



Our ref: 19639/15

6 July 2015

**Ref: Consultation Paper/Draft guidelines for the assessment of knowledge and competence
(ESMA/2015/753)**

APF - Organismo per la tenuta dell'Albo dei Promotori Finanziari, the Italian authority for the single Register of Financial Salesmen (i.e. Italian tied agents) would like to submit the following comments in response to the Draft guidelines proposed by ESMA.

1. We would like to see greater flexibility in the Draft guidelines and the recognition of broader autonomy for national competent authorities (NCAs) in assessing appropriate knowledge and competence as required by MIFID 2, Article 25, in consideration of the requirements of competence and experience already laid down, and well established, at national level for persons who provide investment advice or information on financial instruments, investment and ancillary services to clients (what the ESMA consultation paper calls "relevant services").

In fact, there are countries – Italy among them – that have long had rules for tied agents that require the rigorous, advance verification of possession of knowledge and competence adequate to perform relevant services, which we consider to be perfectly equivalent to those that ESMA is now introducing.

Since 1991, **Italy's rules for Italian tied agents¹** have provided for a public Register, entry in which is subject to specific requirements of professional experience (as well as integrity) set down by law on the basis of **strict criteria that specify the requirement of *at least three years*² of properly attested**

¹ Article 5 of Law 1/1991 (the investment firms law), superseded by Article 23 of Legislative Decree no. 416 of 8 August 1996 (the so-called "Eurosif" law) and subsequently by Article 31 of Italian Legislative Decree no. 58 of 24 February 1998 on intermediaries (the Consolidated Law on Finance).

² Article 31.5 of the Consolidated Law on Finance limits entry in the Register to persons with the integrity and experience qualifications laid down by a central government rule (Treasury Minister's decree no. 472/1998 as amended). With specific reference to experience, this decree provides that in order to be entered in the Italian Register, persons must: a) have at least a five-year upper secondary school diploma, or a four-year diploma supplemented by the one-year course envisaged by law, or a foreign educational degree deemed to be equivalent by the Register as the body responsible for this evaluation; and b) pass an examination.

Ministerial Decree no. 472/1998 exempts from the examination persons who have acquired relevant professional experience of one or more periods of work, totalling at least three years, in one of the following activities:



professional experience or otherwise satisfactory performance on an *examination* (that is, *not simply an educational qualification*).

Italian tied agents are also subject to the continuing obligation to update their professional skills, to be provided for by the authorized persons for which they work³.

More specifically, APF, which works under the oversight of Consob, is responsible for holding the public list of Italian tied agents and for ascertaining their possession of the knowledge and competence laid down for entry in the Register. Such assessment is carried through the examination established by law and administered by APF or through the verification of satisfaction of the requirement of at least three years of professional experience.

Accordingly, we should like to point out to ESMA that the choice (in effect in Italy since 1998) of strictly defining the criteria for assessing the competence and knowledge requirements for Italian tied agents' performance of relevant services – on the basis which authorization is granted for the provision of investment advice and information on financial instruments and investment services to clients – rests on a system that envisages:

- *as a rule*, at least a five-year upper secondary school diploma plus a satisfactory grade on an examination administered by the APF. This examination must be *theoretical and practical*⁴. It verifies the effective possession of the knowledge and competence necessary to perform the activity of Italian tied agents, through questions on a range of subjects, including those specified on a compulsory basis by Consob⁵;

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- bank functionary in the managerial career track in one of the investment services or activities envisaged by the Consolidated Law on Finance or in the bank's financial product marketing sector;
 - functionary in an investment firm or asset management company assigned to one of the investment services or activities envisaged by the Consolidated Law on Finance or collective asset management;
 - staff position in a bank/investment firm/asset management company, assigned to a branch or other operational unit, or in any case responsible for such unit, engaged in one of the above-named investment services or collective asset management;
 - staff position in a bank/investment firm/asset management company responsible for internal control.

The assessment of appropriate experience for entry in the Register of financial salesmen is subject to the rigorous judgment of the Register itself, under Consob's oversight. This makes it possible to determine that three years of qualified experience in the sector is equivalent to passing the examination.

³ Article 105 of Consob Regulation no. 16190 of 29 October 2007 containing implementation rules of Legislative Decree no. 58 of 24 February 1998 on intermediaries.

⁴ Twelve out of the sixty questions for each candidate in the Italian examination for Italian tied agents must be of practical nature i.e. designed to assess the candidate's ability to apply his or her knowledge in practice, which is to say designed to assess the candidate's ability to apply his or her knowledge. Correct answers to these questions, moreover, are given the top score.

⁵ Article 100 of Consob Regulation no. 16190 of 29 October 2007, requires that the examination for Italian tied agents covers at least the following subjects: financial market law; rules on financial sales activity; notions of financial mathematics and financial market economics; notions of private law; and notions of tax law relating to the financial market. The regulation of the APF calls for further subjects, including financial planning, behavioral finance, notions of commercial law and of retirement and insurance law.



- *alternatively – hence according to a rigorous judgment of equivalence to the competence and knowledge demonstrated by the examination – recognition of specific professional experience in investment services, collective asset management, or internal controls at an investment firm, for a total period (not necessarily continuous) of three years, together with a high grade of decision-making responsibility (i.e. unit chief or a position with managerial responsibilities).*

2. In view of the foregoing, we hold that:

(i) ESMA should allow National Competent Authorities the power to deem that certain qualified persons who are working as investment firm staff members – like Italian tied agents – already satisfy the appropriate knowledge and competence requirements, on the basis of a judgment of equivalence to be left entirely to the NCAs themselves.

(ii) The Draft guidelines are overly restrictive in circumscribing and identifying “appropriate competence” with “appropriate experience” in the relevant services; and, what is more, with no transitional provisions.

In setting the standards for assessing “appropriate knowledge and experience” of staff who provide investment advice or information, **ESMA should not make the competence requirement coincide exclusively with a period of work experience.**

In our view, the concept of “competence” has to correspond to a capacity for the practical application of one’s knowledge, capacity that can be demonstrated not only through recent professional experience but also through effective application ability, ascertainable by proper testing⁶.

It should accordingly be left to the NCAs to determine how one may acquire “appropriate competence,” which includes but is not necessarily limited to work experience. This is the firm belief that the standards of knowledge and competence used to judge a person’s ability (or lack of ability) to perform certain functions vis-à-vis investors cannot be established in an absolute fashion.

(iii) The subjects contemplated in the examination for entry into the Italian Register of tied agents embrace all the knowledge and competence specified in ESMA’s Draft guidelines (guidelines 22 and 23). In addition, the test covers other matters inherent in Italian regulations on distance marketing, such as *jus poenitendi*, general contract law, and particular regulations governing banking and insurance contracts, with special attention to index-linked and unit-linked life insurance policies, the rules on presentations and on the conduct of financial salesmen, sanctions, and so on.

⁶ APF’s examination of each candidate includes 12 questions (out of 60) that are of a practical nature, i.e. designed to assess the candidate’s ability to apply his or her knowledge in practice.



(iv) Draft guidelines 6.f and 25.a set up a method for assessing knowledge (qualifications) and competence (experience) that is not applicable, in our view, to Italian tied agents, in that – as we have seen – they already operate under entry in a public Register, which implies, in and of itself, the prior verification of possession of the necessary knowledge and competence.

We must point out that if the conclusions set out in points (iii) and (iv) above are not accepted, confidence in national regulations and in the professional competence of persons who have been operating in the Italian market for many years would be dangerously jeopardized, in our opinion, by the unjustified raising of the requisites for tied agent by introducing a minimum experience requirement in addition to the examination. This examination, as noted, is itself sufficient to assess the existence of the knowledge and competence requirements for performing the relevant services.

Stiffening the requirements at national level would also endanger the level playing field for investment firms and tied agents.

Furthermore, the safeguard clause (the so-called “appropriate experience rule” regarding relevant services) in Draft guidelines 6.f and 25.a actually blocks the activity of staff lacking the experience deemed appropriate (at least five continuous years) from the very date of their application, with the very serious consequence that personnel already employed by the investment firm for a considerable period of time in providing investment services and in client relations would be prevented, overnight, from working, with serious losses and inconvenience to investment firms (economic loss and legal repercussions, given the existing contracts) and severe inconvenience to clients.

This would obviously entail substantial damage to the system and to investors, who would be deprived of the assistance of financial advisors.

(v) For purposes of regulatory impact assessment, we should also point out that Italian investment firms invest significantly in initial training for their tied agents and in continuing training in all the relevant areas specified in the Draft guidelines and in the additional areas prescribed by Italian regulations for door-to-door and distance selling. If additional “experience” were to be required in order to begin activity, this would impose a significant extra cost. In the face of such costs, on the one hand, Italian tied agents would be unable to work and would not receive compensation commensurate with the experience already attained in Italy; and on the other, the investment firm would get no return as long as it is unable to employ the agent in providing advice to clients. Further, the additional provision for a tutor to provide training for a considerable period would entail organizational and hierarchical superstructures that firms in this sector decided, in the past, should be abandoned.



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In these circumstances the investment firm is likely to use only already expert staff, who can be employed immediately in providing investment advice and thus is likely to cease investing in the excessively long and costly training of younger personnel. This would entail a severe limitation on young people's access to jobs and on financial market development, which for the reasons set out above we consider unjustified.

(vi) If the foregoing conclusions are not shared, we hold that in order to minimize the impact on Italian investment firms, two changes to the Draft guidelines are anyhow needed:

- The period of work experience required for someone who has passed the examination for Italian tied agents should be **six months or one year** – possibly also in the form of tutoring – depending on whether the candidate's educational qualification is an upper secondary school or a university degree⁷.
- The minimum under the appropriate experience rule should be **three years, not necessarily continuous**, so as to take reasonable account of justified interruptions (e.g. illness, maternity).

Please do not hesitate to contact us for any further information.

With kindest regards.

The Chairman

Carla Rabitti Bedogni

⁷ The Draft guidelines leave this regulatory matter to the competence of Consob.