Asociación Española de Banca

Spanish Banking Association comments on ESMA Consultation Paper:

Draft guidelines for the assessment of knowledge and competence

As general comments:

1. ESMA indicates that it expects the Guidelines to promote convergence in the knowledge and competence of staff providing investment advice and information about financial instruments, structured deposits, investment services or ancillary services to clients.

Notwithstanding the above, the specification of the criteria for assessment of the qualifications and experience required to comply with the Guidelines has to be made at national level (i.e. determine the minimum period of "appropriate experience" that is required for relevant individuals). This could lead to an un-level playing field created as a result of uncoordinated local developments of the aforementioned commitments.

In this regard, maintaining a level playing field and harmonized set of requirements for all investment firms across the EU has always been one of the main objectives of the whole EU legal framework, and specifically, in the investor protection field. Consequently, it would be desirable that, prior to publishing the Guidelines, ESMA has the commitment by all NCAs to support them without exceptions.

The cost of guidelines not fully supported by all NCAS (as was the case after the publication of "Guidelines on the exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps") is huge in terms of level playing field among investor protection and the goals of the Capital Markets Union. In fact, it is more important than ever:

(i) now that the European Commission has launched the Capital Markets Union initiative, recognizing the need to overcome the barriers that are fragmenting markets in the EU and to enforce the principle of free movement of individuals and capital, for which requirements imposed at national level could constitute an unjustified barrier; and

(ii) in this specific consultation paper, which not only impacts in the distribution of financial instruments across the European Union, but also in the labor market, the barriers that some groups (i.e. young people) may face across the different Member States and the brain drain that may occur from some member states to others with lower requirements (and consequently, higher job opportunities and salaries).

2. In addition, the Guidelines should only apply from the date they are implemented and in respect of new staff providing the relevant services and information. Otherwise, this could result in a number of individuals being removed from their duties and reallocated in other

areas of the investment firm against their will, or even in the dismissal of employees where reallocation is not possible.

If ESMA does not accept the above, a transitional period should be considered in order to avoid the disruption in the provision of financial services.

3. Finally, we do not support the automatic extension of requirements set forth in the Guidelines to professional and eligible counterparties as it will mean an administrative burden contrary to the proportionally principle that must guide MiFID legislation.

The fact that an individual does not fulfill all these requirements should not affect investor protection as professional clients are supposed to possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that they incur. Professional clients and eligible counterparties - due to their knowledge and experience - are sufficiently informed and therefore in a position to know or ask for the relevant information. In fact, most of these entities work closely with several investment firms which many times are in competition and must accept the terms and conditions that the client or eligible counterparty impose.

In view of the above, the Guidelines should only apply when the investment advice or information regarding financial instruments is provided to retail clients.

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.

Establishing a concrete period of time does not seem appropriate. Each professional should be capable to offer the service, when is ready for it, after having proved their competence and abilities.

Different employees in entities are selected with different standards, as selection criteria differ between entities, even when they have same qualifications, training and duties there are no two identical people with identical skills and experience. It is possible that someone never reaches the qualification level needed for a concrete task, while others do it in a very short time period. Flexibility for entities to evaluate internally these circumstances must be respected.

Mere formal compliance should be avoided as real and material compliance is the one we should look for. A standard requirement as the one proposed here (5 years) goes against proportionality mentioned in the guidelines where the need of these guidelines to be applied in a proportionate manner, taking into account the nature, scale and complexity of a firm's business and the nature and range of financial services and activities undertaken in the course of its business is recognised.

The new requirement of not less than five consecutive years of appropriate experience in providing the same relevant services at the date of application of these guidelines:

- Considers the need of experience but ignores other knowledge and experience skills.
- It is not justified in a solid way and therefore it seems not adequate to prove the fulfilment of the requirements.
- More discretion should be left for NCAs and for entities to design their internal training programs.
- It could cause disruption in the provision of financial services at the date of application of these guidelines due to the need of replacement for the professionals who do not meet the requirement of 5 years, when it is possible that professionals with less than 5 years of experience have proved their competence.

The application of this clause should be reconsidered and more discretion for NCA should be recognised in line with the possibility for NCA of not applying the guidelines.

ESMA's proposal to establish a minimum of five years as a safe harbor is excessive. Our experience tells us that a relevant individual may have appropriate experience and knowledge and competence enough with less than one year. In this respect, we believe that a period of one year is more appropriate and sufficiently protective for clients.

In the case ESMA understands that more than one year is necessary, prior comparison shall be made with relevant third country legislation in order to establish a similar number of years. If that is not the case, it could create a situation of brain drain from the EU to third country firms, as their main tasks and salaries would be much better than the opportunities they may find in their relevant member state.

Therefore, in case a standard minimum is put in place, 5 years is a too long period and experience in similar functions should also be considered. Also training level of employees should be considered.

ESMA considers that relevant staff in firms with no less than five consecutive years of "appropriate experience" of providing the same relevant services could, at the discretion of the NCA or another national body identified in the Member State and subject to a specific assessment by the investment firm, be considered to possess the necessary knowledge and competence to fulfill their obligations under Article 24 and 25 of MiFID II.

The Guidelines seems to assume that a relevant individual could not be competent by its own unless it has a relevant number of consecutive years of experience providing the same relevant services.

Our understanding is that a relevant individual may be perfectly competent even in the case it has no experience, provided, however, that he/she has the appropriate qualifications. For instance, it seems reasonable to assume that a person with a degree in finance has the appropriate competence to provide the relevant services/information, even where it has a limited experience or even no experience at all.

In other industries/sectors with direct contact and effect on clients/public, a relevant individual is considered competent even in the case it has no experience, provided, however, that if it has the appropriate qualifications (i.e.: dentists, surgeons, public employees, etc.). In other sectors, in which decisions impact everybody in a higher and broader sense than in investment services, qualifications are no even required.

Therefore, we understand that ESMA should include, in addition to the X years exception, new "safe harbors" applicable to "appropriate qualification", including at least:

-Degree in economics, finances or any other similar material;
-Postgraduate course or master in the financial sector;
-Any combination of experience and qualifications shall be positively assessed (i.e.: an employee with a 5 years degree in finances shall need less years of experience than other with a 4 years degree in finances – similar criteria than the one used by ESMA in their selection criteria)

Otherwise, since they will have to be mandatorily trained full time during a number of years, the cost of hiring younger workers will increase. In addition, there will be many young people who would choose not to study to get straight to work in order to gain the years of experience required by ESMA. The aforementioned would reduce the level of preparation and knowledge as well as will increase recruitment costs of young Europeans and thus youth unemployment.

We understand that experience in more than one firm shall be taken into account for the purpose of assessing whether a relevant individual has a relevant number of years of appropriate experience. The fact that the work has been performed in different firms shall not be a relevant for considering experience as "appropriate".

Entities providing investment services are the main interested parties in knowledge and experience of employees being the ones needed for every function they perform. This is the only way they will mitigate reputational risks, avoid misspelling and the correspondent legal responsibility and increase their competitiveness enhancing the quality of the service and clients experience.

On the other hand, requiring more experience and knowledge than the one needed could create damages similar to ones created by infra qualification. Recent studies reveal how over qualification creates labour dissatisfaction, negative attitudes, and, with the intention of moving to another job, short-term behaviour, with the consequent negative impact in entities and service given to clients.

Different distribution models and types of services and products should be kept in mind when designing training programs. Each investment firm has its own idiosyncrasies with respect their distribution models, services offered, type of clients, tasks, responsibilities.... Ideally each one should be able to decide and design their own training plans and methodologies and develop their employee's skills.

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?

The AEB agrees with ESMA that the level and intensity of the knowledge and competence requirements 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 should be differentiated. In no way this should mean staff providing information is less qualified, but their needs of knowledge are different.

The approach should be flexible, taking into account not only the type of service, but the way the service is given, the client, type of product, market.... Simplistic views, that imply any advice requires the same level of knowledge and experience should be avoided.
Those services controlled with automated tools require less participation from the adviser, so their knowledge and experience should different from those investment services with no automation.

As an example, if the advice process consist in introducing information required by a sophisticated program, with no selection done by the employee, knowledge and competence required should be similar for those employees facilitating information and different from the cases where the advice is given totally under the employee criteria.

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

Proportionality must be taken into account according to the complexity of the service, scale and natures and not according to the entity characteristics. The professional giving the service should need the proper knowledge and experience although the entity is a small one.

In Annex IV, 6, h) it defines "*appropriate experience"* in a very rigid approach as the "*ability to perform the relevant services through recent work. This work must have been performed, on a full time equivalent basis excluding breaks, for a minimum period to be specified by the NCA or another national body* ".

ESMA considers that the five consecutive years of "appropriate experience" shall be taken into account only if they have been provided in the "same relevant services" (paragraph 6(f) of the Guidelines). We understand that experience in "similar" services shall be sufficient for a relevant individual to have an "appropriate experience". Otherwise, the exception will have a very limited and restricted application, punishing movements of employees between different departments to increase their competence, without any justification.

We understand that ESMA should clarify that experience in an entity different to an investment firm could be perfectly valid in order to be considered "appropriate experience", if related to the financial sector (for example, the financial department of a large entity, an insurance company or the banking and financial department in a law firm).

NCA should be able to other approach for evaluating experience and not only "recent work". In this sense, we don't agree with ESMA's approach that only consecutive years of experience could be considered as appropriate experience. In addition, in our opinion, it makes no sense that the work must have been performed on a full time equivalent basis excluding breaks.

Moreover, the existence of breaks shall not be relevant for the assessment of experience. If that was not the case, unfair situations would arise for some relevant groups of people (i.e. pregnant women or people taking sick or accident leaves). This would imply a violation of some of the basic principles of the EU (equality, justice, etc.).

NCA should also be able to foresee others ways of providing the service in order to complete the experience requirement during a training period, for example with the supervision of other staff who does meet the requirement.
Experience in other countries should also be considered, as the opposite would mean barriers in finding the best professionals. This makes sense especially considering the global nature of financial markets, the standardized terms and practices across different jurisdictions and, particularly in Europe, the harmonization at the regulatory level.

Otherwise, free movement of persons between EU countries, which is one of the principles of the EU, would be severely affected. In this sense it could be necessary to recruit experts in other markets and national requirement should not be an obstacle for this.

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?

From the combination of paragraph 9 in section 2 (Background and principles) and 6 g) in section Annex IV results a set of certifications admitted for qualifying the "level of knowledge": (i) a primary university degree in economics with specific exams focusing on financial markets, or (ii) other recognised qualifications complemented by identified courses in financial services that capture the requirements of the guidelines...

The AEB finds crucial internal training given in financial entities should be considered.

Competence is only linked to experience acquired in the provision of services and, in accordance with ESMA, this provision could not be considered if it is not continuous or is obtained in different entities.
Guidelines should also recognise the competence as experience and qualitative capacities. Also it should be considered the possibility of graduating the need of experience depending on the level of other capacities acquired.

The AEB also disagrees with paragraphs 25 d) to 25 i) in annex IV when the requirement of experience is not fulfilled as defined in these guidelines, but the professional is qualified by other means (as internal training...) as explained before.

In relation to paragraphs 25(e), (g) and (h), our opinion is that "training" should be replaced by another more general concept such as "education" or "learning", that may include other ways, different to training given by the same company, to obtain the relevant and appropriate knowledge. In this sense, according to the Guidelines, it seems that training can only be given by another member of staff. We understand, however, that training given by other entities (training companies, school of business, other financial entities, etc.) shall be perfectly valid for these purposes.

The obligation established in this paragraph 25(h) is completely unnecessary and will lead to the absurd situation that the trainer shall be present in every single meeting, email or any telephone conversation the trainee has with the clients. While that would have a high impact on the day by day work, the consequences will be even worst in some specific situations as vacations or maternity/sick leaves: what should be done in such situations? Shall investment firms have, for every office or department with direct contact with the client at least three employees?

Moreover, the aforementioned obligation will entail a substantial increase in costs relating to education and training of the staff and, therefore, will adversely affect youth employment.

Some other additional comments we have to specific paragraphs are:

(i) Paragraph 13: ESMA establishes a generic obligation for firms to ensure that staff possesses the necessary knowledge and competence to ensure that the firm is acting in the best interest of its clients. This generic and ambiguous obligation should be either removed or further defined by the Guidelines in order to avoid a host of different interpretations at national level that could hamper a harmonized framework across the EU. In fact, the Guidelines shall take into account that the general goal of acting in the best interest of its clients is further concreted in the legislation with specific obligations for investment firms, mainly information obligations and internal procedures. Consequently, such obligation shall be replaced by the obligation that staff complies with the internal policies and procedures established by the Bank to comply with the Guidelines.

(ii) Paragraph 20(b): ESMA's proposal should clearly stipulate that general tax implications refers exclusively to those taxes payable via the investment firm (as per article 33 (a) of MIFID I Implementing Directive). An investment firm can only assess those taxes that have to be paid through it. Clients can be different types of entities and be situated in different jurisdictions and, therefore, subject to different tax regimes and the investment firm cannot know in depth such regimes. Requiring the contrary would imply that the guidelines would be imposing to investment firms and its staff the obligation of becoming tax advisors of the clients. This comment shall also apply to paragraph 22(b).

(iii) Paragraph 21(b): Since there could be events (whether national, regional or global) completely beyond the control of investment firms and/or unknown at the moment on which the service is given, it will become impossible to understand the impact of those events on markets and on the value of investment products. We would ask ESMA to make a clarification in this regard.

(iv) Paragraphs 22 and 23: requirements applicable to investment advice are based upon investment advice given on an ongoing basis, but not in those cases in which investment advice is given on a one-off basis. In this respect we understand that due to the nature and scope of investment advice provided on a one-off basis some of the requirements contained in the Guidelines do not make sense and, therefore, shall not apply (i.e. understand the fundamentals of the portfolio theory, including being able to explain the implications of diversification regarding individual investment alternatives). We understand that ESMA should clearly establish the requirements applicable in each case, whether by establishing that some of these obligations shall not apply to one-off investment advice or by including a new paragraph only applicable to this kind of investment advice.

(v) Paragraph 22(e): We completely disagree with this obligation. Investment firms cannot be forced to examine, control and assess whether any change has occurred with regards to the client since the information was given. Investment firms shall not be understood to be a kind of "police" controlling and supervising circumstances regarding the client.

In addition, it should be noted that in many cases the investment firm will not be aware of any relevant changes unless the concerned client provides such information (for instance, when any change on the information provided comes from the client's relationship with other investment firms, when it comes from the commercial agreements reached in the development of its activity, etc.). Therefore, we understand that it shall be the client's responsibility to inform the investment firm in case any change has occurred since the relevant information was gathered and that the investment firm may just warn the client with the need to provide such information.

(vi) Finally, although ESMA does not request firms to give comments to Annex V, we would like to make a comment to one of the examples relating to paragraph 22 and 23:

"*A firm regularly monitors that relevant staff demonstrate ability to compare selected products with regards to terms and risks, to be able to select the product best suited to the client profile*"

In this regard, we want to recall that, according to MiFID, products are suited or not suited, but there is no obligation under current legislation for investment firms to select the product best suited to the client profile.

Furthermore, in practice it is rather difficult for an investment firm to assess whether an alternative financial instrument is available and better meets the client's profile as: (i) this would imply that the firm has to assess all the products available in the market; (ii) this would mean that there are instruments that are "more suitable" than others; and (iii) it is not stated the driver to determine when a financial instrument is more suitable than others.

This inclusion would imply, in short, an amendment to the suitability regime established in level 1 with no legal grounds or delegation to do so.

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

Q6: What additional ongoing costs will firms face a result of these proposed guidelines?

The cases where the services are provided by tied agents should be considered.

As a result of these guidelines, intermediaries could be tempted to recruit only professionals that already comply with the requirements, finalising any investment in training employees and making it difficult the generational renewal.

Costs will depend on the criteria adopted by NCAs. In case these authorities decide to require compulsory licenses or certificates the cost will be excessively onerous as these kinds of certificates are much more expensive to acquire that other means of acquiring knowledge.

As mentioned in Q4, internal training with qualified suppliers and universities should be considered as certificated training.

MiFID II focuses investor's interest seeking to improve the quality on investment's products sale (more and better information, more prepared managers, avoiding interest conflicts between manufacturers/distributors, etc ...). The elevation of standards should be proportionate because an exaggerated and unnecessary costs' increase would have serious repercussions, this means that service could be provided only to customers that would justify this cost range, which would make proactive selling investment's products restricted to a "minority elite", and in the case of Spain approximately 90% of customers receive financial services through banking networks.

At a more expensive service, fewer clients may have access to it, leaving retail investors, in number and value representing a major proportion of the population (< 75%), without assistance in making decisions on their investments, and this confronts seriously with other EU initiatives seeking to encourage more retail investors to enter into markets and the long-term savings of individuals (the social forecast system is unsustainable for demographic reasons, etc...).