



European Securities and
Markets Authority

Final Report

Guidelines for the assessment of knowledge and competence



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Acronyms and definitions used

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| AIFMD | Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) 1095/2010 |
| CP | Consultation Paper |
| EC | European Commission |
| ESMA | European Securities and Markets Authority |
| ESMA Regulation | Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC |
| EU | European Union |
| MiFID or MiFID I | Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and the Council |
| MiFID II | Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU |
| MS | Member State |
| CA | Competent Authority |
| SMSG | Securities and Markets Stakeholder Group |
| UCITS | Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) |

1 Executive Summary

Reasons for publication

1. Article 25(1) of Directive 2014/65/EU (MiFID II) states that Member States shall require investment firms to ensure and demonstrate to competent authorities on request that natural persons giving investment advice or providing information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligations under Article 24 and Article 25¹.
2. The European Securities and Markets Authority is required by Article 25(9) of MiFID II to develop – by 3 January 2016 - guidelines specifying criteria for the assessment of knowledge and competence of investment firms' personnel. The guidelines will come into effect on 3 January 2017.
3. In accordance with Article 16(2) of the ESMA Regulation, a consultation was launched on 23 April 2015. The Consultation Paper (CP) set out draft ESMA guidelines for the assessment of knowledge and competence of individuals in investment firms providing investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm. The consultation period closed on 10 July 2015.
4. ESMA received 80 responses. The answers received on the CP are available on ESMA's website unless respondents requested otherwise.
5. As provided by Article 16 of the ESMA Regulation, ESMA also sought the advice of the Securities and Markets Stakeholder Group's (SMSG).
6. This paper contains summaries of responses received and feedback statements provided by ESMA. ESMA recommends that this report should be read together with the CP published on 23 April 2015 to have a complete understanding of the rationale for the guidelines. The final guidelines presented in Annex VI take into account the comments and suggestions raised by respondents.

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7. Section II briefly summarises the feedback to the CP and the main responses from ESMA.
 8. Section III contains the Annexes: Annex I provides the Summary of questions, Annex II contains the legislative mandate, Annex III reports the cost-benefit
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¹ Articles 24 and 25 of MiFID II contain the main conduct of business requirements, such as information to clients, suitability and appropriateness and costs and charges.

analysis, Annex IV reports the Opinion of the Securities and Markets Stakeholder Group, Annex V details the feedback on the CP, Annex VI sets out the final text of the guidelines and Annex VII describes some illustrative examples of the application of certain aspects of the guidelines.

Next Steps

9. The final guidelines in Annex VI will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two-month period during which National Competent Authorities (NCAs) must notify ESMA whether they comply or intend to comply with the guidelines.
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2 Overview

10. Article 25(1) of Directive 2014/65/EU (MiFID II) states that:

- a. Member States shall require investment firms to ensure and demonstrate to competent authorities on request that natural persons giving investment advice or giving information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligations under Article 24 (general principles and information to clients) and Article 25 (suitability, appropriateness and reporting to clients);
- b. Member States shall publish the criteria to be used for assessing such knowledge and competence.

11. ESMA is required by Article 25(9) of MiFID II to develop – by 3 January 2016 - guidelines specifying criteria for the assessment of knowledge and competence of the investment firm's personnel. The guidelines will come into effect on 3 January 2017.

12. In accordance with Article 16(2) of the ESMA Regulation, a consultation was launched on 23 April 2015. The consultation period closed on 10 July 2015. ESMA received 80 responses. The answers received are available on ESMA's website unless respondents requested otherwise.

13. As provided by Article 16(2) of the ESMA Regulation, ESMA also sought the advice of the Securities and Markets Stakeholder Group's (SMSG)². The SMSG supported the objective of the guidelines and called for supervisory convergence, peer reviews and transparency on the criteria used by the different Member States to implement the guidelines, as this could facilitate the transfer of best practices and mutual recognition. The SMSG stated that, while there would be reasons to set higher standards depending on the risks, sophistication and the complexity of the products being advised/sold, ESMA's guidelines are first and foremost about minimum standards of knowledge and competence.

14. The SMSG moreover suggested that more prominence should be given to the possibility of dedicated courses followed by some kind of certification. They additionally felt that 'close supervision' should be clarified so that a senior member of staff is not required to be present at all times during client meetings. The SMSG also stated that the guidelines not only refer to time and resources being made available to the trainee, but also to the one doing the coaching.

² The SMSG response has been published on the ESMA website at the following address: https://www.esma.europa.eu/system/files/2015-smsg-020-advice_on_knowledge_and_competence_requirements.pdf

15. The SMSG furthermore stated that certain staff should not fall into the scope of the guidelines such as those staff at reception desks that only hand out brochures or similar information.
16. Whilst the SMSG did not oppose the grandfathering provision, they stated that it does not absolve the investment firms from the obligation to provide and assess on an ongoing basis the knowledge and competence of the staff members, including those that benefit from the grandfathering. The SMSG suggested that with reference to the knowledge requirement - more prominence should be given to the ability to assess the client's risk profile and other relevant client characteristics, as well as the ability to understand the difference between past and future performance as well as the limits of predictability.
17. With particular regard to the period before someone can be considered to possess appropriate experience, the SMSG suggested that a minimum period should be required by the guidelines while leaving to firms to determine the appropriate period of experience depending on the circumstances. In general, the SMSG was aware that there are costs attached to the achievement of the required level of knowledge and competence. However, it stipulated that expenses potentially deriving from the mis-selling risk could by far outweigh the costs of training. It also pointed at the benefits of a well-trained and competent staff, which could be a competitive advantage for the firm.
18. Following the analysis of the responses to the consultation ESMA has modified the guidelines and provided some relevant examples in order to provide further clarification for the application of the guidelines. The main issues arose in respect of the following areas:
 - a. Assessment of the requirements for existing staff;
 - b. Relationship between qualifications and experience;
 - c. Need to clarify the circumstances under which advice and information are given.
19. ESMA has amended the guidelines to require that all staff (existing or new) must acquire an appropriate qualification and have appropriate experience in order to meet the necessary knowledge and competence required. A staff member who has an appropriate qualification but not the appropriate experience, or vice versa, or who has neither appropriate experience nor appropriate qualification should be required to work under supervision until he/she achieves the appropriate qualification and experience. The maximum period of time that a staff member can be allowed to work under supervision is 4 years.
20. ESMA has amended the guidelines to better clarify the circumstances under which a staff member should be considered to be giving information.

21. In relation to the cost benefit analysis, as stated in the preliminary CBA annexed to the CP, only a qualitative assessment of costs and benefits of the guidelines can be developed since the final detailed requirements will be defined by each Member State. Investment firms will face both one-off and on-going compliance costs. Both types of costs are fundamentally related to the assessment and the update of the requirements of knowledge and competence for those staff members providing advice or information to clients. ESMA considers that the costs associated with the new requirements will result in greater standards of services to clients, a higher degree of investor protection and an overall reduction in client detriment. ESMA considers that these benefits will outweigh all associated costs in respect of these guidelines.

3 Annexes

3.1 Annex I

Summary of questions (from the CP)

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.

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?

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

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?

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

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

3.2 Annex II

Legislative mandate to develop guidelines and relevant legislation

22. Article 16 of ESMA Regulation empowers ESMA to issue guidelines and recommendations addressed to competent authorities or financial market participants, with a view to establish consistent, efficient and effective supervisory practices within the ESFS, and to ensure the common, uniform and consistent application of Union law.

23. Furthermore, Article 25(9) of MiFID II requires ESMA to adopt by 3 January 2016 guidelines specifying criteria for the assessment of knowledge and competence required under paragraph 1 of Article 25.

Article 25(1) of MiFID II

24. Member States shall require investment firms to ensure and demonstrate to competent authorities on request that natural persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligations under Article 24 and this Article. Member States shall publish the criteria to be used for assessing such knowledge and competence.

3.3 Annex III

Cost-benefit analysis

Background

25. Article 5(1)(d) of the MiFID I implementing directive (Directive 2006/73/EC) required investment firms – among other obligations in the context of the general organisation requirements – to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them. According to that provision some Member States designed specific requirements for certain staff in investment firms providing services to clients³.
26. One of the objectives of the review of MiFID was to strengthen the protection of investors in a context of increasing complexity of investment products and continuous innovation in their design⁴. In this perspective raising the professional qualities of the personnel providing information and advice to clients was also seen as a way to contribute in reinforcing investors' trust in financial markets.
27. Therefore, Article 25, paragraphs (1) and (9), of MiFID II establishes a more structured regulatory framework to ensure that natural persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligations in terms of information to clients (Article 24 of MiFID II) and suitability and appropriateness assessment (Article 25 of MiFID II). The new framework requires the issuance of ESMA guidelines on the criteria for the assessment of knowledge and competence and the publication of the criteria to be used for the mentioned assessment by each Member State.

The impacts of ESMA guidelines

28. According to the aforementioned MiFID II mandate ESMA is delegated to specify the criteria for the assessment of knowledge and competence. ESMA considers that knowledge and competence should be based on the acquisition of appropriate qualification and appropriate experience by staff members in order to fulfil the relevant MiFID obligations. Due to the existence of vastly different education and qualification systems at national level across the Member States, the definition of the “appropriate qualification” and the period for the “appropriate experience”, besides a minimum period, have necessarily to be addressed at national level by Member States under the provision of Article 25(1) of MiFID II.

³ On 2012 ESMA also issued the “Guidelines on certain aspects of the MiFID suitability requirements” (ESMA/2012/387) developing some recommendations on the “adequate level of knowledge and expertise” for staff involved in the material aspects of the suitability process.

⁴ MiFID II, recital (79).

29. These guidelines set out an additional level of detail for investment firms and NCAs in this area and provide criteria for the definition of the national requirements and supervision.
30. In this context, ESMA considers that – even if a general obligation for firms to employ personnel with the necessary skills, knowledge and expertise already exists – the main additional costs for the implementation of the new requirements will be encountered by the investment firms located in those Member States where no specific rules in term of appropriate knowledge and competence are in force, while minor costs will be encountered in other Member States where extensive regulation is already in place.
31. As stated in the preliminary cost-benefit analysis annexed to the CP, only a qualitative assessment of costs and benefits of these guidelines can be developed since the final detailed requirements will be defined by each Member States.
32. On one side, and in accordance with large parts of the responses to the CP, it is possible to state that investment firms will face both one-off and on-going costs. The first type of costs are fundamentally related to the assessment of the requirements of knowledge and competence for those staff members that are already providing investment services when the guidelines and the relevant national provisions will become applicable and that do not fulfil the established requirements. For the achievement of the “appropriate qualification” requirement, investment firms would likely sustain:
- a) (direct) costs related to the necessary training and courses (educational costs);
 - b) (opportunity) costs due to the activity under supervision that employees who lack qualification or experience should conduct (until they achieve the missing requirement); and
 - c) the relevant organisational costs (new activities for the compliance function, HR, etc.).
33. The on-going costs should be related to the updating and the review of the requirements and the relevant organisational costs.
34. On the other side, ESMA would like to underline that significant benefits are expected from the new framework devoted to raise the professional quality of staff providing information and advice to clients of the investment firms. The main positive effect should be represented by the increase in the quality of the services provided to clients, with subsequently better investment decisions taking place. This should imply:
- a) a reduction of the mis-selling risk and its related financial consequences (due to loss of reputation, claims, costs of appeals and legal expenditure for tribunal cases, fines, etc.);
 - b) a restoration of investors’ confidence in financial markets;
 - c) positive effects on the productivity and efficiency of the investment firms.

35. ESMA shares the MSG opinion according to which costs of improper behaviour and conduct risk (fines, penalties and reputational risk) could compensate by far the costs of training and coaching.
36. Therefore, ESMA considers that the costs associated with complying with these obligations will result in greater standards of services to clients, a higher degree of investor protection and an overall reduction in client detriment. ESMA consider that these benefits will outweigh all associated costs in respect of these guidelines.

3.4 Annex IV

Opinion of the Securities and Markets Stakeholder Group

Executive summary

In the context of knowledge and competence requirements, the SMSG first of all reiterates some of its earlier advices. These referred to the assessment and certification of knowledge and competence; the need for training and support and the usefulness of a dialogue with employee representatives, where available, on the needs for training and sales policy in general. The SMSG believes that these three elements can reinforce one another.

While the SMSG agrees that the guidelines should be principle-based rather than overly prescriptive, it at the same time calls for supervisory convergence, peer reviews and transparency on the criteria used by the different member states, as this could facilitate the transfer of best practices and mutual recognition. Also, the SMSG considers it important that pass-porting does not result in a watering down of knowledge and competence criteria.

While there may be reasons to set higher standards depending on the risks, sophistication and the complexity of the products being advised/sold, the SMSG believes that the ESMA guidelines are first and foremost about minimum standards of knowledge and competence that apply to anyone providing advice to clients. In this respect, the SMSG is in favour of broad based minimum standards.

While the draft guidelines leave it to the NCA's to determine how exactly appropriate knowledge and experience should be assessed, some examples are being given. The SMSG suggests that more prominence be given to the possibility of dedicated courses followed by some kind of certification. With regard to "appropriate experience" it suggests 'close supervision' rather than the requirement of a senior being present at all times during client meetings. However, at the same time, the SMSG insists that the guidelines not only refer to time and resources being made available to the trainee, but also to the one doing the coaching. With regard to the minimum period before someone can be considered to possess appropriate experience, the SMSG acknowledges that this may depend on the intensity of the training as well as on the person concerned. For all these reasons, it suggests that, beyond a regulatory minimum period (e.g. 12 months, as a period which is neither excessively long, nor too short), it should to a large extent be left to the investment firm to determine the appropriate period, assuming that the investment firm remains ultimately liable.

With regard to the grandfathering proposal for employees that provide the relevant services at the date of application, the SMSG believes that the criterion for the grandfathering should not so much be a certain time span of prior experience as in the ESMA proposal (5 years), but rather the principle that the grandfathering is only valid as long as the employee remains with the present employer and to the extent that the employer is ultimately liable and responsible. Also, the SMSG points at the usefulness that incentives are put in place for those enjoying the grandfathering clause to undergo the assessment anyway. These incentives could be provided by practical arrangements (for example: time and place of

training and knowledge assessments) and by promoting the benefits of certification, for example in changing employer. Also, the SMSG insists that the grandfathering arrangement, being a one-off arrangement, does not absolve the financial institution from the obligation to provide training to and assess on an ongoing basis the knowledge and competence of its staff, including those that enjoy the grandfathering. With regard to the proposed knowledge requirements, the SMSG is of the opinion that the difference between providing advice and providing information is rather a theoretical one, which in practice will be difficult to assess. It also suggests that more prominence be given to the ability to assess the client's risk profile and other relevant client characteristics. In addition, the SMSG suggests that the general principles of back-office operations, to the extent that these are relevant to the client, are included among the knowledge criteria, as well as the ability to understand the difference between past and future performance as well as the limits of predictability.

Although possibilities of cost-effective training can be envisaged, the SMSG is aware that there are costs attached to training and coaching. However, it believes that the cost of conduct risk could potentially by far outweigh the cost of training. It also wants to point at the benefits of a well-trained and competent staff, which could be a competitive advantage.

Introduction

1. This advice is written in reply to the Consultation Paper ESMA/2015/753 of 23 April 2015, on draft guidelines for the assessment of knowledge and competence in the context of MiFiD II. The Consultation Paper itself follows from MiFiD articles 25(1) and 25(9).

“1. Member States shall require investment firms to ensure and demonstrate to competent authorities on request that natural persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligations under Article 24 and this Article. Member States shall publish the criteria to be used for assessing such knowledge and competence.

9. ESMA shall adopt by 3 January 2016 guidelines specifying criteria for the assessment of knowledge and competence required under paragraph 1.”

2. The Consultation Paper proposes six questions. However, the SMSG does not consider itself to be confined to these six questions only. Some of its comments go beyond these questions.
3. In particular, the SMSG wants to reiterate some of its earlier advices which touched upon knowledge and competence. These referred to the assessment of knowledge and competence and corresponding certifications; the need for training and support; and the usefulness of a dialogue with employee representatives, where available, on the needs for training and sales policy in general. The SMSG believes that these three elements can further reinforce one another.

- On assessment of knowledge and certification, see the SMSG advice on MiFiD II (2014/SMSG/35, dd, 03/09/2014), point 15:

“15. the SMSG considers such requirement for anyone advising or selling financial products to take a series 7 type exam as exist in the US or in France to be positive. It should even be mandatory across the EU. “

- On training, see the SMSG advice on MiFiD II (2014/SMSG/35, dd, 03/09/2014), points 39 -41.

“39. There is a need for both broad-based training in order to establish a culture of awareness regarding MiFiD requirements and the importance of compliance. Training should be compulsory for concerned employees who sell any financial product on an annual basis. It also needs to be ensured that the training is of good quality. This ensures that questions can be asked directly, which is important especially for new employees.

40. The knowledge needs to be verified on a regular basis and if the required level of knowledge is not attained in a first instance, there should be no sanctions but rather a re-training by someone.

41. There is also a question of resources to be able to effectively make use of the training provided. It needs to be ensured that required technical conditions (such as proper IT systems) are made available for employees in order to e.g. give proper advice for the clients.”

- On the usefulness of dialogue, see the SMSG advice on cross-selling (2015/SMSG/016, dd 27/03/2015)

“In this respect, the SMSG believes that proper sales policies, including training, remuneration and sanctions should ideally be part of a dialogue with employee representatives where available.”

4. Due to the differences among EU member states when it comes to structure, size, maturity, sophistication etc. of the markets and hence also training systems plus the internationalisation and increasing movement among people it is important that these guidelines are principle-based rather than overly prescriptive. Notwithstanding this consideration, the SMSG believes that the guidelines should be subject to ongoing supervisory convergence and peer review, as this could facilitate best practices and mutual recognition. Apart from the obligation for NCA's to publish their criteria for knowledge and competence assessment, the SMSG proposes that ESMA establishes a database containing the criteria of the different member-states. The motive behind this call for supervisory convergence, peer review and transparency on the criteria is that the SMSG considers it important that pass-porting does not result in watering down of knowledge and competence criteria.

5. The Consultation Paper refers at several instances to proportionality. The SMSG has been informed of several systems where a degree of proportionality has been introduced in national systems of certification and knowledge assessment. This proportionality was to a large extent linked to the type of products offered. In Denmark, the system of certification is linked to a green/yellow/red light classification, which on its turn depends on elements such as risk and complexity. In Sweden too, the trainings and exams are differentiated but starting with and from a common base of minimum standards and then adding elements and questions. While there may be reasons to set higher standards depending on the risks, sophistication and the complexity of the products being advised/sold, the SMSG believes that the ESMA guidelines are first and foremost about minimum standards of knowledge and competence that apply to anyone providing advice to clients. In this respect, the SMSG is in favour of broad based minimum standards.
6. The draft guidelines relate 'knowledge and competence requirements' to 'appropriate qualification' and 'appropriate experience' (see point 8 of the guidelines). The SMSG has some comments on these concepts:
 - First of all, it believes that knowledge and experience reinforce one another. Experience, expressed as number of years in the job, does not on itself guarantee adequate knowledge. At the same time, formal knowledge needs to be enriched by experience "on the job".
 - With regard to 'appropriate qualification', the draft guidelines leave it to the NCA to determine how these qualifications will have to be assessed, but provides some examples. However, there is no example referring to the possibility of dedicated courses at company level or sectoral level followed by some kind of certification.
 - The first example refers to a primary university degree in economics with specific exams focusing on financial markets being a sufficient condition.
 - The second example refers to other recognised qualifications complemented by identified courses in financial services.
 - In both examples, some kind of prior education is the backbone, 'identified courses in financial services' are at most a complement.
 - While the SMSG believes that specific degrees might facilitate the acquisition of appropriate knowledge, they would very seldom in themselves be a sufficient condition. Neither should they be an absolute prerequisite for 'appropriate qualification', as in this case, not having that specific degree would be a barrier to entry. A teacher, who has the ability to explain things in a way that is understandable to everyone, could, provided that (s)he has acquired some knowledge through focused courses, be adequately

qualified to give advice, even without academic degree in economics.

- As an alternative, the SMSG points at the usefulness of dedicated courses, presented either at company level or at sectoral level in consultation with the regulator and followed by certification. At the very least, we would suggest that an example be added and given prominence: *“an NCA might determine that focused courses, offered at company level or at sectoral level in consultation with the NCA, and followed by a formal test (knowledge assessment)”* should be considered an appropriate qualification’.
- With regard to ‘the notion, of appropriate experience’, the draft guidelines relate ‘experience’ to a minimum period of consecutive work in a relevant position, during which the trainee has to be accompanied by a senior colleague during every meeting with clients.
 - The SMSG suggests to replace the latter requirement by the notion of ‘working under close supervision of a senior colleague’. Especially in the early days/stages of employment, there is indeed some merit in the idea of having a senior colleague present during meetings with clients. However, alternative approaches could gradually be considered like gradually loosening the control on the trainee and allowing her/him to do the simpler meetings, preparatory meetings of the trainee and her/his senior, during which the meetings of the day are discussed and prepared, and so on. For all this reasons, we propose the notion of ‘close supervision’, rather than the requirement of a senior to be present at all times.
 - The notion of close supervision being a less strict definition than the requirement for a senior to be present at all times during all meetings with clients, entails the risk that this obligation will be interpreted in a loose way, especially in a context of time pressure. For this reason, the SMSG suggests that the obligation that time and resources be provided for training not only applies to the trainee, but also to the coach. (For example point V.V, 25, f: ensure that, when the staff member is being trained, the person providing the training has the necessary knowledge and competence required by the guidelines and gets sufficient time and resources to do so).
 - The guidelines do not specify how long the minimum period should be before a trainee is considered to have ‘appropriate experience’. This is something, which, probably, is more difficult to assess than knowledge. While the SMSG obviously considers ‘experience’ to be highly relevant, it also acknowledges that the effectiveness of a

training process may depend to a large degree on the intensity of the training process, the cases handled, and the capabilities of the trainee. Moreover, it is not certain whether the legislator really had the definition of a minimum period in mind, when drafting article 25(9). CRD IV, for example, mentions 'experience' (art 91(1)) as a separate word, which is not the case in MiFID II, art 25(9). For all these reasons, the SMSG believes that, beyond a regulatory minimum period after the knowledge assessment has been completed, it should to a large extent be left to the investment firm to determine the appropriate period, assuming that the investment firm remains ultimately liable. As for the regulatory minimum period, it suggests "12 months" as a requirement which is neither excessively long, nor too short.

III. 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 (Q1).

7. The SMSG believes that the wording of this paragraph should be made more explicit to make sure that it is interpreted as a one-off grandfathering arrangement for those who are already in function at the entry into force of these guidelines.
8. With regard to the grandfathering, the SMSG proposes the principles:
 - that this grandfathering should remain valid only as long as the employee remains with his present employer;
 - and to the extent that that the employer is fully liable and responsible.
9. The SMSG believes that the principles established above are more important than a discussion on the time-span of experience in the job for people to whom the 'grandfathering' should apply. As criterion for 'time-span on the job for people to whom the grandfathering applies', it proposes a period of 12 months. This 12 month period is in line with the minimum regulatory experience criterion proposed above. However, the SMSG reiterates that it considers the principles proposed above (see 8a and b) to be more relevant than the issue of the time-span as such.
10. Liability and responsibility of the firm also means that grandfathering being a one-off occurrence should not be confused with the need to, on an ongoing basis assess knowledge and competence, as clearly spelled out in the guidelines, 25b

11. The relevance of grandfathering clause evaporates faster over time, not only due to it being a one-off arrangement, but also to the extent that incentives are put in place for those enjoying the grandfathering clause as long as they stay with their current employer, to on a regular basis undergo the formal assessment procedure anyway. This could e.g. be encouraged through:
- Promoting the benefits of certification: the possibility to change employer while relying on the certification as a reference without having to first pass a test;
 - By practical arrangements facilitating training and knowledge assessments. This refers to time and place of training and knowledge assessments. If, for, example, there is only one possibility a year to undergo training and/or to have one's knowledge assessed, the hurdle is higher than when this is organized on a regular basis.
12. There is a specific situation not covered by the present 'grandfathering' proposal. Some member states have already formal systems of certification and licensing. What with people who have been certified in terms of national systems established prior to 1 January 2017? The SMSG suggests that national certification, in line with the guidelines, is recognized beyond 1 January 2017. However, at the same time, the SMSG calls on National Competent Authorities to compare their existing national arrangements with the new MiFID II standards and update it where needed.

IV. 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? (=Q2)

13. **The SMSG is of the opinion that the difference between providing advice and providing information is rather a theoretical one, which in practice will be difficult to assess.** Moreover, there is a risk that investors will be confused. Is the person sitting in front of them merely giving information or providing advice? Note: this remark does not refer to people at the reception desk who merely distribute brochures, leaflets

Are there, in your opinion, other knowledge and competence requirements that need to be covered in Annex IV.

14. The guidelines need to be more explicit about the need also to assess the clients' financial situation, including his/her capacity for investment loss, the clients' investment objectives, including their risk tolerance and clients' knowledge and

investment experience. MiFID 2 requires that staff of investment firms facing clients, be competent to fulfill their obligations under Art. 24 & Art. 25 (suitability and appropriateness assessment). This assessment has two sides: one is product knowledge, including costs and risks and the other is knowing the customer. While the draft guidelines cover the main subject areas related to knowing the product, they lack in requirements for knowledge and competence in assessing the client risk profile and other characteristics. However, regulators in major EU markets have found that up to 90 % of assessments of clients' risk tolerance, for example, were invalid and unreliable, which led to unsuitable investment advice, provided to clients [AFM (France - 2010); FSA (UK - 2011); CONSOB (Italy - 2012)]. Hence, we suggest that the guidelines are made more explicit about knowledge and competence requirements relating to both understanding the client's risk profile and providing advice such as: (i) the concept of financial planning; (ii) the process by which appropriate investment advice is given to the consumer; (iii) ethical issues in relation to the conduct of business. In this respect, the SMSG also points at the usefulness of ISO22222: "personal financial planning requirements for personal financial planners".

15. In addition, the SMSG proposes that knowledge of the general principles of back-office operations, to the extent that these are relevant to the client (example: settlement) be included among the knowledge criteria.
16. Also, the SMSG proposes to add: "understand the difference between past performance and future performance scenario's as well as the limits of predictability".
17. In Annex IV, point 21d and point 23d, the SMSG suggests to add a reference to the KID document: "*assess data relevant to the investment products offered or recommended to clients such as **Key Information Document**, a prospectus, financial statements, or financial data.*"
18. The SMSG takes it for granted that product knowledge also includes the ability to explain and understand the difference between single instruments, like shares and bonds, and funds investing in those instruments.

V. What additional costs will firms face as a result of the proposed guidelines?

19. The SMSG is aware that there is a cost attached to training and coaching. However, the SMGS is of the opinion that the cost of improper behaviour and conduct risk (fines, penalties, reputational risk) could potentially outweigh by far the cost of training. In addition, the SMSG also wants to point at the benefits of a well-trained and competent staff. Indeed, a competent staff may be a competitive advantage of a financial institution.
20. The SMSG suggests that cost-effective ways of training be considered. Training which has been jointly established through e.g. sectoral arrangements, possibly in cooperation with the regulator, could possibly result in economies of scale that



could reduce the burden for smaller firms. Also, digital training, be it balanced with traditional training, could contribute to reduce costs.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 8 July 2015

Jesper Lau Hansen

Chair

Securities and Markets Stakeholder Group

3.5 Annex V

Feedback on the consultation paper

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.

37. Most of the respondents agreed with the ESMA general approach regarding the provision of a certain numbers of years' "experience" as being appropriate in order to meet the "knowledge and competence" requirement, as proposed by the draft Guidelines.
38. A large number of respondents were of the opinion that the requirement of five consecutive years of experience is too strict and consider that a shorter period would be sufficient to meet the requirements. Also, they believe that different standards should apply depending on the nature of the service performed (for example when giving advice over when giving information).
39. However, the majority of the respondents did not agree with the reference to "consecutive years" of experience and argued that this requirement would be discriminatory since it would affect the employees which are on maternal, paternal or sick leave. Likewise, the majority of the respondents did not agree that the relevant experience should be acquired in the same firm.
40. A small number of respondents believe that five years of continuous experience is not a sufficient indicator and suggested a minimum of ten years' experience. They also supported the idea of an additional assessment that would take the form of a recognised certification that should be carried out by an independent third party.
41. One investors' association considered it important that all persons providing investment advice or giving information on financial instruments possess an appropriate qualification, regardless of the experience they have acquired in providing the relevant services. They also considered that a transition period should be introduced in which existing staff that possess five consecutive years of appropriate experience of providing the same relevant services on the 3rd of January 2017 can continue their work but are obliged to obtain the appropriate qualification, as defined by the competent authority, at the end of the transition period in order to be allowed to continue their work afterwards. The respondent believed that persons that have five consecutive years of appropriate experience should have no problems obtaining an appropriate qualification.

42. The CP proposed that “existing staff in firms with not less than five consecutive years of appropriate experience of providing the same relevant services at the date of application of the guidelines, could be considered to possess an appropriate qualification at the discretion of each NCA or another national body identified in the Member State, where the firm has assessed and continues to assess that the staff member is able to fulfil the firm’s obligations under Article 24 and 25 of MiFID II and any implementing measures relevant to these Articles”. ESMA considers that this proposal needs to be reviewed because, under a legal viewpoint, MiFID II does not foresee instances where personnel already employed at the date of application of these guidelines could, under certain circumstances, avail themselves of an exemption that is not available to other employees. ESMA has therefore modified the guidelines by excluding the possibility for existing staff only holding a certain amount of experience to be considered compliant with Article 25(1) of MiFID II without having attained an appropriate qualification. The guidelines have been amended accordingly by deleting the reference to any possible exemption for existing staff. Thus, from the date of application of the guidelines, all relevant staff will have to possess an appropriate qualification and an appropriate experience as defined by the guidelines themselves. However, as further explained in the following paragraphs, staff members who do not possess an appropriate qualification or appropriate experience or neither should be required to work under the supervision of other staff members.
43. ESMA also notes the opinion of the SMSG and considers that, in order to ensure a minimum degree of harmonisation, all relevant staff should possess a minimum period of previous experience of 6 months. The possibility for CAs (or another national body identified in the Member State) to further differentiate the period of time of experience, beyond the minimum required, depending on the appropriate qualification attained but also based on the relevant services provided, should still be retained. Therefore, the definition has been amended as follows: “Appropriate experience means that a member of staff has successfully demonstrated the ability to perform the relevant services through previous work. This work must have been performed, on a full time equivalent basis for a minimum period of 6 months. Beyond this minimum period, the CA can differentiate the period of experience required, depending on the appropriate qualification attained by staff and also depending on the relevant services being provided”.
44. ESMA has also removed from the definition of appropriate experience the reference to “excluding breaks” so as to take account of respondents concerns about any potential discriminating interpretations.
45. Furthermore, ESMA is of the view that staff possessing the minimum required level of experience should be allowed to work without an appropriate qualification where that work is conducted under the supervision of a staff member who has the appropriate experience and appropriate qualification until such time as they acquire the appropriate qualification. Likewise those staff members that have an appropriate qualification without the minimum level of experience should also be allowed to work under supervision until such time as they have gained the minimum appropriate

experience. Employees who lack both qualification and experience can also work under supervision. The explanation of what working “under supervision” entails has been further developed in the guidelines. Specifically, and in line with the SMSG advice, while on one hand supervising a staff member would not mean “shadowing” the work of that staff member or being present at all times during client meetings, on the other hand any advice or information given by the employee without appropriate qualification should be under the full responsibility of the supervising staff member (for example, suitability reports when providing advice could be countersigned by the supervising staff member). ESMA also deems it appropriate to set a maximum period of 4 years during which a staff member lacking appropriate experience or qualification or both could be allowed to work under supervision. CAs should be able to set a shorter period if they wish.

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?

46. A large majority of respondents agreed with ESMA's approach to differentiate the requirements according to the nature of the service provided, in particular distinguishing between investment advice and information, with a higher standard for the former.
47. Nevertheless, many respondents argued that the distinction between staff giving information to clients and those giving investment advice is not completely clear and that the requirements set out in the draft guidelines appear broadly very similar. Some respondents also asked for greater clarity on where the boundary for staff giving information to clients, for the purposes of these guidelines, is considered to step outside the guidelines completely.
48. ESMA notes that a significant number of respondents sought clarification on the definition provided in the guidelines of staff giving information about financial instruments, structured deposits, investment services or ancillary services to clients. In particular, most argued that the distinction between employees providing investment advice and those giving information may result, in practice, too blurred.
49. ESMA considers that in the context of the guidelines, “giving information” should be read in a broad sense so as to include all situations where employees are put into direct contact with clients in the course of providing any of the investment services defined in the directive, including for example portfolio management. This view is in line with Recital 79 of MiFID II which states that “Given the complexity of investment products and the continuous innovation in their design, it is also important to ensure that staff who advise on or sell investment products to retail clients possess an appropriate level of knowledge and competence in relation to the products offered.

Investment firms should allow their staff sufficient time and resources to achieve that knowledge and competence and to apply it in providing services to clients”. The definition provided in the guidelines has, therefore, been amended to read: “Giving information means directly providing information to clients about financial instruments, structured deposits, investment services or ancillary services, either upon the client’s request or at the initiative of the firm, in the context of the provision by the staff member to the client of any of the services and activities listed in sections A and B of Annex I of MiFID II”.

50. Hence, situations where employees do not directly face clients, such as, for example, in the case of back-office staff, would fall outside the scope of Article 25(1) of MiFID II and of these guidelines. Instead, whenever there is a direct interaction between an employee and a client, the discriminating factor should be whether that employee is, or not, in the process of providing an investment service to the client. The SMSG suggested that the guidelines should not cover “people at the reception desk who merely distribute brochures”. ESMA agrees and based on the clarifications provided would likewise consider similar situations falling outside the scope of the guidelines. ESMA has provided further examples where the provision of information in certain circumstances would be outside the scope of the guidelines. However, ESMA considers that both competent authorities and financial market participants should be cognisant of the risk of staff outside the scope of the guidelines providing relevant services to clients and should take appropriate measures to ensure that only staff that have the necessary knowledge and competence provide relevant services to clients.
51. For the purpose of a correct application of the guidelines, ESMA therefore emphasises that it is important that firms carefully take into consideration the definition of investment advice and the clarifications on its boundaries provided in CESR 2010 Q&As on “Understanding the definition of advice under MiFID⁵”. ESMA has also published examples in Annex VII, for the purposes of these guidelines, of what ESMA considers constitute staff giving information to clients.
52. Consistently with feedback received which recognise the distinction between investment advice and information, ESMA considers that separate requirements for staff giving information to clients, compared to those who give investment advice, should remain. As the requirements are not identical ESMA considers that this will help readers identify the requirements that are relevant, as well as recognising the distinction in information relative to advice, including from a legal and proportionality perspective. ESMA considers that the separation of the criteria should remain for those giving information and those giving advice considering the specific reference in the criteria to the suitability requirements under MiFID II and the “Guidelines on certain aspects of the MiFID suitability requirements⁶” that must be understood and met by staff providing advice.

⁵ http://www.esma.europa.eu/system/files/10_293.pdf

⁶ <http://www.esma.europa.eu/system/files/2012-387.pdf>

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

53. Whilst the majority of respondents supported the general approach of the draft guidelines on the knowledge requirement, part of them interpreted the draft guidelines as equating appropriate qualifications with knowledge and appropriate experience with competence. These respondents state that “competence” is a wide concept that comprises knowledge, commercial skills, reputation, personal abilities etc. According to these respondents, “experience” should vary depending on the qualification and level of knowledge/competence of the staff and the relevant service.
54. Some respondents did not agree with the proposal to require both qualification and experience in order to comply with knowledge and competence requirements and suggested the guidelines should require qualification or experience only.
55. ESMA considers that the definition of knowledge and competence require both qualification and experience. However, ESMA wishes to clarify that knowledge does not equate to a qualification and competence to experience. Rather by acquiring an appropriate qualification and by gaining experience a staff member can be considered to have the necessary knowledge and competence.
56. ESMA also recognises that on some occasions it is difficult to start providing investment advice or giving information if a qualification or experience have to be fulfilled prior to providing the provision of the relevant services. To this end, and in order to improve flexibility but at the same time ensuring that clients receive an appropriate level of service, ESMA has amended the guidelines to allow staff without appropriate experience and appropriate qualification to work under the supervision of a staff member (who has the appropriate experience and appropriate qualification and who assumes the responsibility for the activity of the staff member lacking the necessary experience and/or qualification) until such time as they acquire the appropriate qualification and appropriate experience.
57. A significant number of respondents expressed their concerns for cross-border application of the guidelines since requirements may well vary from one competent authority to another. A more consistent level playing field is asked to be applied to all firms as they act across the EU. Notwithstanding, some respondents noted that the requirements are too strict and detailed and asked to delegate the definition of these requirements to the Member States.
58. ESMA acknowledges that differences between EU Member States regarding knowledge and competence requirements will still exist. This is mainly due to the lack of common qualification systems across the EU. Therefore, the absence of a pan European framework for determining qualifications prevents ESMA from further defining the required level of an appropriate qualification. On the other hand, the guidelines establish a minimum standard for all Member States which will help reach a certain degree of level playing field across the EU.

59. ESMA received a large number of responses concerning the treatment of tied agents and specifically wondering whether the registration as tied agents, following a specific course or exam, can be considered an appropriate qualification. ESMA's view is that the guidelines clearly allow the CA in the Member State where those tied agents operate to determine whether the completion of exams to enable them to be enrolled on a public register is an appropriate qualification.
60. A number of respondents queried whether existing regulatory examinations in their Member State, or exams or training courses at company/sectoral level would meet the requirements of the guidelines. Respondents also queried how the ongoing assessment of whether the staff member held the appropriate qualification should be conducted.
61. Firstly, ESMA agrees that existing regulatory examinations in their Member State or company or sectoral level courses or exams can meet the requirements of the guidelines. However, the guidelines do not name or identify specific qualifications as appropriate. Rather, the guidelines leave to CAs the discretion to determine what is deemed an appropriate qualification that matches the requirements set out in the guidelines. It is therefore in the CA's competence to judge the compliance of courses, whether internal or external, or any other form of training with the guidelines. Similarly, the CA can determine whether the assessment of the relevant staff member's qualification should be conducted internally by the firm or by an external body. Accordingly, ESMA has now made this clear in the guidelines.
62. Some respondents noted that the definition of "appropriate experience" proposed in the CP could only be achieved via full time and consecutive employment and therefore argued that this would be discriminatory against staff that work part-time or had been sick or have taken maternity or parental leave. Other respondents were generally averse to establishing a fixed minimum period of time in respect of appropriate experience. ESMA wishes to clarify that appropriate experience must be gathered on a "full time equivalent basis" and so proportionate adjustment should be made for those working part-time, e.g. if 6 months' appropriate experience is required then someone working half weeks on a part-time basis would have to gather 12 months' experience. Furthermore, ESMA has amended the definition of "appropriate experience" and amended the requirements relating to the supervision of staff so as to ensure that it does not discriminate against staff who have taken extended leave such as maternity, paternity or sick leave. Also by now referring to "previous work" ESMA underlines that non-consecutive experience due to maternity, paternity leave or sick leave should not be considered as a break in a staff member's experience. In relation to setting a minimum period for appropriate experience, ESMA has considered that 6 months is a reasonable benchmark to set as a minimum standard.
63. A very small number of respondents requested that in relation to the criteria for staff to understand "general tax implications", the guidelines refer exclusively to those taxes payable via the investment firm, or strictly related to the investment product.

64. ESMA wishes to clarify that “Understanding general tax implications” refers to the financial instrument or investment service and/or the costs associated with it. MiFID I requires investment firms to give information on all taxes payable via the investment firm as those taxes are elements of the costs and associated charges with a financial instrument or an investment service. This approach was adopted in the requirements of the guidelines and further refined in order to cover the importance of tax effects for some financial instruments. Therefore, if an investment product has a specific tax feature the staff giving information or advice on this product needs to understand how this feature functions. This means that when tax benefits are the primary purpose of a financial instrument or investment service, they belong to its key characteristics, risks and features and as such need to be taken into account in providing a financial service or information. However, the requirement of “understanding general tax implications” is not meant as the provision of individual tax advice.
65. Some respondents stated that the guidelines should not set out in the requirements for staff giving advice criteria related to the suitability test as established under MiFID. Other respondents stated that the guidelines should differentiate between those staff providing advice on an ongoing basis and those on a once off basis. Others requested that the guidelines be more explicit and detailed about the requirements of the suitability requirements.
66. Firstly, ESMA is of the view that all staff giving advice, whether on a once off or on a full time basis, should have clear knowledge and competence about the MiFID suitability requirements as set out in MiFID II, its implementing directive as well as ESMA’s Suitability guidelines⁷. For this reason the guidelines do not set out specific elements of those suitability requirements or give weight to certain aspects over others. Rather, the guidelines require that all aspects of those suitability requirements are an integral part of the required knowledge and competence of a staff member who provides investment advice.
67. A number of respondents queried the requirement to have a periodic assessment in the guidelines.
68. ESMA maintains that a periodic assessment to ensure that staff remain compliant with the requirements of the guidelines is vital to ensure that clients only receive the relevant services from staff with the necessary knowledge and competence. Also, since the knowledge and competence requirements are to a certain degree dependent on the role and activity of staff, it is important that any changes to a staff member’s role and/or activity entails an assessment of whether the requirements are still being fulfilled. ESMA considers that an annual assessment is an appropriate period.

⁷ <http://www.esma.europa.eu/system/files/2012-387.pdf>

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?

69. Whilst the majority of the respondents were of the opinion that no additional requirements are necessary, some emphasised the need to set a greater focus on ethics. In this context it was also emphasised that investment professionals should be subjected to a code of conduct.
70. ESMA agrees that knowledge of ethical business standards is an important requirement and has maintained the reference to these standards in the guidelines and the examples. However, ESMA does not consider that there is a specific need to require each investment firm to individually adopt a code of ethics.
71. The SMSG suggested that the guidelines should also require staff to “understand the difference between past performance and future performance scenario’s as well as the limits of predictability”. ESMA agrees and has amended the guidelines accordingly.
72. The SMSG also proposed that the guidelines add a reference to the KIID document. ESMA agrees and has amended the guidelines accordingly.

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

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

General remarks:

73. As observed by many respondents, it should be preliminarily pointed out that a complete and quantitative analysis of costs for firms and stakeholders cannot be drawn. Costs and impacts will indeed rely on the final criteria that will be adopted by each CA for the implementation of the new requirements and in particular: a) on the list of appropriate qualification or the criteria against which the appropriate qualification needs to be assessed, and b) on the minimum period to be performed to assess the appropriate experience requirement.
74. An investors’ association supported the draft guidelines stipulating that knowledge and competence are essential to the quality of advice and to investor protection and that requirements and standards should not be watered down on the basis of costs, except when the costs are passed on to clients and these costs are not proportional to the benefits that clients gain as a result of the guidelines.

One-off costs

75. According to the majority of respondents the main one-off financial costs would derive from the assessment of the new requirements of appropriate qualification and

experience of those staff members that do not fulfil both of them. These costs would include direct expenses for: trainings, courses and the relevant organisational costs (HR, compliance function, etc.) and indirect costs due to the necessity for those staff which do not possess both qualification and experience to work under supervision. It was also underlined that these costs could be relevant in particular where existing national regulation does not require specific qualification and experience requirements.

On-going costs

76. The main on-going costs indicated by the respondents are related to the activities for the updating and the assessment of the qualification requirement. Also in this case, costs would be represented by educational, technological and compliance costs.

3.6 Annex VI

Guidelines for the assessment of knowledge and competence

I. Scope

Who?

1. These guidelines apply to:
 - a. Competent Authorities and
 - b. Firms.

What?

2. These guidelines apply in relation to the provision of the investment services and activities listed in Section A, and the ancillary services listed in Section B of Annex I of MiFID II.

When?

3. These guidelines apply from 3 January 2017.

II. References, abbreviations and definitions

Legislative references

| | |
|------------------------|---|
| <i>AIFMD</i> | Directive 2011/16/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Manager and amending Directive 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010. |
| <i>ESMA Regulation</i> | Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing an European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. |
| <i>MiFID</i> | Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive |

2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

MiFID II

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast).

Abbreviations

| | |
|--------------|---|
| <i>AIFMD</i> | Alternative Investment Fund Manager Directive |
| <i>CA</i> | Competent Authority |
| <i>CP</i> | Consultation Paper |
| <i>EC</i> | European Commission |
| <i>EU</i> | European Union |
| <i>ESMA</i> | European Securities and Markets Authority |
| <i>MiFID</i> | Markets in Financial Instruments Directive |

Definitions

4. Unless otherwise specified, terms used in MiFID II have the same meaning in these guidelines. In addition, the following definitions apply:
 - a. Competent authority (or CA) means an authority designated under Article 67 of MiFID II.
 - b. 'Firms' means investment firms, as defined in Article 4(1)(1) of MiFID II, credit institutions (as defined in Article 4(1)(27) of MiFID II) when providing investment services as well as investment firms and credit institutions when selling or advising clients in relation to structured deposits, 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 and only in connection to the provision of these services (respectively within the meaning of Article 6(3)(a) and (b) of the UCITS Directive and Article 6(4)(a) and (b) of the AIFMD).
 - c. 'Staff' means natural persons (including tied agents) providing relevant services to clients on behalf of the investment firm.
 - d. 'Relevant services' means providing investment advice or giving information about financial instruments, structured deposits, investment services or ancillary services to clients.

- e. 'Giving information' means directly providing information to clients about financial instruments, structured deposits, investment services or ancillary services, either upon the request of the client or at the initiative of the firm, in the context of the provision by the staff member to the client of any of the services and activities listed in the section A and B of Annex I of MiFID II.
- f. 'Knowledge and competence' means having acquired an appropriate qualification and appropriate experience to fulfil obligations in Article 24 and 25 MiFID II in order to provide the relevant services.
- g. 'Appropriate qualification' means a qualification or other test or training course that meets the criteria set out by the guidelines.
- h. 'Appropriate experience' means that a member of staff has successfully demonstrated the ability to perform the relevant services through previous work. This work must have been performed, on a full time equivalent basis, for a minimum period of 6 months. Beyond this minimum period, the CA can differentiate the period of experience required, depending on the appropriate qualification attained by staff and also depending on the relevant services being provided.
- i. 'Investment products' means financial instruments and structured deposits as defined in MiFID II.
- j. 'Under supervision' means providing the relevant services to clients under the responsibility of a staff member who has both an appropriate qualification and appropriate experience. The staff member can work under supervision for a maximum period of 4 years except where a shorter period is determined by the CA.

III. Purpose

- 5. The purpose of these guidelines is to specify the criteria for the assessment of knowledge and competence required under Article 25(1) of MiFID II, in accordance with Article 25(9) of the same Directive.
- 6. ESMA expects these guidelines to promote greater convergence in the knowledge and competence of staff providing investment advice or information about financial instruments, structured deposits, investment services or ancillary services to clients, and competent authorities to assess the adequacy of the compliance with such requirements. These guidelines set important standards to assist firms in meeting their obligations to act in the best interest of their clients and to assist CAs to adequately assess how firms meet these obligations.
- 7. These guidelines establish minimum standards for the assessment of knowledge and competence for staff providing relevant services. Consequently, CAs can

require greater levels of knowledge and competence for staff giving advice and/or for staff giving information.

8. In complying with these guidelines, ESMA anticipates a corresponding strengthening of investor protection. Annex VII includes a number of illustrative examples of how an investment firm might apply the guidelines. These examples do not form part of the guidelines but instead aim to assist firms in identifying practical examples of how the requirements in the guidelines can be met.

IV. Compliance and reporting obligations

Status of the guidelines

9. This document contains guidelines issued under Article 16 of the ESMA Regulation and required under Article 25(9) of MiFID II. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with the guidelines.
10. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines are directed primarily at financial market participants.

Reporting requirements

11. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, stating their reasons for non-compliance, within two months of the date of publication by ESMA to KCguidelines1886@esma.europa.eu. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.
12. Firms to which these guidelines apply are not required to report to ESMA whether they comply with these guidelines.

V. Guidelines

V.I General

13. The level and intensity of knowledge and competence expected for those providing investment advice should be of a higher standard than those that only give information on investment products and services.
14. Firms should ensure that staff providing relevant services possess the necessary knowledge and competence to meet relevant regulatory and legal requirements and business ethics standards.
15. Firms should ensure that staff know, understand and apply firm's internal policies and procedures designed to ensure compliance with MiFID II. In order to ensure a

proportionate application of knowledge and competence requirements, firms should ensure that staff have the necessary levels of knowledge and competence to fulfil their obligations, reflecting the scope and degree of the relevant services provided.

16. The compliance function should assess and review compliance with these guidelines. This review should be included in the report to the management body on the implementation and effectiveness of the overall control environment for investment services and activities.

V.II Criteria for knowledge and competence for staff giving information about investment products, investment services or ancillary services

17. Firms should ensure that staff giving information about investment products, investment services or ancillary services that are available through the firm have the necessary knowledge and competence to:
 - a. understand the key characteristics, risk and features of those 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;
 - b. understand the total amount of costs and charges to be incurred by the client in the context of transactions in an investment product, or investment services or ancillary services;
 - c. understand the characteristics and scope of investment services or ancillary services;
 - d. understand how financial markets function and how they affect the value and pricing of investment products on which they provide information to clients;
 - e. understand the impact of economic figures, national/regional/global events on markets and on the value of investment products on which they provide information;
 - f. understand the difference between past performance and future performance scenarios as well as the limits of predictive forecasting;
 - g. understand issues relating to market abuse and anti-money laundering;
 - h. assess data relevant to the investment products on which they provide information to clients such as Key Investor Information Documents, prospectuses, financial statements, or financial data;

- i. understand specific market structures for the investment products on which they provide information to clients and, where relevant, their trading venues or the existence of any secondary markets;
- j. have a basic knowledge of valuation principles for the type of investment products in relation to which the information is provided.

V.III Criteria for knowledge and competence for staff giving investment advice

18. Firms should ensure that staff giving investment advice have the necessary knowledge and competence to:
 - a. understand the key characteristics, risk and features of the investment products being offered or recommended, including any general tax implications to be incurred by the client in the context of transactions. Particular care should be taken when providing advice with respect to products characterised by higher levels of complexity;
 - b. understand the total costs and charges to be incurred by the client in the context of the type of investment product being offered or recommended and the costs related to the provision of the advice and any other related services being provided;
 - c. fulfil the obligations required by firms in relation the suitability requirements including the obligations as set out in the Guidelines on certain aspects of the MiFID suitability requirements⁸;
 - d. understand how the type of investment product provided by the firm may not be suitable for the client, having assessed the relevant information provided by the client against potential changes that may have occurred since the relevant information was gathered;
 - e. understand how financial markets function and how they affect the value and pricing investment products offered or recommended to clients;
 - f. understand the impact of economic figures, national/regional/global events on markets and on the value of investment products being offered or recommended to clients;
 - g. understand the difference between past performance and future performance scenarios as well as the limits of predictive forecasting;
 - h. understand issues relating to market abuse and anti-money laundering;

⁸ <http://www.esma.europa.eu/system/files/2012-387.pdf>

- i. assess data relevant to the type investment products offered or recommended to clients such as Key Investor Information Documents, prospectuses, financial statements, or financial data;
- j. understand specific market structures for the type investment products offered or recommended to clients and where relevant their trading venues or the existence of any secondary markets;
- k. have a basic knowledge of valuation principles for the type of investment products offered or recommended to clients;
- l. understand the fundamentals of managing a portfolio, including being able to understand the implications of diversification regarding individual investment alternatives.

V.IV Organisational requirements for assessment, maintenance and updating of knowledge and competence

- 19. Firms should set out the responsibilities of staff and ensure that, where relevant, in accordance with the services provided by the firm and its internal organisation, there is a clear distinction in the description of responsibilities between the roles of giving advice and giving information.
- 20. Firms should:
 - a. ensure that staff providing relevant services to clients are assessed through the successful completion of an appropriate qualification and having gained appropriate experience in the provision of relevant services to clients;
 - b. carry out an internal or external review, on at least an annual basis, of staff members' development and experience needs, assess regulatory developments and take action necessary to comply with these requirements. This review should also ensure that staff possess an appropriate qualification and maintain and update their knowledge and competence by undertaking continuous professional development or training for the appropriate qualification as well as specific training required in advance of any new investment products being offered by the firm;
 - c. ensure that they submit to their CA, on request, records concerning knowledge and competence of staff providing relevant services to clients. These records shall contain information that enables the CA to assess and verify compliance with these guidelines;
 - d. ensure that when a member of staff has not acquired the necessary knowledge and competence in the provision of the relevant services, this staff member cannot provide the relevant services. However, where this member of staff has not acquired the appropriate qualification or the appropriate experience to provide the relevant services or both, this staff member can only provide the relevant

services under supervision. The level and intensity of supervision should reflect the relevant qualification and experience of the staff member being supervised and this could include, where appropriate, supervision during clients meeting and other forms of communication such as telephone calls and e-mails;

- e. ensure that, in situations under letter d., the staff member supervising other staff has the necessary knowledge and competence required by these guidelines and the necessary skills and resources to act as a competent supervisor;
- f. ensure that the supervision provided is tailored to the services to be provided by that staff member and cover the requirements of these guidelines relevant to those services;
- g. ensure that the supervisor takes responsibility for the provision of the relevant services when the staff member under supervision is providing relevant services to a client, as if the supervisor is providing the relevant services to the client, including signing-off the suitability report where advice is being provided;
- h. ensure that the staff member, who has not acquired the necessary knowledge or competence in the provision of the relevant services, cannot provide those relevant services under supervision for a period exceeding 4 years (or shorter if required by the CA).

V.V Publication of information by Competent Authorities

- 21. When a list of the specific appropriate qualifications that meet the criteria of the guidelines is not published by the CA or other national bodies identified in the Member State, the CA must publish the criteria of these guidelines as well as the characteristics that an appropriate qualification needs to meet in order to comply with those criteria.
- 22. CAs should also publish: (i) information on the period of time required to gain appropriate experience; (ii) the maximum period of time under which a staff member lacking appropriate qualification or appropriate experience is allowed to work under supervision; and (iii) whether the review of staff member's appropriate qualification should be carried out by the firm or an external body.
- 23. Information in paragraph 21 and 22 shall be published on the website of the CA.

3.7 Annex VII

Illustrative examples of the application of certain aspects of the guidelines

Examples relating to the scope of the guidelines

The following examples set out instances where a staff member would not fall within the scope of the guidelines:

- employees only pointing out where clients can find information;
- employees distributing brochures and leaflets to clients without giving additional information with regards to its content or providing any follow up investment services to those clients;
- employees who only hand over information such as KIID at the client's request without giving any additional information with regards to its content or providing any follow up investment services to those clients; and
- employees who perform back-office functions and do not have direct contact with the clients.

Examples relating to the scope of the guidelines

Firm should consider that regarding the distinction between staff providing information and staff providing investment advice, that the Q&A issued by CESR⁹ be taken into consideration.

General example relating to part V.I:

A firm provides regular mandatory training to staff in the area of MiFID conduct of business, and organisational requirements.

General example relating to part V.I:

The firm adopts a code of ethics to set forth the standards of business conduct and behaviour necessary for the proper provision of relevant services and obtain written acknowledgements from staff that they have read, understood and complied with it.

Examples relating to part V.I, V.II and V.III:

A firm provides regular mandatory training to staff in the features and characteristics, including potential risks, of the products offered by the firm. This comprises training about products newly offered by the firm.

⁹ http://www.esma.europa.eu/system/files/10_293.pdf

A firm ensures staff are familiar with the situations in which conflicts of interest arise and how to apply the rules regarding the management of conflicts of interest.

A firm ensures staff are familiar with the situations as to when a firm may pay or receive an inducement and the relevant legal requirements regulating inducements.

Examples relating to part V.III and V.IV

A firm regularly monitors the suitability assessments provided by staff to assess whether the staff member has considered all aspects of the suitability requirements, against the specific details of the investment product.

A firm regularly monitors that relevant staff giving advice demonstrate:

- ability to ask appropriate questions to the client to understand her/his investment objectives, financial situation and knowledge and experience;
- ability to explain the risks and rewards of a particular product or strategy to the client;
- ability to compare selected products with regards to terms and risks, to be able to select the product best suited to the client profile.

Examples relating to part V.IV

The firm documents staff roles and responsibilities and evaluates their performance against key set criteria contained in the description of responsibilities.

Investment firms communicate publicly, in a way that is consistent and meaningful to clients, their criteria for demonstrating how staff comply with these guidelines.

Continuous or on-going professional development is required in order for staff to hold the “appropriate qualification”. This ongoing assessment will contain updated material and will test staff on their knowledge of, for example, regulatory changes, new products and services available on the market. This ongoing assessment:

- may involve training in the form of courses, seminars, independent studies or learning; and
- includes verification questions demonstrating that staff has necessary knowledge and competence.

Investment firms verify the relevance of continuous on-going development being provided to staff providing relevant services.