MiFID II DEA REQUIREMENTS: IMPLEMENTATION SUMMARY

14 December 2017

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Section 1: EU-Level Law & Guidance	
Third-Country Passport (Wholesale Activities)	MiFIR establishes a formal third-country regime for third-country firms that engage in wholesale investment services activities. Under this regime, a third-country firm may engage in wholesale investment services and activities across the European Union (the "**Third-Country Passport**") if: • the European Commission has determined that the prudential and business conduct rules of the relevant third-country jurisdiction have equivalent effect to the provisions of MiFID II, MIFIR and CRD IV; • the third-country firm is subject to appropriate supervision in its home jurisdiction; and • appropriate cooperation arrangements are in place between ESMA and the regulatory authorities of the relevant third-country jurisdiction. The Third-Country Passport regime becomes mandatory three years following the equivalence determination.
ESMA DEA Q&A 23	*Are the suitability checks and controls a DEA provider should perform on clients using the service also applicable in case of clients that are not investment firms authorised in the EU?* **Answer 23** Yes, the obligations that fall on a DEA provider as per Article 17(5) of MiFID II and as specified in RTS 6 apply regardless whether the client is an authorised EU investment firms or not. In particular, all clients accessing an EU trading venue through the sub-delegated DEA should be subject to the controls and suitability checks of Article 17(5) of MiFID II as well as provisions of Articles 19 to 23 of RTS 6.
ESMA DEA Q&A 24	*Can DEA clients accessing an EU trading venue through sub-delegated DEA benefit from the exemption offered under Article 2(1)(d) of MiFID II?* **Answer 24** Article 2(1)(d) of MiFID II exempts persons dealing on own account in financial instruments from the requirement to be authorised as a MiFID investment firm. However, it also lists a set of circumstances where such an exemption does not apply, including where such persons have DEA to a trading venue. Article 4(1)(41) of MiFID II defines DEA as "an arrangement where a member or participant or client of a trading venue permits a person to use its trading code so the person can electronically transmit orders relating to a financial instrument directly to the trading venue". A person who directly interacts with the member to obtain the use of the trading code will be the person granted permission under an arrangement. The DEA provider has direct knowledge of that person's use and must be taken to allow it; such a person (Tier 1 DEA client) therefore should be understood to have DEA to a trading venue. However, in some cases a DEA provider may allow a DEA user to sub-delegate the access rights onto a third entity (Tier 2 DEA client). Unlike a Tier 1 DEA client who directly interacts with the member to obtain the use of the trading code, a Tier 2 DEA client would, in most cases, not technically be in possession of

	the trading code of a DEA provider. The trading code is not passed down to the ultimate users of DEA, but only appended to the order message by the DEA provider before being submitted to the trading venue. Therefore, ESMA does not consider such Tier 2 DEA clients as having DEA for the purposes of Article 2(1)(d) of MiFID II. ESMA notes that any risks posed by Tier 2 DEA clients are indirectly regulated through the provisions of Article 17(5) of MiFID II as well as Articles 22 and 23 of RTS 6. In addition, Article 21(4) of RTS 6 requires the DEA providers to be able to identify the different order flows from the beneficiaries of such sub-delegation without being required to know the identity of the beneficiaries of such arrangement.
ESMA DEA Q&A 25	*Does a firm need to be authorised as an investment firm under MiFID II to provide DEA to an EU trading venue?* **Answer 25** Yes, Article 48(7) of MiFID II provides that trading venues should only permit a member or participant to provide DEA "if they are investment firms authorised under [MiFID II] or credit institution authorised under Directive 2013/36/EU". Therefore, non-EU firms (including non-EU firms licensed in an equivalent jurisdiction) or EU firms without a MiFID II licence are not allowed to provide DEA to their clients. This applies regardless of where the clients using the DEA service are located.
ESMA Multilateral Systems Q&A 4	*Can a person that is not authorised as an investment firm but meets the requirements of Article 53(3) of MiFID II be a member or participant of a regulated market or an MTF?* **Answer 4** Yes. Article 53(3) of MiFID II provides that an entity that is not an investment firm or a credit institution can be a member of a regulated market under certain conditions, this rule being extended to MTFs by Article 19(2) of MiFID II. ESMA considers that this provision should be read in conjunction with the requirements of Article 2(1). Under this provision, a person falling under any of the categories listed in Article 2(1) would not have to be authorised as an investment firm. However, pursuant to Article 2(1)(d) (ii) of MiFID II, when a person dealing on own account in financial instruments other than commodity derivatives or emission allowances or derivatives thereof and not providing any other investment services or performing any other investment activities in such instruments is also a member of or a participant in a regulated market or an MTF, it falls under the scope of MiFID II, and should accordingly be authorised as an investment firm unless: • it is exempted under points (a), (i) and (j); or • it is a non-financial entity which executes transactions on a trading venue which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of that non-financial entity or its group. As a consequence, the reference in Article 53(3) to persons other than investment firms and credit institutions only relates to entities that are exempted from authorisation under Article 2(1), such as insurance companies or collective investment undertakings, as long as their own regulatory framework permits them to do so. This Q&A does not address the issue of non-EEA firms being a member or participant of an EEA trading venue.

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Section 2: National-Level Guidance							
What is the name of the relevant national competent authority (NCA)?	Autorité des Marchés Financiers (AMF)	Bundesanstalt für Finanzdients-leistungsaufsicht (BaFin)	Commissione Nazionale per le Società e la Borsa (Consob)	Autoriteit Financiële Markten (AFM)	Komisji Nadzoru Finansowego / Polish Financial Supervision Authority (KNF)	Comisión Nacional del Mercado de Valores (CMNV)	Finansinspektionen (FI)
Has the NCA published any formal guidance on MiFID II DEA requirements?	No	No	Not Available / Unknown	No	Not Available / Unknown	Not Available / Unknown	Not Available / Unknown
Is it expected that the NCA will publish any (further) guidance on MiFID II DEA requirements?	Not Available / Unknown	Possibly	Not Available / Unknown	Possibly	Not Available / Unknown	Not Available / Unknown	Not Available / Unknown
Has the NCA provided any unpublished guidance on MiFID II DEA requirements?	Not Available / Unknown	Yes	Not Available / Unknown	Yes	Not Available / Unknown	Not Available / Unknown	Not Available / Unknown
What is the current industry consensus on how the MiFID II DEA requirements will be implemented in practice?	It is our current understanding that, although third-country firms may be members of a French trading venue, they will not be able to act as DEA providers for the reasons set out in ESMA DEA Q&A 25. Tier 1 DEA Clients dealing on own account must be authorised as investment firms as provided in ESMA DEA Q&A 24.	It is our current understanding that, although third-country firms may be members of a German trading venue, they will not be able to act as DEA providers for the reasons set out in ESMA DEA Q&A 25, regardless of any supervisory equivalence determination by BaFin. Third-country firms may choose to offer order routing services as an alternative.	It is our current understanding that, although third-country firms may continue to be members of an Italian trading venue, they will not be able to act as DEA providers for the reasons set out in ESMA DEA Q&A 25. The authorisation of a third-country Tier 1 DEA Client acting in an agency execution-only capacity when providing sub-delegated DEA to a	It is our current understanding that, although third-country firms may be members of a Dutch trading venue, they will not be able to act as DEA providers for the reasons set out in ESMA DEA Q&A 25. Tier 1 DEA Clients dealing on own account must be authorised as investment firms as provided in ESMA DEA Q&A 24.	Not Available / Unknown	Third-country firms may continue trade for their own account or execute client orders, unless the Minister of Economics and Finance deems that Spanish entities are not given the equivalent treatment or where compliance with the rules of order and discipline in the Spanish securities market is not guaranteed. How this view has been affected by ESMA DEA Q&A	Not Available / Unknown

* Local law provides an exemption for own-account dealing firms that trade only to hedge their commercial risks or for cash management purposes.
** The response "Yes" includes where the requirement is not express under local law but instead only "investment firms" (or the local equivalent) are identified as able to act as DEA Providers.
*** Dutch law appears to require that DEA Providers have a bank license, which could preclude U.S./Swiss/Australian firms from being DEA Providers. Local counsel believes this result may be unintended.
**** Spanish law (still in draft) does not specify the process or requirements for how a third-country firm may obtain authorisation from the CNMV.

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	The authorisation of a third-country Tier 1 DEA Client acting in an agency execution-only capacity when providing sub-delegated DEA to a third-country Tier 2 DEA Client remains to be determined.	Tier 1 DEA Clients dealing on own account must be authorised as investment firms as provided in ESMA DEA Q&A 24. Third-country proprietary firms will need to apply for a case-by-case supervisory equivalence determination under transitional powers granted to BaFin. Applications must be submitted between 3 January and 2 July 2018. BaFIN will check the application for completeness, and the application will be held pending further guidance from ESMA. Until such guidance is forthcoming, the firm can continue to access German markets. The authorisation of a third-country Tier 1 DEA Client acting in an agency execution-only capacity when providing sub-delegated DEA to a	third-country Tier 2 DEA Client remains to be determined.	Dutch law is in the process of being amended to allow a third country proprietary firm to be exempt from authorisation by the AFM (similar to the UK). The authorisation of a third-country Tier 1 DEA Client acting in an agency execution-only capacity when providing sub-delegated DEA to a third-country Tier 2 DEA Client remains to be determined.		24 and 25 remains to be determined.	

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		third-country Tier 2 DEA Client remains to be determined.					

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Section 3: National Legal Implementation							
Legal Summary	No express relief for third-country firms.	Transitional relief available; requires submission to BaFin by 2 July 2018.	A third-country firm must establish a local branch that must be authorised.	Currently, relief only for regulated U.S./Swiss/Austr. firms.***	A third-country firm must establish a local branch that must be authorised.	No express relief for third-country firms; 6-month transitional period to obtain a license.	A third-country firm must establish a local branch that must be authorised.
In General							
Have the MiFID II own-account dealing provisions been implemented under local law?	Yes	Yes	Yes	No (in draft only)	No (in draft only)	No (in draft only)	Yes
Does local law use the MiFID II definition of DEA?	Yes	No material changes	Yes	Yes	Yes	Yes	No material changes
Are own-account dealing firms with DEA to a trading venue required to be authorised?	Yes*	Yes	Yes	Yes	Yes*	Yes*	Yes*
*Are DEA providers required to be authorised?***	Yes	Yes	Yes	Yes***	Yes	Yes	Yes
Are own-account dealing firms that are members of a regulated market or MTF required to be authorised?	Yes*	Yes	Yes	Yes	Yes*	Yes*	Yes*
Third-Country Firms – Authorisation							
Are there any specific exemptions from authorisation for third-country firms?	No	Yes	Yes	U.S./Swiss/Australia	Yes	No****	Yes
Third-Country Firms – Exemptive Relief							

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Does the relief require establishing a branch in the local jurisdiction?	N/A	No	Yes	No	Yes	N/A	Yes
To qualify, must a third-country firm be authorised and effectively supervised in its home jurisdiction?	N/A	No	Yes	Yes	Yes	N/A	Yes
To qualify, must a third-country firm limit its activities to wholesale clients?	N/A	Yes	No	No	No	N/A	No
Does the exemption require a filing or other submission to be made?	N/A	Yes	Yes	Yes	Yes	N/A	Yes
Does national law specify the contents the submission must take?	N/A	Yes	No	Yes	Yes	N/A	Yes
To whom must the filing be made?	N/A	BaFin	Consob	AFM	KNF	N/A	FI
Is there a specific deadline for such filing?	N/A	2 July 2018	No	No	No	N/A	No
What is the effect of the exemptive relief?	N/A	Third-country firms remain temporarily exempt from authorisation until such time as they are able to benefit from an EU-wide equivalence determination.	A third-country firm may provide investment services or perform investment activities from a branch in Italy.	U.S., Swiss and Australian firms regulated in their home jurisdiction do not require a license from the AFM.*** **NB:** Local law may adopt a UK-style overseas person exemption for dealing on own account, and there is a proposal to extend equivalence to Canada, Hong Kong, Japan, and Singapore.	A third-country firm may provide investment services or perform investment activities from a branch in Poland.	N/A	A third-country firm may conduct securities operations from a branch in Sweden. **NB:** Local law remains unclear whether third-country firms could be exempt on the basis of not conducting investment operations in the EEA.

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