Brussels, 13 October 2017

EACB Response to the ESMA Consultation Paper on Guidelines on certain aspects of the MiFID II suitability requirements

October 2017

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 210 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 79 million members and 749,000 employees and have a total average market share of about 20%.

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General Remarks

The European Association of co-operative Banks (EACB) is pleased to participate to the ESMA's Consultation paper on Guidelines on certain aspects of the MiFID II suitability requirements.

The EACB is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 210 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 79 million members and 749,000 employees and have a total average market share of about 20%. (For further details, please visit www.eacb.coop).

For co-operative banks the relationship between a bank and its customers is key, this meaning that all their operations are set to serve the customers' interests. Clients can become members/owners of co-operative banks and a result, they have a direct say in the business and are involved in the governance, strategy and risk management processes. The core business of co-operative banks is value creation for their members and a long-term relationship of trust, opposed to the profit maximization approach of the mainstream banks. Member ownership leads to co-operative banks being predominantly focused on sustainable retail banking and key players in financing the real economy: the households and the SMEs on their territories.Moreover, local co-operative banks usually have a good physical proximity, thanks to their dense networks of branches. They are part of the community, understanding their customers and speaking their language.

For these reasons we attach great importance to the issue of suitability requirements, we welcome ESMA's endeavours and we are happy to provide some feedback to certain aspects of the relevant consultation. Before responding to the specific consultation questions we would like to make some general comments regarding the draft Guidelines on certain aspects of the MiFID II suitability requirements as per below:

1. Principle of proportionality

The EACB welcomes that ESMA emphasises 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 the Consultation Paper.

However, we fear that ESMA does not always observe the principle of proportionality in the draft guidelines. For example, when requiring client information in the context of "know your customer principle" institutions may require only the information which is necessary and appropriate in individual cases to understand the client's circumstances. We believe that the nature of the service in some cases should enable firms to collect less information about the client. We elaborate on specific points of the guidelines where this is the case. In our responses to consultation questions below.

Another an example that in our view is not in line with the principle of proportionality relates to the obligation to obtain 'the necessary information' as set forth in article 25 paragraph 2 of MiFID II.

More in particular, we believe that firms should not be obligated "to encourage clients to disclose their financial investments they hold with other firms in detail, if possible also on an instrument-by-instrument basis" as proposed in paragraph 41 of guideline 3. Besides it will be difficult for investment firms to monitor on a continuing basis the reliability of this information, that may be subject to change on a daily basis. Hence whether firms need to ask such information should be up to the discretion of the firm itself, rather than imposing these requirements as sort of good practice.

2. Term robo-advice

In many points in the draft guidelines, ESMA refers to "robo-advice". At this point there is only very limited experience with robo-advice in Europe. The managed assets appear to be relatively small. In principle, the same requirements should apply to investment advice provided by a man or an application under MiFID II. This also follows from article 54 paragraph 1 of the MiFID II Delegated Regulation. For these reasons, we consider that special provisions on robo-advice in these guidelines are premature and would require a detailed and careful assessment.

Indeed, the ESAs have assessed quite recently inter alia in their Joint Committee Discussion Paper on automation in financial advice (JC 2015 080 4 December 2015) the potential benefits and risks of automation in financial advice. The ESAs have concluded to determine at a later stage which, if any, regulatory and/or supervisory actions may be required to mitigate the risks while at the same time harnessing the potential benefits.

In this context, the question arises whether or not a more fundamental view should be developed by the European legislator - at a higher legislative level – on how current investor protection rules in general, including suitability requirements, should be equally and proportionally be applied to robo-advice, rather than in these draft guidelines.

If nonetheless special rules for the "robo-advice were to be included, we would like to point out the following:

- The term "robo-advice" has not been defined uniformly throughout Europe. The definition used in the guidelines does not seem to allow us to distinguish between various types of services. It would be useful if there was a common clear understanding in Europe of which services are covered by the term "robo-advice" and which are not. Therefore, if specific provisions are included in the guidelines regarding robo-advice, we would encourage ESMA to provide a corresponding definition for robo-advice, in order to ensure a uniform implementation of the Guidelines in Europe.
- In our view digital tools, which are only designed as simple and objective search engines, should not fall under the definition of robo-advice under these Guidelines. A clarification in that regard would be desirable.
- Some draft guidelines clearly apply to robo-advice only. However, for some other guidelines, this is not always clear. We would therefore suggest that it is always made very clear which guidelines apply only to robo-advice.

3. Investor Protection Scope- Mission Statement

The draft guidelines seem to have been exclusively based on the idea of the "vulnerable client". However, there are also many competent and experienced investors who can reliably assess their actions and make informed and responsible investment decisions. We fear that this is not sufficiently taken into account and reflected in the draft guidelines. In order to alleviate this, we consider that the guidelines should provide guidance on the extent to which deviations are possible, for example, when it comes to experienced investors.

4. Relevancy with regard to professional clients

We understand that these guidelines principally address situations where services are provided to retail clients, but these guidelines should also be considered as applicable, to the extent that they are relevant, when services are provided to professional clients. With due regard to what is mentioned sub 3 of Annex III (Guidelines) it remains unclear to what extent these guidelines should be relevant when services are provided to professional clients.

Taking into account article 54 paragraph 3 of Commission Delegated Regulation 2017/ 565, we understand that banks can assume the necessary knowledge and expertise of professional clients, and in case of investment advice for per se professional clients the financial ability to bear any related investment risk consistent with the investment objectives of that client. Therefore the suitability assessment of professional clients will be focused on investment objectives of the client including client's risk tolerance. Although the range of requirements and the nature of these clients is different, this consultation paper does not really give much attention (only in paragraph 38 and 39) to how suitability should be applied in relation to investment advice and portfolio management for professional clients. More in particular, when providing advisory services to professional clients, we believe that the financial position may be relevant for the purpose of assessing the investment objective (see paragraph 39), but not for the purpose of assessing whether the client is able to bear potential losses or not. Hence, obtaining such information serves another purpose.

A far more light touch and proportional approach should be possible in this situation without elaborated questionnaires to be filled in by the professional clients. This would need to be clarified in the draft Guidelines.

5. Information Overload

The draft guidelines create new information requirements for investors in many cases. We totally support that investors must be well informed in order to be able to make good investment decisions. However, it needs to be ensured that investors are not flooded with information in a way that they can no longer distinguish important from less important. For that purpose, the extent and detail of the information to be required should be carefully examined. Moreover, new information requirements should have legal basis. In our responses to the consultation questions below we identify some information requirements included in the draft guidelines which –in our view - are not necessary for a good investment decision by the investor and should be deleted.

6. Timing

We would like to stress that the timing of this consultation does not allow compliance with new or updated suitability guidelines as of the start of entering info force of MiFID II. European banks are still preparing themselves for the final stage of implementing MiFID II requirements and devoting enormous efforts on that. Furthermore, the close link with other MiFID II requirements such as product governance, costs disclosure and, knowledge and competence requirements shall make effective implementation of suitability requirements more complex and proper implementation would require more time. For these reasons, we would kindly ask ESMA to take this into account when defining the date of application of these guidelines.

Please find our detailed responses to the consultation questions below.

Responses to the Consultation Questions

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.

- Point 17:

An obligation to assess the client's understanding of investment risk as well as the relationship between risk and return on investments exceeds the requirements at level 1 and level 2 of MiFID II. Rather, the investment firms should take appropriate measures to ensure that the customer understands the concept of investment risk as well as the relationship between risk and return as provided in the 2012 Guidelines

We are therefore calling for the deletion of the draft supporting guideline under point 17 (maintaining the previous supporting guideline point 16 from the year 2012.

- Point. 19

On page 40 it is stated under paragraph 19, that firms should not use disclaimers (or other similar types of statements) aimed at limiting their responsibility for the suitability assessment. This is obviously correct.

However, this guideline should not prohibit firms using disclaimers at all. In this context it is important to be recognised that for making an adequate suitability assessment, the client also has to meet obligations. More in particular, in case they do not provide all or the right information, the suitability assessment could be suboptimal. Clients are for example sometimes hesitant to provide information regarding their income and assets and loans with other banks.

Also if the information changes in the course of time, the clients should inform the investment firm because it can influence the suitability assessment. This is in particular important in case of a one off suitability assessment. The firm cannot be held liable for clients not meeting these obligations and therefore should be allowed to use a disclaimer to inform clients thereof.

Moreover, the sentence *“For example, when collecting clients’ information required to conduct a suitability assessment (such as their investment horizon/holding period or information related to risk tolerance), firms should not claim that they do not assess the suitability.”* implies that already the request of the information that is necessary to carry out the suitability assessment obliges to conduct a suitability assessment.

The EACB members do not share this understanding. There is no legal basis for this in MiFID II or the delegated acts. We would also see a contradiction to the requirements on the appropriateness test. In the context of the appropriateness assessment, investment firms must (only) require and examine (exclusively) knowledge and experience. However, since knowledge and experience are also to be requested and assessed also in the context of the suitability test, it could be interpreted to lead to a complete suitability test being carried out in addition to the appropriateness test. Such a requirement can only be imposed by the European legislator. We believe that this is also not the intention of ESMA anyway.

Moreover, this statement may conflict with automated tools used for execution only services, where firms offer guidance toos for their clients for investing. Where a client is able to use suitability elements in an automated execution only tool, this should not automatically lead to a conclusion that investment advice is provided.

As to the issue on disclosure of algorithm where robo-advice is rendered, the question arises whether there is any added value in informing the clients about the algorithm. Furthermore, is it sufficient to inform that the algorithm is used, or should you also explain the algorithm (see references hereto on page 17 paragraph 39). We assume that the algorithm should not be explained, as the guideline itself does not reflect this. In this context ESMA should take a critical look as to the question whether or not such additional information requirements really has added value to the client.

For the reasons set above we ask that ESMA expressly clarify these points in the guidelines.

- Point. 21

We assume that point 21 only applies to robo-advice. This should be clarified.

Moreover, the last bullet point ("An explanation of how and when the client's status will be updated") is not understandable- even in this context. It is unclear which client's status it referred to and in which cases an update of this status would be considered. We would, therefore, suggest deleting the last bullet point.

- Point 22

We assume that point 22 only applies to robo-advice. This should be clarified.

We do not consider it useful that the guidelines provide for technical specifications on how investment firms provide their clients with specific information. The technical design of the information should be left to the investment firms themselves.We therefore propose the deletion of marg. 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.

In general, we agree with the described requirements –in particular, when it comes to robo-advice. We also agree that due to the (mostly) missing opportunities of a "human / manual review of the answers", an automated check for consistencies in the customer details must be ensured. The customer should be made aware of inconsistencies and should have the opportunity to correct them. At the same time, it is important to keep in mind which information is actually relevant to the specific client and the individual case in order to check the suitability. Here, investment firms should have sufficient room to make decisions so as not to ask the client for unnecessary information, which may ultimately lead to a refusal to provide certain information and thus the client will not receive investment advice.

We would also like to make the following comments:

- Point 26

The required data to obtain the necessary information for the suitability assessment is at some points exaggerated, for example in the section "marital status", "age" and "employment situations" (e.g. future loss of job is likely). Their significance is questionable and the description sometimes undefined, so these points should be deleted. Financial institutions should therefore not be obliged to request this information from the client.

- Point 29

We consider it very problematic to have to assess (appraise) the investor's "financial literacy" and to take it into account in the suitability test. It is also unclear how firms should or could appraise and assess the client's financial literacy and understanding of basic notions such as, for example, investment risk (including concentration risk) and risk-return trade of, and make this appraisal part of the suitability assessment as prescribed by ESMA in paragraph 29.. It is not and should not be the task of a financial institution to perform educational tests.

Moreover, the principle of non- discrimination could be endangered if, for example, a decision on whether a particular financial instrument can be recommended to an investor or not is made on the basis of educational qualifications or certificates.

Last but not list this requirement goes beyond Level 1 and Level 2, and we ask for its deletion.

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

No, we do not consider any further clarification necessary.

We would like to take the opportunity and highlight that as noted in our introductory remarks, proportionality as to the extent of information to be collected from clients is essential. Particularly in light of the context of providing advisory or portfolio services related to the mass retail for which such services may become too expensive as a result of inter alia strict suitability requirements is essential. Hence, with that in mind, we recommend to reflect this in the guidelines.

We believe that the nature of the service in some cases should enable firms to collect less information about the client. This should be the case where a firm offers a quick simple investment advisory proposition with only a limited number of quite simple non-complex investment products, such as certain UCITS funds, to its mass retail clients. Or where the advice or portfolio management services relate to a small amount of money for the client or relates to very specific purpose based on which a full client intake of all suitability requirements should not be necessary.

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.

- Point 37

In our view, the requirement for *"more in - depth information would usually need to be collected for potentially vulnerable clients"* is exaggerated. If a bank gathers all information which is necessary to assess suitability this should be enough. There should not be any additional or stricter criterion.

- Point 41

The requirement that "Firms should also encourage clients to disclose their financial investments with other firms in detail, if possible on an instrument-by-instrument basis." is very problematic for various reasons.

For example, there are investors who deliberately choose several accounts with different credit institutions. One reason may be that the respective bank will not have a complete picture of the financial instruments held.

In practice, it is common for an investor to maintain various independent accounts for different purposes. In such cases, the credit institution providing investment advice could not draw any reasonable conclusions from information on accounts with other credit institutions.

A further problem is that the composition of the different account will potentially change frequently, especially in the case of active investors. It does not seem to be practical that a customer will bring with him / her current depot extracts for each consultation. This is especially true if the client has deliberately chosen to have his financial instruments managed by different banks. Thus, the information available at the advisory credit institution would therefore not be always not up-to-date.

Therefore, it is sufficient –in our view- that the credit institution providing the advice assesses whether the relevant recommendation is financially viable for the client based on the information provided by the customer.

- Point 42

It is important to note the following regarding guideline 4 and its supporting guidelines: Under Article 55 para. 3 p. 1 MiFID II delegated Regulation, an investment firm may rely on the correctness of the information provided by its clients or potential clients, unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

Accordingly, the information given by the client to a financial firm are to be treated as correct in principle. There is no obligation for an investment firm to verify the details of its customers. Only in cases where the customer information has "obvious" deficiencies should investment firms check client information.

A different approach would go beyond the MiFID II Level 2 requirements.

Therefore, we would support maintaining the existing supporting guideline point 42 as in the current guidelines of 2012 ("For example, firms should consider whether there are any obvious inaccuracies in the information provided by their clients.").

- Point 44

We consider that having to assess the client's self-assessment with exercises, as described in lit (a) is problematic. First of all, there is no legal basis for such a requirements. In addition, customers will reject such a "knowledge review" as discriminatory.

We therefore encourage ESMA to delete lit. (a).

- Point 49

Under Article 55 para. 3 p. 1 MiFID II delegated Regulation, an investment firm may rely on the correctness of the information provided by its clients or potential clients, unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

Accordingly, the information given by the client to a financial firm are to be treated as correct in principle. There is no obligation for an investment firm to verify the details of its customers. Only in cases where the customer information has "obvious" deficiencies should investment firms check client information.

The requirement as envisaged point 49 to actively check the possibility of clients overestimating their knowledge and experience would be contrary to level 1 and level 2 text. AT the same time it is very complex and unpractical –if at all feasible- , not in line with the principle of proportionality, while it could be perceived by clients as discriminatory.

For all these reasons, we consider that point 49 should be deleted.

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

- **Point 54**

ESMA calls on the institutions to reduce the risk that clients - without a real change in their circumstances - update their data with the aim of making certain products that would otherwise be unsuitable for them suitable.

This requirement conflicts with Under Article 55 para. 3 p. 1 MiFID II delegated Regulation, whereby an investment firm may rely on the correctness of the information provided by its clients or potential clients. Moreover, such a requirement should be possible in practice, if at all, only with disproportionate effort.

We therefore propose the deletion of point 54 of the relevant supporting guidelines.

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.

- **Point 56**

Point 56 in sentence 3, requires financial firms to inform their clients on how they perform the suitability assessment in situations where a client is a legal person or a group of two or more natural persons or where one or more natural persons are represented by another natural person.

We do not consider this requirement necessary. The right to represent natural and legal persons is defined in national law and very specific legal requirements apply. Therefore, we do not consider that it is necessary to impose an obligation to provide additional information to the client in that regard.

The 2012 general guideline on the topic of 'Client information for legal entities or groups' has been incorporated in the first subparagraph of Article 54(6) of the MiFID II Delegated Regulation. We believe that guideline 6 does not add much to what already follows from article 54(6) of the MiFID II Delegated Regulation.

Therefore, we would suggest deleting point 56, 3 sentence of the respective guidelines.

- **Point 58, 60 and 61**

We do not see any reason why, in cases where national law provides legal representation for legal persons or groups of persons, the institution's policy must be subject to additional detailed rules on suitability assessment. An investment firm should establish and implement policy as to who should be subject to the suitability assessment and how this assessment will be done in practice. However, with this extended scope ESMA restricts the firms to make their own risk-based decision regarding the suitability assessment of legal persons.

Furthermore, the monitoring of per se professionals differs from the monitoring of elective professionals, which in itself would justify a different approach. Therefore we kindly request ESMA to delete this addition.

We would therefore encourage ESMA to maintain the relevant guidelines of 2012, which only provide for additional requirements for cases that no representative is foreseen under national law or no representative has been appointed.

- Point 63

We agree with the suggested approach to conduct the suitability assessment for a group of clients, where no legal representative is foreseen under applicable national laws.

However, with regard to paragraph 63, option (a), it is not clear to us how an investment firm can practically meet the requirements of ESMA, in paragraph 59: (1) to suit the interests of (all) the relevant clients, taking also into account their need for protection; and (2) to deal with situations where the characteristics of individual clients within a group are different. This needs to be clarified. If the group of two or more natural persons agrees to designate a representative, it should consequently be the sole responsibility of the designated representative - and not the responsibility of the firm - to meet the requirements (in paragraph 59) on behalf of all the individual clients within the group.

According to paragraph 63 option (b), firms could also consider collecting information about each individual client and assessing the suitability for each individual client. Especially when the client is a group of two or more natural persons and no representative is foreseen under applicable national law, this approach seems very unpractical to us and will probably result in significant costs, associated with among other things staffing and IT development. For example, when collecting information and assessing the suitability of each individual client within the group, relevant differences between the individual clients could occur, that should in fact result in a different investment profile for each individual client. Then of course the question arises about how the firm in practice can comply with the MiFID II overarching principle of acting in the clients' best interests. Hence, option (b) should not be mandatory.

- Point 64

The EACB agrees with the suggested same approach to be followed, if a group of two or more natural persons agrees to designate a representative, as described in subpar. 2 of Article 54(6) of the MiFID II Delegated Regulation. The knowledge and experience should be that of the representative. However, we would consider that it need to be clarified that this should be regardless the level of knowledge and experience of each of the individual clients within the group of two or more natural persons.

Furthermore the financial situation and investment objectives would be those of the underlying clients as agreed upon with the designated representative on behalf of all the individual clients within the group.

Hence, the investment firm should not be obliged to collect information on the financial position and investment objectives etc. from each and every individual client.

- Point 65

Point 65, sentence 2, requires that where the client is a couple the firms relevant policy should take into account in its policy the matrimonial regime that applies to that couple.

However, the matrimonial regime regulates the property relations of spouses, i.e. the inner relationship of a couple, the relationship between the two. A distinction must be made between the "external" relationship between the investment firm and the client, which is not regulated by the matrimonial regime. In addition, consideration of the matrimonial regime across jurisdictions would not be possible for the investment firms in practice.

Therefore, we would propose to delete point 65, 2 sentence.

- Point 66

The EACB considers that if parties have in fact difficulties in deciding from whom the information on knowledge and experience or on the financial situation should be collected, for the purpose of suitability assessment or on defining their investment objectives, the firm should not be obliged to adopt the most prudent approach (as mentioned in paragraph 66, by taking into account the information on the person with the least knowledge and experience, the weakest financial situation or the most conservative investment objectives). In our view it is the sole responsibility of the clients themselves - and not the responsibility of the firm - deciding from whom the information on knowledge and experience or on the financial situation should be collected and on defining their investment objectives.

Moreover, firms indeed may better consider refraining from providing investment advice or portfolio management services in such a situation.

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.

- Point 68

The EACB members understand that ESMA has introduced this guideline to expand on the 'know your product' aspects of suitability assessment that were addressed in the 2012 guideline. This however, has already been sufficiently incorporated in article 54(9) of the MiFID II Delegated Regulation, that provides that: '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'.

Furthermore, the relevance of this guideline in fact has been diminished to a large extent due to the MiFID II provisions on Product Governance. Therefore, we believe additional guidance with this guideline and supporting guidelines is not needed. We recommend removing General guideline 7 and supporting guidelines.

- Point 71

In point 71, the draft guidelines provide investment firms should determine the complexity of financial instruments. In this context, firms should take into account Article 25 (4) of MiFID II and the related guidelines of ESMA regarding the distinction between complex and non- complex products. This reference is highly problematic since the guidelines have been drafted for a different purpose i.e. to serve to define whether a product can be marketed without appropriateness test.

These very broad guidelines - individual points could be understood to mean that any simple bank bond, which is bail in-able, is to be considered as a complex tool - are now increasingly extended to other areas. This distinction between complex and non-complex products is decisive under the PRIIPs Regulation in defining whether a warning need to be displayed to the key information document (KID). The above interpretation in the ESMA guidelines will lead to almost all KID to contain a warning. This shows that the delineation between complex and non-complex as provided in the relevant ESMA guidelines should not serve for any other purposes other than define whether a product can be marketed without appropriateness test. In this extent, we consider the distinction between complex - noncomplex and in particular the reference to the elated 2015 ESMA Guidelines on complex debt instruments and structured deposits not as an appropriate solution for the purpose of the suitability test.

The complexity of financial instruments has also been discussed extensively at European level in the context of the ESMA guidelines on MiFID II product governance requirements (June 2, 2017, ESMA35-43-620, hereinafter "product governance guidelines"). ESMA was right to conclude that the complexity of financial instruments is not a suitable criterion for determining the target market for financial instruments. In Europe, beyond the above-mentioned differentiation between complex and non-complex products for the execution only regime, there is also no uniform understanding of how the degree of complexity of financial instruments should be determined. Accordingly, the complexity in the final product governance guidelines was not used to determine the target market.

Therefore, also for consistent supervisory practice reasons, we consider that the present draft guidelines should not make complexity a specific point for the purposes of the suitability test.

We therefore recommend deleting point 71.

- Point 73- 74

The classification of products and categorizing financial instruments for the purpose of identifying the target market is governed by the final ESMA report regarding guidelines on MiFID II Product Governance Requirements. And should not by governed General guideline 7 and Supporting guidelines thereto.

Furthermore, the classification of products is for the purpose of identifying the target market, but not for purposes of the suitability assessment. There is in fact no legal obligation to classify products for the purposes of suitability assessment on level 1 or 2.

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.

- Point 75

The guideline confirms the main content of 2012 guideline on the topic of 'arrangements necessary to ensure the suitability of an investment. The rationale behind has in fact remained unchanged. Some additional guidance has been provided on the issue of concentration risk.

According to general guideline 8, paragraph 75, in order to match clients with suitable investments, firms should establish policies and procedures to ensure that they consistently take into account: all available information about the client necessary to assess whether an investment is suitable, including the client's current portfolio of investments and asset allocation within that portfolio.

We refer to our introductory remarks regarding the principle of 'proportionality'. The available information about the client, necessary to assess whether an investment is suitable, should of course be relevant.

Therefore we recommend changing the sentence 'take into account all available information' into 'take into account all available relevant information'. We believe that the nature of the investment service in some cases should enable firms to collect less information about the client.

Furthermore, if it is meant that the portfolio of the client includes any financial investments they hold, also with other firms, we do not agree with this approach to ensure the suitability. A firm could be aware of other investments of the client with other firms, but should not be required to request such information.

And even more the firm should never be required to take into account the 'asset allocation' of these assets invested by other firms.

Again, we believe that firms should not be obliged "to encourage clients to disclose their financial investments they hold with other firms in detail, if possible also on an instrument-by-instrument basis" as proposed in paragraph 41 of guideline 3. We believe it will be difficult for investment firms to monitor on a continuing basis the reliability of this information that may be subject to change on a daily basis. Hence, whether firms need to ask such information should be up to the discretion of the firm itself, rather than imposing these requirements as sort of good practice.

- Point 76

ESMA the definition of personal recommendation to not only cover a recommendation to buy, hold or sell a financial instrument, but also the recommendation not to buy, sell or hold a financial instrument ("or not to do so") which would therefore require a suitability test

This is, in our view, in clear contradiction to the will of the European legislator as envisaged in the MiFID II delegated Regulation. Indeed, under Article 9 MiFID II Delegated Regulation, a personal recommendation shall constitute a recommendation to purchase, sale, subscribe for, exchange, repurchase, hold or redeem a particular financial instrument. The recommendation to "not do so" is not covered. Article 9 of the MiFID II delegated Regulation is final and the present Guidelines cannot extend the scope of its application.

- Point 82

We generally agree with the additional guidance regarding diversification and agree that firms, when advising or providing portfolio management services, 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.

However, we do not agree with the suggestion (in the second sentence of paragraph 82) that the firms should consider directing clients towards specific types of investments such as those considered 'secured' or 'per se diversified', in cases where the size of a client's portfolio is too small to allow for an effective diversification. Although this could certainly be a suitable solution for some clients and quite practical from a firms' point of view, we believe however that this relates to how a firm should advise and provide portfolio management services, while in fact this goes beyond the purpose of the guidelines (to clarify the application of certain aspects) of the MiFID II suitability requirements. Therefore, we recommend removing the second sentence of paragraph 82.

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.

- **Point 87- 88**

This guideline has been added by ESMA to address the new requirement provided by article 54(9) of the MiFID II Delegated Regulation, which requires firms to conduct an assessment, while taking into account cost and complexity, of whether equivalent products can meet their clients' profile.

First of all, it is unclear how 'a thorough assessment of the possible investment alternatives' should be undertaken. We assume that the assessment may be limited to the investment alternatives that have been selected with due regard to Product Governance procedures and does not require the firms to extend the range of financial instruments that are being offered to its clients. We believe this should be clarified.

Furthermore, this approach relies on the assumption that a possible investment alternative is always available, which in fact for certain investment products shall not always be the case, for example when recommending or investing in more complex tailor-made investment products.

Furthermore, it has been suggested that relevant factors to identify products that are broadly equivalent could be the consideration of their target market and their risk-return profile. This approach relies on the assumption that the information about the target market, risk-return profile and costs of broadly equivalent products is always available and correct. Moreover, that firms in fact can fully rely on this information of the manufacturers of these broadly equivalent products.

For firms with a restricted range of investment products, or recommending only one type of investment product, or providing dependent advice only, so where the assessment of equivalent investment products could be very limited, we presume that firms are therefore not expected to consider the (whole universe of) possible investment alternatives in order to comply with the requirement under Article 54(9) of MiFID II Delegated Regulation. We believe in fact that this should be clear.

In addition, ESMA takes a very wide approach to what constitutes "equivalent product" in point 88. However, we consider that criteria such as "similar target market" or the "similar risk-return profile" is too far reaching. An investment firm and/or an adviser would in all likelihood take into account a very large product horizon in the selection process. There would probably be thousands of financial instruments that would be captured under the description of "equivalent product" under point 88 in article even though these financial instruments can not be regarded as equivalent by virtue of their different design or operation. Rather, from our point of view, it is appropriate and necessary to read the term "equivalent" as "nearly identical". The specific point should be amended accordingly.

- Point 90 und 91

An new obligation to the Guidelines from 2012 is that a thorough assessment of possible alternative products, taking into account the costs and complexity, has to take place in the context of investment advisory and asset management services (see draft guideline 9).

On a positive side, we believe that this assessment of possible alternative products can not necessarily take place at the level of the consultant, but at a higher level as envisaged in point 90.

In this context, we would like to note the following in relation to point 91 which states that when choosing a more costly or more complex product, the reasons for this need to be clearly explained in the suitability report: (1) If, however, the decision about possible alternative products is made at a higher level (e.g. the product committee), then an explanation in the suitability report (by the consultant) makes no sense. (2) The obligation to document the reasons for the selection in the suitability, as set out in the draft guidelines, goes beyond Article 25 (6) MiFID II and Article 54 (9) of the Delegated Regulation 2017/565, which requires that investment firms shall have, and be able to demonstrate, adequate policies and procedures. We would therefore ask for the deletion of point 91, 2 sentence.

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.

- Paragraph 92

In general, the suggested approach makes sense and that the relevant requirements are relevant to ensure that firms comply with their obligation to act in the best interest of their clients, specifically in situations where there is a heightened risk of non-compliant behaviors', due to the presence of conflicts of interests.

However, it would be helpful if it is included in Guideline 10, respectively the Supporting guidelines belonging hereto, that the rebalancing of a portfolio would not be considered as a switch.

- Paragraph 93

We consider that in most cases it will be quite difficult or at least arbitrary to quantify the non-monetary costs and benefits.

- Points 94 and 96

According to point 94, the investment firm would be required to state in the suitability report the reasons a clear explanation of the reasons why the benefits of the recommended switch are greater than its costs. This is in clear contradiction with point 96, which states that the cost- benefit analysis can be done at a higher level. If, however, a superior body makes the decision on the costs and benefits of a switch, documenting this in the suitability report (by the consultant) makes no sense. In this case, the latter does not carry out the cost-benefit analysis, but rather the superordinate body. In addition, this requirement goes beyond the Level 2 text, which merely requires that the securities firms can "demonstrate" that the benefits of the switching overweigh their costs (see Article 54 para 11 MiFID II Delegated Regulation 2017/565).

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.

We do not consider any further guidance necessary.

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

The EACB would like to share the following 2 points:

- ESMA does not specify what constitutes excessive concentration (as outlined in Annex III Point 83), thus creating uncertainty. Additionally many investment firms explicitly chose to provide investment services on a non-independent basis in order to sell and recommend financial instruments from themselves or manufacturers with close links. This is now counteracted by ESMA guidelines. It is unclear why ESMA chooses to single out specific issues without regard to the MiFID II directive as a whole.

- Moreover, we would like to share the following regarding guideline 12 (Record-keeping) for which there is no specific question in the ESMA Consultation Paper: Apart from introducing some additional details specific to MiFID II, for example the reference to the suitability report and some guidance for firms providing robo-advice, ESMA has fundamentally confirmed the content of the 2012 guideline (9) on the topic of ‘record keeping’. In fact the rationale behind this 2012 guideline has not changed.

The rules on record-keeping in MiFID II relate to requirements for documentation on transactions. Those rules are separate from the guidelines on the suitability requirements. However, the requirements in the supporting guidelines 107-109, regarding for example policies and procedures that could appropriately ensure the business continuity, the backup and the functioning of disaster recovery plans and arrangements to mitigate the risks of malicious cyber activity, do not relate to suitability requirements. Therefore, they should not form part of these guidelines. We recommend removing guideline 12 and the supporting guidelines (paragraph 105-109).

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.

As a European Association we cannot specify the level of resources that would be required to implement and comply with the guidelines in each firm.

Contact:

The EACB trusts that its comments will be taken into account.For further information or questions on this paper, please contact:

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