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Additional Information

Level 1 Regulation
Markets in Financial Instruments Regulation (MiFIR) Regulation (EU) No 600/2014 - Investor Protection and Intermediaries

Topic
Recording of telephone conversations and electronic communications

Subject Matter
Recording of telephone conversations and electronic communications

Question
Do the record keeping requirements set out in Article 16(7) of MiFID II apply only when, through a given channel, the execution and transmission of the order is allowed in addition to the reception and transmission of the order?

ESMA Answer

10-07-2017

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 3, question 12]

No.

ESMA considers that the content of Article 16(7) of MiFID II and the related Article 76 of the MiFID II Delegated Regulation does not support the narrow interpretation that telephone conversations and electronic communications should be recorded only when, through a given channel, the execution and transmission of the order is allowed in addition to the reception and transmission of the order.

The first subparagraph of Article 16(7) of MiFID states “Records shall include the recording of telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders”. The inclusion of language such as “relate to” points to a wider reading of the recording requirement.

This reading is also supported by the provision included in the second subparagraph of Article 16(7) of MiFID II which makes it clear that the conclusion of a transaction is not a prerequisite for the requirement to record relevant conversations or communications to apply.

Article 16(7) is intended to apply to specific MiFID services that are set out in Annex 1, Section A of MiFID II. ‘Reception and transmission’ is a separate MiFID service to execution, so the recording requirement must apply separately to situations when a firm receives and transmits a client order, irrespective of whether the execution and transmission of the order is allowed on that given channel.

Finally, we note that Recital 57 of MiFID II underlines the importance of such records involving client orders, for the reasons set out in the CESR technical advice to the Commission:

- to show the intention behind trading and the knowledge of the person at the point at which they trade, which are matters that are often not easily established, but may be crucial in a successful enforcement case;

- to assist the national competent authorities in assessing an investment firms' on-going compliance with market abuse requirements and conduct of business obligations and, in particular, with the requirements in MiFID on information to clients and potential clients, on best execution and on client order-handling; and

- to ensure that there is evidence to resolve disputes between an investment firm and its clients over the terms of transactions, being in some cases the sole evidence to be relied on in the event of a dispute.

ESMA believes that the above objectives could not be achieved if the MiFID II telephone recordings requirements were not applied to all orders given by clients and independently from the fact that through a given channel, the execution and transmission of the order is allowed in addition to the reception and transmission of the order.