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ESMA_QA_2800

Submission Date

10/03/2026

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

Topic

Suitability

Additional Legal Reference

MiFID II 2014/65/EU (Art. 16, 25); Deleg. Reg. (EU) 2017/565 (Art. 54; record-keeping).

Subject Matter

Personal recommendation and suitability statement: documentation nature and staff attribution in split/automated processes

Question

Under MiFID II, investment advice is defined as a personal recommendation to a client in relation to transactions in financial instruments. In practice, the personal recommendation, the suitability assessment, the documentation and the technical generation/transmission of the suitability statement may be performed by different persons and/or partly automated systems.

Could ESMA clarify the following points:

1. For determining whether and by whom investment advice was provided, is it primarily relevant who gave/communicated the personal recommendation to the client, rather than who merely prepared/generated/transmitted the suitability statement through IT systems?
2. Should the suitability statement under MiFID II / Delegated Regulation (EU) 2017/565 be understood as documentation and rationale of a recommendation that has already been made, rather than as a constitutive element of “investment advice”?
3. Is it necessary, for the attribution of investment advice to a specific staff member, that the same staff member is technically able to create/approve/transmit the suitability statement, or can these steps be separated without changing the attribution of who “advised”?

ESMA_QA_2799

Submission Date

10/03/2026

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

Topic

Suitability

Additional Legal Reference

MiFID II 2014/65/EU (Art. 16, 25); Reg. (EU) 2017/565 (Art. 54); ESMA/2015/1886 (rev.) (paras 4(j), 19, 20(d)-(g)).

Subject Matter

Attribution of investment advice in split or system-supported workflows (personal recommendation vs suitability statement)

Question

In practice, investment firms may apply “tandem” or split workflows where one staff member conducts the client meeting, gathers the client’s circumstances and communicates/explains a concrete course of action to the client, while another staff member and/or a partly automated system performs the suitability assessment, approval and/or generates/transmits the suitability statement.

Against this background, could ESMA clarify, under MiFID II and relevant Level-2 measures, the EU-law criteria for determining whether the staff member who leads the client interaction and explains the recommendation is already providing investment advice, or whether that activity can be regarded as acting under supervision?

In particular:

1. For the attribution of investment advice, is the decisive element who communicates the personal recommendation to the client, rather than who technically generates/approves/transmits the suitability statement?
2. In split workflows, what organisational minimum features are expected to evidence “under supervision” (e.g. explicit assignment of the supervisory role, timely intervention capability, documented review/approval/sign-off), where the supervised staff member communicates the personal recommendation?

ESMA_QA_2792

Submission Date

03/03/2026

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT third-party risk management

Historic Question Reference

2024_7290 Definition and scope of ICT services

Subject Matter

is Mastercard Schemes Network ICT service?

Question

Is Mastercard Schemes Network ICT service?

ESMA_QA_2791

Submission Date

26/02/2026

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

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

Topic

Suitability

Historic Question Reference

follow-up to ESMA email ref. 26-0343 + Submitted Question (ESMA_QA_2790)

Additional Legal Reference

ESMA Guidelines ESMA/2015/1886 (rev.), paras. 4(j), 19, 20(c)-(g); MiFID II (Directive 2014/65/EU), Art. 16(2) and 16(6), Art. 25(1), Art. 25(2), 25(6) and 25(9); Commission Delegated Regulation (EU) 2017/565, Art. 54 and Art. 72.

Subject Matter

Records / audit trail / digital workflows / use of user credentials / Record-keeping and audit trail for “under supervision” in digital/segregated advisory workflows

Question

I would like to request a general clarification on the interpretation of the ESMA Guidelines ESMA/2015/1886 (rev.) regarding record-keeping requirements for “under supervision” (in particular paragraphs 19, 20(c) and 20(g)).

In practice, client communication, suitability documentation and system completion are often performed in a segregated and digital manner (e.g. different staff members involved in the client interaction, documentation and approval). This raises, in particular, the following questions:

1. Minimum requirements for records / traceability

What minimum requirements arise from the Guidelines regarding records to enable the competent authority to verify that supervision actually takes place and is carried out to an appropriate extent?

2. Objective evidence of assumption of responsibility

Is the mere formal naming of a qualified person in the documentation (e.g. in the suitability statement) sufficient, or do the Guidelines expect objectively verifiable review/approval/sign-off evidence?

3. Digital processes / segregated documentation

What requirements apply in digital systems and segregated documentation workflows where client communication, suitability documentation and system completion are not carried out by the same person?

4. Use of user credentials / role awareness

How should “under supervision” be assessed under the Guidelines if user credentials of a qualified person are used for system documentation/system completion, but that person does not provide a conscious assumption of responsibility (review/approval/sign-off) or is not aware that they are intended to act as the supervisor?

ESMA_QA_2790

Submission Date

26/02/2026

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

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

Topic

Suitability

Historic Question Reference

follow-up to ESMA email ref. 26-0343

Additional Legal Reference

ESMA Guidelines ESMA/2015/1886 (rev.), paras. 4(j), 19, 20(c)-(g); MiFID II (Directive 2014/65/EU), Art. 16(2) and 16(6), Art. 25(1), Art. 25(2), 25(6) and 25(9); Commission Delegated Regulation (EU) 2017/565, Art. 54 and Art. 72.

Subject Matter

“Under supervision” – responsibility, role awareness, real-time supervision, sign-off / “Under supervision” in investment advice: responsibility, role assignment and supervisory sign-off

Question

I would like to request a general clarification on the interpretation of the ESMA Guidelines ESMA/2015/1886 (rev.) regarding “under supervision” in the context of investment advice, in particular paragraphs 4(j), 19 and 20(d)–(g).

In practice, investment firms use supervision/tandem models in which a supervised staff member communicates the personal recommendation to the client, while a qualified/experienced person performs supervision and carries out documentation/approval steps.

Against this background, I kindly request clarification on the following points:

1. Real-time supervision vs. ex post review

Do the Guidelines typically require that, for “under supervision”, the supervisor is able to intervene in real time (e.g. by attending, listening-in/reading along, and having an immediate stop-go capability), or can an exclusively ex post review/approval be sufficient?

2. “Under the responsibility of” / “same responsibility”

How should the requirement be understood that the activity is performed “under the

responsibility of” a qualified/experienced person (para. 4(j)) and that the supervisor assumes “the same responsibility” (para. 20(g))?

Which organisational minimum features are typically expected where the supervised staff member communicates the personal recommendation to the client?

3. Explicit assignment and awareness of the supervisory role

Does “under supervision” require that the supervisory role is explicitly assigned and that both the supervised staff member and the supervisor are aware of their respective role, responsibilities and limits?

4. Conscious assumption of responsibility / sign-off

Is the signing of the suitability statement by the supervisor mentioned in para. 20(g) to be understood as a standard expectation (or, in digital processes, a functional equivalent such as a documented review/approval/sign-off)?

Is the mere presence of a qualified person without a conscious assumption of responsibility sufficient?

ESMA_QA_2770

Submission Date

12/02/2026

Status: Question Rejected

Additional Information

Level 1 Regulation

Undertakings for Collective Investment in Transferable Securities Directive (UCITS) Directive 2009/65/EC

Level 2 Regulation

UCITS - Directive 2010/43/EU on organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company

Level 3 Regulation

Performance Fees - Guidelines on performance fees in UCITS and certain types of AIFs - ESMA34-39-968

Topic

Costs and fees

Historic Question Reference

ESMA_QA_774

Additional Legal Reference

Guidelines on performance fees in UCITS and certain types of AIFs - 05/11/2020 | ESMA34- 39-992 EN - paragraph 29

Subject Matter

interpretation of the condition "... as long as this would be in the investor's best interest (i.e. it would result in the investor paying less fees)."

Question

May I ask you for further clarification of your answer to ESMA_QA_774.

Q1 :

The example in your answer shows the very specific example of deducting the performance fee from excess performance before calculating the performance fee. The example is not the normal calculation described in the first bullet point where the performance fee is not deducted from excess performance for calculating the performance fee. Correct?

Q2:

The normal calculation described in the first bullet point where the performance fee is not deducted from excess performance for calculating the performance fee means that also a possible performance fee accrued until the day before (D-1) is not deducted from excess performance because otherwise the mathematical incorrectness which I described in my question still exists for the current performance fee calculation period

(usually the fiscal year of the fund) with the false result just not including the false effect for the day of calculation (D). Correct?

Q3

In your answer you formulated the example where the performance fee is deducted from excess performance for the calculation of the performance fee as follows:

EXAMPLE: According to the prospectus, the Management Company will receive a performance fee, equivalent to 9% of the positive net earnings of the fund.

However, as you showed in your mathematical expression the actual, resulting performance fee is not 9% but

8,26%. As I mentioned in my question normal business as well as legal understanding of "x% of something"

always means that the result of x% is not deducted from the something before calculating the "final" x%.

Wouldn't the a.m. wording of the example be the right description for the performance fee calculation

without deducting the performance fee from the earnings before calculating it; and the correct wording for

the mathematical expression you showed rather be for example the Management Company will receive a

performance fee, equivalent to 9% of the positive net earnings of the fund after that performance fee is

deducted from the net earnings so that the actual performance fee is 8,26%?

ESMA_QA_2708

Submission Date

03/12/2025

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

Additional Legal Reference

ESMA 35-43-349 Q&A

Subject Matter

Inducements

Question

When an investment firm pays a third party (e.g law firms, accounting firms) any commission in connection with the provision of an investment service or ancillary service to the client must ensure that all the conditions set out in Article 24(9) of Directive 2014/65/EU and requirements set out in paragraphs 2-5 are met at all times. One of the requirements is that the fee and commission shall be considered to be designed to enhance the quality of the relevant service to the client if it is justified by the provision of an additional or higher level service to the relevant client, proportional to the level of inducements received. Which is responsible to enhance the quality of the relevant service to the client? The investment firm or the third party (e.g the law firms, the accounting firms)

ESMA_QA_2675

Submission Date

28/10/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT third-party risk management

Additional Legal Reference

Art. 30, DORA

Subject Matter

Contractual agreement with ICT service providers

Question

Art. 30 (1) & (2) of DORA demand that financial institutions have signed contractual agreements with all their ICT service providers, in particular in Art. 30(2) &(3) the elements that shall be included in the contractual arrangements are listed.

Are ICT service providers permitted under DORA to charge the financial institutions "merely for signing" a DORA addendum or updated contractual arrangements in the framework of Art. 30, DORA?

ESMA_QA_2648

Submission Date

19/09/2025

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/2012/188 - Guidelines - Compliance function (MiFID)

Topic

Outsourcing

Additional Legal Reference

EBA/GL/2019/02 (EBA Guidelines)

Subject Matter

Outsourcing; Critical and important functions; Principle of Proportionality

Question

In light of the first subparagraph of Article 16(5) of Directive 2014/65/EU (MiFID II), as well as Article 2(3) and Article 30(1) of Commission Delegated Regulation (EU) 2017/565, can it be affirmed that where a management company has delegated to an entity the performance of crucial elements of the marketing of UCITS funds, including their registration and listing for marketing purposes, the activity of that entity in entering into brokerage and distribution agreements with third-party intermediaries for the purpose of marketing such funds constitutes outsourcing of a critical and important function?

Furthermore, and in the light of the EBA Guidelines on Outsourcing Arrangements (EBA/GL/2019/02), to what extent does the principle of proportionality guide the assessment carried out during the risk evaluation of such outsourcing arrangements? In particular, do factors such as the continuity and duration of the agreement with third-party intermediaries, the scope and materiality of the delegated tasks, and the frequency and regularity of such delegation have an impact on whether the relationship should be qualified as the outsourcing of a critical or important function under the above-mentioned instruments?

ESMA_QA_2645

Submission Date

17/09/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Packaged Retail and Insurance-based Investment Products Regulation (PRIIPS) Regulation (EU) No 1286/2014

Level 2 Regulation

PRIIPS - Regulation 2017/653 on the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents

Topic

Disclosures

Additional Legal Reference

Additionally MiFID 2 - article 44

Subject Matter

Intent to Present Future Performance in Percentage Terms in Robo-Advisory App – Compliance with MiFID II (incl. Article 44) and PRIIPs

Question

We are currently exploring the possibility of presenting future performance in percentage terms within our robo-advisory application. The app provides automated investment recommendations based on client profiling and risk tolerance, and may in the future include visual projections of potential returns.

These projections would be expressed as percentages, clearly labeled as hypothetical, and accompanied by appropriate disclaimers and risk warnings. The format would follow the structure and methodology of performance scenarios as outlined in Annex IV of the PRIIPs Regulation.

In this context, we would like to clarify:

Is it permissible to present future performance in percentage terms if the format aligns with the performance scenarios described in PRIIPs Annex IV?

Would such a presentation be compliant with Article 44 of MiFID II, particularly in digital interfaces?

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_2604

Submission Date

08/07/2025

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

ESMA/2012/188 - Guidelines - Compliance function (MiFID)

Topic

Product governance

Subject Matter

Clarification as regards to Perpetual features

Question

We are writing to request clarification regarding the regulatory treatment of perpetual futures. Specifically, we would like to confirm whether, in cases where a Cyprus Investment Firm (CIF) offers listed futures contracts through a Multilateral Trading Facility (MTF) operating in Europe, the perpetual futures offered by the CIF would fall within the scope of Category 10 – Other Derivatives, as defined in the First Appendix, Part III of Law 87(I)/2017, as amended from time to time.

In addition, we would appreciate your confirmation on whether any leverage restrictions apply to perpetual futures, either under CySEC's national rules or under EU-level requirements, particularly in the context of investor protection measures.

ESMA_QA_2496

Submission Date

27/03/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT-related incident

Subject Matter

Incident report submission format

Question

What is the submission format for the incident reports (initial notification, intermediate and final) that CTPPs and Financial Entities need to submit to the CA?

ESMA_QA_2459

Submission Date

11/03/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Register of information

Subject Matter

Fintech company: DORA AND ROI

Question

Hi Team,

Hope you are well!

We are a Spanish Fintech company called Toqio, our company lets you create, customize, and scale unique financial products in our platform. Please find more information below:

<https://toqio.co/platform>

Could you please confirm that we have to comply with DORA and also we have to send the ROI to the authorities?

Thank you in advance,

Kindest regards,

Ester

ESMA_QA_2457

Submission Date

07/03/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Other DORA topics

Subject Matter

Clarification on DORA Audits for Non-European ICT Service Providers

Question

The DORA law states that ICT third-party service providers must fully cooperate during onsite inspections and audits conducted by competent authorities, the Lead Overseer, the financial entity, or an appointed third party.

Will these audits be conducted the same way if the provider is located outside Europe,

ESMA_QA_2456

Submission Date

07/03/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT third-party risk management

Subject Matter

Clarification on DORA Compliance for Intra-Group providers

Question

Can you confirm our understanding of the DORA law: an intra-group entity providing services to a financial entity is subject to the same obligations as a non-critical third-party provider. This includes requirements related to contractual

arrangements, provisions for critical functions, exit strategies and termination conditions, information registry, reporting to competent authorities, and pre-contractual assessments. Additionally, if the services involve critical or important functions, further requirements apply, such as TLPT tests and audits by competent authorities.

ESMA_QA_2435

Submission Date

10/02/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Register of information

Subject Matter

Register of Information at consolidated level

Question

A Group contains within it both insurance entities and banking entities; for the purposes of preparing the Register at a consolidated level, must it consider both types of Entity? To which Authority is the Register sent at a consolidated level?

ESMA_QA_2431

Submission Date

04/02/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Register of information

Subject Matter

Non-EU ICT service providers without a LEI - conflicting validation rules

Question

When an ICT service provider reported under schedule 05.01 is a legal person outside of the EU, the absence of a EUID and LEI will result in a report validation error rendering the submission of the ROI impossible. Should such service provider

be left out of the register or should a dummy EUID be used (preferably issued by ESA to adequately consolidate missing positions)

ESMA_QA_2428

Submission Date

03/02/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Register of information

Subject Matter

Register of Information at sub-consolidated Level

Question

For the purpose of preparing the Register of ICT Supplier Information (RoI) on a sub-consolidated basis, is it necessary to include within the different templates (ref. "B_XX.XX.XXX") the information pertaining to both the Contractual Agreements that

the Entity signs and those that it uses?

Specifically then, the “financial entity maintaining the register of information” is to be considered corresponding to the "entity signing the contractual arrangement" and the "financial entity making use of the ICT service(s)"?

ESMA_QA_2399

Submission Date

14/01/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Digital operational resilience testing

Subject Matter

Finalised Comprehensive List of DORA questions

Question

Is there a finalised comprehensive list of all questions that the firms involved in the financial markets should answer? For each question is it clear to which type of firm it applies?

ESMA_QA_2396

Submission Date

10/01/2025

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT risk management

Additional Legal Reference

Article 3 (21)

Subject Matter

Definition on ICT services

Question

Article 3 (21) of DORA defines that 'ICT services' means digital and data services provided through ICT systems to one or more internal or external users on an ongoing basis.

It is not clear whether "digital and data services" should be interpreted as:

Version one: either digital or data services (so two different of sets of activities or

Version two: services which need to be both: digital service and parallel/in the same time data service.

ESMA_QA_2386

Submission Date

20/12/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Digital operational resilience testing

Additional Legal Reference

article 2(1)(e) DORA

Subject Matter

Applicability of DORA to third country investment firms

Question

DORA also applies to the "financial entities" listed in Article 2 DORA. This includes investment firms as defined in Article 4 point (1) of Directive 2014/65/EU. Reference is made to Article 2 subsection 1 under e. in conjunction with Article 3 point (33) of DORA. Does this mean that DORA also applies to investment firms with their seats outside the EU which provide investment services in the EU?

ESMA_QA_2382

Submission Date

18/12/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Digital operational resilience testing

Subject Matter

Applicable accounting standard for calculation of turnover

Question

Our understanding is that a business can rely on the exemption under either Article 3(60) micro enterprise, (63) small enterprise or (64) medium-sized enterprise categories under DORA. We have however not been able to find clear information

on which accounting standard that should be used when calculating annual turnover under DORA. In addition, our analysis has not shown that the Commission Recommendation 2003/361/EC on small and medium-sized enterprises provides any guidance on the question of which accounting standard can be used. In a recent informal call with the Swedish FSA, we were informed that, when calculating the turnover of an entity to determine whether it falls under the SME exemption under DORA, the entity should use the same accounting standards that were used to draw up the relevant audited accounts. Thus, if IFRS is applied by the national entities, the relevant entity shall use the same basis (IFRS) to calculate the relevant national turnover. Is this also ESMA's view?

ESMA_QA_2381

Submission Date

17/12/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Other DORA topics

Subject Matter

art. 3 ust. 21

Question

Are service providers that are financial entities, in particular GPW, KDPW, IRGiT Banks, foreign entities that are financial institutions ICT service providers? The service does not concern the provision of ICT services, but e.g. maintaining a bank

account.

ESMA_QA_2379

Submission Date

17/12/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Other DORA topics

Subject Matter

Art. 1 ust. 1 DORA - systems supporting the business processes of financial entities

Question

Financial entities select ICT service providers based on risk assessment, taking into account the business continuity plan and a number of national and sectoral regulations regarding cybersecurity. In addition to standard contractual relationships

with entrepreneurs, there are also solutions that financial entities use:

a) on the basis of a license, e.g. open source. The license provisions are not negotiated, and the service is not individually parameterized for the investment company. The investment company has no influence on the shape of the service and the license provisions. The licenses contain provisions regarding automatic update of the tool, but do not contain provisions regarding, e.g. support or SLA, e.g. Adobe Acrobat Reader;

b) web applications, e.g. Lex/Legalis systems (review of legal acts), which employees access via a browser, the agreement does not involve installing the application on the employee's computer, but only providing a specified number of licenses for use by the company, or a web system for registering correspondence in the case of ordering a courier;

c) providers of employee benefits, e.g. medical care. They are not directly related to the company's business, employees use the application on private devices and log in with a private email address, while registration is necessary for the medical company to create an account for the employee;

Is it possible to apply the principle of proportionality, provided for in the DORA regulations, which will allow for proper identification of risks and the application of proportionate mitigants in the case of the above-mentioned services? In the opinion of the financial entity, the application of all the obligations indicated in the DORA regulations, in particular those concerning contractual provisions and reporting obligations, is disproportionate to the risk generated by the above solutions. The financial entity does not deny the need for each case of evaluation of the solution and review of its correct functioning, the number of entities in relation to which these obligations would have to be performed may affect the quality of the duties performed.

Are the services supporting a critical or important function all the services used as part of performing this function, including those that are quickly and relatively cheaply replaceable (e.g. Adobe Acrobat Reader, 7ZIP, e-mail encryption program)?

ESMA_QA_2328

Submission Date

06/11/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Other DORA topics

Subject Matter

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Question

We have service providers (Market Axess), who classify themselves as DORA-relevant because they offer regulated financial services (ARM and APA). However, they do not see themselves obligated to make contractual adjustments according to

Article 30. This is because "financial services" would not fall under the definition of "ICT service" as per Article 3(21) of DORA. Additionally, this requirement would only apply to non-regulated companies. Is this understanding correct?

ESMA_QA_2318

Submission Date

31/10/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation 2020/1503 - European crowdfunding service providers for business

Topic

Product governance

Subject Matter

Individual portfolio management of loans

Question

Does a European crowdfunding service provider ("ECSP") have the right to link the individual portfolio management of loans to the bulletin board functionality by not only allocating investors funds to one or multiple crowdfunding projects on ECSP's

crowdfunding platform but also by allowing investor a possibility of automatically investing in the loans published on the bulletin board?

ESMA_QA_2313

Submission Date

23/10/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Register of information

Additional Legal Reference

ITS on Register of Information

Subject Matter

b_06.01.0020 - Licensed activity - Legal Protection Insurance

Question

Which licensed activity has to be selected for the licensed activity dropdown in the Register of Information if the entity is a legal protection insurance? According to the Annex of Solvency II it is the class 17, but class 17 is not available in the choices for the drop down field.

ESMA_QA_2311

Submission Date

22/10/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Digital operational resilience testing

Subject Matter

Scope of application of DORA for UCITS Management Companies

Question

Can you set out how UCITS Management Companies fall in scope for DORA and if there are any exemptions.

ESMA_QA_2310

Submission Date

22/10/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Digital operational resilience testing

Subject Matter

Application of DORA to non-EU AIFMs of AIFs with EU investors

Question

The scope of DORA includes (Article 2(1)(k) “managers of alternative investment funds”. Such an entity is defined in Article 3(44) as “... a manager of alternative investment funds as defined in Article 4(1), point (b), of Directive 2011/61/EU”. It is

noted that the definition does not extend to the need to be authorised or registered under Directive 2011/61/EU. As such this can be read as meaning that all managers (regardless of their jurisdiction) of alternative investment funds could potentially fall within scope of DORA.

ESMA_QA_2107 clarifies that a financial entity in the EU is subject DORA and that DORA does not directly apply to a non-EU entity providing services to an EU financial entity – although DORA may apply indirectly to the non-EU entity given that the “EU financial entity is expected to validate that the non-EU third-party provider does not prevent it to be compliant with DORA”.

Does the same principle apply to non-EU AIFMs that manage AIFs (regardless of where those AIFs are established) which have investors based in the EU i.e. DORA will not directly apply to such non-EU AIFMs, but may apply indirectly if such investors are financial entities in the EU who are directly subject to DORA?

ESMA_QA_2301

Submission Date

08/10/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT third-party risk management

Additional Legal Reference

Reg. DORA - Art. 3

Subject Matter

ICT Service definition

Question

Related to the definition provided by the Regulation, what are the criteria that can be used to identify the continuity component (i.e "on ongoing basis) mentioned?

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_2241

Submission Date

23/07/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT-related incident

Subject Matter

Consultas relacionadas con el reporte de incidentes

Question

Buenos días, me gustaría hacer dos consultas relacionadas con el reporte de incidentes:

En primer lugar, tras la publicación del segundo lote de RTS de DORA. En relación al RTS Final Report Draft Regulatory Technical Standards on the content of the notification and reports for major incidents and significant cyber threats and determining the time limits for reporting major incidents and Draft Implementing Technical Standards on the standard forms, templates and procedures for financial entities to report a major incident and to notify a significant cyber threats. Nos gustaría realizar dos consultas:

- Por una parte, se incluye, en el artículo 6 de los plazos de notificación para el reporte intermedio, las entidades financieras presentarán sin demora indebida un informe intermedio actualizado, en cualquier caso, cuando se hayan restablecido las actividades regulares. Por lo tanto, ¿se trata de un reporte obligatorio actualizar el informe intermedio bajo esa casuística?

- Por otro lado, en la RTS no se identifica a la autoridad competente a la que se debe de realizar los distintos reportes. En nuestro caso, España, tenemos como CSIRT de referencia INCIBE y también como autoridad competente BANCO DE ESPAÑA, ¿podrías comentarnos a quién es específico se deberían de realizar esos reportes, por favor?

En segundo lugar, aunque no se disponga de una relación estrecha con DORA, ha resultado también necesario Se elabora un informe semestral para la Autoridad Bancaria Europea (EBA) relacionado con los incidentes de ciberseguridad sufridos, con el propósito de llevar a cabo estudios estadísticos en el sector. ¿Podrías ayudarnos a confirmar si esta información es cierta y donde podríamos encontrar la referencia por favor?

ESMA_QA_2240

Submission Date

23/07/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT-related incident

Subject Matter

Consultas relacionadas con el reporte de incidentes

Question

Buenos días, me gustaría hacer dos consultas relacionadas con el reporte de incidentes:

En primer lugar, tras la publicación del segundo lote de RTS de DORA. En relación al RTS Final Report Draft Regulatory Technical Standards on the content of the notification and reports for major incidents and significant cyber threats and determining the time limits for reporting major incidents and Draft Implementing Technical Standards on the standard forms, templates and procedures for financial entities to report a major incident and to notify a significant cyber threats. Nos gustaría realizar dos consultas:

- Por una parte, se incluye, en el artículo 6 de los plazos de notificación para el reporte intermedio, las entidades financieras presentarán sin demora indebida un informe intermedio actualizado, en cualquier caso, cuando se hayan restablecido las actividades regulares. Por lo tanto, ¿se trata de un reporte obligatorio actualizar el informe intermedio bajo esa casuística?

- Por otro lado, en la RTS no se identifica a la autoridad competente a la que se debe de realizar los distintos reportes. En nuestro caso, España, tenemos como CSIRT de referencia INCIBE y también como autoridad competente BANCO DE ESPAÑA, ¿podríais comentarnos a quién es específico se deberían de realizar esos reportes, por favor?

En segundo lugar, aunque no se disponga de una relación estrecha con DORA, ha resultado también necesario Se elabora un informe semestral para la Autoridad Bancaria Europea (EBA) relacionado con los incidentes de ciberseguridad sufridos, con el propósito de llevar a cabo estudios estadísticos en el sector. ¿Podrías ayudarnos a confirmar si esta información es cierta y donde podríamos encontrar la referencia por favor?

ESMA_QA_2226

Submission Date

02/07/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Other DORA topics

Subject Matter

Scope of the definition of ICT services

Question

As the manager of an Alternative Investment Fund (AIF), we provide specialized investment opportunities to professional investors such as pension funds, insurers, and banks within the EU. Consequently, both our firm and our investors fall within

the scope of DORA.

Our investors can access their portfolios through an online portal operated by a third-party service provider (an ICT third-party service provider). We intend to establish a DORA addendum with this ICT third-party service provider to address this specific ICT service.

Several of our investors have inquired about DORA compliance in relation to their contractual relationship with us. While we are committed to ensuring the portal itself is compliant, we believe our core service – providing investment opportunities – does not constitute an ICT service under DORA. The online portal is merely a supplementary tool for accessing reports, not a fundamental part of our contractual obligations. This view is further supported by the fact that our agreements with investors only stipulate that we provide them with reports, without specifying the method of delivery.

Given these considerations, do you agree with our assessment that our services to investors do not fall under the definition of an ICT service as per DORA and that we, in respect of our investors, cannot be considered an ICT third-party service provider?

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

Underwriting 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_2160

Submission Date

18/04/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Register of information

Subject Matter

DORA compliance contractual template to be provided by the ESA's for FE's / ICT providers

Question

Contractual agreements need to be updated to ensure that they are DORA compliant, yet Financial Entities (FE's) do not know when standard contractual

clauses will be provided by the relevant public authorities following the Article 30.4. of Regulation(EU) 2022/2554 We understand that if standard contractual clauses are not provided by the relevant public authorities' in due time, then the legal departments of FE's and ICT providers will potentially need to develop their own contractual clauses and templates, which will not only create a huge amount of work, duplicated by the different parties, and potentially mis-interpretation of the regulation, but will lead to protracted contractual negotiations between the FE's and the ICT providers over which template should be used to cover the services provided, i.e. the template designed by the FE, or, the template designed by the ICT provider, and which will undoubtedly lead to a situation whereby the FE's and ICT providers are required to manage multiple different contractual arrangements (which in turn will generate a tremendous additional supervisory efforts regarding the different provisions implemented).

Could you please kindly confirm the expected date when the relevant public authorities will release a first draft of the DORA compliant standard contractual clauses and template to be used by the FE's and ICT providers?

Notwithstanding the fact that the abovementioned article refers to standard clauses for certain specific services, the financial sector has claimed the publication of standard contractual clauses under DORA. This will not only ease negotiations between FE's and ICT providers but will also enforce the contractual security framework, as less misinterpretations of DORA will take place.

Additionally, critical ITC providers are still to be designated by the ESAs and, therefore, negotiations between FE's and ICT providers have not started yet in most of the cases. Therefore, we strongly request that consideration be given to the possibility of establishing a transitional period to adapt the contracts to the framework established by DORA.

ESMA_QA_2159

Submission Date

18/04/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT risk management

Historic Question Reference

Clarification Request on Preliminary Assessment of ICT Concentration Risk submitted via DORA's consultation papers.

Additional Legal Reference

Art.1(i) of the 'Draft RTS to specify the elements that a financial entity needs to determine and assess when subcontracting ICT services supporting critical or important functions', as mandated by Article 30(5) of Regulation (EU) 2022/2554

Subject Matter

Intragroup ICT service providers consideration regarding the preliminary assessment of ICT concentration risk.

Question

When conducting the preliminary assessment of potential ICT concentration risk associated with an ICT service provider, as stipulated in Regulation 2022/2054 and its corresponding draft RTS on subcontracting ICT services supporting critical or important functions, what treatment should be applied to ICT intra-group service providers? In other words, are financial entities (FEs) required to consider this concentration risk for ICT intra-group service providers? Alternatively, would the exemption outlined in Regulation 2022/2054 article 31.8(iii) apply, thereby meaning that this risk should not be considered for intra-group service providers?

REGIS-TR SA seeks further clarification on this matter, given that the DORA Regulation establishes that

- 'While intra-group provision of ICT services entails specific risks and benefits, it should not be automatically considered less risky than the provision of ICT services by providers outside of a financial group and should therefore be subject to the same regulatory framework. However, when ICT services are provided from within the same financial group, financial entities might have a higher level of control over intra-group providers, which ought to be taken into account in the overall risk assessment'.

Similarly, article 28.4(c) states that

- 'Before entering into a contractual arrangement on the use of ICT services, financial entities shall: (c) identify and assess all relevant risks in relation to the contractual arrangement, including the possibility that such contractual arrangement may contribute to reinforcing ICT concentration risk as referred to in Article 29'.

Furthermore, the aforementioned article 29 covers the considerations and risks to take into account in relation to ICT service providers supporting critical or important functions, when performing the preliminary assessment of ICT concentration risk.

Additionally, the draft RTS on 'the elements which a financial entity needs to determine and assess when subcontracting ICT services supporting critical or important functions' also explains that

- 'ICT intragroup subcontractors, including the ones fully or collectively owned by financial entities within the same institutional protection scheme, providing ICT services supporting critical or important functions should be considered as ICT third-party services providers. Intragroup ICT subcontracting should not be treated differently from subcontracting outside of the group. The risks posed by those ICT intragroup subcontractors may be different but the requirements applicable to them are the same in accordance with Regulation (EU) 2022/2054. When the use of ICT subcontractors is permitted, then those also include ICT intragroup subcontractors', thereby making no distinction between intra-group and external service providers.

Due to these reasons, we are uncertain about whether the exemption outlined in Regulation 2022/2054 article 31.8(iii) would apply; or if exposure to a ICT intragroup service providers should also be considered during the preliminary assessment of ICT concentration risk.

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_2100

Submission Date

05/02/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Digital operational resilience testing

Subject Matter

Cross-border Market Jurisdiction

Question

Would an EU-based Firm providing ICT Services wholly to non-EU-based Firms be deemed in or out of scope for DORA?

ESMA_QA_2099

Submission Date

05/02/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Other DORA topics

Additional Legal Reference

Article 3 (21)

Subject Matter

The activities of credit bureaus (credit reporting agencies)

Question

The activities of credit bureaus (credit reporting agencies) are not directly referenced within the scope of DORA. These services may not traditionally be seen as "ICT Services", but they could be interpreted as "data services provided through ICT systems". Are these intended to be within scope for ICT services?

ESMA_QA_2091

Submission Date

02/02/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT risk management

Additional Legal Reference

„4. Data reporting service providers shall, in addition, have in place systems that can effectively check trade reports for completeness, identify omissions and obvious errors, and request re-transmission of those reports.”

Subject Matter

implemtnation of Article 10 (4)

Question

Can you elaborate the requirement above? What an effective check should contain and how should be implemented practically?

ESMA_QA_2079

Submission Date

23/01/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

Other DORA topics

Subject Matter

DORA, Article 3 - definition of microenterprise and small enterprise

Question

We are investment company that doesn't meet DORA requirements to qualify as microenterprise neither as small enterprise since we have more than 10 employees (total of 14) but our annual turnover and/or annual balance sheet total that does not

exceed EUR 2 million. What are our obligations under DORA regulation?

ESMA_QA_2062

Submission Date

03/01/2024

Status: Question Rejected

Additional Information

Level 1 Regulation

Transparency Directive (TD) Directive 2004/109/EC

Topic

Notifications of major shareholdings

Additional Legal Reference

ESMA Indicative list of financial instruments that are subject to notification requirements according to Article 13(1b) of the revised Transparency Directive

Subject Matter

Clarification on the application of the Transparency Directive, particularly Article 13, 1b, and its subsequent sub-points, in the context of synthetic shares

Question

Article 13 1. (b) states that Financial instruments with economic effect similar to that of the financial instruments referred to in that point, whether or not they confer a right to a physical settlement are subject to the notification requirement of Article 9 in the TD. The definition of "Financial Instrument" is further elaborated in Article 13, 1b, and its subsequent sub-points, and includes the wording "any other contracts or agreements with similar economic effects which may be settled physically or in cash.". ESMA has also produced an Indicative List of

Given this context, my question is: Do synthetic shares, which are created through various derivatives and structured financial processes to mimic the performance of actual shares without conferring ownership, fall under the scope of "financial instruments" as defined in Article 13(1)(b) of the Transparency Directive? Specifically, do synthetic shares qualify as "contracts or agreements with similar economic effects" that are subject to notification requirements pursuant to this paragraph?

ESMA_QA_2057

Submission Date

20/12/2023

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT third-party risk management

Additional Legal Reference

On Draft Implementing Technical Standards to establish the templates composing the register of information in relation to all contractual arrangements on the use of ICT services provided by ICT third-party service providers as mandated by Regulation (EU)

Subject Matter

Software companies

Question

How can DORA Article 28 be applied on software companies when the financial entity purchases off-the-shelf software licenses? If the off-the-shelf software supports critical or important function, should the DORA Article 28 (8) be applied?

ESMA_QA_2056

Submission Date

20/12/2023

Status: Question Rejected

Additional Information

Level 1 Regulation

Regulation (EU) 2022/2554 - The Digital Operational Resilience Act (DORA)

Topic

ICT third-party risk management

Additional Legal Reference

On Draft Implementing Technical Standards to establish the templates composing the register of information in relation to all contractual arrangements on the use of ICT services provided by ICT third-party service providers as mandated by Regulation (EU)

Subject Matter

Software distributors

Question

When an off-the-shelf software license (e.g. operating systems, database) is purchased through a distributor, is the distributor qualifying as “ICT third-party service provider” in case if the distributor itself is not providing any additional services in addition to the distribution, and its contractual tasks are completed with the successful intermediation of the license agreement? Is the software company qualifying as a direct “ICT third-party service provider” based on the end-user license agreement (EULA) accepted by the financial entity?

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 its business such that it is carrying out an investment activity and not providing an investment service?

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_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_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_273

Submission Date

16/06/2021

Status: Question Rejected

Additional Information

Level 1 Regulation

Securitisation Regulation (EU) 2017/2402

Topic

Securitisation

Additional Legal Reference

Definition of "securitisation" and link to Article 147(8) of Regulation (EU) 575/2013

Subject Matter

Clarification of securitisation characteristics

Question

The "securitisation" is defined as a transaction having several characteristics one of which refers to characteristics listed in Article 147(8) of Regulation (EU) 575/2013. In 147(8) Regulation (EU) 575/2013 one of the characteristics, namely (b) specifies that "the contractual arrangements give the lender a substantial degree of control over the assets and the income that they generate". Please clarify what is meant by "substantial degree of control over the assets and the income"? Are there any further explanations or clarifications on this matter or is there any practical experience available which could help to set clear criteria of what could be treated as "substantial degree of control" and what could not.

Thank you

No hay parametros en la URL.