

**ICMA response to  
ESMA consultation paper ESMA35-43-3114**

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***Review of the Guidelines  
on MiFID II product governance requirements***

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**EXECUTIVE SUMMARY**

1. ICMA initially set out the ICMA1 and ICMA2 approaches to MiFID product governance as a proportionate application of the regime to preserve European companies' ability to raise capital funding in the international bond markets.
  2. ICMA has set out amendments to the target market *assessment* in the ICMA1 and ICMA2 approaches to reflect both the Level 2 ESG-related changes and certain aspects of ESMA's current guidelines consultation. The target market *definition* in the ICMA1 and ICMA2 approaches remains unchanged. ICMA has published the related reasoning.
  3. Regardless of the above, ICMA remains of the view that the product governance regime remains conceptually flawed regarding commoditised funding products such as Eurobonds, which should be out of scope. Partial alleviations to the regime could (i) exempt "non-complex" bonds, (ii) exempt the professional investor context and/or (iii) limit manufacturer review obligations to the primary market context. (The Capital Markets Recovery Package's make-whole clause and eligible counterparty provisions are not expected to have any useful impact in terms of alleviation.)
  4. Referencing an additional alternative in the ESMA Guidelines to the three MiFID II DR Art.2(7) approaches is welcome.
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**INTERNATIONAL BOND MARKET APPROACHES (ICMA1 and ICMA2)**

5. **International bond market background** – ICMA has historically focused on proportionate application of the MiFID product governance (PG) regime in a way that is compatible with preserving European companies' ability to raise capital funding in the international bond (Eurobond) markets. A company borrowing in these markets can, within hours intra-day, both hire a temporary syndicate of underwriter banks and have them place a bond issue on its behalf with investors – raising funds worth up to several billion euros. This ability to secure large sums quickly becomes particularly important for companies in challenging macro-economic conditions when markets are volatile, with access opportunities opening and closing unpredictably within days.

6. **Current ICMA1 & ICMA2 approaches** – In this respect, ICMA published in December 2017 (and notified to staff at ESMA and at various NCAs) two papers setting out two potential PG compliance approaches that MiFID-regulated underwriters (together with any MiFID-regulated bond issuers) could choose to adopt to enable them to continue operating, as PG co-‘manufacturers’, within the international bond market dynamics set out above:
- (a) [The MiFID II product governance \(PG\) and Packaged retail investment and insurance products Regulation \(PRIIPs\) regimes - January 2018: An approach for the Eurobond markets](#) – known as “ICMA1” and relating to all syndicated bonds sold to professional investors; and
  - (b) [The MiFID II product governance \(PG\) regime - Retail bonds \(admitted to trading on an EEA regulated market\) – ‘ICMA2’](#) – relating to simple, listed bonds sold to all investors (including retail investors).
7. **New consequential revisions to the ICMA1 & ICMA2 approaches**
- (A) ICMA published on 5 October 2022 a [revision of Schedule 1 to the ICMA1 approach](#) and a [revision of Schedule 1 to the ICMA2 approach](#) that each set out a target market *assessment* based on ESMA’s five criteria. These revisions were intended to reflect technical changes arising in (i) Delegated Directive EU/2021/1269’s amendments to Delegated Directive EU/2017/593 as regards the integration of sustainability factors into the PG regime and otherwise in (ii) ESMA’s current PG guidelines consultation.
  - (B) The current ICMA1 and ICMA2 legends set out the target market *definition*<sup>1</sup> (see the current ICMA1 approach at Schedule 4 and the current ICMA2 approach at Schedule 2) and these legends remain unchanged (subject only to amendments already set out in the [ICMA Primary Market Handbook](#)<sup>2</sup> to deal with other developments, such as Brexit).
  - (C) In this respect ICMA also published on 5 October 2022 a paper, [ICMA proposed approach to sustainability-related amendments to product governance and MiFID II Delegated Directive](#), detailing the related reasoning (this paper follows on from, and is consistent with, ICMA’s [February 2019 comments](#) on ESMA’s original amendment proposals<sup>3</sup>).

## ALLEVIATIONS NEEDED / EXISTING ALLEVIATIONS INSUFFICIENT

8. **Points previously made** – Regardless of the above practical compliance approaches, ICMA has previously warned and remains of the view that the PG regime is conceptually flawed regarding commoditised funding products such as Eurobonds, which should be outside the scope of the PG regime altogether. In the context of the existing regime ICMA has however (i) acknowledged the potential legislative expediency of an exclusion just for ‘non-complex’ bonds<sup>4</sup> and (ii) pointed out that at a minimum there is no practical rationale for the regime to apply in a professional investor context (and referencing several technical exemptions in this respect). See further ICMA [May 2020 response](#) to European Commission MiFID II/R review consultation, as summarised in a [related July 2020 ICMA Quarterly Report article](#).
9. **Manufacturer review obligation to end after completion of initial distribution (so limited to primary market only)** – If a ‘distributor’ is no longer obliged to review the target market of a

<sup>1</sup> Target market “*definition*” (the ‘who’ that is communicated as a headline legend in the context of the ICMA1 and ICMA2 approaches) is distinct from target market “*assessment*” (the compatibility ‘why’ referencing the ESMA five criteria).

<sup>2</sup> Complimentary access is available, on request, to staff at ESMA and its member NCAs.

<sup>3</sup> The final amendments in Delegated Directive EU/2021/1269 were substantively unchanged from the original amendment proposals in ESMA’s December 2018 consultation ESMA35-43-1210.

<sup>4</sup> Such instruments can in any case be sold on an execution-only basis, with PG target market definitions thus being arguably inconsequential.

product that it “no longer offers, sells or recommends” (as stated in new paragraph 73 of the draft Guidelines), then why should a manufacturer be obliged to continue reviewing the target market if all of its related distributors no longer offer, sell or recommend the product? Accordingly, by way of a further alleviation suggestion in **response to Q9** in ESMA’s current consultation<sup>5</sup>, it seems logical and appropriate that a manufacturer’s review obligation should at least end after initial distribution of the product. In this respect, the manufacturer review obligation for a bond product could be defined to end either (i) on termination of any consent given for prospectus use under Article 5.1 of the Prospectus Regulation EU/2017/1129 (in a ‘retail cascade’ context) or (ii) on settlement of the primary issuance (in an institutional context). A limitation to the primary market context has already been in practical effect in the French domestic market and should be expanded to the EU-level.

10. **Capital Markets Recovery Package (CMRP) insufficiency** – ICMA’s [August 2021 response](#) to the Commission’s retail investment strategy consultation (under Q6.9 on p.7) noted, referencing p.25 of the [2021Q3 ICMA Quarterly Report](#), that the CMRP is not expected to have any useful impact. It is not worth bond underwriters (as ‘manufacturers’) expending resources implementing ‘lighter’ internal compliance policies and procedures for a narrow ‘slice’ of bonds (those with a make-whole clause but no other embedded derivatives), sandwiched between the wider universe (of bonds with other embedded derivatives and of bonds with no embedded derivatives at all) that remains subject to the PG regime. Regarding the CMRP’s alleviation for instruments marketed or distributed exclusively to eligible counterparties (ECPs), it is worth noting that bonds are not routinely distributed to ECPs exclusively as the typical professional investor base is wider than ECPs.

## OTHER

11. **“Sustainability preferences” according to MiFID II DR Art.2(7)** – In **response to Q2** in ESMA’s current consultation<sup>6</sup>, the third bullet in new paragraph 20 of the draft Guidelines (additional to the Art.2(7) alternatives and referencing “a focus on either environmental, social or governance criteria or a combination of them”) provides some welcome flexibility.

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<sup>5</sup> “Q9: Do you agree with the suggested approach on the requirement to periodically review products, including the clarification of the proportionality principle? Please also state the reasons for your answer.”

<sup>6</sup> “Q2: Do you agree with the suggested approach on the identification of any sustainability-related objectives the product is compatible with? Do you believe that a different approach in the implementation of the new legislative requirements in the area of product governance should be taken? Please also state the reasons for your answer.”