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## Consultation Paper

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on the application of the existing Joint Committee Guidelines on complaints-handling to authorities competent for supervising the new institutions under MCD and/or PSD2

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# 1. Responding to this consultation

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The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 6.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

## Submission of responses

To submit your comments, click on the ‘send your comments’ button on the consultation page by 27/05/2018. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

## Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA’s rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA’s Board of Appeal and the European Ombudsman.

## Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

## 2. Abbreviations

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<b>AISP</b>	account information service provider
<b>EBA</b>	European Banking Authority
<b>EIOPA</b>	European Insurance and Occupational Pensions Authority
<b>ESMA</b>	European Securities and Markets Authority
<b>JC</b>	Joint Committee
<b>MCD</b>	Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (the Mortgage Credit Directive)
<b>PISP</b>	payment initiation service provider
<b>PSD1</b>	Directive 2007/64/EC on payment services in the internal market
<b>PSD2</b>	Directive (EU) 2015/2366 on payment services in the internal market (the revised Payment Services Directive)
<b>RAISP</b>	account information service provider benefiting from an exemption under Article 33 of Directive (EU) 2015/2366

## 3. Executive Summary

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In June 2014, the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) adopted the Joint Committee (JC) Guidelines for complaints-handling for the securities and banking sectors.<sup>1</sup> These Guidelines apply to authorities competent for supervising complaints-handling by firms in their jurisdiction, which in the banking sector include credit institutions, payment institutions and electronic money institutions as defined in the Capital Requirements Directive, the Payment Services Directive and the Electronic Money Directive respectively.

In March 2016, an additional Directive started to apply, the Mortgage Credit Directive (MCD), which introduced requirements for credit agreements offered by new types of actors, defined as ‘credit intermediaries’ and ‘creditors’, with the latter consisting of credit institutions and non-credit institution creditors. While credit institutions have always been in the scope of the JC Guidelines, credit intermediaries and non-credit institution creditors are presently not. In order to ensure that consumers are provided with the same level of protection for residential mortgages they are purchasing, irrespective of the category of firm they approach, and taking into account that Articles 14 and 15 of the MCD require all creditors and credit intermediaries respectively to have in place complaints procedures, the EBA has arrived at the view that it is appropriate to extend the scope of application of the JC Guidelines to authorities competent for supervising non-credit institution creditors and credit intermediaries under the MCD.

Similarly, in January 2018, the revised Payment Services Directive (PSD2) started to apply and added two new providers of payment services – payment initiation service providers (PISPs) and account information service providers (AISPs) – to the previous scope under PSD1. Taking into account that the JC Guidelines already apply to different types of payment service providers under PSD1 (e.g. credit, payment and e-money institutions), the EBA has arrived at the view that the JC Guidelines should also cover these new providers of payment services. However, in the specific case of AISPs that provide only account information services, which PSD2 exempts from a number of requirements, the JC Guidelines can be made to apply only to security-related, but not to other types of, complaints.

Finally, taking into account that some AISPs, non-credit institution creditors and credit intermediaries are very small, comprising of one or two persons only, who might therefore not have the capacity to incorporate the requirements of the JC Guidelines in their internal practices and procedures in the same manner as larger institutions, the EBA has arrived at the view that competent authorities should apply the Guidelines in proportionate manner, taking into account the nature, scale and complexity of the businesses of those providers and the nature and range of the services they offer.

### Next steps

The consultation period will run from 27.03.2018 to 27.05.2018. The Final report on the application of the JC Guidelines to authorities competent for supervising the new institutions under PSD2 and MCD will be published after this consultation.

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<sup>1</sup>See: <https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/guidelines-for-complaints-handling-for-the-securities-esma-and-banking-eba-sectors>

## 4. Background and rationale

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### 4.1 Background

1. In June 2012, the European Insurance and Occupational Pensions Authority (EIOPA) published its ‘Guidelines on Complaints-Handling by Insurance Undertakings’. In June 2014, the ESMA and the EBA read across these Guidelines to the investment and banking sectors respectively and adopted them as JC Guidelines for complaints-handling for the securities and banking sectors.<sup>2</sup>
2. The JC Guidelines therefore represent an identical set of requirements and ensure a consistent approach to complaints-handling across the banking, investment and insurance sectors. These Guidelines are to the benefit of (i) consumers, who will be able to rely on the same approach irrespective of what type of product they have purchased and where they have purchased it, within the EU – thereby improving consumer confidence in financial services, (ii) firms, some of which may sell products from more than one sector, and (iii) national competent authorities, which will have to oversee implementation of one set of guidelines in their respective jurisdictions.
3. The JC Guidelines apply to and cover the activities, legal entities and competent authorities defined in the following Directives that fell into the scope of action of ESMA and the EBA:
  - a) the Markets in Financial Instruments Directive (MiFID);
  - b) the Alternative Investment Fund Manager Directive (AIFMD);
  - c) the Undertakings for collective investment in transferable securities (UCITS Directive);
  - d) the Capital Requirements Directive (CRD) and Capital Requirements Regulation (CRR);
  - e) the Payment Services Directive (PSD); and
  - f) the E-Money Directive (EMD).
4. The JC Guidelines are addressed to authorities competent for supervising complaints handling by firms in their jurisdictions. They are, therefore, applicable to complaints submitted by natural or legal persons to the following financial institutions that were in the scope of action of the EBA and ESMA:
  - a) investment firms (as defined in Article 4(1)(1) of the MiFID);

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<sup>2</sup> See: <https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/guidelines-for-complaints-handling-for-the-securities-esma-and-banking-eba-sectors>

- b) management companies (as defined in Article 2(1)(b) of the UCITS Directive) and investment companies that have not designated a management company (as referred to in Article 30 of the UCITS Directive);
  - c) external alternative investment fund managers (AIFMs, as defined in Article 5(1)(a) of the AIFMD) when providing services pursuant to Article 6(4) of the AIFMD;
  - d) credit institutions (as defined in Article 4(1) of the CRR); and
  - e) payment institutions (as defined in Article 4(4) of the PSD);
  - f) electronic money institutions (as defined in Article 2(1) of the EMD).
5. 21 months after the application date of the Guidelines, on 21 March 2016, the Mortgage Credit Directive (Directive 2014/17/EU, or MCD) applied in the EU, laying down a common framework for agreements for credit for consumers secured by a mortgage or otherwise relating to residential immovable property. In so doing, MCD introduced requirements for credit agreements offered by a new category of actors defined as credit intermediaries and ‘creditors’, the latter of which consist of credit institutions and non-credit institution creditors.
6. While credit institutions are already financial institutions under the Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (EBA Regulation) and therefore in the scope of the JC Guidelines, non-credit institution creditors and credit intermediaries are not financial institutions within the meaning of the term defined in Article 4(1) of the EBA Regulation and do not fall within the scope of application of the JC Guidelines. Moreover, Article 1(2) of the EBA Regulation does not expressly refer to MCD as one of the Directives in the scope of action of the EBA. However, Article 1(2) continues by prescribing that ‘the Authority shall act within the powers conferred by this Regulation and within the scope of, Directive [...] and of any further legally binding Union act which confers tasks on the Authority [...]’, the latter case of which covers the MCD and numerous other EU Directives and Regulations that have conferred tasks on the EBA since the EBA Regulation entered into force in 2011.
7. However, in order to ensure that:
- consumers are provided with the same level of protection for the same product that they are purchasing (residential mortgage), irrespective of the provider with whom they conclude the credit agreement, and
  - all actors under MCD that carry out the same activity (provision of residential mortgages or ancillary services for the conclusion of a credit agreement) face the same regulatory burden,

EBA considered that it would be appropriate to apply the JC Guidelines to authorities competent for supervising non-credit institution creditors and credit intermediaries and to consult on this proposal.

8. Unlike the MCD, which defined altogether new service providers, the revised Payment Services Directive (Directive (EU) 2015/2366, or PSD2), which applies since 13 January 2018, added to its

previous scope under PSD1 two new payment services – payment initiation and account information services – and extended the scope of the already existing categories of payment service providers – ‘credit institutions’, ‘payment institutions’ and ‘electronic money institutions’ with providers offering these services – PISPs and AISPs.

9. Given that PISPs and AISPs fall into the categories of payment service providers - ‘credit institutions’, ‘payment institutions’ and ‘electronic money institutions’, as defined in PSD2, and as the JC Guidelines apply to authorities competent for supervising these firms already, AISPs and PISPs would then be covered by default by the Guidelines.
10. In the specific case of AISPs that provide only account information services, but no other payment services, PSD2 exempts them from a number of requirements. However, in line with the provision of Article 33(2) of PSD2, these exempted AISPs are to be treated as payment institutions and therefore should also be covered by the JC Guidelines.
11. Taking into account that exempted AISPs under Article 33 of PSD2 need to be *registered* (unlike institutions that provide account information services and other payment services, which are not exempted and therefore need to be *authorised*), this consultation paper refers to them as registered AISPs (or RAISPs). This will also allow to distinguish them from other institutions that are authorised to provide account information services, such as credit institutions, payment institutions and electronic money institutions.
12. For reasons of transparency, in order to adhere to the principle of good regulatory practice, and given that RAISPs are exempted from a number of provisions under PSD2, the EBA arrived at the view that it should properly assess whether there are any grounds on which PISPs and AISPs that provide only payment initiation services or account information services respectively should be, or have to be, exempted from the scope of the JC Guidelines, and to consult on the conclusions drawn.
13. The need to consult on the assessment of the applicability of the JC GL to the authorities competent for supervising complaints-handling by the new actors under MCD and PSD2 is also confirmed further by the explicit caveat provided in footnote to the definition of ‘firms’ in the JC Guidelines, which states the following: ‘Should additional EU Directives come into force that will bring new financial activities and/or financial institutions into the scope of action of an ESA, said ESA will consult on any extension of the applicability of the guidelines to these firms and activities’.

## 4.2 Rationale

### Non-credit institution creditors and credit intermediaries under MCD

14. While the JC Guidelines cover payment institutions and refer to the Payment Services Directive, they do not cover non-credit institution creditors and credit intermediaries and do not refer to the MCD either. However, the EBA has had to acknowledge that non-credit institution creditors and credit intermediaries carry out the same activity as credit institutions – namely the provision of residential mortgages or ancillary services for the conclusion of a credit agreement respectively – which are covered by the scope of application of the JC Guidelines and MCD.

15. Therefore, in order to contribute to high level of consumer protection, the EBA is of the view that the same level of protection should be afforded to consumers for identical products, irrespective of the provider offering them. To that end, the EBA assessed the case for applying the JC Guidelines to authorities competent for supervising non-credit institution creditors and credit intermediaries.
16. First, the EBA took into account that the powers of the EBA and its scope of action are defined in Article 1(2) of the EBA Regulation, which prescribes that ‘the Authority shall act within the powers conferred by this Regulation and within the scope of, Directive [...] and of any further legally binding Union act which confers tasks on the Authority [...]’. Thus, considering that MCD confers tasks to the EBA, power is conferred upon the EBA by the EBA Regulation to act in the scope of MCD.
17. Second, Article 16(1) of the EBA Regulation empowers the EBA to issue guidelines to competent authorities ‘with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law’.
18. Furthermore, Article 4(2) of the EBA Regulation defines competent authorities for the purpose of the EBA regulation bringing authorities competent for the supervision of the financial institutions under the remit of the EBA (credit institutions, payment institutions, e-money institutions and other). In the case of MCD, additional powers are conferred on the EBA by the explicit reference in Article 5(3) of the MCD, which brings MCD competent authorities in the scope of action of the EBA to the extent that those authorities have been designated as competent for ensuring the application and enforcement of the provisions of the Mortgage Credit Directive.
19. Article 5(3) of the MCD prescribes that ‘Member States shall ensure that the authorities designated as competent for ensuring the application and enforcement of Articles 9, 29, 32, 33, 34 and 35 of this Directive are either or both of the following:
  - a) competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010;
  - b) authorities other than the competent authorities referred to in point (a) provided that national laws, regulations or administrative provisions require those authorities to cooperate with the competent authorities referred to in point (a) whenever necessary in order to carry out their duties under this Directive, including for the purposes of cooperating with the European Supervisory Authority (European Banking Authority) (EBA) as required under this Directive’.
20. Therefore, the EBA is of the view that the JC Guidelines can and should be directed to non-credit institution creditors and credit intermediaries, the activities of which are supervised by competent authorities that fall within the scope of action of the EBA. In so doing, EBA will ensure that those competent authorities:
  - adopt consistent, efficient and effective supervisory practices under MCD; and
  - apply MCD in a common, uniform and consistent way.

21. In support of the above, recital 79 of the MCD states that ‘In order to facilitate the ability of credit intermediaries to provide their services on a cross-border basis, for the purposes of cooperation, information exchange and dispute resolution between competent authorities, the competent authorities responsible for the admission of credit intermediaries should be those acting under the auspices of the EBA or other national authorities provided that they cooperate with the authorities acting under the auspices of EBA in order to carry out their duties under this Directive.’
22. Third, the MCD already requires non-credit institution creditors and credit intermediaries to introduce complaints handling procedures in respect of the services they provide. More specifically, Article 14(1) of the MCD requires creditors and, where applicable, credit intermediaries to provide the consumer with the personalised information needed to compare the credits available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement. Paragraph 2 of that Article continues by requiring this information to be provided by means of European Standardised Information Sheet (ESIS) as provided in Annex II of MCD. Section 12 of the said ESIS is related to complaints and requires certain information to be provided to consumers which covers the following:
- contact details;
  - information on the procedure for filing the complaint;
  - the period for handling the complaint, where applicable;
  - information on the alternative dispute resolution bodies for out-of-court complaints and redress, where applicable.
23. Article 15(1)(f) of the MCD also requires credit intermediaries or appointed representatives to provide consumers with certain information which includes information on the ‘procedures allowing consumers or other interested parties to register complaints internally about credit intermediaries and, where appropriate, the means by which recourse to out-of-court complaints and redress procedures can be sought’. Therefore, non-credit institution creditors and credit intermediaries would only have to align their complaints procedures they are required to implement under the MCD with the requirements of the existing JC Guidelines.

**Q1. Do you agree on the application of the JC Guidelines to credit intermediaries and non-credit institution creditors under MCD? If not, please provide your reasoning.**

### **PISPs and AISPs under the PSD2**

24. While assessing the applicability of the JC Guidelines to authorities competent for supervising PISPs and AISPs that provide only payment initiation services or account information services respectively, EBA took into account that the definition of ‘firms’ in paragraph 9 of the JC Guidelines is such that it does not make specific reference to versions of particular Directives, but only refers to them by their name (e.g. the ‘Payment Services Directive’). Similarly, the JC Guidelines do not reproduce or amend the definitions set out in those Directives, instead cross-referring to the definitions included in the respective Directives themselves, such as ‘payment institutions’.

25. The cross-reference to the Payment Services Directive is therefore 'dynamic', i.e. refers to the latest version of the respective legislative act, which in this specific case, and since 13 January 2018, would be the revised Payment Services Directive (Directive (EU) 2015/2366, or PSD2), and the respective new definitions of the cross-referred terms.
26. Therefore, the reference in the definitions of 'firms' to 'payment institutions' under Article 4(4) of the Payment Services Directive should be understood as reference to 'payment institutions' under Article 4(4) of the PSD2. As a result, the JC Guidelines are applicable to authorities competent for supervising all payment institutions under PSD2, including PISPs that provide only payment initiation services, but no other payment services, without the need to change the JC Guidelines.

**Q2. Do you agree on the application of the JC Guidelines to PISPs that provide only payment initiation services, but no other payment services, under PSD2? If not, please provide your reasoning.**

27. With regard to RAISPs, Article 33 of the PSD2, which is a full-harmonisation article, provides that AISPs 'shall be treated as payment institutions'. This suggests that, given that the JC Guidelines apply to payment institutions, they would apply to RAISPs, too.
28. That being said, the EBA also took into account that Article 33(2) of the PSD2 explicitly exempts RAISPs from the application of, amongst other provisions of PSD2, Articles 101 and 102 of the PSD2 on dispute resolution and ADR procedures. This means that RAISPs are exempted from the requirements to:
  - a) apply adequate and effective complaint resolution procedures for the settlement of complaints of payment service users concerning the rights and obligations under Titles III and IV of PSD2 (Article 101(1) of the PSD2); and
  - b) inform the payment service user about at least one ADR entity which is competent to deal with disputes concerning the rights and obligations arising under Titles III and IV (Article 101(3) of the PSD2).
29. At the same time, however, Article 5(1)(f) of the PSD2, which in accordance with Article 33(1) of the PSD2 applies to RAISPs, requires applicants to provide, among other information during the authorisation/registration procedure, 'a description of the procedures for monitoring, handle and follow up a security incident and security related customer complaints...'. This means that, despite the exemption in Article 33(2) of the PSD2, RAISPs should have in place customer complaints procedures, albeit limited to security-related complaints.
30. Taking into account the hierarchy of norms established under EU law that level 1 acts supersede level 2 and level 3 acts (such as the JC Guidelines), the EBA is of the view, and is proposing in this CP, that the JC Guidelines should – in line with PSD2, a level 1 act – be applicable to authorities competent for supervising complaints-handling by RAISPs, but only in respect of the security-related subset of customer complaints.

31. However, the EBA would welcome an approach by competent authorities where they encourage RAISPs to apply the JC Guidelines to all types of complaints they receive, not only to the security-related ones, in order to ensure a consistent treatment of consumer complaints.
32. It should also be noted that the JC Guidelines do not specify the types of complaints they apply to. Therefore, the application of the JC Guidelines to security-related complaints should not be considered as a newly introduced requirement that is applicable only to RAISPs, but as a requirement that has already applied to all firms under the JC Guidelines.
33. This means that during the authorisation/registration procedure under PSD2, applicants should incorporate the requirements of the JC Guidelines in the description of the procedure in place to monitor, handle and follow up a security incident and security related customer complaints under Article 5(1)(f) of the PSD2.

**Q3. Do you agree on the application of the JC Guidelines to RAISPs under PSD2, albeit limited to security-related complaints only? If not, please provide your reasoning.**

#### **RAISPs, non-credit institution creditors and credit intermediaries that are natural persons**

34. One of the issues that the EBA assessed in respect of the applicability of the JC Guidelines to RAISPs, non-credit institution creditors and credit intermediaries was related to the reference to ‘firms’ in the Guidelines, in particular that it may be understood as a term that covers legal entities only, whereas some RAISPs, non-credit institution creditors and credit intermediaries could also be natural persons.
35. However, EBA considered that waived payment institutions under Article 26 of the PSD1 could also be natural persons and that they, similarly to RAISPs, are treated under PSD1 as payment institutions. This means that the current JC Guidelines already foresee the scenario where a natural person is an obliged entity under the Guidelines without the need to state this explicitly.
36. Therefore, EBA arrived at the view that the definition of ‘firms’ in the JC Guidelines is not limited to legal persons only and that the JC Guidelines should be applicable to all RAISPs, non-credit institution creditors and credit intermediaries, including those that are natural persons.

**Q4. Do you agree with the view of the EBA that the JC Guidelines should apply to RAISPs, non-credit institution creditors and credit intermediaries that are natural persons? If not, please provide your reasoning.**

#### **Proportionality and partial application of the JC Guidelines**

37. EBA took into account that, in many cases, RAISPs, non-credit institution creditors and credit intermediaries are very small, in some cases comprising of one person only, who might not have the capacity to meet the requirements of the JC Guidelines and incorporate them in their internal practices and procedures in the same manner as larger institutions. The EBA also assessed the risk

that compliance with the JC Guidelines might introduce additional (high) administrative burden to these (in many cases small) actors. Therefore, EBA considered the pros and cons of establishing specific requirements on proportionality for these actors only and/or to partially apply the Guidelines to them.

### Proportionality

38. Having assessed the respective arguments, the EBA did not incorporate specific requirements on proportionality because the aim of the JC Guidelines of establishing an identical set of high-level complaints-handling procedures covering several level 1 acts applicable across the banking, insurance and securities sectors runs contrary to establishing specific requirements for a single subset of firms only.
39. Moreover, at the time of development of the JC Guidelines, ESMA and the EBA explicitly clarified in paragraph 22 of the Feedback statement, on page 6 of the Final report, that the two ESAs drafted the guidelines with the proportionality principle in mind (in accordance with the respective sectoral legislation) and, therefore, national competent authorities have been required to apply the guidelines taking into account the nature, scale and complexity of firms' businesses and the nature and range of the services they provide.
40. This means that proportionality is embedded in the JC Guidelines as a general principle and that competent authorities should ensure a proportionate regime when applying these Guidelines to RAISPs, non-credit institution creditors and credit intermediaries.

### Partial application of the JC Guidelines

41. While considering introducing partial application of the JC Guidelines to credit intermediaries, non-credit institution creditors and RAISPs, the EBA assessed the applicability of each of the requirements of the Guidelines to the activities of these actors and the risk of imposing additional administrative burden by including them in the scope of application of the JC Guidelines.
42. EBA considered that Guidelines 1 and 2 on 'complaints management policy' and 'complaints management function' might be disproportionate to the activities of the above actors because of the nature, scale and complexity of their businesses and, in particular, that they might:
  - not be able to structure their internal organisation in such a way to have a separate complaints management unit in order to mitigate possible conflicts of interest; and
  - not have the same formal governance processes in place as other larger institutions.
43. EBA, however, arrived at the view that credit intermediaries, non-credit institution creditors and RAISPs could comply with the requirements of Guidelines 1 and 2 in a way that reflects the size of their business and the complexity of their organisation, without the need to exempt these firms from the application of Guidelines 1 and 2. Competent authorities would then assess the compliance of credit intermediaries, non-credit institution creditors and RAISPs with these Guidelines having in mind the proportionality principle.

44. In the specific case of credit intermediaries, EBA took into account that EIOPA has issued a separate set of Guidelines on complaints-handling focused expressly on complaints-handling by insurance intermediaries. In this set of Guidelines, EIOPA exempts insurance intermediaries that are sole traders from the application of the requirements related to identification and mitigation of possible conflicts of interest.
45. EBA considered applying the same approach in respect of credit intermediaries under MCD but decided not to do so because it will prevent EBA from fulfilling the objective of the JC Guidelines of ensuring a consistent approach to complaints-handling across the banking sector. Exempting credit intermediaries that are sole traders from the part of the requirements of Guideline 2 related to identification and mitigation of possible conflicts of interest will put (i) 'firms' that are natural persons, such as non-credit institution creditors, RAISPs, and waived payment institutions under PSD1 (exempted institutions under Article 32 of the PSD2) and (ii) credit intermediaries that are legal persons comprising of a one or two people in a disadvantageous position.
46. Regarding the risk of imposing additional administrative burden to credit intermediaries, non-credit institution creditors and RAISPs, EBA is of the view that that risk is mitigated by the fact that these service providers are required to have in place complaints procedures as stipulated by the respective Directives – PSD2 and MCD. Therefore, their practices and procedures would just need to be aligned with the requirements of the JC Guidelines.

**Q5. Do you agree with the view proposed by the EBA that proportionality should be applied in a general way to the activities of RAISPs, non-credit institution creditors and credit intermediaries and that they should not be exempted from any of the requirements of the Guidelines? If not, please provide your reasoning.**

## 5. Implementation

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### Date of application

47. These Guidelines apply to authorities competent for supervising complaints-handling by PISPs that provide payment initiation services only and RAISPs under PSD2 and/or by non-credit institution creditors and credit intermediaries under MCD from 1 May 2019.

## 6. Accompanying documents

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### 6.1 Draft cost-benefit analysis / impact assessment

#### Introduction

With these guidelines the EBA intends to comply with its duty under Article 16(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council) to establish consistent, efficient and effective supervisory practices within the ESFS, and to ensure the common, uniform and consistent application of Union Law.

As per Article 16(2) of the EBA regulation, any guidelines developed by the EBA shall be accompanied by an Impact Assessment (IA) annex, which analyses ‘the potential related costs and benefits’. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.

This annex presents the IA with cost-benefit analysis of the provisions included in the guidelines described in this Consultation Paper. Given the nature of the guidelines, the IA is high-level and qualitative in nature.

#### Problem definition and the baseline scenario

The core problem that the draft guidelines aim to address is lack of consistency in the application of the regulatory rules related to handling consumer complaints across the banking, investment and insurance sectors. While the current framework under the JC Guidelines targets explicitly a set of entities<sup>3</sup>, other entities such as non-credit institution creditors and credit intermediaries providing comparable services under MCD and which may cause similar consumer detriments are not covered in the same framework. Indeed, under the current regulatory framework credit institutions providing residential mortgage services are subject to the requirements of the JC Guidelines when they handle consumer complaints. However, this is currently not the case for non-credit institutions providing same or comparable residential mortgage services. Similarly, credit institutions can provide ancillary services facilitating the conclusion of a credit agreement for residential mortgage. If the credit institutions provide this service in-house then the potential complains related to this service fall under the scope of the JC Guidelines whereas if this service is provided by a credit intermediary then this activity falls outside the scope of the JC Guidelines.

Inconsistent regulatory treatment of consumer-handling practices in the banking, investment and insurance sectors may be detrimental to the EU internal market. Consumers and the services they receive may be subject to different rules although the risk associated with these services are similar.

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<sup>3</sup> These entities include investment firms, management companies and some investment companies, external alternative investment fund managers, credit institutions, payment institutions (including PISPs that provide payment initiation services only and RAISPs) and electronic money institutions.

This may create gaps in consumer protection and may deteriorate consumer confidence in the sector. Similarly, firms operating in one or multiple of these sectors and providing consumer services of comparable risk are subject to different regulatory rules. This may then deteriorate level-playing field in the single market.

There are currently more than 50 000 credit intermediaries and non-credit institution creditors in the EU that do not fall under the scope of the JC Guidelines and this is approximately 85% of the all firms in the EU.<sup>4</sup>

Currently, there are some competent authorities that have practices in place to harmonise complaints-handling procedures across the three financial sectors within their jurisdictions, including the new actors under PSD2 and MCD, while in other Member States such practices do not exist. The cost of compliance associated with the implementation of these guidelines are expected to be higher for the latter.

## Objectives

The objective of these guidelines is to ensure consistent application of regulatory rules for complaints-handling in all financial sectors and jurisdictions. For this purpose, they aim to ensure that competent authorities handle complaints in a harmonised framework that is comparable across these sectors and jurisdictions. This is expected to increase consumer confidence, strengthen supervisory practices and contribute to level playing field in the EU banking, investment and insurance sectors. Overall, the specific and general objectives of the guidelines are:

### Specific objectives

- Consistent handling of consumer complaints across all relevant sectors (banking, investment and insurance);
- Harmonised treatment of consumer complaints in financial services across jurisdictions; and
- Updating the regulatory framework to address new challenges in the EU banking sector (e.g. the introduction of the MCD and the revision of the PSD1).

### General objectives

- Ensuring consistent and effective (risk-based) supervisory practices;
- Contributing to supervisor convergence across EU Member States;
- Increasing consumer protection and consumer confidence; and
- Contributing to level-playing field in the EU.

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<sup>4</sup> The figures are a proxy and based on an EBA survey as of end-2016.

## Assessment of the technical options

### Scope of the guidelines

Option 1a: Status quo (i.e. no intervention)

Option 1b: Extending the scope of the JC Guidelines

Under the status quo, investment firms<sup>5</sup>, management companies<sup>6</sup>, investment companies that have not designated a management company<sup>7</sup>, external alternative investment fund managers when providing services pursuant to Article 6(4) of the AIFMD<sup>8</sup>, credit institutions<sup>9</sup>, and payment institutions<sup>10</sup> and electronic money institutions<sup>11</sup> fall under the scope of the JC Guidelines.

Under option 1a (no intervention) the problems related to inconsistent application of the JC Guidelines when entities (and competent authorities) handle potential consumer complaints are expected to persist. Option 1b aims to extend the scope of the JC Guidelines to entities that are not directed under the JC Guidelines, yet provide comparable services to those that are subject to JC complaint-handling rules. Precisely, these entities are non-credit institution creditors and credit intermediaries that operate within the scope of the MCD. In the specific case of payment initiation and account information service providers under PSD2, the JC Guidelines should, in principle, apply because of the dynamic cross-reference to ‘payment institutions’ and ‘Payment Services Directive’ in the JC Guidelines but as good regulatory practice, EBA is consulting on the extension to those providers. Given the legal background of the Level 1 texts, other entities that are included in MCD and PSD2 such as credit institutions and payment service providers are part of the status quo and are subject to JC Guidelines even if there is no intervention.

The cost of compliance associated with the extension of the scope of the JC Guidelines to non-credit institution creditors and credit intermediaries is expected to be small. In line with the provisions of the JC Guidelines firms should apply a common and standardised procedure for handling consumer complaints. The cost associated with the implementation of these rules are mostly operational and in some cases one-off (i.e. in case where entities are subject to some sort of similar rules). Similarly, for the competent authorities there would be operational cost associated with the monitoring of the disclosed information. The overall cost for the entities would depend on the current practice in place: the cost of compliance with the draft guidelines is expected to be lower in jurisdictions where the competent authorities have already extended the JC Guidelines to these entities or apply national rules similar to the content of the JC Guidelines.

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<sup>5</sup> As defined in Article 4(1)(1) of MiFID.

<sup>6</sup> As defined in Article 2(1)(b) of the UCITS Directive.

<sup>7</sup> As referred to in Article 30 of the UCITS Directive.

<sup>8</sup> As defined in Article 5(1)(a) of the AIFMD.

<sup>9</sup> As defined in Article 4(1) of the CRR.

<sup>10</sup> As defined in Article 4(4) of the PSD,

<sup>11</sup> As defined in Article 2(1) of the EMD.

The overall benefits of extending the scope of the JC Guidelines such as higher consumer confidence, higher degree of comparability across financial sectors, services and jurisdictions, are expected to exceed the associated costs. As a result, extending the scope of the JC Guidelines (option 1b) is the preferred option.

### Proportionality and partial application

Option 2a: Introducing specific proportionality criteria

Option 2b: Applying the general principle of proportionality

The options assess whether the current draft revision of the guidelines introduces a balance between the policy requirements and the characteristics of the institutions (i.e. whether the policy requirements for the institutions are appropriate and fair given a set of criteria) or they should introduce further specific criteria to apply the principle of proportionality.

In addition, the EBA assessed specifically the introduction of partial application of the JC Guidelines on 'complaints management policy' and 'complaints management function' for credit intermediaries, non-credit institution creditors and RAISPs. For example, the relevant provisions under JC Guidelines may require internal (re)organisation to separate complaints management unit in order to mitigate possible conflicts of interest. These rules may impose disproportionality large administrative burden on small entities with significantly low risk profile.

JC Guidelines accounts for the proportionality and require competent authorities to apply the guidelines taking into account the nature, scale and complexity of firms' businesses and the nature and range of the services they provide. In other words, JC Guidelines aim to avoid disproportionately large (administrative and operational) costs for the firms with respect to their characteristics such as their size, internal organisation, and the nature, scope and complexity of their activities.

Based on the above-mentioned arguments, the introduction of additional criteria is not expected to have additional benefits for the industry and for the regulatory framework. As a result, the current draft guidelines apply the general principle of proportionality in line with the JC Guidelines, i.e. the preferred option is option 2b.

## 6.2 Overview of questions for consultation

**Q1.** Do you agree on the application of the JC Guidelines to credit intermediaries and non-credit institution creditors under MCD? If not, please provide your reasoning.

**Q2.** Do you agree on the application of the JC Guidelines to PISPs that provide only payment initiation services, but no other payment services, under PSD2? If not, please provide your reasoning.

**Q3.** Do you agree on the application of the JC Guidelines to RAISP under PSD2, albeit limited to security-related complaints only? If not, please provide your reasoning.

**Q4.** Do you agree with the view of the EBA that the JC Guidelines should apply to RAISPs, non-credit institution creditors and credit intermediaries that are natural persons? If not, please provide your reasoning.

**Q5.** Do you agree with the view proposed by the EBA that proportionality should be applied in a general way to the activities of RAISPs, non-credit institution creditors and credit intermediaries and that they should not be exempted from any of the requirements of the Guidelines? If not, please provide your reasoning.

# ANNEX - Guidelines on complaints-handling for the securities and banking sectors

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## Guidelines on complaints-handling for the securities (ESMA) and banking (EBA) sectors

### **Purpose**

1. In order to ensure the adequate protection of consumers, these guidelines seek to:
  - a. clarify expectations relating to firms' organisation relating to complaints-handling;
  - b. provide guidance on the provision of information to complainants;
  - c. provide guidance on procedures for responding to complaints;
  - d. harmonise the arrangements of firms for the handling of all complaints they receive; and
  - e. ensure that firms' arrangements for complaints-handling are subject to a minimum level of supervisory convergence across the EU.

### **Scope**

2. These guidelines apply to authorities competent for supervising complaints-handling by firms in their jurisdiction. This includes circumstances where the competent authority supervises complaints-handling under EU and national law by firms doing business in their jurisdiction under freedom of services or freedom of establishment.
3. With regard to non-credit institution creditors and credit intermediaries the Guidelines apply to the extent that those authorities have been designated as competent for ensuring the application and enforcement of the provisions of the Mortgage Credit Directive to which these Guidelines relate.
4. These guidelines do not apply where a firm receives a complaint about:
  - a. activities other than those supervised by 'competent authorities' pursuant to Article 4(3) of the ESMA Regulation, or Article 4(2) of the EBA Regulation, or Article 5 of the Mortgage Credit Directive; or
  - b. the activities of another entity for which that firm has no legal or regulatory responsibility (and where those activities form the substance of the complaint).

However, that firm should respond, where possible, explaining the firm's position on the complaint and/or, where appropriate, giving details of the firm or other financial institution responsible for handling the complaint.

### **Compliance, reporting obligations and date of application**

5. These guidelines are issued pursuant to Article 16 of the ESA Regulations.<sup>12</sup> In accordance with Article 16(3), competent authorities and financial institutions must make every effort to comply with the guidelines.
6. These guidelines set out ESMA's and the EBA's view of appropriate supervisory practices within the European System of Financial Supervision and of how Union law should be applied. ESMA and the EBA therefore expect all competent authorities and financial institutions to which these guidelines are addressed to comply with guidelines. Competent authorities to which these guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.
7. Competent authorities must notify ESMA and/or the EBA whether they comply or intend to comply with the guidelines, stating their reasons for non-compliance, within two months of the date of publication of the translated versions by ESMA and the EBA to [JCGuidelines.complaintshandling@esma.europa.eu](mailto:JCGuidelines.complaintshandling@esma.europa.eu) and [compliance@eba.europa.eu](mailto:compliance@eba.europa.eu). In the absence of a response by this deadline, competent authorities will be considered non-compliant. A template for notifications is available on the ESMA and EBA websites.
8. These guidelines apply from the date of the reporting requirement referred to in paragraph 7.
9. Irrespective of whether or not an authority pursuant to Article 4(2) of the EBA Regulation is addressed under paragraphs 2 and 3, where a Member State has designated more than one authority in accordance with Article 5 of Directive 2014/17/EU and one of them is not an authority pursuant to Article 4(2) of the EBA Regulation, the authority pursuant to Article 4(2) of the EBA Regulation designated under Article 5 of Directive 2014/17/EU should, without prejudice to national arrangements adopted under Article 5(3) of Directive 2014/17/EU:
  - a) inform without delay the other designated authority of these guidelines and their date of application;
  - b) ask that authority in writing to consider applying the guidelines;
  - c) ask that authority in writing to inform either the EBA or the authority pursuant to Article 4(2) of the EBA Regulation within two months of the notification under subparagraph (a) whether it applies or intends to apply these guidelines; and
  - d) where applicable, forward without delay to the EBA the information received under subparagraph (c).

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<sup>12</sup> ESMA - Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

EBA - Regulation (EU) No 1093/2010 Of The European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

## Definitions

10. Unless otherwise specified, terms used in the following sectoral legislation have the same meaning in these guidelines:

- a. the Markets in Financial Instruments Directive (MiFID);
- b. the Alternative Investment Fund Manager Directive (AIFMD);
- c. the Undertakings for collective investment in transferable securities (UCITS Directive);
- d. the Capital Requirements Directive (CRD) and Capital Requirements Regulation (CRR);
- e. the Payment Services Directive (PSD);
- f. the E-Money Directive (EMD); and
- g. the Mortgage Credit Directive (MCD).
- h. For the purposes of these guidelines only, the indicative definitions set out in the table below, which do not over-ride equivalent definitions in national law, have been developed.

<i>firm(s)</i> <sup>13</sup>	<p>The following financial market participants if they are carrying out (i) investment services listed in Section A of Annex I of MiFID and ancillary services listed in Section B thereof, or (ii) a banking service listed in Annex I to CRD, or (iii) the service of collective portfolio management of UCITS, or (iv) a payment service as defined in Article 4(3) of the PSD, or (v) issuing electronic money as defined in Article 2(2) of the EMD; or (vi) provision of credit agreement as defined in Article 4(3) of the MCD; or credit intermediation activities as defined in Article 4(5) of the MCD:</p> <ul style="list-style-type: none"> <li>• investment firms (as defined in Article 4(1)(1) of the MiFID);</li> <li>• management companies (as defined in Article 2(1)(b) of the UCITS Directive) and investment companies that have not designated a management company (as referred to in Article 30 of the UCITS Directive);</li> <li>• external AIFMs (as defined in Article 5(1)(a) of the AIFMD) when providing services pursuant to Article 6(4) of the AIFMD;</li> <li>• credit institutions (as defined in Article 4(1) of the CRR);</li> <li>• payment institutions (as defined in Article 4(4) of the PSD);</li> <li>• electronic money institutions (as defined in Article 2(1) of the EMD); and</li> <li>• credit intermediaries and non-credit institution creditors (as defined in Article 4(5) and (10) of MCD respectively).</li> </ul>
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<sup>13</sup> Should additional EU Directives come into force that will bring new financial activities and/or financial institutions into the scope of action of an ESA, said ESA will consult on any extension of the applicability of the guidelines to these firms and activities.

<i>complaint</i>	A statement of dissatisfaction addressed to a firm by a natural or legal person relating to the provision of (i) an investment service provided under MiFID, the UCITS Directive or the AIFMD; or (ii) a banking service listed in Annex I to the CRD; or (iii) a service of collective portfolio management under the UCITS Directive; or (iv) a payment service as defined in Article 4(3) of the PSD, or (v) issuing electronic money as defined in Article 2(2) of the EMD; or (vi) credit agreement as defined in Article 4(3) of the MCD; or (vii) credit intermediation activities as defined in Article 4(5) of the MCD.
<i>complainant</i>	A natural or legal person who is presumed to be eligible to have a complaint considered by a firm and who has already lodged a complaint.

### Guidelines on complaints-handling

<p><b>Guideline 1 - Complaints management policy</b></p> <p>1. Competent authorities should ensure that:</p> <ul style="list-style-type: none"> <li>a) A ‘complaints management policy’ is put in place by firms. This policy should be defined and endorsed by the firm’s senior management, who should also be responsible for its implementation and for monitoring compliance with it.</li> <li>b) This ‘complaints management policy’ is set out in a (written) document e.g. as part of a ‘general (fair) treatment policy’.</li> <li>c) The ‘complaints management policy’ is made available to all relevant staff of the firm through an adequate internal channel.</li> </ul>
<p><b>Guideline 2 - Complaints management function</b></p> <p>2. Competent authorities should ensure that firms have a complaints management function which enables complaints to be investigated fairly and possible conflicts of interest to be identified and mitigated.</p>
<p><b>Guideline 3 - Registration</b></p> <p>3. Competent authorities should ensure that firms register, internally, complaints in accordance with national timing requirements in an appropriate manner (for example, through a secure electronic register).</p>
<p><b>Guideline 4 - Reporting</b></p> <p>4. Competent authorities should ensure that firms provide information on complaints and complaints-handling to the competent authorities or ombudsman. This data should cover the number of complaints received, differentiated according to their national criteria or own criteria, where relevant.</p>

#### **Guideline 5 - Internal follow-up of complaints-handling**

5. Competent authorities should ensure that firms analyse, on an on-going basis, complaints-handling data, to ensure that they identify and address any recurring or systemic problems, and potential legal and operational risks, for example, by:
- a) Analysing the causes of individual complaints so as to identify root causes common to types of complaint;
  - b) Considering whether such root causes may also affect other processes or products, including those not directly complained of; and
  - c) Correcting, where reasonable to do so, such root causes.

#### **Guideline 6 - Provision of information**

6. Competent authorities should ensure that firms:
- a) On request or when acknowledging receipt of a complaint, provide written information regarding their complaints-handling process.
  - b) Publish details of their complaints-handling process in an easily accessible manner, for example, in brochures, pamphlets, contractual documents or via the firm's website.
  - c) Provide clear, accurate and up-to-date information about the complaints-handling process, which includes:
    - (i) details of how to complain (e.g. the type of information to be provided by the complainant, the identity and contact details of the person or department to whom the complaint should be directed);
    - (ii) the process that will be followed when handling a complaint (e.g. when the complaint will be acknowledged, indicative handling timelines, the availability of a competent authority, an ombudsman or alternative dispute resolution (ADR) mechanism, etc.).
  - d) Keep the complainant informed about further handling of the complaint.

#### **Guideline 7 - Procedures for responding to complaints**

7. Competent authorities should ensure that firms:
- a) Seek to gather and investigate all relevant evidence and information regarding the complaint.
  - b) Communicate in plain language, which is clearly understood.
  - c) Provide a response without any unnecessary delay or at least within the time limits set at national level. When an answer cannot be provided within the expected time limits, the firm should inform the complainant about the causes of the delay and indicate when the firm's investigation is likely to be completed.

- d) When providing a final decision that does not fully satisfy the complainant's demand (or any final decision, where national rules require it), include a thorough explanation of the firm's position on the complaint and set out the complainant's option to maintain the complaint e.g. the availability of an ombudsman, ADR mechanism, national competent authorities, etc. Such decision should be provided in writing where national rules require it.