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Additional Information

Level 1 Regulation

Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Secondary Markets

Level 2 Regulation

Regulation 2017/589 - RTS specifying the organisational requirements for investment firms (RTS 6)

Level 3 Regulation

ESMA70-872942901-38 - Q&A on MiFID II and MiFIR market structures topics

Topic

Direct Electronic Access and algorithmic trading

Additional Legal Reference

Regulation 2017/584- RTS on organisational requirements for trading venues (RTS 7)

Subject Matter

EU trading venue through sub-delegated DEA and exemption offered under Article 2(1)(d) of MiFID II

Question

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?

ESMA Answer

15-11-2017

Original language

[ESMA 70-872942901-38 MiFID II MiFIR market structures Q&A, Q&A 3.24]

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.