



Markets in Financial Instruments Directive (MiFID II)

■ Why does it matter to intermediaries?

On 3 January 2018, the Directive on Markets in Financial Instruments (MiFID) II became applicable. **Financial intermediaries providing investment advice** act as investment firms as defined by the MiFID II and have to comply with a set of MiFID II conduct rules. These concern, amongst others, remuneration, information requirements and professional knowledge. Independent advice is clearly distinguished from non-independent advice and there is a **ban on commission in case the firm informs the client that investment advice is provided on an independent basis**.

The Directive foresees an **opt-out regime**. Firms that are regulated at national level and that do not hold clients' money and only receive and transmit orders and/or provide advice, like many financial intermediaries, can be exempt by Member States from the MiFID II regime. Some MiFID II requirements, however, have to be applied in an "analogous" way to opt-out firms. The latter do not benefit from the MiFID II Single License to operate cross-border.

■ State of play

The MiFID II review is happening in different phases, with part of the review covered by the CMU follow-up package, and other parts covered by the RIS.

CMU follow-up package - MiFIR / MiFID II Review

The CMU follow-up package included a review of MiFIR (Markets in Financial Instruments Regulation) and some targeted changes to MiFID II. Important proposed changes by the Commission included the introduction of an EU-wide consolidated tape for trading information and a ban on payment for order flow (PFOF - triggered by the "GameStop-case"). The PFOF ban was much discussed in the European Parliament and Council. The end result, as published in the Official Journal on 8 March 2024, is a ban on PFOFs. Member States where the practice of PFOF already existed before 28 March 2024 had the possibility to allow investment firms under their jurisdiction to be exempt from the ban, provided that PFOF is only provided to clients in that Member State. However, this practice must end by 30 June 2026. Member States making use of this option had to notify ESMA by 29 September 2024 and ESMA made a (public) list of these countries making use of the exemption. The **final list** only refers to Germany as a Member State having made use of the exemption possibility.

Retail Investment Strategy

The RIS proposal, published on 24 May 2023, contains amendments to MiFID II.

Focus on some key proposed amendments to MiFID II from an intermediary perspective

Below is an overview of some key changes in the Commission's, Parliament's and Council's RIS texts from an intermediary perspective:

Inducement rules

The **Commission** keeps the current ban on inducements in case of independent advice and portfolio management, and there is an additional ban on inducements regarding the reception and transmission of orders or execution of orders.

In the **Parliament's** text, this new ban on inducements for non-advised sales has been deleted (just as in the IDD-part of the RIS text).

In the **Council**, the new ban is also deleted. It includes, however, new overarching principles for inducements:

- Inducements do not provide an incentive to the firm to offer or recommend a particular instrument/service to the client;
- the level of inducements is proportional to the value of the instrument/ service;
- Inducements to entities belonging to the same group are treated in the same way as inducements from other entities;
- Inducements do not directly benefit the firm/ shareholders/employees without tangible benefit to the client.

Firms have to explain in their inducements policy/ procedures how they comply with the above principles.



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In the Council's text, it is considered non-compliant with the best interest of the client if the following criteria, where applicable, are not at least met:

- The inducement takes into account qualitative criteria such as compliance with applicable regulations;
- The inducement is designed to enhance the quality of the relevant service to the client (ongoing quality if ongoing inducement and additional or higher-level service, proportional to the level of inducements received – 3 examples are given);
- The firm can demonstrate that, where linked to a financial instrument, the inducement was taken into account in the context of the product governance requirements when assessing the instrument's cost structure;
- An appropriate mechanism exists for reclaiming the inducement in nominal value in case clients' interests have been harmed as a result of the firm's non-compliance with the investor protection requirements;
- The inducement does not contain any form of variable or contingent threshold/ any other value accelerator unlocked by attaining a target based on volume or value of sales;
- The inducement is based on a clear, comprehensible and transparent calculation method;
- The inducement can be identified separately from other fees, commissions or non-monetary benefits and payments or benefits which are necessary for the provision of services.

These criteria have to be met on an ongoing basis as long as they continue to pay or accept and retain the inducement. Firms have to keep an internal list of all inducements, as well as records of inducement tests.

Introduction of a "best interest test"

The **Commission** replaces the currently existing MiFID II "quality enhancement test" for inducements by a "best interest test", requiring firms:

- (a) to provide advice based on an assessment of an appropriate range of financial instruments.
- (b) to recommend the most cost-efficient financial instruments among financial instruments identified as suitable to the client and offering similar features;
- (c) to recommend, among the range of financial instruments identified as suitable to the client, a product or products without additional features that are unnecessary to the achievement of the client's investment objectives and that give rise to extra costs.

The **Parliament** has made substantive changes to this new test, aimed, amongst others, at putting less focus on cost-only. Firms who provide advice would have to:

- inform the client of the range of instruments assessed and advise on an appropriate range suited to the client's needs whereby the range is adapted to the business model;
- recommend the most efficient instruments, taking into account performance level of risk, qualitative elements, costs and charges (so the efficiency is not limited to cost-efficiency-only, as the Commission proposal did) and if an equivalent product with higher cost is recommended, firms have to justify this on objective grounds;
- not to place the firm's interest ahead of the client's;
- criterion c) is deleted by the EP.

The Parliament also adds that where an inducement ban exists, the best interest test conditions will be presumed fulfilled (BIPAR note: this implies that there is no "best interest test" for independent advice, nor in Member States with a ban on inducements).

The **Council** adds to a) that this is from 1 or more manufacturers (sufficiently diversified regarding type, characteristics and underlying investment assets to ensure that the client's investment objectives can be met). It adds to b) that "cost efficiency" shall also take into account other factors relevant to the client, such as performance and expected return.

It deletes point c).

Appropriateness and suitability tests

As part of the suitability test, the **Commission** adds that firms will have to look at portfolio diversification and the appropriateness test is expanded to also contain the capacity to bear full or partial loss and risk tolerance. In case of a negative appropriateness test, the firm has to give a warning and can only proceed upon explicit request of the client.

The **Parliament** amends the "capacity to bear losses" and portfolio diversification to make these requirements more practical. In case of advice and portfolio management, the EP has added that the composition of existing portfolios only has to be investigated by the firm to the extent that the client discloses this. It has added the need to look at sustainability within the suitability assessment. Firms also have to inform clients about the existence of different types of advice. In case of the appropriateness test, the EP has deleted the requirement to include in the assessment the client's capacity to bear full or partial loss and risk tolerance.



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The **Council's** text makes a clearer split between both tests. It adds additional record keeping (warnings for example). For the suitability test it clarifies that portfolio diversification should only be done to the extent possible and it adds that if the client is not willing to provide information on existing portfolios, the firm shall base the assessment of portfolio diversification on the information available to it. The Council also states that a product cannot be suitable if it contains features which are unnecessary to the achievement to the client's investment objectives and that gives rise to extra costs. In the appropriateness test, the Council keeps the requirement of verification of risk tolerance / bearing losses.

New type of "independent advice"

A new type of "independent advice" is introduced by the **Commission** when well-diversified, cost-efficient and non-complex financial instruments are advised upon, with a "light" suitability test (no need to assess knowledge and experience of clients, nor portfolio diversification).

The **Parliament's** report deletes a reference to the concept (but keeps another reference to it).

The **Council** keeps the concept.

Training

The **Commission** moved the current ESMA guidelines regarding training into a new MiFID II annex. Continuous professional development is added ("CPD", 15h per year) and a training requirement regarding sustainable investment. A certificate is needed in the Commission's proposal to prove compliance with the requirements.

The **Parliament** states that Member States may require a certificate or other types of documents. The EP has kept the 15h of CPD (more hours were proposed in some of the MEP amendments), adding that this should be during working hours. The EP added that Member States need to have assessment mechanisms and that they can require more than 15h. It also adds that an appropriate number of the 15h has to go to sustainability. Member States may provide that continuing vocational training acquired and required as part of another professional qualification can be valid.

The **Council** text kept the 15h but added that Member States need mechanisms to assess training and it leaves flexibility for a certificate or an equivalent form of evidence.

Value for money

New product governance rules are introduced by the **Commission** to ensure value for money. ESMA is to create benchmarks and there are requirements (reporting) for distributing firms as well.

In the **Parliament**, the benchmarks are turned into supervisory tools. These are European benchmarks for groups of comparable products, manufactured and distributed in more than one Member State, to be developed by ESMA. For financial instruments that are manufactured and distributed in only 1 Member State, national benchmarks have to be developed (there will be RTS from ESMA to ensure a horizontal approach). Deviations from the benchmark will have to be explained (the measure of last resort is removal of the financial instrument from the market).

For PRIPs, the EP amends the requirements for "distributors": it clarifies that they only have to identify and quantify additional costs regarding distribution not already taken into account by the manufacturer (so there is no more duplication of requirements as was the case in the Commission text). It also clarifies that the distributor does not have to assess whether all costs are justified, but only those costs incurred for the distribution (so here also no more duplication). The EP does add the requirement to assess additional features/ services that could impact the value and benefits provided to the investor.

The EP adds for PRIPs a peer grouping exercise requirement – distributors may rely on the manufacturers' analysis. "Distributors" have to do a peer analysis of service costs based on an internal analysis of relevant peers in the market. ESMA will develop guidelines on the process / criteria for the peer grouping.

For PRIPs, the EP specifies that manufacturers and "distributors" have to report costs and charges of the products to the NCA, including where relevant distribution costs and costs related to "the distribution of advice". NCAs have to report this data to ESMA and ESMA has to develop RTS regarding the content / type of data and the format / frequency/ starting date. The EP has also added a requirement for ESMA to create guidelines on criteria if costs are justified / proportionate.

The EP has also added that Member States have to report to the Commission and ESMA 5 years after the application date of RIS regarding the implementation of this article. The Commission has to do an evaluation and assess if the new product governance rules brought better value for money to citizens; the impact on conflicts of interest associated with inducements; and the implementation of financial literacy measures. If there is no positive change, the Commission shall issue legislative proposals if appropriate. In the Council, we understand that a similar approach is under discussion, with peer reviews.



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In the **Council's** text, the requirements for distributors for PRIIP products remain similar to the Commission text, but it is called a value for money assessment and a peer group comparison is added (additional testing required if there are outliers). Distributors may, however, rely on the manufacturer value for money assessment if this already takes into account all distribution costs. Member States may allow distributors to compare with the EU benchmark instead of doing a peer analysis. Distributors of PRIIPs have to report to the home NCA (if this is not yet in KID) the distribution costs, including advice cost and inducements and in which Member State they will distribute the product. There are more reporting requirements if the manufacturer has no reporting obligations.

The Council text foresees a European benchmark as a supervisory tool. These benchmarks should be public and applicable after a test has demonstrated their relevance. ESMA is to provide access to the data and can charge fees to firms.

NCAs are to report 5 years after the application date on value for money/peer grouping. There should be an ESMA report 6 years after application and a Commission report 7 years after application.

More detailed rules on costs and charges

More detailed rules on costs and charges and their disclosure are added in the **Commission's** proposal.

The **Parliament** keeps the requirement to inform the client prior to services / transaction with information on costs, associated charges and third-party payments. It adds that this includes all costs and charges relating to the distribution of the instrument, cost of advice where relevant.

The EP has made a distinction for expressing the overall cost over different periods for different types of products.

It keeps the need for separate itemisation for third-party payments. For third-party payments, it kept the requirement to disclose the cumulative impact on the net return over the holding period (it deleted this requirement for other types of costs/charges).

The possibility to give the method of calculation when this cannot be ascertained prior to the provision of the service has been limited to third party payments only by the EP (not anymore for "any costs, associated charges"). The EP adds that the exact amount then has to be provided ex post.

The EP has kept the requirement for an annual statement. It has kept the fact that an annual statement should not be provided if there is an online system with up-to-date

statements but added that this is upon the request of the client (not automatically as proposed by the Commission).

The **Council** makes no big changes to the Commission's proposal but deletes the possible lighter approach for professional clients. It also expands the need for RTS to the method of calculation and replaces the words "third party payments" everywhere by "inducements".

■ **Next steps**

The **RIS proposals** will follow the normal legislative procedure of the EP's and Council's amendments and adoption (see separate article on CMU/SIU/RIS).

ESMA's actions

Statement providing initial guidance to firms using Artificial Intelligence technologies

In June 2024, ESMA published a public Statement providing initial guidance to firms using Artificial Intelligence technologies when they provide investment services, including investment advice, to retail clients. The Statement looks at the benefits and risks and reminds firms to respect MiFID II rules, in particular regarding acting in the best interest of the client, organisational aspects, conduct of business rules and record keeping rules. The ESMA Guidance applies whether AI is used with or without the direct knowledge and approval of senior management. It provides only initial guidance and firms are encouraged to seek further resources and engage with their NCA to navigate complex AI-related challenges effectively. ESMA and NCAs will keep monitoring the evolution and the relevant EU legal framework on AI to determine if further action is needed.

Launch of a data collection exercise on costs linked to investments in AIFs and UCITS

On 14 November 2024, ESMA announced the launch of a data collection exercise together with the NCAs, on costs linked to investments in AIFs (Alternative Investment Funds) and UCITS (Undertakings for Collective Investments in Transferable Securities). ESMA together with the NCAs designed a two-stage data collection exercise involving both manufacturers and distributors of investment funds:

1. Information requested from manufacturers will provide an indication on the different costs charged for the management of the investment funds.
2. Information requested from distributors (i.e., investment firms, "independent financial advisors", neo-brokers): ESMA states in its press release that distributors will inform "on the fees paid directly by investors to distributors".



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ESMA explains that the initiative contributes to shedding light on pricing practices in a key part of the EU financial markets, information that has until now not been accessible to retail investors and supervisory authorities. "Greater transparency will allow investors to know more about the features of the products that are offered to them and will further support the development of a competitive market for UCITS and AIFs."

The data collection follows the level 1 mandate received from the European Commission under the UCITS and AIFM Directives review. A report based on this data will be submitted to the European Parliament, the Council and the European Commission in October 2025. This will also be part of an enhanced 2025 ESMA market report on costs and performance of EU retail investment products.

Common Supervisory Action

On 14 February 2025, ESMA together with the NCAs, launched a Common Supervisory Action (CSA) to assess to what extent **UCITS management companies** and **Alternative Investment Fund Managers (AIFMs)** have established effective compliance and internal audit functions with the adequate staffing, authority, knowledge, and expertise to perform their duties under the AIFM and UCITS Directives.

These functions are designed to ensure that the internal control mechanisms to monitor, identify, measure, and mitigate any possible risks of non-compliance with the applicable rules are in place. Therefore, ensuring that the entities have robust internal controls is crucial to avoid investor detriment and preserve financial stability.

The work will be done using a common assessment framework developed by ESMA, which sets out the scope, methodology, supervisory expectations, and timeline on how to carry out a comprehensive supervisory action in a convergent manner.

During 2025, NCAs will share knowledge and experiences through ESMA to foster convergence on how they supervise the compliance of UCITS management companies and AIFMs with the relevant rules in the area. ESMA will then publish a final report with the results of the exercise in 2026.

First consolidated report on sanctions and measures

In October 2024, ESMA published its first consolidated report on sanctions and measures imposed by the NCAs in Member States in 2023. In 2023, more than 970 administrative sanctions and measures were imposed across EU Member States in financial sectors under ESMA's remit. These include sanctions under AIFMD⁴, BMR⁵, CSDR⁶, ECSPR⁷, EMIR⁸, MAR⁹, MiCA¹⁰, MiFID II, MiFIR, PR¹¹, SFTR¹² and UCITS¹³.

The aggregated value of administrative fines amounted to more than 71 million EUR. The highest amounts of administrative fines were imposed under the **MAR** and the **MiFID II**. Overall, the report highlights that there is still room for more convergence between NCAs in the exercise of their sanctioning powers. ESMA stresses that the use of sanctions is only one of multiple tools in the NCAs' supervisory toolkit, and supervisory effectiveness cannot be measured solely based on the number or value of the sanctions imposed in a Member State. The consolidated report does not provide a full picture of national enforcement activities; for example, these may also include more informal actions, and not all criminal sanctions are included in the scope of the report.

Building on this report, ESMA will further foster the effective and consistent implementation of capital markets rules and ensure similar breaches lead to similar enforcement outcomes across the EU.

⁴ AIFMD= Directive of 8 June 2011 on Alternative Investment Fund Managers

⁵ BMR= Regulation of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds

⁶ CSDR=Regulation of 23 July 2014 on improving securities settlement in the EU and on central securities depositories

⁷ ECSPR=Regulation of 7 October 2020 on European crowdfunding service providers for business

⁸ EMIR=Regulation of 4 July 2012 on over-the-counter derivatives (OTC) derivatives, central counterparties and trade repositories

⁹ MAR=Regulation of 16 April 2014 on market abuse

¹⁰ MiCA=Regulation of 31 May 2023 on markets in crypto-assets

¹¹ PR=Regulation of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market

¹² SFTR=Regulation of 25 November 2015 on transparency of securities financing transactions and of reuse

¹³ UCITS=Directive of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities



7th Market Report on the Costs and Performance of EU Retail Investment Products

On 14 January 2025, ESMA published its seventh Market Report on the Costs and Performance of EU Retail Investment Products. The report shows a decline in the costs of investing in key financial products, even if the cost levels of funds in the EU “remain high by international standards”. Distribution costs are generally not included.

ESMA lists the following as **key findings** of its report:

- UCITS costs decline gradually, from high levels,
- UCITS performance slightly improved,
- ESG UCITS with lower costs and higher performance than non-ESG,
- Alternative Investment Funds less demanded by retail investors,
- Structured Retail Product costs improve but remain difficult to assess for clients.

The report aims at facilitating increased participation of retail investors in capital markets by providing consistent EU-wide information on cost and performance of retail investment products. ESMA states that improvements in data availability continue, but significant data issues persist.



■ Links

- [Directive on Markets in Financial Instruments](#)
- [Reviewed MiFIR Regulation](#)
- [Reviewed MiFID Directive](#)
- [List of EU Member States using the temporary exemption from the PFOF prohibition](#)
- [ESMA's Statement providing initial guidance to firms using AI technologies](#)
- [ESMA's first consolidated report on sanctions and measures - Underlying data available in excel format - Snapshot of report's key findings](#)
- [ESMA's 7th Market Report on the Costs and Performance of EU Retail Investment Products](#)
- [ESMA's Final Report on bond transparency and reasonable commercial basis under MiFIR Review](#)
- [MiFIR Review Consultation Package](#)
- [ESMA's consultation on the ESEF RTS for sustainability reporting and on the amendments to the EEAP \(European Electronic Access Point\) RTS](#)

Statement, supporting the Commission's objective to “simplify and reduce the reporting burden in the financial sector”

On 7 February 2025, ESMA published a statement, supporting the European Commission's objective to “simplify and reduce the reporting burden in the financial sector”. It announces that it will look across its entire remit, including data, policy and supervision, to identify ways to ensure that the measures applicable to market participants are proportionate.

The first areas on which ESMA has focused are the following:

- **Transparency and volume cap regimes:** ESMA has introduced changes in the transparency framework under the MiFIR Review that will contribute to a significant reduction in the reporting burden for market participants.
- **Transaction reporting:** other initiatives under the MiFIR Review aimed at reducing or easing the reporting burden include the consolidation and alignment of reference data for the purpose of transaction reporting and transparency and the alignment of specific requirements related to transaction data with other reporting regimes, such as EMIR.
- **Digitalising sustainability and financial disclosure:** in the corporate reporting area, ESMA is currently consulting on proposals, in accordance with the European Single Electronic Format (ESEF), to digitalise sustainability disclosures in a phased way to spread the reporting burden over a number of years. The consultation also points at easing the burden associated with electronic disclosures of the notes to the financial statements.

ESMA will continue to engage with stakeholders to identify areas where further simplification and burden reduction could be achieved. This and other future initiatives will help to reduce cost and complexity for companies, saving time that can be redirected towards other business activities.