Fédération Européenne des Conseils et Intermédiaires Financiers

CONSULTATION PAPER

Draft guidelines for the assessment of knowledge and competence

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FEDERATION EUROPEENNE DES CONSEILS ET INTERMEDIAIRES FINANCIERS
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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.

First of all, we support ESMA's general approach acknowledging that the specification of the criteria for assessment of the qualifications and experience required to comply with these guidelines must be made at national level (paragraphs 8-10).

We do not agree with any provision ("grandfathering clause") based on a requirement of consecutive years of "appropriate experience" of providing the same relevant services for those staff members who will already be providing these services at the date of application of the proposed guidelines. Indeed, we believe that this provision does not represent a real safeguard for staff, because the ESMA proposal does not appropriately take into account the characteristics of the financial systems and labour markets of each Member State.

As set out in the Consultation Paper, existing staff members who, at the date of application of the future guidelines, have five consecutive years of appropriate experience of providing the same relevant services could be considered to possess an appropriate qualification, provided that investment firms have assessed their ability to fulfil the firm's obligations under Article 24 and 25 of MiFID II and any implementing relevant measures. We emphasize the problems resulting from the introduction of a "grandfathering clause" of this nature, which would not ensure any form of safeguard for all existing staff who have been providing relevant services for *less* than five years:

- The introduction of a requirement of five years of appropriate experience would entail a retroactive effect, the legitimacy of which could be contested on constitutional grounds and for its breach of labour law. Indeed, this requirement would apply to staff members who are already providing relevant services on behalf of an investment firm. Accordingly, the retroactive application of the requirement of at least five years of appropriate experience would entail the breach of the principle of legal certainty;

- The retroactive application of the requirement of appropriate experience would also create a situation of uncertainty for investors. Draft guidelines actually acknowledge that "investment advice is a high value service that requires an enhanced level of investor protection". We agree with this statement and we emphasize that such a "high value" is mainly based on the relationship of mutual trust which is developed over time between the investor and his/her tied agent/financial advisor. Indeed, the choice of preventing those staff members with less than five years of appropriate experience from providing relevant services would breach the principles of *bona fide* and trust: on the one hand tied agents and financial advisors would suddenly be prevented from providing a service that they have so far been providing in full compliance with all applicable laws; on the other hand, some investors would be affected by the loss of their tied agent/financial advisor. Furthermore, some investors would be precluded from access to investment advice (or, in any case, they would be compelled to look for another tied agent/financial advisor): this would widen the "advice gap" and, more generally, resut in significant harm to investor protection.

As for the structure of the "grandfathering clause" (i.e. at least five consecutive years of appropriate experience of providing the same relevant services), we believe that this clause does not take appropriately into account market features. Indeed, we think that the requirement pertaining to the

consecutive nature of the years of "appropriate experience" is in breach of the principles of economic freedom and the protection of competition. The Consultation Paper does not seem to consider: i) that financial systems exhibit a high level of innovation; ii) the spontaneous and competitive interaction of demand and supply forces in the labour market. Accordingly, it is desirable (as proof of a dynamic and free market) that staff members may enhance their knowledge and competence by acquiring appropriate experience in different investment firms. At the same time, if we consider single staff members, the decision to change job position by moving to another investment firm may involve short periods of inactivity, as it is also necessary to review the contractual position of the agent/employee. Accordingly, the idea that the years of "appropriate experience" should be consecutive and made in the same firm should be completely rejected, as it implies: i) a breach of the aforementioned principles of economic freedom and competition; ii) a discrimination among staff members based on personal career developments (particularly, single staff members who have acquired experience in a single investment firm *versus* staff members who have worked for different firms).

To comply with the ESMA/2012/387-Guidelines investment firms currently have to already ensure that staff involved in material aspects of the suitability process have an adequate level of knowledge and expertise (which includes that (i) they understand the financial instruments they offer or recommend, (ii) they assess the compatibility of the financial instruments with the needs of the clients to whom they provide investment services, (iii) they ensure that financial instruments are offered or recommended only when this is in the interest of the client.)

There are a lot of additional requirements expressed in the ESMA/2012/387-Guidelines which prompt investment firms to put in place adequate policies and procedures to enable them (i) to understand the essential facts about their clients and (ii) the characteristics of the financial instruments available to those clients. This also includes the important topics of (i) understanding the total amount of costs to be incurred by the client for the transactions, (ii) the key risk factors and (iii) general tax implications.

It should be the task of the Compliance Officer of the investment firm to assess knowledge and competence of the relevant staff member. This could be managed in different ways. We are of the opinion that it is most effective to have uniform rules to assess knowledge and competence (e.g. by the NCA). On this basis the Compliance Officer gains an idea of the practical activities of each relevant staff member. Thus, the Compliance Officer should assess knowledge and competence to obtain an accurate picture of the way the relevant staff member is proceeding through the suitability processes with the client and check if the process is compliant with the requirements expressed in the ESMA/2012/387-Guidelines.

We are of the opinion that single national competent authorities may require a period of consecutive years providing the same relevant services, provided that the investment firm has assessed and continues to assess this knowledge and competence. A lot of differences exist among Member States. Accordingly, ESMA should not impose any requirements in terms of years: this decision should be left to the discretion of each Member State. Furthermore, we believe that this experience should take into consideration documented experience acquired in previous firms on the same relevant products and services. As a matter of fact, existing staff providing information or advice are often recruited based on their professional experience, which must be taken into consideration in the assessment of knowledge and competence.

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?

Provision of advice is a valuable investment service for the customer. Therefore, it must be distinguished from the first level of service which usually consists of providing information on financial instruments, structured deposits and services to clients. Therefore, the level of knowledge and competence expected for those providing advice should be of a higher standard than for those providing information.

Whilst investment advice requires a differentiation in the level and intensity of the knowledge and competence requirements between investment advisors and other staff providing information on financial products and services, we should emphasize that the activity of providing information "about financial instruments, structured deposits, investment services or ancillary services" has a commercial nature, as it is specified in the definition presented in the draft guidelines: "Information […] means information directly provided by staff to clients in order to market these investment products or services without providing investment advice." It therefore still needs to be subject to relevant controls.

As a final remark, we suggest considering that some professional categories *already* comply with knowledge and competence requirements, which encompass both investment advice and the provision of information to clients: accordingly, it is not appropriate to require a distinction in the level and intensity of relevant requirements for these specific categories. From this viewpoint, tied agents exhibit both a peculiar professional qualification and specific rules for the assessment, maintenance and updating of knowledge and competence. Specifically, pursuant to art. 4, par. 1(29) of Directive 2014/65/EC (MiFID II), tied agents may promote both investment and/or ancillary services and provide advice on financial instruments and services on behalf of a single investment firm, thereby for tied agents it is not appropriate to require a distinction between investment advice and the provision of information to clients.

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

We agree with most of the requirements proposed in the draft guidelines as set out in Annex IV. We only disagree with section 25 (a). Moreover, we are of the opinion that section 23 (e) might create problems because it is too vague: it would be more suitable to define "potential changes that may have occurred, and that the investment firm should have been aware of". However, we agree that when an ongoing relationship exists, firms should use updated information to perform the required suitability assessment.

We would like to emphasize two elements of great importance pertaining to the future application of the guidelines: i) the assessment, maintenance and updating of knowledge and competence; ii) the definition of a minimum period of appropriate experience for all those staff members who have *never* provided the relevant services. We consider that according to the draft guidelines (*Background and principles for guidelines specifying criteria for the assessment of knowledge and competence*, par. 9) national competent authorities may identify as "appropriate qualifications" those qualifications complemented by identified courses in financial services that capture the

requirements of the guidelines. Moreover, in the draft guidelines (Examples relating to paragraph 25) continuous or ongoing professional development (for example, in the form of courses and learning) is required in order for staff to hold the "appropriate qualification". As for this, we believe that, in the definition of "appropriate qualifications", national competent authorities should specifically consider professional certifications as a means to enhance the skills, knowledge and expertise of staff members. Specifically, this is the case of the initiatives for the increase of professionalism in advisory activities; with regard to this, EFPA (*European Financial Planning Association™*) represents a landmark case. EFPA™ is the first European Non-Governmental Organisation (NGO), headquartered in Brussels, established to enhance professionalism in the European financial services sector.

More specifically, we agree that, for *new* staff members, the definition of the period of "appropriate experience" can be differentiated depending on the appropriate qualification attained by staff and also depending on the relevant service being provided.

Moreover, we would like to stress that guidelines should give investment firms the choice between using in-house educational systems and using third-party educational systems. Professional staff training is common in many investment firms. Highly specialized investment firms, well-established investment firms or large investment firms probably already have huge in-house knowledge, competence and experience and could provide education and training to relevant staff members by using their own resources, whereas other firms also might have the relevant knowledge, competence and experience but rather want to use external (independent) education systems, which also provide an examination and issue certificates. We believe that the guidelines for the assessment of knowledge and competence shall be applied proportionally with clear differences between retail and professional clients.

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?

No, we believe that the knowledge and competence requirements proposed in the draft guidelines are complete, perfectly comply with relevant market features and ensure appropriate investor protection in the provision of relevant services.

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

Probable costs are those for primary training and/or cost for examinations. Moreover, some additional costs due to the higher qualification/expertise levels of staff could be expected.

If the investment firm has sufficient in-house training staff, training costs might not be significant. If the firm decides to use third party educational systems, costs become significantly higher. In total, we believe that payroll costs will increase within a range of 7-10%.

At an international level all efforts shall be made so that educational costs lead to significant tax relief for the investment firm.

Moreover, we believe that the "grandfathering clause", as envisaged by ESMA, will have significant negative effects on social costs. Indeed, this choice would prevent those tied agents working for less than five years from providing a service that the same staff member has so far been providing in full compliance with relevant legislation; as a result, some investors would be affected by the loss their tied agent/financial advisor, with negative effects on the principles of *bona fide* and trust. Investors

would be precluded from access to investment advice (or, at the very least, they would be compelled to look for another tied agent/financial advisor); this would widen the "advice gap" and, more generally, could lead to significant harm to investor protection. From the viewpoint of each tied agent, the retroactive introduction of a requirement of at least five years of appropriate experience would breach the principle of legal certainty (especially in the case of tied agents who shall be registered in the public register). Moreover, this provision: i) may be contested for its legitimacy on constitutional grounds and for its possible breach of labour law; ii) would entail a sudden and inexplicable change in the position of single staff members.

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

Generally speaking, firms will face substantial recurring costs due to the training costs of incoming staff and loss of earnings due to the burden required on existing staff, especially in small and medium sized investment firms.

Tied agents represent a peculiar scenario, as they already provide investment advice and information on financial instruments and services on behalf of an investment firm complying with specific requirements of professionalism, assessment and updating of knowledge and competence, which meet the knowledge and competence requirements set out in the Consultation Paper. In the case of tied agents, an additional cost relates to the introduction of a training period for those who, with the adoption of the guidelines, will register in the public register. We consider that this additional cost should be regarded as an investment whose effects, in the medium to long term, would enhance career development for each tied agent.

As a result, in the case of tied agents, being cognisant of the registration in the public register ("appropriate qualification"), additional costs would assume a different form and size from other professional categories, which do not possess an appropriate qualification comparable to the registration in the public register of tied agents. Consequently, the likely impact of these guidelines will probably be higher for these other categories which are not registered in a specific register and/or are not currently required to comply with specific national requirements of knowledge and competence (as tied agents are); nonetheless, this would imply a level playing field among tied agents and other professional categories: both the market and the industry would benefit from the enhancement of professional levels and investor protection.

ABOUT FECIF

The **European Federation of Financial Intermediaries and Financial Advisers (FECIF)** is a Brussels-based non-profit organization, chartered in June 1999 for the defence and promotion of the role of financial advisers and intermediaries in Europe. FECIF represents about 38 trades bodies or organizations, encompassing over 230,000 Advisors in Europe and around 400,000 employees in total.

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