

ESMA Consultation Paper on Draft guidelines for the assessment of knowledge and competence (ESMA/2015/753) - BVI's position paper

Issuers whose products are distributed through intermediaries have a genuine interest that intermediaries' personnel possess appropriate knowledge and competence if they provide investment advice regarding issuers' products or information about these. Likewise, an investment management company has also an interest that its own personnel providing investment advice or individual portfolio management is properly trained. BVI¹ therefore fully supports prudent regulation regarding knowledge and competence of investment firm's personnel in relation to the products they offer as well as investment management companies in relation to the products for which they provide investment advice or include in individual portfolio management.

Nevertheless, we strongly oppose the understanding that staff members are required to have experience of a certain period of time. In this regard, ESMA draws no distinction between knowledge and competence required according to Level 1 and experience which is not required according to Level 1. Experience regarding the relevant services is, however, not the only way to gain the appropriate knowledge and competence for staff members to provide investment advice and in particular give information about financial instruments, investment services or ancillary services to clients. Depending on the qualification and generally the background of the individual staff members on the one hand and the service to be provided by the staff member on the other hand, the general assumption that a minimum period of experience is required is disproportionate. ESMA should therefore consider qualification, skills and experience as the triad which allows the firm – supervised by the NCA – assessing that the staff member has the required knowledge and competence. The more qualifications and skill a staff member has, the less experience might be required and *vice versa*. In this respect, a list provided by the NCA regarding appropriate qualifications (see page 5 No. 10) should not be exhaustive.

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.

We agree with the general understanding that staff with experience of five years may be considered to possess the appropriate knowledge and competence. This understanding should be fixed in the guidelines and should not be subject to the discretion of each NCA or another national body identified in the Member State. However, as analysed above, such period of experience should not be considered as a minimum requirement. Depending on the qualification and skills, staff members with less or no experience can meet the requirement of appropriate knowledge and competence. It would be

¹ BVI represents the interests of the German investment fund and asset management industry. Its 90 members manage assets in excess of EUR 2.6 trillion in UCITS, AIFs and assets outside investment funds. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the assets of 50 million private clients over 21 million households. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.



inappropriate to exclude such staff members to be considered as possessing the required qualification. Hence, we would support an approach which explicitly allows firms to assess the competence and knowledge of staff members individually.

In addition, it is decisive that not only experience gained within one firm is relevant. In practice, staff members may gain experience in various firms. Changing jobs does not have any influence on the experience gained. Having gained experience in different firms might even help to build up a more profound knowledge due to the different approaches and situations with which the staff member has to deal.

Furthermore, in no case should the requirement relate to experience in consecutive years. Experience once gained does not diminish easily. In addition, there might be good reasons why a staff member has suspended their professional activity, e.g. due to maternity leave. Requiring an experience of consecutive years would discriminate certain types of employees.

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?

While we generally agree with the understanding that someone giving advice should have a certain of knowledge and competence regarding the product offers whereas someone providing information on product should not be required to have the same level of knowledge and competence, we believe that the wording chosen by ESMA is unclear: An investment advisor must not be required in any case to have a higher level of knowledge than personnel in the same firm not providing advice but only information on products or services. Rather, as long as both types of personnel maintain sufficient knowledge for their tasks this should be sufficient – even if the person providing information has the same knowledge and competence level as the advisor. Hence, the guideline should be rephrased as follows (no. V.I. 12):

“The level and intensity of knowledge and competence expected for those providing investment advice **and giving information on investment products should be of an appropriate standard. The appropriate standard expected for those providing investment advice is higher than for** those that only give information on investment products.”

Furthermore, the definition of providing information on investment products seems to be very broad. As a consequence, the strict requirements in particular regarding the knowledge described in no. V. 20. b. could apply to all staff members who may have contact with clients. In particular, it is necessary to exclude staff members who simply act as messengers from these requirements. We therefore would suggest clarifying in the guidelines that these apply if the information about financial instruments is given in connection with the provision of an investment service. The wording in no. III. 6. e. should be as follows:

“Information about financial instruments, structured deposits, investment services or ancillary services means information directly provided by staff to clients **in connection with the provision of an investment or ancillary service** without providing investment advice.”



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

We would like to comment on specific sections of the draft guidelines as follows:

No. III. 6. b.

The definition of firms includes UCITS management companies as well as AIFMs providing MiFID-related services. While we share the general understanding, we believe that the exact wording could reflect the applicability of the guidelines more precise since for non-MiFID service, the specific requirements of the UCITS-Directive and AIFMD regarding knowledge and competence staff members apply. We therefore suggest the following wording:

“Firms mean investment firms (as defined in Article 4(1)(1) of MiFID II, including credit institutions when providing investment services, UCITS management companies and external Alternative Investment Fund Managers (AIFMs) **insofar as** they are providing the investment services of individual portfolio management or non-core services (within the meaning of Article 6(3)(a) and (b) of the UCITS Directive and Article 6(4)(a) and (b) of the AIFMD).”

No. III. 6. c.

In order to avoid any irritations regarding the applicability of the guidelines, the definition of staff should be aligned with Art. 25 para. 1 of MiFID II Level 1 as follows:

“Staff means natural persons (including tied agents) **giving investment advice or information about financial instruments, investment services or ancillary services to clients.**”

No. III. 6 h.

Please refer to answer to question 1. We strongly believe that the knowledge and competence should be assessed based on the triad of qualification, skills and experience and should be assessed by each firm individually. Hence, the guideline should read as follows:

“**Experience** means that a member of staff has successfully demonstrated the ability to perform the relevant services through recent work. **A firm can differentiate** depending on the **qualification and skills** attained by staff and also depending on the relevant services being provided.”

No. IV. 8.

As outlined above, the requirements of appropriate qualification and appropriate experience are not in line with the understanding of Level 1. NCAs should therefore not be required to consider a minimum period in which the staff member has provided the relevant service as precondition to provide services. Rather, the knowledge and competence depends on whether the staff member has factual and practical knowledge required for the service. Regarding practical knowledge, e.g. investment advice should comprise of the skill to assess clients’ needs and expectations, finding solutions, present the product and related information and have the appropriate knowledge regarding customer care and client meetings.

No. V.I. 18.

While we generally appreciate the approach that compliance with these guidelines should be assessed, in practical terms, this task should not be assigned to the compliance function mandatorily. In smaller entities, it could as well be that the management itself reviews compliance. Hence, the compliance function should only be mentioned as an example of an independent function in charge of the assessment.



No. V.II. 20 b. to d. and 21 b.

Staff giving information about financial instruments, investment services or ancillary services, should not be required to provide any information regarding tax implications. Tax implications depend on many factors in particular the type of investor (private, professional) and the specific circumstances. In addition, employees should not be required to put themselves in a situation where they could be considered as giving tax advice. In Germany, only tax consultants and lawyers are allowed to provide business-like assistance in tax matters.

In addition, it seems inappropriate that a staff member should only be allowed to provide information about financial instruments, investment services or ancillary services if he has knowledge and competence about all investment products available through the firm. Firms offering a broad range of products (which ESMA clearly intends to facilitate according to the proposed rules on the requirements accept third party payments according to Art. 24 para. 9 Level 1) would be required to train all their relevant staff with respect to all products. Hence, the knowledge and competence should only refer to the key characteristics, risk and features and costs of the investment products for which the staff member provides information.

In addition, it seems disproportional that all types of sales or call centre staff have a full understanding of the impact of (macroeconomic) figures and national/regional/global events on markets. Knowledge requirements should be closely related to the investment products and/or investment services for which information is given.

No. V.III. 22 b.

Although we generally agree that the appropriate standard expected for those providing investment advice is higher than for those that only give information on investment products, we are still concerned regarding the requirement to have an understanding of general tax implications due to the aforementioned reasons. Furthermore, investment advisors should be allowed to specialise in certain areas. Hence, they should not be required to maintain the highest level of knowledge and competence with respect to all products the firm offers. It is in the firm's interest to train its staff members that they have good knowledge and competence with respect to all products. However, the knowledge and competence should only refer to the key characteristics, risk and features and costs of the investment products for which the staff member in fact provides investment advice.

No. V.V. 25 h.

In practice, it would be difficult to ensure that the main person providing the training is always present. The guidelines should be clarified insofar as the person receiving the training should be allowed to hold client meetings and communication if always another member of staff is present who has the necessary knowledge and competence regarding the products or services concerned. In addition, it should be clear that with respect to telephone conversations, the attendance of the instructor via telephone should be sufficient.

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?

We believe that the guidelines generally provide sufficient guidance for NCA's and market participants. Hence, we are not aware of any other requirements which should be covered in the guidelines.



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

As a general remark, ESMA did not analyse what measures will trigger costs but generally outlines that some firms will be affected more than others. Hence, we think that the Annex III does not provide for the cost-benefit analysis within the meaning of Article 16 para. 2 of the Regulation No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) according to which ESMA is required to analyse the related potential costs.

The proposed guidelines will trigger at least the following additional one-off costs:

- Firms will have to implement / adjust training, e.g. web based training including tests and processes dealing with results. This will require software tools and possibly additional personnel for implementation and review.
- Employees will have to be trained regarding the requirements and standards according to these guidelines.

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

Annex III does likewise not provide for a cost-benefit analysis with respect to ongoing costs (cf. answer to question 5).

The proposed guidelines will trigger at least the following additional costs:

- Firms will have to regularly review/update training, e.g. web based training including tests and processes dealing with results. This will require personnel for implementation and review.
- Employees will have to be trained continuously regarding the requirements and standards according to these guidelines.
- Investment advisor trainees are required to be supervised in all cases by trained personnel. This is binding human resources. Additional costs will be triggered if additional personnel are needed.