

## PUBLIC STATEMENT

### ESMA presents the results of the 2021 Common Supervisory Action (CSA) on MiFID II product governance requirements

#### Background

1. In February 2021 ESMA announced on its website<sup>1</sup> the launch of a common supervisory action (CSA) with national competent authorities (NCAs) on the application of MiFID II product governance rules across the European Union (EU).
2. The CSA was set up to allow the NCAs and ESMA to assess firms' compliance with this key investor protection requirement, including on how manufacturers ensure that financial products' costs and charges are compatible with the needs, objectives and characteristics of their target market and do not undermine the financial instrument's return expectations; how manufacturers and distributors identify and periodically review the target market and distribution strategy of financial products; and what information is exchanged between manufacturers and distributors and how frequently this is done.
3. ESMA had published its guidelines on the topic in 2017<sup>2</sup> and had also published a series of Q&As<sup>3</sup>, including on the topic of how manufacturers should consider the costs of products. All of these have been considered for the 2021 CSA.
4. The CSA has been performed based on a common approach and high-level methodology developed at ESMA level in 2020. The CSA assessment framework, including scope, methodology, supervisory expectations and timeline, is the result of a joint effort to carry out comprehensive supervisory action in a convergent manner.
5. In announcing the 2021 CSA to the public, ESMA noted that the initiative, and the related sharing of practices across NCAs, would help ensure consistent implementation and application of EU rules, enhance the protection of investors, as well as improve NCAs' understanding of supervisory approaches in line with ESMA objectives. The 2021 CSA contributes to fulfilling ESMA's mandate on building a common supervisory culture among NCAs in promoting sound, efficient, and consistent supervision throughout the EU. These important supervisory convergence objectives are pursued through continuous interaction

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<sup>1</sup> [ESMA launches a Common Supervisory Action with NCAs on MiFID II product governance rules \(europa.eu\)](https://www.esma.europa.eu/press-news/esma-news/esma-launches-a-common-supervisory-action-with-ncas-on-mifid-ii-product-governance-rules)

<sup>2</sup> ESMA35-43-620.

<sup>3</sup> ESMA35-43-349.

with and amongst NCAs, who are collectively and actively engaged with ESMA with the aim of achieving common goals.

### **Overview of the execution of the CSA by NCAs**

6. 26 EU and EEA NCAs participated in this CSA and shared knowledge and experiences at the level of ESMA throughout 2021, to ensure supervisory convergence in the way they supervise the MiFID II product governance requirements and, ultimately, enhance the protection of investors across EU and EEA Member States.
7. A total of 214 firms were included in the CSA sample, 115 of which credit institutions (CIs), and 99 investment firms (IFs). NCAs used different criteria to select meaningful samples for their respective markets. Criteria used included a firm's total number of clients, the market share in the provision of investment services, revenues, the evidence from prior investigations, etc. Most NCAs deployed a mix of criteria to identify the firms that would ensure a proportionate and meaningful coverage of their national markets.
8. The overall sample of 214 firms across 26 jurisdictions comprised 15 manufacturers, 122 distributors and 73 firms acting both as manufacturers and distributors.
9. Notwithstanding the challenging circumstances of the COVID-19 emergency, various NCAs did not limit themselves to purely desk-based approaches, but also made use of video/audio conferencing tools to perform remote inspections, to testing the overall effectiveness of firms' policies and procedures and assessing products' target markets and distribution strategies.

### **Main findings**

10. The 2021 CSA has shown that firms generally define a target market for the products they manufacture and/or distribute and that firms follow the list of five target market categories set out in the ESMA guidelines. However, in some cases the definition of a target market appears to be approached as a formalistic exercise as it is done at an insufficiently granular level and with the use of unclearly defined terms.
11. Furthermore, the definition of a target market does not always translate into a compatible distribution strategy that enables the product to reach the identified target market.
12. Finally, further areas of improvement have emerged with regard to the requirements:
  - to perform a scenario analysis as required under Article 9(10) of the MiFID II Delegated Directive. For example, a lack of convergence has emerged on how firms perform such an analysis and it is sometimes unclear how these scenarios are actually used by firms for the product's target market identification;
  - to perform a charging structure analysis as required under Article 9(12) of the MiFID II Delegated Directive, a key investor protection requirement on which ESMA had already provided guidance to firms in the form of dedicated Q&As. For example, it

emerged that manufacturers' procedures insufficiently describe how a product's cost structure is evaluated to ensure compatibility with the product's target market;

- to review products. For example, it emerged that such reviews are not always performed frequently enough and with an adequate scope to verify if the financial instrument remains consistent with the needs, characteristics and objectives of the target market;
- to exchange information between manufacturers and distributors. For example, a significant number of firms provide reports to the product manufacturers only at the latter's request and not on a proactive basis.

### Next steps

13. Based on the results of the CSA, ESMA has decided to review its guidelines on the MiFID II product governance requirements to address the most relevant areas where a lack of convergence has emerged and to complement the guidelines with relevant examples of good practices that emerged from the CSA. The review also aims to align the guidelines to the revised MiFID II Delegated Directive on the topic of sustainable finance and to the revised MiFID II in the context of the Commission's Capital Markets Recovery Package, and to incorporate the advice received from ESMA's Advisory Committee on Proportionality (ACP). The Consultation Paper on the revised ESMA guidelines<sup>4</sup> includes further details and analysis of the results of the CSA and on how ESMA proposes to integrate them in the guidelines themselves to improve convergence and therefore the level of investor protection across the EU.
14. NCAs will undertake follow-up actions on individual cases, where needed, to ensure that regulatory breaches as well as other shortcomings or weaknesses identified are remedied.
15. ESMA reminds market participants that they should ensure compliance with all relevant MiFID II regulatory requirements at all times.

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<sup>4</sup> ESMA35-43-3114.