



European Securities and  
Markets Authority

# Supervisory Briefing

on supervisory expectations in relation to firms using tied agents in the  
MiFID II framework



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# 1 Introduction

## 1.1 Overview

1. In accordance with the ESMA Regulation<sup>1</sup>, one of ESMA's objectives is to actively foster supervisory convergence across the Union with the aim of establishing a common supervisory culture.
2. Following the UK withdrawal from the EU, ESMA has been monitoring the behaviour of firms in order to understand whether their interaction with EU-based clients is done in a way that is compliant with the MiFIR and MiFID legislation (including the regimes providing the conditions for third-country firms to provide investment services and activities in the Union). In this context, some practices concerning investment firms using tied agents recently emerged as a potential source of circumvention of the abovementioned legal framework.
3. Furthermore, ESMA believes that these issues have a more general relevance, and it is thereby important to identify the supervisory expectations on firms using tied agents in a convergent manner across the Union. Therefore, this supervisory briefing takes into account all cases where an EU firm uses tied agents; a specific focus is given to cases where tied agents are legal persons that are controlled or have close ties with other entities or third-country entities.

## 1.2 Scope

4. This supervisory briefing contains the supervisory expectations by ESMA and National Competent Authorities (hereafter, NCAs<sup>2</sup>) in relation to firms providing investment services and/or performing investment activities through the use of tied agents.
5. This supervisory briefing covers the following aspects:
  - a) The supervisory expectations when firms appoint tied agents, and
  - b) The supervisory expectations on firms using tied agents in their on-going activities.
6. In this supervisory briefing "firms" means investment firms and credit institutions (see footnotes (3), (4), (6) and (7) for further details).

## 1.3 Status of this document

7. The supervisory briefing is issued under Article 29(2) of the ESMA Regulation which enables ESMA to develop practical instruments and convergence tools such as supervisory briefings. The purpose of these tools is to promote common supervisory approaches and practices.

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<sup>1</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC as amended by Regulation (EU) 2019/2175.

<sup>2</sup> In accordance with Article 4(26) of Directive 2014/65/EC.

8. The content of this supervisory briefing is not subject to any 'comply or explain' mechanism for NCAs and it is not binding.

## 1.4 Background

9. According to Article 4(29) of MiFID II, a tied agent is a natural or legal person who, under the full and unconditional responsibility of only one firm on whose behalf the tied agent acts (hereafter indicated as "duty of exclusivity"), "promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments, places financial instruments or provides advice to clients or prospective clients in respect of those financial instruments or services" (hereafter, "activities" provided by a tied agent).
10. MiFID II requires Member States to implement the tied agent regime whereas previously it was an optional regime under MiFID I (Article 29 of MiFID II).
11. Article 29 of MiFID II provides the requirements for firms that appoint tied agents<sup>3</sup>. According to such provisions, Member States shall ensure, inter alia, that tied agents are sufficiently good repute and that they possess the appropriate general, commercial, and professional knowledge and competence (Article 29(3) of MiFID II). MiFID II also foresees that Member States may adopt or retain provisions that are more stringent than those set out in Article 29 or add further requirements for tied agents registered within their jurisdiction (Article 29(6) of MiFID II).
12. Among other requirements, Article 29(2) of MiFID II states that when a firm decides to appoint a tied agent it remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the firm and that firms shall monitor the activities of their tied agents so as to ensure that they continue to comply with MiFID II when acting through tied agents.
13. This provision complements (among others) Article 16(2) of MiFID II, concerning the organisational requirements, according to which firms shall establish adequate policies and procedures sufficient to ensure the compliance of the firm, including their tied agents, with the obligation under MiFID II as well as rules governing personal transactions and Article 23 of MiFID II on the identification, prevention and management of conflicts of interest between firms, including (inter alia) their tied agents or any person (directly or indirectly) linked to them by control, that arise in course of the provision of investment services or activities<sup>4</sup>.
14. The Level 1 MiFID II framework is completed by the MiFID II delegated regulation on organisational requirements and operating conditions for investment firms (Regulation 2017/565, hereafter "MiFID II delegated regulation"). The MiFID II delegated regulation provides requirements concerning firms and their "relevant persons" (see following paragraphs for further details). According to Article 2(1), the definition of "relevant person" includes, inter alia: (a) tied agents, (b) directors, partners or equivalent, or managers of a tied agent, (c) employees of a tied agent and any other natural persons whose services are placed at the disposal and under the

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<sup>3</sup> Pursuant to Article 1(3) of MiFID II, Article 29 of MiFID II on the obligations of investment firms when appointing tied agents applies to credit institutions excluding second subparagraph of Article 29(2) (concerning the discretion for Member States to allow tied agents to hold money and/or financial instruments of clients).

<sup>4</sup> Both articles also apply to credit institutions when providing investment services and activities by virtue of Article 1(3) of MiFID II.

control of a tied agent and who are involved in the provision by a firm of investment services and activities, (d) natural persons who are directly involved in the provision of services to a tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities.

15. According to Article 21(1)(b) of the MiFID II delegated regulation, a firm shall ensure that its relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities. The MiFID II delegated regulation also requires firms to inform their clients when they are acting through a tied agent<sup>5</sup>.
16. Moreover, Article 34 and 35 of MiFID II allow firms<sup>6</sup> to use tied agents in the provision of activities in other jurisdictions in the EU<sup>7</sup>. Notably, a firm may:
  - Use tied agents established in its home Member State to provide services in other Member States. In this case, the competent authority of the home Member State shall communicate to the competent authority of the host Member State the identity of the tied agents (Article 34(2) and (3) of MiFID II for investment firms and Article 34(5) of MiFID II for credit institutions),
  - Use tied agents established in a host Member State. In this case, the firm has to provide specific information to its home NCA (Article 35(2)(b) of MiFID II for investment firms and Article 35(7) for credit institutions). According to Article 35(2) tied agents established in a host Member State shall be assimilated to the branch, where one is established, and shall be subject to the MiFID II provisions relating to branches.
17. The present supervisory briefing provides the common understanding of ESMA and NCAs with regard to the supervision of firms using tied agents to provide investment services and/or activities and aims at contributing to the development of a convergent supervisory culture across the Union. It is also meant to give indications to market participants of compliant implementation of the MiFID II provisions relating to tied agents. ESMA acknowledges that, especially in some jurisdictions in which the use of tied agents is common, the relevant NCAs are expected to apply the supervisory briefing within a reasonable timeframe.
18. The content of this supervisory briefing is not exhaustive, does not constitute new policy, and does not promote any particular way of supervising the rules. It has been designed to be used in the way that best fits with supervisors' methodologies (whether distributing the briefings internally,

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<sup>5</sup> According to Article 47(1)(e) of MiFID II delegated regulation, the firm shall provide clients or potential clients, where a firm is acting through a tied agent, a statement of this fact specifying the Member State in which that tied agent is registered. Such requirement should be read in conjunction with Article 46(4) of MiFID II delegated regulation which requires firms to notify a client in good time about any material change to the information provided under Articles 47 to 50 which is relevant to a service that the firm is providing to that client.

<sup>6</sup> Pursuant to Article 1(3) of MiFID II:

- Article 34 of MiFID II on the freedom to provide investment services and activities (across the EU) applies to credit institutions excluding paragraphs (2) and (3) on the communication requirements and the interaction between NCAs as these requirements for credit institutions are provided under paragraph (5) of Article 34,
- Article 35 of MiFID II on the establishment of a branch applies to credit institutions excluding: paragraphs (2) to (4) on - the notification requirements and interactions between NCAs, paragraph (6) on the commencement of business by the branch, and paragraph (9) on right of host-NCA to carry out inspections on branches. Article 35(7) of MiFID II regulates the use of tied agents in a Member State outside the home Member State by a credit institution to provide investment services and activities (while the establishment of a branch by a credit institution is regulated under the CRD, directive 2013/36, Article 35 et seq.).

<sup>7</sup> As complemented by the Commission Delegated Regulation (EU) 2017/1018 and the Commission Implementing Regulation 2017/2382 on the information to be notified by investment firms, market operators and credit institutions.

or passing them to external bodies, such as auditors, for example). NCAs may apply the supervisory expectations set out in this supervisory briefing in a manner that is proportionate to the size, risk profile, and nature, scale and complexity of the firms in question, its proposed tied agent(s) and its appointed tied agent(s).

## 2 Supervisory expectations when firms appoint tied agents

19. As mentioned, a firm appointing a tied agent remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the firm.
20. It is expected that a firm, before appointing a tied agent, has a clear understanding of how the tied agent will contribute to the strategy of the firm, what types of clients the tied agent will be dealing with and how the firm will obtain and deal with these clients. Depending on the legal nature or complexity of the structure of the tied agent that the firm intends to appoint, the firm may need to consider developing a business plan before appointing that tied agent.
21. In order to ensure that the activities provided by tied agents on firms' behalf comply with the MiFID II requirements, NCAs should be satisfied that firms have carried out a proper assessment when appointing tied agents and have put in place appropriate arrangements to monitor their activities with specific regard to the case where the appointed tied agents are legal persons with close links with other entities, including non-EU entities, that could exercise inappropriate influence over the way in which the tied agent carries out the activities on behalf of the firm or that could prevent the firm from effectively monitoring the activities of their tied agent (e.g., cases in which the tied agent is a legal person and is owned or controlled or has close links to a third-country entity that is itself involved in activities concerning manufacturing or distribution of financial instruments). In more detailed terms, NCAs should be satisfied that, before the appointment of a tied agent, a firm assesses, inter alia, that:
  - a. The tied agent is suitable to promote or provide activities on behalf of the firm. The firm should, in particular, assess the registration of the tied agent in the public register kept by the Member State in which the tied agent is established or, if required in accordance with Article 29(3) of MiFID II, verify whether the tied agent which the firm intends to appoint is of sufficient good repute and possesses the necessary knowledge and competence. The firm should also include the tied agent in the assessment of the knowledge and competence of staff in accordance with the ESMA Guidelines for the assessment of knowledge and competence<sup>8</sup>,
  - b. The tied agent has the ability, capacity, sufficient resources, appropriate organisational structure to support the performance of the activities on behalf of the firm. The firm should assess that the clients and potential clients dealing with the tied agent will have the same level of protection as if they dealt with the firm itself. To that end, it is expected that the firm has a good understanding and is satisfied that the tied agent, especially if the tied agent is a legal person, is able to ensure the compliance with MiFID II requirements. For this purpose, it is expected that the firm assesses and is satisfied at least of:

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<sup>8</sup> ESMA71-1154262120-153 EN (rev), available at [https://www.esma.europa.eu/sites/default/files/library/esma71-1154262120-153\\_guidelines\\_for\\_the\\_assessment\\_of\\_knowledge\\_and\\_competence\\_corrigendum.pdf](https://www.esma.europa.eu/sites/default/files/library/esma71-1154262120-153_guidelines_for_the_assessment_of_knowledge_and_competence_corrigendum.pdf).

- i. The organisational structure of the tied agent,
  - ii. The knowledge, skills, and experience and time commitment of the persons responsible for the management and internal control (if relevant) of the tied agent and the provision of the activities on behalf of the firm,
  - iii. The good reputation and suitability of the persons responsible for the management and internal control (if relevant) of the tied agent and the provision of the activities on behalf of the firm,
  - iv. The existence of appropriate mechanisms that the tied agent will use to report to the firm on the activities carried out on behalf of the firm,
- c. If the tied agent is a legal person, the tied agent has anticipated the number of natural persons that within the tied agent will be involved in the provision of activities on behalf of the firm and this number is appropriate to the activities that the tied agent will carry out on behalf of the firm. The appointing firm should also assess the place from which the employees of the tied agent or any natural persons whose services are at the disposal and under the control of the tied agent will provide activities on behalf of the firm, and how such employees or natural persons are monitored. A firm should not be satisfied if the tied agent has no sufficient substance in the EU or if a tied agent mainly relies on resources based outside the EU (see paragraphs 24 and 25 for further details),
- d. If the tied agent of an investment firm is, under the national legislation, allowed to hold money and/or financial instruments of clients in accordance with the second subparagraph of Article 29(2) of MiFID II<sup>9</sup>, it is expected that the investment firm assesses:
- i. that the financial situation of the tied agent does not pose risks to the safeguard of clients' assets,
  - ii. that the tied agent has put in place the necessary arrangements to comply with the MiFID II requirements on the safeguard of clients' assets,
- e. The appointment of the tied agent does not prevent the firm from complying and continuing to comply with the MiFID II legislative framework. To this end, it is expected that the firm also verifies that the organisational settings of the tied agent do not prevent the effective supervision of the tied agent by the firm, especially when the tied agent is a legal person.
22. NCAs should be satisfied that the firm and the tied agent clearly agree the respective rights and obligations. In particular, the firm should have instruction and termination rights, rights of information and right of inspections and access to books and premises of the tied agent. It is also expected that such agreement ensures that the tied agent will not rely on third parties for the performance of functions or tasks related to the provision of activities on behalf of the appointing firm. In addition, it is expected that the agreement between the firm and the tied agent addresses at least the following aspects:

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<sup>9</sup> Paragraph 21(d) above only covers investment firms as, according to Article 1(3) of MiFID II, the second subparagraph of Article 29(2) does not apply to credit institutions, when providing one or more investment services and/or performing investment activities.

- a. Details of the registration in the public register where the tied agent is recorded in accordance with Article 29(3) of MiFID II. If the tied agent is a legal person, the tied agent should: (a) provide a list of the natural persons that will be involved in the provision of activities on behalf of the firm and interact with clients and potential clients and (b) clarify where these natural persons will be established for the provision of such activities,
  - b. Description of the activities that the tied agent will carry out on behalf of the firm in accordance with Article 29(1) of MiFID II,
  - c. Prohibition for the tied agent to provide any activities as tied agent of another firm,
  - d. Obligation for the tied agent to disclose the capacity in which it is acting and the firm that it is representing when contacting or before dealing with any client or potential client. It is expected that the firm's clients or potential clients can immediately understand that they are interacting with the firm through a tied agent. For example, the tied agent should not use references, email accounts or telephone numbers which can be associated with an entity that is different from the appointing firm, a third country or a third-country entity. This is particularly important in those cases where the tied agent is a legal person that is controlled by or closely linked to a third-country entity that is itself involved in activities concerning manufacturing or distribution of financial instruments,
  - e. Illustration of the mechanisms through which the firm will monitor the activities of the tied agent (e.g., regular reporting that the tied agent has to provide to the firm, regular meetings between the tied agent and the internal control functions of the firm),
  - f. Indication that the firm and its auditors have access to data related to the activities carried out by the tied agent on behalf of the firm, as well as to the relevant business premises of the tied agent, where necessary for the purpose of effective oversight in accordance with Article 29(2) of MiFID II,
  - g. Obligation for the tied agent to protect any confidential information relating to the firm and its clients or potential clients.
23. When assessing the decision of a firm to appoint tied agents, and when supervising firms that have appointed tied agents, NCAs should consider the assessment made by the firm and be satisfied that:
- a. The level of business that the tied agent is expected to carry out on behalf of the firm is adequate to the organisation and level of staff/resources that the tied agent will use,
  - b. The organisational settings of the tied agent do not prevent the effective supervision of the tied agent by the firm,
  - c. The ownership structure or other close links of the tied agent do not prevent the firm's compliance with the requirements on conflicts of interest,
  - d. The firm is well equipped to monitor the activities that the tied agent will carry out on its behalf,



- e. The agreement between the firm and tied agent clearly allocates the respective rights and obligations and includes the measures to enable the firm to exercise oversight and mitigate the risks that the activities of the tied agent on its behalf may pose.
24. NCAs should carefully scrutinise the cases in which firms have a business model that mainly consists of (and their remuneration mainly comes from) appointing tied agents which are legal persons with close links to other entities, especially to third-country entities as such schemes may be used to access EU markets without the relevant MiFID authorisations.
25. ESMA considers that firms should avoid appointing a tied agent which is a legal person and whose employees involved in the provision of the activities on behalf of the firm (e.g., sale staff) are also at the disposal or under the control of other entities, including third-country entities. Such entities could exercise inappropriate influence over the way in which a tied agent carries out the activities on behalf of the firm or may prevent the firm from effectively monitoring the activities of their tied agent (e.g., cases in which the tied agent is a legal person and is owned or controlled or has close links with a third-country entity that is itself involved in activities concerning manufacturing or distribution of financial instruments). This includes instances in which natural persons are involved in the provision of the activities carried out by a tied agent on behalf of a firm as a result of arrangements with another entity such as staff sharing agreements or secondment. ESMA believes that allowing a tied agent to carry out activities on behalf of a firm by mainly using the resources of another entity, especially a third-country entity, constitutes a serious impediment to the firm's compliance with Article 29(2) of MiFID II specifically the duty of the firm to monitor the activities of its tied agents so as to ensure that they continue to comply with MiFID II when acting through tied agents. To this end, and also to ensure that the duty of exclusivity to which tied agents are bound (by virtue of Article 4(29) of MiFID II) is fulfilled, it is expected that tied agents have sufficient substance in the EU and do not mainly rely on resources based outside of the EU in the provision of activities on behalf of the appointing firm.

### **3 Supervisory expectations on firms using tied agents in their on-going activities**

26. Article 29(2) of MiFID II requires firms to monitor the activities of their tied agents to ensure that they continue to comply with MiFID II when acting through tied agents. Thus, firms using tied agents should ensure that sufficient resources are devoted to monitor tied agents' activities, especially when the appointed tied agents are legal persons characterised by complex organisational and/or ownership structures and / or when the tied agent has close links with other entities or third-country entities.
27. Once a firm appoints a tied agent, it is expected that the firm has in place adequate internal measures and processes to appropriately oversight the activity that the tied agent carries out on its behalf. Without any claim of exhaustiveness, the following organisational requirements provided in the MiFID II delegated regulation in relation to firms and their relevant persons (refer to paragraph 14) should be mentioned:
- a. The firm's compliance function shall advise and assist the relevant persons responsible for carrying out investment services and activities to comply with the firm's obligation under MiFID II (Article 22(2)(b)),

- b. The firm's actions relating to risk management shall monitor (inter alia): (a) the level of compliance by the firm's relevant persons with the arrangements, processes and mechanisms adopted by the firm to manage the risks relating to the firm's activities (Article 23(1)(c)(ii)) and (b) the adequacy and effectiveness of measures taken to address any deficiencies in the policies, procedures, arrangements and mechanisms adopted by the firm to manage the risks, including failures by the relevant persons to comply with such arrangements, processes and mechanisms (Article 23(1)(c)(iii)),
  - c. The firm's remuneration policies and procedures shall not incentivise relevant persons to favour their own interest to the potential detriment of any client (Article 27(1)). The firm shall also ensure that the remuneration policies and practices apply to all relevant persons with an impact (direct or indirect) on investment services provided by the firm to the extent that the remuneration of such person and similar incentives may create a conflict of interest that encourages them to act against the interest of the firm's clients (Article 27(2)),
  - d. The firm's conflict of interest policy shall identify procedures and measures that ensure that relevant persons carry on their activities at an appropriate level of independence (Article 34(3)). In order to ensure the requisite degree of independence, the firm's procedures and measures shall include (inter alia) the measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out investment or ancillary services or activities (Article 34(3)(d))<sup>10</sup>.
28. NCAs should be satisfied that the governance arrangements adopted by the firm are appropriate to monitor the activities carried out by the tied agents and proportionate to the number of the appointed tied agents, their legal nature, as well as their organisational and ownership structure. For this purpose, a firm may, for example, consider appointing one or more independent or non-executive directors in charge of monitoring the activities of tied agents or to carry out an independent (external) review of its internal control framework (and staff) in charge of monitoring the tied agents.
29. In order to monitor the tied agent's activity, NCAs should be satisfied that a firm has in place, inter alia:
- a. Adequate organisational arrangements (such as internal measures and processes) to appropriately monitor the tied agent for which the firm has responsibility. The firm's control and risk framework should be designed by taking into account the business model of the tied agent. The firm's staff which oversee the tied agents' activity should be appropriately skilled and experienced for these purposes,
  - b. Appropriate reporting mechanisms. To this end, it is expected that the firm engages in face-to-face meetings/discussions with its tied agent (in person or virtually) and avoid excessive reliance on high-level attestation from the tied agent. It is also expected that the firm receives on a regular basis at least information on:

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<sup>10</sup> Other requirements stemming from the MiFID II delegated regulation can be relevant in this context even if not explicitly mentioned in paragraph 27, such as those on the personal transactions of relevant persons (Articles 28-29), the additional organisational requirements in relation to investment research or marketing communication (Article 37), and on client order handling (Article 67(3)). With regard to Article 34 of the MiFID II delegated regulation mentioned above in letter (d) of paragraph 27, it should be noted that all letters from (a) to (e) of the second subparagraph of Article 34(3) apply to the relevant persons.

- i. The number of clients handled by the tied agent, the products distributed, the relevant financial figures of the activity carried out by the tied agent on behalf of the firm,
    - ii. The proof that the tied agent disclosed the name of the firm when interacting with clients or potential clients,
    - iii. If the tied agent is a legal person, the number of natural persons involved in the provision of the activities that the tied agent carries out on behalf of the firm and the place from which these persons provide such activities,
  - c. Adequate mechanisms to assess the quality of the services provided by the tied agents (e.g., advice provided to firms' clients) and the consistency of the tied agent's policies and procedures with the relevant EU legislative framework on the services provided (e.g., requirements concerning the assessment of the suitability),
  - d. Adequate mechanisms for the identification of conflicts of interest. The firm should give particular attention to the conflicts of interest which may arise from the relationship between the appointed tied agent and other entities or third-country entities with which the tied agent has close links (e.g., stemming from ownership structure or commercial agreements).
30. In addition to the above, it is expected that a firm regularly monitors, through experienced persons, such as financial accountants, the financial situation of the tied agent who is acting on its behalf, especially if the tied agent is allowed to hold money and/or financial instruments of clients in accordance with the second subparagraph of Article 29(2) of MiFID II.
31. It is also expected that a firm that appoints tied agents deals with the complaints concerning the activities that the appointed tied agent carries out on its behalf.
32. NCAs should be satisfied that a firm that appoints tied agents is able to terminate the relationship with a tied agent where necessary, with immediate effect when this is in the interests of its clients, without detriment to the continuity and quality of its provision of activities to clients. If a firm has reasonable grounds to believe that the conditions described above and in Chapter 2 are not satisfied, or are likely not to be satisfied, in relation to any of its appointed tied agent, the firm should take immediate steps to rectify the matter or terminate its contract with the relevant tied agent.
33. It is also expected that, when the relationship between a firm and a tied agent is terminated:
  - a. The firm should immediately inform the NCA of its home Member State, specifying if the termination is due to matters having a serious regulatory impact or involving an offence or a breach of a MiFID II requirement,
  - b. The firm should inform all relevant clients to avoid interacting with the tied agent after the termination of the relationship,
  - c. Outstanding activities and obligations to clients should be properly completed and fulfilled either by the firm itself or another tied agent that the firm has appointed.