

# Guidelines

on MiFID II product governance requirements

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## Guidelines

### 1. Scope

#### Who?

1. These guidelines apply to:

- Firms.
- Competent authorities.

#### What?

2. These guidelines apply in relation to the manufacturing or distribution of financial instruments and structured deposits. In particular, these guidelines apply in relation to the following requirements:

- i. Article 9(3) of Directive 2014/65/EU<sup>1</sup> (MiFID II);
- ii. Article 16(3) and 16(6) of MiFID II;
- iii. Article 24(1) and 24(2) of MiFID II;
- iv. Articles 9 and 10 of the Commission Delegated Directive (EU) 2017/593<sup>2</sup> (MiFID II Delegated Directive).

#### When?

3. These guidelines apply as from two months from the date of publication of the guidelines on ESMA's website in all EU official languages.

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<sup>1</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.06.2014, p. 349).

<sup>2</sup> Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (OJ L 87, 31.3.2017, p. 500-517).

## 2. Legislative references, abbreviations and definitions

### 2.1 Legislative references

ESMA Regulation		Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC <sup>3</sup>
MiFID II		Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU <sup>4</sup>
MiFID II regulation	Delegated	Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive <sup>5</sup>
Commission Regulation 2021/1253	Delegated (EU)	Commission Delegated Regulation (EU) 2021/1253 of 21 April 2021 amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms <sup>6</sup>

### 2.2 Abbreviations

ACP	Advisory Committee on Proportionality
CP	Consultation Paper
CSA	Common Supervisory Action
EC	European Commission
EEA	European Economic Area

<sup>3</sup> OJ L 331, 15.12.2010, p. 84.

<sup>4</sup> OJ L 173, 12.06.2014, p. 349

<sup>5</sup> OJ L 87, 31.3.2017, p. 1.

<sup>6</sup> OJ L 277, 2.8.2021, p. 1.

ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
EU	European Union
SMSG	Securities and Markets Stakeholder Group

## 2.3 Definitions

firms	investment firms (as defined in Article 4(1)(1) of MiFID II) and credit institutions (as defined in Article 4(1)(27) of MiFID II) when providing investment services and activities (as defined in Article 4(1)(2) of MiFID II), investment firms and credit institutions when selling or advising clients in relation to structured deposits, UCITS management companies (as defined in Article 2(1)(b) of UCITS Directive <sup>7</sup> ) and external Alternative Investment Fund Managers (AIFMs) (as defined in Article 5(1)(a) of the AIFMD <sup>8</sup> ) 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), in each case excluding where financial instruments are marketed or distributed exclusively to eligible counterparties (in accordance with the exemption in Article 16a of MiFID II)
products	financial instruments (within the meaning of Article 4(1)(15) of MiFID II), excluding bonds with no other embedded derivative than a make-whole clause in accordance with the exemption in Article 16a of MiFID II, and structured deposits (within the meaning of Article 4(1)(43) of MiFID II)
manufacturer	a firm that manufactures a product, including the creation, development, issuance or design of that product, including when advising corporate issuers on the launch of a new product;

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<sup>7</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32)

<sup>8</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 01.07.2011, p.1-73).

distributor

a firm that offers, recommends or sells a product and service to a client.

### 3. Purpose

4. These guidelines are based on Article 16(1) of the ESMA Regulation. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure the common, uniform and consistent application of the MiFID II requirements on product governance. In complying with these guidelines, ESMA anticipates a corresponding strengthening of investor protection.

## **4. Compliance and reporting obligations**

### **4.1 Status of the guidelines**

5. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with these guidelines.
6. Competent authorities to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

### **4.2 Reporting requirements**

7. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.
8. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.
9. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.
10. Financial market participants are not required to report whether they comply with these guidelines.



## 5. Guidelines on the application of Articles 16(3) and (6) and 24(2) of MIFID II

### 5.1 General

11. These guidelines should, in accordance with subparagraph 2 of Article 9(1), and subparagraph 1 of Article 10(1) of the MiFID II Delegated Directive, be applied in a way that is appropriate and proportionate, taking into account the nature of the product, the investment service and the target market of the product.
12. When a firm acts both as the manufacturer and distributor of products, the guidelines set out below apply as relevant, and as long as the firm meets all the applicable manufacturer and distributor obligations.
13. In general, firms acting as manufacturers and/or distributors should substantiate and document choices made in the context of their product governance arrangements, including with regard to the target market identification and related distribution strategies.

### 5.2 Guidelines for manufacturers

#### **Identification of the potential target market by the manufacturer: categories to be considered**

14. The potential target market identification by manufacturers should not solely be conducted on the basis of quantitative criteria but needs to be based on sufficient qualitative considerations as well. In identifying the target market for a product, manufacturers should also take into account the results of the scenario and charging structure analyses<sup>9</sup> undertaken for the relevant product<sup>10</sup>. Services for the mass market in particular, may require automation of processes and this automation is usually based on formulas or algorithmic methodologies that process quantitative criteria for products and clients. Such numerical data is usually generated through scoring systems (for example, by using product features like volatility of financial instruments, ratings of issuers, etc. or through “conversion” of factual data into numerical systems). With regard to the target market identification, firms should not exclusively rely on such quantitative criteria but sufficiently balance them with qualitative considerations.
15. Manufacturers should use the list of categories set out in these guidelines as a basis for identifying the target market for their products. The list of the categories is cumulative:

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<sup>9</sup> The terms “scenario” analyses and “charging structure” refer to the analyses required under respectively Article 9(10) and (12) of the MiFID II Delegated Directive.

<sup>10</sup> For example, the scenario analyses performed by the firm may reveal that a product’s value is particularly sensitive to negative market conditions, leading to the identification of a narrower target market in terms of clients’ risk tolerance. As another example, the charging structure analysis performed by the firm may reveal that the charging structure of the product is not compatible with the identified target market, leading the firm to modify the charging structure of the product and/or reassess the target market. ESMA provided guidance on the application of the charging structure analysis requirement in Q&A 16.2-4 of its Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics ([https://www.esma.europa.eu/sites/default/files/library/esma35-43-349\\_mifid\\_ii\\_qas\\_on\\_investor\\_protection\\_topics.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf)).

when assessing the target market, each manufacturer should use each of those categories. In doing so, a manufacturer should analyse the relevance of each category for a certain product and then align the depth of the identification in proportion to the type, nature and other features of the product (as described in paragraph 19-31 of the guidelines).

16. Manufacturers should detail/describe each of these categories, without merging categories, while taking into account their relationship and ensuring the consistency between different categories since they all contribute to the definition of the target market for a given product.
17. Manufacturers should not exclude any of the five below mentioned categories. If, in the manufacturers' view, these five categories are too restrictive to identify a meaningful target market, additional categories may be added. In the decision, whether to use such additional categories or not, manufacturers may take into account the characteristics of the information-channels with distributors. For example, in order to facilitate the exchange of information with distributors and to foster open architecture, manufacturers may limit the use of additional categories to cases where these are essential to define a meaningful target market for the product.
18. Manufacturers need to identify a potential target market<sup>11</sup>. As they usually do not have direct client contact, and in accordance with subparagraph 2 of Article 9(9) of the MiFID II Delegated Directive, this means that their target market identification may be based inter alia on their theoretical knowledge and experience of the product.
19. Manufacturers should use the following list of five categories:
  - a) The type of clients to whom the product is targeted: The firm should specify to which type of client the product is targeted. This specification should be made according to the MiFID II client categorisation of "retail client", "professional client" and/or "eligible counterparty". To avoid possible misuse of the exemption provided in Article 16a MiFID II<sup>12</sup>, the decision to market or distribute a product exclusively to eligible counterparties should clearly be made ex ante (either when performing the initial target market assessment or when performing periodic reviews), based on the firm's internal processes.
  - b) Knowledge and experience: The firm should specify the knowledge that the target clients should have about elements such as: the relevant product type, product features and/or knowledge in thematically related areas that help to understand the product. For example, for structured products with complicated return profiles, firms could specify that target investors should have knowledge of how this type of product works and the likely outcomes from the product. Regarding experience, the firm could describe how much practical experience target clients should have with elements such as: relevant product type, relevant product features and/or experience in thematically related areas. The

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<sup>11</sup> See Article 9(9) of the MiFID Delegated Directive.

<sup>12</sup> According to Article 16a of MiFID II, a firm is, inter alia, exempted from the product governance requirements where the financial instruments are marketed or distributed exclusively to eligible counterparties.

firm could specify, for example, a time period for which clients should have been active in the financial markets. Knowledge and experience may be dependent on each other in some cases (i.e., an investor with limited or no experience could be a valid target client if they compensate missing experience with extensive knowledge).

- c) Financial situation with a focus on the ability to bear losses: The firm should specify the percentage of losses target clients should be able and willing to afford (for example, from minor losses to total loss) and if there are any additional payment obligations that might exceed the amount invested (for example, margin calls). This could also be phrased as a maximum proportion of assets that should be invested.
- d) Risk tolerance and compatibility of the risk/reward profile of the product with the target market: The firm should specify the general attitude that target clients should have in relation to the risks of investment. Basic risk-attitudes should be categorised (for example, “risk oriented or speculative”, “balanced”, “conservative”) and clearly described. Since different firms in the chain may have different approaches to defining risk, the firm should be explicit about the criteria that must be met in order to categorise a client in this way. Firms should use the risk indicator stipulated by the PRIIPs Regulation<sup>13</sup> or the UCITS Directive, where applicable, to fulfil this requirement. Where relevant, firms should also consider the risks included in the narrative below the PRIIPs summary risk indicator, such as currency and/or liquidity risk.
- e) Clients’ Objectives and Needs: The firm should specify the investment objectives and needs of target clients that a product is compatible with, including the wider financial goals of target clients or the overall strategy they follow when investing. Those objectives can be “fine-tuned” by specifying particular aspects of the investment and expectations of targeted clients. The particular clients’ objectives and needs a product is intended to fulfil may vary from specific to more generic. For example, a product may be designed to meet the needs of a specific age demographic, to achieve tax efficiency based on clients’ country of tax residence, or be designed with special product features to achieve specific investment objectives such as “currency protection”, “regular payments”, etc., as relevant. In addition, reference should be made to the expected investment horizon/recommended holding period (e.g., number of years the investment is to be held), duly considering the potential impacts for clients of an early exit (for example in terms of costs).

20. Within the broad category of clients’ objectives and needs, the firm should also specify any sustainability-related objectives the product is compatible with. To ensure a sufficient level of granularity of the target market, when identifying sustainability-related objectives, firms

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<sup>13</sup> Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ 352, 09.12.2014, p. 1–23).

may specify, where relevant, the following aspects (in line with the definition of “sustainability preferences” according to Article 2(7) of the MiFID II Delegated Regulation<sup>14</sup> and as further detailed in the ESMA guidelines on certain aspects of the MiFID II suitability requirements):

- a) The minimum proportion of the product that is invested in environmentally sustainable investments as defined in Article 2, point (1), of Regulation (EU) 2020/852<sup>15</sup>;
- b) The minimum proportion of the product that is invested in sustainable investments as defined in Article 2, point (17), of Regulation (EU) 2019/2088<sup>16,17</sup>;
- c) Which principal adverse impacts (PAI) on sustainability factors are considered by the product, including quantitative or qualitative criteria demonstrating that consideration. Firms could use the categories presented in the SFDR RTS<sup>18</sup> (instead of an approach based on each PAI indicator) such as “emissions”, “energy performance”, “water & waste”, etc.
- d) Whether, where relevant, the product has a focus on either environmental, social or governance criteria or a combination of them<sup>19</sup>;

21. Depending on the characteristics of the specific product manufactured, the description of one or more of the above categories may result in the identification of a broad group of target clients that could also encompass a more restricted group. For example, if a product is considered compatible with target clients possessing general relevant knowledge and experience, obviously it will be compatible with a sophisticated level of knowledge and experience.

22. In order to avoid the risk of misinterpretations and misunderstandings, manufacturers should clearly define the concepts and terminology used when defining the target market across the five categories listed in paragraph 19 above.

### **Identification of the potential target market: differentiation on the basis of the nature of the product manufactured**

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<sup>14</sup> Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, p. 1).

<sup>15</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13).

<sup>16</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).

<sup>17</sup> The product’s minimum proportion referred in the two bullet points above is the one published in the product’s binding contractual documentation such as the one referred to in Article 6 of Regulation (EU) 2019/2088 or any other relevant legal document.

<sup>18</sup> Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of ‘do no significant harm’, specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports (OJ L 196, 25.7.2022, p. 1–72)

<sup>19</sup> As referred to in paragraph 27, second bullet point, of the ESMA Guidelines on certain aspects of the MiFID II suitability requirements (Ref. ESMA35-43-3172).

23. The identification of the potential target market should be done for all products, in an appropriate and proportionate manner, considering the nature of the product. This means that the target market identification should consider the characteristics of the product including its complexity (including costs and charges structure), risk-reward profile or liquidity, or its innovative character.
24. In this context, manufacturers should define and adequately graduate the level of complexity to be attributed to manufactured products to determine the necessary level of detail with which the target market should be identified. Although complexity is a relative term, which depends on several factors, firms should also take into account, the criteria and principles identified in Article 25(4) of MiFID II.
25. For more complex products, such as structured products with complicated return profiles, the target market should be identified with more detail. For simpler, more common products it is likely that the target market will be identified with less detail<sup>20</sup>. Depending on the product, the description of one or more of the above-mentioned categories may be more generic. The simpler a product is, the less detailed a category may be.
26. For certain particularly complex and risky products, such as contracts for difference (CFDs) and other products with similar features, manufacturers should perform a very careful target market assessment, resulting in a significantly reduced target market or no compatible target market at all. If a manufacturer considers that a CFD or product with similar characteristics does not have a compatible target market, it should not make the product available for distribution. If a manufacturer considers that there is a target market whose needs, characteristics and objectives a CFD, or a product with similar features, is compatible with, such a target market should in any case be confined to high-risk seeking clients understanding the risks involved and who are able and prepared to lose money, on average, with their investment and who are seeking speculative investments with only a small chance of earning positive returns.
27. Manufacturers may also decide to define the target market by adopting a common approach for some products if they have sufficiently comparable product features (“clustering approach”). When adopting a clustering approach, manufacturers should use a sufficient level of granularity to ensure that only products with sufficiently comparable characteristics and risk features are grouped together (i.e., clusters should be homogeneous in themselves and heterogeneous towards other clusters). In ensuring that homogenous clusters are identified, firms should pay particular attention to the level of complexity of products, meaning that the more complex the underlying products of a cluster become, the more granular the clustering should be. Generally speaking, for certain more complex products, it is expected that a clustering approach will not be appropriate and that firms should define the target market at the level of the individual product.
28. Manufacturers should consider multiple key factors when clustering products, such as: risk factors (such as market, credit and liquidity risk); charging structure (level and type of

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<sup>20</sup> See Recital 19 of the MiFID II Delegated Directive.

costs); optionality elements (in case of derivatives, or products with embedded derivatives); financial leverage; eligibility to bail-in; subordination clauses; observability of the underlying (e.g. the use of unfamiliar or opaque indices); guarantees of principal repayment or capital protection clauses; liquidity of the product (i.e. tradability on trading venues, bid-ask spread, selling restrictions, exit charges); and the currency denomination of the product).

29. When using a clustering approach, the manufacturer should always check and document for each specific product whether it belongs to a certain cluster and thus whether the target market identified for this cluster can be assigned to this product. For this purpose, clear criteria should be specified under each cluster. In any case, when using a clustering approach, manufacturers should consider the outcomes of the charging structure and scenario analyses of each product.
30. In all cases, including when using a clustering approach, the target market must be identified at a sufficiently granular level to avoid the inclusion of any groups of investors for whose needs, characteristics and objectives the product is not compatible.
31. For bespoke or tailor-made products, the target market of the product will usually be the client who ordered the product unless the distribution of the product to other clients is also foreseen.

#### **Articulation between the distribution strategy of the manufacturer and its definition of the target market**

32. According to Article 16(3) of MiFID II, the manufacturer shall ensure that its intended distribution strategy is consistent with the identified target market and, according to Article 24(2) of MiFID II, the manufacturer needs to take reasonable steps to ensure that the product is distributed to the identified target market. The manufacturer should define its distribution strategy so that this strategy favours the sale of each product to the target market of this product. This includes that, when the manufacturer can choose the distributors of its products, the manufacturer makes its best efforts to select distributors whose type of clients and services offered are compatible with the target market of the product.
33. In defining the distribution strategy, a manufacturer should determine the extent of clients' information necessary to the distributor to properly assess the target market for its product. Hence, the manufacturer should propose the type of investment service through which the targeted clients should or could acquire the financial instrument. If the product is deemed appropriate for a sale without advice, the firm could also specify the preferred acquisition channel.

### **5.3 Guidelines for distributors**

#### **Timing and relationship of target market assessment of the distributor with other product governance processes**



34. The distributor's target market identification (i.e., the identification of the 'actual' target market for that product) should be conducted as part of the general decision-making process about the range of services and products the distributor is going to distribute. Hence, the actual target market identification should occur at an early stage on an ex-ante basis (i.e., before going into daily business and/or before deciding whether the product should be included in the firm's offer), based on the firm's business policies and distribution strategies as defined by the management body. In particular, the identification of the target market of products intended for distribution should ensure that the decisions undertaken to define the distributor's product assortment are based on the consideration of the characteristics, objectives and needs of the distributor's client base.
35. In particular, distributors should take responsibility to ensure, from the very beginning, the general consistency of the products and investment and/or ancillary services that are going to be offered, and to choose which products are to be offered under the different services, to ensure compatibility with the needs, characteristics, and objectives of target clients. The aspects related to this general consistency of products, services and distribution strategies with target clients should be addressed and formalised in the firm's policy as to the services, activities, products and operations offered or provided.<sup>21</sup>
36. The decision-making process about the service and product universe in combination with the target market identification process should directly influence the way in which the firm's daily business is conducted, as the management body's choices are implemented along the firm's decision chain and hierarchy. Those processes will jointly have a direct impact on the compatibility of products and services offered and will influence all other relevant processes connected with the services provided, especially the definition of budgeting objectives and staff remuneration policies.
37. Firms should especially focus on the investment services through which the products will be offered to their respective target markets. In this context, ESMA expects that the nature of the products is duly taken into account, paying particular attention to those products characterised by complexity/risk features or by other relevant features (such as, for example, illiquidity and innovation).<sup>22</sup> For example, if a distributor has detailed information on some clients (for example, through an existing relationship with them for the provision of investment advice), it could decide that, considering the particular risk-reward profile of a product, the interest of this group of clients would be best served if execution services are excluded for them. Similarly, the distributor could decide that some non-complex products which could potentially be offered under the execution-only regime will only be

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<sup>21</sup> In line with Article 9(3)(b) of MiFID II.

<sup>22</sup> This is in line with Recital 18 of the MiFID II Delegated Directive, which clarifies: 'in light of the requirements set out in Directive 2014/65/EU and in the interest of investor protection, product governance rules should apply to all products sold on primary and secondary markets, irrespective of the type of product or service provided and of the requirements applicable at point of sale. However, those rules may be applied in a proportionate manner, depending on the complexity of the product and the degree to which publicly available information can be obtained, taking into account the nature of the instrument, the investment service and the target market. Proportionality means that these rules could be relatively simple for certain simple, products distributed on an execution-only basis where such products would be compatible with the needs and characteristics of the mass retail market'.

offered in accordance with appropriateness or suitability requirements, so as to grant a higher degree of protection to clients.

38. Specifically, distributors should decide which products are going to be recommended (also through the provision of portfolio management) or offered or actively marketed to certain groups of clients (characterised by common features in terms of knowledge, experience, financial situation, etc.). Distributors should also decide which products will be made available to (existing or prospective) clients at their own initiative through execution services without active marketing, considering that in such situations the level of client information available may be very limited.
39. At the same general decision-making stages, distributors should consider what distribution strategies should be used for the different client groups, including the way in which products will be marketed. In particular, where firms intend to use nudging and digital engagement practices such as gamification techniques<sup>23</sup> for the distribution of certain products, distributors should carefully assess whether using such techniques would be in the best interests of the client group for which such strategies would be used. Distributors should therefore determine to which groups of clients such services will be made available, based on the characteristics of the clients or potential clients. However, certain gamification techniques (such as those used in trading apps designed to nudge the (potential) client towards harmful behaviour, e.g., maximise the number of trades) will never be in the interest of the client. Additionally, nudging and digital engagement practices can contribute to the distribution of products outside of their target market. When determining the target market for their services, distributors should also pay particular attention to situations in which a bundle of services will be provided to clients, such as both execution services and the ancillary service of granting loans allowing the client to carry out the transaction.
40. In any case, where on the basis of all information and data that may be at the distributors' disposal and gathered through investment or ancillary services or through other sources, including the information obtained from manufacturers, the distributor assesses that a certain product will never be compatible with the needs and characteristics of its existing or prospective clients, it should not include the product in its product assortment (i.e. the products that will be offered, to whom, and through the provision of which investment services).

### **Relation between the product governance requirements and the assessment of suitability or appropriateness**

41. The obligation of the distributor to identify the actual target market and to ensure that a product is distributed in accordance with the actual target market is not substituted by an assessment of suitability or appropriateness and has to be conducted in addition to, and

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<sup>23</sup> Gamification techniques add games or game-like competitive elements to non-game contexts such as financial services. Examples of game-like elements are earning of points or badges; keeping score or leader boards; showing performance graphs; by using meaningful stories or avatars to engage users; or introducing teammates to either induce conflict, cooperation, or competition. Gamification is a type of digital engagement practice that can be used; in turn, digital engagement practices refer to how actively users interact with a software application or platform.



before such an assessment. In particular, the identification, for a given product, of its target market and related distribution strategy should ensure that the product ends up with the type of customers for whose needs, characteristics and objectives it had been designed, instead of with another group of clients for whom the product may not be compatible.

#### **Identification of the target market by the distributor: categories to be considered**

42. Distributors should use the same list of categories used by manufacturers (see paragraph 19 and 20) as a basis for defining the target market for their products, also avoiding merging two or more categories (see paragraph 16). 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 products and the type of investment services they provide and the level of detail of information gathered from clients. In this context, distributors should ensure that the concepts used for the definition of the actual target markets for products are aligned with the concepts used in the context of the suitability and appropriateness arrangements. For example, regarding the manufacturer's target market category of knowledge and experience, which may broadly refer to "basic", "average" or "advanced" investors, the distributor should adopt a more granular classification consistent with its suitability or appropriateness arrangements, where appropriate given the features of the products; another example would be a distributor that, in relation to the category clients' risk tolerance, specifies clients' willingness to take the risk of a decline in the product's value by a certain percentage. Importantly, when defining the actual target market for products, distributors should use consistent terms and definitions and should ensure consistency between the actual target markets defined for products with homogeneous product features.
43. Since the manufacturer has to specify the potential target market based on its theoretical knowledge and experience with a similar product, it will determine the product's target market without specific knowledge of individual clients. Therefore, the manufacturer's assessment will be conducted with a more general view of how the features/nature of a product would be compatible for certain types of investors, based on their knowledge of the financial markets and their past experience with similar products. In this way, a set of boundaries is introduced on a more abstract level.
44. The distributor on the other hand has to specify the actual target market, considering the boundaries of the potential target market set by the manufacturer. Distributors should base their target market on their information and knowledge of their own client base and the information received from the manufacturer (if any) or information that has been obtained by the distributor itself via desk research (especially in cases where the distributor is a new firm that does not yet have enough-actual information about its own clients). Distributors should use the manufacturer's more general target market assessment together with existing information on their clients or prospective clients to identify their own target market for a product that is the group of clients to whom they are effectively going to offer the product through the provision of their services.

45. To this end, distributors should conduct a thorough analysis of the characteristics of their client base, i.e., existing clients, as well as prospective clients (for example, a distributor may have clients with bank deposits to whom they intend to offer investment services). Distributors 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.
46. When refining the manufacturer's target market, the distributor should not deviate from the fundamental decisions made therein. However, distributors cannot just rely on the manufacturer's target market without considering how the target market defined by the manufacturer would fit to their client base. For that purpose, distributors should implement and maintain a dedicated process, which needs to be run in all cases. This process is subject to proportionality, i.e., the scrutiny and – if necessary – the refinement of the manufacturer's target market by the distributor should be more intensive for more complex products and could be less intensive in case of simpler, more common products. To ensure a proper scrutiny of such more complex products, distributors should also determine whether, next to the manufacturer's target market description, they need access to underlying assessments such as the outcomes of the manufacturer's scenario and charging structure analyses. If, as a result of the process, the distributor comes to the conclusion that the target market of the manufacturer does not need to be refined, the distributor may use the manufacturer's target market as it is.
47. Distributors may also decide to define the target market by adopting a clustering approach for some products, in line with the principles of ensuring a sufficient level of granularity as indicated in paragraphs 27-30. For example, in ensuring that only UCITS with sufficiently comparable characteristics are clustered for the purposes of the target market identification, differentiating factors would be the types of asset classes the UCITS invests in, its investment strategy, risks, charging structure (e.g., level and types of costs), any leverage used, and so on. Such factors should be used in a cumulative manner.
48. Usually, the target market assessment of the distributor will occur after the manufacturer has communicated its target market to them. However, it is possible that manufacturer and distributor could define both the manufacturer's target market and the distributor's target market, including any review and refinement process, at the same time. This could, for example, occur where the manufacturer and the distributor jointly develop a common target market standard for the products they usually exchange. Both the manufacturer and the distributor retain their responsibility for their obligations to identify a target market as described in MiFID II and the MiFID II Delegated Directive and further specified in these guidelines to identify a target market. A manufacturer has still to take reasonable steps to ensure that products are distributed to the identified target market and a distributor has to ensure that products are offered or recommended only when this is in the interest of clients.
49. When distributors define their product assortment, they should pay particular attention to situations where they might not be able to make a thorough target market assessment by

virtue of the type of services they provide (in particular, execution services under the appropriateness test or the execution-only regime). This is especially important for products characterised by complexity/risk features (or other relevant features such as, for example, illiquidity or innovation), as well as for situations where there might be significant conflicts of interest (such as in relation to products issued by the firm itself or by other entities within the group). In such circumstances, it is most important that distributors take into due consideration all relevant information provided by the product manufacturer, both in terms of target market and distribution strategy.

### **Identification of the target market: differentiation on the basis of the nature of the product distributed**

50. The identification of the target market assessment by the distributor should also be done in an appropriate and proportionate manner, considering the nature of the product, in line with what described in paragraph 23 to 31.
51. Where the manufacturer has identified a target market for simpler, more common products the distributor's target market identification does not necessarily have to result in a refinement of the manufacturer's target market.

### **Identification and assessment of the target market by the distributor: interaction with investment services**

52. As noted above, distributors are required to identify and assess the circumstances and needs of the group of clients to whom they are effectively going to offer or recommend a product, so as to ensure the compatibility between that product and the respective target clients. This obligation should apply in a proportionate manner depending, not only on the nature of the product (see paragraph 50), but also on the type of investment services that firms provide.
53. In this regard, it should be noted that, on one hand, the ex-ante assessment of the actual target market is influenced by the services provided, since it can be conducted more or less thoroughly depending on the level of client information available, which in turn depends on the type of services provided and the conduct of rules attached to their provision (in particular, investment advice and portfolio management allow for the acquisition of a wider set of information on clients compared to the other services). On the other hand, the target market assessment influences the decision on the type of services that are going to be provided in relation to the nature of the product and the circumstances and needs of the identified target clients, considering that the level of investor protection varies for different investment services, depending on the rules that apply at the point of sale. In particular, investment advice and portfolio management services allow for a higher degree of investor protection, compared to other services provided under the appropriateness regime or under execution-only.
54. It is therefore expected that when distributors define their product assortment, they pay particular attention to situations where they might not be able to conduct a thorough target market assessment by virtue of the type of services they provide. In particular, where

distributors only carry out execution services with the assessment of appropriateness (for example through a brokerage platform), they should consider that they will usually be able to conduct an assessment of the actual target market which is limited to the sole categories of clients' knowledge and experience (see paragraph 19(b)); where they only conduct execution services under the execution-only regime, not even the assessment of clients' knowledge and experience will usually be possible.<sup>24</sup> In this respect, firms should pay particular attention to the distribution strategy suggested by the manufacturer (see paragraph 33, 59 to 61).

55. This is especially relevant for products characterised by complexity/risk features (or other relevant features such as, for example, innovation), as well as for situations where there might be significant conflicts of interest (such as in relation to products issued by entities within the firm's group or when distributors receive inducements from third parties), being also mindful of the limited level of protection afforded to clients at the point of sale by the appropriateness test (or no protection at all, in the case of execution-only). In such circumstances, it is most important that distributors take into due consideration all relevant information provided by the product manufacturer, both in terms of potential target market and distribution strategy. For example, where the manufacturer's target market describes a product with particular features which requires, not only detailed client's knowledge and experience, but also a specific financial situation as well as unique objectives/needs, the distributor may decide to adopt a prudent approach by not including it in its product assortment (even though the firm would be in the position to assess ex-ante the compatibility of that product with its client base in terms of knowledge and experience).
56. Moreover, taking into account that the client's protection decreases when information available is not sufficient to ensure a full target market assessment, distributors may also decide to let clients operate on a non-advised basis after warning them that the firm is not in the position to assess their full compatibility with such products. In any case, as mentioned in paragraph 60, this decision should always be based on the consideration of the product's features (e.g., in terms of costs/complexity), as well as on other relevant situations (such as the occurrence of conflicts of interest in case of self-placement or inducements). Therefore, products should not be distributed under non-advised sales if the distributor cannot reasonably expect (i.e., ex-ante) that the distribution strategy for the product (including its marketing and information strategy) will generally enable the product to reach the identified target market. Likewise, providing a warning that the firm is not in the position to assess a client's full compatibility with a product does not exempt the firm from the obligation to review products, also taking into consideration any sales outside of the target market (see also paragraph 72).
57. On the contrary, if distributors intend to approach clients or prospective clients in any way to recommend or actively market a product or consider that product for the provision of

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<sup>24</sup> As explained above (see paragraph 45), for the definition of the target market, in addition to information gathered through investment or ancillary services, distributors could use any further information and data deemed reasonably useful that may be at their disposal and gathered through other sources. Therefore, even firms only providing investment services under appropriateness or execution-only regime, could be in the position to conduct a more thorough assessment of the target market.

portfolio management, then a thorough assessment of the target market should always be conducted.

### **Distribution strategy of the distributor**

58. The distributor should take the distribution strategy identified by the manufacturer into account and review it with a critical look. However, ultimately, including when a manufacturer is an entity not subject to MiFID II and thus it is not obliged to identify a distribution strategy, the distributor should define its own distribution strategy in light of information on its client base and type of services provided.

59. Considering the nature of the product and the investment service, distributors should refine the distribution strategy as identified by the manufacturer taking into account the characteristics of the distributor's client base. In particular, in making such a refinement, where the distributor considers that a more complex product with a relatively narrow target market can also be distributed under non-advised services, it should identify additional measures to ensure that the distribution strategy is compatible with the product's target market. In such cases, distributors should consider aspects such as:

- What marketing strategy should be followed for the product (e.g., active marketing, the use of nudging and/or gamification techniques, 'finfluencers'<sup>25</sup>, and so on). For example, a distributor could decide to make a more complex product only available when requested by the client and not to actively market it or use any gamification techniques or finfluencers in the distribution of such a product to its clients; and
- Whether and how the product should be displayed in the client's choice environment. For example, a distributor could decide not to show a more complex product on a prominent place on the website or at the top of a client's search results, or could decide to show such a product only if the client specifically requests it.

60. In particular, while taking into due consideration the suggested distribution strategy of the manufacturer, the distributor could decide to follow a more prudent approach by providing investment services that afford a higher level of protection to investors, such as investment advice. For instance, if the manufacturer considers that the features of a given product are compatible with a distribution strategy through non-advised services, the distributor may still decide that the characteristics of its existing or prospective clients (for example, very limited knowledge and no experience with investments in that type of product, unstable financial situation and very short-term objectives) are such that investment advice would be the most appropriate choice to ensure their best interests.

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<sup>25</sup> An influencer is usually someone who is active on social media and has:

- the power to affect the purchasing decisions of others because of his or her authority, knowledge, position, or relationship with his or her audience; and
- a following in a distinct niche, with whom he or she actively engages. The size of the following depends on the size of his/her topic of the niche.

In the case of a 'finfluencer' the influencer generates content on financial topics such as investments.

61. On the contrary, the distributor could decide, in certain circumstances, to take a less prudent approach in relation to the distribution strategy defined by the manufacturer. For example, if the manufacturer deems that a given product, due to its specific features, should be offered through investment advice, the distributor could still make that product available through execution services to a specific segment of clients. In these situations, ESMA expects that the distributor would do so only after a thorough analysis of the features of the products and the target clients. Moreover, this decision should be reported to the manufacturer as part of the distributor's obligation to provide the manufacturer with sales information in a way that the manufacturer can take it into account in their product governance process and when selecting suitable distributors (as described in paragraph 32 and 33).

### **Portfolio management, portfolio approach, hedging and diversification**

62. When providing investment advice, adopting a portfolio approach, and portfolio management to the client, the distributor can use products for diversification and hedging purposes. In this context, products can be sold outside of the product target market, if the portfolio as a whole or the combination of a financial instrument with its hedge is suitable for the client. Sales outside of the positive product target market can also occur in relation to the sustainability-related objectives of the product, provided that the approach is consistent with the approach outlined in the ESMA suitability guidelines<sup>26</sup>.
63. The identification of a target market by the distributor is without prejudice to the assessment of suitability. This means that, in certain cases, permissible deviations between the target market identification and the individual eligibility of the client may occur if the recommendation or sale of the product fulfils the suitability requirements conducted with a portfolio view as well as all other applicable legal requirements (including those relating to disclosure, identification and management of conflicts of interest, remuneration and inducements).
64. Providing investment advice, adopting a portfolio approach, or portfolio management services does not exempt the firm from defining a target market for each product to be distributed and from monitoring deviations from the target market to ensure that products are only distributed outside the target market when this can be justified for diversification or hedging purposes. For this purpose, deviations from the product's target market categories "client type" and "clients' knowledge and experience" cannot be justified for diversification or hedging purposes. However, in the case of portfolio management, given the specific nature of the service, the level of "clients' knowledge and experience" of the target market may take into account the approach set out in the ESMA suitability guidelines<sup>27</sup>.

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<sup>26</sup> Paragraph 88 of the ESMA suitability guidelines (ESMA35-43-3172).

<sup>27</sup> In particular, the second bullet point of paragraph 38 of the ESMA suitability guidelines explains "(...) when portfolio management is to be provided, as investment decisions are to be made by the firm on behalf of the client, the level of knowledge and experience needed by the client with regard to all the financial instruments that can potentially make up the portfolio may be



65. The distributor is not required to report sales outside of the positive target market to the manufacturer if these sales are for diversification and hedging purposes and if these sales are still suitable given the client's total portfolio or the risk being hedged.
66. Sales of products into the negative target market should always be reported to the manufacturer and disclosed to the client, even if those sales are for diversification or hedging purposes. Moreover, even if for diversification purposes, sales into the negative target market should be a rare occurrence (see also paragraphs 80-88).

**Regular review by the manufacturer and distributor to respectively assess whether products and services are reaching the target market**

67. Article 16(3) MiFID II and Articles 9 and 10 of the MiFID II Delegated Directive require manufacturers and distributors to review products on a regular basis to assess whether the product remains consistent with the needs, characteristics and objectives, including any sustainability-related objectives, of the identified target market and whether the intended distribution strategy remains appropriate.
68. Firms should use both quantitative and qualitative criteria to review products, relating to the product's characteristics (e.g., changes in the product's risk factors, investment strategy, cost structure (e.g., level and types of costs)), market conditions (e.g., adverse market conditions, regulatory developments) and distribution (e.g., client complaints, sales outside the target market, results from client surveys, online client trading behaviour). Firms should determine the frequency and depth of product reviews while taking into account the nature of the product and, where appropriate, the service. For example, for certain simpler products distributed under the execution-only exemption, product reviews can be less frequent and require less depth, and ad-hoc reviews can in such cases to a large extent be driven by client complaints and/or market events that significantly affect the product's risk-return profile. A manufacturer that has advised a corporate issuer on the launch of a new product, may also apply the review obligation for that product in a proportionate manner, irrespective of whether it concerns a simpler or more complex product.
69. Manufacturers should consider, on a proportionate basis, what information they need in order to complete their review and how to gather that information. In line with Recital 20 of the MiFID II Delegated Directive, relevant information could include, for example, information on which distribution channels have been employed, the proportion of sales made outside the target market, summary information of the types of clients, a summary of any complaints received, and questions suggested by the manufacturer to a sample of clients for feedback. Such information may be in an aggregated form and does not need to be on an instrument-by-instrument or sales-by-sales basis.
70. To support reviews by manufacturers, distributors must provide them with information on sales and, where appropriate, any other relevant information that may be the outcome of

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less detailed than the level that the client should have when an investment advice service is to be provided. Nevertheless, even in such situations, the client should at least understand the overall risks of the portfolio and possess a general understanding of the risks linked to each type of financial instrument that can be included in the portfolio. Firms should gain a very clear understanding and knowledge of the investment profile of the client".

the distributor's own periodic review. Whenever distributors have relevant information to support reviews by manufacturers, they should proactively provide it to the manufacturer and not provide such information only at the manufacturer's request. Furthermore, distributors should consider data and information that may give an indication 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. Any such information is subject to the proportionality principle and may generally be in an aggregated form and does not generally need to be on an instrument-by-instrument or sale-by-sale basis. However, instrument-specific information should be provided in cases with particular relevance for certain individual instruments (e.g., if the distributor comes to the conclusion that a target market for a specific product was wrongly determined).

71. In relation to the reporting of information on sales outside the manufacturer's target market, distributors should be able to report any decisions they have taken to sell outside the target market or to broaden the distribution strategy recommended by the manufacturer and information on sales made outside the target market (including sales within the negative target market), taking into account the exceptions as noted in paragraph 65.
72. For the purposes of their own review, distributors should determine what information they need in order to be able to draw reliable conclusions on whether products have been distributed to the identified target market. To be able to draw such reliable conclusions, firms may need to gather further information about their clients. Furthermore, firms should reconsider their distribution strategy for more complex products distributed through non-advised sales, if, for example, the review shows that such products are too often distributed outside the positive target market (or even in the negative target market).
73. Distributors are required to review products as long as they are offered, sold or recommended. For example, where a distributor no longer offers<sup>28</sup>, sells or recommends<sup>29</sup> a product, the distributor is no longer obliged to review the target market of that product, despite that a client may still have investments in that product. Where a distributor recommends to its clients to hold a product it no longer offers or sells, it should still undertake a review of the target market of that product prior to making that recommendation.

### **Distribution of products manufactured by entities not subject to MiFID II product governance requirements**

74. Firms that distribute products, that have not been manufactured by entities subject to the MiFID II product governance requirements, are expected to perform the necessary due diligence so as to provide an appropriate level of service and security to their clients compared to a situation where the product had been designed in accordance with the MiFID II product governance requirements.

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<sup>28</sup> In this context, 'offered' has a wide application and should be read in a broad sense.

<sup>29</sup> A firm recommends a product to a client if it recommends a client to either buy, hold or sell a product.



75. Where a product has not been designed in accordance with the MiFID II product governance requirements (for example, in the case of products issued by entities that are not subject to the MiFID II product governance requirements), this may affect the information gathering process or the target market identification:

- Target market definition: The distributor shall determine the target market also when the target market is not defined by the manufacturer<sup>30</sup> (see paragraph 42). Therefore, even where the firm does not receive a description of the target market from the manufacturer or information on the product approval process, it has to define its “own” target market. This should be done in an appropriate and proportionate manner (see paragraph 23).
- Information gathering process: distributors shall take all reasonable steps to ensure that the level of product information obtained from the manufacturer is of a reliable and adequate standard, to ensure that products will be distributed in accordance with the characteristics, objectives and needs of the target market<sup>31</sup>. Where all relevant information is not publicly available (for example, through the PRIIPs KID or a prospectus), the reasonable steps should include entering into an agreement with the manufacturer or its agent in order to obtain all relevant information enabling the distributor to carry out its target market assessment. Publicly available information may only be accepted if it is clear, reliable and produced to meet regulatory requirements<sup>32</sup>. For example, information disclosed in compliance with requirements in the Prospectus Directive, the Transparency Directive, the UCITS Directive, the AIFMD Directive or third-country equivalent requirements are acceptable.

76. The obligation referred to in paragraph 75 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 available and the complexity of the product<sup>33</sup>. Thus, information about simpler, more common products, such as ordinary shares, will usually not require an agreement with the manufacturer but can be derived from the manifold information sources published for regulatory purposes for such products.

77. Where the distributor is not in a position to obtain in any way sufficient information on products manufactured by entities not subject to the MiFID II product governance requirements, the firm would be unable to meet its obligations under MiFID II and, consequently, should refrain from including them in its product assortment.

### **Application of product governance requirements to the distribution of products that were manufactured before the date of application of MIFID II.**

78. Products which were manufactured before 3 January 2018 and continue to be distributed to investors should fall within the scope of product governance requirements applicable to

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<sup>30</sup> See Article 10(1) of the MiFID II Delegated Directive.

<sup>31</sup> See subparagraph 3 of Article 10(2) of the MiFID II Delegated Directive.

<sup>32</sup> See Article 10(2) of the MiFID II Delegated Directive.

<sup>33</sup> See subparagraph 3 of Article 10(2) of the MiFID II Delegated Directive.

distributors, in particular, the requirement to identify a target market for any product. In this 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 guidelines, the distributor, after reviewing it with a critical look, could rely on this target market identification.

79. However, a target market should be assigned by the manufacturer to such products, at the latest, following the next product review process cycle 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.

## **5.4 Guidelines on issues applicable to both manufacturers and distributors**

### **Identification of the ‘negative’ target market and sales outside the positive target market**

80. The firm needs to consider whether the product would be incompatible with certain target clients (“negative” target market)<sup>34</sup>. When doing so, the firm should apply the same categories and principles as stated above in paragraphs 14-22 and 42-49. In line with the approach followed for the identification of the ‘positive’ target market, the manufacturer, who does not have a direct relationship with end-clients, will be able to identify the negative target market on a theoretical basis, i.e. with a more general view on how the specificities of a given product would not be compatible with certain groups of investors; the distributor, taking into account the manufacturer’s more general negative target market as well as information on its own client base, will be in the position to identify more concretely the group of clients to whom it should not distribute that specific product. In addition, the distributor is also required to identify any group(s) of clients for whose needs, characteristics and objectives, a service related to the distribution of a certain product would not be compatible.
81. For products which consider sustainability factors, firms are not required to identify a negative target market with respect to their sustainability-related objectives. This means that the sustainability-related objectives of products only contribute to identify a “positive” target market in terms of clients (groups of clients) with compatible sustainability-related objectives. The same products could still be distributed to clients falling outside that “positive” sustainability-related target market objective, provided that they are compatible with the features of the other target markets categories defined by these guidelines<sup>35</sup>. Hence, for products which consider sustainability factors, the firm should always perform a negative target market assessment with respect to the five target market categories

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<sup>34</sup> See Articles 9(9) and 10(2) of the MiFID II Delegated Directive.

<sup>35</sup> Recital 7 of Delegated Directive (EU) 2021/1269 explains that “To ensure that financial instruments with sustainability factors remain easily available also for clients that do not have sustainability preferences, investment firms should not be required to identify groups of clients with whose needs, characteristics and objectives the financial instrument with sustainability factors is not compatible”.

(client type, knowledge and experience, financial situation, risk tolerance and objectives and needs), but should not consider the sustainability-related objectives of the products. This is to assess whether these other target market aspects might be incompatible with certain clients, for example, if the product that considers sustainability factors concerns a risky product intended for clients with a long-term investment horizon and willing and able to lose their investment amount (in which case the product would not be compatible with clients that would have a low risk tolerance, whether or not their sustainability preferences are compatible with the sustainability-related objectives of the product).

82. Some of the target market characteristics used in the positive target market assessment by manufacturers and distributors will automatically lead to opposing characteristics for investors for whom the product is not compatible (for example, if a product is made for the investment objective “speculation” it will at the same time not be suitable for “low risk” objectives). In this case, a firm could define the negative target market by stating that the product or service is incompatible for any client outside the positive target market.
83. Again, it is important to take account of the principle of proportionality. When assessing a potential negative target market, the number and detail of factors and criteria will depend on the nature, especially the complexity or the risk-reward profile, of the product (i.e., a plain vanilla product is likely to have a smaller group of possible investors for whom it is incompatible, while the group of clients for whom the financial instrument is not compatible might be large for a more complex product).
84. There might be situations where products could, under certain circumstances and where all other legal requirements are met (including those relating to disclosure, suitability or appropriateness, identification and management of conflicts of interest), be sold outside the positive target market. However, these instances should be justified by the individual facts of the case, the reason for the deviation should be clearly documented and, where provided, included in the suitability report.
85. As the negative target market is an explicit indication of those clients for whose needs, characteristics and objectives the product is not compatible and to whom the product should not be distributed. The sale to investors within this group should be a rare occurrence, the justification for the deviation should be accordingly significant and is generally expected to be more substantiated than a justification for a sale outside the positive target market.
86. For example, the sale of products outside the target market could occur as a result of non-advised sales (i.e. where clients approach a firm to purchase a certain product without any active marketing by the firm or having been influenced in any way by that firm), where the firm does not have all the necessary information to conduct a thorough assessment of whether the client falls within the target market, which might be the case, for instance, for execution platforms that only operate under the appropriateness regime. It is expected that in the context of product governance arrangements, firms analyse ex-ante situations such as the one described, and make a responsible decision on how they are going to address them should they occur, and that client-facing employees are informed of the approach defined at management body level, so that they can comply with it. Firms should also take

into consideration the nature of the products included in the range of those they intend to offer to clients (for example, in terms of complexity/risk) and the existence of any conflicts of interest with clients (such as in the case of self-placement), as well as their business model. Some firms could, for example, consider the possibility of not allowing clients to operate if they fall within the negative target market, while letting other clients transact on a product that is in the 'grey' area, i.e., between the positive and negative target markets.

87. It is important that if the distributor becomes aware, for example, through the analysis of clients' complaints or other sources and data, that the sale of a certain product outside the target market identified ex-ante has become a significant phenomenon (for instance, in terms of number of clients involved), such input will be taken into due consideration in the course of its periodic review of the products and related services offered. In such cases, the distributor may, for example, come to the conclusion that the target market originally identified was not correct and that it needs to be reviewed or that the related distribution strategy was not appropriate for the product and has to be reconsidered.
88. Deviations from the target market (outside the positive or within the negative) which may be relevant for the product governance process of the manufacturer (especially those that are recurrent) should be reported to the manufacturer taking into account the exceptions as noted in paragraph 65.

**Application of the target market requirements to firms dealing in wholesale markets (i.e. with professional clients and eligible counterparties)**

*Professional clients and eligible counterparties as part of the intermediation chain*

89. The requirements set out in Article 16(3) and 24(2) of MiFID II apply to services and products manufactured and/distributed to retail and professional clients. At the same time, these articles specify that the clients to be targeted shall be the "end-clients". This 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 (i.e., the final client in the intermediation chain). The specific type of end-client targeted is to be stated in the client-type category referred to in paragraph 19(a).
90. Where a professional client or an eligible counterparty buys a product with the intention to sell it on to other clients, therefore acting as a link in the intermediation chain, they should not be considered as "end-clients".
91. In such a case, the professional client (or eligible counterparty) would be acting as distributor and therefore should comply with the product governance requirements applicable to distributors.
92. For example, if a firm sells a product to an eligible counterparty that buys the product with the intention of distributing it more widely to professional or retail clients, the eligible counterparty should reassess the relevant target market in line with its obligations as a distributor. If the eligible counterparty then makes changes to the product before onward

distribution, this is likely to mean that it must comply with the product governance provisions for manufacturers as well as those for distributors.

*Professional clients as end-clients*

93. The MiFID client categorisation framework calibrates conduct of business protections to the needs of each client category (i.e., retail clients, professional clients and eligible counterparties).
94. Firms are entitled to assume that professional clients have the required knowledge and experience to understand the risks attached to the particular products or services for which they have been classified as a professional client<sup>36</sup>. MiFID II, nonetheless, makes a distinction between per se professional clients and elective professional clients – providing that clients in the latter category should not be presumed to possess the knowledge and experience comparable to per se professional clients.
95. Therefore, firms should, when carrying out their target market identification, consider the differences in assumed knowledge between retail and professional clients and, within the professional client category, elective professional clients and per se professional clients<sup>37</sup>. For example, the contrast in approach should take account of the differences in the knowledge and experience profiles of these different client categories.
96. It is possible that some products (for example those that are suitable for distribution in mass retail markets) will have a widely defined target market that might include both retail and professional clients. Such products, for example, units or shares in an ordinary UCITS fund, could, by default, be regarded as having a target market that includes professional clients. However, some other products, in particular products that have complex risk profiles, will have a more narrowly defined target market. For instance, the target market for a contingent convertible bond might be only composed of per se professional or elective professional clients who are likely to understand the complexities associated with these products.

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<sup>36</sup> See Annex II of MiFID II.

<sup>37</sup> See subparagraph 2 of section II.1 of Annex II of MiFID II.