



Latest Level 3 ESMA Q & As related to MiFID II/MiFIR

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ESMA published and updated in the last couple of days additional Level 3 Q&A papers. Due to the specification and clarification purposes of the Level 3 papers, this should help you during the implementation phase and could clarify open questions. Please find the four updated Q&As from October 3rd and 4th 2017 below.

PwC provides you with this Newsletter an overview of the latest questions related to:

1. **Best Execution**
2. **Recording of telephone conversations and electronic communications**
3. **Post-sale reporting**
4. **Information on costs and charges**
5. **Client categorisation**
6. **Transparency topics**
7. **Non-equity transparency waivers**
8. **The systematic internaliser regime**
9. **Direct Electronic Access (DEA) and algorithmic trading**
10. **Multilateral and bilateral systems**
11. **Systematic internaliser**
12. **Ancillary activity**
13. **Position management controls**

We are happy to discuss with you any thoughts and issues you may have. We are also happy to review your solutions with regard to MiFID II and MiFIR.

Please do not hesitate to contact us.

1. **MiFID II and MiFIR – investor protection and intermediaries topics (3 October 2017 | ESMA35-43-349)**

Link to the document:

https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf

Best Execution

- Question 16: How do the OTF best execution obligations apply when third-party brokers are clients of the OTF or when these brokers provide Direct Electronic Access (DEA) to the OTF (see Article 4(1)(41) of MiFID II)?
- Question 17: Should an investment firm using direct electronic access (DEA) services provided by an intermediary firm (such as a broker) list the execution venue selected via the DEA arrangement (under the RTS 28 reporting obligation), or the broker providing the DEA service (under the report to be published under Article 65(6) of the Delegated Regulation)?

Recording of telephone conversations and electronic communications

- Question 13: What is the applicable scope of the record keeping requirements set out in Article 16(7) of MiFID II in terms of products and services?

Post-sale reporting

- Question 8: Article 62(2) of the MiFID II Delegated Regulation states “...Reporting under this paragraph should be on an instrument-by-instrument basis, unless otherwise agreed with the client...What kind of flexibility could be allowed by such an agreement with clients?”
- Question 9: When reporting to clients information required under Articles 62(1) and 62(2) of the MiFID II Delegated Regulation, can firms agree with clients to assess the depreciation of the overall value of the client’s portfolio, or of leveraged financial instruments or contingent liability transactions included in a client’s account, on a threshold higher than the “10% and thereafter at multiples of 10%”?

Information on costs and charges

- Question 15: Which methodology should an investment firm use when calculating the ‘costs related to transactions initiated in the course of the provision of an investment service’ for its ex-ante cost disclosure?
- Question 16: How is Recital 79 of the MiFID II Delegated Regulation “The costs and charges disclosure is underpinned by the principle that every difference between the price of a position for the firm and the respective price for the client should be disclosed, including mark-ups and mark-downs.” to be interpreted with regard to the position for the firm?
- Question 17: How should investment firms identify and disclose mark-ups and structuring costs embedded in the transaction price (Recital 79 of the MiFID II Delegated Regulation)?
- Question 18: How should an investment firm assess, in accordance with Article 50(1) paragraph 3 of the MiFID II Delegated Regulation, that an eligible counterparty does not intend to offer the financial instruments to its clients?
- Question 19: Which specific limitations to the cost transparency regime may professional clients and eligible counterparties agree on?
- Question 20: How should the cost disclosure be made regarding the respective figures that are to be disclosed in aggregated and itemized form (see Question 13) in case the respective costs or charges are zero?
- Question 21: At what date should investment firms send their first annual ex-post information to their clients?

Client categorisation

- Question 1: Are investment firms required to inform of their MiFID categorisation all their clients, including those already categorised under MiFID I, or should they just provide such information to new clients or to clients which categorisation has changed under MiFID II?

2. On MiFID II and MiFIR transparency topics (3 October 2017 | ESMA70-872942901-35)

Link to the document:

https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf

General Q&As on transparency topics

- Question 7: When should the operator of an RFQ system provide pre-trade transparency?
- Question 8: Do real time post-trade transparency requirements apply equally to trading venues and systematic internalisers?

Non-equity transparency waivers

- Question 2:
 - a) Which deferral regime applies to investment firms trading OTC?
 - b) Is it relevant in what Member State the relevant instrument is traded or admitted to trading on a trading venue?
- Question 3: Publication of transactions in aggregated form (Article 11(3)(a) of MiFIR, Article 11(1)(a)(ii) of RTS 2): What happens if there are less than five transactions executed on the same day? Does this imply that no publication has to be made?
- Question 4:
 - a) How is the requirement for a package order/transaction that 'Each component of the transactions bears meaningful economic or financial risk related to all the other components' to be interpreted?
 - b) Can package orders/transactions also include equity instruments? If yes, how is pre- and post-trade transparency applied?
 - c) When does an investment firm apply the systematic internaliser obligations on a package order level?
- Question 5: What are normal trading hours for non-equity instruments? Are investment firms allowed to postpone publication of transactions until the opening of the next trading day in respect of trades in non-equity instruments taking place outside of normal trading hours?

The systematic internaliser regime

- Question 4:
 - 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 2017/56516? 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

- Question 7: For the purpose of the SI determination, when should an investment firm be considered as “executing client orders” when dealing on own account outside of trading venues?
- Question 8: What are the limitations to the commercial policy for restricting access to quotes in accordance with Article 18(5) of MiFIR?
- Question 9: Are systematic internalisers allowed to limit the number of transactions they undertake to enter into with clients pursuant to any given quote under Article 18(7) of MiFIR to one transaction?

3. On MiFID II and MiFIR market structures topics (3 October 2017 | ESMA70-872942901-38)

Link to the document:

https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38_gas_markets_structures_issues.pdf

Direct Electronic Access (DEA) and algorithmic trading

- Question 23: Are the suitability checks and controls a DEA provider should perform on clients using the service also applicable in case of clients that are not investment firms authorised in the EU?

Multilateral and bilateral systems

- Question 17: Can an OTF offer trading in C(6) REMIT wholesale energy products only?
- Question 18: When an OTF authorised to trade financial instruments also trades REMIT wholesale energy products, i.e. in non-financial instruments, what are the applicable MiFID II/MiFIR provisions?
- Question 19: How do the OTF best execution obligations apply when third-party brokers are clients of the OTF or when these brokers provide Direct Electronic Access (DEA) (see Article 4(1)(41) of MiFID II)?

Systematic internaliser

- Question 23: Article 15(2) of MiFIR sets out that “in justified cases”, systematic internalisers may execute orders at a better price than the quoted prices provided that the price falls within a public range close to market conditions. What are those justified cases?

4. On MiFID II and MiFIR commodity derivatives topics (4 October 2017 | ESMA70-872942901-28)

Link to the document:

https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-28_cdtf_gas.pdf

Ancillary activity

- Question 10: Should the capital test be calculated using consolidated accounts? Should firms use capital on a worldwide basis or just capital

employed within the EU?

- Question 11: How should various underlyings falling under the C(10) category be treated for the purpose of ancillary activity calculations?

Position management controls

- Question 1: Are position management controls required to play a role in the application of position limits applied by NCAs according to Article 57(1) MiFID II?