaire/approach follow this exact sequence, i.e., shall the investment firm inquire the client, in a first moment, about its Knowledge and Experience on a specific instrument/ service, and then about the client's financial situation and his investment objectives ?

ESMA_QA_2439

Submission Date
13/02/2025

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Position reporting

Additional Legal Reference
Article 83(1)(b) of CDR 2017/565; Article 57(1) of MiFID II

Subject Matter
Q&A on open interest thresholds in energy derivatives

Question
How do open interest thresholds that are denominated in lots such as in Article 83(1)(b) of CDR 2017/565 (10,000 lots) and in Article 57(1) of MiFID II (300,000 lots) translate into underlying units of energy derivatives such as Megawatt Hour (MWh), million British Thermal Units (MMBTU), or Therms (therm)?

ESMA Answer

13-02-2025

Original language

For the purpose of converting thresholds that are denominated in lots into underlying units of energy derivatives, ESMA considers the monthly contracts in which most trading activity is concentrated as a baseline, each representing 1 lot.

The conversion for the 10,000 lot threshold is exemplarily demonstrated below:

For gas and base load power, the monthly contracts representing 1 lot, are considered equivalent to 720MWh (1MW[1]*24h*30days). Given that 1 MWh = 3.41 [2] MMBTU and 1 MMBTU = 10 therm, the following thresholds apply:

10,000 lots = 10,000 * 720MWh **= 7,200,000 MWh**

10,000 lots = 10,000 * 720MWh * 3.41 MMBTU/MWh **= 24,548,477 MMBTU**

10,000 lots = 10,000 * 720MWh * 3.41 MMBTU/MWh * 10 therm/MMBTU **= 245,484,766 therm**

For peak load power, the monthly contract representing 1 lot is considered equivalent to 264MWh (1MW*12h*22days) and consequently, the following threshold applies:

10,000 lots = 10,000 * 264MWh **= 2,640,000 MWh**

This Q&A expands the scope of the existing Q&A on Position limits - the definition of "a lot" to also cover position reporting, without changing the approach.

Concerning gas derivatives denominated in units different from MWh, please also refer to the Q&A on lot sizes and position limits.

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[1] Sometimes the physical power of energy contracts is stated in daily terms, e.g. 1 MWh/d = 1/24 MW instead of 1 MW, however, this is less common.

[2] The calculations were performed using a conversion factor of 3.4095106405145.

ESMA_QA_2436

Submission Date
12/02/2025

Status: Forwarded to EC/Public Consultation/Other

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Non-equity transparency

Subject Matter
Legal qualification of Financial Transmission Rights under MiFID II

Question

Do Financial Transmission Rights referred to in the Forward Capacity Allocation Regulation (Commission Regulation 2016/1719) qualify as financial instruments under Annex I, Section C of MiFID II (Directive 2014/65/EU)?

ESMA_QA_2416

Submission Date
27/01/2025

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Recording of telephone conversations and electronic communications

Subject Matter
Scope of the record keeping obligation of telephone conversations and electronic communications

Question

Are electronic communications or telephone conversations limited to the provision of information about different investment alternatives subject to the record keeping obligation under article 16(7) of MiFID II when there is no possibility to enter into a trade during that interaction?

ESMA Answer

18-06-2025

Original language

Yes, when the conversations and communications are intended to result in a transaction. Subparagraph 2 of Article 16(7) of MiFID II stipulates that telephone conversations or electronic communications that are intended to result in the conclusion of transactions must be recorded, even if those conversations or communications do not result in the conclusion of transactions.

Subparagraph 2 should be understood as applying to all telephone conversations and electronic communications that are intended to and may ultimately result in a transaction, even if the order itself may only be formally placed through a different channel, as such communications may still be relevant to the transaction and the client order. Therefore, if the discussion is expected to refer to investment options that in essence may lead to a transaction, although the order is not formally placed during such telephone conversation or electronic communications, investment firms should record them.

For guidance on the type of communications that are relevant for Article 16(7), please refer to ESMA Q&A 3.11 and 3.13 available here.

ESMA_QA_2415

Submission Date
27/01/2025

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Recording of telephone conversations and electronic communications

Subject Matter
Scope of the obligation to document face-to-face conversations with clients

Question

Should face-to-face conversations with clients be recorded if the client order is placed in a written form or contract signed during the meeting??

ESMA Answer

18-06-2025

Original language

Subparagraph 7 of Article 16(7) of MiFID II stipulates that when client orders are placed through channels other than telephone, they must be documented in a durable medium[1]. Subparagraph 7 mentions as examples of acceptable formats: mail, fax, email, or documentation of clients orders made at meetings and that, in particular, the content of face-to-face interactions may be recorded through written minutes or notes.

In addition, Article 76(9) of the MiFID Delegated Regulation[2] require that such records include some minimum information listed in such article.

Therefore, if a client order is placed during a face-to-face meeting and documented with a written form or contract signed during that meeting, the investment firm shall comply with Article 76(9) of the MiFID II Delegated Regulation and ensure that such written form or contract includes at least all the information listed in Article 76(9) of the MiFID II Delegated Regulation. If the written form or contract does not contain all the information specified in Article 76(9), the firm must ensure that the missing div are documented in additional records.[3]

[1] As defined in Article 4(62) of MiFID II.

[2] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

[3] Firms are reminded that Article 74 of MiFID II Delegated Regulation concerning record keeping requirements of client orders and decisions to deal also applies.

ESMA_QA_2304

Submission Date
11/10/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Q&A on lot sizes and position limits

Question
In the gas derivatives market, lot sizes defined in the contract specification by trading venues do not represent a standard quantity of the underlying across all

market areas, for the same maturity. How should the open interest in lots be calculated for gas derivatives, for the application of position limits in Article 57(1) of MiFID II?

ESMA Answer

11-10-2024

Original language

In most European gas market areas, the unit of trading is MWh/h. However, in some market areas the market trading convention is different. For example, the unit of trading is MWh/day in French PEG and Spanish PVB and Ktherms/day in UK NBP. Those differences are reflected in the unit of trading of associated derivatives contracts and their lot sizes: one lot of PEG or PVB gas derivative contract is 24 times smaller than one lot of the TTF gas derivative contact, for the same maturity. Taking the example of a monthly contract, one lot of TTF represents 720MWh while one lot of PEG and PVB represent 30MWh.

Gas derivatives are traded on EU trading venues and therefore subject to positions limits where the open interest equals or exceeds 300,000 lots over a one-year period, in accordance with Article 57(1) of MiFID II.

Due to the differences in unit of trading explained above, the open interest of contracts with smaller lot sizes may exceed the 300,000 lot threshold even though, when converted to MWh, their open interest is much smaller compared to contracts with larger lot sizes. In other words, those contracts may exceed the threshold due to historical market conventions rather than actual liquidity. This goes against the

original intention of the position limit regime, which aims to set position limits only on contracts with significant liquidity.

Therefore, it is necessary to ensure a consistent calculation of open interest in gas derivatives contracts to assess the 300 000 lot threshold and set position limits for critical or significant commodity derivatives under Articles 11(1) and 13 of RTS 21a. For such position limit assessment, the open interest should be calculated "equivalent lot", where one equivalent lot of all gas derivative contracts represent the same quantity of MWh as the benchmark TTF derivative contract for the same maturity.

The conversion from lots to equivalent lots, based on contracts existing in August 2024, is provided below for illustration purposes:

Hub	Unit of trading	Lot size set by venues	Conversion of lot size in MWh	Equivalent lot for the application of position limits
THE, PSV, TTF, CEGH VTP, ETF, ZTP, CZ VTP, MGP	MWh/h	1 lot = 1MW	Daily contract: 1 lot = 1MW*24 hours = 24MWh	1 equivalent lot = 1 lot (no conversion)
			Monthly contract: 1 lot = 1MW*24hours*30days = 720MWh	[Monthly contract] 1 equivalent lot = 720MWh

PEG, PVB	MWh/d	1 lot = $\frac{1}{24}$MW	Daily contract: 1 lot = $\frac{1}{24}$MW * 24 hours = 1MWh Monthly contract: 1 lot = 1MWh/d *30days = 30MWh	1 equivalent lot = $\frac{720}{30}$ = 24 lots [Monthly contract] 1 equivalent lot = 24 lots = 24 * 30MWh = 720MWh
NBP	Ktherms/d	1 lot =1,000therms/d 1 therm ~ 29.31KWh	Daily contract: 1 lot = 1000terms/d*1day~29.31MWh Monthly contract: 1 lot = 1000terms/d*30days ~ 879.21MWh	1 equivalent lot = $\frac{720}{879.21}$ ~ 0.82 lot [Monthly contract] 1 equivalent lot = 0.82 lots = 0.82 * 879.21MWh ~720MWh

				1 equivalent lot = $\frac{720}{2930.71}$ ~ 0.25 lots
LNG JKM	MMBtu	1 lot = 10,000MMBtu	Monthly contract: 1 lot = 10,000MMBtu = 2,930.710701722MWh	[Monthly contract] 1 equivalent lot = 0.25 lots = 0.25 * 2,930MWh ~ 720MWh

ESMA_QA_2286

Submission Date
18/09/2024

Status: Question Published

Additional Information

Level 1 Regulation
Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II)

Topic
Information to clients on topics other than costs and charges

Additional Legal Reference
Annex I, Section B, point 5

Subject Matter
Scope of ancillary services and supervisory convergence

Question

What is the exact scope of the ancillary service, point 5 in annex I, Section B: Investment research and financial analysis or other forms of general recommendations relating to financial instruments?

ESMA_QA_2249

Submission Date
12/08/2024

Status: Question Rejected

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Investment advice on an independent basis

Additional Legal Reference
article 2(1), under points (c) and (k) of Directive 2014/65/EU (MiFID II)

Subject Matter

Scope of the exemptions provided for in article 2(1), (c) and (k) of Directive 2014/65/EU (MiFID II)

Question

We would like to submit to you the two following questions regarding the ambit of the exemptions provided for in article 2(1), under points (c) and (k) of Directive 2014/65/EU (MiFID II).

• As regards art. 2(1)(c) of MiFID II, the provision states that :

“The Directive shall not apply to (…) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service”.

Article 4 of the Commission Delegated Regulation 2017/565 then states further that :

“(…) an investment service shall be deemed to be provided in an incidental manner in the course of a professional activity where the following conditions are satisfied: (a) a close and factual connection exists between the professional activity and the provision of the investment service to the same client, such that the investment service can be regarded as accessory to the main professional activity ; (…)”.

Moreover, Recital 34 of this Delegated Regulation states that “the exemption should only apply if the investment service has an intrinsic connection to the main area of the professional activity and is subordinated thereto”.

Given the foregoing, assuming that conditions (b) and (c) from article 4 of the Delegated Regulation are met, should article 2(1)(c) of MiFID be construed as meaning that, in order to benefit from the exemption thereunder, it suffices that the provision of an investment service is complementary to the provision another service otherwise regulated, and do not need to be necessary to the provision of that other service?

• As regards art. 2(1)(k) of MiFID II, the provision states :

“The Directive shall not apply to (…) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated”.

Assuming that the investment advice is not specifically remunerated, should this article be construed as meaning that, in order to benefit from the exemption thereunder, it is necessary but sufficient that the investment advice is made in the context of the provision of another service (not covered by the Directive), irrespective of whether the investment advice is ancillary, incidental, complementary or even, factually or otherwise, connected to the other service, and irrespective of whether the activity is regulated?

ESMA_QA_2247

Submission Date
08/08/2024

Status: Question Rejected

Additional Information

Level 1 Regulation
Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II)

Level 2 Regulation
Directive 2017/593 - MiFID II Delegated Directive

Level 3 Regulation
ESMA/2015/1886 - Guidelines - Assessment of knowledge and competence (MiFID)

Topic
Investment advice on an independent basis

Additional Legal Reference
CNMV Guía Técnica 4/2017 (Modificada diciembre 2020)

Subject Matter
Recertificaciones MIFID

Question
Que ocurre cuando el personal que trabaja en una entidad financiera con su certificado de Mifid en vigor durante un año no realiza los cursos de formación para renovar dicha certificación. Por ejemplo porque se encuentre en situación de baja laboral. Dicho empleado/a debe con posterioridad realizar el curso completo o debe simplemente recertificarse con los cursos de formación anual.
La Guía de la ESMA 2015/1886 no dice nada al respecto sobre la "caducidad" y el art. 21.d) del Reglamento 2017/565 sobre MIFID II establecen que el personal deben tener los conocimientos y competencias adecuados, pero ninguna normativa habla de lo que sucede si no se cumplen las horas de formación continua.

ESMA_QA_2214

Submission Date
10/06/2024

Status: Question Rejected

Additional Information

Level 1 Regulation
Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II)

Level 2 Regulation
Directive 2017/593 - MiFID II Delegated Directive

Topic
Inducements

Subject Matter
Underwritting and placing fees

Question

In the specific situation that the calculation of the remuneration perceived by the firm for the placing/underwriting service is independent/unconnected with the number of securities finally placed to investors (i.e. the firm receives the same remuneration from the issuer or offeror of securities irrespectively of the amount of securities it sells to investors) as the circumstance “it is clear that the remuneration perceived for the placing service is connected to the provision of the investment service to the investor buying the financial instrument” is not met, should this remuneration be considered as an inducement?
If that is the case, how and to what extent entities should disclose in a “fair, clear and not misleading” manner information on such remuneration in costs, charges and inducements disclosures to their clients?

ESMA_QA_2172

Submission Date
07/05/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Client categorisation

Subject Matter
Two classifications for one client

Question

Assuming that the investor disclosure requirements are predefined in legal documents and agreements, is it possible to select two client categories for a professional client (such as per se eligible counterparty and professional client)?

ESMA Answer

11-07-2024

Original language

Yes. More generally, it is possible to have clients categorised in two different client categories, depending on the investment service or activity provided or even the financial instrument. Nevertheless, if the client is classified into different categories, they must be clearly informed, for each relevant category, which financial instruments, investment services, and activities fall under it.

As an example, under Annex II of MiFID II, a retail client may waive the benefit of certain MiFID II rules of conduct by stating in writing to the investment firm that they wish to be treated as a professional client, "*either generally or in respect of a particular investment service or transaction, or type of transaction or product*". As such, one client may be treated as retail for one investment service and/or type of financial instrument but as a professional client for a different combination of service and product.

Similarly, a client qualifying as a *per se* eligible counterparty for the services of execution of orders, reception and transmission of orders and dealing on own account would be treated as a professional client for other types of investment

services or activities for which the eligible counterparty category is not applicable.

ESMA_QA_2148

Submission Date
03/04/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II)

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Reporting to clients

Additional Legal Reference
Article 63, Paragraph 1 of Delegated Regulation EU 2017/565

Subject Matter

Deadline for providing clients with statement on owned financial instruments

Question

What is the latest date on which the statement, under Article 63, Paragraph 1 of the Delegated Regulation EU 2017/565, for the respective quarter should be sent by the investment firm and how to determine this date?

ESMA Answer

11-07-2024

Original language

For the information requirements under Article 63(1) to meet their investor protection objectives, it is important that the statement of a client's financial instruments and funds is provided as soon as possible after the end of the reporting period. For instance, a statement sent later than 1 month after the end of the reporting period should be considered as being provided in an untimely manner unless the firm can justify of a compelling reason why it may not be sent before. Indeed, it is in the best interest of the client to receive this information as soon as possible after the end of the reporting period so that they may decide on any action to be taken, if any.

ESMA_QA_2137

Submission Date
19/03/2024

Status: Question Rejected

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Level 3 Regulation
ESMA/2015/1783 - Guidelines - Complex debt instruments and structured deposits (MiFID)

Topic
Appropriateness

Subject Matter

Non-complex structured deposits

Question

If a structured deposit has only one variable affecting the return received on maturity (the agreed term), and has an exit fee that is either a fixed sum, a fixed sum for each month remaining until maturity (the agreed term) or a percentage of the original sum invested, would it still be considered a non-complex financial instrument, in accordance with point (v) of Article 25(4)(a) of MiFID II, if the client is entitled to receive the positive market value of the underlying option, if any, if the client exits prematurely, e.g. in the event of unforeseen liquidity requirement? If the structured deposit is exited prematurely, and not on the agreed upon maturity date, the market value of the underlying option will depend on more than one variable, i.e. the underlying index, the volatility of the index, time to maturity.

ESMA_QA_2136

Submission Date
18/03/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
disclosure of cost on return

Question
The cumulative effect of the costs on the return shall show “anticipated spikes and fluctuations of the costs”; does that also apply to the ex-post disclosure of the

cumulative effect of the costs on the return?

ESMA Answer

16-12-2016

Original language

[Published as Q&A 9.3 in ESMA 35-43-349 Q&As on Investor protection]

Based on Article 24(4) MiFID II and Article 50(10) of the MiFID II Delegated Regulation, firms have to provide clients with an illustration to show the cumulative effect of the costs on the return.

When providing the client ex-post with information on total costs and charges, a firm can for instance decide to show the historical costs, and simultaneously provide the client with a forward looking illustration with regard to expected costs. In this case, the firm can show the historical costs that show a spike, for instance because of entry costs, and future expected costs based on the firm's expectations (including anticipated spikes and fluctuations).

If the ex-post illustration takes into account only historical data, the firm has to account for realised spikes and fluctuations in costs. However, since these data are historical, there are no 'anticipated' spikes.

ESMA_QA_2104

Submission Date
12/02/2024

Status: Question Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/578 - RTS on market making agreements and market making schemes (RTS 8)

Topic
Direct Electronic Access and algorithmic trading

Additional Legal Reference
Article 2(1)(b)

Subject Matter

Market making in securitised derivatives

Question

Are there technical circumstances related to securitised derivatives under which it can be considered that a market maker posting one-way quotes is considered to meet the obligations on market making agreements set out in Article 2 of RTS 8?

ESMA_QA_2025

Submission Date
13/12/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Information to clients on costs and charges

Historic Question Reference

The second paragraph of this Q&A includes a reference to the Q&A 9.13 of the ESMA Q&As on MiFID II and MiFIR Investor protection and intermediary topics (Ref: ESMA35-43-349) which can also be found in the ESMA Q&A tool as Q&A 1825.

Additional Legal Reference

Art. 24(4) of MiFID II, Article 1(4)(a) of Directive 2021/338/EU, Art. 50(2) and (9) of the MiFID II Delegated Regulation, Article 59(4) MiFID II Delegated Regulation

Subject Matter

Disclosure of costs and charges paid in or represented in an amount of foreign currency

Question

How should investment firms indicate the parts of the total costs and charges paid in or represented in an amount of foreign currency in their ex-ante and ex-post costs and charges disclosure?

ESMA Answer

13-12-2023

Original language

Article 50(3) MiFID II Delegated Regulation stipulates inter alia that where any part of the total costs and charges is to be paid in or represents an amount of foreign currency, investment firms must provide an indication of the currency involved and the applicable currency conversion rates and costs. However, Article 50(3) does not specify how firms should disclose such costs, neither for ex-ante nor for ex-post disclosures.

Firms are required to provide aggregated ex-ante information on all costs and charges. [1] This includes costs to be paid in or representing an amount of foreign currency[2] and costs of currency conversion, where applicable. Firms should include these costs and charges in the ex-ante costs and charges disclosure in accordance with Q&A 9.13.[3] Additionally, in accordance with Article 50(3) MiFID II Delegated Regulation, firms should indicate the currencies involved, the applicable currency conversion rates and currency conversion costs, irrespective of whether the client has requested an itemised breakdown.

For the ex-post disclosure of costs and charges, firms are required to provide to clients' aggregated information at least on an annual basis about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s).[4] Thus, the costs paid in or representing an amount of foreign currencies, and the currency conversion costs incurred, shall be included by firms in the aggregated amounts of their ex-post cost and charges disclosure. In contrast to the ex-ante information, in ESMA's view, in the ex-post cost disclosure, firms would neither be expected to indicate the foreign currencies involved, nor to specify the applied currency conversion rates and costs. Only if clients request an itemised breakdown, firms should disclose the relevant foreign currencies, conversion rates and related costs. ESMA notes that further information for each individual transaction is required by Article 59(4) MiFID II Delegated Regulation. This includes information on foreign currencies involved and the applicable currency conversion rates.

[1] According to Article 24(4) of MiFID II and Article 50(2) of the MiFID II Delegated Regulation.

[2] For the purpose of this Q&A, the notion of “foreign currency” depends on the currency of the account and/or the reference currency of the costs and charges disclosure.

[3] Also according to Article 1(4)(a) of Directive 2021/338/EU relating to the disclosure of ex-ante cost information where the agreement to buy or sell a financial instrument is concluded using a means of distance communication.

[4] According to Article 50(9) of the MiFID II Delegated Regulation.

ESMA_QA_2024

Submission Date
13/12/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Information to clients on costs and charges

Historic Question Reference
This Q&A updates the ESMA Q&A 1825. The updated wording of the answer is set out in bold and underlined.

Additional Legal Reference
Art. 24 of MiFID II, Art. 50(2) of the MiFID II Delegated Regulation

Subject Matter
Aggregation of costs and charges

Question
When providing information of costs and charges to clients, on which basis should costs be aggregated? What is the level of aggregation that firms need to apply?

ESMA Answer

13-12-2023

Original language

In accordance with Article 24(4) MiFID II and Article 50(2) of the MiFID II Delegated Regulation, firms shall aggregate costs and charges in connection with the investment service and costs and charges associated with the financial instruments. Third party payments received by investment firms in connection with the investment service provided to a client shall be itemised separately[1]. The aggregated costs and charges shall be totalled and expressed both as a cash amount and as a percentage. The following example shows the cost figures that are to be disclosed[2]:

Investment services and/or ancillary services	€ 1.500	1.5%
Third party payments received by the investment firm	€ 500	0.5%
Financial instruments	€ 1.500	1.5%
Total costs and charges	**€ 3.500**	**3.5%**

In addition, the investment firm shall provide an itemised breakdown at the request of the client. ESMA would expect that an investment firm take reasonable steps to minimise the effort for the client to submit such requests. When disclosing costs and charges in an online environment for instance, a best practice would be to enable the client to access such information through the use of hyperlinks. ESMA also considers it a best practice when an investment firm actively informs its clients of their right of submitting such a request when providing the aggregated information.

When an itemised breakdown is requested by the client, an investment firm should provide such breakdown (in a consistent way such that cost items may be aggregated) at least at the level of the cost items that are depicted in the tables included in Annex II MiFID II Delegated Regulation:

• One-off charges

• Ongoing charges

• All costs related to transactions

• Any charges that are related to ancillary services (not applicable to financial instruments)

• Incidental costs

Where firms use an all-in fee, the all in-fee should be disclosed under the relevant cost item (for example “ongoing charges”). For all other cost items covered by the all in-fee (or not charged at all), the firm should indicate a ‘zero’. For costs not covered by the all-in fee (for example, stamp duties, or exit or entry fees paid to the fund manager), the costs incurred shall be disclosed in the relevant category.

Moreover, for the avoidance of doubt, ESMA notes that also in case of all-in fees, in accordance with Article 50(2) of the MiFID II Delegated Regulation firms must disclose separately any third-party payments received in their aggregated disclosure of costs and charges.

The obligation to aggregate costs and charges is without prejudice to any other obligations to provide clients with cost information. For instance, for financial instruments that are within the scope of PRIIPs Regulation, a KID will be distributed to retail investors by investment firms that advise or sell a PRIP, thus providing information on ex-ante costs and charges per individual PRIIP.

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[1] ESMA notes that in the case of independent advice and portfolio management, the investment firm must transfer all fees, commissions or monetary benefits received from third parties in full to the client (Article 12(1) of the Delegated Directive) and clients shall be informed about the fees, commissions or monetary benefits transferred to them.

[2] The table is included for illustrational purposes only and ESMA does not intend to suggest a prescriptive format (i.e format, colour, font size etc).

ESMA_QA_1997

Submission Date
26/10/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Directive 2017/593 - MiFID II Delegated Directive

Level 3 Regulation
ESMA/2013/606 - Guidelines - Remuneration (MiFID)

Topic
Remuneration

Subject Matter
Payments to be considered as remuneration

Question
When calculating remuneration for small closely held company where the majority owner is also an employee, a member of management and the board, should the dividends he/she earns from his/her shares in the company be added to remuneration?

ESMA Answer

28-02-2025

Original language

Answer provided by the European Commission

Art 2(5) of Commission Delegated Regulation (EU) 2017/565 defines remuneration as “all forms of payments or financial or non-financial benefits provided directly or indirectly by firms to relevant persons in the provision of investment or ancillary services to clients”.

Art 27 of Commission Delegated Regulation (EU) 2017/565 stipulates that the remuneration policies and practices of the firm is applicable “to all relevant persons with an impact, directly or indirectly, on investment and ancillary services provided by the investment firm or on its corporate behaviour, regardless of the type of clients, to the extent that the remuneration of such persons and similar incentives may create a conflict of interest that encourages them to act against the interests of

any of the firm's clients.”

In the case of a closely held company that provides investment service to clients, where a person, being a majority shareholder, also cumulates different functions involving important decision-making, notably those of a manager and member of the board, the risk of conflict of interest or impact on the corporate behaviour can be considered as high since the payment of dividends may incentivise this person to consider and give preference to his/her own interest over the company’s client interests. Therefore, in that context, the payment of such dividends is to be considered as a ‘remuneration’ defined under Article 2(5) of Commission Delegated Regulation (EU) 2017/565 which triggers the requirements under article 27 of Commission Delegated Regulation (EU) 2017/565 on remuneration policies and practices.

By analogy, in Case C-352/20, the Court ruled that “a dividend policy of a fund manager may fall within the scope of the provisions of the Directives regarding remuneration where the payment policy of those dividends is such as to induce those employees to take excessive risks which are detrimental to the interests of the UCITS or AIFs managed by that company and to the interests of their investors and is capable of facilitating the circumvention of the requirements flowing from those provisions.

ESMA_QA_1966

Submission Date
02/10/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Directive 2017/593 - MiFID II Delegated Directive

Level 3 Regulation
ESMA35-43-620 - Guidelines - Product governance (MiFID)

Topic
Product governance

Additional Legal Reference
Commission Delegated Directive (EU) 2017/593, Articles 9(9) and 10(2)

Subject Matter
Integration of sustainability within the MiFID II product governance requirements

Question
When conducting the negative target market assessment for a product that does not consider sustainability factors, should a firm also consider any clients' sustainability-related objectives the product is not compatible with?

ESMA Answer

02-10-2023

Original language

Response provided by the European Commission:

Yes. According to Article 9(9) and 10(2) of Commission Delegated Directive 2017/593, any clients' sustainability-related objectives shall be considered when specifying the type(s) of clients whose needs, characteristics and objectives the product is compatible with ('positive target market assessment'). This also applies to the identification of any group(s) of clients whose needs, characteristics and

objectives the product is not compatible with ('negative target market assessment'). In practical terms, whether, and if so, which sustainability-related objectives may be relevant for the identification of the negative target market for a particular product that does not consider sustainability factors, will depend on the characteristics of the product. Indeed, firms are required to consider whether the product would be incompatible with some sustainable related objectives but this evaluation might conclude, in some specific situations, that there is no incompatibility with those objectives, so no negative target market would be determined in those specific situations for the criterion "sustainability related objective". Reversely, in other situations the consideration should lead to the identification of a negative target market in relation to the product's sustainability-related objectives.

Status of the answers provided by the European Commission: *The answers provided by the European Commission are provided pursuant to Article 16b(5) of Regulation 2010/1095 to clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.*

ESMA_QA_1527

Submission Date
09/08/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position reporting

Subject Matter
Position reporting

Question
Who should submit position reports under Article 58(2) of MiFID II?

ESMA Answer

07-07-2017

Original language

[ESMA 70-872942901-36 Commodity derivatives Q&A, Q&A 4.3]

Only investment firms trading in commodity derivatives or emission allowances or derivatives thereof outside a trading venue (economically equivalent OTC contracts) should submit position reports under Article 58(2) of MiFID II.

ESMA_QA_1216

Submission Date
22/06/2023

Status: Question Rejected

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Additional Legal Reference
MiFID II Article 4 (2) & Annex I Section A

Subject Matter
Correct classification of Investment Services and Investment Activities

Question

Can an investment firm which is licensed under the MiFID II Directive, conduct it business such that it is carrying out an investment activity and not providing an investment service?

ESMA_QA_1130

Submission Date
14/06/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on topics other than costs and charges

Subject Matter
MiFID practices for firms selling financial instruments subject to the BRRD resolution regime

Question

What information must firms collect from clients in order to comply with Article 44a(1) and 44a(2) of BRRD 2?

ESMA Answer

14-06-2023

Original language

[ESMA35-43-439 Investor protection BRRD Q&A 3]

In order to comply with Article 44a(1) of [BRRD 2] firms must perform a suitability test in accordance with Article 25(2) of MiFID II. Therefore, for this purpose, firms must comply with the relevant MiFID II requirements on the collection of information from clients (Article 25(2) of MIFID II and Articles 54 and 55 of the MiFID II Delegation Regulation[1]).

Article 44a(2) of BRRD 2 sets out additional controls that firms must perform, beyond the previously mentioned suitability assessment, when selling SELS to retail clients. In order to comply with this Article, firms' policies and procedures shall enable them to collect from the retail client and assess the information on the retail client's financial instruments portfolio including any investments in SELs held with other firms as per Article 44a(3) of BRRD 2.

The information to be collected from clients for the purpose of Article 44a of BRRD 2 is therefore likely to be broader than the information currently collected by firms for the purpose of the MiFID II suitability assessment as in MiFID II there is no explicit requirement to collect accurate information on SELs held with other firms.[2]

[1] See also ESMA guidelines on certain aspects of the MiFID II suitability requirements [Ref: ESMA35-43-869 of 28 May 2018]

[2] For the purpose of the MiFID II suitability requirements, firms need to obtain, amongst other things, the necessary information regarding the client's or potential client's "financial situation including his ability to bear losses" that "shall include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments". ESMA has noted in its guideline 3 of its MiFID II guidelines on certain aspects of the MiFID II suitability requirements that "depending on the scope of advice provided, firms should also encourage clients to disclose div on financial investments they hold with other firms, if possible also on an instrument-by-instrument basis".

ESMA_QA_1841

Submission Date
29/05/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
How to disclose cost information (in good time) to a client who places an order via telephone?

ESMA Answer

29-05-2019

Original language

[ESMA35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 28]

According to MiFID II (Articles 24(4) and 25(6)) and the MiFID II Delegated Regulation (Article 46(2) and (3) and Article 50), firms must provide ex-ante information about costs and charges in good time before the provision of investment services or ancillary services to clients or potential clients and on a durable medium (or by means of a website (where it does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied). Such requirements are technology neutral.

In practice, this raises issues in some situations, for example when a client who neither has an email address nor an internet access wants to place an order via telephone. This may also be the case where a client who has an email address or an internet access nevertheless insists on placing an order via telephone without delaying the transaction to consult costs and charges information provided on a durable medium. Indeed, for transactions where time is of the essence, it may not be in the best interest of the client to delay the transaction so that the client can consult the costs and charges information provided by the firm on a durable medium.

Where an investment service concerning a financial instrument with no “product costs” is to be provided or in the residual instances where the firm is not required to disclose “product costs”, the ex-ante information about costs and charges may be provided to the client in the form of a costs grid/table – e.g. at the time of the onboarding (please see Q&A 23).

Where a firm does not fulfil the conditions to take the approach described in Q&A 23, before the provision of each investment service or ancillary service, the firm may offer to the client to either:

- delay the transaction in order to provide the ex-ante information about costs and charges in a durable medium prior to the provision of the service; or
- provide the ex-ante costs information over the phone prior to the provision of the service (thereby fulfilling the requirement that the information must be provided in good time) and, simultaneously, to provide that same information in a durable medium (or through a website in accordance with Article 3(2) of the MiFID II Delegated Regulation).

ESMA_QA_973

Submission Date
29/05/2023

Status: Question Rejected

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/576 - Best execution reporting for investment firms (RTS 28)

Topic
Best Execution

Subject Matter
Classification of NON EU instruments in RTS28 report

Question

For RTS28 report, we classify the instruments using:

• the cficode of Firds to classify the instruments in Equities – Shares & Depositary Receipts, Debt instruments, Interest rates derivatives …
• the volumes of Fitrs to classify the Equities – Shares & Depositary Receipts in subassets ((i) Tick size liquidity bands 5 and 6 (from 2000 trades per day), (ii) Tick size liquidity bands 3 and 4 (from 80 to 1999 trades per day) (iii), Tick size liquidity band 1 and 2 (from 0 to 79 trades per day))

How should we classify non – EU instruments that are not present in Firds and Fitrs?

ESMA_QA_900

Submission Date
11/05/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Ancillary activity

Subject Matter
MiFID II Q&A on the Ancillary Activity Exemption

Question
Is the ancillary activity exemption under Article 2(1)(j)(ii) of MiFID II available to persons whose main business is the execution of client orders in physically settled

wholesale energy products traded on an organised trading facility (C6 carve-out products)?

ESMA Answer

05-03-2024

Original language

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

No. The main business of a person seeking to operate under the ancillary activity exemption in accordance with Article 2(1)(j) of MiFID II must be a commercial activity based on, or involving, commodities. A person whose main business is the trading of C6 carve-out products is therefore not eligible to the ancillary activity exemption and cannot provide investment services in commodity derivatives, emission allowances or derivatives thereof to the clients of its main business without being authorised as an investment firm.

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The

views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts

ESMA_QA_847

Submission Date
27/04/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- MDP

Topic
* EMIR Reporting

Additional Legal Reference
MiFID II main text, Annex I, Section C on financial instruments

Subject Matter
Interpretation of "emission allowances" under C(4)

Question

Does the financial instruments in Annex I, section C(4) include derivatives on emission allowances not recognized under the EU ETS, thus making these reportable under EMIR?

Specific example: Derivatives on UKAs, recognized under UK ETS.

ESMA Answer

24-06-2024

Original language

Yes. The definition of derivatives on emission allowances provided in Section C(4) of Annex I to MiFID II does not distinguish between emission allowances recognised for compliance under the EU ETS Directive, and other emission allowances. Therefore, derivatives on emission allowances not recognised for compliance under that Directive qualify as financial instruments.

ESMA_QA_662

Submission Date
18/01/2023

Status: Question Rejected

Additional Information

Level 1 Regulation
Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II)

Topic
Provision of investment services and activities by third country firms

Additional Legal Reference
For legal reference, please see attachement.

Subject Matter
Conditions for branches of third country credit institutions registered at ESMA as MIFID investment firms to service per se professional clients and eligible counterparties within the EU

Question

ESMA is requested to provide interpretation on whether:

— it is appropriate that the Home Member State Authority of these Branches registered as MIFID investment firms expects them to comply with the complete set of legislation regime of MiFID2, MIFIR and EMIR in the same way as any investment firm in the legal form of an EU credit institution;

— these Branches registered as MIFID investment firms may freely provide cross-border investment services to per se professional clients and eligible counterparties in an EU Member State different from their Home Member State based on their investment license issued by their Home Member state, subject to complying with the notification requirements described in paragraph 2 of Article 34 of MIFID2.

ESMA_QA_1500

Submission Date
05/12/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Multilateral and bilateral systems

Subject Matter
Multilateral and bilateral systems - Systematic internalisers

Question
Can an investment firm acting as single liquidity provider on an RM and/or an MTF, operate an SI?

ESMA Answer

16-12-2022

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 5.33]

Yes, but only if the two activities are fully separated. ESMA notes that instances where an investment firm acts as a single liquidity provider on an RM and/or MTF generate a conflict of interest, due to the investment firm having privileged access to order book information when acting in its liquidity provider capacity.

To better manage the possible conflict of interest the investment firm should take all the necessary steps to carry out the two activities in a separated manner (e.g. having distinct management and operational teams and physical separation of activities, ensuring segregation of execution systems and having safeguards in place to ensure that there is no information leakage across the two activities). The above is without prejudice to the MiFID II provisions on identification and management of conflicts of interest to be met by each of the two investment firms.

ESMA_QA_607

Submission Date
25/10/2022

Status: Question Rejected

Additional Information

Level 1 Regulation
Directive 2014/65/EU - Markets in Financial Instruments Directive (MiFID II)

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Level 3 Regulation
ESMA35-43-869 - Guidelines - Suitability (MiFID)

Topic
Suitability

Subject Matter

Suitability

Question

Per article 54(3) in Delegated Regulation, for Investment Services offered to a professional client you are entitled to assume client has the necessary level of knowledge and experience. However per article 54(6), knowledge and experience is required from the natural person representing the legal entity on the Suitability Questionnaire. Isn't that contradicting as the professional clients per Annex II of MiFID II Directive are legal entities and is interpreted that 54(3) is never applicable and all parts of Suitability Questionnaire in one way or another need to be completed?

ESMA_QA_1546

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Third country issues

Subject Matter
Third country issues

Question
Should economically equivalent contracts traded on a third-country venue be considered EEOTC for position limit and position reporting purposes under MiFID

II?

ESMA Answer

23-09-2022

Original language

[ESMA 70-872942901-36 Commodity derivatives Q&A, Q&A 6.1]

Whether or not positions held in commodity derivatives contracts traded on third-country venues that are economically equivalent (EE) to contracts traded on an EU trading venue, are to be considered as EETOC for position limit and position reporting purposes under Article 58(2) of MiFID II depends on the characteristics of that third-country trading venue, as set out in ESMA Opinion 70-154-466 of 15 December 2017[1].

Market participants holding positions on third country venue contracts, that may be considered EEOTC under Article 58(2) of MiFID II and Article 6 of RTS 21 or considering trading such contracts, should contact their CA and make them aware of those contracts. The CA will then get in touch with the third-country venue with a request for further information. Based on the information provided, ESMA will determine whether the third-country trading venue meets the criteria set out in the ESMA Opinion. If so, the respective third-country venue will be listed in an Annex to the Opinion.

Where a third-country trading venue appears in the annex to the Opinion, EE contracts traded on that venue will not be considered EEOTC for position limit and position reporting purposes. EE contracts traded on any other third-country trading

venue that does not appear in the Annex to the Opinion will be considered EEOTC.

ESMA is aware that it is important for market participants to have legal certainty as soon as possible on the treatment of their transactions in EE contracts on third-country trading venues for position limit and reporting purposes. Whilst ESMA cannot commit to any set timeline for the assessment of the information received through NCAs, all notifications will be processed as expediently as possible.

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[1] https://www.esma.europa.eu/sites/default/files/library/esma70-156-112_cdtf_opinion_eeotc_third_countries.pdf

ESMA_QA_1544

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position reporting

Subject Matter
Position reporting

Question
Which types of firm fall within each of the ITS 4 categories for the purposes of the weekly Commitment of Trader (CoT) reports?

ESMA Answer

23-09-2022

Original language

[ESMA 70-872942901-36 Commodity derivatives Q&A, Q&A 4.22]

ITS 4 implementing MiFID II provides the format of the weekly reports (CoT reports) to be published by trading venues and provided to ESMA. In providing information to the trading venues to enable them to produce weekly reports, members and participants of those venues must use their knowledge and judgment to categorise their activities and the activities of their clients accurately.

iIn order to achieve accuracy and consistency in the reporting of positions across different categories, the following guidance may be of assistance:

EU entities:

- Investment firms or credit institutions – includes banks and other firms regulated under MiFID II.
- Investment funds – entities holding investments directly in the commodity derivatives market as a form of collective investment scheme, including hedge and exchange-traded funds.
- Other financial institutions – those financial firms not falling within any of the other categories including pension funds.
- Commercial undertakings – non-financial entities using commodity derivatives, for example firms using those markets to hedge the risk they directly incur from dealing in physical commodities such as producers, end users, processors, manufacturers, shippers and merchants.
- Operators with compliance obligations under the EU ETS Directive – such as commercial airlines, entities in power and heat generation, energy-intensive

industry sectors including oil refineries, steel works, production of iron, aluminium, metals, cement, lime, glass, ceramics, pulp, paper, cardboard, acids and bulk organic chemicals.

Third-country entities:

For entities based in third countries, ESMA Opinion on the classification of third-country financial entities in weekly position reports under MiFID II[1] provides further guidance.

It should be noted that it is possible for a firm to be categorised as an operator with compliance obligations under the Emissions Allowance Trading Directive for a Weekly CoT report for an emissions allowance contract or derivatives thereof while, on the other hand, it must be categorised as a commercial undertaking for a Weekly CoT referring to another asset class of commodity derivatives contract (i.e. metals, oil, coal, gas, power, etc.).

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[1] https://www.esma.europa.eu/sites/default/files/library/esma70-156-6046_opinion_on_classification_of_counterparties_in_weekly_position_reports.pdf

ESMA_QA_1543

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position reporting

Subject Matter
Position reporting

Question
In cases where an OTC contract is economically equivalent to more than one ETD contract traded on an EU trading venue and where those ETD contracts are not

falling under the coordination procedure set out in Article 57(6) of MiFID II, to which NCA should the reporting of the EEOTC contracts be addressed?

ESMA Answer

23-09-2022

Original language

[ESMA 70-872942901-36 Commodity derivatives Q&A, Q&A 4.21]

In cases where an OTC contract is economically equivalent to more than one ETD contract traded on a trading venue in the EU and where those ETD contracts do not fall under the coordination procedure established in Article 57(6) of MiFID II, positions in the EEOTC contract should be reported to the NCA of the trading venues where the ETD contract with the largest volume of trading is traded.

For aggregation purposes, in order to calculate “net positions” according to Article 57(1) of MIFID II and Article 3 of RTS 21a, the EEOTC contract should be considered only once and be aggregated only once with the ETD contract with the largest volume of trading.

ESMA_QA_1317

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Ancillary activity

Subject Matter
Scope of the ancillary activity test

Question
Is a third-country firm (or a third-country subsidiary of an EU firm) dealing on an EU trading venue in commodity derivatives or emission allowances or derivatives

thereof in scope of the Ancillary Activity test as per CDR 2021/1833?

ESMA Answer

23-09-2022

Original language

[ESMA 70-872942901-36 Commodity derivatives, Ancillary activity, Q&A 14]

No. A third-country firm (or a third-country subsidiary of an EU firm) dealing on an EU trading venue in commodity derivatives or emission allowances or derivatives thereof is not in scope of the ancillary activity test as per CDR 2021/1833. Consequently, such third-country firm (or third-country subsidiary of an EU firm) does not have to notify any EU competent authority or ESMA that it makes use of the ancillary activity exemption.

ESMA_QA_1533

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position reporting

Subject Matter
Position reporting

Question
Where an NFE trades only, or partly, for hedging purposes, can every transaction be reported as being for speculative purposes? Can on-venue liquidity provision be

also reported as being for speculative purposes?

ESMA Answer

23-09-2022

Original language

[ESMA 70-872942901-36 Commodity derivatives Q&A, Q&A 4.11]

No. NFEs and financial entities should ensure that their position reports accurately describe their position. This is necessary to ensure the reliability and accuracy of the position reports submitted to NCAs and the published weekly position reports. Accordingly, NFEs are expected to correctly flag positions as hedging (or speculative) based on the conditions established in Article 7 of RTS 21a. In particular, the reports should accurately describe whether the position is risk reducing in relation to the NFE's commercial activities. This is the case even if the NFE does not apply for a hedging exemption under Article 8(1) and (2) of RTS 21a (in accordance with Q&A 1520) because it does not expect its aggregated positions resulting from hedging and non-hedging activities to exceed the limit set by the relevant NCA for that commodity derivative contract.

The same applies to the reporting of positions held by NFEs and financial entities that result from on-venue mandatory liquidity provision and the reporting of positions held by a financial entity to reduce risks directly relating to the commercial activity of the non-financial entity in the same predominantly commercial group, even if those entities do not apply for a position limit exemption in accordance with Articles 9 or 8(3) and (4) of RTS 21a respectively.

ESMA_QA_1311

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Ancillary activity

Subject Matter
Calculation of denominator

Question
Should the denominator in the capital employed test under Article 5(4) of CDR 2021/1833 be calculated using consolidated accounts? Should firms use capital on

a worldwide basis or just capital employed within the EU?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901 Commodity derivatives, Ancillary services, Q&A 10]

The CDR 2021/1833 RTS 20 capital employed test should be calculated using consolidated accounts. According to Article *5(4) of* CDR 2021/1833, the capital employed for carrying out the main business of a group shall be the sum of the total assets of the group minus its short-term debt as recorded in the consolidated financial statements of the group at the end of the relevant annual calculation period.

Firms shall use capital employed on a worldwide basis when calculating the capital test.

ESMA_QA_1492

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Direct Electronic Access (DEA) and algorithmic trading - Trading venues

Question
Can trading venues set specific trading hours which are applicable only to a sub-set of financial instruments (or to a specific financial instrument)?

ESMA Answer

23-09-2022

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.35]

Yes, a trading venue may set instrument-level trading hours for a specific sub-set of financial instruments (or for a specific financial instrument), provided that such specific trading hours (and the instruments to which they apply) are made public and communicated by the venue to market participants.

As an example, trading venues may set specific trading hours based on the trading hours of the underlying market (where applicable) to facilitate liquidity provisions by market makers.

ESMA_QA_1289

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Ancillary activity

Subject Matter
Criteria privileged transactions exemption

Question
What are the criteria that liquidity provision contracts need to meet in order to qualify for the privileged transactions exemption under Article 2(4) of MiFID II?

ESMA Answer

23-09-2022

Original language

[ESMA70-87294901-36 Commodity derivatives, Ancillary activitiy, Q&A 8]

Article 2(4) fourth paragraph, letter (c) of MiFID II permits a number of transaction types to be classified as “privileged transactions” and thus to be set aside for the purposes of the ancillary activity calculations. Those transaction types include “transactions in commodity derivatives and emission allowances or derivatives thereof entered into to fulfil obligations to provide liquidity on a trading venue, where such obligations are required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or by trading venues”. Therefore, Article 2(4)(c) of MiFID II establishes two alternatives of liquidity provision programmes that can be exempt from the ancillary activity calculations, one being based on requirements by regulatory authorities and the other based on requirements imposed by trading venues. Under both alternatives it is only the transactions carried out under the liquidity programme that are exempt but not the liquidity provider as a person.

When elaborating the Level 2 rules, ESMA offered one example of the circumstances in which transactions undertaken in order to fulfil liquidity obligations would be privileged, i.e. the market making requirements established by the UK energy regulator, OFGEM, which oblige large electricity suppliers to post the prices at which they buy and sell wholesale electricity on power trading platforms up to two years in advance and to trade at those prices. This is an example of an obligation required by a regulatory authority in line with applicable national rules which satisfies the conditions imposed by the first alternative described in Article 2(4)(c) of

MiFID II.

Article 2(4)(c) of MiFID II uses the term “obligations to provide liquidity” as opposed to the related term market maker which is used in Article 2(1)(j)(i) of MiFID II to determine the scope of the ancillary activity exemption and which is defined in Article 4(1)(7) of MiFID II.

As a consequence, a liquidity provider under Article 2(4)(c) of MiFID II in addition to providing liquidity on a continuous basis and being willing to deal on own account against its proprietary capital has to be under genuine obligations to carry out transactions. Such obligations have to be specified in advance by the trading venue and have to be the subject of an enforceable agreement between the trading venue and the liquidity provider. The obligations a trading venue requires liquidity providers to fulfil have to be transparent to other market participants and be applied in a non-discriminatory manner.

The obligations of any liquidity provider have to go clearly beyond the activities of any ordinary market participant providing liquidity in a more general sense by simply trading on the market. The obligations should contain elements such as or comparable to quoting requirements with a maximum spread, a minimum volume, a minimum quote duration and, depending on the trading model, a maximum response time to provide quotes and a minimum participation rate. Only transactions executed under these obligations should be considered as privileged transactions.

ESMA_QA_1285

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Ancillary activity

Subject Matter
Ancillary activity exemption

Question
When does a firm that can no longer make use of the ancillary activity exemption need to apply for a license?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, Ancillary activities, Q&A 7]

When a person’s trading activity increases to such an extent that it can no longer be considered to be ancillary to its main business under Article 2(1)(j) of MIFID II, the firm must apply to the competent authority for a license.

The calculations for the ancillary activity test must be carried out annually in the first quarter of the calendar year that follows an annual calculation. Where, based on those calculations, a person’s trading can no longer be considered to be ancillary to its main business, the firm must apply to the competent authority for an authorisation as soon as reasonably practicable.

ESMA_QA_1284

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Position limits on a trading venue or EEOTC

Question
Do position limits also apply to positions in contracts that have been entered into prior to 3 January 2018 and are traded on a trading venue, including an OTF, or are

economically equivalent OTC contracts (EEOTC) to those traded on a trading venue?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, Position limits., Q&A 18]

Yes. The position limits regime does apply to all positions in agricultural commodity derivatives and critical or significant commodity derivatives offered by EU trading venues and EEOTC contracts, irrespective of the time when the contracts have been entered into. This is even the case if the relevant financial instrument was not a financial instrument at the time of the contract formation, e.g. prior to the application of MiFID II on 3 January 2018.

This is because all positions in a MiFID II commodity derivative held by a position holder are assessed constantly and from the point of application (see also Q&A 1515). Articles 57 and 58 of MiFID II do not refer to the formation of the contract in any of their provisions. As soon as a financial instrument becomes subject to the position limits regime, the position limits apply to the positions of position holders and are to be reported and monitored against position limits.

ESMA_QA_1282

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Intercommodity spread or diff contracts

Question
How are position limits applied to intercommodity ‘spread’ or ‘diff’ contracts?

ESMA Answer

23-09-2022

Original language

[ESMA70-87294901 Commodity derivatives, Position limits Q&A 17]

A commodity derivative contract in the legal form of a “spread” or “diff” contract is a cash-settled contract whose value is determined by the difference between two reference commodities that may vary in, inter alia, type, grade, location, or delivery characteristics. Whilst having multiple underlying constituents, the spread derivative is available on a trading venue as a single tradable financial instrument.

A spread contract differs from a ‘spread trading strategy’ (two or more commodity contracts traded together to achieve a particular economic effect), as such a strategy may be executed by a single action in a venue’s trading systems, but it remains composed of separate, and legally distinct commodity derivatives which are executed as trades simultaneously.

As a spread contract has no single underlying commodity at a specific place or time, it is not possible to link it to a single physical deliverable supply against a contractual obligation to physically settle the trade. It is for this reason all spread contracts are cash-settled and not physically settled.

Article 57(4) of MiFID II states ‘A competent authority shall set limits for critical or significant commodity derivatives and agricultural commodity derivatives that are traded on trading venues based on the calculation methodology laid down in regulatory technical standards adopted by the Commission […]’. Whilst specifically referencing each contract, this should refer to outright instruments (i.e. the disaggregated components of spreads) and the limits be applied at that level. The

prevailing limits will apply to the net eligible positions, which include the positions held in the disaggregated component of a spread contract as set out in Article 3(2) of RTS 21a.

In cases where a constituent leg is not independently admitted for trading, then the spread itself will receive a limit (de minimis or bespoke). In these cases, the same methodology as for C10 commodity derivatives that have no physical underlying will apply, as such the open interest figure for the spread shall be used as the baseline for both the Spot Month and Other Months' limits.

ESMA_QA_1279

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Agricultural contracts

Question
How should agricultural contracts that have a high variability of open interest during the year be treated (i.e. minimum open interest is below 20,000 lots but maximum

above it)?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, Position limits, Q&A 13]

Article 17 of RTS 21a states that new and less liquid agricultural commodity derivatives for which the total combined open interest in spot and other months' contracts does not exceed 20,000 lots for a consecutive three-month period are assigned a spot month and other months' position limit of 10,000 lots. Therefore, any agricultural commodity derivatives with a high variability would have to exceed the threshold of 20,000 lots of open interest on a daily basis based on end-of-day figures for three consecutive months before an individualised position limit has to be set for that agricultural commodity derivatives.

ESMA_QA_1278

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Hedge exemption

Question
Can a hedge exemption be netted against positions in derivatives which are not objectively measurable as reducing risks directly related to that person’s

commercial activity?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, Position limits, Q&A11]

No. Once an exemption has been granted and positions are approved as risk-reducing in accordance with Article 8 of RTS 21a, those positions fall outside the position limit regime. Otherwise, the benefit of a risk-reducing position would be double-counted, by first being excluded from the limit and then being used to offset a speculative exposure.

ESMA_QA_1277

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position reporting

Subject Matter
Various underlyings listed in Annex I, Section C(10) of MIFID II?

Question
How is the position limits regime applied to the various underlyings listed in Annex I, Section C(10) of MIFID II?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, Position limits Q&A 10]

Section C(10) of Annex I of MIFID II covers a number of different types of commodity derivatives. For these instruments the following approaches should be taken:

Position limits should be applied to freight rate derivatives (wet and dry freight) based on the open interest both in the spot month and in the other months when the freight rate derivative contract qualifies as critical or significant under Article 57(1) of MiFID II.

Position limits should be applied to derivative contracts relating to indices qualifying as critical or significant under Article 57(1) of MiFID II if the underlying index is materially based on commodity underlyings as defined in Article 2 No. 6 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016. ESMA considers that the underlying index is materially based on commodities if such commodities have a weighting of more than 50% in the composition of the underlying index. The spot and the other months' limits should be based on open interest only, in accordance with Article 15(1) of RTS 21a, as no single measurable deliverable supply can be determined for the commodities contained within the index.

A commodity derivative contract in the legal form of a “spread” or “diff” contract is a contract that is cash-settled and whose value is determined by the difference between two reference commodities which may vary in type, grade, location, time of delivery, or other features. The application of the regime regarding these contracts is dealt with specifically in Q&A 1282.

For other derivatives listed in Section C10 of Annex I of MiFID II and in Article 8 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016, ESMA is not expecting the setting of any position limits as the underlyings of such derivatives are not considered to be commodities as defined in Article 2 No. 6 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.

ESMA_QA_1276

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Position limits for options and futures

Question
Will there be a different position limit for options and futures? If so, how should options be converted into futures for the application of position limits?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901 Commodity derivatives , Position limits, Q&A 9]

No, there will be no separate limits for futures and options on the same commodity derivative. Futures and options are fungible in terms of their economic effect at expiry if an option expires in the money with the respective future expiring at the same time. During the life of an option contract, the probability of the option expiring in the money is reflected in its delta value.

Option positions should therefore be converted into positions in their respective future contracts on the basis of the current delta to arrive at a delta equivalent futures position. Long delta equivalent positions on calls and short delta equivalent positions on puts should be added to positions on futures. Short delta equivalent positions on calls and long delta equivalent positions on puts should be subtracted from positions on futures.

If available, position holders should use the delta value published by the trading venue or the CCP to report their positions in options. In the absence of a published delta value, position holders may use their own calculation. Position holders should be able to demonstrate, on demand, to the NCA responsible for the application of the position limit that their calculations correctly reflect the value of the option.

To determine which commodity derivative contracts are critical or significant under Article 57(1) of MiFID II and which agricultural commodity derivatives are liquid under Article 17 of RTS 21a and also to establish position limits based on the quantity of open interest, the open interest of futures plus the delta-adjusted open interest of options should be used, where there is a future and/or option traded on

the commodity derivative and the relevant data are available. This is consistent with the reporting of positions made under Article 58 of MiFID II.

ESMA_QA_1275

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Additional Legal Reference
Art 57(1) and 58(1) of MiFID II

Subject Matter
Securitised derivatives

Question

Are securitised derivatives considered to be commodity derivatives under MiFID II? How does ESMA differentiate between ETCs and securitised derivatives?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, position limits Q&A 7]

“Securitised derivatives” are transferable securities whose value is based upon underlying assets. However, neither MiFID I (incl. level 2 thereof), nor MiFID II/MiFIR contain a specific definition of these instruments.

Where the underlying asset of securitised derivatives is one or more commodities, these instruments are caught by the definition of “transferable securities” in Article 4(1)(44)(c) of MIFID II and are commodity derivatives under Article 2(1)(30) of MiFIR.

Exchange traded commodities (ETCs) are debt instruments which are within the scope of Article 4(1)(44)(b) of MiFID II and are classified as such in RTS 2. Therefore, they are outside the definition of commodity derivatives in Article 2(1)(30) of MiFIR and the position limits regime does not apply to them.

ESMA is aware that market practices in differentiating between ETCs and securitised derivatives are neither clear nor uniform and presents the following guidance to allow for a correct classification of instruments in practice.

In RTS 2 ETCs are described as debt instruments issued against a direct investment by the issuer in commodities or commodity derivative contracts. The price of an ETC is directly or indirectly linked to the performance of the underlying. An ETC passively tracks the performance of the commodity or the commodity indices to which it refers.

In addition, ESMA considers that ETCs typically have the following features:

- a primary market exists which is accessible only to authorised market participants per-mitting the creation and redemption of securities on a daily basis at the price set by the issuer;

- they are not UCITS and therefore unlike an ETF can have an exposure profile not in compliance with the UCITS diversification requirements;

- they are traded on- and off-venue in significant volumes;

- the price is aligned, or multiplied by a fixed leverage of the price of the underlying commodity;

- a management fee is charged by the issuer;

- they may be issued by non-banking institutions;

- they do not have an expiry date;

- they may have a strict regime of capital segregation, usually through the use of special purpose vehicles;

- they are often aimed at professional investors.

In comparison, the term ‘securitised derivatives’ describes a much wider set of financial instruments that can have a large variety of features among them the following typical features:

- they can have commodities as underlying but also many financial instruments or they can be linked to strategies, indices or baskets of instruments;

- they can passively track the performance of the underlying but they can typically also apply leverage, can have an option structure or also have a lower risk profile than the underlying by, for example, offering capital protection;

- they are traded on venue or OTC by the issuer directly or via intermediaries;

- the issuers’ costs and compensation are factored into their price;

- they have an expiration date;

- they provide an issuer credit risk exposure;

- they are often aimed at retail clients.

Please note that under Article 57(1) and 58(1) of MiFID II, securitised derivatives are no longer subject to position limits and position reporting respectively.

ESMA_QA_1274

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Positions with different maturities

Question
Should positions with different maturities for other months' limits be netted?

ESMA Answer

23-09-2022

Original language

[ESMA 70-872942901 Commodity derivatives, Position limits, Q&A 4]

Yes. Persons must determine their net position for each commodity derivative for the other months' limit, as indicated in Article 3 (4-7) of RTS 21a.

They should sum (or net, as appropriate) all individual positions across the curve excluding those positions in the spot month for that commodity derivative.

ESMA_QA_1273

Submission Date
23/09/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position limits

Subject Matter
Position limits - the definition of "a lot"

Question
What is the definition of a lot for the application of Article 57(1) of MiFID II to those commodity derivatives for which a lot, as defined in the contract specification by the

trading venue, does not represent a standard quantity of the underlying across all maturities/delivery periods for that commodity derivative?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, Position limits, Q&A 2]

In some derivative markets (mainly related to power or gas), trading venues offer trading in derivative contracts that refer to an identical underlying but have a variety of delivery periods, e.g. annual (calendar), quarterly, monthly, weekly (whole week, working day week and weekend) or daily.

For these contracts a lot or unit of trading, as defined in the contract specification by the trading venue, does not necessarily represent a standard quantity of underlying across all maturities/delivery periods, i.e. the lot size for a daily contract is different from that for a monthly contract as the lot size usually depends on the number of relevant days and/or hours in the delivery period. For baseload power derivatives, this is illustrated by the following table:

Delivery period	Unit of trading (1 Lot = 1MW)	Quantity of underlying commodity (baseload)	Lot size
1 day	1 MW	24 MWh	24 h
1 week – 7 days	1 MW	168 MWh	168 h
1 month – 30 days	1 MW	720 MWh	720 h

Since there is not an unambiguous equivalence between a lot and an absolute quantity of underlying commodity, it is necessary to define a reference period and use the associated lot size to determine the open interest in a commodity derivative under Article 57(1) of MiFID II and to set position limits for critical or significant commodity derivatives under Articles 11(1) and 13 of RTS 21a.

As the trading activity in European power and gas derivative markets is generally concentrated in monthly contracts, the period of the monthly contract should be used as the reference period. The associated lot size should be calculated by using the relevant days and/or hours as specified by the trading venue for that particular contract type.

Example:

Lot size calculation for a monthly base load and a monthly peak load power derivative contract to determine liquidity and set position limits:

Base load lot size = 30 days * 24 hours/day = 720 h, 10,000 lots are equivalent to 7.2 TWh,

Peak load lot size: 22 days * 12 hours/day = 264 h, 10,000 lots are equivalent to 2.64 TWh.

ESMA_QA_1491

Submission Date
15/07/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Direct Electronic Access (DEA) and algorithmic trading - Article 17 of MiFID II and RTS 6 - Third party systems with algorithmic trading functionalities

Question

How should firms ensure compliance with the requirements in Article 17 of MiFID II and RTS 6 when using third party systems which offer algorithmic trading functionalities?

ESMA Answer

15-07-2022

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.34]

When firms use third party systems offering algorithmic trading functionalities, they are ultimately responsible for compliance with the relevant requirements in Article 17 of MiFID II and RTS 6, as specifically detailed in Article 4 or RTS 6. However, lacking direct control over the system, its operation and the algorithms deployed, these firms might not be materially able to ensure that all requirements are met.

In such instances, firms can ensure compliance with those technical requirements that cannot be otherwise met by the firm itself through contractual arrangements with the system provider, where the latter commits to ensure that the system, its operation and the algorithms deployed are compliant with the relevant legal requirements.

ESMA_QA_1490

Submission Date
15/07/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Direct Electronic Access (DEA) and algorithmic trading - Trading functionalities with automated management of orders

Question

Do orders that are executed through trading functionalities which offer automated managing of the order qualify as algorithmic trading?

ESMA Answer

15-07-2022

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.33]

Yes. As specified in Article 4(1)(39) of MiFID II ‘algorithmic trading’ ‘means trading in financial instruments where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention […]”.

Hence, orders that are executed through functionalities which additionally to routing orders to trading venues offer automated managing of the order (e.g. automatically redirecting unexecuted portions of such orders to other venues or slicing orders prior to execution) should be in the scope of the MiFID II definition of algorithmic trading. Such functionalities differ from automated order routing systems, as the latter merely determine the trading venue (or trading venues) to which the order has to be sent without changing any parameter of the order (i.e. the order is unmodified in its components, including its size).

On the contrary, algorithmic trading encompasses both the automatic generation of orders and the optimisation of order-execution processes (e.g. slicing of orders) by automated means. Orders executed through such processes should therefore be

flagged as algorithmic trading in line with the requirements under Articles 25(2) and 26(3) of MiFIR and Article 8 of RTS 22 and the further specification in Articles 2(c) of CDR 2017/580. Firms trading through these functionalities should also be considered as engaged in algorithmic trading and apply, the relevant requirements of Article 17 of MiFID II and RTS 6.

ESMA_QA_1126

Submission Date
19/11/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Product governance

Subject Matter
Product governance

Question
Are all bonds embedding a make-whole clause exempt from the MiFID II product governance requirements?

ESMA Answer

19-11-2021

Original language

[ESMA35-43-439 Investor protection Product governance According to Article 16a of MiFID II, "*an investment firm shall be exempted from the requirements set out in the second to fifth subparagraphs of Article 16(3) and in Article 24(2), where the investment service it provides relates to bonds with no other embedded derivative than a make-whole clause or where the financial instruments are marketed or distributed exclusively to eligible counterparties*". This means that the mere presence of a make-whole clause is not sufficient for a financial instrument to be exempt from the MiFID II product governance requirements.

Below is a list of practical examples based on Article 16a of MiFID II.

Example	Target market (type of clients category)	Subject to MiFID II product governance requirements?
Bonds without embedded derivatives (i.e. 'plain vanilla' bonds)	Retail and/or professional clients	**Yes**

Bonds with one or more embedded derivatives without a make-whole clause	Retail and/or professional clients	**Yes**
Bonds with a make-whole clause and no other embedded derivative	Retail and/or professional clients	**No**
Bonds with one or more embedded derivatives AND a make-whole clause	Retail and/or professional clients	**Yes**
All bonds	Only eligible counterparties (as final clients)	**No**

ESMA_QA_1119

Submission Date
28/05/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
When a firm provides both investment advice and RTO/execution services to a client relating to the same transaction(s), when should the firm provide ex-ante

information on costs and charges?

ESMA Answer

28-05-2021

Original language

[ESMA35-43-439 Investor protection Cost and charges Q&A 34]

Pursuant to Article 24(4) of MiFID II and Article 50(5) of the MiFID II Delegated Regulation, firms shall inform clients in good time before the provision of the service of all costs and associated charges relating to the investment and/or ancillary service and the financial instrument.

To enable the client to take an informed investment decision based on the recommendation provided by the firm, the client should be informed of all ex-ante costs and associated charges when the investment advice is provided.[1] Accordingly, where a firm provides both investment advice and RTO/execution services related to the same transaction(s), the ex-ante cost and charges information should cover the costs and charges associated with (i) the service, including the transaction costs to be incurred by the client if the recommended transaction were carried out, and (ii) the financial instrument(s).

The requirement to inform the client about all costs and associated charges in good time before the provision of investment advice applies irrespective of whether the client is subsequently provided with an RTO or execution service relating to the same transaction(s).

In ESMA’s view, ex-ante cost and charges information disclosed to the client when the investment advice is provided would not need to be provided a second time in the context of the subsequent RTO or execution service if the following conditions are met:

- **both services relate to the same transaction(s);**
- **both services are provided within a reasonably short time period; and**
- **the ex-ante cost and charges information is still accurate and complete at the time of the provision of the RTO or execution service.**

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[1] Additionally, in case the advice would take the form of on an ongoing advice (if foreseen in national legislation) charged through ongoing fees, information on the expected overall costs should also have been provided in good time before the advice in the form detailed under Q&A 9.14.

ESMA_QA_1493

Submission Date
06/04/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Tick size regime

Subject Matter
Minimum tick size regime under Article 49 of MiFID II - Pre-trade transparency waivers

Question

Does the minimum tick size regime under Article 49 of MiFID II apply to all orders for which a pre-trade transparency waiver can be granted in accordance with Article 4 of MiFIR?

ESMA Answer

06-04-2021

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 4.6]

Article 49 of MiFID II requires trading venues to adopt minimum tick sizes in relation to equity and certain equity-like instruments. RTS 11 specifies the minimum tick size regime which applies to those instruments depending on their liquidity and price level. As the aim of the minimum tick size regime is to ensure the orderly functioning of the market, its application extends to all orders submitted to trading venues including, for example, limit orders resting on an order book and orders held in an order management system.

However, the minimum tick size regime does not apply to the following:

- transactions executed in systems that match orders on the basis of a reference price as per Article 4(1)(a) of MiFIR;
- negotiated transactions as per Article 4(1)(b) of MiFIR; and
- large-in-scale orders that are matched at the mid-point of bid and offer prices - as per Art 49(1) of MiFID, as amended.

ESMA_QA_1121

Submission Date
31/03/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Inducements

Subject Matter
Inducements

Question
How should the condition be applied that the inducement is justified by the provision of an additional or higher-level service to the relevant client, proportional to the level

of inducements received, as referred to in Article 11(2)(a) of the MiFID II Delegated Directive?

ESMA Answer

31-03-2021

Original language

[ESMA 35-43-439 Investor protection Inducements Q&A 8]

Article 11(2)(a-c) of the MiFID II Delegated Directive lays down the conditions to be met in order for inducements to be considered to be designed to enhance the quality of the relevant service to the client. The condition laid down in Article 11(2)(a) of the MiFID II Delegated Directive has three important elements:

1. An additional or higher-level service;
2. Provided to the relevant client;
3. Proportional to the level of inducements received.

These requirements apply together with the other requirements in Article 11(2) of the MiFID II Delegated Directive, including that an inducement cannot be considered acceptable if the provision of relevant services to the client is biased or distorted as a result of the inducement.

The assessment whether a particular quality enhancement complies with these elements is ultimately a case-by-case assessment. However, in this assessment, ESMA considers that firms should take account of the guidance provided below in order to ensure a consistent application of the requirements.

Additional or higher-level service

According to ESMA, the reference to ‘additional’ or ‘higher level’ requires that the quality enhancement provided should go beyond aspects of the firm’s organisation or services that are legally required or that can be considered as essential for its functioning. This is also apparent from the examples given in Article 11(2)(a) of the MiFID II Delegated Directive. For instance, the provision of non-independent advice on and access to a wide range of suitable financial instruments, including an appropriate number of instruments from non-affiliated third-party providers, can be considered as an ‘additional’ or ‘higher level’ service because a firm providing non-independent advice is not otherwise legally required to assess a sufficient range of instruments from different providers.

Other examples of services that, depending on the specific circumstances (in particular the type of investment service at stake), could be considered as part of an ‘additional’ or ‘higher level’ include, amongst others, the provision of educational material or services aimed at increasing the financial knowledge of the client, such as free access to trainings, seminars or conferences or access to staff bringing specific expertise on special matters such as tax or inheritance law. Such services are neither legally required nor essential for the firm’s functioning. The same goes for services such as free access to market data, investment research or the free provision of digital tools and apps aimed at helping clients to monitor their investments, such as tracking the valuation of their portfolio on a real-time basis, or portfolio simulation tools to help clients take investment decisions. However, in order for these services to be duly ‘additional’ or ‘higher level’, clients would otherwise normally have to pay for these services, i.e. in particular compared to the situation in which investment services are provided to clients in relation to which no inducements are received by the firm.

On the other hand, examples of services that should not be considered as ‘additional’ or ‘higher level’ include merely providing regulatory documents such as a prospectus or a KID or disclosure documents such as costs and charges

disclosures. The reason is that such aspects are required by law. This also generally applies to organisational aspects such as a compliance, internal audit or complaints handling function. Equally, measures aimed at ensuring the necessary staff qualifications (e.g. education and training) that are required per Article 25(1) of MiFID II, should not be justified as ‘additional’ or ‘higher level’.

Regarding essential aspects of the firm’s organisation or service, which therefore should not be considered as ‘additional’ or higher level’, examples would be common call-centres or general publicly available websites. ESMA considers that aspects such as these should not qualify as ‘additional’ or ‘higher level’ since the firm’s organisation or service cannot do without these aspects.

ESMA notes that the examples of ‘additional’ or ‘higher-value’ services provided in this section are not relevant for those Member States that have implemented the list of examples provided in Article 11(2)(a) of the MiFID II Delegated Directive as an exhaustive list.

Provided to the relevant client

Services that can be considered as ‘additional’ or ‘higher level’ in theory, could still not be a quality enhancement for the client in question. Therefore, the ‘additional’ or ‘higher-level’ service should be provided to the relevant client.

For instance, the provision of advice about the suggested optimal asset allocation of the client, not relating to specific financial instruments but to asset classes in general, might not always be relevant for clients receiving the services of reception and transmission and/or execution of orders without investment advice that prefer taking their own investment decisions. Equally, value-added tools to help clients take investment decisions that in theory might be considered as ‘additional’ or ‘higher level’, might not always be relevant for clients receiving investment advice that prefer relying on the investment advice provided by the firm to take their investment decisions with no need to use any additional tool.

Furthermore, the provision of quality enhancing services to the relevant client means that the services should be actively and effectively offered and brought to the attention of the relevant client; therefore, an abstract offer of the quality enhancing service made to all clients and not adequately communicated to or brought to the attention of the relevant client should not be sufficient to comply with this requirement. For example, where a firm provides the client the possibility of a yearly meeting, but where it does not actually invite the client or in any other way effectively inform the client about this possibility, this meeting would not be considered to be a service that is actively and effectively offered and brought to the attention of the relevant client.

ESMA considers, as a good practice, that the quality enhancement can also be provided to a relevant segment of clients, provided that this segment is sufficiently homogeneous, i.e. the quality enhancements provided should be relevant for all clients that belong to this segment. When defining these client segments, factors to take into account include for example the investment or ancillary service provided, the distribution channel used, and the level of inducements received in connection with the service provided to the client. Importantly, a firm that provides different investment services and has different client segments should differentiate the quality enhancements according to the different client segments in its inducements policy.

Proportional to the level of inducements

The third element is proportionality. Services that can be considered as ‘additional’ or ‘higher-level’, and that are provided to the relevant client, should not be regarded as a quality enhancement if the value-added is not proportional to the level of inducements received. It is important to underline that it is the level of inducements received by the firm that is of relevance, not the client’s investment amount. ESMA emphasises that this is equally relevant for the examples given in Article 11(2)(a) of the MiFID II Delegated Directive, firms should thus always assess the proportionality of the inducements received.

ESMA expects firms to be able to demonstrate that the quality enhancements provided to the client are proportional to the level of inducements received.

ESMA_QA_1499

Submission Date
03/02/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Multilateral and bilateral systems

Subject Matter
Multilateral and bilateral systems - Systematic internalisers - Matched Principal Trading

Question
To which extent can an investment firm engage in Matched Principal Trading?

ESMA Answer

03-02-2021

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 5.32]

As set out in Recital 19 of CDR (EU) 2017/565 and further clarified in previous ESMA guidance, Matched Principal Trading transactions are incompatible with the operation of a systematic internaliser, unless these transactions are occasional and not on a regular basis, or these transactions are executed on a trading venue.

Firms undertaking Matched Principal Trading are not ‘on risk’ for these transactions. The receipt of a performance fee or commission associated with the transaction is generally an indication that the firm is ‘off-risk’. Firms that operate as systematic internalisers should be able to demonstrate that they are effectively taking on the inherent financial risk of the associated transactions (notwithstanding any related risk mitigation arrangements that may be in place).

In addition, a systematic internaliser is a bilateral execution mechanism and is not a trading venue for this purpose. Recital 19 of CDR (EU) 2017/565 makes clear that a system which increases the likelihood or efficiency of executing Matched Principal Trading transactions requires authorisation as a multilateral system. This clarification is not limited to investment firms operating as systematic internalisers.

ESMA_QA_1489

Submission Date
03/02/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 3 Regulation
ESMA70-872942901-38 - Q&A on MiFID II and MiFIR market structures topics

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Direct Electronic Access (DEA) and algorithmic trading

Question

When a firm submits an order through DEA, which is then executed on-venue, should the resulting transaction be considered, from the DEA user perspective, as an on-venue or OTC transaction?

ESMA Answer

03-02-2021

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.32]

As per Article 4(1)(41) of MiFID II, DEA is a mechanism allowing a client to “electronically transmit orders relating to a financial instrument directly to the trading venue” using the trading code of the DEA provider. Hence, a DEA trade should not be considered as a series of trades (i.e. one trade involving the DEA client and the DEA provider, one trade submitted by the DEA provider and executed on-venue), but rather as one single trade submitted by the DEA user and executed on-venue.

This interpretation is however without prejudice to other specific guidance provided by ESMA for ad hoc regulatory purposes as, for instance, in the Guidelines on “Transaction reporting, order record keeping and clock synchronisation under MiFID II” (ref. ESMA/2016/1452, p.162).

ESMA_QA_1118

Submission Date
21/12/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
How can firms present ex-post costs and charges information to clients in a fair, clear and not misleading manner in accordance with Article 24(3) of MiFID II?

ESMA Answer

21-12-2020

Original language

[ESMA35-43-439 Investor protection Cost and charges Q&A 33]

In ESMA’s view, to facilitate the understanding of ex-post costs and charges information by clients (especially retail), in line with the general obligation according to which information addressed to clients shall be fair, clear and not misleading, it should be presented:

1. **through a standalone document (which could still be sent together with other periodic documents to clients); or**
2. **within a document of wider content, provided that it is given the necessary prominence to allow clients to find it easily.**

In the latter case, the section on ex-post costs and charges information could, for example, be placed at the beginning of the document with a clear explanatory title and clients’ attention drawn to it also graphically (e.g. through the use of appropriate fonts). Ex-post information on costs and charges should also not be mixed with other information or marketing communications included in that wider document, so that clients can focus on its contents.

Where a breakdown of aggregated figures is provided (at the client’s request), it is important that the consistency of the overall ex-post disclosure presented is ensured so that clients are in the position of easily reconciling aggregated figures with their itemised breakdown referring to the same reporting period (both for cash amounts and percentages). Any discrepancies (typically with regard to percentages) should be clearly explained and justified.

ESMA_QA_1125

Submission Date
06/11/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Product governance

Subject Matter
Product governance

Question
How should firms manufacturing financial instruments ensure that the charging structure of the financial instrument is appropriately transparent for the target

market, such as that it does not disguise charges or is too complex to understand as required by Article 9(12)(c) of the MiFID II Delegated Directive?

ESMA Answer

06-11-2020

Original language

[ESMA35-43-439 Investor protection, Product governance Q&A 4]

Target clients should be able to access and choose the product(s) that best serve their needs, objectives and characteristics by assessing all relevant costs and benefits of the product(s). Therefore, during the product design phase the firm should ensure that the charging structure of the product is not opaque, hard to assess or designed to mislead clients and to exploit behavioural biases. For example, ESMA expects firms to:

- Ensure that artificially low initial rates/costs are not used to attract and mislead unsophisticated clients.
- Avoid the use of unnecessarily complex formulas for the determination of costs.
- Avoid too many cost components or unnecessarily splitting cost components in too many elements if this reduces clarity.
- Consider, in cases where the cost structure is particularly complex, the possibility of some form of testing of the cost disclosures to ensure that these are not too complex to understand based on the characteristics of the target clients.

- Assess whether there is no duplication of costs (e.g. the same type of fee is not included in two different cost categories) and ensure that costs are properly separated and accounted for.

The above list of examples is not exhaustive and firms could use other means to ensure an appropriate level of transparency of products' charging structure.

ESMA_QA_1124

Submission Date
06/11/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Product governance

Subject Matter
Product governance

Question
How should firms manufacturing financial instruments ensure that costs and charges do not undermine the financial instrument's return expectations, as

required by Article 9(12)(b) of the MiFID II Delegated Directive?

ESMA Answer

06-11-2020

Original language

[ESMA35-43-439 Investor protection Product governance Q&A 3]

During the product design phase the firm shall undertake a scenario analysis of their financial instruments[1] and, in this context, simulate product returns taking into account all costs of the instruments (implicit and explicit).

In order to ensure that charges do not undermine the financial instrument's return expectations firms could, for example, assess the consistency between costs and return of a complex product through the Monte Carlo methods. Alternatively, or additionally, firms could, for example, undertake a scenario analysis to assess whether the costs of the product (implicit and explicit) are inferior to the expected return. For instance, where the product qualifies as a PRIIPs, firms should assess whether the costs (implicit and explicit) do not undermine the product's expected return in a "moderate" scenario as referred to in Article 3(3) of the PRIIPs RTS. Firms could also assess whether the expected net return is consistent with those expected for similar products available on the market.

The above list of illustrative examples is not exhaustive and firms could use other methodologies to ensure compliance with Article 9(12)(b) of the MiFID II Delegated Directive. The methodologies adopted to this end should in any case be robust and well documented, with a clear identification of roles and responsibilities in the

process.

Finally, manufacturers could calculate the fair value of a product and compare this value with the (expected) price of the product vis-à-vis the end client and assess if the result is consistent with the current practices for similar products available on the market.

Manufacturers should also include the typical taxes end-clients would have to pay (e.g. capital gains taxes) when calculating whether the costs and charges could undermine the financial instruments return expectations.

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[1] Article 9(10) of the MiFID II Delegated Directive.

ESMA_QA_1123

Submission Date
06/11/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Product governance

Subject Matter
Product governance

Question
How should firms manufacturing financial instruments ensure that these financial instruments' costs and charges are compatible with the needs, objectives and

characteristics of the target market, as required by Article 9(12)(a) of the MiFID II Delegated Directive?

ESMA Answer

06-11-2020

Original language

[ESMA35-43-439 Investor protection Product governance Q&A 2]

As part of the product approval process, firms should have clear and robust policies and procedures to identify and quantify all product related costs and charges. This encompasses all implicit and explicit product costs but also service costs likely to be incurred by the client (e.g. inducements).

These policies and procedures should be approved by the management body and should be assessed and monitored by the compliance function as part of the general obligation to “monitor the development and periodic review of product governance arrangements”[1]. The policies and procedures should be be robust and documented, with a clear determination of roles and responsibilities in the process.

For instance, policies and procedures should be clear on which market parameters are used for the pricing of products and related determination of costs (sources, frequency of updates, how they are applied to products of different characteristics/duration, etc.).

Firms should then assess if and how the costs identified are compatible with the envisaged target market of the product and whether adjustments are needed. In doing so, firms should especially take into account the manner in which costs

accrue (e.g. upfront by a mark-up or mark-down, ongoing, as separate payment, etc.).

Firms should substantiate how cost structures and components are compatible with the characteristics of the target market. For example, firms should ensure that a financial instrument with significant up-front costs should not have in its target market clients with investment horizons that are too short for possibly retrieving the costs from expected returns over time.

Firms should bear in mind that Article 9(13) of the MIFID II Delegated Directive requires manufacturers to provide to distributors all information necessary to understand and recommend or sell the financial instrument properly. In ESMA's view, this does also include information about the product-related costs and charges, which also enables distributors to provide ex-ante and ex-post cost transparency to clients according to Article 24 (4) MiFID II.

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[1] On this topic see also ESMA Guidelines on certain aspects of the MiFID II compliance function requirements [Ref: ESMA35-36-1946] and specifically guideline 4 that states "Firms should ensure that the compliance function fulfils its advisory and assistance responsibilities, including […] participating in the establishment of policies and procedures within the firm (e.g. the firm's remuneration policy or the firm's product governance policies and procedures)"

ESMA_QA_1513

Submission Date
08/07/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Systematic internaliser regime

Subject Matter
Systematic internaliser regime - Transparency - Internaliser Thresholds

Question

a) On which level is the systematic internaliser threshold to be calculated for derivatives? On a sub-class level or on a more granular level?
b) On which level is the systematic internaliser threshold to be calculated for structured finance products (SFPs)?
c) What constitutes a 'class of bonds' under Article 13 of Commission Delegated Regulation (EU) No 2017/565 ? Do senior, subordinated or convertible bonds from the same issuer constitute different classes?
d) On which level is the systematic internaliser threshold to be calculated for emission allowances
e) To which sub-class should the number of transactions and the nominal amount traded of a derivative be allocated when a derivative contract (ISIN) changes over the observation period from one sub-class to another?

ESMA Answer

08-07-2020

Original language

[ESMA 70-872942901-35 MiFIR transparency Q&A, Q&A 7.4]

(a) The calculation should be performed at the most granular class level as identified in RTS 2. Where an investment firm meets the thresholds for such a class, it should be considered as a systematic internaliser for all derivatives within that most granular class. In particular, both the numerator and the denominator should refer to the same class of derivatives.

With respect to equity derivatives, the sub-classes as defined in Table 6.2 of Annex III of RTS 2 for LIS and SSTI should be used.

(b) For SFPs, calculations should be performed at ISIN level and where, for a specific ISIN, an investment firm is above the thresholds prescribed, it should be considered a systematic internaliser for all SFPs issued by the same entity or by any entity within the same group.

(c) A class of bonds issued by the same entity, or by any entity within the same group is a subset of a class of bonds in table 2.2 of Annex III of RTS 2 (sovereign bond, other public bond, convertible bond, covered bond, corporate bond, other bond). Hence, where an investment firm passes the relevant thresholds in a bond it will be considered to be a systematic internaliser in all bonds belonging to the same class of bonds according to table 2.2. of Annex III of RTS 2 issued by the same entity, or by any entity within the same group.

It is therefore possible to distinguish between, for instance, corporate bonds and convertible bonds as different classes of bonds, but the debt seniority of a bond does not constitute a different class.

(d) The calculation should be performed at the level of the emission allowance type. In other words, both the numerator and the denominator shall refer to the same sub-asset class level as identified in RTS 2.

(e) A derivative contract (ISIN) might change sub-class over its life. This occurs whenever the segmentation criteria include one or more of the following (i) the time-to-maturity bucket (ii) being on-the-run or off-the-run. Therefore, it is necessary to clarify when performing the SI test to which sub-class the number of transactions and the nominal amount traded of an ISIN should be allocated where the contract is changing sub-class during the observation period.

More specifically, investment firms shall perform the SI test for all financial instruments (ISINs) traded over the 6-month observation period and which have not expired on the first day of February, May, August, December which are the months by which the publication of the relevant data of the denominator are published by ESMA.

After having identified the instruments for which the test shall be performed, investment firsts can either follow the two-step approach presented below or perform a one-step approach as per step 2.

STEP 1 – perform the SI-test on basis of the sub-class to which the ISIN belongs to on the first day of February, May, August, December and allocate all the transactions executed and the related nominal amount traded of the ISIN to that sub-class. If the SI test is not passed, the investment firm is not required to perform step 2.

STEP 2 – if the SI test under step 1 is passed, the investment firm should re-perform (for all the ISINs allocated to sub-classes that passed step 1) the test by allocating the transactions executed and the nominal amount traded of an ISIN to the relevant sub-class to which the contract belongs to on a specific day over the observation period. This implies that transactions in the same ISIN, which changes sub-class during the observation period will be partially allocated to the initial sub-class and partially to the new sub-class once the change has occurred. For example, if over the observation period 1 October Year (t) and 31 March Year (t+1) a bond future contract on a 10 year bond XYZ and 9 months maturity which goes from time to maturity bucket 3 (6 months – 1 year) to time to maturity bucket 2 (3 months – 6 months) on 12 December Year (t), all transactions and nominal amount traded recorded between 1 October and 11 December Year (t) will be counted in the sub-class of bond futures with the same underlying bond XYZ with a long term and with time to maturity in bucket 3. All transactions and nominal amount traded recorded between 12 December Year (t) and 31 March Year (t+1) will be counted in the sub-class of bond futures with the same underlying bond XYZ with a long term and with time to maturity in bucket 2.

ESMA_QA_1496

Submission Date
29/05/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Multilateral and bilateral systems

Subject Matter
Multilateral and bilateral systems - Authorisation as trading venue for a system facilitating the multilateral interaction of trading interests in securities financing transactions

Question

Should the operation of a system facilitating the multilateral interaction of trading interests in securities financing transactions require authorisation as a trading venue?

ESMA Answer

29-05-2020

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 5.9b]

Multilateral systems are defined by MiFID II in relation to financial instruments. Securities financing transactions include, according to Article 3(11) of Regulation (UE) 2015/2365 (SFTR), repurchase transactions, securities financing lending or borrowing, buy-back or sell-buy back transactions and margin lending transactions, and such transactions can involve financial instruments. Therefore, ESMA considers that securities financing transactions could be treated as transactions in financial instruments, for the purpose of this question.

In particular, an entity operating a system in which multiple third-party buying and selling trading interests in securities financing transactions relating to financial instruments are able to interact, should seek authorisation to operate a trading venue and the relevant provisions should apply.

ESMA_QA_1120

Submission Date
28/05/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Inducements (research)

Subject Matter
Inducements

Question
Acceptable minor non-monetary benefits are defined in paragraph 3 Article 12 of the MiFID II Delegated Directive in respect of portfolio management and

independent investment advice. Should investment firms consider such definition is also applicable to investment or ancillary services other than portfolio management and independent investment advice?

ESMA Answer

28-05-2020

Original language

[ESMA 35-43-439 Investor protection Inducements Q&A 7]

Yes, in ESMA’s view, acceptable minor non-monetary benefits should have the same meaning, defined in paragraph 3 Article 12 of the MiFID II Delegated Directive, irrespective of the investment or ancillary service provided. In particular, according to the penultimate indent of such paragraph, “acceptable minor non-monetary benefits shall be reasonable and proportionate and of such a scale that they are unlikely to influence the investment firm's behaviour in any way that is detrimental to the interests of the relevant client”.

With regard to disclosure, it is reminded that - in accordance with Article 11(5) (a), to which Article 12 cross refers - minor non-monetary benefits may be described in a generic way for all services provided.

ESMA_QA_1133

Submission Date
18/02/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on topics other than costs and charges

Subject Matter
MiFID practices for firms selling financial instruments subject to the BRRD resolution regime

Question

Is the seller required to monitor compliance of his client’s portfolio with the 10% threshold referred to in point (a) of Article 44a(2) on an ongoing basis, for example whenever portfolio composition is affected by disinvestments?

ESMA Answer

18-02-2020

Original language

[ESMA 35-43-439 Investor protection BRRD Q&A 6]

The 10% test is only required to be performed by the seller upon the purchase of a SEL issued as of 28 December 2020. Any other transaction or event involving the client’s portfolio (e.g. a divestment or a change in market values) does not trigger the obligation of point (a) of Article 44a(2).

ESMA_QA_1132

Submission Date
18/02/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on topics other than costs and charges

Subject Matter
MiFID practices for firms selling financial instruments subject to the BRRD resolution regime

Question

What happens if a transaction relating to subordinated eligible liabilities is deemed unsuitable by the firm, but the retail client wishes to proceed anyway?

ESMA Answer

18-02-2020

Original language

[ESMA35-43-439 Investor protection BRRD Q&A 5]

In accordance with Article 44a(1)(b) of BRRD 2, the client is not allowed to proceed with the transaction.

ESMA_QA_1131

Submission Date
18/02/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on topics other than costs and charges

Subject Matter
MiFID practices for firms selling financial instruments subject to the BRRD resolution regime

Question

Where a SEL issued after 28 December 2020 is sold to a retail client whose portfolio does not exceed EUR 500 000, must the seller take into account SELs issued before 28 December 2020 which are already part of the client's portfolio, when verifying whether the 10% threshold referred to in Article 44a(2)(a) is exceeded?

ESMA Answer

18-02-2020

Original language

[ESMA 35-43-439 Investor protection BRRD Q&A 4]

Yes. When ensuring that the retail client does not invest an aggregate amount exceeding 10% of his portfolio in SELs, the seller should add up the values of all SELs present in the client's portfolio, regardless of their issuance date.

ESMA_QA_1129

Submission Date
18/02/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on topics other than costs and charges

Subject Matter
MiFID practices for firms selling financial instruments subject to the BRRD resolution regime

Question

Does Article 44a of BRRD 2 apply only if there is an active offering on the part of the firm?

ESMA Answer

18-02-2020

Original language

[ESMA35-43-439 Investor protection BRRD regime Q&A 2]

No. Article 44a will apply independently of any marketing or active offering by the seller of the subordinated eligible liabilities, and whether the transaction has been initiated by the client or the firm (thus, including in case of reverse solicitation).

ESMA_QA_1128

Submission Date
18/02/2020

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on topics other than costs and charges

Subject Matter
MiFID practices for firms selling financial instruments subject to the BRRD resolution regime

Question

Should all sales of subordinated eligible liabilities to retail clients be subject to a suitability test or should such a test be performed only in the cases where one is due under MiFID II (i.e. where investment advice or portfolio management services are provided)?

ESMA Answer

18-02-2020

Original language

[ESMA35-43-439 Investor protection BRRD regime Q&A1]

As of 28 December 2020[1], all sales of subordinated eligible liabilities (“SELs”) issued on or after that date to retail clients must be subject to the performance by the seller of a suitability test, in accordance with Article 25(2) of MiFID II and of Article 44a of the BRRD 2, independently of the type of investment service provided to sell the SELs (including self-placement). Prior to that date, the suitability test is required only when investment advice or portfolio management are provided, unless where Member States have chosen to apply Article 44a of the BRRD 2 to liabilities issued before 28 December 2020.

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[1] Date of entry into application of BRRD 2.

ESMA_QA_1845

Submission Date
04/12/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
When providing portfolio management, how does the investment firm’s obligation to provide ex-post aggregated costs and charges information under Art. 50(9) of the

MiFID II Delegated Regulation relate to existing reporting obligations under Article 60 of the same Regulation?

ESMA Answer

04-12-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9 , question 32]

In accordance with Article 50(9) of the MiFID II Delegated Regulation, firms may choose to provide annual aggregated ex-post information on total costs and charges “together with any existing periodic reporting to clients”.

In the case of portfolio management, Article 60 of the MiFID II Delegated Regulation also applies.

So, if a firm decides to fulfil its ex-post costs and charges disclosure obligations under Article 50(9) by using the periodic statement required by Article 60, the information provided in this statement needs to also fulfill the requirements of Article 50(9) and (10), i.e. it would need to be expanded.

In addition, if a firm complies with its obligations under Article 50(9) of the MiFID II Delegated Regulation together with its obligations under Article 60, and the periodic statement due under Article 60 is provided on a quarterly basis (or more frequent, e.g. monthly), the firm is not exempted from providing the client with a full picture of the costs and charges incurred for the whole year in accordance with the requirements of Article 50(9). This means that, although more frequent costs information (e.g. quarterly or monthly) may be provided, the client should also be

provided with costs information aggregated on an annual basis.

ESMA_QA_1844

Submission Date
04/12/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
How should the ex-post costs and charges disclosure requirements be applied to the service of portfolio management?

ESMA Answer

04-12-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 31]

In accordance with Article 50(9) of the MiFID II Delegated regulation, firms shall provide annual ex-post information about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s) where they have recommended or marketed the financial instrument(s) or where they have provided the client with the KID/KIID in relation to the financial instrument(s) and they have or have had an ongoing relationship with the client during the year. For the investment service of portfolio management, Article 50(9) applies (please see Q&A 15.1).

For annual ex-post costs and charges disclosures, firms are expected to provide ex-post cost information (service costs, inducements and product costs) aggregated at least at the level of the portfolio (similar to the approach to the ex-ante cost disclosure, please see Q&A 24). Firms should inform their clients that they can request an itemised breakdown, as per Article 24(4) of MiFID II.

In addition, firms may provide more granular information per category of products with the same cost structure or even per financial instrument (on an ISIN basis).

ESMA_QA_1038

Submission Date
03/10/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Subject Matter
Best Execution

Question
How should the RTS 27 and RTS 28 reports be made available to the public?

ESMA Answer

03-10-2019

Original language

[ESMA35-43-349 MiFIDII Investor protection Q&A Best execution 8]

Execution venues and firms are required to make the RTS 27 and 28 reports available to the public, without any charges, in a machine-readable electronic format.

In order to ensure that such reports are in the public domain and freely accessible, firms can publish these reports on their respective websites in an easily identifiable location on a page without any access limitations. ESMA notes that these reports should not be placed behind a firewall, registration page or be subject to password encryption or other restrictions.

Venues and firms should also ensure the readability and comprehensibility of these reports to provide the public with relevant data on execution quality. Therefore, venues and firms should provide the RTS 27 and 28 reports in an electronic format that allows for computerised calculations and mass processing that is compatible with standard and easily accessible machine-reading processes, to fulfil the requirements of (i) being 'machine-readable'[1] and (ii) enabling the public to search, sort and analyse all the provided data.[2] Standard formats, such as CSV or XML may be used for this purpose. Since RTS 28 reports should allow end investors, including retail clients, to better scrutinise execution quality and order routing practices, firms should ensure that the format they use is clear and easily readable for retail clients or offer alternative ways to visualise the data of the report.

[1] Article 10 of RTS 27 and Article 4 of RTS 28

[2] Recital 15 of RTS 27

ESMA_QA_1494

Submission Date
02/10/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Tick size regime

Subject Matter
Tick size regime - Periodic auctions systems

Question
Are periodic auctions systems subject to the tick size regime?

ESMA Answer

02-10-2019

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 4.11]

Yes, periodic auction trading systems are subject to the tick size regime defined under Article 49 of MiFID II and further specified under CDR (EU) 2017/588. Therefore, market operators and investment firms operating such trading systems need to ensure that orders are submitted and that transactions are executed at a price that is in line with the mandatory tick size regime. For periodic auction systems that do not benefit from a reference price waiver, this prohibits the execution of transactions at a price that corresponds to the mid-point in cases where the spread consists of an uneven number of ticks.

ESMA_QA_1547

Submission Date
04/09/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Position reporting

Subject Matter
Price Multiplier for electricity derivative contracts

Question
How should the field “Price Multiplier” (field 25 of Table 3 of the Annex of RTS 23) be populated for electricity derivative contracts?

ESMA Answer

04-09-2019

Original language

[ESMA 70-872942901-36 Commodity derivatives Q&A, Q&A 7.1]

When reporting an electricity derivative contract, i.e. where Base product (field 35 of Table 3 of the Annex of RTS 23) is equal to “NRGY” and Sub product (Field 36 of Table 3 of the Annex of RTS 23) is equal to “ELEC”, a trading venue should report a value in MWh which is equal to the number of relevant hours of delivery during the delivery period, multiplied by the lot size in MW.

ESMA_QA_1068

Submission Date
11/07/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Subject Matter
Best Execution

Question
In accordance with the Annex (Table 3) and Articles 4 and 9 of RTS 27, how should execution venues classify financial instruments, which do not have calibrated

market sizes (i.e. Standard Market Size (SMS), Large in Scale (LIS), Size Specific to the Instrument (SSTI)) and are traded on an EU trading venue?

ESMA Answer

11-07-2019

Original language

[ESMA35-43-349 Investor protection Best execution Q&A 25]

In the case of financial instruments that (i) are traded on an EU trading venue and (ii) for which ESMA has not published on its website any respective Standard Market Size (SMS), Large in Scale (LIS) and Size Specific to the Instrument (SSTI) values, those instruments should be classified, according to the following criteria:

1. For SMS values related to equity instruments: Recital 10 of RTS 27 sets out that “for shares, exchange-traded funds and certificates deemed to be illiquid under Regulation (EU) No 600/2014, the standard market size threshold to be used is the minimum available standard market size for that type of financial instrument”, (see the smallest size in Table 3 of Annex II of RTS 1). The same approach should also be used for any other equity instruments in case temporarily, ESMA does not publish one or more of the parameters related to the transparency calculations, such as the SMS.[1]

2. For (post-trade) LIS values related to equity instruments:

- For shares, depositary receipts, certificates and other similar financial instruments: the LIS thresholds should be those related to the highest threshold available in the smallest average daily turnover (ADT) band (i.e.

ADT < 50 000) provided in:[2]

- Table 4 of Annex II of RTS 1 for shares and depositary receipts;
- Table 6 of Annex II of RTS 1 for certificates and other similar financial instruments.

- For exchange-traded funds (ETFs): the LIS thresholds should be the highest threshold specified in Table 5 of Annex II of RTS 1.

3. For (post-trade) LIS and Size Specific to the Instrument (SSTI) values related to bonds: See Q&A 15 in the section “Non-equity transparency” of the ESMA Q&As on “MiFID II and MiFIR transparency topics”[3].

Those abovementioned criteria should also be used to classify financial instruments issued in non-EU countries that (i) are traded on an EU trading venue and (ii) for which ESMA has not published on its website any respective Standard Market Size (SMS), Large in Scale (LIS) and Size Specific to the Instrument (SSTI) values.

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[1] This approach follows closely Q&A 3 of the section “Equity transparency” of the ESMA Q&As on MiFID II and MiFIR transparency topics [Ref: ESMA70-872942901-35] and see: https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf

[2] These thresholds for (post-trade) LIS values related to shares, depositary receipts, certificates and other similar financial instruments are in line with Q&A 3 of the section “Equity transparency” of the ESMA Q&As on MiFID II and MiFIR transparency topics [Ref: ESMA70-872942901-35].

[3] See ESMA Q&As on MiFID II and MiFIR transparency topics [Ref: ESMA70-872942901-35].

ESMA_QA_1587

Submission Date
03/06/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Secondary Markets

Topic
Systematic internaliser regime

Additional Legal Reference
Markets in Financial Instruments Regulations (MiFIR) Regulation (EU) No 600/2014- Secondary Markets

Subject Matter
Voluntary SI regime

Question
Can an investment firm which decides to opt-in to the systematic internaliser regime determine the instruments on which it will be an SI?

ESMA Answer

03-06-2019

Original language

[ESMA 70-872942901-35 MiFIR transparency Q&A, Q&A 7.11a]

Article 4(1)(20) of MiFID II specifies that investment firms can voluntarily opt-in under the systematic internaliser regime (voluntary systematic internaliser regime). Such opt-in is not limited to instruments that are TOTV but includes all financial instruments, i.e. TOTV and non-TOTV instruments.

ESMA considers that an investment firm that voluntarily opts-in under the systematic internaliser regime can decide in which specific instruments (TOTV and non-TOTV instruments) it choose to be a systematic internaliser and to comply with the related obligations.

In case an investment firm opts-in under the systematic internaliser regime for equity instruments (shares, depositary receipts, ETFs, certificates, other similar financial instruments), the investment firm can choose for which instruments to be a systematic internaliser and to comply with the related obligations.

In case an investment firm opts-in under the systematic internaliser regime for derivatives, the investment firm can choose the individual derivatives for which it

opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for the entire sub-class of derivatives to which the individual derivatives belong to.

In case an investment firm opts-in under the systematic internaliser regime for emission allowances, the investment firm can choose the individual emission allowances for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for the entire sub-asset class of emission allowances to which the individual emission allowances belong to.

In case an investment firm opts-in under the systematic internaliser regime for securitised derivatives, the investment firm can choose the individual securitised derivatives for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for the entire asset class of securitised derivatives.

In case an investment firm opts-in under the systematic internaliser regime for bonds, the investment firm can choose the individual bonds for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for all bonds issued by the same entity or by any entity within the same group for the same bond type.

In case an investment firm opts-in under the systematic internaliser regime for structured finance products (SFP), the investment firm can choose the individual SFPs for which it opts-in and for which it should comply with the related obligations. In other words, the investment firm is not bound to opt-in for all SFPs issued by the same entity or by any entity within the same group.

Investment firms that voluntarily opt-in under the systematic internaliser regime in specific instruments are nevertheless expected to perform the quarterly test for those instruments and, if the pre-set limits for a frequent and systematic basis and for a substantial basis are both crossed, they qualify as systematic internalisers under the mandatory regime.

ESMA_QA_1839

Submission Date
29/05/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
Is it necessary to provide ex-ante information about costs and charges in case of clients' sell orders?

ESMA Answer

29-05-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 27]

Yes, Article 24(4)(c) of MiFID II and Article 46(2) of the MiFID II Delegated Regulation require investment firms to provide to clients or potential clients, in good time before the provision of investment services or ancillary services, the information about all costs and associated charges. When an investment service is provided in relation to the sale of a financial instrument by the client (e.g., execution of orders on behalf of clients, RTO and investment advice), the obligation to provide cost information applies.

Based on Article 50(6) of the MiFID II Delegated Regulation, when an investment firm does not recommend or market a financial instrument or when it is not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation, the investment firm should only inform the client about the costs of the investment service or ancillary service provided by the firm. When an instrument is sold by the client, the firm neither recommends35 nor markets that instrument nor is it obliged to provide the client with a KID/KIID. This means that Article 50(6) of the MiFID II Delegated Regulation applies to this situation and investment firms only need to inform clients about the costs of the investment service(s) and/or ancillary service(s) when selling a financial instrument36.

Based on Article 50(10) of the MiFID II Delegated Regulation, investment firms shall provide their clients with an illustration showing the cumulative effect of costs on return when providing investment services. The aim is to give clients an overview about the impacts of costs on return of an investment so as to be able to assess

and compare the impact of costs during the holding period of the respective financial instrument. Therefore, while such illustration has to be provided at the time of the purchase of the financial instrument, in case of clients' sell orders, it would not provide any further benefit for clients, since there is no further return to be expected from that instrument. Thus, in ESMA's view, Article 50(10) of the MiFID II Delegated Regulation should not be applicable in case of ex-ante cost disclosures relating to clients' sell orders

ESMA_QA_1843

Submission Date
29/05/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
For ex-ante costs and charges disclosures, are firms allowed to disclose the relevant costs and charges that would be incurred by a client by way of a range

(between X€ and Y€ and between X% and Y%) or as a maximum amount/percentage?

ESMA Answer

29-05-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch.9, question 30]

No. According to Article 50(8) of the MiFID II Delegated Regulation, where calculating costs and charges on an ex-ante basis, firms shall use actually incurred costs as a proxy for the expected costs and charges. In addition, according to Article 24(4) of MiFID II and Article 50(2) of the MiFID II Delegated Regulation, investment firms shall provide ex-ante information on costs and charges in a fully individualized, transaction-based manner, i.e. in relation to the specific financial instrument (especially ISIN-based) and in relation to the specific investment service or ancillary service provided.

On the basis of the foregoing, ESMA is of the view that the cash amount and percentage firms should disclose to their clients as the expected costs and charges should be the firm’s best estimate. Disclosures made in the form of a range or maximum amount of fees that the client may incur would not give the client a sufficiently good idea of the fees such client may incur.

ESMA_QA_1842

Submission Date
29/05/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
For ex-ante costs and charges disclosures in relation to investment services and/or products with non-linear charging structures, are firms allowed to use an assumed

investment amount?

ESMA Answer

29-05-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 29]

Yes. Whether investment services and/or products have linear or non-linear charging structures (i.e. where the percentage of fees payable for service costs and/or product costs varies depending on the amount invested), firms may base their ex-ante costs and charges disclosures on an assumed amount, as per Recital 78 of the MiFID II Delegated Regulation.

However, any assumed investment amount chosen by the firm should reflect where, in the charging structure, the specific transaction giving rise to the disclosure is assumed to stand. This means that the firm should make an assumption regarding the scale of the amount the client wants to invest. Such assumption may be based, inter alia, on preliminary discussions with the client and/or the client's past transactions.

ESMA_QA_1067

Submission Date
29/05/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Subject Matter
Best Execution

Question
Do the RTS 28 reporting requirements of investment firms related to the execution of client orders through third-country execution venues only apply to third-country

venues qualified as equivalent by the European Commission?

ESMA Answer

29-05-2019

Original language

[ESMA35-43-349 Investor protection Best execution Q&A 24]

The wording in Recital 2 of RTS 28 on “any entity that performs a similar function in a third country” refers to execution venues located in third countries, irrespective whether or not the European Commission has made an equivalence decision on the third-country market.

ESMA_QA_1066

Submission Date
29/05/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Subject Matter
Best Execution

Question
Does the categorisation of ‘passive’ and ‘aggressive’ orders apply to investment firms which use quote-driven trading systems to have client orders executed?

ESMA Answer

29-05-2019

Original language

[ESMA35-43-349 Investor protection Best execution Q&A 23]

The definitions of Article 2(a) and (b) of RTS 28 for aggressive and passive orders both refer to “orders entered into an order book”. However, quote-driven trading systems do not operate order books (see also the typology and descriptions set out in Annex I of RTS 2). Therefore, as part of their RTS 28 reporting, investment firms which use quote-driven trading systems to have client orders executed should insert a ‘N/A’ (i.e. ‘not applicable’) reference in the fields referring to passive and aggressive orders of the relevant reporting template.

ESMA_QA_1065

Submission Date
29/05/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Subject Matter
Best Execution

Question
What information should execution venues and investment firms report in the template fields of RTS 27 and 28, if the required content is not applicable to their

activities?

ESMA Answer

29-05-2019

Original language

[ESMA35-43-349 Investor protection Best execution Q&A22]

As part of their respective reporting obligations related to the quality of execution, execution venues (RTS 27) and investment firms (RTS 28) should insert a ‘N/A’ (i.e. ‘not applicable’) reference in template fields which are not applicable to their activities.

For example, according to the relevant RTS 27 template, execution venues should insert ‘N/A’ in the respective field (e.g. in the field referring to ‘scheduled auctions’), if the required content is not applicable to the activities of the execution venue.

ESMA_QA_1064

Submission Date
29/05/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Subject Matter
Best Execution

Question
In accordance with the Annex (Table 3, ‘trading mode’ column) of RTS 27: The definition of trading mode as set out in Article 2 of RTS 27 does not provide for any

continuous trading mode. How should the information on the ‘trading mode’ be inserted by an execution venue, which conducts continuous trading?

ESMA Answer

29-05-2019

Original language

[ESMA35-43-349 ESMA Investor protection Best execution Q&A 21]

If an execution venue uses the trading system of a ‘continuous order book’ or a ‘continuous quote driven system’ to conduct continuous trading, it has to provide information on the trading system (as requested in the column of Table 3 entitled ‘trading system’ and based on the typology and descriptions set out in Annex I of RTS 2). In order to fulfil this reporting obligation, it is sufficient to indicate in the respective RTS 27 reports that ‘continuous trading’ was conducted on the execution venue. In this case, execution venues should insert a ‘N/A’ (i.e. ‘not applicable’) reference in the ‘trading mode’ column of Table 3 of the Annex of RTS 27.

ESMA_QA_1665

Submission Date
02/04/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Access to CCPs and trading venues

Subject Matter
Third country trading venue request access to an EU CCP in the absence of an equivalence decision

Question

Can a third country trading venue request access to an EU CCP under Article 38 of MiFIR in the absence of an equivalence decision under Article 28(4) of MiFIR?

ESMA Answer

02-04-2019

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 6.7]

Article 38 of MiFIR governs third-country access requests relating to transferable securities, money market instruments and exchange-traded derivatives.

ESMA considers that an equivalence decision under Article 28(4) of MiFIR is only necessary if the third-country trading venue wishes to enter into an access arrangement with an EU CCP covering derivatives subject to the trading obligation to the extent that they are traded on a regulated market.

In the absence of an equivalence decision under Article 28(4) of MiFIR, third-country trading venues can enter into access arrangements (and maintain existing access arrangements) with EU CCPs for transferable securities, money market instruments and derivatives, to the extent that they are not subject to the trading obligation.

ESMA recalls that access requests covering derivatives traded on OTFs and MTFs are subject to the EMIR access provisions.

ESMA_QA_1498

Submission Date
01/04/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Multilateral and bilateral systems

Subject Matter
Multilateral and bilateral systems - Systematic internalisers - “risk-facing activity”

Question
How does the concept of “risk-facing activity” apply to an EU branch of a third-country firm that operates as an SI in the EU?

ESMA Answer

01-04-2019

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 5.31]

As clarified in Q&As above, ESMA is of the view that based on the SI definition provided in Article 4(1)(20) of MiFID II, the trading activity of a SI is characterised by risk-facing transactions that impact the Profit and Loss of the SI.

ESMA considers that the SI should carry out a degree of risk on an independent basis. Accordingly, ESMA is of the view that an EU branch of a third-country firm, in order to comply with the SI regime, should at least meet the following criteria:

- Risk management

The EU branch should not transfer the risk resulting from its SI activity through a de facto riskless back-to-back booking for hedging purposes whenever a transaction is executed with a client. Any transactions undertaken in an SI capacity should impact the Profit and Loss of the branch.

- Quote provision

The EU branch should have control over the provision of quotes. This would require the EU branch to have the ability to define its own pricing model through dedicated parameters, set its quotes, define its pricing model update and withdraw its quotes on an independent basis. The EU branch should also have traders located in the EU assigned to the SI activity and providing quotes to EU clients.

- Specific commercial policy

The EU branch should have documentation signed with its clients and a dedicated commercial policy with respect to its SI activity including a definition of the objective, non-discriminatory criteria governing access to its quotes.

- Reporting

The EU branch should have a dedicated MIC code for the purpose of the relevant reporting obligations (including those covered by Article 14(5) of RTS 22 and the Guidelines on transaction reporting section 5.14.4 and 5.17.3) to be done in its SI capacity.

ESMA_QA_1497

Submission Date
01/04/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Multilateral and bilateral systems

Subject Matter
Multilateral and bilateral systems - Systematic internalisers

Question
Can a EU branch of a third-country firm operate an SI?

ESMA Answer

01-04-2019

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 5.30]

MiFID II does not prohibit a branch, including the EU branch of a third-country firm, from operating as an SI in the EU. In this case the branch should fulfil all relevant MiFID II / MiFIR provisions and in particular the obligations attached to SI activity, i.e. Article 14 to 27 of MiFIR. The branch should also meet the criteria set out in the Q&A on ‘centralised risk management within a group for the operation of an SI’.

However, as clarified under Article 47(3) of MiFIR, in the absence of an equivalence decision by the European Commission, branches can only operate as SIs in the Member State where they have been authorised. Those branches can therefore only actively serve clients that are located in this Member State.

A branch of a third-country firm is subject to the supervision of the competent authority in the Member State where the authorisation was granted, which is expected to use the supervisory powers under Article 69 of MiFID II, to ensure the compliance by the branch with the SI regime and the related obligations. In this respect, it is also recalled that article 70(2) of MiFID II also require Member States to “*ensure that where obligations apply to […] branches of third-country firms in the case of an infringement, sanctions and measures can be applied, subject to the conditions laid down in national law in areas not harmonised by this Directive, to the members of the investment firms’ and market operators’ management body, and any other natural or legal persons who, under national law, are responsible for an infringement*”.

ESMA_QA_1838

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
Which taxes should be included in the ex-ante and ex-post costs and charges disclosure?

ESMA Answer

28-03-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 26]

According to MiFID II, investment firms must disclose ex-ante and ex-post to their clients i) all costs and associated charges charged by the investment firm for the investment service(s) and/or ancillary service(s) provided to the client as well as ii) all costs and charges associated with the manufacturing and managing of the financial instruments. Such costs are listed in Annex II of the MiFID II Delegated Regulation. Amongst the examples of costs and charges included in Annex II are stamp duty and transactions tax (relating to both service costs and financial instruments costs).

ESMA is of the view that – regarding service(s) costs – a distinction should be made between transactional or service-based taxes related to the provision of an investment or ancillary service (such as stamp duty, transaction taxes or VAT, where applicable), and taxes related to the income/revenue generated by the investment in which the client has invested (such as income or capital gains taxes on the coupons of bonds/dividends of shares).

Taxes related to the provision of an investment or ancillary service should always be included in the costs and charges disclosure.

Firms could decide whether to include or not in their costs and charges disclosure taxes that relate to the income/revenue generated by the investment in which the client has invested.

ESMA_QA_1837

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
What terminology should firms use in costs and charges disclosure material?

ESMA Answer

28-03-2019

Original language

[ESMA 35-43-349 MiFID II Q&AS on Investor protection Ch. 9 , question 25]

To take an informed decision, investors should be able to compare information on costs and charges provided by different investment firms or by the same investment firm regarding different services or products. In addition, as required under Article 24(3) of MiFID II, any information must be fair, clear and not misleading. Therefore, ESMA is of the view that firms should be expected to use the same terminology as used in MiFID II, as transposed in national legislation, and in Annex II of the MiFID II Delegated Regulation. For example, third-party payments should be named as such rather than using other terms that may not describe clearly and in simple terms the nature of such payments. Alongside the MiFID II terminology, firms may add their own “commercial” terminology, but those “commercial terms” should be clearly defined with reference to the MiFID II terminology.

ESMA_QA_1836

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
How should the ex-ante costs and charges disclosure requirements be applied to the service of portfolio management?

ESMA Answer

28-03-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 24]

In accordance with Article 50(5) and Recital 75 of the MiFID II Delegated Regulation, an investment firm must inform the client, in good time before the provision of the investment service of portfolio management, about the costs and charges relating to (i) the investment and ancillary service(s) to be provided (service costs) and to (ii) the financial instrument(s) in which the client's portfolio could be invested in accordance with the mandate given by the client (product costs).

Due to the nature of the service of portfolio management (management on a discretionary client-by-client basis), no cost disclosure is due in relation to each investment decision taken by the firm. However, ex-ante information about costs and charges should be provided before the firm starts providing the service. The quality and completeness of the ex-ante information provided before the provision of the portfolio management service is thus critical.

ESMA is therefore of the opinion that ex-ante information relating to service and product costs where portfolio management is provided should be based on:

- the value of the assets (cash and/or financial instruments) under discretionary management (as disclosed by the client or prospective client before the firm starts exercising its discretionary mandate); and
- the anticipated (model or bespoke) portfolio corresponding to the client's investment profile, objective(s) and, in case of a bespoke mandate, strategy that will be adopted for the management of the client's portfolio, in accordance

with the mandate given by the client.

Both service(s) costs and financial instrument(s) costs should be aggregated, as per Q&A 13. Additionally, firms may, as a good practice, proactively provide greater detailed ex-ante information about costs and charges. For example, firms could provide ex-ante information about costs and charges relating to financial instruments by category of financial instruments with the same costs structure.

ESMA_QA_1835

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
In what circumstances and under which conditions could a firm meet its obligation for ex-ante disclosure by informing its clients of the relevant costs and charges just

once, or on a regular basis, but not before each transaction?

ESMA Answer

28-03-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 23]

Where there are no product costs for the relevant financial instrument (management, structuring or distribution fees which are neither included in the price or in addition to the price of the financial instrument) or in the residual instances where the assessment of product costs is not required (in accordance with Article 50(6) of the MiFID II Delegated Regulation), firms may meet their ex-ante costs and charges disclosure obligation by providing to their clients a grid or table displaying the relevant costs and charges specific to i) the investment or ancillary service and ii) the financial instrument category offered to or demanded by the client.

However, such grids or tables should comply in full with the MIFID II costs and charges requirements. Consequently, the amounts and percentages disclosed in such grids or tables for the relevant investment service(s) and category(ies) of financial instruments should be the same as those that would have been disclosed had the firm informed the client of the relevant costs and charges before each transaction and in a fully individualized, transaction-based manner (as per Q&A22). This means that the categories of financial instruments used as a basis to calculate and disclose service costs through such grids or tables have to be granular enough for this purpose. This also means that the information provided should be clear and

understandable by the client to which it is provided, and such grids or tables should not be brochures in which the firm sets out a long list of tariffs that may or may not apply to a broad range of clients, when specific conditions apply to each.

However, as per Recital 78 of the MIFID II Delegated Regulation, the firm may base the costs and charges disclosed as a cash amount on an assumed investment amount. Nevertheless, the costs and charges disclosed must reflect the costs the client would actually incur on the basis of the assumed investment amount (Recital 78),

As per Article 50(2) of the MiFID II Delegated Regulation, the costs and charges shall also be disclosed as a percentage.

In addition, the information provided in such grids or tables must be updated every time any element changes so that the information provided to the client is, at all times, the same as the information that would have been provided to the client had the firm made such disclosure before each transaction and in a fully individualized, transaction-based manner.

The firm should provide such grids or tables in good time before the first investment service is provided to a new client and at any time they are updated. In addition, they should remain easily available at all times to clients.

ESMA_QA_1834

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Information on cost and charges

Question
Do the MiFID II requirements expect that the ex-ante disclosure of information on costs and charges is provided on the basis of the specific transaction or is it

sufficient for investment firms to disclose information in a more generic way?

ESMA Answer

28-03-2019

Original language

[EMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 22]

According to Article 24(4) of MiFID II and Article 50(2) of the MiFID II Delegated Regulation, investment firms shall provide ex-ante information on costs and charges in a fully individualized, transaction-based manner, i.e. in relation to the specific financial instrument (ISIN-based) and in relation to the specific investment service or ancillary service provided.

This is in line with the objective of the MiFID II costs and charges provisions. Recital 78 of the MiFID II Delegated Regulation clearly states that the MiFID II costs and charges provisions have the objective of ensuring clients' awareness of all applicable costs and charges as well as enabling a comparison of different financial instruments and investment services. ESMA is of the view that this is only achievable if the costs and charges disclosures are specific to the transaction (especially ISIN-based). The only relief to this principle can be found in Recital 78 which allows firms to provide costs and charges disclosures on the basis of an assumed investment amount. Nevertheless, the costs and charges disclosed must reflect the costs the client would actually incur on the basis of the assumed investment amount (Recital 78 sentence 3).

For how to apply this general principle where the service of portfolio management is provided, please refer to Q&A 24. [Q&A1836]

ESMA_QA_1122

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Product governance

Subject Matter
Product governance

Question
Which considerations should manufacturers and distributors take into account when specifying the target market category “type of client to whom the product is

targeted” for CoCo-Bond-Funds?

ESMA Answer

28-03-2019

Original language

[ESMA35-43-439 Investor protection Product governance Q&A1]

In ESMA’s view, CoCo-Bond[1]-Funds are generally not compatible with the retail market. ESMA believes that the investor protection concerns raised by CoCo-Bonds [2] do also largely apply to funds which predominantly invest in CoCo-Bonds or use benchmarks which are predominantly composed of CoCo-Bonds. Therefore, ESMA expects manufacturers and distributors of CoCo-Bond-Funds to carefully scrutinize such products in the respective product approval process and assess the target market proportionally to the features and risks of the product. This assessment should also take into account the envisaged investment services for the product (e.g. in the course of an investment advice or portfolio management some of the above mentioned concerns could be mitigated). Manufacturers and distributors should therefore consider excluding retail investors from the positive target market or including retail clients in the negative target market. For CoCo-Bond-Funds already in the market, ESMA would expect manufacturers and distributors to take the abovementioned considerations into account in the next cycle of the product review process, at latest.

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[1] CoCo Bonds are highly complex, hybrid capital instruments with loss-absorbency features written into their contractual terms. One key characteristic is that they feature an equity

conversion or writing down trigger, set with reference to the issuer's capital position in relation to regulatory requirements. CoCo Bonds are eligible towards issuers' Additional Tier 1 (AT1) capital and feature other unusual characteristics for non-equity instruments, in that they are permanent notes with entirely discretionary income payments. This means 'coupons' may be cancelled at any time, for any reason, and the notes may never be called. While CoCos can be designed in a range of different ways, all are highly complex instruments presenting investment risks that are exceptionally challenging to evaluate and model.

[2] ESMA and the Joint Committee of the European Supervisors as well as several NCAs have already expressed their view that CoCo Bonds are inappropriate for distribution to ordinary retail investors as they raise several inverstor protection concerns (e.g. ESMA Statement on "Potential Risks Associated with Investing in Contingent Convertible Instruments" –ESMA/2014/944 – 31 July 2014 and JC Reminder on "Placement of financial instruments with depositors, retail investors and policy holders ('Self placement')" – JC 2014 62 – 31 July 2014).

ESMA_QA_1818

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Information to clients on costs and charges

Subject Matter
Post-sale reporting

Question
How should investment firms use the product's costs as presented in the PRIIPs KID?

ESMA Answer

28-03-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 9, question 7]

The PRIIPs KID will contain detailed information about costs and charges of the PRIIP. ESMA is of the view that the cost components, as mentioned in the PRIIPs KID, cover all cost components, so that an investment firm can fulfil its obligation under the MiFID II regime with regard to the ex-ante costs and charges of a financial instrument.

Based on the prescribed calculation methodology of the PRIIPs RTS Annex VI, PRIIPs manufacturers have to calculate the total amount of costs on an annualised basis, for standardised investments (usually either €10,000 lump sums or €1,000 p.a. for recommended holding periods). This means that PRIIPs manufacturers have insight in (i) one-off costs; (ii) ongoing costs, which include transaction related costs and charges and (iii) incidental costs. In order to calculate the reduction in yield this total amount of costs is turned into values that reflect the annualised impact on return per year at the recommended holding period. Firms could use this raw annualised data as the basis for the MiFID II cost calculation, and they could also use the PRIIPs annualised Reduction in Yield (RIY) indicator. For products with non-linear charging structures (linear charging structures being understood as where the charges increase in direct proportion to the size of the investment) where investment amounts are different from the abovementioned standardised ones, firms would need to amend the PRIIPs KID data or indicator depending in particular on these charging structures. Once the firm has adjusted the raw annualised data or the RIY indicator in such way that it reflects the costs and charges associated with

the amount that actually will be invested, it could use either the adjusted raw annualised data or the adjusted RIY indicator as the basis for the MiFID II costs and charges calculation. Unless all relevant annualised data is already publicly available, it is probable that an investment firm will have to liaise with the PRIIPs manufacturers to obtain such data.

As investment firms need to include inducements in the costs of the investment services, any inducements mentioned as costs of the PRIIP should be added to the costs of the investment services and deducted from the costs of the PRIIP (as mentioned in the KID).

ESMA_QA_1060

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Best Execution

Subject Matter
Best Execution

Question
What is the scope of the RTS 27 reporting requirements for market makers and other liquidity providers?

ESMA Answer

28-03-2019

Original language

[ESMA35-43439 MIFID II Investor protection Best execution Q&A 20]

RTS 27 requires market makers and other liquidity providers to report on transactions in financial instruments not subject to the trading obligation. This includes transactions (i) that are conducted on an OTC basis or (ii) pursuant to the pre-trade transparency waivers in Articles 4 and 9 of MiFIR (except orders held in an order management facility of a trading venue pending disclosure). In the case of the latter, both trading venues and market makers and other liquidity providers will account for these transactions in their RTS 27 reports. This is because the scope of the RTS 27 reporting requirements for trading venues covers all transactions in financial instruments, including those that are subject to the pre-trade transparency waivers (Recital 6 of RTS 27).

The obligations set out in the previous paragraph require both (i) market makers and other liquidity providers (that facilitate the trade which is finally concluded on the trading venue) as well as (ii) trading venues (where the trade is finally concluded) to provide RTS 27 reporting. This is to ensure the provision of execution quality data in relation to both OTC trades as well as transactions pursuant to the pre-trade transparency waivers that are carried out on-book and off-book, but under the rules of the venue. This information allows to identify the quality of the liquidity provided by market makers and other liquidity providers.

For trading venues, the requirements under Article 7(2)(k) and (l) of RTS 27 identify among the reported information, the number and value of transactions that are subject to a pre-trade transparency waiver (excluding orders held in an order

management facility). This approach ensures that the RTS 27 reports distinguish between (i) liquidity that is subject to a pre-trade transparency waiver and (ii) liquidity subject to pre-trade transparency requirements (and is truly visible).

ESMA_QA_1865

Submission Date
28/03/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Investor Protection and Intermediaries

Topic
Provision of investment services and activities by third country firms

Subject Matter
Third-country firms marketing directly

Question
Article 42 of MiFID II allows third-country firms to market products and services directly (without the need of a branch) to retail clients and professional clients within

the meaning of Section II of Annex II of MiFID II if this is done at the client´s own exclusive initiative (reverse solicitation exemption), specifying that in such a case the firm in question may also offer the client products and services from the same category. Does this mean that a firm that, within the context of a one-off service to the client, has sold, or has had the opportunity to sell, a product or service under this rule may in the future again offer products or services from the same category (i.e. outside the context of the request of the client)?

ESMA Answer

28-03-2019

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch 13, question 4]

No. The reverse solicitation exemption is based on the premise that the product or service is marketed at the client´s own exclusive initiative[1] and can only be applied to the specific product or service requested ("the requirement for authorisation under Article 39 shall not apply to the provision of that service or activity by the third-country firm").

Therefore, when providing a one-off investment service[2] to a client, the third-country firm may not sell to that client (without establishing a branch if so provided for by national law) a product or service from the same category[3] unless requested to do so by the client at its own exclusive initiative and only at the time the client asks for an investment product or service.

Therefore, during the course of a transaction, the firm may offer the client another product or service of the same category as the one requested by the client but not

at a later stage unless the client specifically requests it at its own initiative (e.g. if the client contacts the third-country firm to buy a share, the firm could - at this moment in time - market to the client other shares from the same stock-exchange segment. However, the firm would not be entitled to market more shares to the client a month later, unless this is done through a branch).

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1. On this topic see Q&A 1 [Q&A 1862] of this Section.

2. On this topic see also Q&A 1 of Chapter 15 of this document.

3. On this topic see also Q&A 3 [Q&A 1864] of this Chapter.

ESMA_QA_1487

Submission Date
01/02/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Level 3 Regulation
ESMA70-872942901-38 - Q&A on MiFID II and MiFIR market structures topics

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Direct Electronic Access (DEA) and algorithmic trading - Article 19 of CDR 2017/565 - high frequency trading techniques tests

Question
How should the tests to identify high frequency trading techniques, described in Article 19 of CDR 2017/565, be undertaken?

ESMA Answer

01-02-2019

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.30]

Article 19 of Commission Delegated Regulation (EU) 2017/565 states the requirements for a trading technique to be deemed as high frequency algorithmic trading. Regarding the indicators in Articles 19(1)(a) & (b) firms should assess each instrument based on the relevant trading hours of that instrument for Article 19(1)(a), and sum those calculated indicators for all relevant instruments traded on a trading venue together for Article 19(1)(b). Regarding the applicability established in Article 19(2) firms should apply these calculations to liquid instruments according to the relevant ESMA publications at the time of calculation.

ESMA_QA_1577

Submission Date
30/01/2019

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Systematic internaliser regime

Subject Matter
Schedule for the initial implementation of the systematic internaliser regime

Question

By when will ESMA publish information about the total number and the volume of transactions executed in the Union and when do investment firms have to perform the assessment whether they should be considered as systematic internalisers for the first time as well as for subsequent periods?

ESMA Answer

30-01-2019

Original language

[ESMA 70-872942901-35 MiFIR transparency Q&A, Q&A 7.1]

Commission Delegated Regulation (EU) No 2017/565[1] does not provide for any transitional provision which would allow the systematic internaliser regime to be fully applicable as of 3 January 2018. In the absence of such provisions, the first calculations are expected to be performed only when, in accordance with Article 17 of the Commission Delegated Regulation (EU) No 2017/565, there will be 6 months of data available.

In accordance with the clarifications provided below:

1. ESMA will publish the necessary data (EU wide data) for the first time by:
    1. 1 August 2018 covering a period from 3 January 2018 to 30 June 2018 for equity, equity-like and bond instruments;
    2. The EU wide data for ETCs, ETNs, SFPs, securitised derivatives, emission allowances and derivatives will not be published until at the latest 2020.

2. Investment firms will have to perform their first assessment and, where appropriate, comply with the systematic internaliser obligations (including notifying their NCA) by:
    1. 1 September 2018 for equity, equity-like and bond instruments;
    2. No assessment has to be performed for ETCs, ETNs, SFPs securitised derivatives, emission allowances and derivatives until at the latest 2020.

This timeline applies also to investment firms trading in illiquid instruments. While it is possible for those firms to carry out part of the test based on data at their disposal, the complete determination of the SI activity necessitates an assessment of the investment firms' OTC-trading activity in a particular instrument in relation to overall trading in the Union. In order to ensure a consistent assessment and to ensure that all investment firms are treated in the same manner, for all instruments, irrespective of their liquidity status, the assessment should therefore be performed by 1 September 2018 for equity, equity like and bond instruments. The assessment does not need to be performed for ETCs, ETNs, SFPs, securitised derivatives, emission allowances and derivatives until at the latest 2020.

Similarly, although Commission Delegated Regulation (EU) No 2017/565 allows shorter look-back periods for newly issued instruments compared to the six months described above, ESMA considers that it is important to ensure a level playing field between all instruments and, therefore, suggests to apply the schedule proposed above also to newly issued instruments - i.e. first publication by ESMA of the necessary EU-wide data by 1 August 2018 for equity, equity like and bond instruments and earliest deadline to comply, where necessary, with the SI regime set on 1 September 2018 for equity, equity like and bond instruments.

It is nevertheless important to stress that investment firms should be able to opt-in to the systematic internaliser regime for all financial instruments from 3 January 2018, for example, as a means to comply with the trading obligation for shares. For equity, equity-like and bond instruments for which the overall trading in the Union will not be published, the opt-in regime will remain a possibility for investment firms to become an SI. The same is true as far as ETCs, ETNs, SFPs, securitised

derivatives, emission allowances and derivatives are concerned.

For subsequent assessments, ESMA intends to publish the necessary information within a month after the end of each assessment period as defined under Article 17 of the Commission Delegated Regulation (EU) No 2017/565 – i.e. by the first calendar day of months of February, May, August and November every year. After the first assessment, investment firms are expected to perform the calculations and comply with the systematic internaliser regime (including notification to their NCA) no later than two weeks after the publication by ESMA – i.e. by the fifteenth calendar day of the months of February, May, August and November every year.

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[1] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, p. 1–83).

ESMA_QA_1624

Submission Date
14/11/2018

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/578 - RTS on market making agreements and market making schemes (RTS 8)

Level 3 Regulation
ESMA70-872942901-38 - Q&A on MiFID II and MiFIR market structures topics

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Requirement imposed on market markers to post simultaneous two-way quotes of comparable size

Question
Does the requirement imposed on market markers to post simultaneous two-way quotes of comparable size restrict the ability of market makers to voluntarily post additional liquidity on either side of the order book?

ESMA Answer

14-11-2018

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.29]

No, it is not the intention of RTS 8 to prevent market makers that have live two-way quotes from adding further liquidity in the order book on a voluntary basis. Market Makers are therefore free to discretionarily post additional quotes on either side of order book in addition to the “simultaneous two-way quotes of comparable size and competitive price” imposed by Article 2(1)(b) of RTS 8. Only quotes that are posted to fulfil the obligations imposed by the market making agreement should be flagged as such in field 8 of Table 2 of the Annex of RTS 24 and field 3 of Table 3 of Annex II of RTS 6.

ESMA_QA_1623

Submission Date
04/10/2018

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/589 - RTS specifying the organisational requirements for investment firms (RTS 6)

Level 3 Regulation
ESMA70-872942901-38 - Q&A on MiFID II and MiFIR market structures topics

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Provisions of Article 17(6) of MiFID II and of Chapter IV of RTS 6

Question
Do the provisions of Article 17(6) of MiFID II and of Chapter IV of RTS 6 apply to all general clearing members or only to those clearing members having algorithmic traders as clients?

ESMA Answer

04-10-2018

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.28]

Article 17(6) of MiFID II targets investment firms acting as general clearing members, without mentioning algorithmic trading nor restricting the scope to those clearing members having algorithmic traders as clients. Therefore, Article 17(6) should be interpreted as applying to all firms acting as general clearing members, regardless of the nature of their clients. Analogously, the provisions in Chapter IV of RTS 6 are drafted without any reference to algorithmic trading and should apply to all general clearing members. This reading is reinforced by Recital 1 of RTS 6, which defines the scope of RTS 6 differentiating on the one hand “Investment firms engaged in algorithmic trading” and, on the other hand, those “providing direct electronic access or acting as general clearing members”.

The title of Article 17 and RTS 6 should not be interpreted as narrowing the scope of the provisions in question, but rather suggesting that the issues addressed are more prominent with respect to algorithmic trading.

ESMA_QA_1622

Submission Date
04/10/2018

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Level 2 Regulation
Regulation 2017/566 - RTS on the ratio of unexecuted orders to transactions (RTS 9)

Level 3 Regulation
ESMA70-872942901-38 - Q&A on MiFID II and MiFIR market structures topics

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Order-counting methodology for bulk quotes

Question
In the context of RTS 9, which is the order-counting methodology for bulk quotes?

ESMA Answer

04-10-2018

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.27]

A bulk quote is a bundle of multiple quotes, possibly on several financial instruments. As per Article 3 of RTS 9, where the methodology for counting orders for a specific order type is not detailed, the trading venue “shall count the messages in accordance with the general system behind the methodology outlined and on the basis of the most similar order type appearing in the Annex”. According to the methodology in RTS 9, calculations should be performed at the level of each financial instrument and, furthermore, the Annex specifies that each quote should be counted as two orders (one for the buy side and one for the sell side). Accordingly, each order/quote sent within a bulk quote, should be treated individually and be counted as specified in the Annex of RTS 9.

ESMA_QA_1621

Submission Date
04/10/2018

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Direct Electronic Access and algorithmic trading

Subject Matter
Incentives to be provided under stressed market conditions by the trading venues

Question
Article 6 of RTS 8 requires trading venues to set the incentives and the requirements that must be met by investment firms in order to access those

incentives under stressed market conditions, taking into account the additional risks. What are the types of incentives to be provided under stressed market conditions by the trading venues to comply with this requirement?

ESMA Answer

04-10-2018

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.26]

RTS 8 sets forth an obligation for trading venues to provide incentives to market makers “effectively contributing to liquidity provision under stressed market conditions” (Recital 8 of RTS 8). To this end, the market making schemes should “clearly indicate the conditions for accessing incentives and should take into account the effective contribution to the liquidity in the trading venue measured in terms of presence, size and spread by the participants in the schemes” (Recital 9 of RTS 8).

On the basis of the individual trading system, trading venues still have the ability to adjust their scheme of incentives, which may well be of a “monetary” or “non-monetary” nature as long as they effectively support trading and provision of liquidity to the market on a regular and predictable basis and in particular when it is the most volatile.

In particular, trading venues should not induce market makers to leave an already depleted market or to privilege normal market conditions over stressed ones. This means that those schemes where an incentive is given to all market makers

regardless of whether they effectively meet the requirements in terms of presence, size and spread set by the trading venues under stressed market conditions would not comply with RTS 8 obligations.

Similarly, trading venues can impose different market making quoting obligations during normal and stressed markets, provided that they should always be bound by Article 2(1)(b) of RTS 8. In this regard, relaxation of market making obligations should not be construed as an incentive.

ESMA_QA_1641

Submission Date
04/10/2018

Status: Answer Published

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU-Secondary Markets

Topic
Multilateral and bilateral systems

Subject Matter
Market making agreement for payment received from a trading venue

Question
Would any payment received from a trading venue in respect of market making activity or liquidity provision require the conclusion of a market making agreement?

ESMA Answer

04-10-2018

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 5.9]

No. The purpose of the requirement in Article 48 is to ensure that any party receiving financial incentives, such as rebates, to provide liquidity on a trading venue is subject to appropriate market making obligations, but these need not always take the form of a market making agreement as specified in RTS 8.

A “rebate” in this context should be read to include negative fees or direct payments to the provider of liquidity as well as to refunds or discounts on fees due from the provider of liquidity to the trading venue. It follows from this interpretation that “maker/taker schemes”, whereby financial incentives are provided to market participants to conclude trades by posting passive orders, are not only allowed for firms required to enter into in a market making agreement in accordance with Article 17(4) of MiFID II but also for other market makers covered by Article 4(1)(7) of MiFID II provided that these are subject to the appropriate market making obligations.