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Joint Committee Final Report on guidelines for complaints-handling for the securities (ESMA) and banking (EBA) sectors

Contents

Acronyms

AIFM	Alternative Investment Fund Manager
AIFMD	Alternative Investment Fund Manager Directive
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
EBA	European Banking Authority
EEA	European Economic Area
EIOPA	European Insurance and Occupational Pensions Authority
EMD	E-Money Directive
ESMA	European Securities and Markets Authority
EU	European Union
MiFID	Markets in Financial Instruments Directive
PSD	Payment Services Directive
UCITS	Undertakings for collective investment in transferable securities

1. Overview

Background

1. In June 2012, EIOPA published its "Guidelines on Complaints-Handling by Insurance Undertakings" (EIOPA guidelines).[1]

2. Taking into account the different regulatory provisions for complaints-handling between the securities and banking sectors, and the Alternative Dispute Resolution Directive, ESMA and the EBA consider that the adoption of the EIOPA guidelines for the securities and banking sectors should help to ensure a consistent approach to complaints-handling across the banking, investment and insurance sectors - to the benefit of firms (some of which may sell products from more than one sector), national authorities (which will have to oversee implementation of one set of guidelines in their respective jurisdictions), and 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).

3. In seeking to further supervisory convergence across sectors, these guidelines for the securities and banking sectors (which are issued in terms of Article 16 of the ESA Regulations[2]) should, in turn, strengthen consumer protection – a key statutory objective for ESMA and for the EBA.

4. ESMA and the EBA have also noted the G20's October 2011 "High-level principles on financial consumer protection" which mention "adequate complaints handling and redress mechanisms" as a means to reinforce financial consumer protection.[3]

5. The Joint Committee's Consultation Paper (CP) on 'draft guidelines for complaints-handling for the securities (ESMA) and banking (EBA) sectors' (Ref: JC-CP-2013-03) was published on 6 November 2013. The consultation period closed on 7 February 2014.

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[1] EIOPA-BoS-12/069, 14 June 2012. See https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/guidelines/complaints_handling/EIOPA_Complaints_Handling_GL_EN.pdf

[2] 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.

[3] See point 9 of the G20 High Level Principles on Financial Consumer Protection, October 2011 http://www.oecd.org/daf/fin/financial-markets/48892010.pdf
"Complaints Handling and Redress: Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorised agents' internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public."

6. ESMA and the EBA received 31 responses to the CP, all of which have been published on the ESMA and the EBA websites.

7. ESMA and the EBA also sought the advice of their respective Stakeholder Groups - for ESMA, the Securities and Markets Stakeholder Group's (SMSG); and for the EBA, the Banking Stakeholder Group (BSG).

8. The SMSG did not provide feedback. The BSG provided its advice on the CP (dated 7 February 2014) and this has been published on ESMA's and EBA's websites.[4]

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9. This final report sets out ESMA's and the EBA's feedback to the CP responses, which feedback provides an analysis of responses, explaining why there have been no material changes to the guidelines set out in Section 2 of the CP.

10. Section 2 below sets out the feedback statement, and Annex I contains the full text of the final guidelines.

Cost-benefit analysis (CBA)

11. The majority of respondents were supportive of the analysis of the cost and benefit impact of the proposed guidelines. Therefore, ESMA and the EBA consider that no changes need to be made to the CBA as set out in Annex 1 to the CP.

Next steps

12. The guidelines in Annex I hereto will be translated into the official languages of the European Union (EU), and published on the ESMA and the EBA websites. The application and reporting requirement dates set out in Annex I will start to run from the date of publication of the translations.

2. Feedback statement

13. Overall, the majority of respondents, including the BSG, were supportive of the draft guidelines.

14. Some respondents suggested drafting amendments in order to further improve the text of the guidelines. ESMA and the EBA have reviewed these suggestions, but consider that the final guidelines for the securities and banking sectors should remain fully aligned with the EIOPA guidelines. This is to help ensure a consistent approach to complaints-handling across the investment, banking and insurance sectors in order to limit costs to firms and to more easily facilitate common supervisory oversight.

[4] http://www.eba.europa.eu/documents/10180/475982/Banking+Stakeholders+Group+of+the+EBA.pdf.

15. Some main issues were raised by respondents and these are set out in the 'General' section below, with ESMA's and the EBAs' response thereto. Thereafter, ESMA and the EBA provide feedback to the specific consultation questions.

General

Client categorisation

16. A few respondents (3 out of 31) noted that the guidelines do not distinguish between client categories. While these respondents agreed that all complaints should be handled, they noted that there should be a distinction between how to deal with retail, professional, or market counterparty complaints.

17. These same respondents noted that the CP approach, which does not differentiate between retail and professional clients, appears to go beyond the relevant EU directives and the corresponding implementing national legislation.

18. ESMA and the EBA agree, and by way of clarification, note that national competent authorities should implement the guidelines in accordance with the content of sectoral legislation.

19. For example, in light of the requirements set out in Article 10 of the MiFID Implementing Directive[5], investment firms providing investment services listed in Section A of Annex I of MiFID, and ancillary services listed in Section B thereof, should be expected to apply these guidelines only in relation to the provision of services to retail clients and potential retail clients notwithstanding that the guidelines can provide helpful principles for firms dealing with complaints from non-retail clients.

20. On the other hand, the UCITS Directive, the AIFMD, CRD and CRR do not differentiate between client categories overall, nor do the PSD and EMD in relation to complaints handling. Firms falling within their remits are expected to apply these guidelines in relation to the provision of services to all clients.

Proportionality

21. A few respondents (3 out of 31) highlighted the need for a proportionality provision to be included in the guidelines.

22. As ESMA and the EBA drafted the guidelines with the proportionality principle in mind (in accordance with the respective sectoral legislation) - and therefore national competent authorities should apply the guidelines taking into account the nature, scale and complexity of firms' businesses and the nature and range of services provided - ESMA and the EBA do not consider it

[5] Which implements Article 13(2) of MiFID. In this respect, it should be noted that organisational requirements under MiFID Article 13 apply irrespective of the categories of clients to whom services are provided.

necessary to introduce a further provision but recommend national competent authorities to bear the principle of proportionality in mind when implementing the guidelines into national supervisory practices.

Definitions

23. On the content of the definition of "complaint", some respondents (5 out of 31) noted that it is too vague. Some of these same respondents noted that the cost of applying the guidelines would potentially be very high if applied so broadly (i.e. to any statement of dissatisfaction).

24. In general terms, ESMA and the EBA consider that the wide scope of the definition of "complaint" provided in the guidelines is consistent with their general objectives.

25. On the other hand, ESMA and the EBA note that the definitions are clearly stated as "indicative definitions … for the purposes of these guidelines only", and that they "do not over-ride equivalent definitions in national law" (if any). Therefore, narrower or broader national definitions of "complaint" would not be considered non-compliant with the guidelines.

Data protection

26. Two respondents noted that issues, related to national data protection laws, could arise when collecting and submitting information on customer complaints.

27. ESMA and the EBA acknowledge this issue, and note that the implementation of these guidelines by national competent authorities should be done in accordance with national law implementing the Data Protection Directive (Directive 95/46/EC) and with the General Data Protection Regulation (Regulation (EC) No 45/2001).

Scope

28. One respondent noted, in relation to the scope, that Central Securities Depository (CSDs) should not be covered by the guidelines since their activity is limited only to settlement and custody.

29. ESMA and the EBA note that CSDs are currently not covered under a specific piece of legislation and they are often authorised as credit institutions. Consequently, the guidelines apply to them as for any other credit institution.

Alternative dispute resolution (ADR) mechanisms

30. Two respondents raised concerns on the interaction of the guidelines with the rules applicable to ADR mechanisms.

31. ESMA and the EBA do not consider there to be an issue of consistency or overlap with ADR mechanisms as these guidelines deal primarily with how firms should handle complaints internally. These guidelines are therefore complementary to, rather than conflicting with, ADR mechanisms. Indeed, the introduction of a complaint to the firm is often a necessary precondition for getting access to ADR mechanisms.

Consultation questions, summary of responses, and ESMA and the EBA feedback

We asked: Question 1 - Do you agree that complaints-handling is an opportunity for further supervisory convergence? Please also state the reasons for your answer.

32. The vast majority of respondents agreed that complaints-handling is an opportunity for further supervisory convergence. Respondents also stated that convergence of standards in this area is an important step towards creating a uniform cross-border market for financial services in the EEA and that a harmonised supervisory approach to complaints-handling can further deliver on investor protection – investor protection being a key objective of the ESAs. Some, however, were of the opinion that there was no need to harmonise complaints management handing in all the envisaged sectors beyond what has been laid down in the ADR Directive, as sectors differ in their statutory requirements and also in their customer relationships and principle business obligations.

We asked: Question 2 - Please comment on each of the guidelines, clearly indicating the number of the guideline (there are 7 guidelines) to which your comments relate.

33. There was general support from respondents on the content of the guidelines. Respondents noted that many Member States already have arrangements in place which are at least equivalent to the guidelines and therefore do not expect national competent authorities and firms to encounter major issues when implementing them.

34. One respondent also mentioned that small or medium sized financial institutions or such institutions offering basic banking services might face difficulties when implementing the guidelines and that not all guidelines might be necessary for each sector. For ESMA's and the EBA's response please see paragraphs 21-22 on proportionality.

35. Some specific comments were raised on single aspects of the guidelines. These are summarised below.

Guideline 1 – Complaints management policy

36. One respondent suggested specifying that the complaints management policy should be periodically reviewed and updated.

37. ESMA and the EBA see the benefits of this suggestion, but feel that the guideline should not be formally amended in order to ensure consistency with the EIOPA guidelines. Also, ESMA and the EBA would expect that if the implementation of the complaints management policy reveals drawbacks or weaknesses, senior management would take the necessary measures to review them.

38. One respondent suggested that, in order to enhance transparency, the complaints management policy should be made available to clients (for example, by posting it on the firm's website).

39. ESMA and the EBA believe that the detailed complaints management policy should primarily be made available to all relevant staff and that the provision of complaints-handling information to clients is dealt with in guideline 6 which already refers to the publication of the firms' complaints-handling process, including on their website.

Guideline 2 – Complaints management function

40. Some respondents (6 out of 31) raised concerns about guideline 2 being read as an "obligation" to set up a separate or centralised complaints-handling structure within firm and whether this would be disproportionate for small firms. These same respondents also queried what level of autonomy and independence is expected from the complaints-management function.

41. As stated in paragraph 22, ESMA and the EBA have drafted the guidelines with the proportionality principle in mind, and therefore expect these guidelines to be implemented keeping in mind the size and organisation of the firms and the nature, scale and complexity of their business.

42. Furthermore, ESMA and the EBA consider that both a more restrictive application (requiring the set-up of a separate complaints-handling function) and less restrictive application (allowing the complaints-handling function to be incorporated within another function of the firm) would be considered compliant with the guidelines. Recourse to outsourcing, in accordance with the relevant requirements applicable in the sectoral legislation, could also be considered.

Guideline 3 – Registration

43. Three respondents noted that implementation costs of this guideline could be very high.

44. ESMA and the EBA have already emphasised above that the proportionality principle applies to these guidelines.

45. Furthermore, ESMA and the EBA believe that benefits, deriving from registration of complaints (such as other record-keeping requirements), outweigh the costs as registration is essential both for firms, in order to

facilitate their complaints root-cause analysis, and for national competent authorities, as it enables them to monitor compliance with the guidelines.

Guideline 4 - Reporting

46. Some respondents (6 out of 31) noted this guideline could be costly to implement and suggested that reporting of information on complaints and complaints-handling to competent authorities or ombudsmen should be done only on request, and not on a continuous basis.

47. ESMA and the EBA acknowledge that firms will have to incur costs to implement this guideline, but considered, however, that the benefits (analysed in Annex 1 of the CP) outweigh these costs. Furthermore, the guidelines do not set out any fixed obligations on the periodicity of the complaints-reporting and on the reporting metric.

48. One respondent also noted that there should be some standardisation on the content of the reporting otherwise the information would not be comparable and therefore difficult to analyse.

49. ESMA and the EBA are aware of this suggestion, but feel that these guidelines are not the correct instrument to use to standardise reporting on complaints.

Guideline 5 - Internal follow-up of complaints-handling

50. No major concerns or comments were raised by respondents on the content of guideline 5.

Guideline 6 - Provision of information

51. Some respondents (7 out of 31), while agreeing that it is good practice to acknowledge receipt of a complaint within a reasonable time frame, noted that it would not to be practical or useful to provide every complainant with further information on the firms' internal procedures – especially where this information can be made publicly available and accessible on the company website.

52. ESMA and the EBA note that guideline 6 already refer to the publication of the complaints-handling process through general means (such as the firm's website) but consider that individual information to single complainants in written form provide for an added value for the complainant.

Guideline 7 - Procedures for responding to complaints

53. Some respondents (7 out of 31) noted that the guidelines should not set a fixed timeframe within which firms should deal with complaints and asked to delete the reference to "time limits set at national level".

54. ESMA and the EBA note that this guideline does not set out any specific timeframe for responses to complaints and simply refers to the need to respect time limits when these are set out in national legislation. ESMA and the EBA believe that timely responses to complaints are essential for consumer protection.

55. A few respondents (12 out of 31) also noted that sometimes complaints are resolved quickly at the first point of contact and, in these situations, respondents suggested that there would be no need to apply what is set out in guideline 7(a).

56. ESMA and the EBA disagree, as gathering and investigating relevant evidence and information regarding all complaints is essential to ensure a fair treatment of all customers and not only those who lodge a complaint.

We asked: Question 3 - Do you agree with the analysis of the cost and benefit impact of the proposals?

We asked: Question 4 - Please provide any evidence or data that would further inform the analysis of the likely cost and benefit impacts of the proposals.

57. The majority of respondents were supportive of the analysis of the cost and benefit impact of the proposed guidelines. One respondent however noted that small or medium sized financial institutions or such institutions offering basic banking services might face high costs.

58. Few respondents (2 out of 31) suggested that expenses such as IT and additional staff needed to set up the complaint management functions or to readjust an already existing process to the new regulation might be higher than assumed. In addition, these respondents noted that costs for registration and reporting would be high. These comments, related to the implementation of guidelines 2, 3 and 4 respectively, have been addressed in paragraphs 40-49 above.

Annex 1 - 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. 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

   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

4. These guidelines are issued pursuant to Article 16 of the ESA Regulations.[6] In accordance with Article 16(3), competent authorities and financial institutions shall make every effort to comply with the guidelines.

5. 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.

6. 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 and 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.

7. These guidelines apply from the date of the reporting requirement referred to in paragraph 6.

Definitions

8. 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);

[6] 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.

f. the E-Money Directive (EMD).

9. 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.

firm(s)[7]	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: • investment firms (as defined in Article 4(1)(1) of MiFID); • 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); • external AIFMs (as defined in 5(1)(a) of the AIFMD) when providing services pursuant to Article 6(4) of the AIFMD; • credit institutions (as defined in Article 4(1) of the CRR); and • payment institutions and electronic money institutions (as defined in Article 4(4) of the PSD, and Article 2(1) of the EMD respectively).
complaint	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.
complainant	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.

[7] 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.

Guidelines on complaints-handling

Guideline 1 - Complaints management policy

1. Competent authorities should ensure that:
    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.
    b) This 'complaints management policy' is set out in a (written) document e.g. as part of a 'general (fair) treatment policy'.
    c) The 'complaints management policy' is made available to all relevant staff of the firm through an adequate internal channel.

Guideline 2 - Complaints management function

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.

Guideline 3 - Registration

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).

Guideline 4 - Reporting

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.

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.