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Additional Information

Level 1 Regulation

Markets in Financial Instruments Regulation (MiFIR) Regulation (EU) No 600/2014-
Secondary Markets

Topic

Pre-trade transparency waivers

Subject Matter

Pre-arranged/negotiated transactions for non-equity instruments

Question

Are “pre-arranged” or “negotiated” transactions permitted for transactions in non-equity instruments and in particular for derivatives that are subject to the MiFIR trading obligation? Under which conditions can pre-arranged transactions benefit from the hedging exemption under Article 8(1) of MiFIR?

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Original language

[ESMA 70-872942901-35 MiFIR transparency Q&A, Q&A 5.11]

MiFIR provides for the possibility to formalise negotiated transactions in equity instruments on trading venues subject to a waiver under Article 4(1)(b). Furthermore, ESMA considers that pre-arranged transactions in equity instruments may also be formalised under the large in scale (LIS) waiver under Article 4(1)(c) of MiFIR as long as the conditions for an LIS waiver are met.

While MiFIR does not have specific provisions for negotiated or pre-arranged transactions for non-equity instruments, ESMA considers it nevertheless possible to formalise negotiated or pre-arranged transactions on a trading venue subject to meeting the conditions for the respective waivers from pre-trade transparency set out in Article 9(1) of MiFIR.

Concerning non-equity instruments that are not subject to the trading obligation for derivatives, pre-arranged transactions are possible under the LIS-waiver (first part of the sentence in Article 9(1)(a)) of MiFIR), the waiver for instruments that do not have a liquid market (Article 9(1)(c) of MiFIR), the EFP waiver (Article 9(1)(d) of MiFIR) and the package order waiver (Article 9(1)(e) of MiFIR). Pre-arranged transactions may not be executed using the order management facility waiver (second part of Article 9(1)(a) of MiFIR) or the size-specific-to-the-instrument (SSTI)-waiver (Article 9(1)(b) of MiFIR).

Concerning derivatives subject to the trading obligation, pre-arranged transactions are only possible under the LIS-waiver (Article 9(1)(a) of MiFIR) and the package order waiver (Article 9(1)(e) of MiFIR).

Finally, concerning pre-arranged transactions on cleared derivatives that are concluded on a trading venue, the pre-trade checks specified in the Commission Delegated Regulation (EU) 2017/582 (Article 2) do also apply.

Moreover, ESMA considers that pre-arranged transactions may benefit from the hedging exemption under Article 8(1) of MiFIR subject to meeting the following conditions: at least one of the counterparties to the transaction is a non-financial counterparty, the transaction is in derivative instruments, and the transaction has to have as a result reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.

ESMA emphasizes that when trading venues execute pre-arranged transactions under the rules of their system, they must ensure that these transactions comply with the regulations, including those concerning market abuse and disorderly trading. Venues have an obligation to monitor these trades on possible violations of the rules.