POLISH BANK ASSOCIATION

PBA's comments to the ESMA Consultation Paper on "Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements "

Q1: Do you agree with the suggested approach on providing information about the purpose of the appropriateness assessment? Please also state the reasons for your answer.

We have one question according to the proper understanding of the Guideline 1 point 14 tiret 2: *" Information regarding the situations where no assessment will be done (i.e. where the client does not provide the information requested or such information is not sufficient to conduct the appropriateness assessment or where services are provided under the execution-only exemption) and the consequences thereof."*

Is it generally allowed that the investment firm provide for in their internal policies, the situation where no assessment will not be possible (for instance where the validation rules- especially in online channels – don't allow to skip questions or give no answer by the client) ?

We also consider, that it is crucial to underline in the Guidelines that investment firms are allowed to choose the tool to deliver the information to the client. We would like to advocate for adequate level of flexibility to allow investment firms to choose the most suitable and efficient form of delivering the information. Therefore, we do not support the requirement to keep a record of the information provided Moreover, from the practical point of view it could be impossible to keep the proof that the client have seen the information on the appropriateness assessment.

Q2: Do you agree with the suggested approach on the arrangements necessary to understand or warn clients? Please also state the reasons for your answer.

We have some doubts about the approach proposed by ESMA. First, we see some inconsistency between not encouraging the client to re-take the questionnaire within a certain period of time and the guidelines for updating data (Guideline 5).

Moreover, we are wondering about the effectiveness of the solutions suggested by ESMA relating to creating temporary *cooling-off periods* for the client before the next taking the questionnaire. In practice, this may mean that different investment firms will apply different *cooling-off periods* and in some institutions clients will be able to start filling the questionnaire after a longer or shorter break. Such arbitrariness may also lead to uncertainty on the market as to how long such a period should be.

We also have doubts about the effectiveness of limiting the number of attempts the client has to complete the appropriateness test, because we don't know what should be the behavior of the institution if the client would use all of the possibilities for re-filling the test. Moreover, we consider, that mechanisms that allow the client to correct the answer should remain an important option.

Q3: Do you agree with the suggested approach on the extent of information to be collected from clients? Please also state the reasons for your answer.

1.
In this point we would like to underline the key role of the proportionality principle in the proper understanding of those Guidelines.
In line with this principle the scope of information requested from the clients on their knowledge and experience should vary according to the level of complexity of the particular products, while taking into account the level of product information.

It is the investment firm obligation to assess which set of instruments should be considered appropriate for a specific group of clients with the same level of knowledge and experience. Therefore, investment firms can and should create a questionnaire that assesses the clients' general understanding and experience in a specific area.

2.
Taking above-mentioned issues into consideration, we have got doubts if that the current wording of paragraph 26 of the consulted document:

"Considering the type and characteristics of investment products, firms should ask for more in-depth information on a client's knowledge and experience when non-advised services are provided in relation to more complex or risky products as compared to less complex or risky products. After all, assessing a client's capacity to understand the risks associated with more complex or risky products will require more in-depth information from the client. It is important to clarify that in this context, ESMA is referring to complexity as a relative term."

and 32 of the proposed guidelines

"When providing access to more complex or risky investment products, firms should carefully consider whether they need to ask more in-depth information about the client's knowledge and experience than they would ask when less complex or risky investment products are at stake. This should enable firms to,

on the basis of the answers provided, assess the client's capacity to understand the risks associated with such instruments. For such investment products with a high level of complexity or risk (for example, derivatives or leveraged products).Firms should carry out, on the basis of the answers provided, a reliable assessment of the client's knowledge and experience, including, for example, his ability to understand the mechanisms which make the investment product "more complex", whether the client has already traded in such products, the length of time he has been trading them for, etc."

goes beyond the relevant provisions of MiFID II by using the reference to the "more risky products". Therefore we suggest the change of this term into more suitable: "more complex products".

Q4: Do you agree with the suggested approach regarding the appropriateness assessment relating to a service with specific features (paragraph 34 of the Guidelines)? In particular, do you agree with the examples provided (bundled services and short selling), or would you suggest including other examples? Please also state the reasons for your answer.

We don't agree with the suggested approach.

Our understanding of proposed Guideline lead us to the conclusion, that the guideline is going further than the requirements established at the level 1 regulation. It seems to be more on the suitability assessment topics (covered rather by the ESMA Guidelines on certain aspects of the MiFID II suitability requirements), which covers the clients whole situation. We consider, that this isn't necessarily when it comes to the appropriateness assessment, because in this case focus should be put on the particular type of products or services. More detailed analysis should be provided rather providing tin the case of advice services. In our opinion for the simple financial products the examination of knowledge and experience of the clients should be also more simple and the scope of selected information should be narrower.

We would like also raise doubts concerning obligation to examine appropriateness of ancillary services, that are bundled with investment products. In our opinion knowledge and experience of ancillary services are not as relevant as for investment services. For example, if a firm intends to provide execution of orders on behalf of clients and safekeeping and administration of financial instruments for the account of clients, this bundle of services will not have different risk than each of its component.

Q5: Do you agree with the suggested approach on the reliability of client information? Please also state the reasons for your answer.

First, we do not see the full application of the rule of proportionality in this area. In our opinion for the simple financial products the examination of knowledge of the clients should be also more simple.

Secondly, we have got doubts in the real possibility of verification the integrity, correctness and consistency of the information collected form the clients,

because it is not possible to check the reliability of the transaction's history from other service providers. Actually, in those cases the client is the only source of the information.

Finally, we assume that the examination should be limited to obvious inconsistencies only. We see no justification for adding an obligation to cross-check information collected from different services.

Q6: Do you agree with the suggested approach on relying on up-to-date client information? Please also state the reasons for your answer.

We don't agree with the suggested approach.

In our opinion requirements that two staff members should review and approve cases where an update of clients data results in a higher level of knowledge and experience is pointless, when examination of knowledge and experience is objective. If case review is based on objective information and without any additional discretionary powers included, there is no need to examination from two employees. Suggested approach would generate additional costs without improvement of the services quality.

Finally, we would like to point out that there is a lack of explanation of differences between the need of up-to-date client information and the need to mitigate the risk of inducing the client to update his level of knowledge or experience so as to **make a certain investment product appear appropriate (point 45).**

Given the current proposal (Guideline 5 point 43: will it is possible that the investment firm sends the last questionnaire that already contains client's answers and the client, in case when some of these have to be revised, can change only these ones, without a necessity to fill it wholly out once again?

In other words, whether the client can use his last questionnaire that will be provided in editorial version to make only such changes that will assure that the information is still accurate?

Q7: Do you agree with the suggested approach on client information for legal entities or groups? Please also state the reasons for your answer.

We don't agree with the suggested approach.

In our opinion requirements to examine knowledge and experience representatives of the legal entities is too extensive. In Polish law, these requirements would result in the obligation to examine all members of the Management Board. In many case the Management Board delegates a special representative (or specific member of the Management Board) for managing all issues related to investment services and – in our opinion -only this person should be examined. Examination of the Management Board would consume a lot of time, which does not contribute to the quality of the services, when they are not engaged in the services. We also emphasise that it should be the right

of the legal entity to delegate a representative/ a proxy to the contacts with bank or investment firm.

Moreover, we see some parallels with the rules from suitability guidelines when we consider the topic of appropriateness. We argue that requirements should not be transferred from the area of suitability to the area of appropriateness.

Q8: Do you agree with the suggested approach on the arrangements necessary to understand investment products? Please also state the reasons for your answer.

We partially agree with the suggested idea.

In general, we agree with the idea, but in our opinion the suggested approach is too much detailed and in the most it does not contribute to the quality of the services. A level of granularity should be connected with collected data from the client. We have to consider we can collect only limited scope of data from clients to assess appropriateness, because in general client don't intend to reveal too much information the client would not reveal too much information about him. On the other hand also the questionnaire must be adapted to the capacity of human focus.

So the question is whether we would have sufficient data from client to determine appropriateness with such a level of granularity of investment products. Also, requiring investment forms to verify external data can be very costly and time-consuming without any practical additional value or improvement of consumer protection level.

Q9: Do you agree with the suggested approach on the arrangements necessary to assess the appropriateness of an investment or else issue a meaningful warning? Please also state the reasons for your answer.
N/A

Q10: Do you agree with the suggested approach on the effectiveness of warnings? Please also state the reasons for your answer.

We don't fully agree with the suggested approach.

In our opinion the investment firm should only issue a meaningful warning. Obligation to forbid transaction seem to be too extensive and It could violate rights of clients to conduct a transaction. It may cause wrongful competition between investment firms, as some clients will look for entities that will not prevent them from concluding transactions due to lower level of consumer protection. Furthermore, it should be noted that the above risk should be managed at the level of the conflict of interest management system as well as the product governance policy, but should not lead to the prohibition of the client from concluding the transaction.

We oppose any obligation to introduce rules that would ultimately prevent or restrict clients from investing in certain financial instruments according to their wishes. MiFID II rules don't provide a basis for such restrictions. Rather we see

the clients right to be warn and still to have to possibility to proceed the transaction. Market participants need rather the clear statement that the transaction shall be still possible for the client after getting a warning.

Also, we have problem with the understanding the rule stablished in the point 71:
"In this context, firms should have policies and procedures identifying ex-ante whether there are any conditions and criteria under which a client would not be allowed to proceed with a transaction after having received a warning. For example, a firm could take into account situations where there is a heightened risk of conflicts of interest because the firm is selling its own investment products (or investment products issued by entities of the same group) or actively marketing investment products from within the firm's range. Another factor that could be considered is a high level of complexity or risk of products offered or demanded. Furthermore, firms should evaluate the overall effectiveness of the warnings issued on an ex-post basis, for instance, by assessing the ratio of warnings that were followed by a transaction to the total of all warnings issued, and should make adjustments to their relevant policies and procedures where necessary."

One can't expect from the investment firm to have policies and procedures identifying ex-ante whether there are any scenario when a investor would not be allowed to proceed a transaction after having received a warning. We assume that this type of approach will lead us to the point when investment firm will ban particular transactions for particular clients only based on ex ante analysis. We fully support and understand the need for maximum protection of investors' interests, but their expectations and the comfort of receiving the product / instrument they expect should also be taken into account.

Q11: Do you agree with the suggested approach on the qualifications of firm staff? Please also state the reasons for your answer.
N/A

Q12: Do you agree with the suggested approach on record-keeping? Please also state the reasons for your answer.
N/A

Q13: Do you see any specific difficulties attached to the requirement to keep records of any warnings issued and any corresponding transactions made by clients?
N/A

Q14: Do you agree with the suggested approach on determining situations where the appropriateness assessment is needed? Please also state the reasons for your answer.
N/A

Q15: Do you agree with the suggested approach on controls? Please also state the reasons for your answer.
N/A

Q16: When providing non-advised services, should a firm also assess the client's knowledge and experience with respect to the envisaged investment product's sustainability factors and risks? If so, how should such sustainability factors and risks be taken into account in the appropriateness assessment? Please also state the reasons for your answer.

In our opinion sustainability factors and risks are inconsistent with the criteria of the knowledge and experience. The role of the investment firm when providing services based on execution of orders are different. Sustainability factors and risks could be considered when provide investment advice.

When the firm executes the orders of the clients it should be neutral, that means don't interfere in the client's investment decisions. Such approach could lead to the wrong impression of the client and could make the blurry line between the knowledge and the preferences of the clients. Using sustainability factors and risks as criteria during appropriateness assessment could cover the scope of the investment advice. It is worth to mention that including such a factor would contribute to the price of the services, but it would be also difficult to achieve with financial instruments issued by small and medium companies, which are not obligate to publish such a range of information. This could also adversely interfere in the financing of small and medium companies.

Moreover, at this moment the market of sustainable investment or products is just in the stage of development, therefore it is difficult to create now a sufficient scope of questionnaires for the clients.

Finally, we have got doubts what will be the outcome of such activity and what will be the benefit of assessing the client's knowledge and experience with respect to the envisaged investment product's sustainability factors and risks. We consider that sustainability factors should be taking into consideration in the advisory services.

Warsaw, 24 April 2021