

## **EFAMA's comments on ESMA's Consultation Paper Draft guidelines for the assessment of knowledge and competence [ESMA/2015/753]**

EFAMA<sup>1</sup> welcomes the opportunity to provide comments on ESMA's Consultation Paper on draft guidelines for the assessment of knowledge and competence.

**Q1: Do you think that not less than five consecutive years of appropriate experience of providing the same relevant services at the date of application of these guidelines would be sufficient to meet the requirement under knowledge and competence, provided that the firm has assessed their knowledge and competence? If yes, please explain what factors should be taken into account and what assessment should be performed by the investment firm. Please also specify whether five consecutive years of experience should be made in the same firm or whether documented experience in more than one firm could be considered.**

We agree with the general understanding that staff with experience of five years or more may be considered to possess the appropriate knowledge and competence. This understanding should be fixed in the guidelines and should not be subject to the discretion of each NCA or another national body identified in the Member State. Nonetheless, such period of experience should not be considered as a minimum requirement. Depending on their qualifications and skills, as well as their roles within the organisation, staff members with less experience should be able to be viewed as meeting the requirement of appropriate knowledge and competence after an assessment by the investment firm. For instance, an appropriately educated and well-motivated person with only three years' experience may be perfectly capable of fulfilling the requirements.

We thus believe that it should be left to the investment firm to determine whether a particular staff member with less than five years' experience could be considered appropriately qualified. Firms are by far in the best position to assess the strengths and weaknesses of their own staff and should thus simply document the reasons for anyone below this threshold. This will allow NCAs focus on the supervision and enforcement of the MiFID II framework, while giving firms the flexibility to determine what kind of staff they need to properly perform relevant services and how their staff can best be trained to maintain and strengthen their abilities in order to provide high-quality services to their clients.

It is also important to recognise that not only experience gained within one firm is relevant. In practice, staff members may gain experience in various firms. Changing jobs should not have any influence on

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<sup>1</sup> EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 63 corporate members almost EUR 19 trillion in assets under management of which EUR 12.7 trillion managed by 55,600 investment funds at end March 2015. Just over 39,300 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 26,300 funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit [www.efama.org](http://www.efama.org)

the assessment of the experience gained. Indeed, gaining experience in different firms can often help to build up a more profound knowledge by the individual due to the experience of dealing with different situations.

Moreover, under no circumstances should the requirement relate to experience gained only in consecutive years. Experience once gained does not simply diminish overnight and there might be good reasons why a staff member has suspended their professional activity for a period (e.g. maternity or paternity leave, sabbatical, disability leave, extended illness). Requiring an experience of consecutive years might discriminate against certain types of employees.

Likewise, the correct level of competence and knowledge required does, of course, also need to distinguish between the two types of services provided (i.e. staff giving information and staff providing advice), as we explain in more detail in our answers to Q2 and Q3 below. These comments also extend to our comments to the definition of "knowledge and competence" [Art. 6(f)] which is covered as part of our answer to Q3 below.

**Q2: ESMA proposes that the level and intensity of the knowledge and competence requirements should be differentiated between investment advisors and other staff giving information on financial instruments, structured deposits and services to clients, taking into account their specific role and responsibilities. In particular, the level of knowledge and competence expected for those providing advice should be of a higher standard than that those providing information. Do you agree with the proposed approach?**

EFAMA generally agrees with the differentiation of investment advice and the provision of information when it comes to the level of knowledge and competence required. We nevertheless believe that MiFID II Art. 25(1) and (9) allow Member States more room for interpretation than is currently envisaged by ESMA. We believe that greater granularity is needed, as the width of "staff giving information" is too broad and can entail all kinds of staff that may have contact with clients on the marketing of financial instruments, investment services or ancillary services.

Thus, within the distinctive categories, there should be enough room for firms to tailor the knowledge and experience requirements to the features and responsibilities of the respective functions, providing a greater degree of granularity to define the captured activities in more detail. This will allow investment firms clearly to identify the individual staff that are captured under these new requirements. An example for this distinction could be staff in call centres, who primarily work from pre-defined scripts drafted by staff members with sufficient knowledge and for whom much less training is required to fulfil their tasks.

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

Please find below our comments to the specific sections of the draft guidelines.

### **I. Scope**

We note that the scope of the draft guidelines is at odds with the mandate of the Level-1 Directive. MiFID II Art. 25(1) and 25(9) make it clear that these guidelines shall apply to natural persons giving investment advice or giving information. ESMA, on the other hand, states that the draft guidelines shall apply in "relation to the provision of the investment services and activities listed in Section A, and the ancillary services listed in Section B of Annex I of MiFID II" (sub-section "What?").

For the avoidance of doubt, it is necessary to clarify that the guidelines address only the specific services indicated in the Directive.

### III. Definitions

#### Definition of "firm" [para. 6(b)]

With regards to the definition of firms, it should be unquestionably clear that UCITS and AIF management companies are included in the definition only to the extent they provide MiFID-services as referred to in Article 6(3) of the UCITS Directive and Article 6(4) of the AIFMD. Therefore, we suggest supplementing the definition by adding:

*"Firms mean investment firms (as defined in Article 4(1)(1) of MiFID II, including credit institutions when providing investment services, UCITS management companies and external Alternative Investment Fund Managers (AIFMs) that are providing the investment services of individual portfolio management or non-core services (within the meaning of Article 6(3)(a) and (b) of the UCITS Directive and Article 6(4)(a) and (b) of the AIFMD) **and only in connection to the provision of these services**".*

#### Definition of "staff" [para. 6(c)]

The definition of "staff" as proposed by ESMA is rather imprecise due to the inclusion of the term "relevant services". For reasons of clarity and consistency, we propose the removal of the definition of "relevant service" and suggest the definition of staff be rephrased as follows:

*"Staff means natural persons (including tied agents) providing investment advice or information about financial instruments, structured deposits, investment services or ancillary services to clients."*

#### Definition of "information about financial instruments, structured deposits, investment services or ancillary service" [para. 6(e)]

The current definition assumes that the scope targets only those staff who market investment products or services and give information on these.

The question arises which exact staff categories this scope would entail. We presume that UCITS and AIF management companies' sales people and staff managing non-discretionary individual portfolio mandates are included, if they are providing MiFID services and they are in direct contact with clients. We ask for further clarification.

#### Definition of "knowledge and competence" [para. 6(f)]

Please consider our response to Q1, in which we strongly oppose the idea that only staff members with five years' (or more) experience could be considered as appropriately qualified to fulfil the obligations as required under Articles 24 and 25 MiFID II, thus assuming that any person with less experience does not.

#### Definition of "appropriate experience" [para. 6(h)]

When it comes to the definition of appropriate experience, we are concerned that the current wording of "appropriate experience" is based on full-time employment and could disadvantage many staff members, including those with direct contact with clients who work on a part-time basis.

We also question whether the basis for calculation should be “excluding breaks”, as experience, once acquired, does not simply disappear. We would appreciate further clarification what this would entail with regards to holidays and staff taking maternity leave, while assuming that the final provisions are not meant to be potentially discriminating against part-time workers and staff on maternity or paternity leave, sabbaticals, disability leave, extended illness, etc.

## **V. Guidelines on the application of Article 25(1) of MIFID II**

### **V.I General**

First, with regards to the important principle of proportionality (see para. 5 on page 4), we believe that the application of the guidelines should appropriately reflect the different circumstances in the institutional market space, since market participants tend to have better resources to monitor and assess knowledge and competence themselves.

Second, in line with our response to Q2, we generally agree with paragraph 12 that the level and intensity of knowledge and competence expected for those providing investment advice should be of a higher standard than those that only give information.

Third, we would highlight that paragraph 14 (to be read in conjunction with paragraph 17) could create unintended consequences on the free movement of persons. In the draft guidelines, ESMA acknowledges that there is a variety of assessments on knowledge and competences across the different Member States and for this reason it states that “the specification of the criteria for assessment of the qualifications and experience required to comply with these guidelines has to be made at national level” (paragraph 9, p. 5). As requirements may well vary from one NCA to another, ESMA should refrain from posing additional barriers to companies wishing to make use of the MiFID passport, by requiring that “firms should ensure that staff providing relevant services possess the necessary knowledge and competence to meet relevant regulatory and legal requirements [...]”. This provision could make it very difficult for a firm to meet its obligations (i.e. the legal requirements, if ESMA interprets “legal” as “national”) according to all possible different requirements established by NCAs. In any case, it should take into account foreign qualifications, which are essential for many investment firms providing services on a pan-European basis. It simply cannot be the case that knowledge and competency are considered as sufficient in one Member State, but later deemed insufficient once the same service is provided into another Member State through the use of the MiFID passport.

### **V.II Requirements for staff giving information about investment products, investment services or ancillary services**

In line with our previous comments, we believe that too little differentiation has been made between the different types of marketing (i.e. giving information vs giving investment advice). ESMA's proposal for staff providing information is nearly identical, with the sole expectation of knowledge of portfolio theory (para. 23(g)), which should be an additional requirement for staff giving investment advice.

It is important to highlight that certain types of staff are not intended to engage in conversations with (potential) clients on specific products because the investment firm itself is fully aware they do not have the sufficient competences. Staff, whose task is not to sell individual products or services, should not be required to have the knowledge and competences described under paragraphs 20(b), (c), (d) or (e), as they solely need to understand the characteristics and scope of the product portfolio and the scope of services as a whole. To underline this differentiation, we believe that exemptions from the

requirements in paragraphs 20 and 21 should be appropriate for staff in call centres that primarily work from predefined scripts drafted by staff members with appropriate and sufficient knowledge. Indeed, if all types of staff were required to demonstrate the same level of qualification even for services requiring lower levels of expertise, this would also create serious implications for investment firms trying to keep these staff engaged and motivated by solely providing these services.

Furthermore, more clarifications are necessary on the "general tax implications" (para. 20(b)). Also, the current wording "costs to be incurred" should be brought into line to match the requirement under para. 20(c), signifying that there is a general grasp of costs, without it being necessary for the staff member to be able to make a precise cost calculation.

With regards to para. 21(b), we also consider it onerous that all types of sales or call centre staff have a full understanding of the impact of (macroeconomic) figures and national/regional/global events on markets. For these categories of staff it should be sufficient to articulate investment firm's view and perception of the market (which is developed by technical experts), without necessarily understanding all the underlying background. In our view, all knowledge requirements thus should be closely related to the investment products and/or investment services on which information is given.

As for 21(d), we consider it onerous for staff to assess all data relevant to the investment products, including, in particular financial statements and financial data and encourage ESMA to reconsider this provision.

#### **V.IV Organisational requirements**

Annex V provides illustrative examples on the application of paragraph 24, one of which is a code of ethics. We raise no objections to any code of ethics, but we would underline that these industry codes are created on a voluntary basis and are thus self-regulatory activities, and their implementation could be harmed by making them a quasi-obligation to fulfil ESMA's guidelines.

#### **V.V Assessment, maintenance and updating of knowledge and competence**

We again underline that it should be the primary responsibility of the investment firm itself to determine appropriateness of knowledge, competence (and experience) of a staff member in a particular role within their organisation. Whether an individual can perform a certain task depends on their qualifications and skills in combination with their role in the organisation.

With regards to para. 25(a), please regard our earlier comments on the proposed five-year threshold.

Para. 25(d) states that "the staff member cannot provide the relevant services until the staff member acquires appropriate experience and an appropriate qualification". We are not sure whether this is currently correctly worded. The final wording should better accommodate staff members involved in on-the-job training.

Para. 25(h) requires that a member of staff who does not yet have the required amount of experience needs to be accompanied by a trainer during all client meetings. While we understand the need for more training until a staff becomes fully experienced, we believe that is impractical for a trainer to be present at each meeting. We would thus suggest the notion of "working under close supervision with the trainer" and to provide feedback on each of these meetings to the trainer to ensure this close supervision.

**Q4: Are there, in your opinion, other knowledge or competence requirements that need to be covered in the draft guidelines set out in Annex IV?**

We are not aware of other knowledge or competence requirements that need to be covered in the draft guidelines set out in Annex IV.

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

This is very difficult to answer at this stage as we are clearly lacking clarity around scope and definitions (compared to the current national rules and standards) to estimate fully the final costs of such a transition. Only once these questions are satisfactorily answered might it be possible to draw general observations on the additional one-off costs for the industry.**Q6: What additional ongoing costs will firms face as a result of these proposed guidelines?**

This is very difficult to answer at this stage as we are clearly lacking clarity around scope and definitions (compared to the current national rules and standards) to estimate fully the final costs of such a transition. Only once these questions are satisfactorily answered might it be possible to draw general observations on the additional ongoing costs for the industry.

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