ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS
FINANCIAL MARKET PROFESSIONALS

AMAFI / 19-73
Replaces and supersedes AMAFI / 18-30
22 July 2019

MiFID 2
COSTS AND CHARGES
Implementation Guide

Information on costs and charges are a major aspect of MiFID 2, first because the provisions of MiFID 2, and the measures of Level 2 in particular, constitute a significant change compared to the MIF 1 regime. The second reason is that implementation of the provisions requires a great deal of work on the part of ISPs. While the goal of increased transparency about the costs and charges of ISPs vis-à-vis their clients is not up for discussion, the obligations resulting from it must be assessed even more carefully given that the reading and understanding of the provisions provided for in MIFID 2 are not entirely straightforward, require significant IT development and can, depending on the way in which they are applied, negatively impact the proper operation of market activities.

The obligations to inform clients about costs and charges are provided for in Articles 24.4 of MiFID II and 50 of Delegated Regulation MiFID II 2017/565 (“MiFID II DR”). ESMA brings elements of appreciation on this topic in its questions and answers document on investor protection. Given that, by its nature, the document will evolve over time, new assessment elements may be added by the European Authority after the publication of this note.

WARNING

Users of this document should note that its sole purpose is to share with AMAFI members the discussions of AMAFI Committees and Working Groups on the issues raised by the implementation of provisions regarding information about costs and charges in MIFID 2.

While this document takes into account the exchanges with AMF departments, it has not been approved by the Authority. The information it contains must, therefore, be used prudently at all times. AMAFI cannot be held liable for it under any circumstances.

It should be noted, in particular, that some of the assessments provided in this document are still under discussion at the European level, notably within ESMA. The European Authority may therefore publish, at a yet unknown date, positions which will result in a review of the analyses provided by AMAFI herein. The document may, therefore, be modified in the future.

AMAFI ■ 13, rue Auber ■ 75009 Paris ■ France
Phone : +33 1 53 83 00 70 ■ http://www.amafi.fr ■ E-mail : info@amafi.fr

Contents

1. Introduction 3
1.1. Terms and abbreviations 3
1.2. Summary of applicable obligations 4
2. Information regimes 4
2.1. *Ex-ante* disclosure 4
2.1.1. Information regimes 4
2.1.2. Interpretation of the “recommend or marketed” concept 5
2.1.3 Scope of the *ex-ante* information requirement 6
2.2. *Ex-post* disclosure and the existence of an ongoing relationship 6
3. Cost Calculation 11
3.1. Product Costs 11
3.1.1. Cost calculation method 11
a. Packaged Products 11
b. Simple non-packaged Products (“vanilla” Products) 12
3.1.2. Recovery of Product Cost information by distributors 12
a. The case of Products with a KID 13
b. The case of Products without a KID 13
3.2. Service Costs 14
4. Potential for limited application 15
4.1. Required conditions 15
4.2. When does a “financial instrument embed a derivative”? 15
4.3. What does “intends to offer them to its clients” mean? 16
4.4. Arrangements for obtaining client approval 16
4.5. Implementation method 16
5. Communicating the information 16
5.1 Methods for communicating ex-ante information 17
5.1.1. General regime 17
5.1.2. Use of costs tables 17
5.1.3. Overview of the terms of communication 18
5.1.4. Specific cases of orders made by telephone 19
5.2. Content of the information 20
5.2.1. Degree of detail 20
5.2.2. The nature of the Amounts to be notified to clients 20
5.2.3. Presentation of the cumulative effect on return 23
5.2.4 Information on inducements 23
6. Summary of obligations 24
7. Other questions 25
7.1. Distribution chain 25
7.2. Bundled offers 26
7.2.1. Scope of application of this obligation 26
7.2.2. Implementation of this obligation 26
7.2.3. Potential for limited application 26

1. Introduction

1.1. Terms and abbreviations

The following abbreviations are used for the terms in the document starting with a capital letter:

- **Costs**: in the rest of the document, this term refers to all "costs and charges" which the client must be informed of by virtue of Article 24.4 of MiFID 2;
- **Distributor**: a person who proposes, sells and recommends Products;
- **ESMA**: European Securities and Markets Authority
- **ESMA Q&A**: questions and answers on MiFID II and MiFIR investor protection and intermediary topics (link);
- **Full Disclosure Regime**: information regime on Costs covering both Services and Product Costs (see 2.1.1 below)
- **ISPs**: investment companies and credit institutions which have been approved to provide investment services. Management companies are not included[1];
- **KID**: Key Information Document: a document containing key information about Products within the scope of PRIIPs to be provided to retail investors;
- **Manufacturer**: a person who produces financial instruments. This includes the creation, development, issue and/or design of financial instruments;
- **MiFID II**: Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Directive 2002/92/EC and Directive 2011/61/EU;
- **MiFID II DR**: Delegated Regulation (EU) 2017/565 of the Commission of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards the organisational requirements and operating conditions applicable to investment firms and the definition of certain terms for the purposes of that Directive;
- **MiFID 2**: Directive 2014/65/EU and its application acts;
- **PRIIPs**: Regulation (EU) no. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key investor documents for packaged retail and insurance-based investment products;
- **PRIIPs DR**: Delegated Regulation (EU) 2017/653 of the European Commission of 8 March 2017 supplementing Regulation (EU) no. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key investor documents for packaged retail and insurance-based investment products (PRIIP) with technical regulation standards regarding the presentation, content, review and revision of key investor documents and the conditions to be met to meet the requirement to provide these documents;
- **Product**: a financial instrument as defined in MiFID II (Annex I, Section C) and structured deposits;
- **Service**: investment services and activities and ancillary services as defined by MiFID II (Annex I, Sections A and B);
- **Service Only Regime**: information regime on Costs covering Services Costs only (see 2.1.1 below).

[1]The special case of portfolio management companies and their subjection to MiFID 2 was explained by the AMF in its MiFID II - Guide for Asset Management Companies, last updated on 6 February 2017 (*MiFID II - Guide for Asset Management Companies, Sheet 1*).

1.2. Summary of applicable obligations

MIFID 2 requires that ISPs inform investors in a good time about the Costs related to the Services provided and, if required, to the Products marketed or recommended. The Costs must be provided as an aggregate (as a percentage and an absolute value) to ensure that investors can analyse the cumulative effect of the Costs on the return of the Products presented to them.

An estimate of expected Costs must be provided to the client upstream of the transaction or before the Service is provided (*ex-ante* disclosure). The estimate must be completed by information about the Costs actually incurred by the client and provided annually, at least, when certain conditions have been met (*ex-post* disclosure).

2. INFORMATION REGIMES

2.1. *Ex-ante* disclosure

The *ex-ante* information provided to clients, in good time, before the transaction, can only consist of Cost estimates as real Costs are only known once the transaction has been completed. In accordance with Article 50.8 of MiFID II DR, these estimates are based on past Costs related to similar financial services and instruments.

2.1.1. Information regimes

There are two different *ex-ante* Cost disclosure regimes:

- A dual information regime which covers the Costs of both Services and Products – the "Full Disclosure" Regime (*MiFID II DR, Arts. 50.2 and .5*);
- A single information regime which only covers the Costs of Services – the "Service Only" Regime (*MiFID II DR, Arts. 50.2 and .6*).

In addition to the two *ex-ante* disclosure regimes, there is also an option, allowed for in article 50.1 of MiFID II DR when the conditions for implementation exist, *(see 4.1 below)*, to implement limited application of these obligations.

Combined reading of articles 50.5 (a), 50.5 (b) and 50.6 highlights three potential situations:

(1) The Product is packaged and sold to a retail client (a KID must be provided because the Product is included in the scope of PRIIPs)[2];
(2) The Product is not packaged or the Product is packaged but is sold to a professional client or to an eligible counterparty (PRIIPs does not apply) and the ISP "recommends or markets it";
(3) The Product is not packaged or the Product is packaged but is sold to a professional client or to an eligible counterparty (PRIIPs does not apply) **and** the ISP "does not recommend or market the Product".

AMAFI is therefore of the opinion that the information regime for Costs depends first on the type of Product and on the investor category, the goal is to determine if the transaction contemplated is within the scope of PRIIPs or not:

- If PRIIPs is applicable, the client must receive the Costs for the Product and Service(s) regardless of the distribution scheme used. The Full Disclosure Regime applies.

[2] The article also addresses cases in which the ISP is required to provide their client with the "*UCITS KIID*".

- The following distinctions must be made when PRIIPs does not apply:
  - on one hand, the Product is recommended or marketed. In this case, the client must receive the Costs for the Product and the Service(s). The Full Disclosure Regime applies;
  - on the other hand, the Product is not recommended or marketed (*see 1.1.2 above*). In this case only the Costs for the Service(s) provided must be communicated. Potential Product Costs do not have to be provided. This is the Service Only Regime.

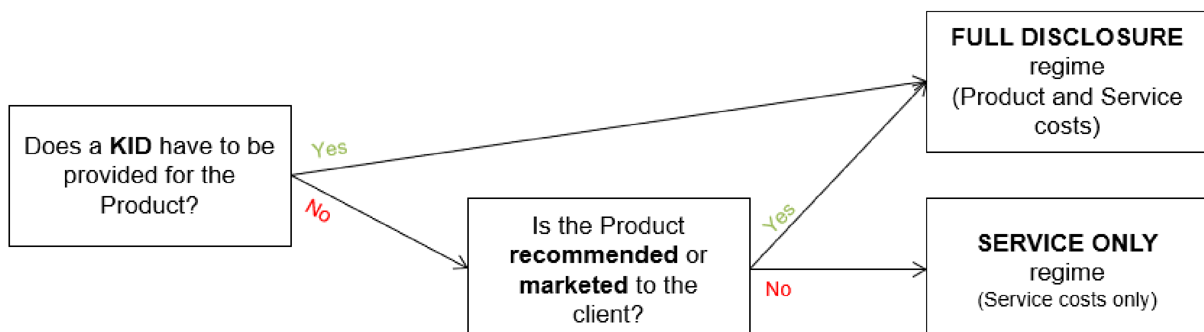
Reminder – PRIIPs scope of application

Two cumulative conditions must be present for PRIIPs to apply:

1. The Product in question must be a **Packaged Product** or an insurance-based product. This, therefore, excludes vanilla products such as equities or most simple bonds from the scope[3];
2. The investor in question must be a **retail investor,** defined by PRIIPs as a non-professional investor as meant by MIFID 2 (*PRIIPs, art. 4.6.a*). Products sold to professional clients or eligible counterparties are not included in the PRIIPs scope even if they are packaged.

The diagram below shows a decision tree used to determine the information regime for Costs applicable *ex-ante* (*see 4.1 below*).

Diagram 1 – Determination of the ex-ante information regime applicable



It should again be noted that, in certain situations, a limited application of these disclosure regimes can be implemented (*see 4.1 below*).

2.1.2. Interpretation of the "recommend or marketed" concept

The issue of interpreting the "recommend or market" concept is therefore key to determine which regime should be applied, i.e. the Full Disclosure Regime or the Service Only Regime.

In the absence of a detailed statement by ESMA on this point, AMAFI is of the opinion that an ISP "**markets**" a Product when it take an active part in the distribution chain (for example, as part of a distribution or placement contract).

[3] *European Commission's reply to the ESA's call to clarify the scope of the PRIIPs Regulation, European Commission, DG FISMA, 14 May 2019 (link).*

On the other hand, if the ISP is only providing a passive investment service, we cannot see how this can be considered to be "marketing" the product bought, sold or subscribed to at this time. To be considered as a passive supply situation, the service cannot be preceded by any of the following actions: marketing campaign, distribution of promotional messages about the Product, selection of a list of products offered for subscription and highlighted on a website, active sales, etc. In this case, given that the only Service performed for the client consists in sending the execution order received or in executing the transaction without a prior recommendation or any marketing on the part of the ISP, the Service Only Regime appears to be the only one applicable. These situations are more likely to be identified as part of intermediation activities or brokerage, particularly vis-à-vis a professional clientele or with eligible counterparties.

In addition, it should be noted that an ISP can be deemed to be "**recommending**" a Product to a client even if they do not provide the client with an investment advice service for the Product.

2.1.3 Scope of the *ex-ante* information requirement

Irrespective of the applicable information regime (*Full disclosure* or *Service only*), the *ex-ante* information requirement applies regardless of the type of client order and the categorisation of the client. It must therefore receive the *ex-ante* information in respect of both its purchase orders and its orders to sell[4] (*Q&A ESMA, Question-Answer 9.27*). The level of detail of this information will be adapted depending on the category of client (more specific information may be provided to retail investors).

2.2. *Ex-post* disclosure and the existence of an ongoing relationship

In addition to the *ex-ante* information, investment services providers (ISPs) are required to provide a comprehensive overview that aggregates all the costs the client has actually incurred — *ex-post* information — when the following two conditions are both satisfied (*MiFID II DR, Art. 50.9*):

- the ISP recommended or marketed the product or had to provide the client with a KID (i.e. the ISP was subject *ex-ante* to the Full Disclosure Regime); and
- there is an ongoing relationship between the ISP and the client.

This overview must be provided at least once a year (*ESMA Q&A, Questions-Answers 9.4 and 9.5*). In this case, the reference period is the period of time that has passed since the previous *ex-post* information. In addition, the first *ex-post* report must be based on a reference period that ends at the latest on 2 January 2019 (*ESMA Q&A, Question-Answer 9.21*).

Interpretation of the concept of "ongoing relationship"

It is particularly important to understand the concept of "*ongoing relationship*". It is one of the prerequisites for providing the client with *ex-post* information in addition to *ex-ante* information. Provided once a year to the client "*on a personalised basis*", this *ex-post* information concerns "*all costs and charges related to both the financial instrument(s) and investment and ancillary service(s)*". It is required when the following two conditions are both satisfied (*MiFID II DR, Art. 50.9*):

- The ISP recommended or marketed the product or had to provide the client with a KID (i.e. the ISP was subject *ex-ante* to the Full Disclosure Regime); and
- There is an ongoing relationship between the ISP and the client.

[4] In the case of orders to sell, only the service costs must be provided to the client (*Service only* regime). However, the impact of costs on performance does not have to be communicated to the client (*Q&A ESMA, Question-Answer 9.27*).

To understand this concept of "*ongoing relationship*", it is helpful to start by noting two points:

- This first is that nowhere does MiFID II provide a precise definition of this concept. The only somewhat substantial indication is provided as an example: "*Investment firms having an ongoing relationship with the client, such as by providing an ongoing advice or portfolio management service* […]" (*MiFID II DR, Art. 54.7*).

The second point relates to the objective pursued through the *ex-post* disclosure requirement so imposed, namely "*to improve transparency for clients on the associated costs of their investments and the performance of their investments against the relevant costs and charges over time,* [by requiring] *periodic ex-post disclosure* […] *where the investment firms have or have had an ongoing relationship with the client during the year*" (*MiFID II DR, recital 82*).

It is perhaps because of the ambiguity in these two textual elements that ESMA thought it necessary to provide clarification on what is covered by the concept of "*ongoing relationship*" in its Q&A (*ESMA Q&A, Question-Answer 15.1*).

15 Other issues [Last update: 23 March 2018]

Question 1 [Last update: 23 March 2018]

The term "ongoing relationship" is used in various articles in the MiFID II Directive and the MiFID II Delegated Regulation. How should this term be understood?

Answer 1

The term "ongoing relationship" should have its ordinary meaning. It should be understood consistently in the context of all articles of the MIFID II Directive or the MiFID II Delegated Regulation[45] where it appears. The term should apply to a client relationship that is continuing, or has been so during the preceding year. The existence of an ongoing relationship (or not) with a client should be assessed on a case-by-case basis, taking into consideration the nature of the service provided. Firms should be able to explain how, why and when they have assessed a particular client relationship as ongoing (or not).

When determining the nature of their relationships with clients, firms should consider the following non-exhaustive and non-cumulative list of situations. Indicators of the existence of an ongoing relationship include:

- **Where both parties have concluded a contract for the provision of an investment or ancillary service that is not a one-off service. This would apply for as long as the parties agreed to such a contract and would include situations where**:
  - there is a portfolio management agreement in place;
  - there is an agreement for the firm to provide the client with a periodic assessment of suitability;
  - the client holds a trading account with the investment firm and trades on that account on the basis of an executive investment service;
  - the firm provides safekeeping and administration of financial instruments in conjunction with an investment service.
- **Where there is an agreement for an ongoing fee to be paid by the client to the firm for an ongoing service.**
- **Where the firm receives ongoing inducements, provided that all the conditions for the legitimacy of inducements envisaged by Article 11 of the MiFID II Delegated Directive are met.**

45 See Articles 27(7) (best execution) of MiFID II, 50(9) (costs and charges) and 54(7) (suitability) of MiFID II Delegated Regulation.

ESMA therefore considers that, non-exhaustively, there are two situations in which an "*ongoing relationship*" may be assumed to exist: either (i) because the ISP receives ongoing inducements (commissions paid by the client), or (ii) because the ISP and the client have concluded a contract for the provision of an investment or ancillary service that is not a one-off service.

To characterise this second situation, ESMA identifies certain indicators that ISPs must consider in determining whether or not the relationship with their client is ongoing. The Authority therefore believes that the provision of an ongoing investment advice or portfolio management service or a safekeeping and administration service signals the existence of an ongoing relationship. It also believes that this is the case when the client holds a "trading account" and trades on that account on the basis of an "executive investment service".

While the first three indicators do not present any difficulties based on the analysis conducted by AMAFI, which believes that these services can be provided only in the case of an "*ongoing relationship*", the same cannot be said, however, for the last indicator. **AMAFI believes that,** solely within the context of the disclosure required on costs and charges[5], **the existence of a contract under which a "*trading account*" is opened on behalf of a client for the purpose of trading on that account is not alone sufficient to determine the existence of an "*ongoing relationship*". A more in-depth analysis is needed to establish the existence of such a relationship.**

To support this conclusion, several factors must be taken into account:

- First, it should be noted that the concept of "*executive investment service*" used by ESMA does not correspond to any of the concepts which, in connection with one or more investment services, are defined by or used in MiFID II, or are even related to what might be seen in market participants' practices. In the absence of evidence to the contrary, this may need to be viewed as a typo in the drafting of ESMA's answer which intended to refer here to "*execution investment services*".

  Execution of orders, reception and transmission of orders and dealing on own account[6] should also all be understood as falling under execution services.

- The concept of "*trading account*" used by ESMA is not mentioned anywhere in MiFID II. As such, and without seeking to analyse the exact scope of this concept, it would seem to have been employed only to identify an account other than an account opened for the purpose of a safekeeping activity, since this service is also referenced as such in the ESMA Q&A.

  In practice[7], a "*trading account*" is therefore an account in which the rights and obligations that the execution of a transaction creates for the client are recognised, as long as the transaction has not been finalised (generally through a settlement/delivery transaction against an account held by a custodian).

- Therefore, the provision of an execution service requires that transactions carried out must be recorded in a trading account: "*An investment firm shall arrange for records to be kept of all services, activities and transactions undertaken by it*" (*MiFID II, Art. 16.6*).

---

[5] The points developed below are valid only in this context and cannot be expanded to other MiFID II requirements, in particular regarding best execution.
[6] Provided it is used as a way to execute a client order.
[7] ESMA itself appears to share this interpretation. It differentiates between these two types of accounts when considering the subject of post-sale reporting (*ESMA Q&A, Question/Answer 11 of Chapter 8*). In any case, a "trading account" cannot be considered to be a "clearing account": the term "trading" used by ESMA cannot be mistaken for the term "clearing". This is particularly true since, as clearing does not fall within the scope of MiFID II, such a "connection", established in the case of a MiFID II Q&A, could be made only via wording that clearly highlights the reasoning adopted.

The concept of "*trading account*", which ESMA seems to have used as a differentiating factor to determine which of the ISPs that provide an execution service are required to disclose the *ex-post* information, therefore serves no purpose. The provision of an execution service necessarily means the existence of a trading account.

- It is also not clear how the fact that the execution services may be provided under a service agreement concluded between the ISP and the client could be a factor that is used to determine the existence of an ongoing relationship.

  MiFID II requires that ISPs, before providing any investment services[8] to their clients, whether retail or professional, enter into an agreement, in paper or another durable medium, setting out the essential rights and obligations of the firm and the client for all investment services provided (*DR MiFID II, Art. 58; see also AMAFI / 18-08, Topic 1*).

- AMAFI agrees with ESMA's opinion: "*The term "ongoing relationship" should have its ordinary meaning*". As MiFID II offers no clarification, this ordinary meaning should be understood as a relationship that has not been interrupted over time, that is sustained and continuing, that has not been terminated in any way, that is marked by continuous extension in space, that is uninterrupted (*see Larousse*).

- Since neither the existence of a "*trading account*" nor that of a contract concluded with the client can be a decisive criterion for situations that determine the existence of an "*ongoing relationship*" in the context of an execution service, it is necessary to look elsewhere. In that respect, one cannot consider that such a criterion would derive sufficiently from the mere fact that, as part of this execution service, not just a single transaction but several (at least two) transactions might be carried out, even if they are carried out very infrequently. Such an analysis would, with very few exceptions, be equivalent to considering that there is an "*ongoing relationship*" every time an execution service is provided. If this were done systematically, it would run counter to what the very introduction of this criterion implies.

  In reality, the concept of "*ongoing relationship*" must be analysed in relation to the service itself, which ESMA moreover confirmed when it considered that the service that triggers the *ex-post* disclosure requirement must not be a "*one-off service*".

  On this point, it is worth noting in particular the analysis recently conducted by the Haut Comité Juridique de la Place Financière de Paris (the HCJP, a high-level committee that deals with legal issues affecting the French financial community): "*The services of reception and transmission of orders and of execution of orders are subject to immediate execution, whenever a client gives an order. When they are provided under a framework service agreement, each of these services corresponds to the characteristic performance under this contract of which the execution, by the service provider, is repeated over time as many times as the client instructs*" (*Progress report - Impact of Brexit on banking and financial contracts (only available in French), HCJP, 29 September 2017*).

[8] For investment advice, however, the requirement applies only "*where a periodic assessment of the suitability of the financial instruments or services recommended is performed*".

As this analysis confirms, "*execution services*" are, by definition, one-off services that are not provided over time but immediately and that are ongoing only for the time it takes to execute or transmit the instruction or order given by the client[9]. In any event, **even in the case of a series of instructions and orders, if each one is independent and unrelated to the others, an "*ongoing relationship*" cannot exist if the execution of one does not determine the execution of the others**.

- This understanding does not mean, however, that an "*ongoing relationship*" can never be established. This can happen in two situations:
  - The first is when a connection can be made between several transactions executed by the ISP for a single client. That is, when the ISP agrees, after the transaction is concluded, to carry out other transactions with the same client and in connection with that first transaction,[10].
  - The second situation is when the ISP provides the client, in addition to and concurrent with the execution services, with an additional service that would in fact be ongoing (for example, when arranging financing[11]). In this second situation, it is the existence of this additional service provided on an ongoing basis and concurrent with the execution services that characterises these execution services as potentially being provided in connection with an ongoing relationship.

- The analysis performed above, which is restrictive relative to ESMA's analysis, is fully consistent with the one example given in Article 54.7 of the MiFID II DR, and is moreover used as the basis for its reasoning by the European Authority itself: "*an ongoing advice or portfolio management service*" is indeed maintained over time, with continuity of service at all times, which must also be recognised in the context of the safekeeping service.

Bearing in mind that the points put forward by ESMA in its answer are only "*indicators*" which, as such, cannot alone signal the existence of an ongoing relationship or eliminate any flexibility that ISPs need to determine, based on their own specific situations, whether or not they have an ongoing relationship with a client, **AMAFI believes that**:

- The existence of an "*ongoing relationship*" in the case of an "*execution service*" (execution of orders, reception and transmission of orders and certain forms of dealing on own account) cannot follow from the existence of a "*trading account*" or of an agreement entered into with a client.

- Except in the specific cases described above, **the immediate and non-continuous nature of an "*execution service*" precludes the possibility of assuming it is part of an "*ongoing relationship*"**.

- The existence of an "*ongoing relationship*" in the case of the provision of execution services must be assessed on the basis of an analysis to be performed in accordance with the nature of the activities carried out by the ISP and with the type of clients involved.

---

[9] Which the very definition of the services of execution of orders and reception and transmission of orders confirms. Their purpose is, in the first case, to conclude "*agreements to buy or sell one or more financial instruments on behalf of clients*" and, in the second, to transmit orders on behalf of clients to the persons responsible for concluding such agreements. In both cases, the service is therefore provided immediately.

[10] Conversely, when several operations that are part of a single transaction are executed for a client (for example, the regular swapping of payment flows related to the conclusion of interest-rate swaps), they cannot be characterised as the provision of an ongoing service since these various flows do not result from the provision of an investment or related service.

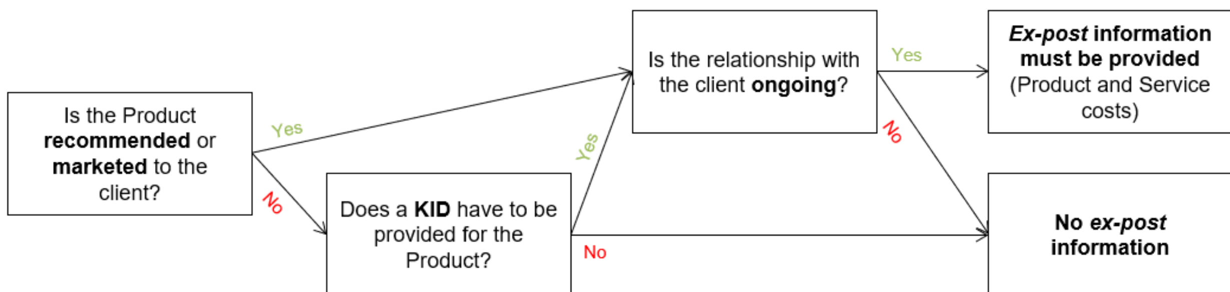
[11] For example, granting credit or a loan to the client to allow the latter to carry out transactions (*see related service referenced in point (2) of Section B of Annex I of MiFID II*).

In the context of wholesale activities[12], AMAFI believes that it is unlikely[13] that an ongoing relationship would exist in that segment for the provision of execution services[14]. Also, given the objective initially assigned to the provision of *ex-post* information, namely increased transparency for clients thanks to additional information on the costs incurred over time, in this wholesale activities context, AMAFI believes there is no need for such increased transparency.

There may, however, be such a need for retail clients for whom, in contrast, an ongoing relationship is more likely to exist insofar as they may be provided with an "ongoing" service such as safekeeping and administration services.

The diagram below provides a decision tree for determining whether the ISP is required to communicate *ex-post* information on costs to investors.

Diagram 2 – Determination of the ex-post information regime applicable



3. Cost Calculation

3.1. Product Costs

Detailed information about the calculation method to use for the information on the Costs due under MiFID 2 is provided in the ESMA Q&A.

3.1.1. Cost calculation method

a. *Packaged Products*

In order to standardise the information provided to clients, ESMA has proposed importing the PRIIPs cost calculation method as the calculation method for all packaged Products, regardless if they are sold to retail clients or not (*ESMA Q&A, Questions-Answers 9.6, 9.7 and 9.8*).

When the ISP sells a packaged Product to a professional client or an eligible counterparty, the European Authority recommends that the method prescribed by PRIIPs be used, even if the transaction does not fall within the scope of PRIIPs (*see 3.2.1 b below*).

---

[12] In which the investment services providers' counterparties, usually investment services providers themselves or at the very least qualified as eligible counterparties or professional clients, have knowledge of the markets and financial instruments equivalent to that of the investment services provider.
[13] Except in the specific instances described above.
[14] The conclusion already drawn in the previous version of this Guide (*AMAFI/17-76*) is therefore maintained.

Reminder – PRIIPs cost calculation method

The cost calculation method prescribed by PRIIPs is detailed in Annex VI of the PRIIPs DR.

With respect to structured Products, the list of costs to be taken into account is detailed in paragraphs 27 to 46 of the same annex.

The costs are split into three categories:

- One-off costs: entry (e.g.: sales commissions ("mark-ups"), structuring fees, legal fees, hedging fees, etc.) and exit costs;
- Ongoing costs: notably, underlying instrument costs;
- Incidental costs: if applicable. In most cases, this category will be equal to 0 for structured Products.

Using the PRIIPs calculation method, the total costs to be shown in the KID are equal to the difference between the Product offer price and its fair value:

costs = price – fair value

Note that PRIIPs provides the principles underlying fair value, but does not set prescriptive rules for its calculation.

b. *Simple non-packaged Products ("vanilla" Products)*

ESMA has stated that PRIIPs does not include a cost calculation methodology for simple non-packaged Products. ISPs are therefore free to use the methodology of their choice (*ESMA Q&A, Question-Answer 9.8*).

No methodology is required for these Products.

This is consistent with the financial reality of certain simple, non-packaged Products such as vanilla equities and bonds. By their nature, some of these Products do not have a production cost, and therefore, no Product Cost, but, rather, Service Costs. Thus, when the Full Disclosure Regime is applicable to these Products (i.e. when they are recommended or marketed), a "0" Product Cost or a costs table setting out only the Service costs must be communicated to the client (*ESMA Q&A, Questions-Answers 9.20 and 9.23*).

3.1.2. Recovery of Product Cost information by distributors

The information must be provided to the client by the ISP who is in contact with them. Thus, if the Manufacturer does not distribute it Product itself and the Full Disclosure Regime is applicable, the Distributor will be required to know the Manufacturer's Costs to aggregate them with its own and provide the total amount to the client.

ESMA provides more information in its Q&A about the calculation methods to be used depending on the Product category and, consequently, the information Distributors must obtain from Manufacturers.

Generally speaking, when Distributors are not able to obtain the information required from the Manufacturer(s), they must ensure that they are in a position to make a sufficiently precise and reliable estimate of the total Product Costs before distributing it (*ESMA Q&A, Question-Answer 9.11*).

A proposal to standardise the Cost information to be communicated by Manufacturers to Distributors under MiFID 2 obligations was made at the European level as part of the work done by FinDatex (link).

a. *The case of Products with a KID*

When the product falls under the scope of PRIIPs and thus has a KID, the KID contains information on costs and charges (expressed as an annualised impact on return). ESMA believes that this information is consistent with the information on the Product costs required under MiFID II (*ESMA Q&A, Question-Answer 9.7*).

In contrast, ESMA does not allow the information about Product costs included in the KID to be used for transactions where the underlying is a product that has a non-linear charging structure and an investment amount different from EUR 10,000[15] (*ESMA Q&A, Question-Answer 9.7*).

Therefore, the product cost information required under MiFID II can be identical to that provided in the KID:

- where a product has a linear charging structure including if the investment amount is not EUR 10,000;
- where a product has a non-linear charging structure but an investment amount exactly equal to EUR 10,000.

In contrast, if the product has a non-linear charging structure AND an investment amount different from EUR 10,000, it is necessary to take account of information that is separate from and in addition to the KID to calculate the Product costs.

Regardless, in order to calculate the *ex-post* information, the Distributor will necessarily be required to communicate with the Manufacturer to obtain relevant information about it, unless the data has already been made public. The RIY contained in the KID is not a cost. However, with respect to the *ex-post* information, the Distributor must provide aggregated Costs in absolute value and as a percentage in their report. To do so, it must be in contact with the Manufacturer to obtain the raw data (*ESMA Q&A, Question-Answer 9.9*).

The information exchange between Manufacturer and Distributor can be made using the European MiFID Template (EMT) developed by FinDatex.

b. *The case of Products without a KID*

There are two categories for Products which do not have a KID because they are not included in the scope of PRIIPs:

(1) the Product does not have a KID because it is not sold to retail investors (i.e. it is sold to professional clients or eligible counterparties);
(2) the Product does not have a KID because it is not a Packaged Product (this will be the case for vanilla equities and bonds).

With respect to the first category (packaged Products sold to professional clients or eligible counterparties), ESMA suggests using the same methodology as that defined for PRIIPs Products. Therefore, the same reasoning as for the aforementioned situation (*see 3.1.2.a above*) must be applied (*ESMA Q&A, Question-Answer 9.8*).

With respect to the second category (simple non-packaged Products), given that there is no Product Cost, Distributors must provide a 0 amount – which does not exempt them, where required, from providing Service Costs (*see 3.2 above*).

---

[15] PRIIPs requires that costs mentioned in the KID are calculated on the assumption that the investor invests 10,000 EUR (*DR PRIIPs, Appendix VI, para. 90).*

The table below provides a summary of the methods for recovering Product Cost information and the calculation method to be used depending on the type of client and of the Product in question.

	PRIIPs Products		**Non-PRIIPs Products**	
	With a linear charging structure	***With a non-linear charging structure***	**Packaged sold to professionals or ECs**	**Simple non-packaged**
Product Cost calculation method	PRIIPs		ESMA suggestion to use PRIIPs	NA
Recovery of *ex-ante* information	Using KID's data and/or raw data	Raw data (and/or using KID's data If the investment amount is equal to EUR 10,000)	Raw data	NA
Recovery of *ex-post* information	Raw data		Raw data	NA

3.2. Service Costs

The specific Service Costs must only be disclosed in cases in which these Costs are assumed by the client. Therefore, with respect to Service Cost information, execution commissions and/or price spreads and/or mark-ups must be provided to the client depending on the type of remuneration applied.

Generally speaking, "cash equities" intermediation activities, for example, are usually remunerated exclusively with execution commissions and the ISP acts in an agency capacity. However, there are instances of specific execution services for which the intermediary - who acts as a riskless principal in this case - remunerates itself by selling equities at a higher price than it would previously have purchased them for.

AMAFI has noted that ESMA is of the opinion that the obligation to provide Cost information would require ISPs to include the explicit "*as well as the implicit costs*"[16] of transaction costs. At this point in the analysis, and subject to further examination, it can, however, be assumed that when implicit costs exist, they are very marginal in most situations compared to the explicit costs of execution services about which the client is informed as described in paragraphs 3.2 and 5.1.2. If applicable, and while waiting for further clarification, ISPs should confirm that the implicit costs are, in fact, marginal enough, based on the information and data in their possession.

In accordance with ESMA Question-Answer 9.17, which refers to the PRIIPs methodology, with respect to structured Products, the potential mark-ups and structuring costs are added to the Product Costs (in accordance with Annex VI of the PRIIPs DR, § 36 to 46) which the client will be informed of (*see 3.1.1 a above*). The Service Costs related to the structured Products can be the distribution costs received by the Distributor. If there are no such costs, the information about the Service Costs can also be equal to 0 and be displayed as such (*ESMA Q&A, Question-Answer 9.20*). AMAFI's reasoning above would apply in an identical way for OTC derivatives traded in "principal" for which, in the absence of a Distributor, Service Costs are 0. The Manufacturer's remuneration will appear in the Product Costs.

[16] See ESMA Question-Answer 9.12

4. POTENTIAL FOR LIMITED APPLICATION

4.1. Required conditions

When dealing with a professional client or eligible counterparty, the ISP can potentially implement limited application of the obligations for Cost disclosure in the following situations (*MiFID II DR, Art. 50.1*):

- For professional clients, except when (non-cumulative conditions):
  - an investment advice or portfolio management service is provided; and/or
  - the financial instrument in question embeds a derivative.
- For eligible counterparties, except when (cumulative conditions):
  - the financial instrument in question embeds a derivative; and
  - the eligible counterparty intends to offer it to their clients.

While the characterisation of situations in which investment advice or portfolio management service is being provided does not present any particular difficulties, it is, = important to determine when a financial instrument embeds a derivative and what the phrase "*intend to offer it to its clients*" means.

4.2. When does a "financial instrument embed a derivative"?

While, to date, the European Authority has not covered this point in the ESMA Q&A on which this document is based, it has nevertheless reviewed it within the framework of its Guidelines on Complex Products: "*For the purpose of points (ii) and (iii) of article 25(4)(a) of MiFID II, an embedded derivative should be interpreted as meaning a component of a debt instrument that causes some or all of the cash flows that otherwise would result from the instrument to be modified according to one or more defined variables*" (ESMA, Guidelines on complex debt instruments and structured deposits).

Therefore, the following Products are provided as examples in the annexes of the Guidelines to illustrate the concept ("*convertible and exchangeable bonds, indexed bonds and turbo certificates, contingent convertible bonds, callable or puttable bonds, credit-linked notes, warrants*").

In addition, with respect to Products which are not debt instruments and may meet this definition, in 2011 the AMF provided a non-exhaustive list which included partly-paid securities and financial securities subscription warrants as examples of Products with an embedded derivative (*AMF instruction n° 2011-15*).

Lastly, a definition was also provided at the European level in the IAS 39 accounting standard: "*An embedded derivative is a component of a hybrid (combined) instrument that also includes a non-derivative host contract — with the effect that some of the cash flows of the combined instrument vary in a way similar to a stand-alone derivative. [...] A derivative that is attached to a financial instrument but is contractually transferable independently of that instrument, or has a different counterparty from that instrument, is not an embedded derivative, but a separate financial instrument*"[17].

[17] Commission Regulation (EC) no. 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) no. 1606/2002 of the European Parliament and of the Council.

The combination of these elements has led AMAFI to conclude that, to enter into the scope of the requirement examined here, the Product in question must include at least one component derivative. Therefore, this excludes all “simple” derivatives (generally referred to as “vanilla”) whose main characteristic is that they are derivatives themselves and do not include one or more other derivative. The derivatives listed in Annex III of DR 2017/583 of 14 July 2016[18] are examples of this, with the exception of Tables 1 to 3 and 9 to 11.

4.3. What does “intends to offer them to its clients” mean?

AMAFI is of the opinion that the eligible counterparty “*intends to offer them to its clients*” when it carries out a transaction on behalf of end-clients. In this case it acts as the Distributor (final or intermediary) for the Product.

ESMA further notes in Question-Answer 9.18 that it expects ISPs to have procedures in place to record the fact that the eligible counterparty does not intend to redistribute the Product.

4.4. Arrangements for obtaining client approval

The ISP must carry out certain actions upstream to be able to implement the limited application option. They are described in article 50.1 of MiFID II DR: “*Investment companies which provide investment services to professional clients* ***can agree*** *with their clients to limit the application of the obligations set in this article*” and “*investment companies which provide investment services to eligible counterparties* ***can agree*** *to limit the application of the requirements of this article*”.
In the case of both professional clients and eligible counterparties, the result is that the client must agree to the limited application. However, given the way the text is written (i.e. “*can agree*”), AMAFI has concluded that it is not necessary to obtain the express approval of the client for this purpose. Tacit agreement can be obtained via the general terms and conditions or the services contract agreed on with the clients in question (*ESMA Q&A, Question-Answer 9.18*).

4.5. Implementation method

The implications of the implementation of limited application are presented below (*see 5.1 above*).

5. COMMUNICATING THE INFORMATION

ESMA expects two types of communication for *ex-ante* information:

- **For ongoing services**[19]: an *ex-ante* simulation of the amount of the Costs based on clients’ profile must be provided to the client prior to contract signature. The estimate must take into account the type of financial instruments planned, the characteristics of the transactions, etc. (*ESMA Q&A, Question-Answer 9.14*). The information can be presented in the “**Costs simulation examples**” document as shown hereafter (*see 5.1.1 below*);

[18] Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance Products, emission allowances and derivatives.
[19] AMAFI considers the following to be ongoing services: advisory services over time, portfolio management, custody account-keeping and services requiring remuneration over time.

AMAFI considers that this requirement can be fulfilled by providing clients with a document in which generic examples of simulations required as appropriate to the case with regard to the products and services provided to the client by the ISP.

Such a document is then sent to the client prior to the provision of the "ongoing service".

- **In all cases**, regardless of the relationship with the client (ongoing or not), prior to the service is provided: ***ex-ante* information about Service Costs and, if applicable (*see 2.1.1 above*), those of the Product: this information can take the form of the cost table ("Table") or be provided by transaction ("trade-by-trade")** as illustrated hereafter (*see 5.1. below*) (hereinafter "*ex-ante* information").

  In cases where aggregate information on total costs — consisting of product costs and service costs — is required, and for products for which a PRIIPs KID is provided, it should be noted that the product costs can be found in the KID (*see 3.1.2 above*). Nevertheless, the mere provision of the KID is not alone sufficient to satisfy the MiFID II costs and charges disclosure requirement if service costs need to be added to these product costs (*see 5.2.1 below*).

5.1 Methods for communicating ex-ante information

5.1.1. General regime

In general, ESMA expects that the *ex-ante* information will be communicated to the client on each transaction ("*trade-by-trade* information") (*Q&A ESMA, Question-Answer 9.22*). The ISPs are therefore required to provide clients with information applied to the service provided and the financial instrument concerned by the transaction in question and upstream of the provision of each service.

However, two other regimes exist alongside this general regime: on the one hand, the ability to use costs tables (*see 5.1.2*) and, on the other hand, the specific situation of orders made by telephone (*see 5.1.3*).

5.1.2. Use of costs tables

Pursuant to the provisions of the various levels of MiFID 2, it is possible to use costs tables in the following two cases:

(1) Generally, where there is no Product Cost associated with the Service provision or where the Product Costs should not be communicated, a Table may be used: "*Where there are no product costs for the relevant financial instrument* […] *or in the residual instances where the assessment of product costs is not required* […]*, firms may meet their ex-ante costs and charges disclosure obligation by providing to their clients a grid or table displaying the relevant costs and charges specific to i) the investment or ancillary service and ii) the financial instrument category offered to or demanded by the client.* » (*Q&A ESMA, Question-answer 9.23*); and

(2) Within the framework of the regime of limited application[20] (*see 4, above*).

Therefore, the first situation applies whatever the type of client i.e. including retail clients when at least one of the following conditions is met:

- There is no Product Cost linked to the transaction: this could be the case, in particular, where the underlying Product is a vanilla Product, such as a share or simple bond, for example (*see 3.1.1.b, above*);

[20] Question-answer 9.23 of the ESMA Q&A is not precise about the scope, so this must be read as permitting a general exception, without taking account of limited application.

- The Service only information regime applies (*see 2.1.1, above*).

The second situation applies when the conditions of limited applications are met (*see 4, above*). Therefore, in this second situation, a costs table can be sent to the client even where Product Costs exist.

In either situation, a Table, in sufficient detail depending on the ISP's activities and the characteristics of the relevant client, can be provided to the client as *ex-ante* information.

This must be provided to the client at the time the relationship is entered into and made available to it at all times during the ongoing relationship. It must be updated on a regular basis, and at least, annually. In the event of a change[21], the client must be informed that the Table has been updated. However, as stated in recitals 84 of MiFID II[22] and 69 of MiFID II DR[23] and in Question-Answer 23, the Table does not have to be provided to the client before every transaction, unless the latter expressly requests it.

5.1.3. Overview of the terms of communication

Therefore, based on the client, the Product type and the distribution regime used, AMAFI proposes the communication methods detailed in the following table, applicable on an *ex-ante* basis:

Product type	Retail clients		Professional clients				Eligible counterparties			
			Advisory		Non advisory		No redistribution		Redistribution	
	Product	Service	Product	Service	Product	Service	Product	Service	Product	Service
Non-packaged vanilla Products (e.g.: vanilla equities, vanilla bonds)	0	Table[24]	0	Table	NA or 0	Table	NA or 0	Table	NA or 0	Table
Vanilla derivatives (ex: flow derivatives instruments without embedded derivatives)	Trade-by-trade[25]	Trade-by-trade	Trade-by-trade	Trade-by-trade	NA or Table	Table	NA or Table	Table	NA or Table	Table
Other Packaged Products (e.g.: structured Products, complex OTC derivatives, instruments with a derivative)	Trade-by-trade[26]	Trade-by-trade	Trade-by-trade	Trade-by-trade	Trade-by-trade	Trade-by-trade	Table	Table	Trade-by-trade	Trade-by-trade

[21] "The firm should provide such grids or tables in good time before the first investment service is provided to a new client and at any time they are updated" (*Q&A ESMA, Question-Answer 9.30*).
[22] *Ibid.*
[23] "*In cases where an investment firm is required to provide information to a client before the provision of a service, each transaction in respect of the same type of financial instrument should not be considered as the provision of a new or different service*" (*MiFID II DR, recital 69*).
[24] It being understood the provision of a table in this situation is only intended to inform retail clients of the Service Costs related to the execution of their order (RTO or execution of orders services). In this situation, ESMA does not consider it possible to use ranges and maximum amount (*see 5.2.2, above*).
[25] As a reminder, for the products considered here, product costs can be found in the KID (*see 3.1.2, above*). Nevertheless, the mere provision of the KID is not alone sufficient to satisfy the MiFID II costs and charges disclosure requirement if service costs need to be added to these product costs (*see 5.2.1, below*).
[26] *Ibid.*

Table legend

The grey areas of the table represent the limited application regime. The other areas not in grey represent the "traditional" disclosure regime but those labelled "Table" are applied in compliance with the derogation system such as that set out in Question-Answer 9.23 of the ESMA Q&A.

In this case, "Not Applicable" (NA) refers to the application of the Service Only Regime.

If the conditions required for the limited application regime are not met (*see 4.1, above*), the "traditional" information regime must be used. As noted above (*see 2.1.1, above*):

- The information on Product and Services Costs are provided under the Full Disclosure Regime. The communication methods for this information can be those of the cost table (in part or in full) if this is proportional to the clients and financial instruments in question; or
- The information on Service Costs alone must be provided under the Service Only Regime. The communication methods for this information can be those of the cost table, if proportional to the client and services in question.

5.1.4. Specific cases of orders made by telephone

Whatever the means of communication, MiFID II does not envisage some derogations to the requirement to provide the information on a durable medium prior to the completion of the transaction. However, when an order is made by telephone, it would often be detrimental if the ISP were to delay in performing the transaction on time, not only due to the need to provide to the client information on costs and charges on a durable medium, but also to give him or her the time to read it. In this case, there is exposure to the risk of market changes between the time at which the order is made and the transaction being completed. This situation would be even more concerning, because it is difficult to demonstrate that it is in keeping with compliance with the "best execution" requirements.

There are two situations which must be distinguished when dealing with orders made by telephone:

(1) The ISP has been able to communicate upstream a cost table to the client (*see 5.1.2, above*): the ex-ante information requirements have already been met at the time the order is made and the ISP can carry out the transaction without providing additional Costs information to the client;

(2) The ISP is required to provide trade-by-trade information to the client: in this case, the ISP must suggest to the client that the transaction is delayed to allow time for receipt of information regarding Costs on a durable medium or not to delay the transaction and to accept that such information will not be received on a durable medium prior to the transaction. In this second case, ESMA therefore authorises the ISP to provide information on Costs to the client by telephone (which is not a durable medium) prior to the transaction since a durable medium containing this same information will be provided to him or her "*simultaneously*" (*Q&A ESMA, Question-Answer 9.28*).

5.2. Content of the information

5.2.1. Degree of detail

MiFID II DR states that the information on Costs communicated to clients must be provided in aggregate form in absolute value and in percentage. The following information must, therefore, be provided to clients (*MiFID II DR, Art. 50.2*):

- all Product-related Costs: absolute value and percentage;
- all Service-related Costs: absolute value and percentage;
- all of the inducements received (*see 5.2.3 below*) related to the Products and/or the Services provided: absolute value and percentage.

ESMA provided the following table as an example to present the information (*ESMA Q&A, Question-Answer 9.13*):

Investment services and/or ancillary services	€1,500	1.5%
Third-party payments received by the investment firm	€500	0.5%
Financial instruments	€1,500	1.5%
Total costs and charges	**€3,500**	**3.5%**

AMAFI notes that this presentation was provided by ESMA for illustration purposes only. It is, therefore, not required of the ISP who is at liberty to use another one as long as it contains all of the required information and that the terminology used is identical to that presented in Annex II of the MiFID II DR (or, as a minimum, that there is a link with the terms used by MiFID II, if commercial terminology is used) (*ESMA Q&A, Question-Answer 9.25*).

5.2.2. The nature of the Amounts to be notified to clients

❖ **Ranges/maximum amounts**

AMAFI considers that it is appropriate to distinguish between two types of remuneration, depending on whether or not their calculation is based on parameters that have been sufficiently determined in advance:

- Remuneration is "fixed" where it is set for a defined amount according to intangible parameters, even where the exact amount is not yet known. This is, of course, the case in relation to commissions applied on a fixed basis which is known in advance. It is also the case in relation to commissions calculated depending on a fixed percentage of the amount of the price of the transaction to be performed, with an eventual minimum or maximum price, as well as a gradual decrease depending on the amount of the order: as a general rule, this practice is implemented in relation to provision of investment services of execution of orders or the reception and transmission of orders on shares.

- Remuneration is "variable" when the percentage rate which will serve as the basis for calculating the transaction is not yet known. This situation occurs in practice in OTC transactions involving bonds or derivatives with institutional clients.

(1) Fixed remuneration

In this case, the fixed amount of Costs is notified to the client either *trade-by-trade* or using a costs table, depending on the specific nature of the financial instrument (*see 5.1 above*).

(2) Variable remuneration

AMAFI considers it is therefore possible to use ranges and maximum rate/amount.

Analysis

In this second case, since it is not possible to communicate *ex-ante* to the client a sufficiently precise amount of remuneration, i.e. a "real" amount, there is the possibility, as acknowledged by MiFID II, of providing the client information based on a "*reasonable estimation*": "*where the real costs are not available, the investment company may make a reasonable estimation*" (*DR MiFID II, Art. 50.8*). AMAFI therefore considers that presenting information using a range or maximum amount is compatible with the obligation to provide the client with a "*reasonable estimation*": indeed, this condition would be met since this range or maximum amount would be the closest possible to the cost that the client would, in fact, have to meet, and would therefore ensure that the information provided to him or her is of a good quality. This assumes, in particular, that the ranges and maximum amounts used are estimated on the basis of liquidity and market condition assumptions that are reasonable and realistic and that the range presented is the narrowest possible (which, notably, assumes that the financial instruments used are sufficiently granular). But this also assumes that the ranges and maximum rates are reviewed regularly and, as a minimum, at each change (*see 5.1.2 above*).

This approach, determined following exchanges with the AMF and highlighted in the first version of this document (*AMAFI / 17-76*), must nevertheless be studied in light of the position recently adopted by ESMA. It is, indeed, appropriate to note that at the time its Q&A were updated at the end of May 2019, the European Authority specified that the use of ranges or maximum amounts was not permitted. It considered that, for the purposes of compliance with the *ex-ante* communication obligation, this information "*would not give the client a sufficient good idea of the fees such client may incur*" (*ESMA Q&A, Question-answer 9.30*).

To reach this conclusion, ESMA indicated: "*According to Article 50(8) of the MiFID Delegated Regulation, where calculating costs and charges on an ex-ante basis, firms shall use actually incurred costs as a proxy for the expected costs and charges.".* It went on to highlight: "*In addition, according to Article 24(4) of MiFID II and Article 50(2) of the MiFID II Delegated Regulation, investment firms shall provide ex-ante information on costs and charges in a fully individualized, transaction-based manner, i.e. in relation to the specific financial instrument (especially ISIN-based) and in relation to the specific investment service or ancillary service provided."* According to the European Authority, these factors must lead to a situation where: "*the cash amount and percentage firms should disclose to their clients as the expected costs and charges should be the firm's best estimate."*

However, this analysis is worthy of discussion on two separate points.

- Firstly, the principle of the hierarchy of rules requires consideration of the Level 1 text. In this case, that is Article 24.4 of MiFID 2.

  This does not impose any requirement that "*ex-ante information on costs and charges* [be provided] *in a fully individualized, transaction-based manner i.e. in relation to the specific financial instrument (especially ISIN-based) and in relation to the specific investment service or ancillary service provided."*

- It is only at the second level, in Article 50.2 of the DR MiFID II, applying Article 24(4) of MiFID II, that we find the specificity according to which all costs and related charges invoiced, directly or indirectly, to the client must be aggregated. The text does not expressly mention (although it is unquestionably within its spirit) that the information must be provided in a completely individualised manner which is based on the transactions i.e. in relation to the specific financial instrument (especially ISIN-based) and in relation to the specific investment service or ancillary service provided.

Above all, the reason that a range or maximum amount would be incompatible with the principle of information evaluated on the basis of a given transaction is not explained.[27] In light of the texts, it is therefore not established that the information concerning a given transaction may not be provided using a costs table – ESMA has, itself, acknowledged this[28] - or a range or maximum amount.

- AMAFI considers that the range and maximum amount are, on the contrary, appropriate to give clients a better idea of the costs they will pay, since the maximum remuneration they can be expected to pay is known in advance.

- Ultimately, it is strange that the question-answer does not take any account of the client category in determining the extent to which it is able to understand and process the information provided.

Therefore, in the absence of any information expressly to the contrary, AMAFI considers that this Question-Answer is only applicable to the "general" regime and not to the regime of limited application under Article 50.1 of DR MiFID II (*see 4 above*).

Yet, other provisions[29] of MiFID II confirm that the expectations regarding investor protection must take account of the client category. In particular, Level 1 envisages that information on costs and charges is provided in a comprehensible way, so that clients "*may reasonably understand*" the information that must be communicated to them, but also that delegated actions taken pursuant to Article 24 of MiFID II "*take into consideration (…) the type of client or potential client, retail client or professional client, or in the case of paragraphs 4 and 5, its classification as an eligible counterparty.*" (*MiFID 2, Articles 24.5 and 24.14*).

From this perspective, it therefore seems difficult to reasonably consider that clients would not be able to understand the level of costs and charges using a range or a maximum amount. In relation to this, this technique is normally used regarding professional clients and eligible counterparties, and we cannot see any reason why this could not continue.

In light of the various considerations, and taking account of the fact that there is nothing to prevent the considerations raised by ESMA being read in light of recital 86 of MiFID II, AMAFI consider, given the terms previously set out, appropriate the use of ranges and maximum amounts to communicate *ex-ante* costs in the context of the information to be provided to the client on costs and charges, *a fortiori* in respect of professional clients and eligible counterparties.

❖ **Absolute value and/or percentage?**

With regard to the communication of costs Table to retail clients (*see above 5.1.1.*), considering that the amount of transactions cannot be known beforehand, a generic amount (e.g. EUR 1 000 or 10 000) can be used to provide to the client the aggregated costs in absolute value and in percentage.

On the other hand, regarding professional clients and eligible counterparties, AMAFI considers that they have the necessary knowledge and experience to deduce from the information in percentage terms the absolute value of these Costs.

[27] For example, if an intermediary informs its client that it is remunerated using an *ex ante* estimated margin of between 0.5 and 1% for liquid bonds with French issuers, this information is correct with regard to any transaction that will be negotiated today regarding "A" bonds and will also be correct tomorrow regarding "B" bonds. Using the same reasoning, the costs tables have been considered acceptable. It is not a matter of giving very generic information to avoid being precise; it is a question of avoiding pointless repetition of the same information, to the extent it is correct, for two given transactions.
[28] In its Question-Answer 23 (*see 5.1.2 above*).
[29] See, in particular, Recitals 86 and 104 of MiFID II.

5.2.3. Presentation of the cumulative effect on return

In addition, the ISP must also provide its client with an illustration of the cumulative effect of the Costs on return given that it is providing an investment service. The information must be communicated on an *ex-ante* and an *ex-post* basis. The ISP is free to choose the way it provides the illustration as long as it meets the three following cumulative conditions (*MiFID II DR, Art. 50.10*):

- It must show the effect of the overall Costs on the return on the investment;
- It must show the spikes or fluctuations expected in the Costs; and
- It must include a description of the illustration.

As part of limited application, it can be agreed that the presentation of the cumulative effect on return not be provided to the client: "*However, in other cases, when they provide investment services to professional clients or eligible counterparties, investment companies can agree, at the request of the client in question, not to provide an illustration of the cumulative effect of the costs on return*" (*MiFID II DR, Recital* 74).

5.2.4 Information on inducements

"*For the purposes of point a) [information on service-related costs and charges], third-party payments received by investment companies for the investment service provided to a client are presented separately and the aggregate costs and charges are expressed as an absolute amount and a percentage*" (*MiFID II DR, Art. 50.2*).

In addition to information on Service Costs, and potential Product costs, the ISP also has an obligation to provide its clients with separate information on the "*third-party payments* [it] *received]*".

AMAFI therefore understands that only inducements **received** by the ISP must be provided to the client. Inducements paid by the ISP do not have to be. This interpretation is confirmed by the presentation table in Question-Answer 9.13 of the ESMA Q&A (*see 4.2.1, above*) which only presents "*the third-party payments received by the investment firm*".

6. Summary of obligations

SUMMARY OF APPLICABLE MiFID 2 OBLIGATIONS – COSTS AND CHARGES

Is the Product packaged?

Yes

Does the Product embed a derivative?

Yes

Is the Product recommended or marketed?

No

What type of client is it sold to?

Eligible counterparty

Does the eligible counterparty intend to redistribute it?

No

Yes

Professional client

Retail client

Yes

What type of client is it sold to?

Retail or professional client

EC

Does the eligible counterparty intend to redistribute it?

Yes

No

No

Is the Product sold to a retail client ?

Yes

No

Is the Product recommended or marketed?

Yes

What type of client is it sold to?

Professional client

What type of investment service is provided?

Advise or DM

Other

Eligible counterparty

No

No

Is the Product recommended or marketed?

Yes

What type of client is it sold to?

Retail client

Professional client

What type of investment service is provided?

Advise or DM

Other

Eligible counterparty

No

What type of client is it sold to?

Retail client

Professional client or eligible counterparty

Box	Regime	Product cost	Service cost
A	SERVICE ONLY Limited application possible No *ex-post* information	Product cost NA	Service cost No required methodology
B	SERVICE ONLY No limited application No *ex-post* information	Product cost NA	Service cost No required methodology
C	FULL DISCLOSURE No limited application *Ex-post* information if ongoing relationship	Product cost PRIIPs methodology	Service cost No required methodology
D	FULL DISCLOSURE Limited application possible *Ex-post* information if ongoing relationship	Product cost PRIIPs methodology	Service cost No required methodology
E	SERVICE ONLY Limited application possible No *ex-post* information	Product cost NA	Service cost No required methodology
F	FULL DISCLOSURE No limited application *Ex-post* information if ongoing relationship	Product cost = 0 (no Product cost)	Service cost No required methodology
G	FULL DISCLOSURE Limited application possible *Ex-post* information if ongoing relationship	Product cost = 0 (no Product cost)	Service cost No required methodology
H	SERVICE ONLY No limited application No *ex-post* information	Product cost NA	Service cost No required methodology
I	SERVICE ONLY Limited application possible No *ex-post* information	Product cost NA	Service cost No required methodology

Assumptions :

1. A non-packaged Product cannot embed a derivative;
2. A product which is not recommended or marketed cannot be sold by investment advice or under discretionary management;
3. A product which is recommended or marketed is not necessarily sold by investment advice or under discretionary management.

Below are some examples of the different situations described in the previous diagram:

- *Case A*: in a reverse solicitation, a product is structured in accordance with the requests of an eligible counterparty. This product is neither recommended nor marketed. The eligible counterparty has no intention of redistributing it. Thanks to the potential use of the limited application principle, information on Service Costs is provided to the eligible counterparty in a Costs Table. Product costs are not communicated (Service Only Regime);

- *Case B*: convertible bond sold at the request of a professional client. This product is neither recommended nor marketed. Only Service Costs will be communicated to this client (Service Only Regime).

- *Case C*: EMTN sold to a retail client as part of an investment advice service. The KID is provided to the retail client as well as personalised information about the expected Product and Service Costs;

- *Case D*: currency swap traded between two ISPs. In accordance with the potential for limited application, the information about the Product and Service Costs are provided to the second ISP in a cost table;

- *Case E*: option on a listed share sold without recommendation or marketing to a professional client. In accordance with the potential for limited application, the information about Service Costs will be provided in a cost table. Product Costs are not provided (Service Only Regime);

- *Case F*: share sold to a retail client as part of an investment advice service provided by its client representative. The following information is provided to the client: the Product Cost is equal to 0 (*see 2.1.1.b above*), in application of the proportionality principle, Service Costs (execution service and investment advice service) are communicated to the client in a cost table;

- *Case G*: at the time of a new bond issue, the ISP must prepare a presentation note on the bond for public viewing on its website. A fund manager subscribes to part of the issue. They are provided with information about the Product Cost (equal to 0) and, due to the potential use of the limited application principle, with a cost table of Service Costs;

- *Case H*: a retail client purchases a share via an online broker. The Service Only Regime applies and Product Costs do not have to be provided. Service Costs are provided in a cost table in application of the proportionality principle;

- *Case I*: a bond is traded OTC between two ISPs. The regime applicable is the Service Only Regime and only the Service Costs are provided to the purchasing ISP. Thanks to the potential use of the limited application principle, the latter are provided in a cost table.

7. OTHER QUESTIONS

7.1. Distribution chain

When several ISPs provide services to a client, each must inform this client of the Costs related to their services. The end-Distributor in direct contact with the client must aggregate all of the Costs (*MiFID II DR, art. 50.7*).

However, AMAFI notes that each ISP in direct contact with the client must provide this client with information on Costs (their own Costs aggregated with those of the ISPs of the chain who are not in direct contact with the client). Therefore, the Distributor is not required to provide the client with information about the Costs incurred by the ISP-account holder without a direct contractual tie with the client.

7.2. Bundled offers

Note that article 24.11 of MiFID II states that: "**When an investment service is offered together with another service or product as part of a package** or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and **shall provide for a separate evidence of the costs and charges of each component**".

7.2.1. Scope of application of this obligation

AMAFI is of the opinion that this obligation on bundled offers is applicable when a dual condition is met:

- There is a least one investment service among the services in the bundled offer; and
- The client is invoiced for all of the services at the same time.

Therefore, when the only services included in the bundled offer are ancillary services (*MiFID II, Annex I, Section B – for example, custodian service*) AMAFI is of the opinion that the obligation is not applicable.

7.2.2. Implementation of this obligation

If article 24.11 of MiFID II is applicable, the ISP is obligated to provide the client with information on Costs:

- Regarding the bundled offer and each Service taken separately; and
- *Ex-ante* and, when applicable, *ex-post*.

7.2.3. Potential for limited application

With respect to professional clients and eligible counterparties, as long as the conditions for the implementation of limited application are met (*see 4.1 above*), AMAFI is of the opinion that it is not necessary to provide the client with detailed information Service by Service, but that information on the overall bundled offer meets the obligation.