**CNCEF answer to**

**CONSULTATION ON REVIEW OF GUIDELINES ON MIFID II PRODUCT GOVERNANCE REQUIREMENTS**

**Introduction**

The “Chambre Nationale des Experts Financiers” (“**CNCEF**”) is a French regulated Association representing 2884 financial intermediaries operating in France. CNCEF strives to achieve a strong and competitive financial system in France. Promoting a sustainable economy is currently one of the main topics of the Association’s work program.

**Background**

MiFID II introduced product governance requirements for firms that manufacture and distribute financial instruments. In June 2017, ESMA published a first version of Guidelines on certain aspects of the MiFID II product governance requirements. Recent regulatory have triggered a review of these Guidelines.

The main proposals referred to in the Consultation Paper are listed as below:

* Integration of sustainability-related objectives.
* Clustering approach.
* Distribution strategy.
* Target assessments for CFDs.
* Periodic review.

In these circumstances, CNCEF welcomes the opportunity to comment on ESMA’s Consultation Paper on Guidelines on MIFID II product governance requirements. However, CNCEF considers that the new regulatory should avoid regulatory complexity or legal uncertainty.

**Summary of questions**

**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.**

**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.**

**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.**

**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.**

**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.**

**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.**

**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.**

**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.**

**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.**

CNCEF agrees with the suggested clarifications on the identification of the potential target market by the manufacturer.

CNCEF agrees with the fact that firms are exempted from the product governance requirements where the investment service relates to bonds with no other embedded derivative than a make-whole clause or where the financial instruments are marketed or distributed exclusively to eligible counterparties.

CNCEF considers that these exemptions should be applied to all financial instruments distributed to professional investors.

CNCEF also agrees with the fact that:

* the relation to clients’ risk tolerance should not be limited to a reference to the PRIIPs summary risk indicator.
* the expected investment horizon for a product is a key aspect when determining the target may be consistent with the principle of independence market’s objectives and needs a product is compatible with.

**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.**

CNCEF totally agrees 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. This proposal may facilitate the implementation in separate roles and in different stages of the product cycle. CNCEF considers that a different approach might introduce regulatory uncertainty.

**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 confirm that the concept of minimum proportion would not be practically applicable for shares and bonds.

**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.**

CNCEF agrees with the clustering approach but considers that the suggested guidance on complexity should be clarified.

CNCEF confirms that it is obvious that “*1. The target market and distribution strategy assessment, as well as the product governance requirements in a broader sense aim at preventing mis-selling of products. Considering that this mis-selling risk is especially pronounced for more complex and risky products, the target market and distribution strategy assessment should be most diligent for such product*”.

However, while the consultation indicates on that point that “*several firms did not adequately define and consider the product’s level of complexity and oftentimes only categorized products for this purpose based on the difference between complex and noncomplex products as defined in Article 25(4) of MiFID II. ESMA stresses that a proper definition and graduation of the level of complexity of products is a necessary precondition to enable the firm to adequately determine the level of detail with which the target market should be identified. Moreover, while Article 25(4) of MiFID II contains relevant criteria and principles for determining a product’s level of complexity, in ESMA’s view, firms should not solely rely on the dichotomy between complex and non-complex products for the purposes of the target market assessment and should determine what factors make a product more or less complex (for example by considering its charging structure or its underlying assets).”,* this proposal creates a new subcategory of “more or less complex” products that complexifies -a little bit more- the unclear concept of MIFID 2 complexity of products.

Consequently, CNCEF considers that a full alignment with Article 25(4) of MiFID II which contains relevant criteria and principles for determining a product’s level of complexity, is sufficient to determine if a cluster approach is permitted or not.

Moreover, we need to clarify this paragraph (“*ESMA considers that firms may use a clustering approach for both simpler and more complex products, for example for certain standardized exchange traded derivatives). It is however key that firms use a sufficient level of granularity when clustering products, considering the level of complexity included in a cluster. Generally speaking, this will mean that the more complex the underlying products of a cluster become, the more granular the clustering should be.”*), which is contradictory, and/or unclear.

Finally, CNCEF disagrees with the fact that ESMA proposes including a non-exhaustive list of multiple key factors that should be considered by the manufacturers, when defining the clusters. We consider that an exhaustive list permits to implement the suggested approach with no juridical uncertainty.

**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.**

CNCEF agrees with the ESMA’s view, “*whether the offering of a certain product is in the interest of the client does not only depend on the nature of the product and the investment service under which it is to be distributed, but also on how such a product will be distributed. In particular, certain aspects of a firm’s proposition can add complexity and risks to a product that in itself would be considered as relatively simple*.” However, we consider the fact that the manufacturer could define the way products will be marketed to clients, might be very/too intrusive for the distributors and may be inconsistent with the principle of the distributors ‘independence.

**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.**

CNCEF disagrees with the fact that the distributors should determine (on their own responsibilities) whether they need access to underlying documents such as the outcomes of the manufacturer’s scenario and charging structure analyses. CNCEF considers that the manufacturers should have the responsibility to communicate the underlying documents, such as the outcomes of the manufacturer’s scenario and charging structure analyses, in particular for complex products.

**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.**

See comments above.

**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.**

CNCEF agrees 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, we 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. These principles have been already implemented by the CNCEF’s members.

**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.**

CNCEF disagrees with the proposal by which ESMA would like to clarify that firms have the responsibility to provide relevant information to manufacturers to support their reviews and should not only do so at the manufacturer’s request. It should be to the responsibilities of the manufacturers to collect relevant information to support their reviews.

CNCEF considers the fact that it should be “*the responsibility for distributors to determine, on an ex-ante basis, what information they need to consider in assessing whether products generally reach the intended target market*” as unclear and exceedingly difficult to implement.

CNCEF agrees with the third proposal of §48.

**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.**

CNCEF agrees with the suggested approach on the negative target market assessment in relation to a product with sustainability factors and have the same understanding.

**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.**

No comments.

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

No comments.

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

No comments.