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Consultation

The FBF's response to ESMA's consultation on the draft guidelines for the assessment of knowledge and competence

The French Banking Federation (FBF) is the professional body representing the interests of the banking industry in France. Its membership is composed of all credit institutions authorised as banks and doing business in France, i.e. more than 450 commercial and cooperative banks. FBF member banks have 40,000 permanent branches in France. They employ 400,000 people and serve 60 million customers.

Preamble

ESMA wants to harmonise on a European scale the level of knowledge and competence of staff at financial institutions who provide either advice or information on financial product to clients. FBF shares this ambition, which will help enhance consumer protection even more.

However, from the outset, we would like to raise two issues that we feel are leading to excesses that end up penalising the client:

1/ The convergence that ESMA makes between advisory, which is an investment service consisting in providing the client with a personalised recommendation, and merely giving the client information. This convergence is potentially dangerous as it blurs the lines between merely conveying information and providing investment advice. The former involves providing general information, while the latter means delivering an investment service.

"Information", as defined in item III.6.e (page 12) in particular, states that information is provided to the client in order "*to market*" a particular investment product or service. The term "*to market*" is, at best, unclear and, at worst, inaccurate. FBF believes this could only be a general marketing process in which information is provided for general purposes. However, this point has to be clarified, in order to exclude the sales act from the definition of information.

We feel that this is neither fair, nor in compliance with MiFID II. Article 25.1 of MiFID states that individual persons providing advice or information must possess the necessary knowledge or competence to meet their obligations. This article does not state that such knowledge and competence are similar. Given the vast differences, we therefore cannot agree that knowledge and competence requirements should be similar or almost similar for staff members who inform clients and staff members who advise them.

FBF wants to return to a clear definition of information, in order to differentiate it from investment advice.

2/ FBF is concerned about the change of wording along the consultation, in which staff knowledge and competence has become appropriate qualification and appropriate experience. There is not necessarily a link between knowledge and qualification, particularly for older staff, and competence is not always commensurate with experience. Otherwise, no young person would be competent. These definitions appear to be aimed at converging the level of knowledge and competence of staff who inform clients with that of staff who advise clients.

FBF also wants the MiFID II wording to be used.

Moreover, establishments are being given less than 18 months (by January 2017) to implement these changes, which is not reasonable if they must set up new models and train all their advisors in client relations.

FBF wants establishments to have at least two years for implementation.

Q1: Do you think that not less than five consecutive years of appropriate experience of providing the same relevant services at the date of application of these guidelines would be sufficient to meet the requirement under knowledge and competence, provided that the firm has assessed their knowledge and competence? If yes, please explain what factors should be taken into account and what assessment should be performed by the investment firm. Please also specify whether five consecutive years of experience should be made in the same firm or whether documented experience in more than one firm could be considered.

Reply:

FBF believes that this requirement is not reasonable and raises many difficulties.

- regarding the requirement for knowledge and competence, provided that the firm has assessed their knowledge and competence.

First, we would insist that this consultation make a distinction between what is information and what is advice.

It is important to make a distinction between information, a recommendation, and advice to determine the resulting obligations and the knowledge and competence that are necessary:

- Information is defined as an objective presentation of the facts or figures with no comment or value judgement.

- Advice is defined as the providing of personalised recommendations to a client either on his request or on the ISP's initiative. A personalised recommendation is defined as suited to the client or based on a review or analysis of his situation. Investment advice is defined as the providing of personalised recommendations regarding one or more transactions in financial instruments.

Given that these definitions are currently clearly understood and consensual, we would not want to cast doubt on them, particularly by introducing a definition of information that is not clear.

- If so, state the factors that should be taken into account, and what assessment should be performed by the investment firm.

The criteria for assessing experience should be expressed in terms of observable activity performed rather than the amount of time in the position.

The following skills could be taken into account, for example:

- ☐ know-your-client factors (his personal, net worth and tax situation, his knowledge of financial instruments, etc.);
- ☐ understanding of the client's investment need (acceptable risk, desired investment timeframe, suitability of the investment service with the knowledge of the client, etc.)
- ☐ formalisation of the sales act (i.e., traceability of items for analysis of the client's needs, the commercial proposal, and information on the product's characteristics, the recommended investment timeframe, risk exposure, theoretical average return, etc.).

- Specify whether five consecutive years of experience should be made in the same firm or whether documented experience in more than one firm could be considered.

Since 2010 France has implemented an efficient certification mechanism involving all staff concerned – salespersons, managers, clearing agents, traders, financial analysts, and compliance and internal control officers – which sector professionals would like to retain. This mechanism provides that:

- new arrivals have six months to obtain certification, internally or externally;
- a grandfather clause is provided for existing staff. It is strange to want to impose a time period for a grandfather clause, as that implies that existing staff have neither the knowledge nor the competence to exercise their profession. This is absolutely not true and, moreover, could raise real legal issues, particularly with regard to the validity of actions conducted by such persons if a European authority considers them, per se, to lack the appropriate competence.

In “certifying” the competence required on a national level, experience should not depend on whether that experience was acquired at one firm or several.

However, and similar to AMF's certification (French NCA), each firm's own internal assessment models should be allowed. In this case, the model should be freely transferrable within the same banking group or the same central body (1). External certification, meanwhile, should be recognised by other European authorities in order to facilitate exchanges and free movement of persons.

¹ Central body (“organe central”) as defined in Article L 511-30 of the French Monetary and Financial Code

Regarding Section III 6 h: Appropriate experience means that a member of staff has successfully demonstrated the ability to perform the relevant services through recent work. This work must have been performed on a full time equivalent basis excluding breaks, for a minimum period to be specified by the NCA or another national body identified in the Member State. This period of time can be differentiated depending on the appropriate qualification attained by staff and also depending on the relevant services being provided. The obligation to possess five consecutive years of experience is inapplicable within the same firm without causing serious discrimination against young women, if maternity and parental leave were to constitute grounds for suspending a working contract ("excluding breaks"). Similarly, this would severely limit professional mobility, whether geographical between firms or between business lines, something that would inevitably undermine staff employability.

Turnover and suspensions of work contracts should be taken into consideration, as the advisor positions concerned are prone to high rates of turnover, which has meant that average service in these positions ranges from three to four years (although it is becoming longer). How would it then be possible to assess advisors if they needed five years to acquire the necessary knowledge and competence? Similarly, the young age of working advisors is often the cause of suspensions of work contracts during the five-year period. The proposed requirement provides no response to how to manage such suspensions. Should the duration be moved to the end of the five years?

And, lastly, the best efforts obligation, which is set at five years of experience, is completely arbitrary and does not correspond to the real experience acquired in the type of clients actually managed by the advisor. A greater focus should be placed on absolute obligation, measured in terms of observable, material and traceable competence.

FBF believes that existing staff should be grandfathered in. If, however, a mandatory time period was to be considered, FBF recommends a maximum of two years to be grandfathered in. ESMA provides, in item 25, pages 16 and 17, that as long as the person has not acquired the suitable knowledge and competence, he must not undertake any sales act, nor have any client meeting, nor even communicate with the client. The profession wants to have more details on how to interpret this principle. For, while ESMA's guideline is tantamount to advocating that the advisors concerned be required to work as a two-person team, this requirement is not operationally feasible, due to the wage inflation that it creates, which would undermine the competitiveness of credit establishments.

FBF advocates, first, a six-month deadline for any new arrival to obtain certification (if he hasn't already done so, of course). During this period, the financial establishment must monitor this person in both his relations with clients and the execution of his tasks. A two-person team is one possible solution but not the only one, and we feel it is excessive for the ESMA to dictate the mechanism that establishments must set up to ensure compliance in client relations. For example, if ESMA was to stick to its position, some establishments might assign only administrative tasks, with no client relationships, to persons who are not yet certified.

Q2: ESMA proposes that the level and intensity of the knowledge and competence requirements should be differentiated between investment advisors and other staff giving information on financial instruments, structured deposits and services to clients, taking into account their specific role and responsibilities. In particular, the level of knowledge and competence expected for those providing advice should be of a higher standard than that those providing information. Do you agree with the proposed approach?

Reply:

The title of the consultation uses the terms of Article 25.1 of MiFID II. But ESMA states, as early as item 8, its definition of “knowledge and competence” using the terms “suitable qualification and experience”. This change in terminology leads to a toughening of the level 1 text that goes beyond the ESMA’s remit. These terms “qualification and experience” are used in items 9 and 10 of the principles; in the draft guidelines in the definitions in items III.6.3f, III.6g and III.6h; and in the updating of knowledge and competence in items 25.a, 25.b, 25.d.

FBF wants the directive’s terminology to be used throughout the draft guidelines

FBF is concerned about retaining the distinction between information and advice. However, we believe that ESMA’s distinction between certification for providing information to the client and certification for advising the client would be hard to implement and prone to a separation of tasks that is not always appropriate. Based on the principle that “if you can do the big things, you can do the little things as well”, we would like ESMA to allow each national authority decide on its own.

In item 13, ESMA says it wants to distinguish the level of knowledge and competence necessary for staff giving information from that of staff providing advice. But in items 20 and 21 of the draft guidelines (page 14 and 15) it states that the knowledge and competence required for providing information are very similar to that necessary for investment advisory (items 22 and 23).

Furthermore, it stipulates in item 24 that banks must have procedures that clearly distinguish the responsibilities of the persons who provide advice from the persons who merely provide information.

FBF states its view that the difference between staff providing information and staff giving advice is based on the notion of personalised information, which is provided only by the advisor. In concrete terms, it would be necessary to delete from item 20 the obligations for staff providing information that are linked to individual client knowledge, such as the reference to taxation and the transaction context in item 20b, and to delete items 20c and 20e.

Q3: What is your view on the knowledge and competence requirements proposed in the draft guidelines set out in Annex IV?

Reply:

In item 20b, *“understand the key characteristics, risk and features of the investment products available through the firm, including any general tax implications and costs to be incurred by the client in the context of transactions. Particular care should be taken when giving information with respect to products characterised by higher levels of complexity”* :

The words *“available through the firm”* should be replaced with *“investment products on which they provide information to clients”*.

In particular, it would be hard for the person giving information to also provide information on tax issues, given how closely such issues are linked to the client. Taxation is typically an aspect of advice and not mere information, except to tell the client that there could be a tax impact or benefit.

Moreover, “to clients” should be added to item 21.e, as there is no justification for them to know the clients beyond their actual portfolio.

Q4: Are there, in your opinion, other knowledge or competence requirements that need to be covered in the draft guidelines set out in Annex IV?

Reply:

The various texts that have been transposed (MiFID) or that are in the process of being transposed (MiFID II) contain obligations and recommendations with regard to the knowledge and competence required by advisors providing advice to clients. They have resulted in the implementation by supervisory authorities of rules for monitoring and following up on training provided by credit establishments.

For example, a system for certifying knowledge and competence applying to the advisors concerned was introduced in 2010 and has been implemented since then.

FBF wants the current certification system to remain in place and for new arrivals to be able to work during their first six months in order to have the time to obtain their certification and to have enough knowledge and competence to be in compliance with MiFID II.

Similarly, the annual review of training needs is excessive. FBF wants the review to be on a biannual basis.

Q5: What additional one-off costs would firms encounter as a result of the proposed guidelines?

Reply:

It is impossible to estimate the additional costs associated with ESMA's proposed requirements by the specified deadline. Nonetheless, any new regulatory requirement will have ramifications for the information and/or training. The impacts of these changes are all the greater as the banking business relies on the industrial implementation of processes.

Q6: What additional ongoing costs will firms face a result of these proposed guidelines?

Reply:

It is impossible to estimate the additional costs associated with ESMA's proposed requirements by the specified deadline. Nonetheless, any new regulatory requirement will have ramifications for the information and/or training. The impacts of these changes are all the greater as the banking business relies on the industrial implementation of processes.