April 2021

EBF RESPONSE TO ESMA CONSULTATION ON APPROPRIATENESS AND EXECUTION-ONLY UNDER MIFID II

Key points:

- The EBF welcomes ESMA's effort to give guidelines on how to best apply the appropriateness test requirements.
- EBF members believe that the appropriateness guidelines as proposed by ESMA are going further than the original idea behind level 1 requirements.
- Information provided to investors should be proportionate as far as extent of information, means of communication and timing are concerned. one may fear that if too much information and too many details are required from clients, they may be desensitized to invest which would be contrary to CMU overarching objectives.

General comments

When drafting the guidelines on appropriateness and execution-only requirements, ESMA has used ESMA guidelines on suitability requirements in investment advice as a starting point. However, appropriateness assessment is constructed, as per the Level 1 legislation, as a narrower obligation focusing on the knowledge and experience of the client and the complexity of the product. **As a result, the appropriateness guideline goes further than the original idea behind level 1 legislation**.

We believe it is important to strongly underline the need to take a **proportionate** approach to the requirements based on the complexity of the intended investments and type of investor.

We believe that the final Guidelines should expressly remind in their foreword that, according to Article 54 (3) of the Delegated EU Regulation 2017/565, "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 are only of relevance for retail clients and professional clients for whom investment firms cannot make use of the presumption provided for by Article 54 (3) of the Delegated EU Regulation 2017/565. This

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

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.

EBF partially agrees with the suggested approach.

- **Format**

We agree with that it is up to the firms to decide how they inform their clients about the appropriateness assessment and the used format. However, the amount of the information that should be provided to the clients is vast. Any additional information on the purpose of the appropriateness assessment constitutes be an unnecessary that clients do not necessarily pay attention to it (undesirable cost benefit).

- **Content**

The guideline should clearly state that the information can be provided as standardized information, e.g., through a firm's terms and conditions.

For firms providing online services, pop-up boxes and interactive text are mentioned as effective ways of providing the information. This does not comply with the requirement that "the format used to inform clients should however enable firms to keep records of information provided". It is not possible to document and keep track of whether clients have seen the appropriateness information .

As a consequence, we do not support the requirement to keep record of the information provided, because it is not always possible to document and keep track of that clients have seen the information about appropriateness assessment.

We believe it is necessary to clarify (within the proposed paragraph 17 of the proposed Guidelines or by adding further paragraphs) that:

- firms can choose different methods and tools to provide the information, to the extent all the information made available to clients complies with the relevant provisions;
- the method used should allow ex post verification/confirmation on the provision (or acknowledgment in case of filling out the questionnaire via remote channels, such as web and call center) of the information to clients;
- consequently, firms should give this information in writing or on a suitable durable medium in line with the different profiling methods (e.g., paper questionnaire vs. questionnaire that can be filled in via remote channels);
- the disclosure, which may or may not be in writing, needs to take into account the relevant features of the method/tool adopted for communicating with clients. The compatibility and effectiveness of the disclosure needs to be further evaluated in terms of its content;
- 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 reported in the context of appropriateness assessment, as this information can be reported also in other informative documents provided to clients (e.g., pre-contractual information, contract for the provision of execution services);

- while firms cannot delegate the decision on the appropriateness of the investment service/product to their client, firms cannot limit without reason the investors' right under MiFID II to consent to the execution of transactions, if the investors decide to overrule an inappropriateness determination duly communicated to the client.

- **Timing**

Given the need for flexibility in trading situations, it is paramount to broadly interpretate "in good time".
Paragraph 14 first bullet states, that "[…] and the importance of providing information that is up to date." This is only of relevance for suitability testing.

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.

EBF does not agree with Guidelines 2 which is too detailed when it comes to designing the questionnaires. We also believe that there is a tendency that some clients may consider the proposed approach as an exam, thereby discouraging them from investing which should be avoided in a CMU context.

Detailed comments relating to cooling off periods and circumvention:

- ESMA's guideline is unduly restricting the right for clients to trade financial instruments. The idea of cooling off periods and limiting the number of attempts cannot be reconciled with the client right under Art. 25(3) in MiFID II and Art. 56 in the Delegated Regulation to proceed with a trade even in case of a failed appropriateness assessment. This means that a cooling off period or limiting the number of attempts would have no effect in practice. Mechanisms that allow the client to provide a correct answer have to remain a valid option. Clients will not accept any restrictions preventing them from correcting a mistakenly given answer.
- In situations where a firm has implemented a process to block a client from trading until an appropriateness test has been taken, a cooling off period or limit on the number of attempts would only create an illusion of that the client would have a greater knowledge later on. This type of guideline is also ambiguous at best given that it allows for significantly diverging different approaches thereby creating arbitrary situations between firms (e.g., one firm implementing a cooling off period of a couple of hours vs. another firm implementing 1 day vs. a third firm implementing 2 days). The same reasoning applies to limitations on to the number of attempts. In addition, there is no clarity as to the next steps for a client maxing out his number of allowed attempts.
- Clients who rely on non-advised and execution-only services may allocate limited time resources with the placement of orders itself (e.g. compared to the assessment of an investment opportunity). Tests that verify the information given by the client would be time consuming and would be an unnecessary burden.
- Designing questionnaires as envisaged is highly difficult as there are no strict criteria for verification of client knowledge. and experience. This requirement also contradicts the general notion of Art. 55 (3) of Del. Reg. 2017/575 that entitles firms to rely on clients' answers. Only if there is specific evidence that the investment firm to rely on the information provided by its clients or potential clients unless it is or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.
- Restrictions on the client being able to revise his answers are, in our opinion, not necessary if the pool of available financial instruments to the clients is not

dependent on his answer. Any such restrictions may incentivise the client to modify his answers in order to receive access to specific financial instruments he would otherwise not have. These restrictions are also not necessary as the client is already protected through the risk warnings, which allow him to identify a lack of specific knowledge and/or experience before making an informed decision.

- There is a clear risk for institution shopping to the extent questionnaires are not uniform and entirely comparable between market participants. This will inevitably lead to a lack of consistency when a client mistakenly answers a question (e.g., does it affect a broader or narrower pool of financial instruments? Is a different level of granularity and/or difficulty embedded in the questionnaire for a given product type?). Indeed, specific features of financial instruments may not necessarily representative for a given product category or may be disproportionate given the investment universe on offer.
- Sub-paragraph 22, last bullet – "client should be able to reply that he/she does not know how to answer the question": EBF does not consider that this addition is useful, insofar as the appropriateness testing is black and white – either the client knows or doesn't know the answer. It is further unclear what a firm should do with the information that a client does not know the answer to a particular question. Depending on the structure of the appropriateness assessment, the practical effect would either be that the client still passes the test or that the client fails the test. In that context, the possibility to answer "I don't know" becomes completely redundant.
- Last bullet in sub-para 26 is inconsistent with the other comments made by ESMA regarding cooling off periods and that clients should not be able to repeat assessments/tests.
- The last sentence of paragraph 27 seems unnecessarily overprotective. It should suffice to clearly state the purpose of collecting the information, outline on a high level the type of information intended to collect and encouraging the client to provide the information. Based on this information the client should be allowed to decide not to provide the information.
- Furthermore, it should be outlined in the guidelines that there are not any legal requirements in regard to the method of collecting the information as long as it is relatively easy for the client to provide the information (e.g., in an online service it should be possible to direct a client to personal interaction with an advisor in regard to collecting the information).
- Lack of guidance about other non-complex financial instruments pursuant to article 25§4 (a) (vi) Dir. 2014/65 could result in diverging approaches, between market participants.

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.

We agree with the suggested approach, but we have to underline the need for some adjustments to the proposed Guidelines in order to properly take into account that the focus of the information to be collected for the appropriateness test is the capacity of the clients to understand the essential characteristics and risks involved in relation to the investment service or product offered or demanded.

This means that according to the proportionality principle mentioned by the proposed Guidelines the extent of the information to be asked on the clients' knowledge and experience should only vary according to the level of complexity of the products, whilst

taking into account the level of product information the investment firm makes available elsewhere about such product types: in fact, the complexity of investment products depends on how much it is difficult for investors to understand their essential characteristics.

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

Under the proportionality principle, firms determine which cluster of instruments are to be considered appropriate for each cluster of clients having the same level of knowledge and experience. To this end, firms may build a questionnaire which assesses the client's general understanding of and experience on, not any tradable instruments (including those which are generally considered non-complex, e.g. shares, plain vanilla bond), but only a certain number of specific financial instruments (i.e. the more complex), certain specific complex features and/or the risk/return ratio.

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 should consequently be adjusted 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 reflects too much ESMA's Guidelines on certain aspects of the MiFID II suitability requirements (which correctly require to define the extent of the information to be collected also taking into account the different level of risk of investment products according to the dimensions of the suitability requirements) and does not properly fit to the appropriateness requirements which are less bound by the level of risk involved (cf. plain vanilla products with higher levels of volatility do not become subject to appropriateness requirements on the mere basis of their risk level).

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 EBF does not think that the suggested approach is appropriate as it goes beyond the Level 1 requirements. This approach is too aligned on the suitability assessment, which covers the customer's whole situation, tailored to the needs of the investor relationship. However, this holistic view is unnecessary, because the appropriateness assessment focuses on the relevant product or service (rather than the more detailed analysis being conducted in the case of suitability assessment when financial advice is provided for the customer).

It is crucial to keep the requirements proportionate, including the documentation.

Investment credits (i.e., leveraging) and short selling are good examples of services where it should be ensured that the clients have the necessary experience and knowledge with the service. For simple and "standardised" services such as pure execution services the requirements including the documentation should be limited.

Though the guideline does not intend to provide guidance on investment advice and portfolio management, the spillover effect on these services should be considered.

We would suggest some adjustments to the proposed Guidelines in order to properly take into account that the focus of the appropriateness test on the capacity of the clients to

understand the essential characteristics and risks involved in relation to the investment service or product offered or demanded.

This means that according to the proportionality principle mentioned by the proposed Guidelines the extent of the information to the clients' knowledge and experience should only vary according to the level of complexity of the products. The complexity of investment products depends on the difficulty for investors to understand their essential characteristics.

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

Under the proportionality principle, firms determine which cluster of instruments are considered appropriate for each cluster of clients having the same level of knowledge and experience. To this end, firms may build a questionnaire which assesses the client's understanding of and experience on specific financial instruments (i.e. the most complex), certain specific complex features and/or the risk/return ratio.

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 should consequently be adjusted deleting the reference to "more risky products" proposed as an additional driver to the one related to "more complex products".

As mentioned above, the proposed wording reflects too much ESMA's Guidelines on certain aspects of the MiFID II suitability requirements (which correctly require to define the extent of the information to be collected also taking into account the different level of risk of investment products according to the dimensions of the suitability requirements) and does not properly correspond to the appropriateness requirements.

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

EBF partially agrees with the proposed guideline.

When it comes to checking the reliability, accuracy and consistency of information collected about clients, it is not possible to check the reliability of transaction history conducted by other service providers, because transaction data is not necessarily available. In these cases, service provider should rely on the information given by the client. Furthermore, Paragraph 38 states that Firms should have consistency control on replies in place in order to highlight contradictions in information collected. Does this mean that any questionnaires should be designed to cross-examine answers from the client? This would be very burdensome and result in "double-up" in questions.

As a conclusion, as long as the examination is restricted to obvious inconsistencies, we do not oppose it. We oppose the obligation to cross check information that have been gathered from a variety of services. The accuracy of an appropriateness assessment linked to a particular service should not automatically result in an adjustment for other types of services: the aim of the client when requesting or receiving different services may be different for each service and the tools or questions relied on could also differ. Additionally, data protection laws may also an obstacle (notably article 5 and 6 GDPR).

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 guideline seems to take as starting point how suitability assessment works. It therefore seems somewhat disproportionate. If an investment firm has concluded based on a sufficient appropriateness test that a client has the necessary experience and knowledge for simple financial instruments or one or more less complex instruments to be appropriate, it should not be necessary to update the information regularly as it seems disproportionate to assume the customer loses the understanding of the financial instrument to make it appropriate to trade. There should not be put proactive requirements on firms in non-advisory services to periodically reach out to clients to update information or request confirmation of previously delivered information.

It is unclear what is meant by "more vulnerable clients" in subparagraph 41. If this should be something else than a MiFID client category, this needs to be clarified through Level 1 modifications. It is further not possible in a client-initiated trade situation to know based on an appropriateness assessment whether the client is more vulnerable or not. Actually, all clients of older age are not vulnerable per se; quite the opposite might be true for clients that already have had the chance to gather experience and knowledge over the course of lifetime. Such an assessment combined with restrictions for older clients may be seen as an act of discrimination by certain clients.

Paragraphs 42 to 45 seem to point to an advisory service or at least an ongoing service and/or ongoing interaction of some sort. However, this is not the case for execution services which are dependent on the client engaging the firm and initiating trading services. A firm assesses appropriateness in the trade situation and not on a periodic basis, unless of course a client engages the firm on multiple occasions throughout a year for example and then trades different types of financial instruments. A firm cannot in general know when to contact a client because of potential changes regarding knowledge and experience. The relevant thing should be that the firm, in the situation when the client engages the firm, includes in its process that the client should have the ability to update information.

Specifically, in paragraph 42, we suggest ESMA to insert the adjective "significant" before the word "change" ("firms should implement procedures to asks clients to inform them of any **significant** change in their situations", not "of any change").

Paragraph 44 states that a firm need to have arrangement in place to ensure an update of a client's information on his knowledge and/or experience in a case where "unusual transactions are registered on the client's account". This would mean that firms have to monitor client's account on an ongoing basis in order to evaluate if a client's transactions are appropriate. This would be very burdensome, costly and also unnecessary due to the warning the client has possibly received when entering into these transactionsMoreover, unusual transactions may have been carried out by a client whereas his knowledge and competence are unchanged. On the contrary, a client may have enhanced his knowledge and competence without performing unusual transactions. This sentence is not understandable, and we suggest ESMA to withdraw it. There is further no clear legal basis on Level 1 for this requirement.

We do not understand ESMA's reasoning regarding the risk of clients updating their knowledge and experience "too frequently". It must be kept in mind that firms do not decide how often a client wants to trade different types of instruments and the firm's responsibility is to assess the client's knowledge and experience in relation to the instrument type which is relevant for the trade at hand. If a client has gained knowledge of certain instruments at different times during a three-month period and therefore engages the bank 10 times to perform transactions, it would be necessary to "update" the knowledge and experience assessment whenever the client would engage with an instrument type for which the client has not yet passed an appropriateness assessment.

If the same client has multiple bank relationships, it becomes even more difficult to apprehend the evolutionary nature of knowledge and/or experience.

To require that two staff members should be involved in making the assessment or controlling the assessment is too burdensome. Firstly, every single staff member involved in a knowledge and experience assessment should have the sufficient knowledge and competence to make the call himself/herself. Secondly, having two staff members involved would put a disproportionate burden on the client who very well may want to execute a transaction which is time sensitive. A multi-tiered approach where ongoing monitoring is organised through first level controls and the compliance function should suffice, when exercised in combination with appropriate staff training.

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

The section seems to be copied from the suitability guidelines and not at all adjusted to the appropriateness test. In an online trading tool, company representatives have to be coded into the client's profile so that the system/platform recognizes pre-defined representatives. When dealing with a company client the starting point is then that the designated company representative is set either through a Power of Attorney or based on the company's articles of association or other official publications. This is done when setting the client up to start using online trading services.

For front line staff dealing with clients over phone the question about the handling of representatives should be covered by an internal conduct of business instruction, but it does not make sense to require a dedicated policy for how to conduct an appropriateness assessment for representatives.

Paragraph 50 may cause some confusion. It would be beneficial for the reader to emphasise that for a group of legal entities within a company group, the starting point is that each entity should be assessed separately similarly to each entity within a group being client categorised separately.

In paragraph 49, ESMA could simplify and clarify the first sentence as follow: "~~If the~~ **In a** group of two or more natural persons involved ~~have difficulties in deciding the person(s) from whom the information on knowledge and experience should be collected~~, the firm should adopt the most prudent approach by taking account the information on the person with the least knowledge and experience, , when more than one person is actually required to formulate the instruction or order jointly or simultaneously. It should remain without prejudice to the ability to impose restrictions to represent a legal entity or a group on a purely contractual basis (e.g. people could agree to limit the decisions or warnings to those representatives that actually understand the product).

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

We need to underline the need for some adjustments to the proposed Guidelines in order to properly take into account that the purpose of mapping investment products under the appropriateness regime is necessarily consistent with the logic of the appropriateness itself.

While it is correct to focus on the level of 'complexity' of investment products, the proposal to further take into account the relevant risk factors (such as credit risk, market risk,

liquidity risk) goes beyond the relevant MiFID II provisions and needs consequently to be re-evaluated and, possibly, deleted.

As a matter of fact, the proposed wording reflects too much ESMA's Guidelines on certain aspects of the MiFID II suitability requirements (which correctly require to classify investment products also on the basis of their risks) and does not properly correspond to the appropriateness requirements.

Moreover, while we agree that it can be important to ensure the granularity on the knowledge of the clients where this is proportionate, we believe that the granularity could be lower in order to verify the experience of the clients with regard to macro asset class of investment products.

In paragraph 54, we suggest ESMA to withdraw the section about the necessity to check and challenge data on more complex investment products or compare data provided by multiple sources of information.

Indeed, many data providers have the same sources of information and it would be useless to challenge or compare data provided by them. This might only lead to a reduction of the range of financial instruments offered to clients using an order reception-transmission service. It could be very costly and time consuming to require firms to verify external data. Efficiency may result from imposing data providers to comply with particular rules.

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.

In order to keep the warning simple, precise and easily understandable and at the same time ensure that clients are encouraged to provide the necessary information and discouraged from proceeding without the investment being assessed appropriate, it is unnecessary and counterproductive (especially in terms of content requirements and timing considerations) to outline whether the issue is a lack of providing information or because it has been assessed inappropriate due to the information provided.

However, the precision included in paragraph 57 is particularly welcomed.

In Paragraph 62, we believe that the first sentence is too direct. Relevant staff (i.e. financial advisors) are trained to perform a fair and regulatory-compliant appropriateness assessment. But some room is left to them in their relationship with clients. Moreover, the appropriateness assessment is a case-by-case assessment, relying on the staff's know-how and ability to establish a relationship based on trust with their clients. Then, it is necessary to leave them some discretion. Thus, we suggest ESMA to delete the following section: "to ensure they do not have undue discretion."

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

We oppose the obligation to introduce policies that ultimately would prevent or restrict clients to invest in certain financial instruments if they wish to do so. The MiFID provisions do not provide the basis for such limitations; they entitle the client to be warned and proceed with the transaction. Such a high filter would cause a high level of unsatisfied clients and would pose a serious incentive to resort to providers of financial services that do not comply with these rules (see also Guideline 7). Therefore, ESMA should state clearly that proceeding the transaction is still possible for the client after receiving a warning.

Specifically:

- We do not agree with paragraph 71, especially with the assertion that firms should have policies and procedures identifying ex-ante whether there are any conditions under which a client would not be allowed to proceed a transaction having received a warning[1]. Defining ex ante situations where clients would not be allowed to perform transactions having received a warning after the appropriateness test would lead to a ban on certain transactions, what is not provided by article 25(3) of MIFID II. Moreover, clients want to access to a large range of financial instruments and could be tempted to circumvent the impact of such bans.
- Warnings are issued by firms when no information has been provided by the client on his knowledge and experience or when this information is insufficient or in case the assessment of such information shows that the product or service offered or demanded is not appropriate for the client. These cases have nothing to do with situations where a firm sells investment products from its own range.

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

In our view, the collection of information is not an investment advice and it's not provision of information to the client about financial services or financial instruments, therefore firm staff involved into simple collection of client's information for the purpose of appropriateness assessment is not required to comply with Art. 25.1 of MiFID II Directive. Client-facing staff involved in the provision of investment services on the basis of appropriateness assessment or execution only should already comply with ESMA Guidelines on client-facing staff knowledge and competence requirements and therefore the proposed Guideline 10 has a very limited added value with regard 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.

We consider that there is no need for additional guidelines regarding recordkeeping. Existing level 2 rules are sufficient.

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?

We consider that there is no need for additional guidelines regarding recordkeeping. Existing level 2 rules are sufficient.

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.

Paragraph 82 needs further clarification as to what types of interaction require recordkeeping besides the performing of an appropriateness test and the information obtained from the client.

[1] We understand that these procedures would not concern transactions performed under the execution-only regime.

Regarding paragraphs 82, 83 and 86 in situations where a non-advised transaction 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. However, it is a completely different case for self-service tools and platforms where clients log on themselves to initiate orders and execute transactions. A client, who logs on to a self-service channel to execute a transaction, could amongst others be based on either one of the three situations happening prior to that the client initiates the order:

1. The client has made its own assessment of equity A and logs on to the firm's self-service channel and initiates a trade.
2. The client has had a chat with an equity broker at the firm where they talked about the equity market in general and equities A, B and C specifically. The client some time thereafter logs on to the firm's self-service channel to initiate a trade in equity A.
3. The client has received a personalized communication through an e-mail subscription whereby the firm communicates its house views on a certain equity model portfolio. The client some time thereafter logs on to the firm's self-service channel and initiates a trade in equity A which is covered by the communication.

The examples could be further complicated by adding a scenario where the client logs on to the firm's self-service channel and initiates a trade in equity A as well as a trade in equity D, which is not covered by the communication in points 2 or 3 above. There are no possible connections between the type of communication in points 2 and 3 on one hand and a firm's self-service channel on the other hand. How should the underlying logic of a self-service channel know whether a client that logs on to it has been in contact with e.g., a broker and/or has received a communication in written form via e-mail?

The wording in paragraph 86 is very broad. In situations where a client has received personalised communication or even has been advised and refrains from trading in the specific situation, but then decides to trade afterwards in a self-service channel, it should be made clear that the investment firm is not obliged to link the personalised communication to a trade. If paragraph 86 were to become the norm, it would in practice mean that firms can no longer make use of the execution-only regime in pure self-service channels. It would create a situation where firms would need to design and apply a general appropriateness test for all non-professional clients just in order for them to get access to and use a pure self-service channel. Given that the instruments in scope here are non-complex, this type of result of the proposed Guidelines would go against the intention of the execution-only regime as stated in the MiFID II Directive. Furthermore, it would act contrary to providing clients with efficient access to financial instruments which have been deemed to not pose material risks from a client protection perspective.

As for hand-held situations the firm's internal instructions should define the boundaries of what is to be considered as execution-only and what is not. The employee having the conversation with the client will in most cases be completely unaware of whether a client has received previous communication. Therefore, the employee should be able to assume that the order is made on the client's initiative, unless the client informs the employee of the previous communication or the employee has knowledge about the previous communication.

A question that would also need to be addressed is for how long the firm should consider that previous communication would prevent the use of the execution-only regime and the impact it would have on the need for traceability. At what point in time can firms consider that the communication is no longer valid from the perspective of defining a transaction as in scope or out of scope from the execution-only regime?

Considering all these aspects, requiring firms to trace whether the order is made in response to a personalized communication would be disproportionate. It should be sufficient that quality assurance testing is made based on for example a review of how well employees adhere to the firm's internal instructions (with components like documentation of appropriateness assessments and taped calls). Furthermore, we would advocate for the following:

a) transactions initiated by clients through the use of pure self-service channels should always be seen to be made on the initiative of the clients.
b) for client transactions that are made in hand-held situations firms should have internal instructions to define the boundaries between situations that fall within the execution-only regime and situations that cannot be handled within the execution-only regime; and
c) that the proposed paragraph 86 under Guideline 12 is deleted.

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

We ask ESMA for the deletion of paragraph 88 which is far too suspicious of firms' sales staff and then, inappropriate.
In addition, paragraph 90 seems to impose a new obligation to record written minutes when the appropriateness assessment is done through face-to-face meetings. The recordkeeping obligations and, specifically, the possibility of using written minutes to document "relevant face-to-face conversations" with clients is foreseen in article 16.7 of MIFID 2 and is limited to the cases specified therein. No new requirements should be imposed in this respect.

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.

We don't agree with this proposal. According to the draft delegated regulation amending delegated regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms, the client shall only be asked for his sustainability preferences;

About EBF

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4,500 banks - large and small, wholesale and retail, local and international - employing about 2.1 million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that securely handle more than 300 million payment transactions per day. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic growth.

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