



## FIA | FIA EUROPE SPECIAL REPORT SERIES: OPEN ACCESS: CCPs, TRADING VENUES AND BENCHMARKS

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This Special Report is the third in the FIA and FIA Europe's series covering specific areas of the European Securities and Markets Authority's ("ESMA") consultation process for the implementation of the recast Markets in Financial Instruments Directive ("MiFID II") and Regulation ("MiFIR"). This Special Report provides an overview of the proposals for open access for trading venues and central counterparties ("CCPs") set out in its Discussion Paper (ESMA/2014/548) published on 22 May 2014. ESMA has been mandated to develop draft regulatory technical standards ("RTS") on a number of issues relating to non-discriminatory access.

### OPEN ACCESS REQUIREMENTS

Articles 35-37 of MiFIR set out requirements for trading venues and CCPs to have non-discriminatory access to one another and non-discriminatory access to benchmarks. These provisions require that CCPs clear financial instruments on a "non-discriminatory and transparent" basis regardless of the trading venue on which a transaction is executed, and that trading venues provide, on request, trade feeds on a non-discriminatory and transparent basis to a CCP that wishes to clear transactions that are traded on the relevant venue. They also require that both CCPs and trading venues be given non-discriminatory access to benchmarks.

### NON-DISCRIMINATORY ACCESS TO CCPs AND TRADING VENUES

#### GROUND FOR DENYING ACCESS

ESMA has proposed conditions under which CCPs may refuse access to a particular trading venue, which are summarised below:

- i. Anticipated large volume of transactions: a large anticipated volume of transactions will be grounds for denying access to a trading venue only where the expected growth in volume arising from granting access is so substantial that it exceeds the capacity planning of the CCP, *i.e.* the CCP's systems will not be able to cope with the anticipated volume of transactions.
- ii. Anticipated increase in number and type of users: similarly, an anticipated increase in the number of users will only be grounds for denying access where the increase is so substantial that it exceeds the capacity planning of the CCP. ESMA notes that it is yet to identify additional risks from the types of users accessing a CCP, since the European Markets Infrastructure Regulation ("EMIR") already contemplates the conditions (including those relating to risk) that must be fulfilled before users can access a CCP as clearing members or as clients of a clearing member.

- iii. Operational risk: operational risk will be grounds for denying access to trading venues where the CCP believes that its operational risk management design would not be able to cope with the anticipated increase in operational risk arising from granting access.
- iv. Complexity or other factors creating significant undue risk: access may be denied to a trading venue that deals in financial instruments not covered by the CCP's authorisation. Separately, the costs incurred by the CCP in facilitating access can be grounds for denying access where they are substantial enough to threaten the viability of the CCP as a standalone entity. Further, a CCP may deny access to a trading venue located in another jurisdiction if such access will adversely affect its ability to enforce rules.

ESMA notes that it is not clear how the conditions in (i) - (iii) above could constitute grounds for trading venues to deny access to CCPs, and has invited the views of market participants on this issue.

#### ***CONDITIONS UNDER WHICH ACCESS IS GRANTED***

ESMA has been mandated to draft RTS on the conditions under which CCPs and trading venues must grant one another access. ESMA has considered certain conditions in its Discussion Paper, some of which are specific to either CCPs or trading venues, and others that are common to both sets of entities.

ESMA's proposals for common conditions include requirements that (i) the information provided in access requests be kept up-to-date and used only for specific purposes; (ii) the relevant CCP and trading venue agree on procedures for communication, dispute resolution, termination of the access arrangements and risk management and (iii) the access arrangements meet certain standards, including those relating to transparency, monitoring and not impeding the users' ability to extend existing access and comply with their respective regulatory obligations. ESMA expects both CCPs and trading venues to comply with these common conditions on a standalone basis.

ESMA has been mandated to explain what "transparent" and "non-discriminatory" mean in relation to the fees charged by trading venues and CCPs. ESMA considers "transparent" in this context to mean that there should be no difficulties in accessing information on fee schedules, which in turn must identify the fees per service with sufficient granularity to ensure that the fees charged are predictable. "Non-discriminatory", in relation to the clearing fees charged by CCPs, means that the fees are based on a set of objective criteria regardless of where the transaction takes place, and in relation to trading venue fees, means that a CCP accessing a trading venue should be subject to the same fees and rebates as another CCP accessing the trading venue for similar instruments.

Trading venues are entitled under MiFIR to non-discriminatory treatment by CCPs regarding how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts, and cross-margining with correlated contracts cleared by the CCP. ESMA has been mandated to explain what non-discriminatory treatment means in each case. ESMA's proposals are summarised below:

- i. Collateral requirements: CCPs must apply the same margin methodology to contracts that are economically equivalent, and therefore focus on the characteristics of contracts, and not to the platform on which they are traded;
- ii. Netting: similarly, economically equivalent contracts from a particular trading venue should be netted with contracts already cleared, if such netting can be carried out legally in compliance with the insolvency law applicable to the CCP. However, if the CCP cannot effectively comply

with applicable insolvency law (due to risks arising from conflicts between the laws to which the contracts are subject), ESMA considers that the CCP would have grounds not to net contracts from different trading venues; and

- iii. Cross-margining: the CCP's risk policy to offer portfolio margining (in compliance with applicable EMIR requirements) should apply to these contracts independently from the trading venue on which they were traded, and the contracts traded on a particular trading venue must be able to benefit from the same offsets or reductions as the contracts with significant and reliable correlation already cleared by the CCP.

#### ***CONDITIONS UNDER WHICH GRANTING ACCESS WILL THREATEN THE SMOOTH AND ORDERLY FUNCTIONING OF MARKETS***

ESMA has been mandated to specify the conditions under which granting access to CCPs and trading venues will threaten the smooth and orderly functioning of the markets or would adversely affect systemic risk. ESMA considers that this could occur in two circumstances: firstly, where national regulators are in possession of knowledge that a trading venue or CCP is not meeting its relevant legal obligations, or is unlikely to meet them as a consequence of granting access, and there are no remedial actions to allow compliance within a sufficient timeframe.; secondly, in circumstances related to liquidity fragmentation (defined by MiFIR as a situation in which there is an inability to trade because of the absence of clearing arrangements or where clearing members would be forced to hold their positions in an instrument in more than one CCP limiting the potential for netting financial exposures).

#### ***TEMPORARY EXCEPTION FOR EXCHANGE-TRADED DERIVATIVES***

MiFIR permits trading venues that trade derivatives at volumes falling below a specified threshold to opt-out of the non-discriminatory access requirements under MiFIR, in relation to exchange-traded derivatives only, for a period of 30 months. MiFIR expresses this threshold as an annual notional amount traded of €1,000,000 million.

To calculate annual notional amount, ESMA suggests a trading venue should be required to aggregate the notional amount of every transaction in exchange-traded derivatives concluded under its rules for the preceding calendar year, and sum this with the equivalent calculations for any other trading venues within its group that are based in the European Union. ESMA also sets out examples of how notional amounts should be calculated for certain instrument types.

#### ***NON-DISCRIMINATORY ACCESS TO AND OBLIGATION TO LICENSE BENCHMARKS***

MiFIR requires that a person with proprietary rights to a benchmark ensure that CCPs and trading venues are permitted non-discriminatory access to certain information relating to the benchmark, and to licences.

#### ***INFORMATION TO BE MADE AVAILABLE THROUGH LICENSING***

ESMA has been mandated to formulate RTS specifying the information to be made available to CCPs and trading venues by the proprietary owners of benchmarks, and its proposals are summarised below:

- i. Relevant price and data feeds: Relevant information must be available, which includes a feed of the benchmark values, where access is made available as soon as the benchmarks are calculated.
- ii. Composition: When the benchmark seeks to measure, replicate or track a group of assets, relevant information would include the constituents of the benchmark and weightings. ESMA

notes that where this information is not available, the details on the methodology used to determine the benchmark should be clear and comprehensive to CCPs and trading venues.

- iii. Methodology: The Discussion Paper sets out the information ESMA considers to be relevant in relation to methodology, which is in line with the IOSCO Principles for Benchmarks.
- iv. Pricing: Relevant information in respect of pricing would include values, types and sources of inputs, for example, the constituents used to develop benchmark values.
- v. Other information: ESMA considers that trading venues and CCPs should be notified of any inaccuracy in the benchmark calculation and of the updated benchmark, and of any changes to the technical features of the data feed.

#### ***OTHER CONDITIONS FOR GRANTING OF ACCESS***

ESMA acknowledges that it is important to balance the regulatory goal under MiFIR of providing CCPs and trading venues with non-discriminatory access to benchmarks against the proprietary rights held by the owner of the benchmark. A key proposal by ESMA in this respect is that persons with proprietary rights in the benchmark may decide how to license relevant information to users of CCPs and trading venues. For example, relevant information can be licensed directly to users or via the trading venue or CCP.

ESMA also proposes certain conditions to be complied with by parties to a benchmark licence agreement. These include requirements that the information provided by parties be kept up-to-date and used only for specific purposes, the parties agree on procedures for communication, dispute resolution, termination and risk management, and that the licence agreement meet certain standards, including those relating to transparency, monitoring and not impeding the parties' ability to extend existing access arrangements.

#### ***STANDARDS GUIDING HOW A BENCHMARK MAY BE PROVED TO BE "NEW"***

MiFIR permits the person holding the proprietary rights to a "new" benchmark to postpone the obligation to license the benchmark for a period of 30 months. MiFIR requires that a person with proprietary rights to a new benchmark, who also owns an existing benchmark, establish that the new benchmark meets certain criteria relative to the existing benchmark. These criteria are that the benchmark is not a duplication or an adaptation of, or a substitute for, an existing benchmark, and that the methodology of the new benchmark is substantially different from the methodology of the existing benchmark. ESMA has been mandated to specify standards guiding how a benchmark may be proved to be new.

ESMA considers that a benchmark may be less likely to be new in certain circumstances. Examples of indicators that a benchmark is not new are if the contracts based on the newer benchmark are fungible or capable of being netted by a CCP with contracts based on an existing benchmark, the regions/industry sectors covered by the new and the established benchmarks are the same or relatively similar, the benchmark values are highly correlated or the methodologies of each benchmark are the same or relatively similar.

## UPCOMING SPECIAL REPORTS

In the coming days, FIA and FIA Europe will issue will issue special reports on the remaining topics addressed in the two papers:

- 1) **Market Infrastructure** (requirements for organisation of new trading venues and impact of the new obligation to trade on those venues)
- 2) **Investor Protection**
- 3) **Algorithmic and High Frequency Trading** (defining terms and regulating activities)
- 4) **Third Country Access** (treatment of third country firms accessing EU customers)
- 5) **Reporting of Instruments**
- 6) **Transparency Requirements for Instruments**

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Additional MiFID II/MiFIR documents are available [here](#).

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