

Stockholm, 29 April 2021

NSA response to ESMA's consultation on guidelines for appropriateness and execution-only

The Nordic Securities Association (NSA)¹ welcomes the opportunity to respond to ESMA's consultation on appropriateness and execution-only requirements under MiFID II.

Before answering the specific questions, we would like to make the following general comments.

1. General comments

The NSA notes that to a large extent, the proposed guidelines have been based on the existing guidelines for suitability. In our view, this approach fails to recognise that MiFID II sets out a different regulatory regime for "advised" and "non-advised" services, which needs to be respected on level 3.

Moreover, it is important to ensure that the guidelines work in an online environment, i.e. that the requirements on appropriateness and execution-only are technology neutral. Otherwise there is a risk that the guidelines could have a negative impact on the abilities of retail clients to access products at their own initiative i.e. through self-service channels.

2. 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.

The NSA agrees that firms should be able to decide how to inform clients about the appropriateness test and which format to use.

¹ NSA is composed by the Danish Securities Dealers Association (Børsmæglerforeningen), the Finance Finland (Finanssiala ry), the Norwegian Securities Dealers Association (Verdipapirforetakenes Forbund) and the Swedish Securities Markets Association (Föreningen Svensk Värdepappersmarknad).

Considering that execution services often take place online, it is important to avoid information overload and requirements which make it difficult to provide information in a digital format. It is important to allow the provision of standardized information to clients. Also, the expression “in good time” must be interpreted in a flexible way in order to work in a trading environment.

Furthermore, in order to avoid legal uncertainty, ESMA should clarify in the feedback statement that “advised services” relates to investment advice under MiFID. We also suggest an amendment to paragraph 14, bullet 3 on page 26 clarifying that firms should provide information on the differences between suitability test and appropriateness test and not, as the wording now suggests, a comparison between investment services per se.

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.

The NSA considers that the proposed Guideline 2 is too detailed regarding how firms should design a questionnaire.

Moreover, the NSA strongly opposes the requirements of cooling-off period and limiting the number of attempts to respond to a questionnaire, paragraph 23 on page 27. Such requirements are too prescriptive and not in line with the level 1 and 2 which clearly allow clients to proceed with a transaction after having received a warning.

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.

The NSA wants to underline the importance of proportionality so that the collection of information does not become too granular.

We also think the term “specific types” of products in paragraph 24 on page 28 is unclear. Firms should be able to use the same questions for the same types of products and services.

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.

The NSA generally agrees with the two examples (bundled services and short selling) in Guideline 3 as services with specific features but wants to underline need for proportionality e.g. as regards record keeping obligations.

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

The NSA wants to underline that it is not possible for an investment firm to double-check information that the client has provided in respect of transactions carried out with another investment firm or bank. Thus, it must be possible for the investment firm to rely on information provided by the client relating to such transactions. We suggest that this point is clarified in the feedback statement.

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

The NSA objects to the proposal for a “periodic update-requirement” for execution services in paragraph 42 – 44 on page 32. In our view such updates are more appropriate for clients which have an ongoing relationship regarding advisory services. An appropriateness test is triggered by a client’s transaction and an investment firm should therefore only be required to update client information when there is a change e.g. if client wants to invest in a new product which is not covered by a previous assessment.

We also question the wording in paragraph 41 which suggests that firms should distinguish between vulnerable and non-vulnerable clients. This requirement go beyond the rules of client classification in MiFID II.

In the opinion of NSA, the proposal in paragraph 45 that two staff members should be involved in a review is much too prescriptive, unnecessary and burdensome. Staff member undertaking an appropriateness assessment has sufficient knowledge and experience to conduct an update. Furthermore, the requirement will not make sense in an online environment where the client has no contact or connection to the firm’s staff.

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

As a general comment, it is important that the approach taken on client information for legal entities or groups is based on the nature of execution services.

For legal and groups entities, the investment firm should base its assessment on the legal representative which the firm has registered in its IT system (normally such registration take place in connection with onboarding of the client).

For clients belonging to a group, firms should be able to assess the knowledge and competence of the person initiating the trade. It is not possible to know in a trading situation which of several persons who belong to a group is the least knowledgeable unless every person in the group is tested, which can hardly be ESMA’s intention.

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

The NSA considers that Guideline 7 introduces unnecessary complexity as it overlaps MiFID II rules on product governance. We suggest that ESMA re-consider the need for this guideline.

We oppose the requirement in paragraph 54, page 35 to use more than one data provider for complex products since this in many cases will not be possible, due to the fact that data is not available or that the product is manufactured by the firm itself.

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.

No comments.

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

NSA takes the view that paragraph 71 should be deleted. Considering that MiFID level 1 and 2 clearly allows a client to proceed with a transaction after having received a warning it is in our view not appropriate for ESMA to adopt a guideline which expect firms to adopt policies refusing clients to exercise such right.

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

We have no strong objections although it is important to ensure that the requirements are aligned with other requirements on staff qualifications in the MiFID II framework. Is it necessary to draft guidelines as well?

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

We have no strong objections although it is important to ensure that the requirements are aligned with other requirements on record keeping in the MiFID II framework. Is it necessary to draft guidelines as well?

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?

No comments.

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.

The NSA wants to emphasize the need for technology neutral rules that work for self-service tools and platforms i.e. where the client log-on and trade without any personal contact with the firms' staff. In our view, such online trading should always be considered as provided at a clients own initiative, since there are no possible connections between the self-service tool and what may have happened before the client logs on to use the tool. This should be reflected in paragraph 86, page 42.

For a non-advised transaction that is made through a direct personalized communication with an employee of the firm (so called hand-held situations) firms should have internal instructions for employees to be able to distinguish between transactions falling within the execution-only exemption and other non-advised transactions.

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

No comments.

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 n the appropriateness assessment? Please also state the reasons for your answer.

According to the NSA, the inclusion of a specific product's characteristics into the appropriateness assessment is already required by Art. 25(3) in MiFID II and is therefore in partly covered by the proposed Guidelines 7 and 8.

Moreover, it should be noted that sustainability factors and risks are just two additional components to already existing factors and risks that a financial instrument can have. If sustainability is singled out as a separate characteristic it would risk diminishing other factors and risks from the appropriateness assessment. Based on these concerns, the NSA does not support the introduction of a specific guideline on sustainability.

At a more general level, we also consider that the time-table of EU proposals on sustainability, including MiFID II delegated act, is uncertain and also are concerned with lack of available data in order to make the required assessment.
