

PUBLIC STATEMENT

Actions to mitigate the impact of COVID-19 on the EU financial markets – 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 have been granted under this provision which will expire on 3 July 2020 without the possibility for further extension and, in consequence, as of 4 July 2020 the open access provisions with respect to ETDs will start applying.

ESMA recalls that CCPs and trading venues may deny access requests in the cases described in detail in Commission Delegated Regulation (EU) 2017/581. Where a CCP or trading venue denies an access request it should provide full reasons for that decision identifying how the relevant risks arising from granting access would in the current situation be unmanageable and that there would be significant undue risk remaining.

ESMA recalls that NCAs may deny access requests only in case such access would require an interoperability arrangement or threaten the smooth and orderly functioning of markets or would adversely affect systemic risk. When performing such assessment, NCAs should consider whether the CCP or trading venue in question has adequate risk management procedures, including with respect to operational and legal risks, to avoid the access agreement creating significant undue risks to third parties that cannot be mitigated.

ESMA considers that the current market environment characterised by a high degree of uncertainty and volatility driven by the COVID-19 pandemic may negatively impact the operation of CCPs and trading venues and, in particular, increase operational risk which may impact the orderly functioning of markets. In particular, these circumstances may limit the ability of trading venues and CCPs to process access requests due to the lack of extra capacity and human resources necessary to review, test, simulate and grant access requests at a time when the majority of staff are working remotely and under business continuity arrangements. Furthermore, NCAs should consider the impact on the orderly functioning of markets and financial stability of migrating flows of transactions and changing IT infrastructure in

¹ OJ L 173, 12.6.2014, p. 84; as amended by Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019.



consequence of providing access in the current fragile environment due to the COVID-19 pandemic. In that context, NCAs should also assess whether the CCP or trading venue is able to adequately implement significant changes to its risk management procedures and models, including but not limited to credit risk, operational and legal risks.

In this respect, and in accordance with Article 31(1) of Regulation (EU) No 1095/2010² with a view to coordinate supervisory actions, ESMA is issuing this Public Statement to inform the market that competent authorities are expected to take into consideration, to the extent relevant, the aforementioned adverse developments when taking decisions on open access requests. In particular, considering the limited two-month timeframe provided by MiFIR for NCAs to assess access requests, it may be challenging for NCAs to soundly assess whether an open access request may threaten the smooth and orderly functioning of the markets, or adversely affect systemic risk in the current market circumstances.

ESMA expects CCPs and trading venues to have the necessary operational capacity to process access requests once the exceptional market circumstances have cleared up.

² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331 15.12.2010, p. 84)