DDV Response

ESMA Consultation "Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements"

Deutscher Derivate Verband

Executive Summary

- In the interest of ensuring uniform standards regarding the protective principles that characterise non-advised services, it is to be welcomed that ESMA would like to publish guidelines for this business segment.
- However, DDV is of the opinion that the suitability assessment requirements are not 1:1 transferable to non-advised services. The latter are tailored to the needs and preferences of investors who act on their own initiative and make their own investment decisions ("self-directed investors"). The present guidelines do not take this sufficiently into account.
- A key principle of the appropriateness assessment is that investment firms may fundamentally rely on the information provided by clients on their knowledge and experience. Another characteristic feature of the appropriateness concept is that a negative result of the appropriateness assessment does not prevent the execution of a transaction.
- Product complexity should not be considered as the guiding criterion for special requirements for the procedures and the content of the adequacy of the assessment – this can be seen several times in the draft (e.g., Guideline 3 and Guideline 7).
- Here, it would probably be more appropriate to take into account an assumed increased need for protection by correspondingly designing the product- and, in particular, the risk information that the client receives in particular when it comes to "leveraged financial instruments".

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The German Derivatives Association (Deutscher Derivate Verband, DDV) is the industry representative body of the 15 leading issuers of structured products in Germany. The DDV welcomes the opportunity to provide comment, and is pleased to respond to this consultation.

With the consultation paper on aspects of the MiFID II appropriateness and execution-only requirements, ESMA is addressing key issues in the non-advised securities and derivatives business. Over the last 25 years, this non-advised business segment, especially in the form of non-advised services with an appropriateness assessment, has developed into a significant offering for the investing public – standing independently alongside the advisory and asset management services. The non-advised securities services of direct banks are characteristic of this, at least in the German market. Their business model is tailored to the needs and preferences of investors who act on their own initiative and make their own decisions (“self-directed investors”). However, non-advised securities services also feature significantly in the practices of traditional bank branches in addition to their investment advice and asset management services.

In the course of these developments, a legal understanding of the Level 1 and Level 2 requirements has been established in individual Member States, which has been implemented with great effort and should not be challenged by Level 3 requirements without good reason, especially since (at least in Germany) there have been no fundamental abuses from an investor protection perspective in local practice. In our opinion, European harmonisation should take into account the different possible interpretations. The present guidelines have not done this sufficiently. Rather, ESMA seems to assume that 1) the suitability assessment requirements would be easily transferable to non-advised services in practice, and that 2) the level of protection applied to advised services is also appropriate in the context of non-advised services. In our opinion, however, there is in fact an acute risk that implementation of the ESMA guidelines could, for practical reasons, lead to a significantly reduced product range for investors. In view of the considerable economic importance of non-advised services, not least for the investment activities of private households, we would therefore like to preface our response to the consultation paper with some general legal comments before responding to the questions raised by ESMA.

General comments:

Non-advised services of investment firms have found a comprehensive and balanced regulation in MiFID II as well as in the European and national provisions for their specification and implementation, which does justice to this special sales situation. Here, investment firms ensure client protection with respect to non-advised services mainly by providing information that meets the requirements of Article 24(5) of MiFID II. Clients or potential clients must be provided with information that “*reasonably*” enables them “*to understand the nature and risks of the investment service and of the specific type of financial instrument that is being* *offered and, consequently, to take investment decisions on an informed basis*." This information-based client protection is supported – excluding cases of execution-only services – by the appropriateness assessment of Article 25(3) of MiFID II, which requires investment firms to verify, on the basis of client knowledge and experience, whether a client can adequately assess the risks of the type of investment service or product they are requesting.

A key principle of the appropriateness assessment is that investment firms may fundamentally rely on the information provided by clients on their knowledge and experience. This is explicitly and unambiguously regulated in Article 55(3) of Delegated Regulation (EU) 2017/565 (hereinafter "MiFID II Delegated Regulation"). Another characteristic feature of the appropriateness concept is that a negative result of the appropriateness assessment does not prevent the execution of a transaction. If, in the course of the appropriateness assessment, the investment firm comes to the conclusion that the investment service or product requested by the client is not appropriate for the client, or if it is unable to assess the appropriateness due to a lack of information provided by the client, this triggers an obligation for the investment firm to inform and warn the client. If, however, the client persists in their request despite this warning, the investment firm is not prevented from executing the transaction requested by the client (Article 25(3) first and second subparagraphs of MiFID II and Article 56(2) of the MiFID II Delegated Regulation). In this respect, the concept of the appropriateness assessment differs fundamentally from the suitability assessment that is required in the context of investment advice and portfolio management.

This conceptual difference between appropriateness and suitability is not indicative of a protection deficit in the appropriateness concept. Rather, the design of the appropriateness assessment and its consequences in the MiFID II regulations reflect the needs of the client groups that typically use investment services that do not require advice. These are self-directed investors who make a conscious decision not to seek out the support of third parties, whether in the form of investment advice or asset management, but rather make their own investment decisions. This group of investors, whose guiding principle is "informed investment decisions", needs and wants investor protection through proper, correct, and comprehensible information. It is proper that MiFID II also obliges investment firms to check the appropriateness of the transactions in question against the benchmark of informed investment decisions, and to clearly warn non-advised clients about inappropriate transactions. This additional protective mechanism does nothing other for non-advised services than concretise the general obligation of investment firms to act in the client's best interest; the concept of the statutory regulation does not include any further protective mechanisms. In particular, the concept of the appropriateness assessment also respects the freedom of the non-advised client to disregard warnings on an informed basis, and to decide to carry out potentially inappropriate transactions.

In the interest of ensuring uniform standards regarding the protective principles that characterise non-advised services, it is to be welcomed that ESMA would also like to publish guidelines for this business segment. Measured against the basic legal concept briefly outlined above, which has formed the basis for the practice of non-advised securities services for many years, the draft guidelines appear to be too far-reaching in a number of places and not fully covered by the framework of the Level 1 and Level 2 provisions. Even if the provisions of MiFID II and the MiFID II Delegated Regulation also leave room for interpretation with regards to the design of the appropriateness assessment (as they do with many issues), this room for interpretation is limited by the conceptual and systematic basis of the appropriateness criterion outlined above. In our opinion, this demarcation has not yet been fully achieved, particularly with regard to the following aspects and approaches to regulation, which can be found in various places in the draft guidelines.

- Some parts of the draft are characterised by a conspicuous distrust of the information provided by clients when asked about their knowledge and experience. This applies, for example, to Guideline 1, Guideline 4, and Guideline 5, where the authors of the draft tend to impose an obligation on firms to investigate the “real level of knowledge” of clients (overstretching the concept of information about the client).
- A further expression of what can be, at times, an excessively paternalistic approach is the attempt to protect clients from themselves – beyond what is provided for under the MiFID II framework – such as in Guideline 9. Contrary to what is seemingly implied in the draft, there is no obligation on investment firms not to execute inappropriate transactions.
- Such addition client protection mechanisms, which are not provided for by law, cannot be created by mixing product governance obligations with adequacy assessment requirements, such as in Guideline 7.
- The same applies to the tendency to use product complexity as a criterion for special requirements for the procedures and the content of the adequacy assessment, which can be seen several times in the draft (e.g., Guideline 3 and Guideline 7).

That said, we provide the following comments on the questions submitted by ESMA:

Q 1: Do you agree with the suggested approach on providing information about the purpose of the appropriateness assessment? (Guideline 1)

General comments:

The approach suggested by ESMA is, in principle, to be welcomed. When Guideline 1 (paragraph 13) emphasises that the purpose of the information obligation imposed on investment firms is to ensure that they act “*in the client’s best interest*”, it should, however, be clarified at this point that it is not a question of an abstract “client’s best interest”, but rather the “best interest” of a client who has consciously decided to make use of a non-advised service. In addition, we have the following specific comments on individual points:

Specific comments:

1. **p. 25, paragraph 14, 1st Bullet Point:**

   It should be clarified here that the required explanation can also be provided in a standardised format. The standardisation of information and warnings is already provided for in the Directive itself specifically for non-advised services (see Article 25(3) first and second subparagraphs of MiFID II).

2. **p. 26, paragraph 14, 3rd Bullet Point**

   This point should be deleted without replacement. In the interest of avoiding information overload, it does not seem appropriate to require investment firms to provide (again) information on the difference between advised and non-advised services. To the extent necessary, such information is already contained in the details on the services offered by the investment firm.

Q 2: Do you agree with the suggested approach on providing information about the purpose of the appropriateness assessment? (Guideline 2)

General comments:

The specific wording of Guideline 2 (p. 26, paragraph 18) correctly covers the obligation of an investment firm to ensure that the required information on the experience and knowledge of the client is properly requested. However, a critical view should be taken of the regulatory density of the explanatory provisions in paragraphs 19 et seq., insofar as they address the scope of the required information to be requested. Information on the points that investment firms have to take into account when asking about the knowledge and experience of their clients is primarily provided for in Article 55(1) of the MiFID II Delegated Regulation. This provision, which is also subject to the principle of proportionality, applies to all types of financial instruments and investment services. The request for further detailed information on individual aspects of a client's level of knowledge and experience would go beyond the statutory guiding principle and would not provide any additional insight for non-advised services. Contrary to what the draft guidelines seem to imply, this is also a matter of covering relatively simple situations in which clients are unlikely to run the risk of misunderstanding or incorrectly answering questions posed by investment firms. Insofar as the draft repeatedly addressed the risk of such misunderstandings, this is most likely explained by the fact that the relevant passages were formulated on the basis of the corresponding sections of the "Guidelines on certain aspects of the MiFID II suitability requirements". There, however, the additional inquiry into further aspects, such as investment objectives, risk appetite, and loss-bearing capacity, involves much more complex interrelationships than are associated with the determination of information on knowledge and experience. Against this background, the draft should be reviewed and pared down from conceptual approaches that are associated with the special circumstances of investment advice or asset management, but do not play any role in non-advised services.

In addition, the explanatory provisions in paragraphs 19 et seq. of the guidelines follow, in part, a clearly paternalistic approach, which, in this form, finds no basis in the legal concept of the MiFID II framework on non-advised services. This can be seen, for example, in the fact that the draft repeatedly expresses a clear scepticism about the veracity of client information, and encourages investment firms in various ways to verify its accuracy. However, such a sceptical attitude towards the accuracy of client information contradicts the legally established principle that investment firms may generally rely on the information provided by their clients unless it is manifestly inaccurate (see Article 55(3) of the MiFID II Delegated Regulation). An obligation to check the information provided by the client for more than plausibility is not compatible with this legal interpretation. In particular, investment firms are not obliged under the appropriateness concept of MiFID II to examine clients to protect them from themselves. In this respect, individual sub-items of Guideline 2 are clearly too far-reaching.

Specific comments:

1. **p. 27, paragraph 22:**

   In paragraph 22, the draft addresses in detail the "*most common reasons why investors could fail to answer questionnaires correctly*". The passage, which largely corresponds to a section of the suitability guidelines, proves to be clearly overstretched in the context of the appropriateness guidelines. Within the scope of the appropriateness assessment, the subject of the duty to inquire on the part of investment firms is solely the knowledge and experience of the client, which are to be inquired about taking into account the criteria specified in Article 55(1) of the MiFID II Delegated Regulation. In terms of content, this involves purely questions of knowledge that are relatively easy to ascertain and can hardly be considered as sources of error. In this context, it also seems superfluous to give the client the option of answering a question by replying that they do not know how to answer the question (paragraph 22, last bullet point). If a client does not know whether they have knowledge or experience with regard to a certain type of financial instrument or investment service, then the question addressed to them should simply be answered to the effect that there is no knowledge or experience on this point.

2. **p. 27, paragraph 23:**

The measures proposed here are obviously designed to protect the client from themselves. It is undoubtedly true that investment firms have to ensure that the appropriateness assessment is not carried out on the basis of obviously inconclusive or false information. This is also the purpose of clearly informing the client about the purpose of the appropriateness assessment and the importance of accurate information (see Guideline 1, paragraph 14). However, it overstretches the due diligence obligations of investment firms providing non-advised services if they are required to take special precautions to prevent clients from appearing to be more experienced or knowledgeable than they actually are. Preventing or refraining from such behaviour is, in principle, the responsibility of the client, not of the investment firm.

3. **p. 28, paragraph 24:**

   Article 25(3) of MiFID II and Article 55(1) of the MiFID II Delegated Regulation oblige investment firms to obtain the necessary information from the client about their experience and knowledge. This, of course, needs to be done in an appropriate manner. However, the duty to inquire does not establish an obligation to obtain certainty about the client's real level of knowledge and the knowledge actually gained from the stated experience on the basis of the relevant information provided by the client. What matters is the information provided by the client, on which the investment firm may rely unless the incorrectness of the information provided by the client was positively known by the investment firm or should have been known to the investment firm during a plausibility check (Article 55(3) of the MiFID II Delegated Regulation). In accordance with the clear provision of Article 55(3) of the MiFID II Delegated Regulation, whether the client has embellished their real knowledge in the information provided does not have to be critically questioned by the investment firm so long as the information provided is plausible.

4. **p. 28, paragraph 25:**

   The provision correctly states that the collection of client information on knowledge and experience should not be designed as a client self-assessment. However, even the justified concern of preventing such self-assessments does not require that client knowledge be verified by means of tests and multiple-choice questions of the kind required in the first and second bullet points of paragraph 25. Such requirements are not covered by Level 1 and Level 2 of the MiFID II framework.

Q 3: Do you agree with the suggested approach on the extent of information to be collected from clients? (Guideline 3)

General comments:

Guideline 3 largely reflects the current legal situation and therefore does not require a separate commentary. However, a critical view should be taken when ESMA, referring to the proportionality principle with regard to more complex or risky investment products, raises the need for an in-depth inquiry into client knowledge and also links this to an in-depth "*reliable assessment*" of the client's knowledge and experience (p. 30, paragraph 32). Such requirements cannot be derived from the legal basis of the appropriateness assessment. Their introduction is reserved for the legislative process at Level 1 and Level 2. The lack of this legal basis cannot be substituted for by ESMA guidelines.

Specific comments:

p. 30, paragraph 32 and paragraph 33:

The draft refers to "*more complex or risky investment products*" without further explanation. Later in the text, "*derivatives or leveraged products*" are mentioned as examples. As "*derivatives*" also refers to securities with derivative elements (see Article 4(1) of MiFID II in conjunction with Article 2(1)(29) of MiFIR), it can be assumed that paragraph 32 is aimed not only at "pure" derivatives and leverage products, but also at investment certificates. However, this is not sufficiently clear, so the scope of the proposed regulations cannot be determined with certainty.

Irrespective of this terminological ambiguity, there are far-reaching legal objections to the regulation envisaged by ESMA. The legal basis for the duty to inquire (Article 25(3) of MiFID II and Article 55(1) of the MiFID II Delegated Regulation) does not allow for the blanket special treatment of – however defined – more complex or risky investment products in the context of the appropriateness assessment. Asking about special parameters is (also) not provided for these products (e.g., in Article 55(1) of the MiFID II Delegated Regulation). On the contrary: in the context of the appropriateness assessment, the MiFID II framework only differentiates between the normal case of all financial instruments, to which Article 25(3) of MiFID II applies, and the special case of non-complex financial instruments within the meaning of Article 25(4) of MiFID II and Article 57 of the MiFID II Delegated Regulation, which are completely exempt from the requirement of the appropriateness assessment under certain conditions. In other words, from the point of view of necessity (proportionality), the legal system only recognises the privileged treatment of non-complex financial instruments, for which an appropriateness assessment is not required from the outset under certain preconditions when they are sold without advice. This does not provide any basis for differentiating the scope of the duty to inquire in the normal case of all other financial instruments. The aforementioned provisions do not provide a basis for obliging investment firms to examine particularly critically the information provided by their clients on their knowledge and experience in certain products.

To the extent that "*more complex or risky investment products*" also refers to certain forms of investment certificates, the lack of practical relevance of the considerations in paragraph 32 of the draft should also be pointed out. At least in the German market, where investment certificates in their various forms have long been established as normal investment instruments, it is not comprehensible why an in-depth inquiry – of any kind whatsoever – into knowledge and experience should be required for these products differing from any corresponding inquiry into knowledge and experience in equities or UCITS, for example.

Finally, it should be noted that the MiFID II framework does not justify any special treatment of securitised (leverage products) and unsecuritised "pure" derivatives with regard to the scope of the information to be collected and assessed. These financial instruments are regulated in MiFID in the same way as, for example, equities or UCITS. Accordingly, Article 25(3) of MiFID II and Article 55(1) of the MiFID II Delegated Regulation do not contain any specific requirements regarding the manner and intensity of client information collection in the case of different financial instruments. Insofar as ESMA, with its considerations on differentiation of the duty of inquiry of investments firms in the case of "more complex or risky investment products", would like to take into account a higher need for protection for clients who want to execute non-advised transactions in leveraged instruments, the formulation of the duty of inquiry does not ultimately appear to be a suitable approach from either a legal or a practical point of view. Here, it would probably be more appropriate to take into account an assumed increased need for protection by correspondingly designing the product- and, in particular, the risk information that the client receives. In practice, German banks often take this into account with non-advised services for higher-risk leveraged products by providing clients interested in such transactions with a separate risk explanation and warning before the clients conclude such transactions for the first time. In this regard, it might be advisable to refer to "leveraged financial instruments" pursuant to Art. 62 para. 2 of the MiFID II Delegated Regulation.

Q 4: Do you agree with the suggested approach regarding the appropriateness relating to a service with specific features? (Guideline 3, paragraph 34)

General comments:

We agree with the suggested approach in paragraph 34 (p. 30), and have no additional comments on it.

Q 5: Do you agree with the suggested approach on the reliability of client information? (Guideline 4)

General comments:

The regulatory content of Guideline 4 goes beyond the clear rules on reliance on client information found in Article 55(3) of the MiFID II Delegated Regulation. According to this provision, an investment firm may, in principle, rely on the "*information provided*" unless it is "*manifestly out of date, inaccurate or incomplete*". Investment firms cannot be required to perform more than a plausibility check based on these circumstances, whereby the standard of review is obvious existence of erroneous information. There is no legal basis for more extensive consistency checks of the kind provided for in paragraphs 37 to 39.

Specific comments:

1. **p. 31, paragraphs 37 - 39:**

   With regard to these provisions, we first refer to our general comments. The approach chosen in the draft appears to be very excessive overall, and not only for the legal reasons mentioned. If one takes into account that, in the appropriateness assessment, the duty to inquire is limited to the knowledge and experience of the client, it is unclear what kind of consistency test ESMA has in mind. It would certainly be noticeable if a 20-year-old client stated that they had more than 15 years of experience in securities transactions, or if a client stated that they had more than ten years of experience in a financial instrument that had only existed for three years. These are cases of manifestly incorrect information. However, aside from these manifestly incorrect cases, there is no obligation to detect further implausibilities in whatever form.

2. **p. 31, paragraph 37, footnote 13:**

   Insofar as footnote 13 on p. 31 of the draft refers to "*proportionality principles*" when dealing with professional clients, it must be clarified that per se professional clients are considered to be professional clients to the same extent with regard to all financial instruments and services in accordance with the express provision in Section I, p. 1 of Annex II to MiFID II (see also Section 67(2) p.1 of the German Securities Trading Act (WpHG)). According to this provision, investment firms may assume that such a client possesses "*the experience, knowledge and expertise to make its own investment decisions*" with regard to all financial instruments. In other words, with the classification as a per se professional client, it is clear that sufficient experience and knowledge are available. A separate assessment of the client is no longer required in addition to the classification as a professional client. Rather, in the case of per se professional clients, the appropriateness assessment answers itself, so to speak. The same applies to designated professional clients with regard to the “*types of transaction or product*” for which the client is classified as a professional client (see Article 56(1) second subparagraph of the MiFID II Delegated Regulation). Overall, this is not a question of proportionality, but simply the consequence of the classification of a client as a professional client.

Q 6: Do you agree with the suggested approach on relying on up-to-date client information? (Guideline 5)

General comments:

The suggested approach is in line with the legal situation at the outset. However, Guideline 5 again reflects the draft’s tendency to protect clients alleged to have acted against their best interest, and to impose extensive evidence checks on investment firms for this purpose. However, the extensive examination obligations envisaged are not covered by the legal bases of the MiFID II framework. The draft should be adapted to the prevailing legal situation in these points.

Specific comments:

1. **p. 32, paragraph 41:**

   As the authors of the draft correctly state, experience tends to increase over time. Updating the information on knowledge and experience is therefore only necessary at relatively generous intervals, if at all.

   A critical view should be taken of the proposed special treatment of “*vulnerable clients*”. This is clearly referring to older clients, under the assumption that they will no longer be able to use their knowledge and experience appropriately with increasing age. Such an approach would ultimately not only force investment firms to discriminate, it also has no basis in the provisions of the MiFID II framework. The final sentence of paragraph 41 should be deleted without replacement.

2. **pp. 32-33, paragraph 45:**

   It can probably not be ruled out that clients may provide inaccurate information in order to carry out certain types of transactions (for which their actual level of knowledge is not sufficient) warning-free. However, it seems questionable whether it is actually in line with the spirit and purpose of the provisions relating to the appropriateness assessment to impose extensive monitoring obligations on investment firms in order to prevent such self-harming client behaviour. This again raises the fundamental question of whether investment firms have a duty to protect clients from deliberate self-harm. In our view, no such duty can be inferred from the relevant provisions of the MiFID II framework. The investment firm acts in the client’s best interest if it aligns its conduct and organisation with the legal provisions. Further-reaching obligations cannot be constructed by recourse to the client’s best interest. Accordingly, there is also no legal basis for the control and review procedures provided for in paragraph 45 of the draft. This is also confirmed by the following control consideration: investment firms may execute non-advised transactions – after appropriate warnings – even if the client does not provide any information at all, but still insists on the execution of the transaction. In this case, however, it cannot be the task of the investment firm to systematically verify whether the client provides inaccurate initial or updated information in order to avoid annoying warnings.

3. **Further comments on pp. 32-33, paragraph 45:**

   For non-advised services, it is in any case not appropriate to link special review and control obligations to certain conflicts of interest that are typical for advised services but not play a significant role for non-advised services. This applies, for example, to the special emphasis on conflicts of interest arising from self-placement situations or inducements. These conflicts of interest are at least mitigated for non-advised services, as the initiative to conduct the transaction comes from the investor, who is not influenced by the investment firm in their investment decision. Accordingly, they do not provide any reason from the outset to impose more stringent requirements on investment firms in connection with the appropriateness assessment.

Q 7: Do you agree with the suggested approach on client information for legal entities or groups? (Guideline 6)

General comments:

The issue addressed in Guideline 6 is clearly regulated in Article 54(6) second subparagraph, second sentence of the MiFID II Delegated Regulation (knowledge and experience in the course of the suitability assessment), which also applies to the appropriateness assessment. The basic principle there that the acting person is to be taken into account is also consistent, at least in German law, with the general principles of knowledge attribution in the case of representative actions (Section 166(1) of the German Civil Code (BGB)). Insofar as the provisions of Guideline 6 modify the statutory regulation, they are superfluous and should be viewed critically.

Specific comments:

pp. 33-34, paragraphs 49 and 50:

The legal provisions of the MiFID II Delegated Regulation clearly state the assessment of knowledge and experience needs to be based on the person actually acting. Considerations deviating from this, according to which, in the case of several persons authorised to act, the knowledge and experience of the least qualified person should be taken on precautionary basis, have no basis in the statutory regulations and are superfluous for non-advised services as well as for the purpose of protection. Guideline 6 should therefore be limited to reproducing the existing statutory regulations.

Q 8: Do you agree with the suggested approach on the arrangements necessary to understand investment products? (Guideline 7)

General comments:

According to the explanation on p. 12 of the consultation paper (paragraph 36), the requirements provided for in Guideline 7 are to be based on the product governance arrangements (i.e., have an independent regulatory character). In fact, the content of these provisions does not relate to the appropriateness assessment, but rather to requirements that would have to be included in the product governance guidelines (if at all). In order to avoid duplication and unnecessary questions of delimitation, Guideline 7 should be dispensed with.

Specific comments:

1. p. 34, paragraph 52:

The provisions of paragraph 52 represent a particularly superfluous duplication of product governance issues. In addition, the fourth sentence of paragraph 52 again takes up the idea that investment firms could or should – significantly within the framework of their product governance arrangements – limit the type of products that are offered through non-advised services. The product governance rules provide little in the way of this self-restriction. It should certainly not be incorporated through the back door into the requirements for the appropriateness assessment. In this context, it should again be pointed out that non-advised transactions are not initiated by the investment firm, but by the clients themselves. For this reason, there is no need for restrictions in response to the typical conflicts of interest that occur with investment advice (self-placement practices or to the payment of inducements – see paragraph 52) in connection with the appropriateness assessment.

2. pp. 34-35, paragraphs 53 and 54:

Insofar as these explanatory provisions on Guideline 7 also refer to criteria such the higher complexity and greater risk of investment products, reference can be made to the response to Question 3. With regard to the relevant factors of knowledge and experience of the client in the context of the appropriateness assessment, there is neither a legal basis nor a practical need for special treatment for (supposedly) more complex or risky investment products.

Q 9: Do you agree with the suggested approach on the arrangements necessary to assess the appropriateness or else issue a meaningful warning? (Guideline 8)

General comments:

We have no comments on the policies and procedures provided in Guideline 8 at this time.

Q 10: Do you agree with the suggested approach on the arrangements necessary to assess the appropriateness or else issue a meaningful warning? (Guideline 9)

General comments:

Insofar as Guideline 9 deals with the effectiveness of warnings, we currently have no comments on the requirements envisaged in paragraphs 64 to 69. However, it is incompatible with the fundamental principles of the appropriateness concept of MiFID II if paragraph 70 and 71 of the draft de facto restrict the possibility to execute inappropriate transactions at the request of the client following an appropriate warning. The underlying position of the draft, namely that the client’s best interest may dictate that certain transactions should not be executed contrary to the client’s instructions, has no basis in current law, as repeatedly stated. On the contrary, according to the provisions of the MiFID II framework, the client’s best interest is safeguarded precisely by the appropriateness assessment. As already regulated at Level 1 in Article 25(3) second and third subparagraphs of MiFID II, the legal consequence of a negative appropriateness assessment or an appropriateness assessment that could not be conducted is limited to an obligation to warn. This presupposes the permissibility of executing even inappropriate transactions at the request of the client following corresponding warnings. This legal interpretation may not be contradicted by the ESMA guidelines. Accordingly, paragraphs 70 and 71 should be deleted. The approach of the authors of the draft that the client should be protected from themselves with respect to non-advised services – beyond the extent provided for in Article 25(3) of MiFID II – has no legal basis.

Specific comments:

For the above-mentioned reasons, paragraphs 70 and 71 are not compatible with the statutory concept of the appropriateness assessment and should be deleted.

Q 11: Do you agree with the suggested approach on the qualifications of firm staff? (Guideline 10)

General comments:

We have no comments on the content of the requirements set out in Guideline 10. However, we suggest a further review of whether these requirements are actually necessary in view of the existing general provisions on staff qualifications (which we do not believe to be the case). In the interest of a focused set of requirements that is not burdened by duplications, we suggest that Guideline 10 be deleted.

Q 12 and Q 13: Do you agree with the suggested approach on record keeping?

Do you see any specific difficulties attached to the requirement to keep records of any warnings issued and any corresponding transactions made by the client? (Guideline 11 und Guideline 11, paragraph 77)

General comments:

We have no comments on the policies and procedures provided in Guideline 11 at this time.

However, to the extent that the fourth bullet point of paragraph 77 relates to the documentation of specific decision-making processes and/or procedures that investment firms should develop with respect to the execution of inappropriate transactions, it is necessary to refer to what was stated in the response to Question 10 regarding paragraphs 70 and 71 of Guideline 9. For the reasons stated in the response to Question 10, special procedures within which decisions would have to be made on the execution of inappropriate transactions of which the client has been warned in an appropriate manner are not required. Accordingly, no documentation is required in this regard. It is only necessary to document the fact that the client nevertheless requests the execution of the transaction and that it is subsequently carried out.

Q 14: Do you agree with the suggested approach on determining situations where appropriateness assessment is needed? (Guideline 12)

General comments:

In our opinion, the approach suggested in Guideline 12 accurately reflects the provisions of Article 25(3) and (4) of MiFID II and Article 57 of the MiFID II Delegated Regulation.

Q 15: Do you agree with the suggested approach on controls? (Guideline 13)

General comments:

In our opinion, paragraphs 87, 88, and 90 of Guideline 13 correctly describe the organisational obligations of investments firms with regard to the monitoring and control of the appropriateness assessment process. However, we do have comments regarding the provisions of paragraphs 89 and 91.

Paragraph 89 again takes up the repeatedly criticised differentiation according to the degree of complexity of investment products, this time from the perspective of controls. As explained with regard to the corresponding approaches in Guideline 3 (paragraph 32) and Guideline 7 (paragraphs 53 and 53) of the draft, the legal bases of the duty to inquire (Article 25(3) of MiFID II and Article 55(1) of the MiFID II Delegated Regulation) do not support the blanket special treatment of – however defined – more complex or risky products in the context of the appropriateness assessment. In the absence of corresponding obligations to differentiate here, there is consequently no need for any related control mechanisms.

The monitoring obligation provided for in paragraph 91 of the draft raises comparable concerns. Paragraph 91 calls for an examination of the ratio of warnings that were followed by a transaction to the total of all warnings issued. The authors of the draft obviously assume that investment firms are obliged to react in some way to an excessively high rate of transactions that were conducted after a warning and to remedy this – in the supposed interest of investors. However, MiFID II and the MiFID II Delegated Regulation do not provide for anything like this. Rather, as has been mentioned several times, clients are expressly free under the statutory concept of the appropriateness assessment to enter into inappropriate transactions at their own request with non-advised services if they have been duly warned beforehand. It does not follow from the statutory provisions – contrary to the implied view of the drafters – that such transactions should be prevented in the client’s best interest, even if they occur frequently.

Specific comments:

Paragraphs 89 and 91 of the draft cannot be reconciled in their present form with the statutory concept of the appropriateness assessment for the above-mentioned reasons and should be deleted. This particularly applies to paragraph 91, as the question addressed there could systematically be located at best in the area of product governance (possibly under the aspect of target market deviation). Provisions would have to be made, if at all, according to the regulations in that area, but not in connection with the design of the requirements for the appropriateness assessment.

Q 15: When providing non-advised services, should a firm also assess the client´s knowledge and experience with respect to the envisaged investment products sustainability factors and risks? If so, how should such sustainability factors and risks be taken into account in the appropriateness assessment?

In contrast to advised services, we believe that sustainability criteria do not play a role in the question of a client’s knowledge and experience, which are the reference point for the appropriateness assessment for non-advised services. Accordingly, the disclosure obligations for the non-advised services of investment firms should not be overburdened with sustainability-related aspects, especially as clients using non-advised services are making the investment decisions themselves and – if they want to include sustainability-related factors and risks in their investment decisions – will receive sufficient information about the financial product in this respect.