

2022-10-07

## ESMAs CONSULTATION ON GUIDELINES REGARDING PRODUCT GOVERNANCE

The Nordic Securities Association (NSA)<sup>1</sup> has the following comments to Esma's consultation on guidelines regarding product governance.

### General comments

- The NSA is concerned about the fact that the implementation timelines of the new EU-rules on sustainability are not aligned.<sup>2</sup> We understand of course that these problems to a large extent stem from rules on level 1 and level 2 and therefore lies outside ESMA's power. However, we suggest that ESMA takes the following measures in order to mitigate the negative effects for investors and the industry as a result:
  - (i) Ensure that firms get sufficiently long time to implement the new guidelines on suitability and product governance - no less than 12 months
  - (ii) Issue a supervisory statement clarifying that ESMA does not expect NCAs to prioritize supervision of the level 2 rules until investment firms have had time to properly implement ESMA's guidelines.
- It is important that ESMA guidelines are proportionate and that ESMA takes due care so as to not increase the complexity of the framework. In most investment firms, the product governance is a very digitalized process which involves transfer of very large datasets between producers and distributors of financial instruments. The development of industry-led initiatives such as FinDatEx (EMT and EET) has been very important in this process and the NSA would like to encourage ESMA to take such market standards into account when developing the guidelines e.g. by avoiding terminology that is not in line with the EMT.
- One important issue in the product governance framework that would benefit from increased supervisory convergence is the scope of review obligations for investment firms that are deemed to be "manufacturers" when advising corporate issuers on the primary market (recital 15 delegated directive). It is not reasonable to require that an investment firm which has been involved in a primary issue of shares keep track of how and where such shares are distributed on the EU capital market for all eternity.

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<sup>1</sup> NSA is composed by the Danish Securities Dealers Association (Børsmæglerforeningen), the Finance Finland (Finanssiala ry), the Norwegian Securities Dealers Association (Verdipapirforetakenes Forbund) and the Swedish Securities Markets Association (Föreningen Svensk Värdepappersmarknad).

<sup>2</sup> Nordic Securities Association sent to ESMA dated the 9th of June 2022.

## 1. Specific 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.**

No comments.

**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.**

The NSA agrees with the proposal to align “sustainability objectives” with “sustainability preferences” as proposed by ESMA in **point 20 of the guidelines**. However, in order to increase legal certainty, we propose that ESMA inserts a clear reference to article 2(7) a-c in MiFID delegated acts. In addition, ESMA should provide more guidance as regards which products are intended to be covered by the third bullet which is not covered by MiFID, e.g. in the form of non-exhaustive examples.

**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.**

The NSA considers that the ESMA's proposal on “minimum proportion” would benefit from further clarification. In our view, bonds and shares could be instruments for which an SFDR concept of minimum proportion would not be applicable, as well as derivatives.

**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.**

The NSA wants to underline that from an operational perspective, it is very important that investment firms are able to cluster products. We are concerned that the approach which ESMA proposes is too granular and that this could cause difficulties from an implementation perspective. ESMA should be aware that product governance rules are dependent on highly complex IT systems and exchange of extensive information between manufacturers and 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.**

No comments.

**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.**

The NSA wants to underline that from an operational perspective, it is very important that investment firms are able to cluster products. We are concerned that the approach which ESMA proposes is too granular and that this could cause difficulties from an implementation perspective. ESMA should be aware that product governance rules are dependent on highly complex IT systems and exchange of extensive information between manufacturers and distributors.

**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.**

No comments.

**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.**

To be able to deviate from the target market for diversification or hedging purposes when providing investment advice or portfolio management is very important. Please take into account that there are some differences between these two services when it comes to “knowledge and experience”. For instance, when providing portfolio management services, it is the knowledge and experience which the portfolio manager has of the individual financial instruments that is in focus.

**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.**

The NSA considers that the requirements in point 72 of the guidelines are too exhaustive and even seem to introduce new requirements on level 3 e.g. the sending of a questionnaire. We also question the added value of this requirement.

Moreover, a requirement that the distributor should send information to the manufacturer on its own initiative can only work for situations where there is a relationship between the manufacturer and distributor e.g. they belong to the same group or have a contractual agreement. It is less clear how to apply such a rule where no such relationship exists, for third country products and in respect of distribution on a trading venue where it is not possible for the distributor to know which “manufacturer” at one point in time has helped the corporate issuer (recital 15).

Based on the above considerations, the NSA proposes that the wording of point 72 of the guidelines is removed or amended.

**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.**

NSA agrees.

**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.**

NSA agrees.

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

The NSA is generally hesitant to the inclusion of “good and poor” practices in ESAs guidelines since the legal status of such examples is unclear. If kept, we agree that it should be limited to good practices, as proposed by ESMA.

We note that no examples relate to ESG-products.

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

No comments.

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