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EBF response to ESMA Consultation Paper: Guidelines on certain aspects of the MiFID II Suitability Requirements

Key points:

The EBF welcomes ESMA's Consultation Paper (CP). The rules on assessment of suitability form an important part of the investor protection rules in MiFID II. The EBF generally supports ESMA's aim to update the existing guidelines. Suitability requirements in the context of MiFID II are a key element to correctly adjust investment firms' advice to clients and make suitable decisions based on clients desires as well as information on their situation.

We welcome that ESMA in the Consultation Paper emphasizes the need for proportionality, taking into account the nature and complexity of the financial instruments as well as firm's different business models and their clients' needs. In fact, the EBF believes that well calibrated and proportionate rules are essential for the proper functioning of the suitability requirements, in particular in the light of new technological developments such as robo-advice etc.

As a general remark, the EBF finds that the supporting guidelines are very detailed and in some cases includes unnecessary repetition of what is already stated under Level 2. There are also examples where the guidelines appear to introduce new requirements on firms. In addition, we note that there are cases where the guidelines go beyond the issue of suitability, involving other parts of MiFID II (e.g. knowledge & competence and record-keeping) and how firms should perform the investment service per se (e.g. portfolio management). Based on the above, the EBF would welcome if ESMA in its forthcoming work did a general overview of the draft guidelines in order to make them more stringent and focused on the issue at hand – the suitability requirements under MiFID II.

We disagree on the suggested approach for firms' assessment of equivalent products for client profiles.

When talking about new technological developments of the advisory market, the level playing field becomes more important than ever. Possibilities for gold plating by national competent authorities should be extremely limited as they could create un-level playing field for new technological developments that are by definition not limited to Members States' boundaries.

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EBF Position

Q1: Do you agree with the suggested approach on the information to be provided on the suitability assessment and specifically with the new supporting guidelines on robo-advice? Please also state the reasons for your answer.

Definition of investment advice

To ensure that the guidelines will be implemented consistently across Member States, it is crucially important to have a consistent and harmonised understanding throughout Europe of what constitutes investment advice and how the EU framework can more broadly harmonise the questions of various types of investment advice. Especially when digital tools are involved, different Member States may have a different understanding about when a suitability assessment has to be carried out.

We would therefore recommend that the guidelines describe more precisely the circumstances in which a suitability assessment is required.

The term "robo-advice"

ESMA repeatedly refers to robo-advice in its draft guidelines. There is no standard definition of this term in Europe as things stand. Very little practical experience with robo-advice has been gathered in Europe to date. The volume of assets involved would appear to be relatively small. What is more, there is no compelling link to MiFID II in terms of content or timing. For these reasons, we consider it premature to formulate special rules for robo-advice. In principle, robo-advice should have to comply with the same requirements as those applying to investment advice provided by a person.

The definition provided in para. 6 seems to be unspecific.

Digital tools merely in the form of objective search engines will not, in our view, be subject to the requirements for robo-advice set out in the guidelines. It would be desirable for the guidelines to clarify this point.

Some of the draft guidelines obviously relate to robo-advice only. When it comes to others, however, it is not always totally clear whether they cover only robo-advice or not. We would therefore suggest making it clearer which guidelines apply exclusively to robo-advice.

Information overload

The draft guidelines set out numerous new requirements concerning the information to be provided to clients. We agree that investors need to be well informed in order to make sound investment decisions. But to avoid overwhelming investors with information to the point where they can no longer "see the wood for the trees", ESMA should take a critical look at the scale and level of detail of the information requirements.

Paragraph 17

Paragraph 17 requires investment forms to inform the clients that they may be asked to answer some questions related to situations describing, for example, different levels of loss/return that may occur depending on the level of the risk taken or to other risk situations. This requirement imposes unnecessary burdens to both clients and investment firms. Instead of applying questions relating to the situation of a client to verify a client's personal situation, investment firms should also be allowed to use tool to demonstrate the impact of scenarios on a potential client's investment. In such case, investment firms need to declare the use of such tools as mandatory.

Paragraph 21

We assume that paragraph 21 applies to robo-advice only.

The last bullet point ("*An explanation of how and when the client's status will be updated*") is totally unclear, even in this context. It is not clear what status of the client is referred to and in what circumstances this status might have to be updated. We therefore recommend deleting this bullet point.

The EBF would also like to underline that robo-advice is not necessarily of an on-going nature, and it should be clarified by ESMA in the Final Report that any updating of a client's status would typically not be applicable for one-off advice.

Paragraph 22

We assume paragraph 22 applies to robo-advice only.

We do not believe it makes good sense for the guidelines to set technical requirements concerning the mechanics of how investment firms provide their clients with information. These technical aspects should be left to the firms themselves.

We therefore suggest deleting paragraph 22.

Q2: Do you agree with the suggested approach on the arrangements necessary to understand clients and specifically with how the guideline has been updated to take into account behavioural finance and the development of robo-advice models? Please also state the reasons for your answer.

Guideline 2 relates to the collection and assessment of information about the client. The EBF believes that it is important to ensure that the information collected is proportionate and relevant for the type of service provided. It would be very welcome if ESMA would confirm this application of proportionality in the Final Report and include some illustrative examples.

Paragraph 25

The final bullet point is problematic, in our view. Investors must, as a matter of principle, be able not to reply to a question. Requiring the questionnaire to determine how the client is able to reply would not make good sense, in our opinion, and would be unnecessarily restrictive.

We therefore suggest deleting the final bullet point in paragraph 25.

Instead, the guidelines could require firms to have policies and procedures in place for dealing with clients who reply "no answer" too frequently.

The requirements regarding layout seem highly vague ("The layout should be carefully elaborated and should avoid orienting investors' choices). The general requirements for the provision of information, i.e. that the information must be "clear, fair and not misleading" provide sufficient guidance for the correct handling of the layout by the investment firms.

Paragraph 26

We agree it is important to prevent abusive practices such as recommending pension products to older clients who are unlikely to live long enough to see a payout. Practices of this kind are already banned under existing legislation, however, and any firm found guilty of them will be sanctioned accordingly. Isolated incidents of this kind should not, however, lead to blanket discrimination against investors on the grounds of age.

An investor of any age may have a legitimate interest in acquiring any financial instrument. The purchase of shares or long-term bonds, for instance, may sometimes make good sense even for elderly investors (e.g. with a view to leaving them to their heirs).

It should be remembered, in addition, that an investor of above-average age may also have above-average experience with financial instruments. Experience is, after all, something which comes with age.

With this in mind, the holding period of a financial instrument should not per se be an argument for or against the instrument's suitability. It may even sometimes make good sense for elderly investors to acquire speculative products for hedging purposes, for example.

The important thing is that investors state their investment objectives and that the investment firm assesses the suitability of an instrument on the basis of these objectives.

Paragraph 28

Point 28 of the supporting guidelines (page 43) states that the firm should take "all reasonable steps" to sufficiently assess the understanding of their clients. The EBF questions the added value is of using the word "all" in this sentence and also how this requirement can be followed up in supervision. We propose that the sentence is amended and that the word "all" is deleted". If the word" all" is kept, ESMA should further clarify what this means in practice.

In addition, there should be some clarifications about the scope of consistency assessments: "mechanisms to avoid self-assessment" should not be understood as an obligation to "test" or "examine" the client, i.e. certain reliance on plausible answers should be continued to be permitted (same applies to paragraph 42, 44 (a)).

Paragraph 29

We consider it highly problematic to have to appraise the client's financial literacy and make this appraisal part of the suitability assessment. Firstly, it is not clear how this would work in practice. It should not be incumbent on banks to conduct financial literacy tests on investors.

Secondly, we once again see a danger of discrimination if decisions on whether or not to recommend a financial instrument have to be based on factors such as the client's level of education.

This section should also contain clarifications on the documentation requirements.

Q3: Do you believe that further guidance is needed to clarify how firms should assess clients' ability to bear losses?

In relation to Guideline 3, ESMA uses certain terms which are not defined, e.g. "risky financial instruments" (Point 34) and "illiquid instruments" (Point 35). ESMA states that it is up to each firm to define these terms, taking into account possible guidelines provided by competent authorities (footnotes 30 and 32). The EBF generally believes that common definitions are important from a convergence perspective, but notes that such definitions should not be introduced in Level 3 guidelines. We therefore agree with this flexible approach taken by ESMA. However, as regards the notion of "illiquid instruments", it should be noted that MiFIR does in fact provide a classification of instruments as liquid/illiquid, although this is not really in line with the common market understanding (e.g. FX Forwards are considered as illiquid). For the avoidance of doubt, ESMA should explain in the Final Report that such classification relates to the transparency requirements in MiFIR and not necessarily the investor protection rules or the suitability assessment.

In relation to the supporting guideline of paragraph 36.b (information to be collected when portfolio management services are provided), although not disagreeing with its purpose, we consider that it should be clearly stated that the only reason for the requirement that the client must have a general understanding of types of financial instruments and associated risks is to allow him to have a precise understanding of the terms and limits of the portfolio management' mandate.

In paragraph 26 examples are given for the necessary information to conduct a suitability assessment (because they may affect, for example, the analysis of the client's financial situation (including his ability to bear losses) or investment objectives (including his risk tolerance)). Some examples of necessary information are in certain circumstances of confidential nature (marital status, family situation, employment status, etc.) and potentially disproportionate to its use. As a consequence, firms providing investment services could be non-compliant with the data minimisation principle of the General Data Protection Regulation (GDPR; an organisation should only process the personal data that it actually needs to process in order to achieve its processing purposes). We acknowledge that certain elements of information are useful to provide a suitable investment service, but this is not the case in all circumstances. It would therefore be better to mention the information as useful, rather than necessary.

Paragraph 32 a) requires the firms in determining what information is 'necessary' and relevant to consider, in relation to a client's knowledge and experience, financial situation and investment objectives the type of the financial instrument or transaction that the firm may recommend or enter into (including the complexity and level of risk). The term "level of risk" is not defined and there should be some clarification that this may also be reached by using buckets.

Regarding paragraph 38-39: based on these paragraphs banks are generally entitled to assume that all professional clients (per se or elective) have the necessary level of experience and knowledge, and are therefore not required to obtain information on these aspects. For per se professional clients the firm is also entitled to assume that the client is able to financially bear any investment related risks. However, this approach does not correspond with ESMA's latest guidelines on product governance. These guidelines state (in paragraph 81-82) that firms should consider the differences in assumed knowledge between retail and professional clients and, within the professional client category, elective professional clients and per se professional clients. Consequently, only per se professional clients are presumed to possess the knowledge and experience, not the elective professional clients. These different approaches (mifid – suitability requirements CP vs. Target Market guidelines) are very confusing and should be aligned.

Regarding paragraph 39: the draft guidelines state that credit institutions should obtain information on the financial situation of the 'per se professional client' if the client's investment objectives demand it. This obligation goes beyond level I MiFID II texts (there is no obligation to check the client's financial situation for per se professional clients). We would propose to redraft the example in this paragraph as follows: "Where the client is seeking to hedge a risk, the firm may need to obtain detailed sufficient information on that risk in order to be able…". Hedging a risk might require some information on the risk of the investment, however, no information on client's financial situation (loss capacity) is needed.

The requirement in paragraph 41 to "encourage clients to disclose their financial investments they hold with other firms in detail, if possible also on an instrument-by-instrument basis" is highly problematic for a number of reasons. Some investors make a conscious choice to have investment accounts at various banks. A possible reason for doing so might be that the investor does not want a single bank to have a complete overview of all the financial instruments they hold. In addition, investors frequently maintain different accounts for different, totally separate purposes. In this case, the bank providing advice would be unable to draw any meaningful conclusions from information about accounts held at other banks. A further problem is that the composition of accounts maintained by active investors, in particular, will frequently change. We consider it impracticable to expect clients to bring up-to-date account statements to every appointment with an adviser. This applies all the more to clients who have made a conscious decision to let a number of firms manage their financial instruments. The upshot would be that the information available to the bank providing advice would often be out of date. In order to achieve this goal, it should be sufficient for the firm to collect information about the value of the client's financial holdings with other banks/investment firms.

Q4: Do you agree with how the guideline on the topic of 'reliability of client information' has been updated to take into account behavioural finance and the development of robo-advice models? Please also state the reasons for your answer.

We would like to make the following fundamental observation about general guideline 4 and its supporting guidelines. Under Article 55(3) of the MiFID II Delegated Regulation, investment firms are entitled to rely on the accuracy of information provided by clients or potential clients. An investment firm is not permitted to rely on the information being correct only if it is aware or ought to be aware that "the information is manifestly out of date, inaccurate or incomplete." This means that the information obtained by a firm from a client can generally be treated as reliable. Investment firms have no general obligation to verify the information provided by their clients. Only if there is something "manifestly" amiss with this information is the firm required to check it. Yet general guideline 4 and its supporting guidelines could give the impression that investment firms have to check information obtained from clients as a matter of course. This would go beyond the level 2 requirements of MiFID II. It must continue to be sufficient for investment firms to be conscientious about obtaining information from their clients. We would recommend retaining paragraph 42 of the 21 August 2012 version of the guidelines ("For example, firms should consider whether there are any obvious inaccuracies in the information provided by their clients.").

In paragraph 35 ESMA states that for illiquid or risky financial instruments, 'necessary information' to be collected may include all of the following elements as necessary to ensure whether the client's financial situation allows him to invest or be invested in such instruments: extent of the client's regular income and total income, assets and regular financial commitments. It is important to well define risky financial instruments as the 'necessary information' is very extensive and perhaps disproportionate to the products and services the firm offers.

We believe the supporting guidelines could be made clearer and more succinct in order to avoid different interpretations, by national competent authorities, of information to be collected by investment firms, which may result in multiple types of questionnaires taking into account, namely, the type of investment services provided and the complexity of investment products (as mentioned in paragraphs 36 and 71).

Investment firms naturally stress the importance of their clients passing on any new information. When obtaining investment advice clients are, in addition, regularly asked whether information previously provided is still accurate and up to date. Over and above this, however, the responsibility for ensuring that information is current and correct must lie with the client. With this in mind, we do not consider the following phrase in the final sentence of paragraph 43 to be appropriate: "*…and cannot limit their responsibility by means of a specific clause in the contract with the client, in the general terms and conditions, or otherwise*." On top of that, the design of contracts is regulated by the national civil law of member states. The phrase quoted above could give the impression that the draft guidelines wish to influence national civil law. We assume this is not ESMA's intention. For both these reasons, we see a need to delete this phrase.

With regard to paragraph 47 the requirements imposed to financial forms are not clear and should be further specified. With regard to reliability of client information, despite the reference in the supporting guideline 48 that information and consistency should be evaluated as a whole, the level of options indicated (a bare minimum, but not a standard for each service or type of riskier instruments) may lead to an almost case-by-case questionnaire and greatly prejudice the possibility of a standard (even if more in depth) questionnaire.

Such a potentially complex and variable geometry of questionnaires (linked, namely, to type of investment products, recent trading experience, factual information about the client's financial situation, level of accepted losses over a given time period and personal choices in case of risk uncertainty) may not only be difficult to devise, but may dramatically increase the need for supervisory guidance from national competent authorities.

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

As regards the supporting guidelines in Point 54 (page 51), the EBF understands that ESMA wants to address the problems with clients which try to get access to instruments which normally are not considered suitable for them by making changes in their client profile immediately before the investment.

The EBF does not have information if such client behaviour is a big problem on some EU markets. However, to introduce a general obligation on all investment firms to adopt procedures to verify before or after transactions are made whether client's portfolios has been updated too frequently or only after a short period from last modification, seems to be a very extensive measure to take.

In fact, it should be noted that it is a very normal procedure for firms to update a client's profile immediately before investment advice takes place. The above-mentioned control mechanism would therefore be activated very often, which does not seem reasonable. In this connection, it should also be noted that clients are under an obligation to provide correct information to investment firms and that any client that gives false or misleading information to the firm would be in breach of that obligation.

Q6: Do you agree with the suggested approach to conduct the suitability assessment for a group of clients, especially where no legal representative is foreseen under applicable national laws? Please also state the reasons for your answer.

In point 56 (page 52) reference is made to "an agreement". The EBF would like to ask for clarification which type of an agreement that is referred to. Is it an advisory agreement, where such exists, or an agreement to provide ongoing suitability assessment in accordance with article 24.4 (a) iii MiFID II? Please could ESMA clarify this point.

According to paragraph 61 firms should ensure that their procedures adequately incorporate this guideline in their organisation, which would imply amongst others that they verify that the representative can indeed represent the underlying client. This section is entirely unclear and requires further clarification (i.e.: does this relate to authorisation for representation or the ability?)

We agree on the suggested possible approaches (paragraph 63) but a clarification might be useful as to ESMA's requirement that the policy to be adopted "should enable to suit the interests of the relevant clients, taking also into account their need for protection" (paragraph 59). In respect of opting for one of ESMA's proposals to invite the group of natural persons to designate a representative, it should be clarified that making clients aware of the effects of any agreement reached will be considered as responding adequately to ESMA's requirement of taking into account of the interests of the relevant clients and their need of protection.

EBF members feel that the first part of paragraph 65 needs to be clarified. The current ESMA guidelines (2012) state: "Where there is no agreement and where the financial situations of the persons belonging to the group differ, the firm should consider the most relevant person in this respect (i.e. the person with the weakest financial situation)." Under paragraph 65 of the new draft guidelines ("the firm's policy could however require the underlying clients to agree on which financial situation should be taken…") a group of 2 or more natural persons would apparently always have the choice (even when the financial situation differs) to agree on whose financial situation that should be taken into account. In other words, it is no longer necessary to always take into consideration interests of all the persons concerned (and consequently, the person with the weakest financial situation). This could lead to situations where the interests of the most relevant and most vulnerable persons are neglected.

We also consider that the approach of collecting information about each individual client and assessing the suitability for each individual client where the client is a group of two or more natural persons and no representative is foreseen under applicable national law, may translate into significant costs associated with IT developments. For that reason, we consider that, for many investment firms, option a) will be the preferred solution. In any circumstance, as mentioned in the consultation paper, option b) should not be mandatory and investment firms should be allowed to use other approaches. If the clients/ partners agree on the common FS / IO values that shall be used for the assessment, it shall not be the duty of the firm to consider the matrimonial regime on top of that.

Also regarding paragraph 65. As to couples, their matrimonial regime will not give "per se" an indication on which client credit institutions should collect information on the financial situation/financial objective, as it does not systematically allow knowing the legal capacity to commit assets. There are a many different scenarios, especially in case of international clients. In many cases, the detailed marriage settlement and the source of those assets have to be analysed to state to know the legal capacity to commit assets. This would be very burdensome. During the standard KYC process, credit institutions request the confirmation that the client/account holder acts on his behalf. In the absence of such a statement, the relevant credit institution establishes and verifies the identity of persons on whose behalf they act. This also covers married couples and should be an alternative solution. Hence couples should be treated as any other group of clients.

Q7: Do you agree with the suggested approach on to the arrangements necessary to understand investment products for the purposes of suitability assessment? Please also state the reasons for your answer.

In our view, paragraph 73 provides further guidance on the requirements for identifying the target market, which is an issue for the product governance guidelines. We therefore recommend removing paragraph 73 from these draft guidelines.

It is important to ensure that the guidelines are in line with the rules on suitability assessment on level 1 and level 2. Moreover, the guidelines should not be in contravention with other rules in MiFID II. As regards Point 74 (page 57), the EBF notes that the wording of the supporting guidelines seems to introduce a new obligation on firms to classify products for the purposes of suitability assessment and to use the same classification as the one used for target market. "The elements used for the classification of products for the purposes of suitability assessment should be consistent with those used for the purposes of the identification and assessment of the target market in accordance with requirements on product governance." As there is no such obligation to classify products for the purposes of suitability assessment on level 1 or 2, the EBF takes the view that ESMA should refrain from introducing this though level 3 guidelines.

In addition, ESMA Guidelines on product governance is quite clear that the rules on product governance are without prejudice to suitability (or appropriateness) assessments and that if a client falls within the target market, this should not automatically mean that the product is suitable for a client (Point 32, Page 21). Thus, in order not to blur the distinction between the product governance rules and the suitability assessment, the EBF takes the view that Points 72 and 74 should be deleted.

Q8: Do you agree with the additional guidance provided with regard to the arrangements necessary to ensure the suitability of an investment? Please also state the reasons for your answer.

We find that the additional guidance is positive in what concerns diversification and self-placement.

Regarding paragraph 78, we agree that tools should be designed so that they take into account all the relevant specificities of each client or investment product. For example, a risk-profile-scoring tool should score each part of information necessary for a suitability assessment. As to the example given by ESMA (tools that classify clients or investment products broadly would not fit for purpose), we wonder what would be the extent of "broadly".

Tools are designed to take into account all relevant specificities but at the end the result will be a limited number of standard risk profiles for clients and financial products.

Points 82-84 (page 59) includes guidelines relating to the provision of portfolio advice and management services. In point 82, ESMA states that: "When advising on the whole portfolio of the client or when providing portfolio management, firms should ensure an appropriate degree of diversification within the client's portfolio, taking into account the client's portfolio exposure to the different financial risks (geographical exposure, currency exposure, asset class exposure, etc.). In cases where, from the firm's perspective, the size of a client's portfolio is too small to allow for an effective diversification in terms of credit risk, the firm should consider directing those clients towards types of investments that are 'secured' or per se diversified (such as, for example, UCITS)." The EBF questions whether these recommendations are appropriate to include in ESMA's guidelines since they are more related to how a firm should perform its portfolio management services than the application of the suitability requirements in MiFID II.

Moreover, it should be noted that the suitability rules are also applicable to professional clients and eligible counterparties and that ESMA's guidelines e.g. to invest in "secured" or "per se diversified" are not necessarily appropriate for those categories of clients. In paragraph 86 bullet points 2 to 4 ("*The prevention and detection of, and response to, cybersecurity threats; the protection of client accounts; The use of social and other forms of electronic media in connection with the marketing of the robo-advice services provided (e.g., websites; Twitter; remuneration of bloggers to publicise services; 'refer-a-friend' programs)*" have no bearing on the suitability assessment and should therefore not be included in the guidelines.

In Guideline 8 (page 57), ESMA proposes that firms should take into account "all available" information about the client that is necessary to assess suitability. As mentioned in the General Comments, the EBF takes the view that it follows from the principle of proportionality that the information must also be relevant. This should be clarified in the guidelines. Therefore we propose that Guideline is amended so that in point 75 a) the word "available" is replaced by the word "relevant" (or, alternatively, that the words "and relevant" are introduced after the word "available".)

Q9: Do you agree with the suggested approach for ensuring that firms assess, while taking into account costs and complexity, whether equivalent products can meet their clients' profile? Please also state the reasons for your answers.

We do not agree, as General guideline 9 states that "suitability policies and procedures should ensure that, before a firm makes a decision on the investment product(s) that will be recommended, or invested in the portfolio managed on behalf of the client, a thorough assessment of the possible investment alternatives is undertaken, taking into account products' cost and complexity".

Moreover, the wording is unclear, for example considering what is required for investment advice provided on an independent basis ("where an investment firm informs the client that investment advice is provided on an independent basis, that investment firm shall assess a sufficient range of financial instruments available on the market which must be sufficiently diverse with regard to their type and issuers or product providers (..)" - article 24(7) of MIFID II) or in the general rule present in Article 54(9) of the MiFID II Delegated Regulation ("Investment firms shall have, and be able to demonstrate, adequate policies and procedures in place to ensure that they understand the nature, features, including costs and risks of investment services and financial instruments selected for their clients and that they assess, while taking into account cost and complexity, whether equivalent investment services or financial instruments can meet their client's profile").

In addition, the approach relies on the assumption that costs of broadly equivalent products are available, and that the risk profile can be ascertained.

As for complexity, are investment firms supposed to use the risk-return profile as proxy? Given that firms cannot fully rely on third party information (guideline on arrangements necessary to understand investment products), how can comparable target markets be reasonably found?

Paragraph 88 requires further clarifications – there should be clear guidance of the documentation as this can be rather broad.

According to paragraph 90 the assessment of cost and complexity for 'equivalent' products could be done on a higher level, centrally, (for example within an investment committee or any other committee defining common portfolio strategies or model investment propositions) although a firm will still need to ensure that the selected investment products are suitable and meet their clients' profile on a client-by-client basis. While the last half sentence (marked) makes completely sense in the suitability context, it does not make sense in the equivalence test, where – as correctly stated in the first half of the sentence – a central (as opposed to case by case basis) assessment can be made.

Paragraph 91 states" that a clear explanation of the reasons for recommending a more costly or complex product should be included in the suitability report that the firm has to provide to the client before the transaction is made". Neither Level I, Level II, nor the MiFID II texts oblige credit institutions to add this kind of analysis in the suitability report. Moreover, the suitability report will be developed via a standardised and automated process and therefore it would be technically impossible to document this additional individual assessment in this report. This obligation should be deleted.

Last but not least, products covered include, for example, complex OTC derivatives that are used by SME's to hedge foreign exchange or interest rate risk – for such a situation, as well as for similar tailor-made products, the supporting guidelines should be clear on the conditions to waive analysis of (non-existent) equivalent products (with, granted, clear and sufficient information to investors on the underlying motive to use such waiver).

Q10: Do you agree with the suggested approach for conducting a cost-benefit analysis of switching investments in the context of portfolio management or investment advice? Please also state the reasons for your answer.

We generally agree with the suggested approach.

However, paragraph 94 requires firms to explain in the suitability report why the benefits of a recommended switching of instruments in the client's account outweigh the associated costs. Neither MiFID II nor the Delegated Regulation envisage a requirement of this kind. In our view, therefore, the requirement in paragraph 94 has no legal basis and should be deleted.

Furthermore, the EBF has some concerns regarding the proposed requirement in the context of a firm giving investment advice based on a portfolio approach (point 94). In this case the main thing is that the totality makes sense and that the portfolio as a whole is suitable for the client, and switches will inevitably take place. Explaining every step of the process would not only be cumbersome for firms, it would render the suitability reports difficult to read and overly lengthy. The last point here can also be considered in other places (for example in connection with point 91) as every new addition to the suitability report adds on to what will already now be a very comprehensive report. We urge ESMA to consider the issue of proportionality and the principle of providing information to clients in a clear and understandable manner, and which could actually be of use.

Regarding paragraph 95, if a switch is not documented in a suitability statement, how will be possible to determine that buy-and-sell transactions in different moments in time are related from the beginning? Such patterns could be detected in sample testing of telephone records, but it will be not possible to set up systematic controls.

Q11: Do you believe that further guidance would be needed with regard to the skills, knowledge and expertise that should be possessed by staff not directly facing clients, but still involved in other aspects of the suitability assessment? Please also state the reasons for your answer.

MiFID II contains general requirements that all staff should have sufficient skill and experience to perform their duties. In addition there are special requirements in Article 25(1) MiFID II and Level 3 as regards persons that provide investment advice or information to clients. In the opinion of the EBF it is therefore not necessary to include additional information in these Guidelines as regards skills, knowledge and competence of staff.

The general guideline 11 states that "Firms are required to ensure that staff involved in material aspects of the suitability process have an adequate level of skills, knowledge and expertise", whereas the supporting guideline in paragraph 102 mentions "Other staff that does not directly face clients (..) but is involved in the suitability assessment in any other way must still possess the necessary skills, knowledge and expertise required depending on their particular role in the suitability process".

The definition of what is (and who performs something) material in the suitability assessment should be more detailed and further clarity should be provided on who should be considered as other staff involved in the suitability assessment and the corresponding level of knowledge and expertise. This definition is relevant for institutions to determine the level of qualifications they must ensure employees have to comply with the guidelines and to forecast the associated costs.

In our view, the requirements in paragraphs 99 to 103, which relate to the qualifications of staff at investment firms, do not belong here but should be part of ESMA's Guidelines for the assessment of knowledge and competence (ESMA/2015/1886). To avoid a fragmentation of legal sources, we recommend transferring the content of these paragraphs to the Guidelines for the assessment of knowledge and competence.

In our view, the requirements in paragraphs 99 to 103, which relate to the qualifications of staff at investment firms, do not belong here but should be part of ESMA's Guidelines for the assessment of knowledge and competence (ESMA/2015/1886). To avoid a fragmentation of legal sources, we recommend transferring the content of these paragraphs to the Guidelines for the assessment of knowledge and competence.

In any case, the requirements as stated under paragraph 103 a) (Where relevant, when employing automated tools (including hybrid tools), investment firms should ensure that their staff involved in the activities related to the definition of these tools have an appropriate understanding of the technology and algorithms used to provide digital advice (particularly they are able to understand the rationale, risks and rules behind the algorithms underpinning the digital advice) should be deleted, since it should be sufficient that approval body (e.g. methodology board) has the necessary K&C. Same applies for paragraph 103 (b) requiring that the staff involved is able to understand and review the digital/automated advice generated by the algorithms: it should be sufficient that staff monitoring the outcome has sufficient knowledge to be able to assess the results. This can also be done by means of a script/test criteria. Not the full range of K&C according to ESMA Guidelines might be needed.

If the text is kept, footnote 48 should be moved to Point 101 as it concerns investment advice and portfolio management.

Q12: Do you have any further comment or input on the draft guidelines?

There is a need for additional guidelines as regards the application of the principle of proportionality. As mentioned in the General Comments above, we take the view that the nature of the service in some cases enables the firm to collect less information about the client. For the purpose of supervisory convergence and legal certainty it would be welcome if ESMA introduced these illustrative examples in the guidelines.

Moreover, the rules in MiFID II on record-keeping cover documentation requirements for transactions. Those rules are separate from the requirements on suitability assessment. In Guideline 12 (Point 104 a), the words "all investments (and disinvestments) made" should therefore be deleted as these requirements are dealt with in another context.

The requirements set out in paragraphs 107 to 109 have no bearing on the suitability assessment. To avoid a fragmentation of legal sources, they should not form part of these guidelines.

Q13: What level of resources (financial and other) would be required to implement and comply with the Guidelines (market researches, organisational, IT costs, training costs, staff costs, etc., differentiated between one off and ongoing costs)? When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.

GUIDELINE	COSTS					
	IT		Training		Staff and Other	
	ONE OFF	ON GOING	ONE OFF	ON GOING	ONE OFF	ON GOING
1. Information to clients about the purpose of suitability assessment	LOW		LOW	LOW		LOW
2. Arrangements necessary to understand clients	MED.		LOW	LOW		MED.
3. Extend of information to be collected from clients (proportionality)	MED.	MED.				MED.
4. Reliability of client information			LOW	LOW		
5. Updating client information	LOW					MED
6. Client information for legal entities or groups	HIGH		HIGH		HIGH	HIGH
7. Arrangements necessary to understand investment products			HIGH	HIGH	HIGH	HIGH
8. Arrangements necessary to ensure the suitability of an investment			MED.	MED.		
9. Cost and complexity of equivalent products					HIGH	MED.
10. Cost and complexity of switching investments	HIGH	HIGH			HIGH	HIGH
11. Qualifications of firm staff			LOW	LOW		
12. Record-Keeping	MED.	MED.				