

**ABI's remarks on the
ESMA Consultation Paper
regarding
Guidelines on certain aspects of
the MiFID II appropriateness
and
execution-only requirements**

April 2021

POSITION PAPER

Foreword

The aim of this document is to provide ABI's contribution to the consultation launched by ESMA on the Guidelines regarding certain aspects of the MiFID II appropriateness and execution-only requirements.

Before responding to the specific questions raised by the consultation paper, we think it would be useful to comment on some relevant general aspects.

General remarks

We believe that there should be an express reminder in the foreword of the final Guidelines that Article 54 (3) of the Delegated EU Regulation 2017/565, states: "Where an investment firm provides an investment service to a professional client it shall be entitled to assume that in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge for the purposes of point (c) of paragraph 2".

This means that the Guidelines only relate to retail clients and professional clients for whom investment firms need not base themselves on the assumption envisaged under Article 54 (3) of the Delegated EU Regulation 2017/565.

This remark could take on greater significance from the perspective of the review of the MiFID II, as Article 5 of Directive 2021/338 provides for a review clause which, inter alia, expressly includes client categorisation within the issues to be revised.

Answers to Specific Questions

Q1: Do you agree with the suggested approach on providing information about the purpose of the appropriateness assessment? Please also state the reasons for your answer.

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market.

However, we believe that further clarification is necessary (either within the proposed paragraph 17 itself of the proposed Guidelines or by working in additional paragraphs):

- firms can choose different methods and tools for the provision of this information as long as all the information given to clients complies with the relevant provisions;
- the method used should include some form of record-keeping system about the provision (or some form of acknowledgment in the event of questionnaires being filled via remote channels, such as the web and call centres) of the information to clients;
- consequently, firms should give this information in writing or on a suitable durable medium that caters for the various methods adopted for the profiling activities (e.g., paper-based questionnaire vs. questionnaire to be filled in via remote channels);
- disclosure (which need not necessarily be in a written form) should be effective and its contents should be congruent with the peculiarities of the method/tool chosen to interact with clients. In other words, the level of effectiveness should be evaluated and found to be compatible and commensurate with the specific manner chosen to communicate with clients;
- a summary of the differences between requirements applicable to advised and non-advised services and the description of the situations where no appropriateness assessment will be done (e.g., execution-only transactions) should not necessarily be provided in the context of the appropriateness assessment, as this information can also be given in other information documents delivered to clients (e.g., pre-contractual information or a contract for the provision of execution services);
- even though we agree that firms should not give the impression that it is up to the client to decide on the appropriateness of the investment service/product, we nonetheless wish to highlight that firms should not, without good reason, have to surrender the right provided for under MiFIDII whereby investors consent to the performance of transactions even though firms have informed said clients that such transactions are not appropriate, but the clients have decided to proceed anyway.

Q2: Do you agree with the suggested approach on the arrangements necessary to understand or warn clients? Please also state the reasons for your answer.

Answer: We agree with the suggested approach. However, we feel that some adjustments to the proposed Guidelines are necessary so that they adequately cater for the characteristics of certain business models commonly found on the Italian market. These models tend to limit the scope of application of the appropriateness test much more than the relevant MiFID II provisions. They involve a series of specific mechanisms aimed at providing

clients with suitable warnings or encouraging them to supply the information requested.

Specifically, most Italian firms:

- contractually undertake to perform the suitability assessment (generally with a portfolio approach) not only for the advised investment services but also for the executive ones, in order to offer their clients a higher level of protection;
- allow clients to act under the appropriateness regime in limited cases based on the specific features of the business model adopted by each firm: i) only when clients directly operate through remote channels; ii) in some limited cases when firms verify on one single occasion that clients who want to proceed under an appropriateness regime possess suitable characteristics to do so, regardless of the channel; iii) in some very limited cases, the appropriateness regime is also allowed for transactions requested by retail clients while interacting with the staff members of the firm (on its branch premises or over the telephone) as regards a subset of financial instruments (which do not include very complex products).

This means that the contract for the provision of investment services takes into account clients' multiple investment objectives for different portions of their portfolio.

The boundaries of the allowed appropriateness are defined ex ante in the contract and the profiling questionnaire. Consistently with these, the following scenarios may occur on the Italian market:

- when taking into account clients' multiple investment objectives, firms use a single profiling questionnaire which serves both for suitability and for appropriateness assessment. In this case: i) there is a clear indication in the foreword of the questionnaires about the different implications of appropriateness as compared to suitability; ii) clients must necessarily provide all information related to suitability which also include those for appropriateness;
- whenever clients operate under the appropriateness regime, a specific system is in place in order to obtain the necessary information about client's knowledge and experience and to remind the client about the need to provide this information before each transaction.

Consequently, we would like the final Guidelines to take into account that:

- appropriateness can also be applied in a discretionary manner depending on the type of channels through which the "not advised" investment services are provided;

- in this context, the list of arrangements that can be used to obtain the necessary information for the appropriateness test should be extended as compared to what is currently stated by paragraph 20 of page 9 of the consultation paper.

We suggest rewording paragraph 23 of the proposed Guidelines (pages 27 and 28) so that it contemplates the fact that, in the cases when firms allow for an appropriateness regime (mostly limited to remote channels and for a limited number of clients), there is no obligation to introduce a suspension period for updating the questionnaire as there is no risk of opportunistic reprofiling. This also in view of the fact that in such circumstances, no interaction with the staff of the firm takes place.

Q3: Do you agree with the suggested approach on the extent of information to be collected from clients? Please also state the reasons for your answer.

Q4: Do you agree with the suggested approach regarding the appropriateness assessment relating to a service with specific features (paragraph 34 of the Guidelines)? In particular, do you agree with the examples provided (bundled services and short selling), or would you suggest including other examples? Please also state the reasons for your answer.

Answer: We agree with the suggested approach. However, we believe that some adjustments should be made to the proposed Guidelines so that they duly contemplate the fact that the main aim of gathering the information for the appropriateness test is to gauge the clients' capacity to understand the essential characteristics of the investment service or product offered or requested as well as the risks involved therein.

This means that, based on the proportionality principle mentioned in the proposed Guidelines, the extent of the information to be acquired regarding the clients' knowledge and experience should only vary according to the level of complexity of the products: indeed, the complexity of investment products depends on how difficult it is for investors to understand their essential characteristics.

That's why firms have policies and procedures in place to properly verify the clients' knowledge and experience as regards the different types of investment product classified on the basis of their level of complexity.

Therefore, we believe that the current wording of paragraph 26 of the consultation paper and paragraph 32 of the proposed Guidelines goes beyond the relevant MiFID II provisions and consequently it should be adjusted by deleting the reference to "more risky products" proposed as an additional driver to the one related to "more complex products".

As a matter of fact, the proposed wording too closely reflects ESMA's Guidelines regarding certain aspects of the MiFID II suitability requirements (which correctly require the definition of the extent of the information to be collected also taking into account the different level of risk of investment products according to the reach of the suitability requirements) and does not precisely correspond to the appropriateness requirements which are lower.

Q5: Do you agree with the suggested approach on the reliability of client information? Please also state the reasons for your answer.

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market.

Q6: Do you agree with the suggested approach on relying on up-to-date client information? Please also state the reasons for your answer.

Answer: We agree with the suggested approach. However, we feel that some adjustments should be made to the proposed Guidelines so that they duly contemplate the fact that information given by clients allowed to act exclusively under the appropriateness regime can be updated but there should be no mandatory expiry date. Indeed, information about knowledge and experience does not devolve and therefore should not be subject to expiration; this is without prejudice to the clients being able to update the information at any time should they believe that their knowledge and experience have increased.

In paragraph 32 of the consultation paper and paragraph 41 of the proposed Guidelines, ESMA acknowledges that, updating the information about appropriateness, unlike suitability, has a different nature and is less important. Nevertheless, it proposes that firms put in place procedures which define how frequently information previously collected about a client's knowledge and experience be updated so as to ensure that said information stays up-to-date, accurate and complete for the purposes of the appropriateness assessment.

Therefore, we believe that the wording of the proposed Guidelines should be integrated in order to emphasise the fact that the steps taken for this purpose may be different from those aimed at ensuring that clients update the suitability questionnaire. In view of this, we suggest:

- rewording paragraph 41 by clarifying that the proposed sentence "Therefore, the frequency for updating information on clients could be lower under the appropriateness regime than under the suitability regime" is merely one of the possible examples that could be used for this purpose, but it is not mandatory. Other examples could be the

internal procedures to keep the information about their experiences updated over time based on counters of operations carried out rather than consideration of "indirect" experience acquired by clients through the possession of asset management products and the reception on periodic reporting);

- integrating the last sentence of paragraph 42 "Firms should also have adequate procedures to deal with those situations where the client does not answer to their questions regarding changes or updates of the information provided initially" with a clarification that the Guidelines should be suitably recast to address the difference between the ones regarding appropriateness and the ones regarding suitability.

We also believe it is important to reword paragraph 45 of the proposed Guidelines in order to clarify that it is not relevant and consequently not applicable whenever clients are allowed to operate under the appropriateness regime only acting by remote channels. In such a case there is no interaction with firm staff members and consequently there is no risk of opportunistic reprofiling.

Q7: Do you agree with the suggested approach on client information for legal entities or groups? Please also state the reasons for your answer.

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market.

Q8: Do you agree with the suggested approach on the arrangements necessary to understand investment products? Please also state the reasons for your answer.

Answer: We agree with the suggested approach, but we believe that the proposed Guidelines should be adjusted so as to duly take into account the fact that the purpose of mapping investment products under the appropriateness regime is necessarily consistent with the rationale of appropriateness itself.

More in detail, while we believe it is right to focus on the level of 'complexity' of investment products, we think that the proposal of taking into account their relevant risk factors as well (such as credit risk, market risk and liquidity risk) falls outside the scope of the relevant MiFID II provisions and should consequently be carefully assessed and possibly deleted.

As a matter of fact, the proposed wording too closely reflects ESMA's "Guidelines on certain aspects of the MiFID II suitability requirements" (which quite rightly require classification of investment products on the basis of their

risk profile too) and does not precisely correspond to the appropriateness requirements which are lower.

Moreover, while we agree that it is important to ensure the granularity of information about clients' knowledge, we believe that the granularity level could be lower when verifying clients' experience as regards macro asset class of investment products.

Q9: Do you agree with the suggested approach on the arrangements necessary to assess the appropriateness of an investment or else issue a meaningful warning? Please also state the reasons for your answer.

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market.

Q10: Do you agree with the suggested approach on the effectiveness of warnings? Please also state the reasons for your answer.

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market, but we wish to reiterate what we have already outlined in our answer to Q1 about the need to take into account the fact that warnings should be effective and congruent in terms of content with the features of the method/tool used to interact with clients.

Moreover, we believe that the second part of paragraph 47 of the consultation paper and 71 of the proposed Guidelines are too vague and tricky to implement. In our view, proper management of the situations envisaged under the afore-mentioned paragraphs goes beyond the scope of the appropriateness assessment and should be ensured both by the product governance system and by the type of channel through which the client can act even in the event of a non-appropriateness warning. When this activity is confined to remote channels, there is no interaction with firm staff members and consequently there is no risk of conflict of interest.

Q11: Do you agree with the suggested approach on the qualifications of firm staff? Please also state the reasons for your answer.

Answer: In our view, information gathering is different from giving investment advice and providing the clients with information about financial services or financial instruments. Therefore, there should be no requirement to comply with Art. 25.1 of MiFID II for firm staff simply involved in collecting client information for the purpose of appropriateness assessment.

Only client-facing staff involved in the provision of investment services based on appropriateness assessment or execution should have to comply with ESMA Guidelines on client-facing staff knowledge and competence requirements. Therefore, proposed Guideline 10 seems to provide very little added value compared to ESMA "Guidelines for the assessment of knowledge and competence".

Q12: Do you agree with the suggested approach on record-keeping? Please also state the reasons for your answer.

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market.

Q13: Do you see any specific difficulties attached to the requirement to keep records of any warnings issued and any corresponding transactions made by clients?

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market.

Q14: Do you agree with the suggested approach on determining situations where the appropriateness assessment is needed? Please also state the reasons for your answer.

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market as far as circumstances when appropriateness is needed. However, as already clarified in our answer to Q2, we would like the final Guidelines to also take into account further discretionary application of the appropriateness.

Q15: Do you agree with the suggested approach on controls? Please also state the reasons for your answer

Answer: We agree with the suggested approach which is consistent with the arrangements already in place on the Italian market.

Q16: When providing non-advised services, should a firm also assess the client's knowledge and experience with respect to the envisaged investment product's sustainability factors and risks? If so, how should such sustainability factors and risks be taken into account in the appropriateness assessment? Please also state the reasons for your answer

Answer: We do not believe that the clients' knowledge and experience are relevant to sustainability, because the latter only relates to the clients' investment objectives.

In our view sustainability should be taken into account within the suitability assessment and not within the appropriateness assessment.