

POSITION PAPER



**EBA Consultation Paper
Draft Guidelines on product oversight and governance ar-
rangement for retail banking products
EBA/CP/2014/37**

ESBG (European Savings and Retail Banking Group)

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General comments:

ESBG welcomes the opportunity to provide comments on the EBA Consultation Paper 'Draft Guidelines on product oversight and governance arrangements for retail banking products' (hereinafter the "**Guidelines**"). ESBG respects EBA's decision to try to enhance consumer protection in the area of retail banking products by carefully thought out detailed regulations.

Against the background of those far-reaching Guidelines ESBG would welcome EBA to ensure at the same time that the Guidelines will be compatible with the existing directives in the same area (such as 'Consumer Credit Directive' (CCD), 'Mortgage Credit Directive' (MCD), MiFID II, 'Payment Account Directive' (PAD) and 'Payment Services Directive' (PSD)).

ESBG would also like to draw EBA's attention to the fact that smaller credit institutions might not be able to comply with the extended regulation requirements of the Guidelines. Risk is that such smaller institutions as a consequence withdraw from the market for regular financial products. The unintended effect could be a weakening of competition.

Apart from that, ESBG has the following specific remarks regarding the draft Guidelines:

General questions

Question 1: Do you agree with the proposed approach of capturing the entire product life cycle by covering distributors as well as manufacturers?

Capturing the entire life cycle of a product is a comprehensible idea. However, it is also a law of the market that products at the end of their life cycle fail to satisfy the consumer. That this happens is the result of then available new and innovative products. Thus, it cannot be avoided by the Guidelines that a product at one point might fail to satisfy its consumer.

ESBG wonders whether it is really necessary to regulate retail banking products of rather low complexity in such great detail as in the Guidelines. The respective retail products such as savings deposits, payment accounts, payment services or payment instruments predominantly cover basic needs and generally have been established on the market for a considerable number of years.

That most retail products are simple products is backed up for instance by Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features. This Directive states in article 16 that '*Member States shall ensure that payment accounts with basic features are offered to consumers in their territories*' and '*may identify limited and specific additional cases where credit institutions may be required or may choose to refuse an application for a payment account with basic features*'. Those '*basic features*' are defined in article 17 and include (1) services enabling all the operations required for the opening, operating and closing of a payment account, (2) services enabling funds to be placed in a payment account, (3) services enabling cash withdrawals within the Union from a payment account at the counter or at ATM during or outside the credit institution's opening hours, (4) execution of direct debits, payment transactions through a payment card - including online



payments -, as well as credit transfers, including standing orders, at, where available, terminals and counters and via the online facilities of the credit institution.

Against this background ESBG strongly suggests EBA to take the specific features of retail products into account. As a minimal solution ESBG asks EBA to add a list to the Guidelines that contains more complex retail products for which the Guidelines shall be applicable.

Additionally, ESBG thinks that more detailed requirements on the manufacturing and distribution level weaken the manufacturer's eagerness and ability to develop new products and, thus, slow down the speed of innovation.

Question 2: Do you agree with the delineation of the two sets of requirements for manufacturers and distributors?

ESBG considers Guidelines for both - manufactures and distributors - as essential to create a level playing field. It is important that the Guidelines also aim at covering structures that are not yet subject to today's banking supervision. Also, (partly) exemptions for those credit institutions that are already supervised should be considered.

Question 3: Are there any additional requirements that you would suggest adding to either of the two sets of requirements? If so, why?

No.

Specific questions regarding Guidelines for manufacturers (Title II)

Question 4: Do you agree with Guideline 1 on establishment, proportionality, review and documentation?

To begin with, the Guidelines do not refer to the very low level of complexity of retail banking products. The Guidelines themselves state under **1.5** that *'product oversight and governance arrangement should be proportionate to the level of complexity of the products'*. However, the Guidelines do not distinguish between more or less complex products and/or only slightly modified products and/or products which are merely a combination of existing products and/or just re-launched products. Thus, the Guidelines do not yet reflect the fundamental principle of proportionality which applies to EU legislation.

Regarding the product approval already some Member States have recommendable procedures in place which could complement the Guidelines. There is for instance the assessment of product approval which is based on a catalogue of minimum requirements (German Banking Supervision). Accordingly, the scope of the process, including any test runs, depends on the type of product and on any existing and proven knowledge regarding the product's handling. So is for example a product approval process not required, if all organizational units involved in the respective work processes assume that the institution can handle all activities relating to the new product or market.



Also, new product launches in retail banking principally result from perceived changes in consumer needs. Hence, if new retail banking products are launched, both the target group and the interests of the respective consumers are already known from the beginning and the product is tailor-made to suit them. Thus, in such cases a separate target group analysis or product tests as stated in the Guidelines are unnecessary.

Question 5: Do you agree with Guideline 2 on manufacturers' internal control functions?

ESBG has some doubts regarding the additional value of making product oversight and governance arrangements integral parts of the governance, risk management and internal control framework. Creditors' compliance departments already identify and resolve potential conflicts of interest at an early stage, including those that may arise in the manufacturing process of new products. Also national and European supervisory authorities as well as consumer protection organizations ensure a certain level of control. Furthermore, arbitration offices/ombudsman programmes at European level protect the interest of consumers. And, of course, consumers can raise a claim at the competent civil courts.

Question 6: Do you agree with Guideline 3 on the target market?

Guidelines 3.1 and 3.2 so far do not take into account that retail banking products are generally designed in a way that almost all consumers are potential end-users. Consequently, in view of the contradicting requirement to define a target market we see only two practicable solutions: Firstly, the Guidelines could state that a definition of a target market is superfluous in cases where it would virtually comprise all consumers in the retail market. Or, secondly, the Guidelines could clarify that a defined target market for some retail products can also comprise all consumers. Any other compulsory definition of a target market would not be beneficial for the consumer but rather lead to greater complexity in the field of product selection.

ESBG agrees that it is important for the consumer to receive clear and comprehensive information regarding products which enable him/her to take informed decisions. But, ESBG also urges EBA to ensure that the consumer is not deprived of his/her freedom of choice to buy a certain product by a too compulsory and inflexible definition of the target market (as the regulations of the Guidelines contain in their current version). For instance, it cannot be legitimate for a creditor to exclude a solvent customer from a credit just because he/she is not part of the target group. Therefore, ESBG asks EBA to clearly reflect in the Guidelines that the consumer can at the end freely decide upon which product he/she wants to buy, for his/her individual reasons.

Regarding **Guideline 3.4** ESBG would like EBA to acknowledge that it is the creditors who decide upon the width and depth of their products features. For instance, international manufactures need to consider regional differences and therefore naturally need to offer a wider range of product varieties.

Furthermore, ESBG likes to draw EBAs attention to the fact that consumers can best be served by creditors if their individual needs are assessed and taken into account before a product is suggested. A requirement as under **Guideline 3.5** can easily be contrary to the best interest of a customer. The



Guideline does not yet reflect that at the end a customer's individual needs should be decisive for the proposition of products and not the affiliation to a certain target market that might not even include the best suitable products.

Guideline 3. 6 mentions the assessment of the '*financial capability of the target market*'. ESBG assumes that this requires creditors to estimate the financial capability of each of the identified consumer groups. ESBG would like EBA to reconsider this point: Could a possible result of such an assessment be that a target market fails to fulfil the criterion of '*financial capability*? And, if such a failure is generally possible, what would the consequences be? Having said this, ESBG suggest EBA to remove the requirement to assess financial capability from the Guidelines.

In the event that the above suggestion is not accepted it should be defined, at least, how the estimation of the capability of each of the identified consumer groups should be done.

Question 7: Do you agree with Guideline 4 on product testing?

Due to the comparatively low complexity of products in the retail area ESBG considers an obligatory product testing without exceptions for any '*new product*' as not being proportional. This is especially true as the meaning of the wording '*new product*' has not been defined in the Guidelines yet. Regarding the definition of '*new product*' the following should be taken into account: ESBG thinks that product testing is undoubtedly required for new trading transactions. For retail products, however, the situation is different. Product (re-) launches in retail banking principally result from perceived changes in customer needs. Thus, the target group and the customers' interests are in most cases already well known. Against this background ESBG suggest the following definition of new product:

'A product shall be considered as a new product, when the creditor does not already have sufficient knowledge and experience to appropriately handle the product launch and all related processes.'

This definition better takes into account the differences of products which are (re-) launched in the retail area (regarding the differences see above under **Question 4**).

Also, ESBG would like EBA to confirm that '*product testing*' refers to computerized simulations and not tests with natural persons.

Question 8: Do you agree with Guideline 5 on product monitoring?

ESBG would like EBA to note that it is already common practice for bank advisors to compare the consumers' needs/interests with the suggested product solutions. If the two fail to coincide, consumers do not buy the suggested product. Whether or not a product is up to the needs of the market is thus reflected by its sales figures.



Question 9: Do you agree with Guideline 6 on remedial action?

ESBG asks EBA to clarify that the manufacturer needs to consider remedial action not for any changes in customer requirements that occur at the individual consumer's level, but only in cases of demonstrably undesirable developments that affect the entire market.

Question 10: Do you agree with Guideline 7 on the selection of distribution channels?

Irrespective of the target market identified, it should be clarified that the manufacturer can make available all its products to consumers through online banking. Otherwise, although the aim of the Guidelines is consumer protection through product governance and oversight arrangements, these Guidelines would complicate innovation and access to retail banking products.

Question 11: Do you agree with Guideline 8 on information for distributors?

ESBG generally agrees with **Guideline 8** and suggests to add that distributors should appropriately consider any information provided by the manufacturer.

Specific questions regarding Guidelines for distributors (Title III)

Question 12: Do you agree with Guideline 1 on establishment, proportionality, review and documentation?

ESBG believes that additional requirements for distributors regarding control and documentation are unnecessary, if the creditors are already subject to supervision. Thus, ESBG suggests EBA to consider exemptions for such cases.

Question 13: Do you agree with Guideline 2 on the distributor's internal control functions?

ESBG has no further comments.

Question 14: Do you agree with Guideline 3 on the knowledge of the target market?

Information provided by manufacturers with regard to the target markets should serve as a recommendation only. To find the best individual solution for a consumer the distributor should - before any target market - take into account the individual customer's needs and situation. ESBG suggest EBA to reflect this practical and reasonable approach also in the Guidelines.

Question 15: Do you agree with Guideline 4 on information?

Ultimately, it should be the consumer who decides whether or not to buy a certain product. For the distributors it should be sufficient as justification for offering a certain product to a consumer, who does not belong to a target market (4.2), to point out that it was the consumer's wish to buy the specific product.



About ESBG (European Savings and Retail Banking Group)

ESBG brings together savings and retail banks of the European Union and European Economic Area that believe in a common identity for European policies. ESBG members support the development of a single market for Europe that adheres to the principle of subsidiarity, whereby the European Union only acts when individual Member States cannot sufficiently do so. They believe that pluralism and diversity in the European banking sector safeguard the market against shocks that arise from time to time, whether caused by internal or external forces. Members seek to defend the European social and economic model that combines economic growth with high living standards and good working conditions. To these ends, ESBG members come together to agree on and promote common positions on relevant matters of a regulatory or supervisory nature.

ESBG members represent one of the largest European retail banking networks, comprising of approximately one-third of the retail banking market in Europe, with total assets of over €7,300 billion, non-bank deposits of €3,480 billion and non-bank loans of €3,950 billion (31 December 2012).



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