

Luxembourg, 7 October 2022

Response to the ESMA consultation regarding the review of the Guidelines on MiFID II product governance requirements

Introduction

The Association of the Luxembourg Fund Industry (ALFI) represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg domiciled investment funds, asset management companies and a wide range of business that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax advisory firms, auditors and accountants, specialised IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world.

We thank the European Securities and Markets Authority for the opportunity to participate in this consultation the review of the Guidelines on MiFID II product governance requirements. Please find below a few comments on aspects that were the most relevant to our Members.

Response to questions

Guidelines for manufacturers

Identification of the potential target market by the manufacturer: categories to be considered

Q1. Do you agree with the suggested clarifications on the identification of the potential target market by the manufacturer (excluding the suggested guidance on the sustainability-related objectives dealt with in Q2)? Please also state the reasons for your answer.

Q2: Do you agree with the suggested approach on the identification of any sustainability-related objectives the product is compatible with? Do you believe that a different approach in the implementation of the new legislative requirements in the area of product governance should be taken? Please also state the reasons for your answer.

Under paragraph 20 of the Guidelines ESMA further details one of the categories that should be used to define the target market, i.e. “clients’ objectives and needs”. Within this broad category, the firm should, among others, specify any sustainability-related objectives the product is compatible with. In this context, ESMA suggests to align the definition of “sustainability-related objectives” with the

definition of “sustainability preferences” according to Article 2(7) of the MiFID II Delegated Regulation and as further detailed in the ESMA Guidelines on certain aspects of the MiFID II suitability requirements.

When comparing the criteria to determine clients’ sustainability preferences as defined in the MiFID II Delegated Regulation with ESMA’s proposal in paragraph 20, we noted that ESMA adds an additional criterion to identify “whether, where relevant, the product has a focus on either environmental, social or governance criteria or a combination of them”. We propose in this regard to stay aligned with the requirements of the MiFID II Delegated Regulation and not to add this additional criterion. ESMA’s proposal to further detail the assessment of clients’ “sustainability preferences” as outlined in the course of the consultation on MiFID II suitability guidelines is generally more nuanced than ESMA’s proposal in paragraph 20 of this consultation. Moreover, it should be considered regarding the notion of “governance criteria” that governance aspects are a transversal concept that cannot be considered / focused upon on a stand-alone basis. If this additional criterion should be kept, we suggest to delete this notion.

We welcome the flexibility contained in ESMA’s proposal that firms could use the categories presented in the SFDR RTS (instead of an approach based on each PAI indicator).

Q3: What are the financial instruments for which the concept of minimum proportion would not be practically applicable? Please also state the reasons for your answer.

In our view, the concept of minimum proportion would not be practically applicable for derivatives, shares and sovereign bonds.

Identification of the potential target market: differentiation on the basis of the nature of the product manufactured

Q4: Do you agree with the suggested guidance on complexity in relation to the target market assessment and the clustering approach? Please also state the reasons for your answer.

We agree with the guidance suggested by ESMA and welcome the flexibility provided that manufacturers “may” decide to define the target market by adopting a clustering approach. Nonetheless, while maintaining flexibility, further guidance/examples on how clusters would be defined from an operational perspective would be appreciated.

3.3.3 Guidelines for distributors

Q5: Do you agree with the suggested guidance on the assessment of the general consistency of the products and services to be offered to clients, including the distribution strategies used? Please also state the reasons for your answer.

Q6: Do you agree with the suggested guidance on the identification of the target market by the distributor? Please also state the reasons for your answer.

Q7: Do you agree with the suggested approach on the determination of distribution strategy by the distributor? Please also state the reasons for your answer.

Q8: Do you agree with the suggested approach on the deviation possibility for diversification or hedging purposes when providing investment advice under a portfolio approach or portfolio management? In particular, do you agree that a deviation from the target market categories “type of client” and “knowledge and experience” cannot be justified for diversification or hedging purposes, neither in the context of investment advice under a portfolio approach, nor portfolio management? Please also state the reasons for your answer.

Regular review by the manufacturer and distributor to respectively assess whether products and services are reaching the target market

Q9: Do you agree with the suggested approach on the requirement to periodically review products, including the clarification of the proportionality principle? Please also state the reasons for your answer.

We agree with the approach suggested by ESMA on the requirement to periodically review products, including the clarification of the proportionality principle.

3.3.4 Guidelines on issues applicable to both manufacturers and distributors

Q10: Do you agree with the suggested approach on the negative target market assessment in relation to a product with sustainability factors? Please also state the reasons for your answer.

We agree with the approach suggested by ESMA not to consider the sustainability-related objectives of the products when performing a negative target market assessment which is consistent with the rationale of the exemption under Article 9 MiFID II Delegated Directive to ensure that products with sustainability factors remain easily available also for clients that do not have sustainability preferences.

Application of the target market requirements to firms dealing in wholesale markets (i.e. with professional clients and eligible counterparties)

Q11: Do you agree with the suggested updates on the application of the product governance requirements in wholesale markets? Please also state the reasons for your answer.

We agree with the suggested updates by ESMA to reflect the recent changes to Article 16a of MiFID II (exemption of firms from product governance requirements in relation to a product marketed or distributed exclusively to eligible counterparties) while keeping the references to eligible counterparties as part of the intermediation chain as these would remain relevant.

Q12: Do you have any comment on the suggested list of good practices? Please also explain your answer.

Q13: Do you have any comment on the suggested case study on options? Please also explain your answer.