Comments
ESMA Consultation - Review of the Guidelines on MIFID II product governance requirements

26 September 2022

Association of German Banks

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Lobby Register No R001458
EU Transparency Register No 0764199368-97

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USt.-IdNr. DE201591882

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.

We generally welcome any statements by ESMA regarding the Product Governance Guidelines which could lead to enhanced legal certainty. However, we have a few reservations with respect to the proposed clarifications in paragraphs 13-23. Please find our comments below.

Paragraph 14:
The requirement to generally consider qualitative factors in addition to quantitative factors for all financial instruments is, in our view, too wide-ranging. In accordance with the principle of proportionality, it should be possible to use qualitative or quantitative factors exclusively. Especially in case of less complex or low-risk financial instruments, no relevant added value is generated if qualitative and quantitative factors need to be used in all instances.

ESMA's comments indicate a shortfall with respect to the use of solely quantitative factors which is not justified in this way. We suggest providing for more flexibility, giving the manufacturers the option of applying quantitative or qualitative factors or a combination of both.

Based on the principle of proportionality, it should also be possible to merge certain criteria of the target market determination where the structure of the financial instrument and the potential investor audience permits. We therefore suggest including an exemption to the clarification added in paragraph 16 of the Guidelines (page 27) along the lines of "[…] unless the complexity of the product and/or the targeted potential investors justify a simplified target market determination".

Paragraph 19a):
We support giving consideration to the legal exceptions, but we suggest deleting the first half sentence "To avoid possible misuse of the exemption provided in Article 16a MiFID II". This is just a general hint on potential misconduct for which no evidence has been provided and it also does not provide regulation clarity.

Paragraph 19e):

We are critical of the optional "fine-tuning" of the investment goals proposed by ESMA. This is not provided for in the legislation. In addition, it will be very difficult to make a statement at manufacturer level that a product is aimed at, for example, a certain age group. The guidelines should stick to the proven criteria of asset optimisation, retirement provision and specific retirement provision.

If EMSA wants to retain the "fine-tuning", it should certainly be optional – as envisaged in the draft.

We believe the requirement that, in future, the target market should always include a statement about the investment horizon is understandable given the stated intention of further developing the guidelines. However, there should be no further additions to the target market criteria (in addition to investment horizon and sustainability).

With regard to the specific design of the criteria, in the draft EMSA focuses on years. In practice, however, many firms work with maturity bands such as short, medium and long term. This should also be possible in the guidelines in order to give firms a certain flexibility in implementing the new requirements and to allow them to continue working with established processes. In addition, it is important to consider that it will be very difficult to define an investment horizon in years for products without a fixed term, such as funds or shares. So, for example, in the case of a share, this might give the impression that its price performance is especially positive in the year in question. Such misconceptions should be avoided by continuing to make it possible to reference proven maturity bands.

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.

We welcome the clarification to align the definition of "sustainability objectives" with the definition of "sustainability preferences" according to Article 2(7) of Delegated Regulation (EU) 2017/565 (as amended by Delegated Regulation (EU) 2021/1253) as these categories will have to be considered by an investment firm providing investment advice or portfolio management services when assessing the suitability of a financial instrument for a particular client according to Article 54(2) of MiFID II Delegated Regulation 2017/565. Such an alignment of the criteria

used in the determination of the target market by the manufacturer and the information a distributor is requested to obtain helps to match a client's preferences with a product's identified target market and therefore supports the suitability assessment carried out by the distributor. We also welcome the fact that ESMA does not propose the alignment as the only option which allows for greater flexibility on the manufacturer side.

We also support the additional optional category in no. 20 of the draft guidelines that goes beyond the "sustainability preferences" set out in Article 2(7) of Delegated Regulation (EU) 2017/565, i.e., "sustainability-related objectives" as specified in the third category of no. 20 (= product has focus on environmental, social or governance criteria or combination). This additional optional category allows specifying sustainability-related objectives as part of the target market where they cannot be attributed to the other three categories of "sustainability preferences" according to Article 2(7), e.g., where technical screening criteria for a certain environmental objective do not yet exist. It may become particularly relevant where distribution is not envisaged via investment firms providing investment advice or portfolio management services.

Paragraph 20: In order to avoid misunderstandings between manufacturers and distributors, it should be made clear in the minimum percentages whether it is a minimum proportion or the current actual and therefore variable percentage. In addition, the guidelines for instruments such as shares, bonds and structured products which, unlike funds, have no contractually guaranteed minimum value (such requirements only exist for funds) could explicitly provide for the possibility of using the last actual share.

In paragraph 20 the first bullet point refers to products invested in environmentally sustainable investments as defined in Article 2(1) of Regulation (EU) 2020/852 (the Taxonomy Regulation). Such investments require as per Article 3 of the Taxonomy Regulation that sustainable economic activities do not significantly harm any of the other environmental objectives (DNSH requirements). We understand that the corporate issuer of products is in the best position to provide information on DNSH requirements, other parties such as investment firms acting as co-manufacturers for corporate issuers will not normally have adequate information on important details of such DNSH requirements relating to issuers. We would therefore recommend that ESMA includes a clarification that it is the corporate issuers' responsibility to provide such DNSH information to co-manufacturers and that co-manufacturers only have the responsibility to forward this information they have received from the issuers to the distributors. The issuers' responsibilities should also include the obligation to regularly review its DNSH requirements and to provide updates to co-manufacturers if needed.

We also concur with ESMA's view that the sustainability-related objectives of a product may either refer to data of the issuer or product itself. We suggest providing these alternatives as options for the issuer and/or the manufacturer to determine. We would also welcome an explicit confirmation from ESMA in paragraph 20 that sustainability-related objectives may also refer to the company. For a use-of-proceeds sustainable bond, such minimum proportions may be available, but for a conventional bond (or sustainability-linked bond) with use of proceeds for general corporate purposes, any minimum proportion may only be based on the taxonomy alignment of the issuer as a company (same for equity). It should be clarified that if the product is a bond with proceeds for general corporate purposes, the percentages may be based on taxonomy / SFDR alignment of the issuer as a company.
Obviously, the chosen route needs to be sufficiently notified when communicating the sustainability-related objectives. This is particularly important for the financing of transitional activities or investments that are important for issuers whose businesses as such are not (yet) aligned to the sustainability objectives, but who should (even more) be supported in their attempt to convert their businesses to a more sustainable model (and therefore enabled to use, for example, use of proceeds bonds such as a green bond to finance their sustainable activities.

We note that Delegated Regulation (EU) 2021/1253 already applied as of 2 August 2022, whereas Delegated Regulation (EU) 2021/1269 will only apply as of 22 November 2022. This could force distributors determining the target market without any guidance by the respective manufacturer and may result in sustainable products not being offered to investors until end of November 2022.

In addition, it seems unclear in the current reporting environment whether the information required in order to determine the sustainability objectives (which are supposed to match the individual investor's preferences) can be obtained. Most market participants are currently not able to determine with any accuracy a precise percentage for, e.g., "environmentally sustainable investments" within the meaning of Regulation (EU) 2020/852 or "sustainable investments" within the meaning of Regulation (EU) 2019/2088 (neither at an entity level nor for particular instruments like use-of-proceeds green bonds), but at best could provide minimum quotas (see Q3 below). The current planned Corporate Sustainability Reporting Directive will likely improve the level of available data, however, it is only due to apply in 2024. Manufacturers who have not obtained the respective issuer's confirmations will likely not be willing to expose themselves and in case of doubt will determine that the investment cannot be regarded as sustainable which

naturally will have a negative impact on the availability of sustainable products.[1] As long as the data required to determine sustainability-related objectives along the lines of the criteria determined in Article 2(7) of Delegated Regulation (EU) 2017/565 is not provided through statutory (or equivalent) reporting, there appears to be a risk that products matching an investors sustainability preferences as defined therein will not be available for placement to (retail) investors. It should also be confirmed whether manufacturers can rely on data released or provided by the issuer (e.g. a corporate bond issuer) of a financial instrument without assuming liability for a certain sustainability outcome (e.g., if an issuer of a green bond stipulates in a green bond framework that the proceeds of the bond will be used for a certain sustainable investment, the manufacturers should be able to rely on such information to determine compliance with sustainability preferences).

Likewise, it appears challenging for issuers to evidence compliance with the "minimum safeguards" under Art. 18 (1) of Regulation 2020/852 that are required with respect to the first category of "sustainability preferences" under Art. 2 para. 7 (a) of the Delegated Regulation (EU) 2017/565 (as amended by Delegated Regulation (EU) 2021/1253). In this context, we note and support the efforts of the Platform on Sustainable Finance to clearly delineate the meaning of the term "minimum safeguards" under Art. 18 (1) of Regulation 2020/852 by defining "safeguards" as protections against potential harm as opposed to positive impacts on sustainable development.[2] Some further guidance by ESMA as regards the criteria for the "minimum safeguards" would be helpful in this respect. That said, as the Platform on Sustainable Finance pointed out in its draft report (p. 7) the minimum safeguards are closely linked to the forthcoming requirements for companies under the future Directive of Corporate Sustainability Due Diligence. The latter is still in draft form and companies are still in train of working out internal processes and procedures to ensure and document with adequate certainty the alignment to of their business with these requirements. While both the specific content of these requirements and their entry into force are pending, a proportionate approach and guidance from ESMA to this effect seems required. Otherwise, it would seem questionable whether the sustainability preferences category set out Art. 2 para. 7 (a) of the Delegated Regulation (EU) 2017/565 could be used as a basis for the manufacturer's determination of a target market.

[1] See letter from certain trade associations (EBF, AFME; ICMA and others) to ESMA of 19 July 2022 concerning the implementation of MiFID II ESG requirements.

[2] See, Platform on Sustainable Finance: "Draft Report on Minimum Safeguards", July 2022, with respect to the OECD Guidelines for Multinational Enterprises: "[…] the chapter on science and technology […] focuses almost entirely on the positive contributions a business can make to sustainable development through science and technology, as opposed to the potential harm caused by these technologies" (p. 8) and "The topic of science and technology in the OECD Guidelines […] is not aimed to safeguard against harm, but to promote technological transfer to certain countries and regions. For this reason, it is not relevant for MS [i.e., minimum safeguards]" (p. 10), available under: draft-report-minimum-safeguards-july2022_en.pdf (europa.eu) [01.08.2022].

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.

We assume that the concept of minimum proportion originates from the SFDR and hence was mainly focused on combined products (e.g., funds and other products falling under SFDR) that are required to define a minimum proportion of sustainable investments.

The concept cannot be applied to directly issued instruments such as shares (on an entity level) or (other than use of proceeds bonds as described in Q2 above) bonds, where no minimum proportion of taxonomy or SFDR alignment can be determined. We therefore agree with ESMA's analysis that the minimum proportion should not apply to these instruments (footnote 13 on page 10 of the guidelines). This finding should be included in the guidelines by allowing manufacturers to use the actual proportion of sustainable investments if there is no minimum proportion available.

In the absence of taxonomy alignment reporting at company level and with issuers facing challenges to determine taxonomy alignment for certain activities to which green bond proceeds may be assigned, the outcome may be that (a) issuers are unable or unwilling to share such information with the manufacturer, which results in the absence of such information from the target market determination, or (b) issuers are forced to limit the eligible categories to those where taxonomy alignment can be assessed on a binary basis (leaving out those activities where alignment is merely a possibility – which is the case for many transitionary activities). A (conservatively set) minimum taxonomy-alignment quota at company and/or instrument level will allow issuers and manufacturers to share information on products without running the risk of specifying precise (but false) information. This would further increase the number of products available for potential investors and enhance liquidity.

The problem for banks is that many businesses in the real economy will not be obligated to calculate and disclose the taxonomy of their economic activities until 2023. This is the simple reason there is a lack of data available currently. It means many manufacturers of financial instruments are unable to calculate percentage values and simply enter "0" due to the lack of data.

On this issue, it would have been imperative to harmonise the different timeframes in order to avoid the limited product range observed currently. The problems arising from the requirements coming into force at different times should be taken into account by ESMA and the national administrative authorities as part of their administrative practice.

Below is a non-exhaustive list of instruments for which, in our view, the concept of minimum proportion would not be practically applicable:

(a) Derivatives: it is troublesome that the MiFID II delegated acts and guidelines broadly cover all derivatives as if they were investments. As they are generally used for hedging purposes, they should be handled methodically separate from investments.
(b) Shares: Applying the notion of minimal proportion entails analyzing all economic operations of firms whose shares are distributed to determine the proportion of sustainable economic activity for each share. Unfortunately, at this moment, this information is not available for the large majority of shares. Manufacturers could only use proxy data instead, yet these estimations may not be as precise, putting manufacturers at risk of making inadvertent errors, as well as being unfairly accused of greenwashing.
(c) Bonds: please see the issues described above.

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 object to the reference in paragraph 27 that, in the context of the target market definition of the products, a clustering of similar products should not be possible in the case of particularly complex products. Firstly, there is the aforementioned problem of the lack of a definition of complexity. Secondly, we do not consider the restriction to be appropriate. The question of clustering should be based solely on the comparability of the product structure. If this permits a uniform target market definition, this must also be possible for complex products. There is, of course, the additional requirement that the target market for a particularly complex and high-risk product must be determined particularly carefully and – if necessary – also correspondingly narrowly. In the case of comparable product structures, however, this requirement can be observed uniformly for several products, so there is no need to restrict the cluster option. In the case of structured products, for example, a very large number of very similar products are also issued. Often, the target markets only differ in respect of the investment horizon and the risk indicator, depending on the term. If the highest risk indicator and the shortest investment horizon are now specified across the board for leveraged products, this would provide the greatest possible protection for investors. The result of this process can be referred to as clustering. So there is no reason to ban clustering where it is appropriate. Where it leads to inappropriate target markets, it is already prohibited.

On the clustering approach described in paragraph 27 we welcome the clarifications provided and agree that the level of granularity for each cluster has to be sufficient. However, we do not

think that certain OTC derivatives have to be defined on an individual level as long as the relevant cluster for such OTC derivatives is sufficiently granular. This approach for OTC derivatives has worked well so far according to our experiences in the German market. We also think that a requirement to set the target market for an individual product would not be in line with the guidance in paragraph 31 on bespoke/tailor-made products.

We consider the key factors for clustering described in paragraph 28 to be useful, but these should be understood as non-mandatory samples. Firms should have the discretion to use any key factors as long as they use adequate clusters. We also understand some factors are already covered adequately in the target market category "risk tolerance" (see paragraph 19d), e.g., credit risk is already included in the risk indicator according to PRIIPs. It would be welcomed if ESMA were to include clarifications that these key factors should be understood as non-mandatory samples.

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.

Yes, the target market assessment and distribution strategy should be made at an early stage by the distributor, before the product is marketed to end clients.

We understand ESMA's concerns relating to recent trends regarding "gamification" which had occurred particularly in connection with private clients in the US. But currently it is not clear what characteristics lead to the classification as "gamification techniques" and what exactly is meant by "certain gamification techniques" should "never be in the interest of the client". This may lead to uncertainty. We believe that "gamification" should be best addressed by firms when managing individual processes in which such "gamification" risks would arise and not as a general matter for a potentially large group of products which is often the scope of product governance processes. We therefore think that this approach outside the product governance processes would be easier firms to cover relevant conflicts of interest in a targeted manner. Firms should have full discretion as to what approach they use to adequately cover gamification risks, potential options include rules for the transactions subject to appropriateness tests/execution only or general client information according to Articles 44-58 of Delegated Directive EU 2017/565.

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.

We concur with ESMA's view that the distributors may base their determination of a target market on the abstract determination by the manufacturer but need to perform their own analyses in respect of the specific investor base the distributor has (item 40 on page 13 of the guidelines). The purpose of the target market determination to protect potential investors at every stage of the distribution process can only be achieved if the person selling the product to the (end) investor considers (in addition to the suitability and appropriateness test) each specific investor. This naturally cannot be provided for by the manufacturer as there is no interaction with the (end) investor.

In principle, we agree that the amendments in paragraphs 42-49 make sense. However, the statement in paragraph 46 that distributors may not deviate from the fundamental decisions of manufacturers is problematic. We suggest that it is being clarified that distributors should determine the target market on the basis of the manufacturer's target market but have sufficient flexibility to deviate from it, i.e., this could even result in the selling of an instrument into a negative target market (as determined by the manufacturer) in case the distributor deems this to be appropriate after having considered the specific investor.

We agree that manufacturers and distributors should use the same categories. This is paramount since those categories are disclosed to the end clients in the PRIIP KID and using the same methodology is key for the data transfer between manufacturer and distributor.

Regarding the categories that ought to serve as the basis for determining the target market, we observe that paragraph 42 relates to paragraph 19. We believe that this paragraph should also refer to paragraph 20, which adds sustainability-related objectives as part of the client's objectives and needs to be included in the definition of a target market.

To the extent that – as suggested in paragraph 42 of the draft – it is meant that distributors "translate" the manufacturer's target market into a "language" that fits their distribution processes, we agree with the addition. We suggest that ESMA introduces an illustrative example by referring to the "mapping" of the concrete percentage the manufacturer provides on the share of sustainable investments to the ranges the distributor might use when providing investment

advice (i.e., low – medium – high as referred to in paragraph 71 of ESMA's draft guidelines on suitability).

On the other hand, we are critical of the reference in paragraph 46 that distributors should, if necessary, request further results from the manufacturer's product approval procedure. It would be very difficult for this requirement to be implemented in mass retail business and should therefore be dropped.

However, we believe the note outlining the possibility of clustering similar products in paragraph 47 is positive. This helps distributors check for plausibility given the large number of target markets (as far as we are aware, there are 2.5 million instrument that have a target market in Germany). Without the option of clustering, this undertaking would be completely impossible.

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.

We share ESMA's assessment that non-advised sales coupled with certain specific marketing techniques may raise concerns. According to our understanding, firms have to adequately cover the conflicts of interest resulting from such scenarios and should have full discretion as to how they approach this, including approaches outside product governance processes. Please also see our feedback to Q4 on this.

It is positive to see that in paragraph 59 ESMA has maintained the option of distributing more complex and risky products under non-advised services. This meets the expectations of many clients who rely on the distributor to execute the orders they have placed. Where this is not possible (e.g., for bonds with a make-whole call provision for which there are no PRIIPs KID), the client concerned is generally very dissatisfied. Any restrictions on distributing to those making their own decisions would be to the detriment of the client.

The explanations should therefore focus more on special sales forms such as gamification or the active promotion of products by distributors. The requirement to review these measures in the context of defining the distribution strategy certainly make sense here. However, this is not the case – as mentioned above – if the client is making their own investment decisions and the institution is executing the client order without any active distribution measures relating to the product.

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.

Regarding deviations from "type of client" and "clients' knowledge and experience" described in paragraph 64 we do not share ESMA's assessment with regard to portfolio management. From our experience, such deviations can be very useful for hedging or diversification purposes, e.g., in portfolio management where the investor has mandated an experienced and professional portfolio manager to take investment decisions on their behalf.

We do not agree with the suggested approach, particularly products with specific cost structures which are not designed for retail investors as a stand-alone product, but to be used as building blocks when providing portfolio management.

Under such agreements, a professional portfolio manager may purchase and sell financial products on behalf of the client. This indicates that the relevant portfolio manager may trade financial products that may not correspond to the client's target market but are nonetheless beneficial to the client (e.g., a broad range of financial instruments used to hedge risks, such as currency risks or interest rate risk, or financial products used for portfolio diversification purposes).

Against this background, deviations from the product's target market under portfolio management agreements are justifiable provided they benefit the consumer. The proposed approach risks limiting the portfolio manager's flexibility to the detriment of clients and prevents them from obtaining an optimal framework for portfolio allocation.

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 welcome the clarification in paragraph 68 on the details of the review process which reflects recital 19 of Delegated Guideline EU 2017/593 and good practice already used by firms in Germany.

We note that ESMA intends to include a new second sentence in paragraph 70 which stipulates that distributors would have to provide information to manufacturers whenever they have information to support reviews. Paragraph 70 notes that distributors should proactively provide "relevant information to support reviews by MiFID manufacturers" and "information on sales and […] any other relevant information that may be the outcome of the distributor's own periodic review", specifying the requirements pursuant to Article 10(9) of Delegated Directive (EU) 2017/593. In our opinion, the intention of paragraph 70 is not merely to increase the quantity of information but to create an effective way of receiving the relevant information. In our view such interaction between manufacturers and distributors should not be controversial.

This could conceivably be misinterpreted as distributors having to report each individual sale to the manufacturer of a product, including in cases where the information has no meaningful value for the product review and there is no business relationship between it and the manufacturer. This would be relevant for a very high volume of financial instruments, around 20 million relevant for all EU consumers (see p.4 of https://www.esma.europa.eu/sites/default/files/library/esma50-164-2193_trv_article_key_retail_risk_indicators_for_the_eu_single_market.pdf (europa.eu)) and around 2.5 million for consumers in Germany. This would result in firms incurring huge costs which they would have to pass on to consumers, leading to significant negative effects for consumers. Interestingly, this text would also contravene recital 20 of Delegated Guideline EU 2017/593 which explicitly states that not every sale should be reported. We feel that adequate reporting by distributors to manufacturers should generally be based on cases in which both parties have a contractual relationship based on a distributor agreement and that such reporting should occur in line with the best market practice relevant for individual markets. We therefore ask for clarification.

Paragraph 72: We suggest deleting the paragraph except for the 1st sentence, as we do not see any need for further measures (obtaining supplementary information about their clients in order to be able to assess whether the products have been distributed to the target market). As a result, distributors have all the client information they need for the target market review for the respective service. Based on this, they can determine whether the respective product

was distributed to or outside the relevant target market. No further precautions are required, nor would they be feasible in mass retail business.

A positive aspect is the clarification in paragraph 73 that a product that is no longer sold is no longer subject to the review processes, even if clients still have it on deposit. In the third sentence there is an exemption from that principle when the distributor recommends holding the product. In our view, the exemption goes too far. A product should not be subject to the review if a recommendation to hold the product occurs only from time to time. There should only be an obligation to review the product if the distributor regularly recommends holding that product.

However, the principle of proportionality should likewise also apply to manufacturers. More specifically it would be very helpful in case the investment firm would support a e.g. corporate issuer as co-manufacturer:

- Where, based on the determination by the manufacturer, the product is no longer to be distributed as part of the initial distribution in connection with the issuance ("primary market") and only be traded by the investors, who have initially or subsequently purchased the product in a secondary market, the manufacturer, like the distributor, should no longer be required to review the target market. An indication of the distribution phase as determined by the manufacturer could, for example be drawn from the period specified by the issuer or the person responsible for the drawing up of a prospectus (which may be the manufacturer) for the permitted use of a prospectus for a resale or final placement of securities through financial intermediaries according to Art. 5 para. 1 sub-para. 2 Regulation 2017/1129 (Prospectus Regulation). In case distributors have stopped offering a respective instrument, the manufacturer would lack information on which he could base his review in order to potentially adjust the target market.
- Circumstances that neither result from characteristics of the specific kind of product nor from the nature of the individual instrument but rather from the economic situation of the issuer should not be part of the product review as far as investors are sufficiently protected by the means of transparency requirements applicable to issuers in the secondary market, i.e. the regular financial reporting under the Transparency Directive and the obligations under the so-called "ad hoc" publicity regime according to Art. 17 Market Abuse Regulation. A duplication of these reporting requirements appear to be contrary to the proportionality principle.

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 suggested approach as such sustainable products would remain available to clients without sustainability preferences, which is in line with the EU's general focus on sustainable products. Even where an investor does not express sustainability preferences, it is hard to imagine that a sustainable product would clash with the investor's preferences.

However, based on the wording, it could be inferred that it is always necessary to define a negative target market (or products that do not have sustainability factors); this would be new and we do not consider it appropriate. In our view, it should be made clear that no negative target market needs to be defined for the new sustainability criterion. This would be in line with the fact that sustainability is a subordinated criterion.

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 believe it is a positive step that ESMA has included in its guidelines the exemption for products that are only distributed to suitable counterparties, introduced as part of the MiFID quick fix, and intends to remove outdated explanations from the current guidelines.

With regard to paragraphs 94 and 95, we would like to point out that the assumption about clients' knowledge and experience applies to all professionals, i.e., both to per se professional clients and elective professional clients. The difference between per se professional clients and elective professional clients is an assumption about their financial circumstances. These may only be assumed for those considered per se professional clients. This aspect should be amended accordingly when the guidelines are finalised.

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

In general, we support the clarification in paragraph 5 of Annex III that the good practices and example do not form part of the guidelines itself as these are already quite detailed and the amendments will lead to additional implementation efforts.

Regarding due diligence checks we think standardised templates might be useful both for ensuring quality of checks and reducing workload for distributors when preparing input. It should also be noted that in Germany investment firms are subject to regular audits according to Section 89 of the Securities Trading Act which should be a factor when considering if due diligence checks on a distributor are necessary. Also, we understand that as a matter of principal no due diligence checks would be necessary for distributors of financial instruments with the target market "professional client" and not "retail client".

The wording in the section "Target market assessment by the distributor" could lead to a misunderstanding. The distributor is not required to determine a narrower target market than the manufacturer. Certainly, this may be the result of the target market assessment by the distribution entity. However, it is also possible that the manufacturer and the distributor arrive at identical assessments. The description should therefore be more flexible.

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

The current guidelines are already very long and contain many very detailed requirements. This is even more true with ESMA's suggested additions. For this reason, we do not believe the case studies should form part of the guidelines.