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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?

ESMA Answer

16-10-2024

Original language

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. As a reminder, for derivatives, Article 8a of MiFIR limits pre-trade transparency to ETDs where the regulated market is applying a central limit order book or a periodic auction trading system and to OTC derivatives traded on an MTF or an OTF applying a central limit order book or a periodic auction trading system and meeting the criteria set out in Article 8a(2) of MiFIR.

Except for OTC derivatives subject to the trading obligation, pre-arranged transactions in non-equity instruments 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).

Concerning OTC-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.

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.

12-07-2019

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. As a reminder, for derivatives, Article 8a of MiFIR limits pre-trade transparency to ETDs where the regulated market is applying a central limit order book or a periodic auction trading system and to OTC derivatives traded on an MTF or an OTF applying a central limit order book or a periodic auction trading system meeting and meeting the criteria set out in Article 8a(2) of MiFIR.

Except for OTC derivatives subject to the trading obligation, ~~concerning non-equity instruments that are not subject to the trading obligation for derivatives~~, pre-arranged transactions in non-equity instruments 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 OTC-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.