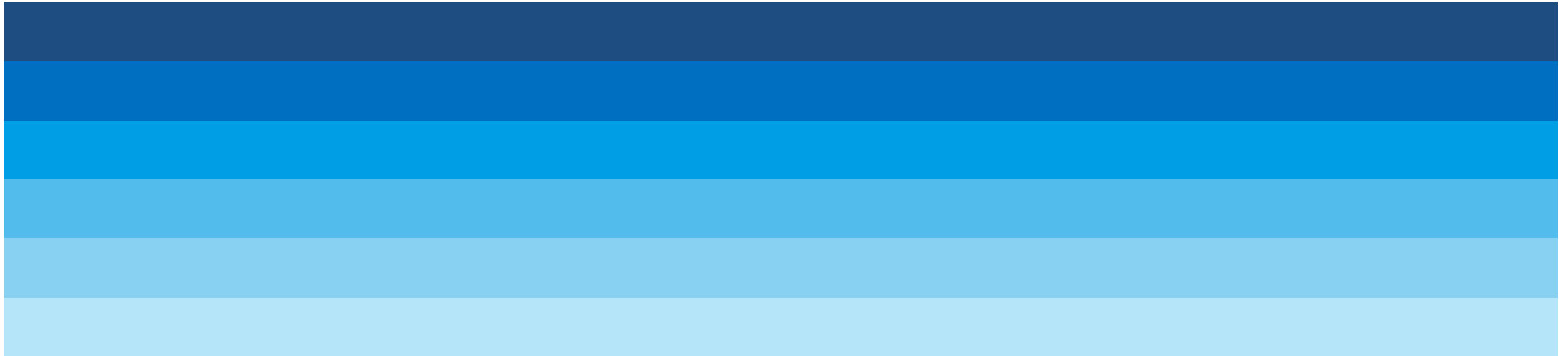


ESMA Response to EFMLG Letter and new ESMA opinions

EFMLG 48th meeting

June 2014



1. Guidelines, Recommendations & Opinions by ESMA

LEGAL BASIS	
Art. 288 TFEU	<i>"recommendations and opinions have no binding force"</i>
Art. 16 Regulation 1095/2010	<p>Guidelines and Recommendations</p> <ul style="list-style-type: none"> • Purpose: <i>"establishing consistent, efficient and effective supervisory practices"</i> <i>"ensuring the common, uniform and consistent application of Union law"</i> • NCA and participant: <i>"shall make every effort to comply with"</i> but they have the possibility not to comply if explained

PROBLEM
has issued Guidelines without consensus of all the NCA → unlevel playing field

REQUEST	ANSWER
Prior to final publication, consensus should be reached with NCA	<ul style="list-style-type: none"> • Prior consensus = veto power to every NCA • Will report to EU institution - on non-compliant NCA

WHAT ABOUT LEVEL PLAYING FIELD?



2. Q & A

LEGAL BASIS

Art. 29.2
Regulation 1095/2010

ESMA may develop *“new practical instruments and convergence tools to promote common supervisory approaches and practices”*

PROBLEM



Interpretations without stakeholders opinion nor public consultation



REQUEST

Not to create a new source of “soft regulation”



ANSWER

- Q & A are covered by Art. 29.2 and contribute to prevent regulatory arbitrage
- Are non-binding
- Are not soft regulation nor go beyond underlying legislation

WHAT ABOUT IF NOT COMPLIED WITH?

3. ESMA opinions

ADDRESSEE

Art. 29.1. (a) Regulation 1095/2010

“providing opinions to NCA”

1

FEBRUARY: PRACTICES FOR FIRMS SELLING COMPLEX PRODUCTS

- **New concept of “complex product”** different from *“complex financial instrument”* (paragraph 27)
- **BEST PRACTICES:**
 - Organization / Internal Control: Conflict of interest when selling entity is the issuer or counterparty
 - Suitability: attitude to risk, time horizon, capacity to afford losses
 - Appropriateness (i.e. warning that *“the client is not likely to understand the risks”*)
 - Disclosures:
 - Outlay of costs and charges: **not** mentioned in Art. 33 of MiFID ID
but mentioned in Art. 24.4 MiFID II
 - *“indication of disinvestment value immediately after the transaction, assuming market conditions remain unchanged”*
 - Consequences of seeking to sell or exit
 - Avoiding jargon
 - National compensation scheme
 - On-going monitoring
 - Execution of client order: *“sale of any complex product meets the firm’s best execution obligations”*



3. ESMA opinions (ii)

2

MARCH: GOVERNANCE FOR SRP

- **New set of definitions used in, but not even covered in MiFID II:** manufacturer, product governance arrangements, distribution...
- **Product governance arrangements**
 - General organisation: *“product governance arrangements should be transparent, consistent and auditable”* Art. 16.3 MiFID II
 - Product design:
 - Manufacturer to ensure products meet

financial needs of target market	Art. 24.2 MiFID II
investment objectives, knowledge and experience	
 - Best interest of the investor in pricing:
 - Benchmark with 3rd parties
 - 3rd party to challenge SRP pricing
 - Product testing:
 - back testing
 - fair *“risk - reward”* trade off
 - Target market of investors:
 - *“conduct robust research to understand investors need, objectives and ability to understand SRP so as to enable firms to reject inadequate SRP’s targeting a markets segment”*
 - provision of 3 market scenarios: performs well, no returns, performs poorly + counterparty fails
 - potential action if an SRP fails to function as investors had been led to expect
 - Distribution strategy
 - Value at the date of the issuance and transparency on costs, as per the manufacturers accounts, and at *“fair value”*
 - Secondary market and redemption:
 - Offer exit opportunities
 - Using objective and predefined methodologies informed to investors in advance
 - Review process: *“actions could be taken to mitigate detriment to investors when an existing SRP does not perform as expected”*

4. Conclusion

→ **What importance does your NCA give to these opinions?**

→ **What to do?**

- **Complying is:**
 - very burdensome
 - not based on legal grounds
 - a potential source of uncompetitiveness
(if competitors do not comply and are not sanctioned)
- **Not complying is:**
 - opposing NCA
 - source of "problems" with NCA
 - capable of being sanctioned? Should not but...
 - source of investors complaints



→ **Common industry approach**

BBVA

CORPORATE
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