

CNMV ADOPTS ESMA'S GUIDELINES ON THE MiFID II'S PRODUCT GOVERNANCE REQUIREMENTS TO REINFORCE INVESTOR PROTECTION

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The Spanish national Securities Market Commission (CNMV) notified ESMA that it shall comply with the Guidelines on [MiFID II product governance requirements](#). It will, therefore, take into consideration the latter and ensure its application by firms that manufacture or distribute products within the scope of its supervisory powers. The product governance requirements introduced by MiFID II have proven to be one of the most important elements of the investor protection framework, aimed at ensuring that only financial products are produced and/or distributed in the best interest of clients.

The objective of such guidelines is to update those published in 2017 to incorporate recent supervisory experience, as well as new regulatory developments. They include the obligation for manufacturers and distributors to **justify and document** the decisions made related to their product governance mechanisms, including the **identification of the target market** and related **distribution strategies**. They establish additional criteria on the periodic review to be carried out to determine whether products and services are reaching the target market.

Some of these new features include:

- The guidelines for manufacturers:
 - State that, when identifying the target market for a product, the results of the scenario analyses and the cost structure carried out should be taken into account.
 - In relation to the category of objectives and clients' needs, any sustainability-related objectives with which the product is compatible should be specified (entities may specify the items included in the definition of sustainability preferences set out in Article 2.7 of the MiFID II Delegated Regulation 2017/565).
 - Criteria on how to identify the target market by grouping products that have sufficiently comparable characteristics and risks is included; in this sense, ESMA believes that grouping of certain more complex products is not appropriate.

- A number of clarifications and criteria are included in the guidelines for distributors:
 - If firms intend to use gamification practices that seek to prompt clients to execute transactions through digital means for the distribution of certain products, distributors should assess whether these are in the best interest of clients. Certain gamification techniques (such as the use of trading software applications for clients' transactions designed to induce detrimental behaviour, such as maximising the number of transactions) are deemed to never be in the client's interest.

- In the case of more complex products, when detailing the target market initially defined by the manufacturer, distributors should assess whether they need access to the results of the scenario and cost structure analysis carried out by the manufacturer.
 - If the distributor considers that a more complex product with a relatively small target market can also be distributed under non-advised services, it should identify measures that ensure that the distribution strategy is compatible with the target market.
 - In the case of portfolio management or advice with a portfolio approach, sales outside the positive target market may occur, also related to the objectives for product sustainability, as long as it is consistent with the approach described in the ESMA Guidelines on certain MiFID II suitability requirements.
- For guidelines applicable to both manufacturers and distributors, distributors must determine what information they need to come to reliable conclusions as to whether products have been distributed in the identified target market, with the possible need to collect more information about clients; it is also important to reconsider the distribution strategy for more complex products distributed by means of non-advised sales if, for example, the review shows that such products have been distributed outside the positive target market (or even within the negative target market) too frequently.

There is also a clarification on the fact that for products which consider sustainability factors, firms are not required to identify a negative target market with respect to their sustainability-related objectives, as these products are compatible with clients who do not have sustainability preferences, as long as they are compatible with the characteristics of the other categories defining the target market.

The guidelines, applicable from 3 October, incorporate the following regulatory developments and recent supervisory experience:

- The modifications to MiFID II resulting from the European Commission's capital markets recovery package,
- The sustainability-related amendments to the MiFID II Delegated Directive 2017/593 introduced in April 2021,
- Recommendations on the product governance guidelines issued by ESMA's Proportionality Committee, and
- The conclusions of the 2021 common supervisory action on product governance coordinated by ESMA.