Nederlandse Vereniging van Banken

ESMA

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Subject: NVB response to ESMA Consultation Paper on Guidelines on certain aspects of the MiFID II suitability requirements

INTRODUCTION

The Dutch Banking Association ('NVB')[1] thanks you for the opportunity to provide you with feedback on the consultation paper 'guidelines on certain aspects of the MiFID II suitability requirements' ("the guidelines"). In order to support ESMA in the process leading to the guidelines, we are pleased to share our comments.

GENERAL REMARKS

Convergence of European suitability standards
The NVB generally supports ESMA's aim to update the existing guidelines. ESMA clearly indicated that the purpose of the draft guidelines is to enhance clarity and foster convergence in the implementation of certain aspects of the new MiFID II suitability requirements, replacing the existing ESMA guidelines on the same topic, issued in 2012. And particularly we understand that these guidelines aim to create more convergence between European supervisory authorities across the EEA.
If convergence within the EEA is highly desirable, please note that in the Netherlands, the Dutch Authority for the Financial Markets (AFM) has issued several guidance notes ("*Leidraden*") in relation to suitability requirements, which also forms the basis for their supervision. The AFM guidance on the same topic goes beyond, i.e. provide stricter rules and more obligations, than the ESMA suitability guidelines. AFM guidance on suitability requirements seems to reflect overall financial planning for the client rather than strict application of suitability requirements under MiFID II. For the Dutch market participants it is therefore sometimes difficult to assess which rules should prevail and should be applied. Although such guidance may be similar, they are not completely the same. Such national differences hinder the fostered convergence in the European market.

Timing
Furthermore, it should be noted that because of the timing of this consultation, compliance with new or amended suitability requirements may not be reached as of the start of entering info force date of MiFID II. One should be aware that Dutch banks are preparing themselves for the final stage of implementing MiFID II. Hence, any amendments of changing views with regard to suitability requirements may not be implemented in time or not implemented correctly. Furthermore, because of the close link and interdependency with MiFID II requirements such as product governance, aggregated costs disclosure and knowledge competence requirements shall make effective implementation of suitability requirements in time even more complex.

Robo-advice
A number of the ESMA guidelines relate to robo-advice defined on page 38 of the guidelines.
First of all, the question arises whether more specific details or guidelines on robo-advice in connection with suitability requirements should not be awaited or depended on further legislative EU developments.

[1] The Dutch Banking Association (NVB) is the representative voice of the Dutch banking community with around 70 member firms, large and small, domestic and international, carrying out business in the Dutch market and overseas. The NVB strives towards a strong, healthy and internationally competitive banking industry in the Netherlands, whilst working towards wider single market aims in Europe.

Secondly, whether or not certain suitability guidelines should be applicable depends on whether processes related to the investment services are automated or not. For example, it makes a difference whether the suitability intake is automated or not. In that sense the question arises whether or not a more fundamental view should be developed by the European legislator - on a higher legislative level - how current investor protection rules in general, including suitability requirements, should be equally and proportionally be applied to robo-advice. Rather than in these guidelines.

Relevancy with regard to professional clients

We understand that these guidelines not only address situations where services are provided to retail clients, but these guidelines should also be considered as applicable - to the extent they are relevant -when services are provided to professional clients. With due regard to what is mentioned sub 3 of Annex III (Guidelines) it remains unclear to us to what extent these guidelines should be relevant when services are provided to professional clients.

Taking into account article 54 paragraph 3 of Commission Delegated Regulation 2017/ 565, we understand we can assume the necessary knowledge and expertise of professional clients and in case of investment advice for per se professional clients, the financial ability to bear any related investment risk consistent with the investment objectives of that client. Therefore the suitability assessment of professional clients will be focused on investment objectives of the client including client's risk tolerance. Although the range of requirements and the nature of these clients is different, this consultation paper doesn't give much attention (only in paragraph 38 and 39) to how suitability should be applied in relation to investment advice and portfolio management for professional clients. When providing advisory services to professional clients, we believe that the financial position may be relevant for the purpose of assessing the investment objective (see paragraph 39), but not for the purpose of assessing whether the client is able to bear potential losses or not. Hence, obtaining such information serves another purpose.

A far more light touch and proportional approach should be possible in this situation without elaborated questionnaires to be filled in by the professional clients.

Proportionality

NVB also welcomes that ESMA in the Consultation Paper emphasizes the need for proportionality, taking into account the nature and complexity of the financial instruments as well as firm's different business models and their clients' needs. But more in particular, proportionality in light of the context of providing advisory or portfolio services related to the mass retail for which such services may become too expensive as a result of inter alia strict suitability requirements is essential. Hence, with that in mind, we recommend to reflect this in the guidelines. We believe that the nature of the service in some cases should enable firms to collect less information about the client. This should be the case where a firm offers a quick simple investment advisory proposition with only a limited number of quite simple non-complex investment products, such as certain UCITS funds, to its mass retail clients. Or where the advice or portfolio management services relate to a small amount of money for the client or relates to very specific purpose based on which a full client intake of all suitability requirements should not be necessary.

Furthermore, as an example we believe that the proposed guidelines - especially the way these are elaborated in the supporting guidelines - may not be in accordance with the principle of proportionality that applies to the obligation to obtain 'the necessary information' as set forth in article 25 paragraph 2 of MiFID II.

More in particular, we believe that firms should not be obligated "to encourage clients to disclose their financial investments they hold with other firms in detail, if possible also on an instrument-by-instrument basis" as proposed in paragraph 41 of guideline 3. Besides it will be difficult for investment firms to monitor on a continuing basis the reliability of this information, that may be subject to change on a daily basis. Hence whether firms need to ask such information should be up to the discretion of the firm itself, rather than imposing these requirements as sort of good practice.

Nederlandse Vereniging van Banken

NVB RESPONSE TO THE CONSULTATION QUESTIONS

I. Information to clients about the purpose of suitability assessment

Guideline 1 - Information to clients about the purpose of suitability assessment

Relevant legislation: Article 24(1) and 24(5) of MiFID II and Article 54(1), of the MiFID II Delegated Regulation.

Q1: Do you agree with the suggested approach on the information to be provided on the suitability assessment and specifically with the new supporting guidelines on robo-advice?

General guideline 1

Paragraph 14
Firms should inform their clients about the suitability assessment and its purpose, including a clear explanation that it is the firm's responsibility to conduct such assessment, so that clients understand the reason why they are asked to provide certain information and the importance that such information is up-to-date, accurate and complete.

NVB: It is well understood that the minimum requirements for a suitability assessment should not make a distinction depending on whether the situation should be considered as 'robo-advice' or not. This also follows from article 54 paragraph 1 of the MiFID II Delegated Regulation.
The ESAs have assessed quite recently inter alia in their Joint Committee Discussion Paper on automation in financial advice (JC 2015 080 4 December 2015) the potential benefits and risks of automation in financial advice. The ESAs have concluded to determine at a later stage which, if any, regulatory and/or supervisory actions may be required to mitigate the risks while at the same time harnessing the potential benefits. It is not clear and not reasoned why ESMA is deserting the joint view of the ESAs.

As indicated in our General remarks a number of the ESMA guidelines relate to robo-advice defined on page 38.
First of all, the question arises whether more specific details or guidelines on robo-advice in connection with suitability requirements should not be awaited or depended on further legislative EU developments.
Secondly, whether or not certain suitability guidelines should be applicable depends on whether processes related to the investment services are automated or not. For example, it makes a difference whether the suitability intake is automated or not. In that sense the question arises whether or not a more fundamental view should be developed by the European legislator - on a higher legislative level - how current investor protection rules in general, including suitability requirements, should be equally and proportionally be applied to robo-advice, rather than in these guidelines.

Supporting guidelines

Paragraph 19
Firms should not use disclaimers (or other similar types of statements) aimed at limiting their responsibility for the suitability assessment in any way. For example, when collecting clients' information required to conduct a suitability assessment (such as their investment horizon/holding period or information related to risk tolerance), firms should not claim that they do not assess the suitability.

NVB: On page 40 it is stated under paragraph 19, that firms should not use disclaimers (or other similar types of statements) aimed at limiting their responsibility for the suitability assessment. This is obviously correct. However, this guideline should not prohibit firms using disclaimers at all. These statements ignore that for making an adequate suitability assessment, the client also has to meet obligations. More in particular, in case they do not provide all or the right information, the suitability assessment could be suboptimal. Clients are for example sometimes hesitant to provide information regarding their income and assets and loans with other banks.

Also if the information changes in the course of time, the clients should inform the investment firm because it can influence the suitability assessment. This is in particular important in case of a one off suitability assessment.
The firm cannot be held liable for clients not meeting these obligations and therefore should be allowed to use a disclaimer to inform clients thereof.

Furthermore, we disagree with the argument set forth by ESMA that "(…) *when collecting clients' information required to conduct a suitability assessment (such as their investment horizon/holding period or information related to risk tolerance), firms should not claim that they do not assess the suitability.*".
This statement may conflict with automated tooling with regard to execution only services, where firms offer guidance tooling for their clients for investing. Where a client is able to use suitability elements in an automated execution only tool, this should not automatically lead to a conclusion that investment advice is provided. ESMA's suggestion conflicts with the current AFM supervisory practice, where firms are being urged to provide some guidance for clients when providing for execution only services.

As to the issue on disclosure of algorithm where robo-advice is rendered, the question arises whether there is any added value in informing the clients about the algorithm. Furthermore, is it sufficient to inform that the algorithm is used, or should you also explain the algorithm (see references hereto on page 17 paragraph 39). We assume that the algorithm should not be explained, as the guideline itself does not reflect this. In this context ESMA should take a critical look as to the question whether or not such additional information requirements really has added value to the client.

II. Know your client & know your product

Guideline 2 - Arrangements necessary to understand clients

Relevant legislation: Articles 16(2) and 25(2) of MiFID II and 54(2) and 55 of the MiFID II Delegated Regulation.

Q2: Do you agree with the suggested approach on the arrangements necessary to understand clients? And specifically with how the guideline has been updated to take into account behavioral finance and the development of robo-advice models?

General guideline 2

Paragraph 23
Firms must establish, implement and maintain adequate policies and procedures (including appropriate tools) to enable them to understand the essential facts and characteristics about their clients. Firms should ensure that the assessment of information collected about their clients is done in a consistent way irrespective of the means used to collect such information.

NVB: Although we agree that the information should be collected from the client in a consistent way, ESMA should consider that the means used to collect information does affect that process. ESMA should realize and be willing to accept that online questionnaires can, due to the absence of human interaction, never be as interactive as having physical discussions with a client during a face to face meeting. Furthermore, in our experience, retail clients are only prepared to invest limited time in responding to online questionnaires. We feel that ESMA should take this into account. Particularly, related to the mass retail for which advisory services or portfolio management services becomes too expensive. Robo-advice may be in terms of costs be an alternative for mass retail, but the extent to which information should be collected for the suitability assessment should in such case be more proportionate and flexible.

Supporting guidelines

Paragraph 29
It is also important that firms appraise the client's financial literacy and understanding of basic notions such as, for example, investment risk (including concentration risk) and risk-return trade off. To this end, firms should consider using indicative, comprehensible examples of the levels of loss/return that may arise depending on the

level of risk taken, and should assess the client's response to such scenarios.

NVB: It is quite unclear how firms should appraise and assess the client's financial literacy and understanding of basic notions such as, for example, investment risk (including concentration risk) and risk-return trade of, and make this appraisal part of the suitability assessment as prescribed by ESMA in paragraph 29. Although we appreciate the issue, we recommend deleting such guidance.

Q3: Do you believe that further guidance is needed to clarify how firms should assess clients' ability to bear losses?

NVB: No further guidance is desirable on the way firms should assess clients' ability to bear losses, as we feel the manner in which the investment firm this assesses may be to the discretion of the investment firm. More in particular, the investment firm should not be required to provide the client with a number of complex calculations whether or not a client is able to bear losses. As this may suggest or implies a more financial planning obligation.

Guideline 3 - Extent of information to be collected from clients (proportionality)

Relevant legislation: Article 25(2) of MiFID II, and Articles 54 and 55 of the MiFID II Delegated Regulation.

General guideline 3

Paragraph 31
Before providing investment advice or portfolio management services, firms need to collect all 'necessary information' about the client's knowledge and experience, financial situation and investment objectives. Necessary information' should be understood as meaning the information that firms must collect to comply with the suitability requirements under MiFID II.
The extent of 'necessary' information may vary and has to take into account the features of the investment advice or portfolio management services to be provided, the type and characteristics of the investment products to be considered and the characteristics of the clients.

NVB: As noted in our General remarks, proportionality as to the extent of information to be collected from clients is essential. Particularly in light of the context of providing advisory or portfolio services related to the mass retail for which such services may become too expensive as a result of inter alia strict suitability requirements is essential. Hence, with that in mind, we recommend to reflect this in the guidelines.
We believe that the nature of the service in some cases should enable firms to collect less information about the client. This should be the case where a firm offers a quick simple investment advisory proposition with only a limited number of quite simple non-complex investment products, such as certain UCITS funds, to its mass retail clients. Or where the advice or portfolio management services relate to a small amount of money for the client or relates to very specific purpose based on which a full client intake of all suitability requirements should not be necessary. Please note that AFM supervisory practice seem to leave less room for application of the proportionality principle as set forth above.

Guideline 4 - Reliability of client information

Relevant legislation: Article 25(2) of MiFID II, and Articles 54(7), subpar. 1 of the MiFID II Delegated Regulation.

Q4: Do you agree with how the guideline on the topic of 'reliability of client information' has been updated to take into account behavioral finance and the development of robo-advice models?

General guideline 4

Paragraph 44
Firms should take reasonable steps and have appropriate tools to ensure that the information collected about their clients is reliable and consistent, without unduly relying on clients' self-assessment.

NVB: In general, we believe that - in accordance with article 55(3) of the MiFID II Delegated Regulation - investment firms are entitled to rely on the accuracy of information provided by clients or potential clients. An investment firm is permitted to rely on the information being correct, unless if it is aware or ought to be aware that "the information is manifestly out of date, inaccurate or incomplete."
The approach in this guideline suggest much more responsibility imposed upon the investment firm to verify and test information which is provided by clients, inter alia by means of a self-assessment.
It is good to note that this suggested approach may have the effect that the intake process, i.e. collecting information from clients, may become too costly and hazardous. Information provided by clients should in principle be regarded as reliable information.

Supporting guidelines

Paragraph 49
Firms should adopt mechanisms to address the risk that clients may tend to overestimate their knowledge and experience, for example by including questions about the characteristics and the risks of the different types of financial instruments. Such measures are particularly important in the case of robo-advice, since the risk of overestimation by clients may result higher when they provide information through an automated (or semi-automated) system.

NVB: ESMA suggest that the risk of overestimation by clients would be higher when information is provided through an automated or semi-automated system. Could ESMA please provide the evidence/source with regard to the statement?

Guideline 5 - Updating client information

Relevant legislation: Article 25(2) of MiFID II, subparagraph 2 of Article 54(7), and Article 55(3) of the MiFID II Delegated Regulation.

Q5: Do you agree with the suggested approach on the topic of 'updating client information'?

General guideline 5

Paragraph 50
Where a firm has an ongoing relationship with the client (such as by providing ongoing advice or portfolio management services), in order to be able to perform the suitability assessment, it should adopt procedures defining:
(a) what part of the client information collected should be subject to updating and at which frequency
(b) how the updating should be done and what action should be undertaken by the firm when additional or updated information is received or when the client fails to provide the information requested.

NVB:
It would be most helpful if more guidance would be provided regarding the definition of 'ongoing relationship'. This definition is not only decisive with regard to updating client information, but many other requirements, such as ex-post aggregated costs transparency requirements.

Guideline 6 - Client information for legal entities or groups

Relevant legislation: Articles 4(1)(9) and 25(2) of MiFID II and Article 54(6) of the MiFID II Delegated Regulation.

Q6: Do you agree with the suggested approach to conduct the suitability assessment for a group of clients? Especially where no legal representative is foreseen under applicable national laws?

General guideline 6

Paragraph 56
Firms must have a policy defining on an ex ante basis, how to conduct the suitability assessment in situations:
- where a client is a legal person; or
- where a client is a group of two or more natural persons; or
- where one or more natural persons are represented by another natural person.
This policy should clearly specify, for each of those situations, the procedure and criteria that should be followed in order to comply with the MiFID II suitability requirements.
The firm should inform its clients ex-ante clearly and accurately about its policy, including for each situation who should be subject to the suitability assessment, whether an agreement with the client is foreseen, how this assessment will be done in practice and the possible impact this could have for the relevant clients.

NVB: The 2012 general guideline on the topic of 'Client information for legal entities or groups' has been incorporated in the first subparagraph of Article 54(6) of the MiFID II Delegated Regulation. We believe that guideline 6 does not add much to what already follows from article 54(6) of the MiFID II Delegated Regulation.

The approach to be followed for the assessment of suitability of a legal person, or in cases where one or more natural persons are represented by another natural person, is detailed in the level 2 provision. With Guideline 6 guidance is provided by ESMA to clarify how suitability assessment could be conducted for a group of clients. Where the applicable national legal framework does not provide sufficient detail in this matter, firms need to adopt an approach as to how to assess the suitability for groups of clients. Consequently, we believe where the applicable national legal framework does provide sufficient detail in this matter, firms should not be obliged to adopt an approach as to how to assess the suitability for groups of clients.

Regarding paragraph 56, sentence 3, it is not clear to us what ESMA means with: 'whether an agreement with the client is foreseen'. Is this an agreement with the client as to how to conduct the suitability assessment for a group of clients? The NVB feels that this part needs to be clarified.

Supporting guidelines

Paragraph 59
The policy adopted by a firm, including with regard to agreements between clients foreseen by such a policy, should enable to suit the interests of the relevant clients, taking also into account their need for protection. Steps taken by the firm in accordance with its policy should be appropriately documented to enable ex-post controls. The policy should clearly indicate how the firm would deal with situations where the characteristics of individual clients within a group are different. Where the policy foresees agreements between clients, they should be clearly made aware of the effects of any agreement reached

Situations where a representative is foreseen under applicable national law

Paragraph 60
Subparagraph 2 of Article 54(6) of the MiFID II Delegated Regulation defines how the suitability assessment should be done with regard to situations where the client is a natural person represented by another natural person or is a legal person having requested treatment as a professional client.
It seems reasonable that the same approach should apply to all legal persons, regardless of the fact that they may have requested to be treated as professionals or not.

NVB: With regard to the part "it seems reasonable that the same approach should apply to all legal persons, regardless of the fact that they may have requested to be treated as professionals or not" (paragraph 60, p. 53), there is no legal basis to extend the scope further than prescribed by law.
A firm should establish and implement policy as to who should be subject to the suitability assessment and how this assessment will be done in practice. However, with this extended scope ESMA restricts the firms to make their own risk-based decision regarding the suitability assessment of legal persons.
Furthermore, the monitoring of per se professionals differs from the monitoring of elective professionals, which in itself would justify a different approach. Therefore we kindly request ESMA to delete this addition.

Situations where no representative is foreseen under applicable national law

Paragraph 63

Approaches such as the following could possibly be considered by firms:
(a) they could choose to invite the group of two or more natural persons to designate a representative; or,
(b) they could consider collecting information about each individual client and assessing the suitability for each individual client.

NVB: The NVB agrees with the suggested approach to conduct the suitability assessment for a group of clients. Especially where no legal representative is foreseen under applicable national laws.

For the NVB paragraph 63 option (a), is the preferred solution: firms could consider choosing to invite a group of two or more natural persons to designate a representative. However, with regard to paragraph 63, option (a), it is not clear to us how a firm can practically meet the requirements of ESMA, in paragraph 59:
- to suit the interests of (all) the relevant clients, taking also into account their need for protection; and
- to deal with situations where the characteristics of individual clients within a group are different.
The NVB feels that this needs to be clarified. If the group of two or more natural persons agrees to designate a representative, it should consequently be the sole responsibility of the designated representative - and not the responsibility of the firm - to meet the requirements (in paragraph 59) on behalf of all the individual clients within the group.

According to paragraph 63 option (b), firms could also consider collecting information about each individual client and assessing the suitability for each individual client. Especially when the client is a group of two or more natural persons and no representative is foreseen under applicable national law, this approach seems very unpractical to us and will probably result in significant costs, associated with among other things staffing and IT development.
For example, when collecting information and assessing the suitability of each individual client within the group, relevant differences between the individual clients could occur, that should in fact result in a different investment profile for each individual client. Then of course the question arises about how the firm in practice can comply with
the MiFID II overarching principle of acting in the clients' best interests. Hence, option (b) should not be mandatory.

<u>Inviting the group of two or more natural persons to designate a representative</u>

Paragraph 64
If the group of two or more natural persons agrees to designate a representative, the same approach as the one described in subpar. 2 of Article 54(6) of the MiFID II Delegated Regulation could be followed:
the knowledge and experience shall be that of the representative, while the financial situation and the investment objectives would be those of the underlying client(s).

NVB: The NVB agrees with the suggested same approach that could be followed, if a group of two or more natural persons agrees to designate a representative, as described in subpar. 2 of Article 54(6) of the MiFID II Delegated Regulation.
The knowledge and experience should be that of the representative. From our point of view, more specific however, regardless the level of knowledge and experience of each of the individual clients within the group of two or more natural persons. Furthermore the financial situation and investment objectives would be those of the underlying clients; however as agreed upon with the designated representative on behalf of all the individual clients within the group. Hence, the investment firm should not be obliged to collect information on the financial position and investment objectives etc. from each and every individual client.

Paragraph 65
The firm's policy could however require the underlying client(s) to agree on which financial situation should be taken into account and on their investment objectives. Where the client is a couple, the firm's policy should take into account the matrimonial regime applicable to that couple.

NVB: We believe the firm should not be obliged to require the underlying clients to agree on which financial situation should be taken into account and on their investment objectives. Nor should the firm be obliged to take into account the applicable matrimonial regime where the client is a couple. Couples should be treated as any other group of clients.

The firm should be able to fully rely on the designated representative, who is responsible for a situation where there is no agreement between the underlying clients or where the financial situations of the individual persons

belonging to the group differ. From our point of view, the designated representative is responsible for taking into consideration the interests of all the persons concerned and the most relevant person in this respect.

The NVB agrees with paragraph 65 ('the firm's policy could however require the underlying clients to agree on which financial situation should be taken…'); a group of 2 or more natural persons should always have the choice to agree on whose financial situation should be taken into account, even when the financial situation differs.

Paragraph 66
If the parties involved have difficulties in deciding the person(s) from whom the information on knowledge and experience or on the financial situation should be collected for the purpose of suitability assessment or on defining their investment objectives, the firm should adopt the most prudent approach by taking into account the information on the person with the least knowledge and experience, the weakest financial situation or the most conservative investment objectives. Alternatively, the firm's policy may also specify that it will not be able to provide investment advice or portfolio management services in such a situation.

NVB: If parties in fact have difficulties in deciding from whom the information on knowledge and experience or on the financial situation should be collected, for the purpose of suitability assessment or on defining their investment objectives, the firm should not be obliged to adopt the most prudent approach (as mentioned in paragraph 66, by taking into account the information on the person with the least knowledge and experience, the weakest financial situation or the most conservative investment objectives). We believe it the sole responsibility of the clients themselves - and not the responsibility of the firm - deciding from whom the information on knowledge and experience or on the financial situation should be collected and on defining their investment objectives.
Moreover, firms indeed may better consider refraining from providing investment advice or portfolio management services in such a situation.

Guideline 7 - Arrangements necessary to understand investment products

Relevant legislation: Articles 16(2) and 25(2) of MiFID II, and Article 54(9) of the MiFID II Delegated Regulation.

Q7: Do you agree with the suggested approach on to the arrangements necessary to understand investment products for the purposes of suitability assessment?

General guideline 7

Paragraph 68
Firms should ensure that the policies and procedures adopted to understand the characteristics, nature and features (including costs and risks) of investment products allow them to recommend suitable investments, or invest into suitable products on behalf of their clients.

NVB: The NVB does not agree with (certain aspects of) the suggested approach on to the arrangements necessary to understand investment products for the purposes of suitability assessment.
The NVB understands that ESMA has introduced this guideline to expand on the 'know your product' aspects of suitability assessment that in the 2012 guidelines were addressed. This however, has already been sufficiently incorporated in article 54(9) of the MiFID II Delegated Regulation, that provides that: 'firms shall have, and be able to demonstrate, adequate policies and procedures in place to ensure that they understand the nature, features, including costs and risks of investment services and financial instruments selected for their clients'. Furthermore, the relevance of this guideline in fact has been diminished to a large extent due to the MiFID II provisions on Product Governance. Therefore, we believe additional guidance with this guideline and supporting guidelines is not needed. We recommend removing General guideline 7 and supporting guidelines.

Supporting guidelines

Paragraph 73
In addition, firms should review the information used so as to be able to reflect any relevant changes that may impact the product's classification. (…).

Paragraph 74
The elements used for the classification of products for the purposes of suitability assessment should be consistent with those used for the purposes of the identification and assessment of the target market in accordance with requirements on product governance.

NVB: The classification of products and categorizing financial instruments for the purpose of identifying the target market is governed by the final ESMA report regarding guidelines on MiFID II Product Governance Requirements. And should not by governed General guideline 7 and Supporting guidelines thereto. Furthermore, the classification of products is for the purpose of identifying the target market, but not for purposes of the suitability assessment. There is in fact no legal obligation to classify products for the purposes of suitability assessment on level 1 or 2.

III. Matching clients with suitable products

Guideline 8 - Arrangements necessary to ensure the suitability of an investment

Relevant legislation: Article 16(2) and 25(2) of MiFID II and Article 21 of the MiFID II Delegated Regulation.

Q8: Do you agree with the additional guidance provided with regard to the arrangements necessary to ensure the suitability of an investment?

General guideline 8

Paragraph 75
In order to match clients with suitable investments, firms should establish policies and procedures to ensure that they consistently take into account:
a) all available information about the client necessary to assess whether an investment is suitable, including the client's current portfolio of investments (and asset allocation within that portfolio);
b) all material characteristics of the investments considered in the suitability assessment, including all relevant risks and any direct or indirect costs to the client.

NVB: The guideline confirms the main content of 2012 guideline on the topic of 'arrangements necessary to ensure the suitability of an investment. The rationale behind it has in fact remained unchanged. Some additional guidance has been provided on the issue of concentration risk.

According to general guideline 8, paragraph 75, in order to match clients with suitable investments, firms should establish policies and procedures to ensure that they consistently take into account: all available information about the client necessary to assess whether an investment is suitable, including the client's current portfolio of investments and asset allocation within that portfolio.
We refer to our General remarks, specifically regarding the principle of 'proportionality'. The available information about the client, necessary to assess whether an investment is suitable, should of course be relevant.
Therefore we recommend changing the sentence 'take into account all available information' into 'take into account all available *relevant* information'. We believe that the nature of the investment service in some cases should enable firms to collect less information about the client.

Furthermore, if it is meant that the portfolio of the client includes any financial investments they hold, also with other firms, we do not agree with this approach to ensure the suitability. A firm could be aware of other investments of the client with other firms, but should not be required to request such information.
Moreover, even if the firms should take into account the amount of assets invested by other firms, the firm should however not be required to take into account the 'asset allocation' of these assets invested by other firms.
We believe that firms should not be obliged "to encourage clients to disclose their financial investments they hold with other firms in detail, if possible also on an instrument-by-instrument basis" as proposed in paragraph 41 of guideline 3. We believe it will be difficult for investment firms to monitor on a continuing basis the reliability of this information that may be subject to change on a daily basis. Hence, whether firms need to ask such information should be up to the discretion of the firm itself, rather than imposing these requirements as sort of good practice.

Supporting guidelines

Paragraph 78
In this regard, the tools should be designed so that they take account of all the relevant specificities of each client or investment product. For example, tools that classify clients or investment products broadly would not be fit for purpose.

NVB: We agree that tools could be designed so that they take into account all the relevant specificities of each client. For example, a tool designed in order to determine the risk profile of a client, that could score each part of the information necessary for a suitable assessment thereto (e.g. financial situation, investment goals, investment horizon, risk appetite and ability to bear losses). But ESMA should realize that the end result for the client normally will only be one of a limited number of standard risk profiles of the firm.

Paragraph 82
When advising on the whole portfolio of the client or when providing portfolio management, firms should ensure an appropriate degree of diversification within the client's portfolio, taking into account the client's portfolio exposure to the different financial risks (geographical exposure, currency exposure, asset class exposure, etc.). In cases where, from the firm's perspective, the size of a client's portfolio is too small to allow for an effective diversification in terms of credit risk, the firm should consider directing those clients towards types of investments that are 'secured' or per se diversified (such as, for example, UCITS).

NVB: We agree with the guidance provided that firms, when advising or providing portfolio management services, should ensure an appropriate degree of diversification within the client's portfolio, taking into account the client's portfolio exposure to the different financial risks.
However, we do not agree with the suggestion (in the second sentence of paragraph 82) that the firms should consider directing clients towards types of investments that are 'secured' or 'per se diversified', in cases where the size of a client's portfolio is too small to allow for an effective diversification.
Although this could certainly be a suitable solution for some clients and quite practical from a firms' point of view, we believe however that this relates to how a firm should advise and provide portfolio management services, while in fact this goes beyond the purpose of the guidelines (to clarify the application of certain aspects) of the MiFID II suitability requirements. Therefore, we recommend removing the second sentence of paragraph 82.

Nevertheless, we generally agree with the additional guidance regarding diversification (in paragraph 82) and self-placement (in paragraph 83).

Paragraph 86
Firms providing robo-advice should also adopt and implement policies and procedures that address issues (at least) related to the following:
- The questionnaire eliciting sufficient information to allow the firm to conclude that the advice provided is suitable for the client;
- The prevention and detection of, and response to, cybersecurity threats;
- The protection of client accounts;
- The use of social and other forms of electronic media in connection with the marketing of the robo-advice services provided (e.g., websites; Twitter; remuneration of bloggers to publicize services; "refer-a-friend" programs).

NVB: We recommend removing paragraph 86, bullets 2, 3 and 4 regarding the prevention and detection of cybersecurity threats, protection of client accounts and the use of social and other forms of electronic media. We believe that this does not relate to the purpose of the guidelines of the MiFID II suitability requirements.

Guideline 9 - Costs and complexity of equivalent products

Relevant legislation: Article 25(2) of MiFID II and Article 54(9) of the MiFID II Delegated Regulation.

Q9: Do you agree with the suggested approach for ensuring that firms assess, while taking into account costs and complexity, whether equivalent products can meet their clients' profile?

General guideline 9

Paragraph 87
Suitability policies and procedures should ensure that, before a firm makes a decision on the investment product(s) that will be recommended, or invested in the portfolio managed on behalf of the client, a thorough assessment of the possible investment alternatives is undertaken, taking into account products' cost and complexity.

NVB: This guideline has been added by ESMA to address the new requirement provided by article 54(9) of the MiFID II Delegated Regulation, which requires firms to conduct an assessment, while taking into account cost and complexity, of whether equivalent products can meet their clients' profile.
We do not agree with (certain aspects of) the suggested approach for ensuring that firms assess, of whether equivalent products can meet their clients' profile, taking into account products' costs and complexity.

It is unclear to us how 'a thorough assessment of the possible investment alternatives' should be undertaken. We assume that the assessment may be limited to the investment alternatives that have been selected with due regard to Product Governance procedures and does not require the firms to extend the range of financial instruments that are being offered to its clients. We believe this should be clarified.

Furthermore, this approach relies on the assumption that a possible investment alternative is always available, which in fact for certain investment products shall not always be the case, for example when recommending or investing in more complex tailor-made investment products.

Furthermore, it has been suggested that relevant factors to identify products that are broadly equivalent could be the consideration of their target market and their risk-return profile. This approach relies on the assumption that the information about the target market, risk-return profile and costs of broadly equivalent products is always available and correct. Moreover, that firms in fact can fully rely on this information of the manufacturers of these broadly equivalent products.

For firms with a restricted range of investment products, or recommending only one type of investment product, or providing dependent advice only, so where the assessment of equivalent investment products could be very limited, we presume that firms are therefore not expected to consider the (whole universe of) possible investment alternatives in order to comply with the requirement under Article 54(9) of MiFID II Delegated Regulation. We believe in fact that this should be quite clear.

Supporting guidelines

Paragraph 91
Firms should be able to justify those situations where a more costly or complex product is recommended over an equivalent product, taking into account that for the selection process of products in the context of investment advice or portfolio management further criteria can also be considered (for example: the portfolio's diversification, liquidity, or risk level). When providing investment advice, a clear explanation of the reasons for recommending a more costly or complex product should be included in the suitability report the firm has to provide to the client before the transaction is made.

NVB: There is no legal basis for ESMA to require that in the suitability report information is included with regard to the costs or complexity of the product as is proposed by ESMA. Neither Level I and Level II, nor the MiFID II texts oblige firms to add this in the suitability report. Therefore, we believe the last sentence of paragraph 91 of the supporting guidelines should be removed.

Guideline 10 - Costs and benefits of switching investments

Relevant legislation: Article 25(2) of MiFID II and Article 54(11) of the MiFID II Delegated Regulation.

Q10: Do you agree with the suggested approach for conducting a cost-benefit analysis of switching investments in the context of portfolio management or investment advice?

General guideline 10

Paragraph 92
Firms should have adequate policies and procedures in place to ensure that an analysis of the costs and benefits of a switch is undertaken, such that firms are reasonably able to demonstrate that the expected benefits of switching are greater than the costs. Firms should also establish appropriate and proportionate controls to avoid any circumvention of the relevant MiFID II requirements.

NVB: The NVB generally agrees with the suggested approach for conducting a cost-benefit analysis of switching investments in the context of portfolio management or investment advice. We acknowledge that the arrangements included in the guidelines are particularly relevant to ensure that firms comply with their obligation to act in the best interest of their clients, specifically in situations where there is a heightened risk of non-compliant behaviors', due to the presence of conflicts of interests.
However, it would be helpful if it is included in Guideline 10, respectively the Supporting guidelines belonging hereto, that the rebalancing of a portfolio would not be considered as a switch.
Furthermore, it is unclear what could be the recommended holding period on the basis whereof it may be determined whether a switch may be beneficial from a cost-benefit perspective.

Supporting guidelines

Paragraph 93
Firms should take all necessary information into account, so as to be able to conduct a cost-benefit analysis of the switch, i.e. an assessment of the advantages and disadvantages of the new investment(s) considered. When considering the cost dimension, firms should take into account all costs and charges covered by the relevant provisions under Article 24(4) of MiFID II and the related MiFID II Delegated Regulation provisions. In this context, both monetary and non-monetary factors of costs and benefits could be relevant. These may include, for example: (…).

NVB: Usually it will be quite difficult or at least arbitrary to quantify the non-monetary costs and benefits.

Paragraph 94
When providing investment advice, a clear explanation of the reasons why the benefits of the recommended switch are greater than its costs should be included in the suitability report the firm has to provide to the client before the transaction is made.

NVB: There is no legal basis for ESMA in relevant legislation (neither in MiFID II nor article 54(11) of the MiFID II Delegated Regulation) to require that in the suitability report a clear explanation is included with regard to the reasons why the benefits of the recommended switch are greater than its costs, as is proposed by ESMA under paragraph 94 of Guideline 10. Therefore, we recommend removing paragraph 94 of the supporting guidelines.

Paragraph 95

Firms should also adopt systems and controls to monitor the risk of circumventing the obligation to assess costs and benefits of recommended switch, for example in situations where an advice to sell a product is followed by an advice to buy another product at a later stage (e.g. days later), but the two transactions were in fact strictly related from the beginning.

NVB: In practice it will be very difficult - if not impossible - to adopt systems and controls to meet the requirement to assess the costs and benefits of a recommended switch, specifically in situations where an advice to sell a product is followed by an advice to buy another product days later. Moreover, it shall not always be the case that the two transactions were in fact related, as from the moment of the first advice to sell a product.

IV. Other related requirements

Guideline 11 - Qualifications of firm staff

Relevant legislation: Articles 16(2), 25(1) and 25(9) of MiFID II and 21(1)(d) of MiFID II Delegated Regulation.

Q11: Do you believe that further guidance would be needed with regard to the skills, knowledge and expertise that should be possessed by staff not directly facing clients, but still involved in other aspects of the suitability assessment?

General guideline 11

Paragraph 99

Firms are required to ensure that staff involved in material aspects of the suitability process have an adequate level of skills, knowledge and expertise.

NVB: We agree that firms are required to ensure that all staff involved in the material aspects of the suitability process have an adequate level of skills, knowledge and expertise. They must understand the role they play in the suitability assessment process and possess the skills, knowledge and expertise necessary to discharge their responsibilities.

These requirements, however, are already contained in MiFID II, even more detailed in article 16(2), 25(1) and 25(9) of MiFID II and in article 21(1)(d) of MiFID II Delegated Regulation. Furthermore these requirements are a part of ESMA's Guidelines for the assessment of knowledge and competence (ESMA/2015/1886).

Therefore, we believe that general guideline 11 and the supporting guidelines are not needed, in order to include additional information or requirements regarding the qualifications of staff of firms giving investment advice or information about financial instruments, structured deposits, investment services or ancillary services to clients on behalf of the firm, including when providing portfolio management.

Furthermore, we believe that no further guidance is needed with guideline 11 and supporting guidelines (paragraph 99-103) with regard to the skills, knowledge and expertise that should be possessed by staff not directly facing clients, but still involved in other aspects of the suitability assessment.

It is seems obvious that non-client facing staff may also need to meet certain knowledge and competence requirements. However, we believe that the investment firm itself should be able to assess this, rather than such requirements should be prescribed by ESMA or a NCA. Moreover, further clarity should be provided on who should be regarded as staff involved in other aspect of the suitability assessment (not directly facing clients); and on the corresponding required level of knowledge and expertise. This is relevant for firms in order to determine the required level of knowledge and expertise the staff should have to comply with this guideline.

Guideline 12 - Record-keeping

Relevant legislation:
Articles 16(6), 25(5) and 25(6) of MiFID II, and Articles 72, 73, 74 and 75 of the MiFID II Delegated Regulation.

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General guideline 12

Paragraph 104
Firms should at least:
a) maintain adequate recording and retention arrangements to ensure orderly and transparent record-keeping regarding the suitability assessment, including the collection of information from the client, any investment advice provided and all investments (and disinvestments) made, and the related suitability reports provided to the client;
b) ensure that record-keeping arrangements are designed to enable the detection of failures regarding the suitability assessment (such as mis-selling);
c) ensure that records kept, including the suitability reports provided to clients, are accessible for the relevant persons in the firm, and for competent authorities;
d) have adequate processes to mitigate any shortcomings or limitations of the record-keeping arrangements.

NVB: Regarding guideline 12 (Record-keeping) no question is asked by ESMA in this Consultation Paper.

Apart from introducing some additional details specific to MiFID II, for example the reference to the suitability report and some guidance for firms providing robo-advice, ESMA has fundamentally confirmed the content of the 2012 guideline (9) on the topic of 'record keeping'. In fact the rationale behind this 2012 guideline has not changed.
The rules on record-keeping in MiFID II relate to requirements for documentation on transactions. Those rules are separate from the guidelines on the suitability requirements. However, the requirements in the supporting guidelines 107-109, regarding for example policies and procedures that could appropriately ensure the business continuity, the backup and the functioning of disaster recovery plans and arrangements to mitigate the risks of malicious cyber activity, do not relate to suitability requirements. Therefore, they should not form part of these guidelines. We recommend removing guideline 12 and the supporting guidelines (paragraph 105-109).

Q12: Do you have any further comment or input on the draft guidelines?

NVB: We refer to what is stated above, under General remarks.

Q13: What level of resources (financial and other) would be required to implement and comply with the Guidelines (market researches, organisational, IT costs, training costs, staff costs, etc., differentiated between one off and ongoing costs)?

NVB: At this stage it is difficult to comment on resources and costs.