

23 March 2020

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

### Background

On 20<sup>th</sup> March 2020, ESMA issued a [public statement](#) in order to clarify a number of issues arising in relation to the application of MiFID II requirements.

ESMA acknowledges that the COVID-19 outbreak and its global spread has created significant and immediate challenges to societies, economies and to financial institutions. In this scenario, ESMA is issuing this [public statement](#) in order to clarify MiFID II requirements on the recording of telephone conversations.

MiFID II states that mandatory records to be kept by investment 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.

In this respect, reference is made to the [ESMA Q&As](#) in particular to **Section 3 'Recording of telephone conversations and electronic communications', Q&A 10**. The latter is in relation to the use of mobile devices in undertaking activities relating to transactions concluded when dealing on own account and the provision of client order services.

ESMA's [public statement](#) states that when the processes as indicated in the above referred Q&A cannot be implemented, investment firms are required to adopt any possible arrangements to ensure full compliance with existing regulatory requirements such as the use of recordable electronic communications as an alternative to telephone conversations.

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 work by significant part of staff, or the lack of access by clients to electronic communication tools).

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 outstanding risks relating to lack of recording. This could include the use of written minutes or notes of telephone conversations when providing services to clients, subject to a prior information 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, investment firms should also ensure enhanced monitoring and ex-post review of relevant orders and transactions.

In these circumstances, ESMA expects investment firms to deploy all possible efforts to ensure that the above measures remain temporary and that full compliance with the existing requirements is restored as soon as possible.

#### Target Audience

The content of this circular (including ESMA's [public statement](#)) is aimed at investment firms and credit institutions providing investment services.

#### Way Forward

Kindly reach out to the following email address: [offsiteinv@mfsa.mt](mailto:offsiteinv@mfsa.mt) should you require any clarifications or should be experiencing any issues in relation to the recording of telephone conversations.