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Additional Information

Level 1 Regulation

Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries

Topic

Appropriateness

Subject Matter

Appropriateness Complex Financial Instruments

Question

Can shares in non-UCITS collective investment undertakings explicitly excluded under point (i) of Article 25(4)(a) of MiFID II be nevertheless assessed against the criteria set out in Article 57 of the MiFID II Delegated Regulation and as a consequence potentially be deemed non-complex financial instruments for the purposes of the appropriateness test?

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Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 10, question 1]

No. Article 25(4) of MiFID II allows, subject to certain conditions, MiFID firms to provide execution and/or reception and transmission of orders services without having to assess the appropriateness of the product for the client. One condition is that the service to be provided does not relate to a complex product. MiFID II has further clarified which instruments should be deemed complex per se.

Shares in non-UCITS explicitly excluded from the universe of non-complex products are complex per se and cannot be reassessed against the criteria set out in Article 57 of the MiFID II Delegated Regulation. This approach is confirmed by Recital 80 of MiFID II which clarifies that: *“Investment firms are allowed to provide investment services that consist only of execution and/or of the reception and transmission of client orders, without the need to obtain information regarding the knowledge and experience of the client in order to assess the appropriateness of the service or the financial instrument for the client. Since those services entail a relevant reduction of client protection, it is appropriate to improve the conditions for their provision. (...). It is also appropriate to better define the criteria for the selection of the financial instruments to which those services should relate in order to exclude certain financial instruments, including those which embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved, shares in undertakings that are not undertakings for collective investment in transferable securities (UCITS) (non-UCITS collective investment undertakings) and structured UCITS as referred to in the second subparagraph of Article 36(1) of Commission Regulation (EU) No 583/2010”* (our underlining)¹.

The treatment of shares (or units²) in non-UCITS as complex products does not prohibit firms from selling these instruments but only ensures a higher level on investor protection by requiring MiFID firms to carry out the appropriateness test before providing MiFID execution

services in relation to these instruments.

1. This position has also been stated by ESMA in its Technical Advice on MiFID II (19 December 2014, ESMA/2014/1569).

2. ESMA has already clarified that investments in non-UCITS collective investment undertakings should be considered complex, regardless of whether they take the legal form of shares or of units (ESMA/2014/1569, page 159).