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Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries

Topic
Client categorisation

Subject Matter
Client categorisation

Question
How should an investment firm assess whether a private individual investor may be treated, on request, as a professional client under Section II of Annex II of MiFID II?

ESMA Answer

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Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch. 11, question 3]

As Section II of Annex II of MiFID II allows some of the protections afforded to retail clients by the conduct of business rules to be waived, such provisions are expected to be relied upon in a reasonable and carefully considered manner that is also consistent with an investment firm's overarching duty to act in the best interest of its clients.

As a reminder, in accordance with the third paragraph of Section II.1, private individual investors may be treated as professional clients only if an adequate assessment of their expertise, experience and knowledge gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making investment decisions and understanding the risks involved. For instance, the fulfilment by a private individual investor of two of the criteria provided in the fifth paragraph of Sub-Section II.1 is an indication that such client may be treated as a professional client. However, such test may not be sufficient to justify the acceptance of a request for waiver received under Sub-Section II.2. Depending on the circumstances (e.g. the category of products the client intends to trade), a more thorough analysis of the client's expertise, experience and knowledge may be required.

Therefore, retail clients that do not meet at least two of the criteria set out in the fifth paragraph of Section II.1 shall not be treated as professional clients. Still, investment firms should not automatically accept to treat as professional clients those who do meet two or more of these criteria.

In addition, in accordance with the second paragraph of Section II.2, investment firms are expected to take all reasonable steps to ensure that a retail client that requested to be treated as a professional client meets the requirements of Section II.1. Whilst investment firms should use their discretion to determine the reasonable steps needed, they should avoid relying solely on self-certification by the client and should consider obtaining further evidence to support assertions that the client meets the identification criteria at that point in time, notably when they consider that the documents or statements received from the clients are not sufficiently conclusive.

For instance, when assessing whether a client meets the criteria set out under the third limb of the fifth paragraph of Section II.1 of Annex II, investment firms must ensure that the position was professional in nature and held in a field that allowed the client to acquire knowledge of transactions or services that have comparable features and a comparable level of complexity to the transactions or services envisaged. Consequently, knowledge gathered in relation to simple products may not be relied upon where a private individual investor requests to be treated as a professional client in respect of more complex products (e.g. knowledge related to vanilla government bonds should not be relevant with respect to envisaged transactions in complex derivatives).

The assessment conducted by the investment firm of the expertise, experience and knowledge of the client shall give the investment firm reasonable assurance that the client is capable of making investment decisions in, and understanding the risks involved with respect to, each type of transactions and services envisaged.

Investment firms shall also maintain adequate recording and retention arrangements in order to demonstrate compliance with the procedure under Section II.2 of Annex II of MiFID II to their national competent authorities.