

- ◆ **Finanzgruppe**
Deutscher Sparkassen- und Giroverband

Position Paper

of the German Savings Banks Association to the ESMA
and the EBA Joint Committee Consultation Paper for
the
"Draft Guidelines for Complaints-handling for the Securities (ESMA) and Banking (the EBA) Sectors"

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1. Introduction

The German Savings Banks Association (DSGV) welcomes the efforts of ESMA and the EBA to ensure reasonable complaint handling in the banking and securities sectors in the EU. The banking sector in particular is one distinguished by long-term and close customer relationships. The proper handling of complaints is an important tool for maintaining customer relationships and enables the trust impaired by the cause of the complaint to be restored and so boost customer ties. Systematic evaluations of complaints also support companies in the optimization of their product offerings and customer support.

Against this background, the best possible handling of customer complaints is an important issue for the German Savings Banks Association, too. So it is hardly surprising that credit institutions – besides investment and management companies – are one of the three addressees of the guidelines which already largely meet the guidelines' complaint management requirements. Moreover, the German banking sector already has sufficient out-of-court dispute resolution bodies meeting the requirements of the ADR Directive even before its national implementation.

However, it should not be overlooked that the German savings banks primarily focus on resolving problems that are directly addressed to them within the scope of the individual customer relationship. Particularly with regard to individual customer dealings, banks repeatedly make concessions at this level that go beyond what the customer may be legally entitled to. From the perspective of the German savings banks, this approach is even advantageous for those customers who can furthermore take the issue to an out-of-court dispute resolution body or even a court of law. Therefore, the German savings banks are somewhat concerned that the Draft Guidelines are striving to standardize complaint management and place it under the control of the supervisory bodies.

The Draft Guidelines also give rise to legal reservations in the opinion of the German Savings Banks Association, because

- the statutory definition of dispute resolution by the ADR Directive renders parallel regulations by supervisory authorities not only superfluous but also unreasonable,
- the too broad a definition of a complaint provides no meaningful starting point for complaint guidelines,
- there is no apparent regulatory competence of ESMA and the EBA and
- in particular the Draft Complaint Guidelines forestall the current national implementation of the ADR Directive.

2. ESMA's and the EBA's lack of regulatory competence in the banking sector

a) Unclear delineation between the guidelines and the ADR Directive requirements

What the relationship between the Draft Guidelines and the ADR Directive applicable in consumer disputes after completion of national implementation will be is unclear. In particular, it is uncertain whether companies can meet the requirements of the guidelines by satisfying the ADR Directive requirements and in particular with a – possibly external - resolution body that meets the ADR Directive requirements or whether, for example, a further additional complaint policy or a mandatory internal complaint management function prior to the resolution procedure will have to be installed.

The German Savings Banks Association sees no need for Complaint Guidelines above and beyond the ADR Directive requirements. Besides the access to guideline-compliant dispute resolution procedures to be granted to consumers and the obligation of companies to draw attention to these dispute resolution procedures should they reject customers' complaints, the ADR Directive contains information and procedural requirements and also official reporting duties at least on a par with the Draft Guidelines. The ADR Directive does however not require the banks themselves to set up a particular complaint function. The German savings banks already have dispute resolution bodies with independent and qualified arbitrators that satisfy the ADR Directive requirements, who for reasons of effectiveness and in the interest of uniform resolution are often located at the association level. Customers of the German savings banks are informed about these dispute resolution bodies and the pertinent arbitration procedures. The guidelines should therefore clarify that satisfying the ADR Directive requirements and the availability of a guideline-compliant dispute resolution body will also fulfil the requirements of the Complaint Guidelines in their entirety.

b) Unclear terminology "Complaint" and "Complainant"

The scope of the guidelines is not clearly differentiated by the prefacing definitions of "Complaint" and "Complainant".

The too broad a definition of "Complaint" covers all and any expression of dissatisfaction by customers and non-customers and is not clearly separable from queries and requests; nor are demands that are undisputed or promptly honoured by companies excluded. By dint of the definition of complaints in the guidelines, oral expressions of dissatisfaction falling well short of the definition

of dispute in the ADR Directive¹, such as for example pointing out that the counter area is too cold or the queue's too long and also mass letters of protest to a number of banks about alleged shortcomings in the banking sector, would have to be registered and reported to the supervisory authorities. On the other hand, it is very much in the interest of all involved that any dissatisfaction expressed is settled as far as possible in direct dealings with the customer and without unnecessary escalation to particular resolution entities or supervisory bodies. A meaningful starting point for Complaint Guidelines from the German Savings Banks Association's perspective can therefore be at the earliest a serious disruption in the customer relationship and the presence of a written documented dispute between the customer and company in the sense of the ADR Directive.

The definition of a "Complainant" is also too broad from the German Savings Banks Association's perspective, because it goes beyond the scope of the ADR Directive by encompassing non-consumers and non-customers as well. With non-consumers, persons who the European legislators have taken into consideration in the ADR Directive and for whom they see no call for complaint regulation are included within the definition of a "Complainant". In this area, ESMA and the EBA in any case lack regulatory competence grounded in particular by their shared commitment to "improving consumer protection". Although a case for this expansion would therefore have to be specifically argued, the Consultation Paper contains no reasons for including non-consumers as well.

c) Absence of consumer interest in harmonising regulation

ESMA and the EBA derive their regulatory competence in particular from their shared responsibility for "improving consumer protection". But from the consumer perspective itself, the Draft Guidelines do not seem to offer any improvements on what can be found in the ADR Directive.

The ADR Directive already provides detailed regulations on consumers' access to dispute resolution bodies that meet the requirements of the guideline in terms of expertise, independence and impartiality. The Directive lays down requirements for an effective, fair and transparent procedure and imposes information duties beneficial to consumers. From the German Savings Banks Association's perspective, there is no apparent consumer interest in parallel or even additional Complaint Guidelines.

¹ Directive 2013/11/EU of 21 May 2013 on alternative consumer dispute resolution

Nor can the German Savings Banks Association note any consumer interest in the further harmonising of regulations in the banking, securities and insurance segments. In all three areas, the national implementation of the ADR Directive for out-of-court dispute resolution throughout Europe has already created uniform framework conditions for consumers.

As already presented above, there is no general need at all for the regulation of complaint handling below the regulatory level of the ADR Directive. Such regulation of the complaint handling upstream of dispute resolution would, at least in the banking sector, not be in the interest of consumers either, who in the current approach to complaint handling outside a lodged out-of-court dispute resolution request frequently profit from individual complaint handling and accommodating decisions motivated by not wishing to negatively affect the customer relationship. Here, consumers benefit in particular from the long-term and comprehensive bank-customer relationship, with regard to which concessions are made that go beyond the specific legal rights of the consumer. Any compulsory standardization of complaint handling beyond dispute resolution procedures would also for direct complaint handling shift the focus more to the legal claims which would have to dominate the outcome of the complaint. This would entail consumers losing what is for them an advantageous accommodating stance on the part of savings banks and rob those savings banks of a key CRM tool. And all this even though existing, statutory regulations provide sufficient opportunity for a legal redress of complaints, because there is access to out-of-court dispute resolution bodies and complainants can always opt for legal action. The Consultation Paper itself comes to the conclusion that there are no deficits in complaints management within the banking sector which would nevertheless justify further regulation.

d) Absence of statutory regulatory powers and absence of regulatory needs in the banking sector

Since the scope covered by the guidelines is already subject to statutory regulation by the ADR Directive currently being enacted at the national level and there is no consumer interest in further-reaching regulation, ESMA and the EBA have, from the German Savings Banks Association's perspective, no regulatory competence for the Draft Complaint Guidelines.

Any regulations of the supervisory authorities coming within the scope of the ADR Directive before this has been implemented at the national level are legally problematical in the opinion of the German Savings Banks Association, because it is first up to national legislators to implement the re-

quirements of the Directive. It will then be the supervisory authorities' role to monitor compliance with those statutory regulations.

In the banking sector, there are no statutory requirements for complaint management above and beyond Art. 42(7) and 83 of the Payment Services Directive (PSD) and the ADR Directive. The German savings banks already have out-of-court dispute resolution bodies that satisfy the existing statutory regulations and provide the information required by law. As the Consultation Paper itself says, there are no complaints management deficits in the banking sector, and hence there is no further need for regulatory measures, either.

Nor do the German savings banks see a need for regulation in the uniform approach to complaints management sought by ESMA and the EBA for the banking, securities and insurance segments. Here, it is in itself questionable to what extent the EIOPA Complaint Guidelines, which were published before adoption of the ADR Directive for the insurance segment, could still serve as the basis for harmonising regulations in several sectors once the ADR Directive imposes legislative regulation of the scope covered by those guidelines. On the one hand, the insurance segment will have European-wide statutory regulations for the reconciliation of disputes between consumers and companies under the ADR Directive; on the other hand, those European-wide regulations will thus already apply uniformly for all companies and hence also for the other sectors which ESMA and the EBA are looking to incorporate in the Draft Complaint Guidelines.

Another argument against the envisaged harmonisation is the lack of comparability of the customer relationships in the sectors to be included. Whereas investment and insurance services tend to be purchased on a case-by-case basis following a comparison of the terms and conditions of other providers, banking services are typically resorted to under a long-term customer relationship. By dint of these special long-term bank-customer ties, maintaining and, where appropriate, restoring customer satisfaction is of particular importance in the banking sector.

Likewise, the circumstance that insurance, investment and other products from the other sectors to be included in the scope of the Draft Complaint Guidelines can be procured as part of a bank-customer relationship does not justify the proposed uniform complaints management, because in each case completely different company services are involved. Whilst insurance and investment products can also be sold via credit institutions (and many other intermediary firms, come to that), problems in the rendering thereof in principle have to be clarified - as customers realise - with the pertinent provider, e.g. the insurance company with respect to an insurance policy, and not with the

intermediating bank for example. The intermediary service of the credit institution also differs significantly from the various performance obligations of the insurer. In so far as the mere circumstance that insurance policies, for example, can also be procured at credit institutions would be sufficient cause for subjecting credit institutions to the complaints standards applicable for insurance companies, then by the same logic travel operators selling travel cancellation insurance or opticians selling spectacle insurance cover would also have to be included in those same standards. In actual fact, however, all these cases are based on entirely different principle contractual obligations for the service providers that justify the dissimilar handling of complaints and preclude the envisaged harmonisation.

Since different supervisory authorities are responsible in the various sectors, there is no interest in harmonisation from the supervisory body perspective either.

3. The questions in the Consultation Paper

a) Question 1: Do you agree that complaints-handling is an opportunity for further supervisory convergence?

As already discussed above, from the German Savings Banks Association's perspective there is neither a need for nor are there regulatory powers for supervisory convergence.

With the ADR Directive, there are already European-wide statutory regulations for dispute resolution for all companies in place. And as already discussed above too, regulating the handling of complaints below the level of a "dispute" within the meaning of that Directive could even be contrary to consumers' interests, from the German Savings Banks Association's perspective. Unlike perhaps when the EIOPA Complaint Guidelines were published, there are at any rate no shortcomings in complaints management that call for a legislative response.

From the perspective of the German Savings Banks Association, there is also no need to harmonise complaints management in the envisaged sectors beyond what has been laid down in the ADR Directive. Apart from the fundamental consumer-entrepreneur relationship, the sectors differ radically in their statutory requirements and also in their customer relationships and principle business obligations.

Consequently, there is also no need to harmonise the supervision of complaints management in the various sectors. The sectors to be harmonised are subject to different supervisory authorities, which monitor different customer and performance relationships and ensure compliance with the various different statutory requirements. Simplifying the workload of the various supervisory authorities does not necessarily require the harmonising of supervisory practices beyond the boundaries of the authorities in question.

With respect to complaint management which also comes within the scope of the ADR Directive, this would in particular forestall the supervisory convergence in the national implementation of the ADR Directive. Art. 18 of the Directive requires the Member States to nominate the national competent authorities, which in turn report directly to the Commission. Accordingly, from the German Savings Banks Association's perspective, ESMA and the EBA lack the powers for bringing about the intended supervisory convergence.

Supervisory convergence for complaint management would, at the least, have to take into account the different statutory requirements in the various sectors and therefore could only follow the statutory requirements valid in all the sectors to be harmonised as its orientation. Extending statutory requirements in individual sectors to other sectors, as envisaged with the Draft Complaint Guidelines in particular to the detriment of the banking sector, is not permissible as the required statutory basis is lacking. A fundamental argument against the harmonisation of supervisory practices in various sectors is that harmonisation would only be possible on the basis of the lowest standard in all those sectors.

b) 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.

- **Guideline 1 "Complaints management policy"**

Where there are disputes with credit institutions, consumers have access to – mostly external - out-of-court dispute resolution bodies whose activities are laid down in codes of procedure. From the perspective of the German Savings Banks Association, these codes of procedure, to which the credit institutions affiliated to the dispute resolution bodies accede, constitute in themselves complaints management policies in the sense of the Draft Guidelines. Some credit institutions have additional internal policies for complaint management. In so far as access to regulated out-of-court dispute resolution is assured, it should however remain an individual

company decision whether an additional internal complaint management policy is to be put in place or whether complaints will be handled individually outside a lodged complaint.

- **Guideline 2 "Complaints management function"**

Effective complaint handling as envisaged with the Complaint Guidelines does not presume, from the German Savings Banks Association's perspective, a complaints management function within a company. Particularly by outsourcing dispute resolution to dispute resolution bodies at the association level, German savings banks are assuring, even before the ADR Directive comes into force, effective dispute resolution through independent and impartial arbitrators with a wealth of expertise. External dispute resolution bodies can normally meet the fair and impartial complaints management called for by Guideline 2 better than internal complaints managers. At any rate, to meet these criteria, internal complaints managers would have to keep a certain distance from the matter at issue, which especially in smaller institutions is often organizationally infeasible and would certainly trigger considerable administrative costs. Similarly, the question whether an internal complaint management function should be set up or the complaint management outsourced should therefore remain a decision to be taken by the individual companies.

- **Guideline 3 "Registration"**

The registration obligation envisaged with Guideline 3 meets with reservations within the German Savings Banks Association in particular because it is unclear what is to be registered and because the registration of unwritten complaints would entail considerable additional administrative costs.

There are already retention periods for credit institutions' written correspondence which apply for written complaints as well. The registration obligation envisaged with Guideline 3 is unclear concerning its extent due to the vague and broad definition of complaint in the guidelines. As "any statement of dissatisfaction" oral expressions of dissatisfaction, even if cleared up before the dispute stage, would also have to be registered in writing with considerable administrative costs. On the other hand, complaints which must be recorded as per the definition of complaint cannot be clearly distinguished from demanding or insistent queries or questions.

- **Guideline 4 "Reporting": forestalls ADR reporting duties**

Apart from the problems with registering vaguely defined "complaints" already described under Guideline 3, corresponding reporting duties would at any rate increase the administrative costs for the banking sector. In addition, there is from the German Savings Banks Association's perspective no regulatory need for the reporting duties envisaged in Guideline 4, because the ADR Directive already lays down reporting duties by the out-of-court dispute resolution bodies to the competent ADR authorities.

For the national supervisory authorities responsible for ensuring compliance with the statutory regulations, reportable complaint figures are on the other hand meaningless, because those complaint figures also contain unjustified complaints and thus give no indication of any failure to comply with statutory provisions.

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

The German savings banks are very keen to continuously optimise their product pallet and align it to the wishes of its customers. Here, complaints can deliver key insights into customer wishes, whereby the decision as to how far they should be included in designing products should remain part of the companies' entrepreneurial freedom. From the perspective of the German Savings Banks Association, companies should only have a duty to remove the root causes of complaints where these constitute a breach of statutory regulations. Guideline 5 therefore ought to be restricted to remedying root causes of complaints which arise from failing to comply with statutory regulations.

- **Guideline 6 "Provision of information"**

The ADR Directive already imposes comprehensive information duties on the companies about out-of-court dispute resolution bodies and their procedures which are at least on a par with those in Guideline 6. The German savings banks already draw the attention of their customers to their reconciliation offerings in contracts and also in their general terms and conditions. From the perspective of the German Savings Banks Association there is therefore no need for the largely parallel regulations in Guideline 6.

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

The regulations on responding to complaints in Guideline 7 again throw up the question as to the delimitation to the ADR Directive requirements, because the ADR Directive already contains similar regulations to those in Guideline 7 and these are in the opinion of the German banking sector completely adequate. In particular, Article 13(3) of the ADR Directive contains a provision whereby consumers are to be provided with information about the ADR entity when a complaint submitted directly by the consumer to the trader could not be settled. It is, on the other hand, unclear what is meant by the "final decision" of the firm in Guideline 7 d), upon which information about further possibilities, such as for example an available ADR mechanism, is to be provided, because in every stage of an ADR mechanism the firm may accede to a request. Nor can every "complaint" within the meaning of the broad definition of complaint in the Draft Guidelines even be answered and laying down of time limits is unworkable from the German Savings Banks Association's perspective due to the differing complexity of complaints.

c) Question 3: Do you agree with the analysis of the cost and benefit impact of the proposals?

Unlike the analyses in the Consultation Paper, we anticipate considerable additional costs for credit institutions due to the Draft Guidelines. In particular, in so far as meeting the regulations of the ADR Directive does not suffice for Draft Guidelines 1 and 2 as well and internal complaints management functions and policies have to be set up in addition to the mostly externally organised ADR entities and their codes of procedure, this would cause considerable costs. In the opinion of the German Savings Banks Association, setting up a complaint management function would not incur only "very low one-off costs", but would on the contrary entail permanent additional administrative costs, which would be considerable in particular for smaller credit institutions and savings banks.

The envisaged registration duties too would trigger considerable additional administrative cost, above all due to the required registering of non-written complaints as well. The envisaged information and complaint response arrangements in Guidelines 6 and 7 would cause considerable additional costs for German savings banks too, in so far as these requirements cannot be met by satisfying the ADR Directive requirements.

d) Please provide any evidence or data that would further inform the analysis of the likely cost and benefit impacts of the proposals?

Additional duties tend to lead to additional costs, so that regulations above and beyond the ADR Directive would definitely entail additional costs for the affected companies. At the present point in time, it is not possible to present robust figures. Regulation of complaints management above and beyond the ADR Directive is from the German banking sector's perspective not required and therefore not reasonable either.