



Executive summary

Many regulators across the globe increasingly view the ability to intervene as one of their key supervisory tools to reduce harm in cases where there is a risk of significant consumer detriment or threat to financial markets. At the same time, many jurisdictions have put in place product governance regimes for financial services firms which aim to avoid, or at least mitigate from an early stage, any potential risks of failure to comply with investor protection rules.

In particular, the design and distribution obligations under these product governance regimes aim to overcome the limitations of disclosure and ensure that firms which manufacture and distribute financial products take some responsibility and adopt a more customer-centric approach.

The stages of development, level of detail, scope and coverage of regulators' product intervention powers, and the product design and distribution obligations under product governance regimes, all vary across jurisdictions. This guide summarises the frameworks in selected jurisdictions, allowing a high-level comparison of the different regimes and offering a glimpse of the direction of travel in this area.

Australia

The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 became law on 5 April 2019, introducing both product intervention powers for the Australian Securities & Investments Commission (**ASIC**) and a design and distribution obligations regime for financial services firms. Importantly, these reforms only apply to the sale and distribution of products to retail clients in Australia and do not apply in relation to wholesale clients.

The product intervention power commenced on 6 April 2019 and a draft regulatory guide in relation to ASIC's use of the power is expected to be released by ASIC for consultation in the middle of 2019. ASIC can use the power to stop, or impose conditions on, the issue and distribution of financial products if ASIC is satisfied that a product (or class of products) has resulted, or is likely to result, in 'significant detriment' to retail clients. ASIC needs to meet various procedural requirements before the power can be exercised, including conducting consultation (but a failure to consult does not invalidate the exercise of the power). There is no right to a private consultation - the intervention order is public.

The product suitability rules are not in force until 5 April 2021, so financial services firms have a two year transitional period to prepare for the documentation, systems and operational changes needed to give effect to them. A draft regulatory guide in relation to ASIC's policy in relation to the design and distribution obligations requirements is expected to be released for consultation in the second half of 2019.

Under this new regime, product issuers will need to make 'target market determinations' (**TMD**) and take reasonable steps to ensure that their distributors distribute to the target market. They must also periodically review and update the TMD (including when a review trigger occurs) to ensure it remains appropriate, keep records of decisions and notify ASIC of any significant dealings in a product inconsistent with the TMD. The TMD does not need to specify the 'negative' target market, but the TMD does have to be public.

Distributors must not distribute a retail product unless it has a TMD and must take reasonable steps so that retail product distribution conduct is consistent with the TMD. They must also collect information (including complaints information) for the issuer and notify the issuer of any significant dealings inconsistent with a TMD.

The European Union and its member states

In the EU, the Markets in Financial Instruments Directive (**MiFID**) and Markets in Financial Instruments Regulation (**MiFIR**, together with MiFID, MiFID II) applied from January 2018. MiFID II introduced product governance obligations for manufacturers and distributors of financial instruments¹ and equipped national competent authorities (**NCA**s) and European Supervisory Authorities (**ESA**s) with product intervention powers.

MiFID II product intervention powers are potentially extremely broad, empowering EU authorities and NCAs to take action not only in relation to financial products, but also to prohibit or restrict "a type of activity or practice". The exercise of product intervention powers is not restricted to instances where there are investor protection concerns, but includes threats to the functioning and integrity of financial markets or the stability of the financial system. Since these powers became available to ESAs and NCAs on 3 January 2018, product intervention powers have been exercised by the European Securities and Markets Authority (**ESMA**) and certain NCAs (including the UK) in relation to the provision of binary options and contracts for differences to retail clients. In the UK, the Financial Conduct Authority (**FCA**) has published proposals to ban the sale of derivatives or exchange traded notes which reference certain types of cryptoassets to address harm posed to retail consumers. See our blog post on the consultation [here](#).

¹ The Insurance Distribution Directive (IDD) also introduced a similar product governance framework for insurance products in October 2018. It is beyond the scope of this document to consider the IDD in further detail.



The EU product governance requirements have a broader scope than under the Australian regime, capturing all regulated financial instruments aimed at both the wholesale and retail markets, and applying to all products sold on both primary and secondary markets. Similar to the obligations in Australia, firms that manufacture financial products are required to specify a target market of end clients for whose needs, characteristics and objectives the product is intended as well as a distribution strategy which is consistent with the identified target market as part of the product approval process. Distributors are required to understand the features of the investment products they offer or recommend and, using the information obtained from manufacturers and information on their own clients, identify a target market of clients to whom products and services are intended to be provided. Unlike Australia, distributors and manufacturers subject to EU requirements are also required to identify the negative target market.

As well as an overview of the EU MiFID II product intervention and product governance requirements, this document contains summaries of the regimes in **France, Germany, Spain** and the **UK**, where relevant, highlighting key differences in application or implementation of the requirements in each jurisdiction. Although the UK is currently expected to exit the EU before 31 October 2019, it is likely that many aspects of EU law will continue to apply for a period after this date - either because the agreed deal provides for an implementation period where EU legislation continues to apply or because of "onshoring" legislation in the case of a "no-deal" Brexit.

In the UK, product governance is likely to remain an area of focus for the Financial Conduct Authority (**FCA**). The FCA has recently [confirmed](#) its plan to review MiFID II implementation and will be assessing how asset managers oversee the design of their products, identify their target market and monitor their products and distribution activities during the course of 2019 and early 2020. The FCA has also recently given clear warning to firms involved in the design and sale of general insurance products that they must do more to protect customers from harm. It has published proposed guidance for insurance product manufacturers and distributors (including, for example, retail banks) to clarify its expectations in terms of product development and distribution approaches. See our briefing on the FCA's review of the general insurance distribution chain [here](#).

Hong Kong

In Hong Kong, structured products, collective investment schemes and the issue of any advertisement, invitation or document relating to an offer of investment in securities, structured products or collective investments schemes must first be authorised by the Securities and Futures Commission (**SFC**) under the Securities and Futures Ordinance (**SFO**) before being offered to the public. In line with the disclosure-based approach adopted by Hong Kong, authorisation by the SFC involves the review of offering documents, and in some cases the structural features of the particular product, to determine if certain impartial benchmarks are met and the required information is disclosed, as opposed to an assessment of the product's merits or suitability. The SFC may use its intervention powers at any time to amend or revoke conditions, or impose new conditions, in respect of any authorisation. In certain circumstances, the SFC may also withdraw an authorisation.

Similar to the product governance regime in Australia, although more high level and principles-based, Hong Kong's product governance regime requires certain issuers to put in place a robust internal product approval process that covers the whole product life-cycle, including target market identification, considering those investors' interests and designing products accordingly. Such measures were introduced in Hong Kong in 2014 in response to the global regulatory trend which saw a number of jurisdictions become increasingly focused (largely prompted by the fallout of the 2008 financial crisis) on the early stages of the product life-cycle as well as the product governance of issuers throughout the product life-cycle.

In Hong Kong, like the EU, the onus is on distributors to understand the products they recommend and ensure suitability, subject to certain exemptions (e.g. where the client is an institutional investor).

Singapore

In Singapore, the current product governance regime has largely come about in response to the retail structured notes crisis triggered by the collapse of Lehman Brothers in 2008. After consulting in 2009 and 2010 on a review of the regulatory regime governing the sale and marketing of unlisted investment products, among other things, the Monetary Authority of Singapore (**MAS**) made a number of changes to its conduct of business framework, particularly with regard to the suitability of products and advice. Most changes had come into effect by 2013 other than the balanced scorecard framework which was introduced in 2016.

Similar to Australia, Singapore's product governance regime is not as broad in scope as the EU regime and only applies to retail clients. Issuers and distributors (to the extent they are regulated financial advisers) must carry out product due diligence before marketing or selling any new product in Singapore, including an assessment of the type of targeted client the new product is suitable for and whether the new product matches the client base of the financial adviser. Significantly, every member of the senior management of the financial adviser (i.e. its executive officers) must have personally satisfied himself/herself that the new product is suitable for the targeted client and personally approved the sale or marketing of the new product to the targeted client. We are yet to see such direct potential personal liability introduced in other jurisdictions, although it is possible that senior management could be held responsible under the various senior management accountability regimes that have been introduced in the likes of Australia, Hong Kong and the UK.



HERBERT
SMITH
FREEHILLS

In Singapore, distributors are required to have a reasonable basis for any recommendation made with respect to any investment product, which is somewhat different to the Hong Kong regime which requires distributors to ensure the suitability of any recommendations or solicitation.

While not quite as broad in scope as the EU, MAS does have reasonably broad powers to intervene in relation to the trading or offer of products to the public where to do so would be in the public interest.

The United Arab Emirates

Laws and regulations in relation to financial services in the UAE and the financial free zones (such as the Dubai International Financial Centre (**DIFC**) and Abu Dhabi Global Market (**ADGM**)) are relatively nascent and as such they do not contain the same level of depth or guidance as in more developed jurisdictions. Furthermore, while there is currently no specific product governance regime either onshore in the UAE or in the financial free zones (though obligations relating to suitability do exist), UAE regulators do have broad powers (which they have used in the past) which allow them the flexibility to intervene where they consider a specific product may give rise to significant detriment or risk to a class of investors or consumers, including the issue of warnings, directions or guidance.



Australia

PRODUCT INTERVENTION

Types of intervention made under power

ASIC can make interventions relating to products/product features, types of consumers accessing product or circumstances in which consumers access product. Examples include:

- additional disclosure obligations;
- mandating warning statements;
- imposing requirements on a person's remuneration (to the extent it is conditional on the achievement of objectives directly related to the financial product);
- amendments to advertising documents; and
- restricting or banning the distribution of the product.

Individual or market wide intervention

ASIC can make an individual intervention or a market wide intervention under the power.

Products subject to the power

The power applies to a wide range of financial products made available to retail clients (e.g. securities, insurance products, derivatives and superannuation) in addition to credit products regulated by the Credit Act (e.g. credit contracts and mortgages) and financial products under the ASIC Act (e.g. extended warranties and short term credit).

Products excluded

Financial products:

- made available to wholesale clients;
- issued or offered by an exempt body or an exempt public authority; and
- excluded by regulation.

Trigger for use of power

ASIC must identify that a product or a class of product has resulted in, or will (or is likely to) result in significant detriment to retail clients.

In considering whether a detriment is significant ASIC can have regard to all relevant factors including:

- the nature and extent of the detriment;
- any actual or potential financial loss resulting from the product to retail clients; and
- the impact of the detriment on retail clients.

Significant detriment may arise as a result of:

- the product features e.g. high leverage;
- defective disclosure e.g. re risks (although the law specifically provides that significant detriment may arise where the product's disclosure document meets the legal requirements e.g. the loss arises from a risk properly and adequately disclosed in a prospectus);
- poor design; or
- inappropriate distribution channels.



Australia continued

Duration and review of an intervention

ASIC can revoke or amend an intervention order at any time.

An intervention can last up to 18 months and can be extended past 18 months by a set period of time or made permanent by ASIC with the Minister's approval. ASIC may, once an intervention order has been extended, amend or revoke it with the approval of the Minister.

In relation to specific intervention orders (over specified product(s)) ASIC must publish any amendment to the intervention order and give a public notice (including stating why the amendment is appropriate) on ASIC's website. ASIC must also serve a copy of the amendment on any person to whom ASIC considers that the order applies, but failure to serve that notice does not invalidate the order.

In relation to class intervention orders, made by legislative instrument, any amendment to the order must also be made by legislative instrument. The usual consultation required for federal legislative instruments is dis-applied for intervention orders by legislative instrument.

An expired or revoked intervention order cannot be remade unless there is a material change in circumstances.

PRODUCT GOVERNANCE

Who is subject to the obligations?

Issuers and sellers of financial products which require a prospectus or a product disclosure statement (**PDS**) for their issue or sale are subject to 'design obligations'.

'Regulated persons' are also subject to 'distributor obligations'. A regulated person is :

- an offeror or issuer of the product;
- a seller of the product (in a 'secondary sale' e.g. sale by a controller);
- an Australian financial services licence (**AFSL**) holder or their authorised representative;
- a person exempted from the AFSL requirement; and
- a person who is required to hold an AFSL but doesn't.

Who is excluded?

Issuers/sellers and distributors of:

- products to retail clients where a prospectus or PDS is not required (exceptions apply);
- products to wholesale clients;
- default superannuation (My Super);
- issuers of fully paid ordinary shares in Australian or foreign companies (unless they are an investment company or issuing ordinary shares that the company intends to convert into preference shares within 12 months after issue);
- products issued or offered for sale by exempt bodies or exempt public authorities;
- margin lending facilities; and
- employee share schemes.



Australia continued

Issuer obligations

Issuers or sellers who are subject to the design obligations must:

- make a target market determination (**TMD**) for the product. It must be reasonable to conclude that if a product were to be issued/sold to a retail client in accordance with the TMD's distribution conditions, the product would likely be consistent with their likely objectives, financial situation and needs;
- set review triggers (events or circumstances suggesting that the TMD is no longer appropriate) and specify these in the TMD;
- set a review period (the maximum time reasonable to allow between TMD reviews) and specify it in the TMD;
- set distribution conditions (e.g. that the product can only be sold through a personal advice channel). It must be reasonable to conclude that if a product were to be issued/sold to a retail client in accordance with the distribution conditions, the retail client would be likely to be in the target market;
- determine what information they need to ensure the TMD remains appropriate and specify that in the TMD and disclose in the TMD that that information will be collected by distributors and provided back to the TMD maker;
- review the TMD;
- keep records of TMD determinations;
- take reasonable steps that will or are reasonably likely to result in distribution consistent with the TMD; and
- notify ASIC of significant dealings that are not consistent with the TMD.

Distributor obligations

Distributors who are 'regulated persons' must:

- not engage in 'retail product distribution conduct' in relation to a product that needs a TMD if one has not been made (unless after making all reasonable enquiries they reasonably believed a TMD was not required or had been made). 'Retail product distribution conduct' includes giving a prospectus or PDS and dealing in (including issuing and arranging issues) and advising on a product. While the explanatory memorandum indicated that 'retail product distribution conduct' is intended to exclude conduct associated with the provision of personal advice (where the personal circumstances of the investor have been considered by the adviser), the drafting of the exclusion does not fully affect this and is more limited, e.g. it does not extend to dealings by platform operators following advice from a third party adviser;
- not engage in 'retail product distribution conduct' in relation to a product whose TMD may no longer be appropriate;
- not engage in 'retail product distribution conduct' if they are the TMD maker and know (or ought reasonably to know) that a review trigger or similar event has occurred, and must take all reasonable steps to ensure that other regulated persons are informed to cease 'retail product distribution conduct', until the TMD is reviewed and amended where relevant;
- comply as soon as practicable but in any event within 10 business days of becoming aware of any such direction;
- take reasonable steps that would have resulted in, or been reasonably likely to have resulted in, 'retail product distribution conduct' being consistent with the TMD;
- provide distribution information (including information specified by the TMD maker and complaints information) to the TMD maker and keep such information for 5 years; and
- notify TMD makers of significant dealings that are not consistent with the TMD.



Australia continued

Products subject to obligations	<p>Most financial products made available to retail clients where a prospectus or PDS is required, (but see Products Excluded below). Some products which are exempt from the requirement to prepare a PDS for their issue are still subject to the obligations:</p> <ul style="list-style-type: none">• investor directed portfolio service (IDPS); and• basic banking product issues. <p>The broad range of products subject to the obligations now includes financial products subject to the ASIC Act.</p>
Products excluded	<ul style="list-style-type: none">• Products issued to retail clients where a prospectus or PDS is not required (exceptions apply);• Products issued to wholesale clients;• Default superannuation (My Super);• Fully paid ordinary shares in Australian or foreign companies (excluding investment company shares and ordinary shares that are intended to convert into preference shares within 12 months of issue);• Products issued or offered for sale by exempt bodies or exempt public authorities;• Margin lending facilities; and• Employee share schemes. <p>It is proposed to exclude more products by regulation, including:</p> <ul style="list-style-type: none">• Medical indemnity insurance;• Depository interests in fully paid foreign ordinary shares; and• Defined benefit superannuation funds and eligible rollover funds.



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Hong Kong

PRODUCT INTERVENTION

Types of intervention made under power

Power to amend or revoke conditions, or impose new conditions, in respect of any authorisation

The Securities and Futures Commission (**SFC**) may at any time amend or revoke any of the conditions (other than the condition that there is an individual approved by the SFC for the purposes of being served by the SFC with notices and decisions for the product/issue (**Approved Person**)) imposed, or impose new conditions, in respect of any authorisation¹ granted by it in relation to:

- a structured product;
- a collective investment scheme; or
- the issue of any advertisement, invitation or document relating to an offer of investments in securities, structured products or collective investments schemes (collectively, **Offer Documents**).

Power to withdraw authorisation

The SFC may also withdraw an authorisation in certain circumstances (see 'Trigger for use of power' section below).

Individual or market wide intervention

The SFC can make an individual intervention in respect of a structured product, collective investment scheme or any Offer Documents in relation to which it has granted an authorisation.

Products subject to the power

The power applies to securities, structured products and collective investment schemes that are offered to the public.

Products excluded

Any financial products not offered to the public, e.g. financial products offered by way of private placement etc.

Trigger for use of power

Power to amend or revoke conditions, or impose new conditions, in respect of any authorisation

The SFC may use this power at any time by notice in writing served on the Approved Person.

Power to withdraw authorisation

The SFC may use this power if it decides that:

- any information or documents required to be submitted to the SFC in relation to an application for authorisation or in respect of an Approved Person were false or misleading in a material particular at the time they were provided;
- any conditions imposed in respect of an authorisation are not being complied with;
- any information provided to the SFC in purported compliance with any conditions imposed in respect of an authorisation were false or misleading in a material particular at the time they were provided; or
- it is desirable to withdraw the authorisation in order to protect the interests of the investing public.

The Approved Person for the collective investment scheme, structured product or Offer Documents must be given a reasonable opportunity to be heard before the SFC can withdraw an authorisation.

Duration and review of an intervention

The SFC's intervention powers are not subject to a specific duration or review criteria.

¹ Structured products, collective investment schemes and Offer Documents must be authorised by the SFC before they can be offered to the public.



Hong Kong continued

PRODUCT GOVERNANCE

Who is subject to the obligations?

Persons licensed by or registered with the SFC (this includes both 'issuers' and 'distributors' of financial products).

Who is excluded?

Persons offering financial products to:

- institutional professional investors; and
- corporate professional investors (i.e. corporates, trusts and partnerships that meet certain monetary/asset thresholds) that the person is reasonably satisfied meet the assessment criteria set out in paragraph 15.3A(b) of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (**SFC Code of Conduct**) and the person has complied with paragraph 15.3B of the SFC Code of Conduct (**CPI Requirements**).

Issuer obligations

An issuer of a structured investment product, the management company of a unit trust/mutual fund and the unit trust/mutual fund itself and (where the unit trust/mutual fund is in the nature of a mutual fund corporation) its board of directors, and any insurance company issuing an investment-linked assurance scheme, are required to put in place a robust internal product approval process that covers the whole product life-cycle. In particular, issuers are required to comply with 14 general principles under the following areas:

- **accountability:** to ensure accountability of issuers and require them to consider investors' interests as part of the internal product approval process;
- **infrastructure:** to ensure each new product goes through proper due diligence and an approval process with checks and balances;
- **target market identification:** issuers must identify the target market and consider investors' interests, and design their products accordingly;
- **product design:** issuers must conduct a detailed assessment of the product risks and features in order to be generally satisfied with the fairness of their products, taking into consideration any other alternatives for achieving the same investment objective and risk/return profile;
- **risk monitoring and stress testing:** issuers must use their best efforts to assess all relevant risks of the products and be generally satisfied that any product risk is properly managed;
- **termination/de-authorisation:** issuers must ensure that the termination/de-authorisation process of a product is carried out fairly;
- **modification of contract terms/constitutive documents:** issuers must ensure that any modifications or adjustments to a product or its contract terms/constitutive documents are fair and reasonable and notification is given in accordance with regulatory requirements;
- **fees:** issuers must ensure that the fees are fair and proportionate;
- **distributor selection:** issuers are encouraged to exert control over the distribution process with regard to the specific target market;
- **investor education:** issuers must consider the need and, where necessary, devise appropriate plans for conducting investor education programmes for their products;
- **disclosure:** issuers must ensure that the disclosures relating to the products comply with all applicable laws, regulations codes and guidelines;
- **legal and compliance:** issuers must ensure that the legal and compliance functions play a role throughout the product life-cycle, the contractual terms are clear and each product and its issuance comply with all applicable requirements throughout the product life-cycle;



Hong Kong continued

Issuer obligations continued	<ul style="list-style-type: none">• conflicts of interest: issuers must avoid/manage any actual or potential conflict of interests by conducting transactions at arm's length and maintaining necessary Chinese walls; and• post-sale obligations: issuers must continue to monitor product performance, review distribution strategy, ensure ongoing disclosure of information, handle investors' requests and review complaints, and provide valuation and market making (if applicable).
Distributor obligations	<p>Distributors must, subject to certain exemptions (e.g. where the client is an institutional investor):</p> <ul style="list-style-type: none">• having regard to information about a client of which they are or should be aware through the exercise of due diligence, when making a recommendation or solicitation, ensure the suitability of the recommendation or solicitation for that client is reasonable in all the circumstances;• understand the investment products they recommend to clients (product due diligence);• provide reasonably suitable recommendations by matching the risk return profile of each investment product with the personal circumstances of each client to whom it is recommended;• in an execution only scenario involving derivative products, assess whether the client has general knowledge of the nature and risks of derivatives based on information obtained from the client during the know your client procedures. If they do not have such knowledge, either explain the risks associated with the product if it is exchange traded or provide appropriate advice as to whether or not the transaction is suitable for the client in all the circumstances if it a non-exchange traded product;• provide all relevant material information to clients and help them make informed investment decisions;• employ competent staff and provide appropriate training;• document and retain the reasons for each investment recommendation made to each client; and• include a mandatory suitability clause in client agreements.
Products subject to obligations	All financial products (except shares or debentures of a private company incorporated in Hong Kong) offered to the public, individual professional investors (individuals who meet certain monetary/asset thresholds) and corporate professional investors that do not meet the CPI Requirements.
Products excluded	Shares or debentures of a private company incorporated in Hong Kong and any financial products offered to institutional professional investors or corporate professional investors that meet the CPI Requirements.



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Singapore

PRODUCT INTERVENTION

Types of intervention made under power

Prohibition of trading

The Monetary Authority of Singapore (**MAS**) may give notice in writing to an approved exchange or recognised market operator stating that it is of the opinion (and setting out the reasons for its opinion) that it is necessary to prohibit trading in particular securities, securities-based derivatives contracts or units in a collective investment scheme.

If, after the receipt of the notice, the approved exchange or recognised market operator fails to take any action in relation to those securities, securities-based derivatives contracts or units in a collective investment scheme and MAS continues to be of the opinion that it is necessary to prohibit trading, MAS may prohibit trading for such period not exceeding 14 days.

Revocation or suspension of authorisation or recognition

MAS may revoke or suspend the authorisation or recognition of a collective investment scheme and the recognition of a recognised business trust.

Stop order for prospectus and profile statement for offer of securities or securities-based derivatives contracts

If MAS is of the opinion that a registered prospectus or profile statement contains a false or misleading statement, omits required information, does not comply with regulatory requirements or it is in the public interest to do so, MAS may serve a stop order on a person making an offer of securities or securities-based derivatives contracts to which the prospectus or profile statement relates directing that no or no further securities or securities-based derivatives contracts be allotted, issued or sold.

Written directions

MAS may, if it thinks it necessary or expedient in the interests of the public or a section of the public or for the protection of investors, issue written directions, either of a general or specific nature, to comply with such requirements as MAS may specify in the written directions.

Individual or market wide intervention

MAS can make an individual intervention or a market wide intervention, depending on the power.

Products subject to the power

The power to prohibit trading applies to securities, securities-based derivatives contracts and units in a collective investment scheme.

The power to revoke, suspend authorisation or recognition applies to collective investment schemes and recognised business trusts.

The power to serve a stop order in relation to a prospectus or profile statement applies to securities, securities-based derivatives contracts and units in a collective investment scheme.

The power to issue written directions applies to units in a recognised business trust, securities and units in a collective investment scheme.

Products excluded

Generally, any capital markets products made available only to institutional or accredited investors, or under another applicable exemption (e.g. private placement exemption etc.).



Singapore continued

Trigger for use of power

Prohibition of trading

MAS may use this power:

- in order to protect persons buying or selling securities, securities-based derivatives contracts and units in a collective investment scheme; or
- where it is in the interests of the public.

Revocation or suspension of authorisation or recognition

MAS may use this power if:

- the application for authorisation or recognition, or any related information or record submitted to MAS whether at the same time as or subsequent to the application, was false or misleading in a material particular or omitted a material particular which, had it been known to MAS at the time of submission, would have resulted in MAS not granting the authorisation or recognition;
- MAS is of the opinion that the continued authorisation or recognition of the collective investment scheme or recognised business trust is or will be against the public interest;
- MAS is of the opinion that the continued authorisation or recognition of the collective investment scheme or recognised business trust is or will be prejudicial to its participants or potential participants;
- in the case of a recognised collective investment scheme, MAS is of the opinion that it is necessary to revoke the recognition of the scheme to give effect to the provisions of any arrangement relating to cross-border offers of collective investment schemes to which Singapore or MAS is a party; or
- in the case of an authorised or recognised collective investment scheme, the responsible person or trustee for the scheme fails to ensure that the conditions and requirements relating to the authorisation or recognition of the scheme continue to be satisfied or fails to furnish such information or record regarding the scheme as MAS may require.

Stop orders

MAS may serve a stop order if a prospectus/profile statement has been registered and:

- MAS is of the opinion that the prospectus/profile statement contains a false or misleading statement;
- there is an omission from the prospectus/profile statement of any information that is required to be included in it;
- MAS is of the opinion that the prospectus/profile statement does not comply with the regulatory requirements; or
- MAS is of the opinion that it is in the public interest to do so.

Written directions

MAS may use this power where it thinks it necessary or expedient in the interests of the public or a section of the public or for the protection of investors, among other circumstances.

Duration and review of an intervention

Prohibition of trading

MAS can prohibit trading in particular securities, securities-based derivatives contracts or units in a collective investment scheme on an organised market for such period not exceeding 14 days.

Revocation or suspension of authorisation or recognition

There is no specific duration or review criteria.

Stop orders

There is no specific duration or review criteria.

Written directions

There is no specific duration or review criteria.



Singapore continued

PRODUCT GOVERNANCE

Who is subject to the obligations?

Licensed financial advisers and exempt financial advisers.

Who is excluded?

Licensed financial advisers and exempt financial advisers when they are, among other things:

- providing any financial advisory service in respect of any investment product to an institutional investor;
- making a recommendation in respect of any investment product to an accredited investor;
- making a recommendation in respect of a capital markets product to any expert investor; or
- making a recommendation in relation to any Government securities.

Issuer obligations

Due Diligence

Before selling or marketing any new product in Singapore to any targeted client (accredited investors, expert investors and institutional investors are excluded from the definition of 'targeted client'), issuers that are licensed financial advisers or exempt financial advisers must carry out a due diligence exercise which includes an assessment of the following:

- the type of targeted client the new product is suitable for and whether the new product matches the client base of the financial adviser;
- the investment objective of the new product;
- the key risks that a targeted client who invests in the new product potentially faces;
- the costs and fees to be incurred by a targeted client investing in the new product as compared to other products with similar features sold by the financial adviser;
- the processes in place for a representative of the financial adviser to determine whether the new product is suitable for the targeted client, taking into consideration the nature, key risks and features of the new product;
- how the new product is intended to be marketed or sold;
- whether any additional measures are necessary to mitigate any conflict of interest between a representative of the financial adviser and his targeted client, arising from the remuneration of such representative as a result of the sale of the new product to that targeted client;
- the minimum qualifications or training required for a representative of the financial adviser before such representative commences financial advisory services in respect of the new product; and
- whether the current systems of the financial adviser, including all relevant client sales documents, adequately support the sale of the new product to the targeted client.

In addition to the due diligence exercise, every member of the senior management of the financial adviser (or a designate) must have, on the basis of the result of the due diligence exercise carried out on the new product:

- personally satisfied himself that the new product is suitable for the targeted client; and
- personally approved the sale or marketing of the new product to the targeted client.



Singapore continued

Distributor obligations	<p><i>Recommendations</i></p> <p>Distributors are required to have a reasonable basis for any recommendation made with respect to any investment product to a person who may reasonably be expected to rely on the recommendation.</p> <p>In particular, distributors must give due consideration to the person's investment objectives, financial situation and particular needs, and have conducted such investigation of the subject matter of the recommendation as is reasonable in all the circumstances.</p> <p>Distributors should know their clients by collecting and documenting information from them such as the financial objectives and risk tolerance of the client. A needs analysis should be conducted by identifying the product that is suitable for the client based on the information obtained from the client. Any recommendations to a client in respect of an investment product should be documented and records kept.</p> <p><i>Customer assessment</i></p> <p>Issuers of capital markets products that are being offered in Singapore are required to classify them as either 'prescribed capital markets products' or 'capital markets products other than prescribed capital markets products' (also referred to as 'specified investment products' (SIPs)) and notify the SGX (if listed) or the distributor (if not listed) of the classification.</p> <p>Distributors offering SIPs to an individual who is not an expert investor or an accredited investor are required to assess the client's knowledge and experience in relation to the type of specified investment product being recommended. Rather than this being a suitability assessment, which considers the client's risk appetite, this is to ensure that the client has the relevant knowledge and experience to understand the features and risks associated with investing in the type of investment product being recommended. If the client fails the assessment, he/she must be given various cautions as to the risks of investing in the investment product.</p> <p><i>Due diligence</i></p> <p>Before selling or marketing any new product in Singapore to any targeted client (accredited investors, expert investors and institutional investors are excluded from the definition of 'targeted client'), distributors that are licensed financial advisers or exempt financial advisers must carry out the due diligence exercise referred to in the 'issuer obligations' section above.</p>
Products subject to obligations	<p>All investment products (i.e. any capital markets product, spot foreign exchange contract other than for the purposes of leveraged foreign exchange trading, life policy, or any other product as may be prescribed by MAS) offered to persons other than institutional investors, accredited investors or expert investors, except Government securities.</p>
Products excluded	<p>All investment products (i.e. any capital markets product, spot foreign exchange contract other than for the purposes of leveraged foreign exchange trading, life policy, or any other product as may be prescribed by MAS) offered to institutional investors, accredited investors or expert investors, and Government securities.</p>



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EU

PRODUCT INTERVENTION

Types of intervention made under power

The European Supervisory Authorities (**ESAs**) and national competent authorities (**NCA**s) are empowered to impose product intervention measures under EU legislation.

ESAs

Under the Markets in Financial Instruments Regulation (**MiFIR**), the European Securities and Markets Authority (**ESMA**)¹ and European Banking Authority (**EBA**)² may, subject to certain limitations³, temporarily prohibit or restrict in the EU:

- the marketing, distribution or sale of certain financial instruments with certain specified features; or
- a type of financial activity or practice.

The European Insurance and Occupational Pensions Authority (**EIOPA**) also has similar powers under the Regulation on key information documents (**KIDs**) for packaged retail and insurance-based investment products (**PRIIPs**)⁴ to prohibit or restrict the marketing or distribution of certain insurance-based investment products or a type of financial activity or practice of an insurer.

Any action adopted by the ESAs prevails over any previous action taken by a NCA.

NCA

Under MiFIR and the PRIIPs Regulation, both of which are directly applicable in member states, a NCA may prohibit or restrict the following in or from that member state:

- the marketing, distribution or sale of certain products; or
- a type of financial activity or practice.

Individual or market wide intervention

ESAs: Individual or market wide intervention (in principle) although it is anticipated that in practice the powers would affect the relevant EU market for a specific product or practice.

NCA: Individual or market wide intervention (in principle) although it is anticipated that in practice the powers would affect the relevant national market for a specific product or practice.

Products subject to the power

In principle, the scope of the powers is designed to be aligned with the scope of the applicable product markets under the relevant EU legislation (as follows):

ESMA: MiFID financial instruments⁵

EBA: Structured deposits

EIOPA: Insurance-based investment products

NCA: All of the above

Note, however, that the wording of the powers also permits EU authorities/NCA to take action to prohibit or restrict "a type of financial activity or practice", which leaves open the possibility of wider product scope.

Products excluded

Products not falling within the categories specified above.

1 Art 40 MiFIR. See also Art 69(2)(s)-(t). On 1 June 2018, [ESMA](#) formally adopted new measures that prohibit the provision of binary options (the measures were not renewed in July 2019 as ESMA believes most NCA have taken permanent national product intervention measures that are at least as stringent as ESMA's measures) and restrict the provision of CFDs to retail clients.

2 Art 41 MiFIR. In relation to structured deposits or a type of financial activity or practice.

3 Intervention should not have detrimental effect on the efficiency of financial markets or on investors that are disproportionate to the benefits of the action; the intervention must not create a risk of regulatory arbitrage; and, where the measure relates to agricultural commodities derivatives, it has only been taken after consultation with the public bodies of physical agricultural markets.

4 Art 15-16 PRIIPs Regulation.

5 The instruments set out in Section C to Annex I of Markets in Financial Instruments Directive 2014/65/EU (**MiFID**) including transferable securities (e.g. shares), money-market instruments, units in collective investment undertakings, derivatives and emission allowances.



EU continued

Trigger for use of power	<p>ESAs</p> <p>First,⁶ where there is either:</p> <ul style="list-style-type: none">• a significant investor protection concern; or• a threat to the orderly functioning and integrity of financial markets; or• a threat to the stability of the whole or part of the financial system; <p>and, secondly:</p> <ul style="list-style-type: none">• regulatory requirements under Union law that are applicable to the relevant financial instrument, structured deposit or activity do not address the threats/concern mentioned above; and• no NCA has taken action to address the problem or the actions taken by an NCA do not adequately address the problem. <p>NCAs</p> <p>NCA</p> s must be satisfied on reasonable grounds that: <ul style="list-style-type: none">• either:⁷<ul style="list-style-type: none">◦ the product or activity or practice gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the financial system within at least one member state;⁸ or◦ a derivative has a detrimental effect on the price formation mechanism in the underlying market;• existing EU regulatory requirements do not sufficiently address the risks and the issue cannot be better addressed by improved supervision or enforcement;• action is proportionate;• NCAs of member states which may be significantly affected by the action have been consulted;• action does not have a discriminatory effect on services or activities provided from another member state; and• where relevant, action has only been taken after consultation with the public bodies of physical agricultural markets. <p>In addition, MiFID II requires NCA</p> s to be given the power to suspend the marketing or sale of financial instruments or structured deposits where a firm has not developed or applied an effective product approval process or otherwise failed to comply with other MiFID II product governance requirements ⁹ .
Duration and review of an intervention	<p>ESAs</p> <p>ESMA, EBA and EIOPA are required to review any prohibition or restriction at appropriate intervals and at least every three months.</p> <p>Unless it is renewed, the prohibition or restriction expires after a three-month period.</p> <p>NCAs</p> <p>There is no limitation on the duration of the intervention, except where action is taken on a provisional basis (see below) in which case the measure taken must not be for a period of more than three months.</p> <p>NCA</p> s must give at least one month's notice to the relevant ESA and to other NCAs of the proposed action before the measure is intended to take effect and publish details on its website. <p>In exceptional cases, a NCA may take action on a provisional basis with no less than 24 hours' written notice before the measure is intended to take effect to all other NCA</p> s and the relevant ESA.

⁶ Article 19 (ESMA) and 20 (EBA) of MiFIR Delegated Regulation set out a list of criteria and factors to be taken into account by ESMA and the EBA in determining whether these criteria are met.

⁷ Where either of these grounds is established, the NCA may impose the prohibition or restriction on a precautionary basis before marketing or selling to clients.

⁸ Article 21 MiFIR Delegated Regulation (substantially similar to the list of factors and criteria in Articles 19-20 MiFIR Delegated Regulation) sets out the list of factors and criteria to be taken into account by NCA

s in determining whether any of these requirements are met.

⁹ Art 69(2)(t) MiFID.



EU continued

<p>Duration and review of an intervention continued</p>	<p>Once the relevant ESA has received notification, it is required to consider whether or not the action is justified and proportionate and publish its opinion. Where a NCA takes action, or declines to take action, contrary to an opinion adopted by the relevant ESA, it is required to publish on its website a notice explaining its reasons for doing so.</p>
<p>PRODUCT GOVERNANCE</p>	
<p>Who is subject to the obligations?</p>	<p>This section focuses on the product governance requirements¹⁰ set out in the Markets in Financial Instruments Directive (Directive 2014/65/EU) (MiFID II) which provides a framework for the regulation of investment firms in the EU.¹¹ EU member states were required to transpose MiFID II requirements into national law by 3 January 2018.</p> <p>MiFID II product governance requirements apply to investment firms which are “manufacturers” and/or “distributors”:</p> <p>Manufacturers: A firm that manufactures an investment product (MiFID financial instruments or structured deposits¹²), including the creation, development, issuance or design of that product, including when advising corporate issuers on the launch of a new product.</p> <p>Distributors: A firm that offers, recommends or sells an investment product and service to a client.</p>
<p>Who is excluded?</p>	<p>Firms outside of the scope of MiFID II (but other EU legislation may be applicable)¹³</p>
<p>Issuer obligations</p>	<ul style="list-style-type: none"> • Maintain, operate and review a product approval process for each financial instrument (including significant adaptations). • Design products which meet the needs of an identified target market of end clients. • Identify potential target market and negative target market “at sufficiently granular level”. • Ensure strategy for distribution is compatible with the identified target market. • Take “reasonable steps” to ensure product is distributed to target market. • Establish, implement and maintain procedures and measures to ensure that the manufacturing of financial instruments complies with the requirements on proper management of conflicts of interest, ensuring in particular that the features of the financial instrument do not adversely affect end clients and the financial instrument does not represent a threat to the orderly functioning or stability of financial markets. • Ensure staff involved in the manufacturing of financial instruments possess necessary expertise to understand the characteristics and risks of the financial instruments they intend to manufacture. • Ensure management body has effective control over product governance process (including ensuring that compliance reports to the management body systematically include information about the financial instruments manufactured by the firm, including the distribution strategy). • Ensure compliance function monitors the development, and undertakes periodic review, of product governance arrangements.

¹⁰ This section focuses on product governance requirements only. There are separate requirements in relation to suitability and appropriateness which are not covered here.

¹¹ There are other product governance rules and guidance in EU legislation which are not covered by this table. For example:

- The Insurance Distribution Directive (IDD), which was required to be implemented in EU member states by 1 October 2018, contains product governance arrangements for insurers and insurance intermediaries which manufacture and/or distribute insurance products. The IDD and MiFID II requirements are similar, but not fully aligned. The MiFID II requirements go further than the IDD in a number of areas.
- The EBA has issued [Guidelines](#) on product oversight and governance arrangements for retail banking products. The Guidelines apply to manufacturers and distributors of products offered and sold to consumers and specify product oversight and governance arrangements pursuant to Capital Requirements Directive IV (CRD IV), the Payment Services Directive, the E-Money Directive and the Mortgage Credit Directive. See [here](#) for EBA’s report on the implementation of the Guidelines.
- PRIIPs Regulation applies to persons who manufacture PRIIPs or advise on or sell PRIIPs. Broadly, a PRIIPs manufacturer is required to prepare a KID for each PRIIP which they produce and publish on their website. A person who advises a retail investor on a PRIIP or sells a PRIIP to a retail investor (a distributor) must provide the retail investor with a KID in good time before any transaction is concluded.

¹² References in this table to financial instruments include structured deposits.

¹³ See footnote 11.



EU continued

Issuer obligations continued

- Enter into written agreement outlining mutual responsibilities when collaborating with non-MiFID/third country firm.
- Undertake scenario analysis to evaluate (i) the risks of poor outcomes for end clients and (ii) the circumstances under which these outcomes may occur (including evaluation of financial instruments under negative conditions).
- Analyse the charging structure proposed for the financial instrument.
- Make available to distributor all appropriate information on the product including information about the appropriate channels for distribution, the product approval process and the target market assessment.
- Undertake regular reviews of the products, including prior to any re-launch or further issue when the firm is aware of any event that could materially affect the potential risk to investors and at regular intervals.
- Identify crucial events that would affect the potential risk or return expectations of products and take appropriate action when such events occur.

Distributor obligations

- Only offer product when in the interest of the client.
- Distributor to ensure it has adequate arrangements to:
 - understand characteristics and target market of each product; and
 - obtain information from manufacturers, including non-MiFID/third country manufacturers, on product, product approval process, target market etc.
- Identify target market, even if target market was not defined by manufacturer, using information obtained from manufacturers and from its own clients.
- Identify negative target market.
- Ensure products and services are compatible with needs and characteristics and objectives of intended target market.
- Ensure intended distribution strategy is consistent with target market.
- Review and update product governance arrangements and take appropriate actions where necessary.
- Review products and services on a regular basis taking into account any event that could materially affect potential risk to the identified target market.
- Reconsider target market and/or update product governance arrangements if firm becomes aware that the target market has been wrongly identified for a product or service or where product or service no longer meets the circumstances of the identified target market.
- Ensure compliance function oversees the development and periodic review of product governance arrangements.
- Ensure relevant staff possess the necessary expertise to understand the characteristics and risks of the products and the services provided as well as the needs, characteristics and objectives of the identified target market.
- Ensure management body has effective control over the distributor's product governance process (including ensuring that compliance reports to the management body systematically include information about the products and the services provided).
- Provide reports to manufacturer with information on sales and reviews to support product reviews carried out by manufacturers.
- (Intermediary distributors) Ensure relevant product information from manufacturer is passed to final distributor in chain.
- (Intermediary distributors) Enable manufacturer to obtain information on product sales from distributors in chain.
- (Intermediary distributors) Apply product governance obligations for manufacturers in relation to the service provided.



EU continued

Products subject to obligations	Product governance rules apply to all MiFID firms involved in manufacturing or distributing MiFID financial instruments and/or structured deposits.
Products excluded	<ul style="list-style-type: none">• Products <i>manufactured and distributed before 3 January 2018</i> do not fall within the scope of the MiFID II product governance requirements.¹⁴• Products which were <i>manufactured before 3 January 2018</i> but which are <i>distributed to investors after 3 January 2018</i> fall within the scope of product governance requirements applicable to distributors, in particular, the requirement to identify a target market for financial products.¹⁵



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¹⁴ ESMA Guidelines on MiFID II product governance requirements: paragraph 64 (p.17).

¹⁵ ESMA Guidelines on MiFID II product governance requirements: paragraphs 65-66 (p.17). However, a target market should be assigned by the manufacturer to such products, at the latest, following the next product review process cycle conducted after 3 January 2018. The distributor should then consider this target market in its own review process.



France

PRODUCT INTERVENTION

Types of intervention made under power

The *Autorité des Marchés Financiers (AMF)* may suspend the marketing, distribution or sale of certain Financial Products (listed below) and the *Autorité de Contrôle Prudentiel et de Résolution (ACPR)* may do the equivalent for structured deposits which are marketed, distributed or sold in or from France.

Individual or market wide intervention

The AMF or ACPR can make (i) an individual intervention or (ii) a market wide intervention.

Products subject to the power

The power would apply to:

- for the ACPR: structured deposits.
- for the AMF:
 - financial instruments;
 - greenhouse gas “allowances” (unit of account representative of the emission of the equivalent of one ton of carbon dioxide); and
 - assets negotiated on a regulated market, listed by decree after consultation by the AMF (**Financial Products** and together with the structured deposits, the **Products**).

Products excluded

Financial Products (listed above) or structured deposits which are marketed, distributed or sold outside France.

Trigger for use of power

The AMF or ACPR is entitled to use its power when:

1. Conditions listed in the paragraph relating to NCAs in the **EU** section (**EU – Trigger for use of power**) are met.
2. The investment service provider has not developed or applied a validation process for Products.
3. The investment service provider does not comply with its duties to have reasonable measures to avoid conflicts of interests.
4. The investment service provider, which is a manufacturer, does not comply with its duties to (i) maintain, apply and review a validation process of each Product before the sale and the distribution to the client, (ii) ensure that the Products are designed in accordance with the validation process mentioned in (i) and that the distribution strategy of these instruments is compatible with the defined target market, (iii) make available to any distributor all relevant information on the Products and their validation process, including the defined target market, (iv) take reasonable measures to ensure that the Products are distributed to the defined target market.
5. The investment service provider, which is a distributor, does not comply with its duties to (i) regularly examine the Products, taking into account any event that could have a significant impact on the potential risk in the defined target market, in order to at least assess whether these instruments continue to meet the needs of the defined target market and whether the planned distribution strategy remains appropriate; (ii) when it does not design the Products, have appropriate devices to obtain information on the Products and their validation process and to understand the characteristics.

Duration and review of an intervention

- Duration of an intervention – the AMF or ACPR’s intervention powers are not subject to a specific duration criteria.
- Review of an intervention – please see **EU** section.



France continued

PRODUCT GOVERNANCE

Who is subject to the obligations?

- Investment services providers which are “manufacturers” and/or “distributors”.
- “Manufacturer” means an investment services provider which encompasses the creation, development, issuance and/or design of Products, including those which advise corporate issuers on the launch of new Products.
- “Distributor” means an investment service provider which offers, recommends or markets Products including those which offers or sells Products and services. In France, “*conseillers en investissement financier*” and “*conseillers en investissements participatifs*” fall within the scope of “distributors”.

Who is excluded?

Rules related to product governance are limited to firms within the scope of MiFID II (but other EU legislation may be applicable).¹ For example, the following entities are excluded:

- insurance undertakings even if the latter may indirectly market Products in the context of unit-linked life insurance contracts (equivalent rules for insurance are provided under the Insurance Distribution Directive); and
- management companies would be subject to product governance obligations only as distributors and not as manufacturers.

Issuer obligations

Manufacturers are required to:

- maintain, apply and revise a validation process for Products;
- identify a potential target market and a negative target market for each Product and review the target market on a regular basis;
- determine the consistent distribution strategy with regards to the target market;
- exchange information on the Products and on the validation process, including the target market with the distributors on a regular basis;
- deal with events which have a material effect on the risk:
 - reevaluate Products when events that materially affect the potential risk to investors occur; and
 - identify crucial events that would affect the potential risk or return expectations of the Products.
- evaluate (i) the risks of poor outcomes for end clients and (ii) the circumstances under which these outcomes may occur;
- evaluate the Products under negative conditions;
- establish, implement and maintain procedures and measures to ensure the manufacturing of Products complies with the requirements on proper management of conflicts of interest; and
- analyse the charging structure proposed for the Products.

See **EU** section.

¹ For further information, please refer to the EU section



France continued

Distributor obligations	<p>Distributors are required to:</p> <ul style="list-style-type: none">• understand the Products' features;• understand the target market provided by the manufacturer and determine if the latter would fit with its client base and review the target market on a regular basis;• determine a consistent distribution strategy with regards to the target market;• ensure that Products are only offered or recommended in the interest of the client;• regularly examine the Products taking into account any event that could have a significant impact on the potential risk in the defined target market;• have appropriate devices to obtain information on the Products and their validation process and to understand the characteristics and identify the target market defined for each Product;• ensure that (i) their compliance function oversee the development and periodic review of product governance arrangements, (ii) relevant staff possess the necessary expertise to understand the characteristics and risks of the Products and the services provided as well as the needs, characteristics and objectives of the identified target market and (iii) the management body has effective control over the distributor's product governance process; and• maintain procedures to ensure compliance with disclosure procedure, assessment of suitability or appropriateness tests, inducements and proper management of conflicts of interest. <p>See EU section.</p>
Products subject to obligations	<p>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.</p> <p>For Products issued by manufacturers located outside EEA: the distributors shall define a target market and take all measures to ensure that Products will be distributed in accordance with the characteristics, objectives and needs of the target market. If a distributor cannot obtain this information, it shall not market these Products.</p>
Products excluded	<p>For Products issued before 3 January 2018:</p> <ul style="list-style-type: none">• Manufacturers are not required to comply with product governance obligations until the next review of Products when a target market must be defined.• Distributors should comply with product governance obligations.



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United Kingdom

PRODUCT INTERVENTION

Types of intervention made under power

The FCA has product intervention powers under EU legislation in its capacity as an EU competent authority (see **EU** section and **Trigger for use of power** below) as well as more established powers under the Financial Services and Markets Act (**FSMA**) which pre-date the implementation of the EU powers and remain in force. There is considerable overlap between the FSMA and EU powers.

The FCA has the power under FSMA to use temporary product intervention powers¹ where it considers it necessary or expedient for the purposes of advancing the consumer protection objective, the competition objective or the market integrity objective.

The extent of the rules which are made will generally depend on the type of intervention deemed necessary to address the issues identified, having regard to whether the intervention would be a proportionate response to the perceived risk to consumers, competition issues or market integrity issues.²

Examples of the nature of product intervention rules that the FCA may make include:

- requiring certain product features to be included, excluded or changed; or
- requiring amendments to promotional materials; or
- the imposition of restrictions on sales or marketing of the product; or
- in more serious cases, a ban on sales or marketing of a product in relation to all or some types of client.

If a product is provided by a business outside the UK, the FCA may make rules targeting regulated activities by authorised persons in the UK that would lead to a specified agreement being formed.

Individual or market wide intervention

Individual or market wide intervention (in principle) although it is anticipated that in practice (and based on prior use of the powers) the powers would affect the relevant market for a specific product or practice. The FCA also has alternative powers for use in taking action against individual firms (e.g. powers of direction).

Products subject to the power

In principle the FCA powers may operate to restrict the behaviour of UK authorised firms³ in relation to any products or practices (including those covered by EU powers).

Products excluded

None – all investments specified under FSMA and all activities carried on by UK authorised firms are within scope.

Trigger for use of power

FSMA

The FCA will consider a product intervention rule where it identifies a risk of consumer detriment, a threat to market integrity or ineffective competition arising from a particular product, type of product or practices associated with a particular product or type of product.

In deciding whether the rule should be made as a temporary intervention rule (which does not require prior consultation or preparation of a cost-benefit analysis), the FCA will consider whether prompt action is required.

Before any proposed product intervention rules are made (whether temporary or permanent), the FCA will consult the PRA. Restrictions applicable to exercise of EU-derived national competent authority (**NCA**) powers may also need to be followed.

1 Section 137D FSMA. FSMA also empowers the FCA to make general rules, which may include permanent product intervention measures, as appear necessary or expedient for the purpose of advancing one or more of its operational objectives (section 137A FSMA).

2 See Chapter 2 of the FCA's Product Intervention and Product Governance Sourcebook (PROD) which explains the FCA's policy with respect to the making of temporary product intervention rules under FSMA.

3 The predominant focus is likely to be on retail investors and products, but these powers may also be used in wholesale markets.



United Kingdom continued

<p>Trigger for use of power continued</p>	<p>EU</p> <p>See EU section. The UK is due to exit the EU before 31 October 2019 (exit day). In March 2018, the UK Government and the European Commission agreed the terms of an implementation period as part of the draft Withdrawal Agreement⁴. The Withdrawal Agreement currently provides that, during the implementation period, EU law will continue to apply in the UK.</p> <p>The UK Government has been preparing for the legal impact of a "no-deal Brexit", where the UK departs the EU without an implementation period, through a programme of "onshoring" legislation. This "onshoring" process ensures that legislation will incorporate current EU-derived law and regulation into UK law with appropriate modifications. For example, the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 amends MiFIR to ensure the legislation can continue to operate effectively at the point at which the UK leaves the EU (see regulation 32 which amends the provisions relating to product intervention).</p>
<p>Duration and review of an intervention</p>	<p>The intervention may be temporary or permanent.⁵ Temporary product intervention rules (which can be introduced without consultation or cost-benefit analysis) have a maximum duration of 12 months from when the rule is made, but the FCA may decide on a shorter duration for a rule. The temporary measures are not renewable. Permanent product intervention rules require consultation.</p> <p>The FCA may review or revoke temporary product intervention rules at any time before the end of the period for which they apply. This may happen where, for example, new rules (subject to the FCA's standard rule-making procedure including market failure analysis, cost benefit analysis and consultation) are introduced on a permanent basis, industry initiatives are developed to address sources of consumer detriment or where further evidence is submitted which demonstrates that consumer detriment will not occur.</p> <p>See also powers of NCAs set out in the EU section.</p>
<p>PRODUCT GOVERNANCE⁶</p>	
<p>Who is subject to the obligations?</p>	<p>The FCA has two overlapping product governance regimes:</p> <ul style="list-style-type: none"> • Product Intervention and Product Governance Sourcebook (PROD): <ul style="list-style-type: none"> ◦ PROD 3⁷ implements MiFID II⁸ provisions on product governance. ◦ PROD applies to MiFID investment firms, CRD credit institutions, MiFID optional exemption firms⁹ and branches of third country investment firms with respect to: <ul style="list-style-type: none"> - manufacturing of financial instruments and structured deposits; and - distribution of financial instruments, structured deposits and investment services. ◦ PROD applies, as guidance, to non-MiFID firms (e.g. insurance firms and alternative investment fund managers) involved in the manufacture or distribution of MiFID products or structured deposits.

4 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018.

5 The FCA used its temporary product intervention powers for the first time in 2014 when it introduced a temporary ban on the distribution of contingent convertible instruments to retail customers. This was replaced by a permanent ban in 2015. In December 2018, the FCA published consultations which propose to make permanent in the UK ESMA's temporary product intervention measures restricting the sale to retail clients of contracts for differences (CFDs) ([CP18/38](#)) and binary options ([CP18/37](#)). The FCA has since confirmed the ban on binary options, CFDs and CFD-like options to retail investors. The FCA's ban is wider in scope than ESMA's intervention measures e.g. the UK ban on binary options includes "securitised binary options" which are not within the scope of ESMA's measures; the ban on CFDs extend to closely substitutable products and include 30:1 leverage limits for CFDs referencing certain government bonds. In July 2019, the FCA proposed a ban on the sale of crypto-derivatives to retail consumers. See our blog post on the consultation [here](#).

6 This section focuses on product governance requirements. There are separate requirements in relation to suitability and appropriateness which are not covered here.

7 PROD 4 sets out product governance provisions applicable to insurers and insurance intermediaries under the under the Insurance Distribution Directive (**IDD**). PROD 4 is not considered further in this table.

8 The FCA plans to carry out supervisory work during 2019 on the application of the MiFID II product governance regime. In particular, the FCA plans to review how firms oversee the design of their products, identify their target market and monitor their products as well as their distribution activities. See the [FCA Business Plan 2019-20](#).

9 i.e. MiFID investment firms with more limited activities and client base.



United Kingdom continued

<p>Who is subject to the obligations? continued</p>	<ul style="list-style-type: none"> • A firm to which PROD applies, and which has complied with the rules and guidance in PROD, is not required to apply the guidance in the Regulatory Guide on the Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD). • The FCA also maintains its legacy product governance framework under the RPPD, although this is not binding on firms subject to PROD and its existence is currently under review:¹⁰ <ul style="list-style-type: none"> ◦ RPPD sets out guidance which covers broadly similar matters as PROD. It sets out the FCA's views on what the combination of Principles for Businesses and detailed rules require respectively of providers and distributors in certain circumstances to treat customers fairly. ◦ RPPD applies to firms involved in the supply of products or services to retail customers which do not fall within the scope of PROD.
<p>Who is excluded?</p>	<p>None</p>
<p>Issuer obligations</p>	<p>PROD 3.2 implements MiFID II requirements which are set out in the EU section. It is unlikely that product governance requirements in the UK will deviate significantly from the MiFID II requirements after the UK exits the EU.</p>
<p>Distributor obligations</p>	<p>PROD 3.3 implements MiFID II requirements which are set out in the EU section. It is unlikely that product governance requirements in the UK will deviate significantly from the MiFID II requirements after the UK exits the EU.</p>
<p>Products subject to obligations</p>	<p>PROD: All MiFID financial instruments and structured deposits. See EU section.</p> <p>RPPD: All products and services supplied directly or indirectly to retail clients which are not covered by PROD.</p>
<p>Products excluded</p>	<p>PROD 3 only applies to the manufacture and distribution of MiFID-scope products and services. The obligations apply on a guidance-only basis to non-MiFID firms involved in the distribution of MiFID products.</p> <p>Distributors are not required to meet the following requirements in PROD 3.3.1 in respect of eligible counterparty business:¹¹</p> <ul style="list-style-type: none"> • understand the financial instruments it distributes to clients; • assess the compatibility of the financial instruments with the needs of the clients to whom it distributes investment service, taking into account the manufacturer's identified target market of end clients; and • ensure that financial instruments are distributed only when this is in the best interests of the client.



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¹⁰ The remainder of the UK section refers to PROD and not RPPD.

¹¹ PROD 1.3.3. See paragraph 17.12 on p.111 of PS17/14. Broadly, eligible counterparty business includes the following services and activities carried on by a firm with or for an eligible counterparty: dealing on own account, execution of orders on behalf of clients or reception, transmission of order and certain arranging activities



Spain

PRODUCT INTERVENTION

Types of intervention made under power	The securities markets regulator (CNMV) can make interventions relating to products/product feature, types of consumers accessing products or circumstances in which consumers access products. See also EU section.
Individual or market wide intervention	The CNMV can make an individual intervention or a market wide intervention under their powers. Examples include suspending the trading of a financial product, suspending, revoking and intervening in investment institutions or replacing the board of directors.
Products subject to the power	The power would apply to all financial products made available to professional clients, retail clients or eligible counterparties regulated by the CNMV.
Products excluded	No financial products are excluded.
Trigger for use of power	Where CNMV identifies circumstances that could affect the normal development of financial products, transparency of securities markets, the correct formation of prices and the protection of investors. See also EU section.
Duration and review of an intervention	The CNMV intervention powers are not subject to a specific duration or review criteria. CNMV is also entitled to apply preventive measures in accordance with the administrative procedures. See EU section.

PRODUCT GOVERNANCE

Who is subject to the obligations?	See EU section. According to Spanish legislation, the following entities entitled to provide investment services in Spain: <ul style="list-style-type: none">• Investment services companies:<ul style="list-style-type: none">◦ securities companies and agencies (SV and AV);◦ portfolio management companies (SGC);◦ financial advisory companies (AEFI);Investments services companies can operate directly or through agents duly registered at the CNMV's registry;• Collective investment schemes management companies (SGIIC);• Credit institutions (i.e. banks, saving banks, cooperative banks); and• Foreign entities authorised to operate in Spanish territory whether under the right of establishment or under freedom of services delivery. CNMV registries, which are publicly available, contain the list of authorised entities, the range of services offered by each of them and the maximum applicable rates. In addition, the Bank of Spain holds similar information in relation to credit institutions and their agents (since they are also authorised to deliver investment services).
Who is excluded?	Firms outside the scope of MiFID II.



Spain continued

Issuer obligations	<p>Spanish legislation implements the MiFID II product governance requirements (see EU section).</p> <p>In accordance with the Spanish Securities Market Act, issuers must also:</p> <ul style="list-style-type: none">• Publish an informative prospectus, offering memorandum or document of similar or equivalent nature;• Review and issue the regulated financial information on a periodic basis;• Report information on significant ownership stakes publicly (according to transparency rules); and• Avoid market abuse and, in general terms, prevent interference in market prices.
Distributor obligations	<p>Spanish legislation implements the MiFID II product governance requirements (see EU section).</p> <p>In accordance with the Spanish Securities Market Act, distributors must also:</p> <ul style="list-style-type: none">• Classify their clients as follows:<ul style="list-style-type: none">◦ retail◦ professionals; and◦ eligible counterparties;• Conduct business and activities with due diligence and transparency;• Comply with general information duties;• Provide guidance and warnings about the risks associated with financial instruments and investment strategies;• Know their clients;• Complete suitability and appropriateness assessments and tests;• Comply with all record keeping obligations as to clients, contracts, products, etc; and• Comply with information obligations in the case of provision of services through another investment services company.
Products subject to obligations	<p>All financial instruments and structured deposits.</p>
Products excluded	<p>No products are excluded (but see EU section).</p>



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Germany

PRODUCT INTERVENTION

Types of intervention made under power

The Federal Financial Supervisory Authority (**BaFin**) as NCA in Germany may restrict or even prohibit financial instruments, structured deposits or financial activities and practices if these are to be considered a significant investor protection concern, or a threat to the stability or integrity of the financial system or financial markets.

Apart from the powers that ESAs may exercise under EU legislation (see **EU** section), BaFin can intervene in the marketing, distribution or sale of a particular financial instrument or a structured deposit as well as in certain forms of financial activity or practice (behavioural intervention). BaFin may also issue restrictions and (unlike ESMA/EBA) also permanent prohibitions.

BaFin can also issue prohibitions and restrictions even before the start of marketing, distribution or sale.

Individual or market wide intervention

Measures adopted by **ESAs** apply across all Member States. As a consequence all market participants providing services in the European Union must comply with the measures.

BaFin can limit measures to individual market participants or direct them at an indeterminate group of recipients by means of a general administrative act.

Products subject to the power

The power would apply to financial instruments (as defined in MiFID II Annex 1 Section C) as well as structured deposits made available to the public.

Products excluded

No products are excluded.

Trigger for use of power

ESAs

See **EU** section.

BaFin can only order restrictions and prohibitions if certain conditions are fulfilled:

1. There must be grounds justifying the assumption that there is a reason to intervene; and
2. The prohibition or restriction must be appropriate in the specific instance and correspond to the principle of proportionality. BaFin therefore has to take the specifics of the individual case into account when it orders a measure, such as the risks, the level of knowledge of the market participants and investors concerned as well as the anticipated effects of the measure, and
3. A financial product gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of whole or part of the financial system within at least one Member State; **or** a derivative has a detrimental effect on the price formation mechanism in the underlying market.

Duration and review of an intervention

ESAs

See **EU** section.

BaFin can adopt permanent measures.

PRODUCT GOVERNANCE

Who is subject to the obligations?

See **EU** section.



Germany continued

Who is excluded?	Firms outside of the scope of MiFID, including: <ul style="list-style-type: none">• Insurers;• Persons providing exclusively intra-group investment services, persons providing in an incidental manner in the course of a regulated professional activity;• Persons dealing on own account in financial instruments (except in commodities);• Persons with compliance obligations under Directive 2003/87/EC (Emissions Trading Scheme) who, when dealing in emission allowances, do not execute client orders and who do not provide any investment services or perform any investment activities other than dealing on own account and do not apply a high-frequency algorithmic trading technique; and• Persons providing investment advice in the course of providing another professional activity not covered by MiFID. This only applies if the provision of such advice is not specifically remunerated.
Issuer obligations	The German Securities Trading Act (<i>Wertpapierhandelsgesetz – WpHG</i>) as well as the Ordinance on the Concretisation of the Rules of Conduct and Organisational Requirements for Investment Firms (<i>Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen – WpDVerOV</i>) implement the MiFID II requirements as set out in the EU section.
Distributor obligations	The German Securities Trading Act (<i>Wertpapierhandelsgesetz – WpHG</i>) as well as the Ordinance on the Concretisation of the Rules of Conduct and Organisational Requirements for Investment Firms (<i>Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen – WpDVerOV</i>) implement the MiFID II requirements as set out in the EU section.
Products subject to obligations	All financial instruments (as defined in MiFID II Annex 1 Section C) as well as structured deposits, also see EU section.
Products excluded	UCITS (Undertakings for Collective Investments in Transferable Securities), employee share schemes and pension schemes as well as products manufactured and distributed before 3 January 2018 do not fall within the scope of the product governance requirements as defined by MiFID II.



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Dubai International Financial Centre and Abu Dhabi Global Market

In the Dubai International Financial Centre (**DIFC**) the Dubai Financial Services Authority (**DFSA**) does not have a specific product intervention power which would enable it to undertake timely and targeted intervention (for a limited period of time) where it considers that there is risk of significant harm to a specific class of clients even if there is no breach of DIFC law or the DFSA Rules. While the DFSA does not have a specific product intervention power under the Regulatory Law or the DFSA Rules, the DFSA may rely on its rule making power under section Article 23 of the DIFC Regulatory Law (DIFC Law No.1 of 2004) to:

- instruct authorised firms in relation to the DFSA's revised or new supervisory expectations;
- announce policy changes or amendments to its approach;
- provide instructions in relation to marketing and disclosure materials;
- issue warnings to consumers, for example in September 2017 the DFSA issued a general investor statement warning investors about the risks associated with product offerings involving the issuance of cryptocurrencies, which the DFSA does not currently regulate;
- announce product bans.

In general, where the DFSA wishes to act swiftly to issue warnings, guidance and clarification to authorised firms on DFSA policy it will do so via the issue of a Dear SEO letter to authorised firms or a general investor statement to consumers. The issue of Dear SEO letters allows the DFSA the flexibility to respond quickly to specific concerns or risks that it has identified without having to go through the DFSA's rule making process.

The DFSA previously issued a Dear SEO letter to authorised firms setting out its supervisory expectations in relation to retail over the counter derivatives and requiring authorised firms to adopt the DFSA's expectations as part of their operations and related systems and controls. Similarly, in 2015 the DFSA announced via a Dear SEO Letter that it would no longer accept applications to establish a Representative Office which proposed to market foreign exchange (**FX**) or other highly leveraged products (**HLPs**) to retail investors and provided additional guidance and clarification to authorised firms marketing such products.

Similarly, while Abu Dhabi Global Market (**ADGM**) is relatively new, having commenced operations in 2016, we anticipate that the Financial Services Regulatory Authority (**FSRA**) will adopt a similar approach to the DFSA in relation to dealing with product intervention.



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United Arab Emirates (onshore)

Onshore in the UAE, the Central Bank (**CB**), the Emirates Securities and Commodities Authority (**ESCA**) and the UAE Insurance Authority (**IA**) regulate the financial services industry in the UAE. Laws and regulations in relation to financial services are relatively nascent and as such the laws and regulations do not contain the same level of depth or guidance as in more developed jurisdictions. While the UAE onshore regulators do not have specific product intervention powers, their establishment laws which were recently revised in 2018, give them broad powers, which the regulators may rely on to intervene where they consider a specific product may give rise to significant detriment or risk to a class of investors or consumers. This was exemplified in 2009 when the Central Bank

issued Central Bank Announcement No. 3803 of 2009 (**Structured Products Notice**). The Structured Products Notice prohibits banks operating in the UAE from selling structured products to retail customers (including high net worth individuals) unless CB approval has first been obtained. The Structured Products Notice is still in force. Since the issue of the Structured Products Notice none of the UAE onshore regulators have publicly issued similar notices or warnings prohibiting licensees from distributing specific types of financial products. The onshore regulators, and in particular the CB, may however choose to issue notices, warnings and instructions to licensees directly. Such announcements are not usually made public.



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