

PUBLIC STATEMENT

COVID-19: Clarification of issues related to the application of MiFID II requirements on the recording of telephone conversations

1. The outbreak of COVID-19 (Coronavirus) and its global spread has created significant immediate challenges to societies, economies and to financial institutions. The European Securities and Markets Authority (ESMA) is issuing this Statement to clarify issues regarding the application by credit institutions and investment firms (referred to as "firms") of the MiFID II¹ requirements on the recording of telephone conversations.²
2. MiFID II states that mandatory records to be kept by firms include, amongst other things, recording of telephone conversations 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 orders.
3. ESMA has issued numerous Q&As to assist firms in the application of these requirements³. In Q&A 10 ESMA had already clarified that

"Firms may permit relevant persons to use mobile devices to undertake activities relating to transactions concluded when dealing on own account and the provision of client order services. This includes devices owned by the firm which are expressly authorised for use and devices which are personally owned and used to make relevant conversations. Whatever the circumstance, a firm shall take all reasonable steps to prevent a relevant person from making, sending or receiving relevant telephone conversations and electronic communications on devices which the firm is unable to record or copy.

Firms are required to establish, implement and maintain an effective recording of telephone conversations and electronic communications policy. This policy should therefore cover the requirements relating to mobile devices.

For example, the policy should cover, amongst other factors, the fact that data must be retained for a period of at least 5 years, relevant persons should be prevented from being able to delete records. It should cover what happens to the data/device if a relevant person leaves a firm and what happens in the event that the device is lost or stolen. Additionally, it should also stipulate the frequency of transferring data from the

¹ Directive 2014/65/EU of the European Parliament and of the Council and its implementing measures.

² See Article 16(7) of MiFID II.

³ See ESMA Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics (Ref: ESMA35-43-349).

mobile device (whether privately owned or expressly authorised for use by the firm) to the firm's own data retention database."

4. When the above arrangements cannot be put in place, firms are required to adopt any alternative arrangements to ensure full compliance with existing regulatory requirements such as the use of recordable electronic communications as an alternative to telephone conversations.
5. ESMA however recognises that, considering the exceptional circumstances created by the COVID-19 outbreak, some scenarios may emerge where, notwithstanding steps taken by the firm, the recording of relevant conversations may not be practicable (for example due to the sudden remote working by a significant part of staff, or the lack of access by clients to electronic communication tools).
6. If, under these exceptional scenarios, firms are unable to record voice communications, ESMA expects them to consider what alternative steps they could take to mitigate the risks related to the lack of recording. This could include the use of written minutes or notes of telephone conversations when providing services to clients, subject to prior information being provided to the client of the impossibility to record the call and that written minutes or notes of the call will be taken instead. In these scenarios, firms should also ensure enhanced monitoring and ex-post review of relevant orders and transactions.
7. In these circumstances, ESMA expects firms to deploy all possible efforts to ensure that the above measures remain temporary and that recording of telephone conversations is restored as soon as possible.