



MiFID II  
Product  
Governance

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### Quick Read

1. MiFID II imposes a series of product governance rules on firms which manufacture and/or distribute MiFID type financial instruments or who sell or advise on structured deposits ("**investment products**"). Firms to which the obligations apply are MiFID II investment firms, credit institutions when providing MiFID II investment services and activities, and UCITS ManCos and AIFMs who have extended their authorisations to include portfolio management and, potentially, non-core services but only in respect of those extended services.
2. The rules are found in MiFID II (Articles 16(3) and 24(2)), elaborated upon by detailed additional provisions set down in the Commission Delegated Directive (Articles 9 and 10). ESMA has also issued *Guidelines on MiFID II product governance requirements* which focus on one element of the requirements, the target market assessment.
3. The aim of the product governance rules is to ensure that manufacturers and distributors of investment products act in the client's best interests during all stages of the life-cycle of products or services.
4. The rules require the manufacturer to :
  - to have a product approval process and governance arrangements which address conflicts of interest, market integrity, threats to the underlying functioning and stability of financial markets;
  - identify at a sufficiently granular level, the potential target market for the product and to specify the type(s) of client for whose needs, characteristics and objectives the product is compatible; and
  - make available to distributors all appropriate information on the investment product and the product approval process, including the identified target market.
5. The rules require the distributor to :
  - determine the actual target market for the product;
  - have product governance controls in place to ensure that products and services it offers or recommends are compatible with the needs, characteristics and objectives of an identified target market and that its distribution strategy is consistent with the identified target market;
  - ensure it can obtain all required information from the product manufacturers; and
  - comply with the normal MiFID disclosure, suitability/appropriateness assessment, inducements and conflicts of interest rules.

6. In addition, each of the manufacturer and distributor is required to ensure that:
  - its board has effective control over the product governance process;
  - its compliance function oversees and reviews the product governance arrangements;
  - its relevant staff have the necessary expertise to understand the characteristics and the risks of the products; and
  - regular (and at set times) reviews are carried out.
7. The rules reflect the different roles of manufacturer and distributor as the manufacturer generally does not interact with the end clients so only sees theoretical target markets, whereas the distributor's obligations relate to the actual target market and, in some cases, with the end clients it interacts with.
8. Proportionately applies "*in a way that is appropriate and proportionate.....taking into account the nature of the financial instrument, the investment service and the target market for the product.*"
9. Some product manufacturers may be out of scope of the rules (*the rules do not apply to UCITS ManCos or AIFMs, for example, except where they have extended their authorisations to MiFID II type investment services and then only in respect of those services*). However, they may, in practice, need to address the product governance rules as if they do not, they may not find any distributors (or may be left to self-distribute).
10. The rules apply to investment products manufactured within the EU, independently of where they are distributed.
11. All other relevant obligations still apply, including those relating to disclosure, suitability or appropriateness, identification and management of conflicts of interests, and inducements. In particular, the determination of target market is not the same as carrying out an assessment of suitability. The former is not about the particular circumstances of an individual client, whereas the latter very much is.
12. The rules apply from 3 January, 2018 and are expected to involve significant costs (IT, process enhancement, training costs, legal costs) for firms. But bear in mind that the rules will apply to product manufactured before 3 January 2018 which is distributed after that date, so firms should start work now.

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## MiFID II Product Governance

### Introduction

MiFID II brings with it many challenges, one of which is the new product governance regime which aims to ensure that manufacturers and distributors of investment products act in the client's best interests during all stages of the life-cycle of products and services.

This will require firms to apply the new rules to product which is distributed after 3 January, 2018 including product manufactured before then. In other words, firms need to not only put new processes and procedures in place in time for 3 January, 2018, they also need to carry out assessments of their existing product line if it is to be distributed after that date.

Given the recent publication by the European Securities and Markets Authority ("**ESMA**") on June 2, 2017 of its *Guidelines on MiFID II product governance requirements* (final report) [ESMA-35-43-620] (the "**ESMA Guidelines**"), now may be an opportune moment to revisit the MiFID II product governance rules.

### Where can I find the rules?

The product governance rules are found in Article 16(3) and Article 24(2) of MiFID II. Article 16(3) is set within the *Organisational requirements* provisions of MiFID II with particular focus on conflicts of interest whereas Article 24(2) is set within the *Investor protection* provisions of MiFID.

Detailed elaborations of the requirements are contained within the MiFID II Commission Delegated Directive 2017/593 (the "**Delegated Directive**"), Chapter III of which focuses on Product Governance requirements, segregating those applicable to product manufacturers (Article 9) from those applicable to distributors (Article 10).

In addition, the ESMA Guidelines focus on the target market assessment, setting out general guidelines; guidelines specifically for manufacturers; guidelines specifically for distributors; and guidelines on issues applicable to both. ESMA has also given a number of illustrative examples and case studies related to the application of certain aspects of its guidelines.

As ESMA has explained, the reason for its focus on target market assessment was because "*this aspect was identified as the most important one for ensuring the common, uniform and consistent application of the above-mentioned articles, also in order to enable the creation of a level-playing field that will facilitate cross-border activities*". Uniformity of approach as between manufacturers and distributors when dealing with concepts and terms which otherwise could be a source of confusion and uncertainty was seen as necessary.

### Who do the rules apply to?

The product governance rules apply to manufacturers and distributors of investment products who are:

- (i) investment firms (as defined in Article 4(1)(1) of MiFID II);
- (ii) credit institutions when providing investment services and activities (within the meaning of Article 4(1)(2) of MiFID II);
- (iii) investment firms and credit institutions when selling or advising clients in relation to structured deposits; and
- (iv) UCITS ManCos and external AIFMs (as defined in Article 5(1)(a) of the AIFMD) when providing the investment services of individual portfolio management or non-core services (within the meaning of Article 6(3)(a) and (b) of the UCITS Directive and Article 6(4)(a) and (b) of the AIFMD).

(each a “**firm**”)

To be clear, although MiFID II (and, consequently, its product governance rules) does not apply to UCITS ManCos or to AIFMs who are only engaged in managing UCITS or AIFs, those entities are likely in practice to have to deal with the product governance rules and to do all that is required of product manufacturers as their distributors are otherwise unlikely to offer or recommend their UCITS or AIFs.

#### **In respect of what product?**

The rules apply in respect of the manufacture for sale to clients of, and to the offering or recommending of, financial instruments (within the meaning of Article 4(1)(15) of MiFID II) and of structured deposits (within the meaning of Article 4(1)(43) of MiFID II).

Like ESMA we use the term “**investment product**” to refer to a financial instrument or to a structured deposit.

#### **Who are “manufacturers” or “distributors”?**

As best explained within the ESMA Guidelines :

- (i) the term “**manufacturer**” refers to a firm that manufactures an investment product, where manufacturing includes the creation, development, issuance or design of that product, including when advising corporate issuers on the launch of a new product; and
- (ii) the term “**distributor**” refers to a firm that offers, recommends or sells an investment product and service to a client.

It should be noted that in many cases the “manufacture” of an investment process might be a collaborative process and that the MiFID II firm may be collaborating with either an entity that is not within the scope of MiFID II (eg. a UCITS ManCo or an AIFM) or with a third-country entity. That requires the MiFID II firm to outline the mutual responsibilities of it and its collaborator(s) in a written agreement.

This may also require that fund platform providers and their UCITS ManCos and AIFMs may need to address product governance in an even more focused way than now.

## **Rules for Manufacturers**

The product governance rules applicable to firms which manufacture investment products for sale to clients are summarised below, with a later section dealing with the target market assessment and the ESMA Guidelines.

Product manufacturers are required to comply with the requirements in a way that is appropriate and proportionate, taking into account the nature of the investment product, the investment service and the product's target market.

### **Product Approval Process**

Product manufacturers must maintain, operate and review a process for the approval of each investment product and for significant adaptations of existing investment products before it is marketed or distributed to clients. That process must specify an identified target market of end clients within the relevant category of clients for each financial instrument and must ensure that all relevant risks to such identified target market are assessed and that the intended distribution strategy is consistent with the identified target market.

Firms must ensure that their investment products are designed to meet the needs of an identified target market of end clients within the relevant category of clients and they must also ensure that the product's distribution strategy is compatible with the identified target market. They must take reasonable steps to ensure that the product is distributed to the identified target market.

### **Identifying the Potential Target Market**

The potential target market for each investment product must be identified by the firm at a sufficiently granular level, and the type(s) of client for whose needs, characteristics and objectives the investment product is compatible must be specified. As part of that process, the firm must identify any group(s) of clients for whose needs, characteristics and objectives the financial instrument is not compatible. Note that where firms collaborate to manufacture a financial instrument, only one target market needs to be identified.

Firms manufacturing financial instruments that are distributed through other investment firms must determine the needs and characteristics of clients for whom the product is compatible based on their theoretical knowledge of and past experience with the financial instrument or similar financial instruments, the financial markets and the needs, characteristics and objectives of potential end clients. Firms must check whether an investment product financial instrument meets the identified needs, characteristics and objectives of the target market and that process must involve checking whether the financial instrument's risk/reward profile is consistent with the target market and whether the design of the product is driven by features that benefit the client and not by a business model that relies on poor client outcomes to be profitable.

## **Conflicts of Interest**

Conflicts of interest have to be taken into account in the product approval process and the product governance arrangements need to ensure that the product manufacturing process complies with the requirements on proper management of conflicts of interest, including remuneration.

In particular, manufacturers have to ensure that the investment product's design, including its features, does not adversely affect end clients nor lead to problems with market integrity by enabling the firm to mitigate and/or dispose of its own risks or exposure to the underlying assets of the product, where the firm already holds the underlying assets on own account;

The Delegated Directive addresses this in very clear terms where it says that potential conflicts of interests must be analysed each time a financial instrument is manufactured and in particular, firms must assess whether the financial instrument creates a situation where end clients may be adversely affected if they take:

- (i) an exposure opposite to the one previously held by the firm itself; or
- (ii) an exposure opposite to the one that the firm wants to hold after the sale of the product;

## **Threat to Financial Markets**

Before deciding to proceed with the launch of the product, firms are also required to consider whether the financial instrument may represent a threat to the orderly functioning or to the stability of financial markets

## **Board Control**

Firms are required to ensure that the board has effective control over the firm's product governance process and that the compliance reports to the board systematically include information about the financial instruments manufactured by the firm, including information on the distribution strategy. Investment firms shall make the reports available to their competent authority on request;

## **Expertise of Staff**

Firms are required to ensure that relevant staff involved in the manufacturing of investment products possess the necessary expertise to understand the characteristics and risks of the investment products they intend to manufacture.

## **Monitoring by Compliance Function**

The firm's compliance function must monitor the development and periodic review of product governance arrangements in order to detect any risk of failure by the firm to comply with its relevant obligations.

## **Collaborators**

Firms are required, where they collaborate, including with entities which are not authorised and supervised in accordance with Directive 2014/65/EU or third-country firms, to create, develop, issue and/or design a product, to outline their mutual responsibilities in a written agreement.

## **Risks of Poor Outcomes**

Product manufacturers must assess the risks of poor outcomes for end clients posed by the product and in which circumstances those outcomes may occur. They must assess the product under negative conditions covering what would happen if, for example:

- (i) the market environment deteriorated;
- (ii) the manufacturer or a third party involved in manufacturing and or functioning of the product experiences financial difficulties or other counterparty risk materialises;
- (iii) the product fails to become commercially viable; or
- (iv) demand for the product is much higher than anticipated, putting a strain on the firm's resources and/or on the market of the underlying instrument.

## **Proposed Charging Structure**

The proposed charging structure for the investment product must be considered, including:

- (i) whether the product's costs and charges are compatible with the needs, objectives and characteristics of the target market;
- (ii) that charges do not undermine the product's return expectations, such as where the costs or charges equal, exceed or remove almost all the expected tax advantages linked to a product; and
- (iii) whether the charging structure of the product is appropriately transparent for the target market, such as that it does not disguise charges or is too complex to understand.

## **Provision of Information to Distributors**

Distributors must be provided with information about an investment product, including information about the appropriate channels for its distribution, the product approval process and the target market assessment. That information must be of an adequate standard to enable distributors to understand and recommend or sell the investment product properly.

## Regular Product Reviews

Firms must review the investment products they manufacture on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. The review should check whether the product remains consistent with the needs, characteristics and objectives of the target market and is being distributed to the target market, or is reaching clients for whose needs, characteristics and objectives the financial instrument is not compatible.

Products must also be reviewed prior to any further issue or re-launch if a firm is aware of any event that could materially affect the potential risk to investors and products should also be reviewed at regular intervals to assess whether they function as intended. The firm itself should determine how regularly to review its financial instruments based on relevant factors, including factors linked to the complexity or the innovative nature of the investment strategies pursued. Firms must also identify crucial events that would affect the potential risk or return expectations of the financial instrument, such as the crossing of a threshold that will affect the return profile of the financial instrument, or the solvency of certain issuers whose securities or guarantees may impact the performance of the financial instrument. When such events occur, firms must take appropriate action which the Delegated Directive indicates may consist of:

- (i) the provision of any relevant information on the event and its consequences on the financial instrument to the clients or the distributors of the product if the investment firm does not offer or sell the financial instrument directly to the clients;
- (ii) changing the product approval process;
- (iii) stopping further issuance of the financial instrument;
- (iv) changing the financial instrument to avoid unfair contract terms;
- (v) considering whether the sales channels through which the products are sold are appropriate where firms become aware that the product is not being sold as envisaged;
- (vi) contacting the distributor to discuss a modification of the distribution process;
- (vii) terminating the relationship with the distributor; or
- (viii) informing the relevant competent authority.

## **Rules for Distributors**

The product governance rules for firms which distribute (ie. firms which offer, recommend or sell) investment products are summarised below, with a later section dealing with the target market assessment and the related ESMA Guidelines.

Distributors are required to comply with the requirements in a way that is appropriate and proportionate, taking into account the nature of the investment product, the investment service and the product's target market.

### **Product Governance Arrangements**

Distributors need to understand the investment products they offer or recommend. They need to assess the compatibility of those investment products with the needs of the clients to whom they provide investment services, also taking account of the identified target market of end clients, and they need to ensure that investment products are only offered or recommended when that is in the interest of the client.

### **Identifying the Actual Target Market**

Distributors are required to put in place adequate product governance arrangements to ensure that products and services they intend to offer or recommend are compatible with the needs, characteristics, and objectives of an identified target market and that the intended distribution strategy is consistent with the identified target market.

Distributors also need to appropriately identify and assess the circumstances and needs of the clients they intend to focus on, so as to ensure that clients' interests are not compromised as a result of commercial or funding pressures. As part of this process, distributors must identify any groups of clients for whose needs, characteristics and objectives the product or service is not compatible.

### **Information from Manufacturer**

Where a firm offers or recommends financial instruments which it does not manufacture, it must obtain from the manufacturer all appropriate information on the product and the product approval process, including the identified target market of the financial instrument and to understand the characteristics and identified target market of each financial instrument.

Where the manufacturer is subject to MiFID II, the distributor must obtain information from that manufacturer to gain the necessary understanding and knowledge of the products it intends to recommend or sell in order to ensure that the products will be distributed in accordance with the needs, characteristics and objectives of the identified target market.

Distributors must also take all reasonable steps to ensure they obtain adequate and reliable information from manufacturers who are not subject to MiFID II to ensure that products will be distributed in accordance with the characteristics, objectives and needs of the target market.

Where relevant information is not publicly available, the distributor must take all reasonable steps to obtain such relevant information from the manufacturer or its agent. Acceptable publicly available information is information which is clear, reliable and produced to meet regulatory requirements, such as disclosure requirements under Directive 2003/71/EC (the “**Prospectus Directive**”) or 2004/109/EC (the “**Transparency Directive**”) of the European Parliament and of the Council. This obligation is relevant for products sold on primary and secondary markets and shall apply in a proportionate manner, depending on the degree to which publicly available information is obtainable and the complexity of the product.

Firms shall use the information obtained from manufacturers and information on their own clients to identify the target market and distribution strategy.

**NOTE :** Distributors must determine the target market for the respective financial instrument, even if the target market was not defined by the manufacturer. When a firm acts both as a manufacturer and a distributor, only one target market assessment is required.

**Don’t forget about suitability, appropriateness, etc.**

When deciding the range of investment products and services that they offer or recommend and the respective target markets, distributors must maintain procedures and measures to ensure compliance with all applicable requirements under MiFID II, including those relating to disclosure; assessment of suitability or appropriateness; inducements; and proper management of conflicts of interest.

### **Regular and Periodic Reviews**

Distributors must periodically review and update their product governance arrangements in order to ensure that they remain robust and fit for purpose, and take appropriate actions where necessary.

They must also review the products they offer or recommend and the services they provide on a regular basis, taking into account any event that could materially affect the potential risk to the identified target market. They must also check at least whether the product or service remains consistent with the needs, characteristics and objectives of the identified target market and whether the intended distribution strategy remains appropriate. They must reconsider the target market and/or update the product governance arrangements if they become aware that they have wrongly identified the target market for a specific product or service or that the product or service no longer meets the circumstances of the identified target market, such as where the product becomes illiquid or very volatile due to market changes.

## **Board Control**

The distributor's board must have effective control over the firm's product governance process to determine the range of products that it offers or recommends and the services provided to the respective target markets and firms must ensure that the compliance reports to the board systematically include information about the products they offer or recommend and the services provided.

## **Oversight by Compliance Function**

The distributor's compliance function must oversee the development and periodic review of product governance arrangements in order to detect any risk of failure by the firm to comply with its relevant obligations.

## **Staff Expertise**

Firms are required to ensure that relevant staff possess the necessary expertise to understand the characteristics and risks of the products that intend to offer or recommend and the services provided as well as the needs, characteristics and objectives of the identified target market;

## **Collaborations**

Where different firms work together in the distribution of a product or service, the firm with the direct client relationship has ultimate responsibility to meet the distributor product governance obligations. However, intermediary firms must:

- (i) ensure that relevant product information is passed from the manufacturer to the final distributor in the chain;
- (ii) if the manufacturer requires information on product sales in order to comply with their own product governance obligations, enable them to obtain it; and
- (iii) apply the product governance obligations for manufacturers, as relevant, in relation to the service they provide.

## Target Market Assessment

Target market identification, product and distribution strategy, and assessment and regular reviews against the needs, characteristics and objectives of the target market are all recurring themes within the obligations imposed on manufacturers and distributors of investment products.

The obligations are not the same for manufacturers and distributors, as manufacturers are generally looking to identify the potential target market (*the type(s) of client for whose needs, characteristics and objectives the investment product is compatible*) based on, inter alia, their theoretical knowledge and experience of the product, whereas the distributor's target market identification focuses on the "actual" target market for the product which may need to take into account the detailed information which the distributor may have on particular clients.

ESMA's Guidelines contain manufacturer specific and distributor specific guidelines on target market assessment, as well as guidelines which apply to both.

### Cumulative Categories for Manufacturers

For manufacturers, ESMA states that they should use the following cumulative list of categories as a basis for identifying the target market for their investment products:

- the type of clients to whom the product is targeted (using the MiFID II client categorisation of "retail client", "professional client" and / or "eligible counterparty")
- knowledge and experience that the target clients should have about elements such as the relevant product type, product features and/or knowledge in thematically related areas;
- financial situation with a focus on the ability to bear losses;
- risk tolerance and compatibility of the risk/reward profile of the product with the target market. ESMA says that the firms should use the risk indicator stipulated by the PRIIPs Regulation or the UCITS Directive, where applicable, to fulfil this requirement;
- clients' objectives and needs: this may vary from the specific to the more generic. ESMA gives examples (i.e. products designed to meet the needs of a specific age demographic, or specific objectives (such as. "green investment", "ethical investment" etc., as relevant).

The ESMA Guidelines go into these and related matters in significant detail, not addressed here.

### Distributors' Target Market Identification

For distributors, the ESMA Guidelines focus on the "actual" target market identification and indicate that the distributors should "*especially focus on the investment services through which the products will be offered to their respective target markets.*" This takes into account products

offered under the execution – only regime; those offered via the provision of portfolio management, etc.

The ESMA Guidelines also note that distributors should use the same list of categories used by manufacturers as a basis for defining the target market for their products. However, distributors should define the target market on a more concrete level and should take into account the type of clients they provide investment services to, the nature of the investment products and the type of investment services they provide.

The ESMA Guidelines also provide that distributors should conduct a thorough analysis of the characteristics of their client base, ie. existing clients, as well as prospective clients and that they should use any information and data deemed reasonably useful and available for this purpose that may be at the distributors' disposal and gathered through investment or ancillary services. In addition, they could use any information and data deemed reasonably useful and available that may be at the distributors disposal and gathered through sources other than the provision of investment or ancillary services.

The obligations on distributors are extensive and ESMA goes into great detail when dealing with various aspects of the distributor's activities including the interaction of the target market assessment with the investment services provided by the firm; the distributor's distribution strategy; where products might be distributed outside the target market; regular review obligations; and, very importantly, the distribution of products manufactured by entities which are not subject to MiFID II product governance requirements.

### **Products Manufactured by Out of Scope Entities**

Where the manufacturer is not subject to MiFID II product governance requirements, the distributor is expected to perform the necessary due diligence so as to provide an appropriate level of service and security to its clients compared to a situation where the product had been designed in accordance with the MiFID II product governance requirements. Particular focus is given to target market definition and to the information gathering process. In that latter regard, publicly available information (e.g. PRIIPs, KID or prospectuses, information disclosed in compliance is the Prospectus Directive, Transparency Directive or UCITS/AIFMD regimes or third-country equivalents) are acceptable.

### **Wholesale Markets**

The ESMA Guidelines also address target market requirements for firms dealing in wholesale markets (ie. with professional clients and eligible counterparties) noting that the requirements set out in Article 16(3) of MiFID II apply irrespective of the nature of the client (retail, professional or eligible counterparty). At the same time, Articles 16(3) and 24(2) MiFID II specify that the clients to be targeted shall be the "end-clients". ESMA has stated that that means that a firm does not need to specify a target market for other firms (professional clients and eligible counterparties) within the intermediation chain, but rather it needs to design the target market with the end-client in mind (ie. the final client in the intermediation chain).

## Timing

MiFID II product governance rules will apply from 3 January, 2018.

Products manufactured and distributed before 3 January, 2018 should not fall within the scope of the product governance requirements but products which were manufactured before 3 January, 2018 but which are distributed to investors after 3 January, 2018 should fall within the scope of product governance requirements applicable to distributors, in particular, the requirement to identify a target market for any financial product.

In that situation, the distributor should act as if the manufacturer was an entity not subject to MiFID II product governance requirements. When the target market has been identified by the manufacturer (on a voluntary basis/on the basis of commercial agreements with distributors) in line with these ESMA guidelines, ESMA has indicated that the distributor, after reviewing it with a critical look, could rely on that target market identification.

However, ESMA has also said that a target market should be assigned by the manufacturer to such products, at the latest, following the next product review process cycle that is conducted according to Article 16(3) of MiFID II after 3 January, 2018. The distributor should then consider this target market in its own review process.

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