Council of the European Union
General Secretariat

PUBLIC

Interinstitutional files:
2025/0381 (COD)
2025/0382 (COD)
2025/0383 (COD)

Brussels, 26 May 2026

WK 7392/2026 INIT

LIMITE

EF
ECOFIN
CODEC

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and Banking Union (MISP) Financial Services Attachés
N° Cion doc.:	ST 16345 2025 INIT
Subject:	Market Integration and Supervision Package - Working Party meeting on 28 May 2026 - Supervision: PL and RO non-paper on MiFID host supervisory measures

PL, RO Non-Paper

Legislative proposal: introduction into MiFID II of extraordinary precautionary measures for host NCAs in relation to non-compliant conduct of business by a foreign investment firm

PUBLIC

Executive summary

- In its current form, MiFID II does not provide for extraordinary measures allowing host NCAs to immediately react to infringements of law by a foreign investment firm if such infringements pose a substantial threat to the safety of the host capital market and its participants.
- According to the current procedure set out in Article 86(1) of MiFID II, if a foreign investment firm acting under the freedom to provide services or through a branch or a tied agent infringes provisions of law which do not confer powers on the host NCA, the host NCA is reliant on the speed and effectiveness of the home NCA's response before taking any direct action against such a non-compliant investment firm. There are no exceptions to the procedure.
- On the other hand, if a foreign investment firm operating through a branch or a tied agent infringes the provisions of law applicable in the host Member State which confer powers on the host NCA, the host NCA cannot exercise its direct regulatory powers unless it has notified such a non-compliant foreign investment firm and the foreign investment firm has failed to remedy the infringement within a time limit set by the host NCA.
- Therefore, in this non-paper, PL and RO propose an amendment to MiFID II, i.e. to introduce extraordinary precautionary measures available to host NCAs in relation to the non-compliant conduct of business by a foreign investment firm, similar to the mechanisms provided for in CRD IV[1], UCITS[2] and Solvency II[3].

1. Background

1.1. MiFID II divides precautionary measures applicable to an investment firm acting within the territory of a host Member State (hereinafter: "**foreign investment firm**") into those to be taken by the competent authority of the firm's home Member State (hereinafter: "**home NCA**") and by the competent authority of the firm's host Member State (hereinafter: "**host NCA**"). The two scenarios reflect two different ways in which the host

[1] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (as amended).

[2] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (as amended).

[3] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (as amended).

NCA responds to infringements of the law by a foreign investment firm in connection with the conduct of business in the host country[4].

Precautionary measures in relation to the infringement of provisions of law which do not confer powers on the host NCA

1.2. Where a foreign investment firm operates under the freedom to provide services, the home NCA acts as the competent supervisor (even if the infringement relates to the provisions of the host country's law).

1.3. On the other hand, where a foreign investment firm operates in a host Member State through a branch or without a branch but through a tied agent, some of the supervisory powers are exercised by the home NCA and some by the host NCA.

1.4. Therefore, if the host NCA determines that:

(a) a foreign investment firm operating under the freedom to provide services infringes provisions of law applicable in the host Member State, or

(b) a foreign investment firm operating through a branch or without a branch but through a tied agent infringes the provisions of law applicable in the host Member State which do not confer powers on the host NCA,

it must rely on the home NCA. The host NCA is then required to address a notice to the home NCA, indicating the infringements identified, the actions to be taken, and the time limit for the home NCA to have the foreign investment firm cease the infringements.

1.5. Only if the measures taken by the home NCA prove to be ineffective or insufficient, may the host NCA undertake necessary measures against the foreign investment firm to protect investors.

1.6. **This mechanism falls far short of what is needed in cases requiring an urgent response by the host NCA to infringements posing a substantial threat to the safety of the host capital market and its participants**. The entire procedure involving the home NCA often requires many months to be carried out, and it entails steps such as drafting a notice, delivering it to the home NCA, awaiting the response from the home NCA (which, in order to respond, must analyse the facts and determine whether it agrees with the host NCA's assessment) and, finally, assessing the effectiveness of the measures taken by the home NCA or ascertaining the expiry of the time limit for taking such measures (which must be long enough to give the home NCA a reasonable chance to take action).

Precautionary measures in relation to the infringement of provisions of law which confer powers on the host NCA

1.7. In the case of a foreign investment firm acting through a branch or without a branch but through a tied agent, there is a division of powers between the home NCA and the host NCA. The procedure applicable to the identification, by the host supervisor, of

[4] These procedures arise from Article 86(1) (for provisions in respect of which supervisory powers are exercised by home NCAs) and Article 86(2) (for provisions in respect of which supervisory powers are exercised by host NCAs) of MiFID II.

PUBLIC

infringements of the provisions of law falling under the competence of the home supervisor is described above in paragraphs 1.4–1.5.

1.8. In the event that the host NCA determines that the foreign investment firm has infringed the provisions which confer powers on the host NCA, it is required to take, independently (i.e. without relying on the prior reaction of the home NCA), all appropriate measures to ensure that the infringement is remedied (e.g. by suspending the right to conduct business in the host Member State), but before applying such measures, the host NCA must first call upon the foreign investment firm to remedy the infringement itself, and it must set an appropriate time limit for the foreign investment firm to do so.

1.9. Thus, once again, the host NCA is deprived of the ability to act immediately in cases requiring urgent safeguards for the host capital market and its participants.

2. Legal solutions provided for in other financial market sectors

2.1. In view of the difficulties described above and the need to enable the host NCAs to act effectively in cases requiring the most urgent intervention, the EU legislator decided to introduce in the legal acts regulating other financial market sectors the possibility of a justified exemption from the prior notification measures (i.e. notification to the home NCA and waiting for its reaction, as referred to in paragraphs 1.4–1.5, or a cease and desist notice as referred to in paragraph 1.8 above) before taking the necessary measures to remedy the infringement itself (hereinafter: **"extraordinary measures"**).

2.2. The extraordinary measures have been provided for in the EU legislation in the CRD IV, Solvency II and UCITS directives:

> **Article 43(1) of CRD IV**:
>
> 1. **Before following the procedure set out in Article 41** [i.e. the standard procedure involving a prior notice to the home NCA and awaiting its reaction], the competent authorities of the host Member State may, **in emergency situations**, pending measures by the competent authorities of the home Member State or reorganisation measures referred to in Article 3 of Directive 2001/24/EC, **take any precautionary measures** necessary to protect against financial instability that would seriously threaten the collective interests of depositors, investors and clients in the host Member State.

> **Article 155(4) of Solvency II**:
>
> 4. Paragraphs 1, 2 and 3 [i.e. referring to the standard procedure involving a prior notice to the home NCA and awaiting its reaction] shall not affect the power of the Member States concerned to take **appropriate emergency measures to prevent or penalise irregularities within their territories**. That power shall include the possibility of preventing insurance undertakings from continuing to conclude new insurance contracts within their territories.

> **Article 21(7) of UCITS**:
>
> 7. Before following the procedure laid down in paragraphs 3, 4 or 5 [i.e. the standard procedure involving a prior notice to the home NCA and awaiting its reaction], the competent authorities of the management company's host Member State may, **in emergencies, take any precautionary measures necessary to protect the interests of investors and others for whom services are provided**. The Commission, ESMA, and the competent authorities of the other Member States concerned shall be informed of such measures at the earliest opportunity.

2.3. All of the above extraordinary measures apply irrespective of the form in which business is conducted – i.e. both under the freedom to provide services and through a branch in a host Member State.

2.4. The MiFID II provisions do not provide for any similar regulation, which leads to the problems described in the first part of this non-paper.

3. RIS and MISP upcoming legislative changes

3.1. PL and RO are aware of legislative proposals related to Article 86 of MiFID II and new Article 17aaa of the ESMA Regulation[5]. While these amendments should be regarded as appropriate and justified, they do not fully address the issue described in this document.

RIS amendments to Article 86 of MiFID II

3.2. According to the draft agreement in the RIS Proposal[6], Article 86 of MiFID II will be amended so as to introduce a time limit of 30 working days for a home NCA to take appropriate measures. However, according to the proposed wording, the time limit shall also be deemed to have been met if the Home NCA merely initiates administrative proceeding. This means that the proceeding itself will be carried by the home authority outside the time limit.

3.3. Therefore, in cases requiring a formal proceeding, the stipulated time limit may be used by a home NCA only for the formalization of actions vis-à-vis the entity, rather than for the actual resolution of the problem.

3.4. For this reason, the proposed amendment to Article 86 of MiFID II does not address the problem identified by PL and RO, which concerns urgent situations requiring a solution that ensures a prompt and effective response to the detected infringements.

Proposed article 17aaa of ESMA Regulation

3.5. The proposed new Article 17aaa of the ESMA Regulation is intended to establish a new procedure for the suspension of the right to provide cross-border services, to be conducted by ESMA. Under the draft, where ESMA has reasonable grounds to conclude that an entity operating on a cross-border basis is committing serious infringements, it may require the home supervisory authority to take appropriate measures to put an end to such infringements. In the absence of action on the part of the home supervisory authority, ESMA may adopt a decision obliging that authority to suspend the entity's ability to conduct cross-border business. Should these measures prove ineffective, ESMA may issue a decision directly addressed to the entity; pursuant to the proposed wording of the new provision, the supervisory authorities in whose jurisdiction the entity operates shall take all necessary steps to ensure the enforceability of ESMA's decision with respect to that entity.

3.6. PL and RO appreciate that, under the MISP package, the European Commission has undertaken an attempt to address issues related to the cross-border activities of

[5] 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.

[6] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules (Text with EEA relevance), 2023/0167(COD), version after Technical Meeting on 11 March 2026.

PUBLIC

investment firms. Nevertheless, in our view, the proposed solution does not fully address the problem in question.

3.7. The solution proposed by PL and RO is targeted at the most urgent situations, where the speed and effectiveness of action are crucial in order to prevent significant harm to investors and other participants in the capital market. The procedure currently available under Article 86 of MiFID is ineffective in such cases due to its dependence on the pace of action of an authority other than the one confronted with the problem (in this instance, the home supervisory authority). Under the solution proposed in Article 17aaa of the ESMA Regulation, the effectiveness of the process would depend on yet another additional entity, namely ESMA.

3.8. In this context, it should be noted that not all time limits under the proposed procedure are of a fixed nature. In particular, ESMA's intervention must be justified by "reasonable grounds." Given the highly subjective nature of this concept, there is no certainty as to how much time may elapse between ESMA obtaining initial information about an infringement and determining that such information is sufficient to initiate the procedure under Article 17aaa.

3.9. Furthermore, at the stage of the procedure described in the first paragraph of the provision in question, the home NCA is required to respond to the information provided by ESMA within a "reasonable timeline set by ESMA." This notion is likewise highly indeterminate.

3.10. The solution proposed by PL and RO and the proposal put forward by the European Commission should not be regarded as competing with one another. In our view, these mechanisms may effectively complement each other. In cases where matters are complex (e.g. cross-border activities of an entity spanning multiple jurisdictions), coordination of actions by ESMA, together with the possibility of taking independent measures where necessary, will undoubtedly prove useful. Conversely, in the most urgent situations, where an immediate and decisive response from the host supervisory authority is required, the solution proposed by PL and RO will be more appropriate.

3.11. In the above context, it should be noted that such a model will be present in the case of UCITS. Under the current legal framework, Article 21(7) of the UCITS Directive provides for extraordinary supervisory measures available to the host supervisory authority. Neither the MISP nor the RIS proposals indicate that these powers would be abolished. Consequently, following the entry into force of MISP and RIS, in the case of UCITS both the procedure involving ESMA under Article 17aaa of the ESMA Regulation and the existing extraordinary supervisory measures under Article 21(7) of the UCITS Directive will remain available. For this reason, the coexistence of both regimes should likewise be possible in the context of Article 86 of MiFID II and Article 17aaa of the ESMA Regulation.

4. Legislative proposal

4.1. In light of the above, PL and RO propose to amend Article 86 of MiFID II by adding a new paragraph 2a with the following wording:

> 2a. Before following the procedure laid down in paragraphs 1 or 2, the competent authority of the host Member State may, in emergencies, take any precautionary measures necessary to protect the interests of investors and others for whom services are provided.

4.2. The proposed amendment should allow the host NCA – in emergency situations requiring immediate remedy of an infringement of the law by a foreign investment firm – to take appropriate measures without notifying the home NCA and awaiting its reaction.

PUBLIC