ESMA's consultation on guidelines on certain aspects of the MiFID II suitability requirements

Position – Executive summary

April 2022

ESBG Transparency Register ID 8765978796-80

On 27 January 2022, the European Securities and Markets Authority (ESMA) launched a consultation on certain aspects of suitability requirements under the Markets in Financial Instruments Directive (MiFID II), in order to update its guidelines following amendments to MiFID II relating to sustainability. ESMA will consider the feedback it receives to the consultation in Q2 2022 and expects to publish a final report in Q3 2022.

THE FINAL ESMA GUIDELINES WORDING SHOULD REFLECT THE LEVEL 2 REGULATION

In general, we have identified that the requirements regarding the collection and assessment of client's information go beyond the legal requirements in Level 2. Additionally, the question's wording in para. 25 in case the client is interested in a financial instrument that considers PAIs is broader than the statutory requirement in Art. 2 (7) (c) MiFID II Delegated Regulation. The MiFID II Delegated Regulation refers to qualitative or quantitative criteria; the ESMA guideline refers to qualitative and quantitative criteria. We ask that the final ESMA guidelines are adjusted to reflect the legal wording in Level 2.

FLEXIBILITY AND SIMPLICITY IN THE IMPLEMENTATION OF THE NEW REQUIREMENTS IS NEEDED

a) Collection of client's information

ESBG considers that the proposed process for the collection of client's information in para. 26 is very detailed and impractical for both the client and the investment firm and thus, we suggest for it to be optional, shortened and oriented more towards the legal requirements for investment firms.

b) Two-steps suitability assessment approach

ESBG Members believe that the two-steps suitability assessment procedure in para. 79 is overly restrictive and time-consuming for both the client and the investment firm, and that it should not be mandatory. Firms should be allowed to collect all information from the client at the same time and assess and identify viable suitable products based on this information. The result will be the same: either the product matches the client's preferences or it does not.

c) Change of client's sustainability preferences

ESBG is also critical of the procedure in para. 80, according to which a deviation from the sustainability preferences should only be permitted if the client has first adapted his/her sustainability preferences. In our view, MiFID II Level 2, and especially recital 8 and Art. 54 (10), allows an investment firm to recommend a product that doesn't meet the client's sustainability preferences, if the firm clearly states and explains to the client that the product does not meet the client's sustainability preferences and documents it in the suitability report.

d) Not always extensive customer exploration is required

When an investment firm does not have any financial instruments included in its product range that would meet the client's sustainability preferences, we believe that collecting the client's full information on his/her sustainability preferences would be of no added value. It would be more beneficial to the client if investment firms were allowed to inform him/her of the lack of sustainable financial instruments and to the issue in the suitability report.

INVESTMENT ADVICE WITH A PORTFOLIO APPROACH

When providing investment advice with a portfolio approach, we consider it would be more beneficial for the client to be asked about his/her sustainability preferences in each advice session instead of collecting information with regard to the portfolio as in the case of providing portfolio management. Once more sustainable products become available, the client can be offered more products when he/she is asked in each advice session.

READ THE FULL POSITION PAPER

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