

PUBLIC STATEMENT

Supervisory approach on the MiFIR open access provisions for exchange traded derivatives (ETDs)

Articles 35 and 36 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012¹ (MiFIR) establish provisions on non-discriminatory and open access to trading venues and central counterparties (CCPs) for transferable securities, money market instruments and ETDs.

Article 54(2) of MiFIR provides national competent authorities (NCAs) with the possibility to temporarily exempt trading venues and CCPs from the MiFIR access provisions for ETDs. A number of exemptions had been granted under this provision for the transitional period established in that Article, which expired on 3 July 2021.²

In that context, ESMA has become aware that co-legislators have given strong indications of their intention to extend the transitional period. The Council put forward a draft amendment of Article 54(2) of MiFIR in its General Approach on the Commission Proposal for a Regulation on a pilot regime for market infrastructures based on distributed ledger technology (so-called “DLT Pilot Regime”), envisaging an extension of the transitional period by two years to 3 July 2023.³ Moreover, ESMA understands that the European Parliament, in its deliberations on the Proposal for a Regulation on a DLT Pilot Regime, also indicated support for extending the transitional period by two years. ESMA is aware that the legislative procedure in relation to the Proposal for a Regulation on a DLT Pilot Regime is not yet concluded. However, both co-legislators appear to have identical positions on such an extension of the transitional period provided in Article 54(2) of MiFIR which suggests that the extension will in all likelihood be established.

From a legal perspective, neither ESMA nor NCAs possess any formal power to allow the disapplication of directly applicable EU legal text. At the same time, based on the assumption that the above-mentioned extension of the transitional period established in Article 54(2) of

¹ OJ L 173, 12.6.2014, p. 84.

² Initially the transitional period in Article 54(2) expired on 3 July 2020. However, co-legislators extended the transitional period in Article 54(2) of MiFIR by one year to 3 July 2021 pursuant to Article 95 of Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 22, 22.1.2021, p. 1).

³ Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology - Mandate for negotiations with the European Parliament, <https://data.consilium.europa.eu/doc/document/ST-10146-2021-ADD-1/en/pdf>

MiFIR will eventually be provided, ESMA considers that it is important to take into account this likely upcoming legislative change when applying the MiFIR open access provisions for ETDs until the provision extending the application of the transitional period will be formally in place. Furthermore, ESMA is mindful of the administrative burden for all parties involved in processing potential access requests that would, in view of the expected extended transitional period, not result in effective access arrangements.

Based on the foregoing, ESMA therefore would expect NCAs to not prioritise actions in relation to the provisions in Articles 35 and 36 of MiFIR with respect to trading venues and CCPs that benefitted from transitional arrangements under Article 54(2) of MiFIR as far as ETDs are concerned.