ESMA Consultation MIFID Appropriateness Guidelines REPLY EUSIPA (European Structured Investment Products Association)
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EUSIPA is listed in the transparency register of the EU under number 37488345650-13.

	ESMA consultation questionnaire	EUSIPA reply
	General comments section	**1. (General introduction and rule hierarchy conflict)** • EUSIPA, the association bundling the voice of the issuers of structured products across the 10 European main markets in that asset class, wishes to mark up its general support for any endeavours aiming to implement the MIFID distribution requirements at the retail point-of-sale in a market-adequate manner. This applies in particular to a meaningful application of the suitability and appropriateness requirements in the respective sales scenarios that they are meant to cover. • Within the context of this consultation EUSIPA wishes to outline that, within MIFID, suitability and appropriateness have been deliberately set up as separate rulesets with a distinct filtering function aiming to ensure, for specifically defined point-of-sale situations, an adequate market access to financial products for investors. However, the proposed guidelines would impede the distinguishability between suitability and appropriateness. • Where these criteria apply and where not has strictly to be seen as a deliberate decision of the law-making institutions. It is not within the remit of any implementation rule-setting or guidance mandate (level 2 and 3 of the *Lamfalussy* hierarchy) that such distinct legislative concepts (embedded in level 1) can be amended. This concerns specifically points such as the requirement for testing the knowledge of clients, adding additional requirements for more complex products, and requiring that certain financial instruments can only be sold based on advice: given the far- reaching impact of these aspects, it should be assumed that if the legislator had wanted such obligations as proposed by ESMA, it would have been included in the relevant rules at level 1 or level 2. • Should ESMA see indeed a need to fundamentally alter or adapt (one of) these legislative concepts, they would be best placed to inform with their proposals, any of which should ideally be based on reliable factual evidence covering national EU markets of a proportionate size, the currently ongoing cross-sectoral study (CSS). The results of the CSS will feed into the EU Commission's Retail Investment Strategy (RIS) which again is meant to underpin any proposed changes of the existing MIFID framework (on its legislative level 1) to be brought forward as a Commission legislative proposal as part of the broader MIFID review. **2) (Current appropriateness regime implementation as result of national market specifics; general approach for setting up standards)** • In practice and since the inception of the MIFID rules in 2004, the appropriateness testing for non-advised sales has throughout the EU seen its market-specific interpretation and application. The before has been clearly driven by national competent authorities but also the industry practice, usually following market necessities and constraints with regard to factors such as general distribution standards or practices for single asset or products classes, new distribution methods and/or specificities of single parts of the customer audience, all of which became relevant in the respective national context. • While the idea to harmonise these national interpretations and standards may, in theory, appear as potentially adding value from a cross-border distribution point of view, it must not be overlooked that any such EU-wide standardisation runs the danger to perpetuate overly strict or rigorous interpretations that may be reasonable to have in a specific national market context, but whose application on an EU-wide level lacks a rationale. When setting up new ESMA standards, the fact also needs to be considered that legitimate interpretations of the relevant rules on appropriateness and corresponding market practices in member states have already been applied for a long period of time and form the basis for the technical implementation of the rules within systems set up with substantial cost and effort. • The relevant (existing) rules regarding appropriateness of both MiFID itself and on level 2 leave a certain room for interpretation, as they refer to a requirement to obtain relevant information from clients and evoke the principle of proportionality. Accordingly, when setting up standards for this kind of distribution, ESMA firstly needs to decide about the appropriate level of protection for clients, taking into account other relevant interests and aspects as well, such as the practicability and easiness of distribution on this basis, ultimately leading to the question of availability of (a wide range of) products for retail clients. However, there is nothing in the Consultation Paper that demonstrates that this

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kind of weighting exercise has taken place in the development of the proposed standards; rather, the standards are generally presented as the only possible way of interpreting the underlying legal requirements.

In EUSIPA's view, the current format of the draft guidance as outlined in the Consultation Paper therefore lacks sufficient groundwork for taking a final decision on their enforcement.

3) (Non-advised sales to be respected as deliberate investor decision, no proven shortcomings)

EUSIPA further wishes to outline its discomfort with the general notion that seems to inform many of the ESMA guideline suggestions, namely the endeavour to incentivise customers to engage in an advised sales process rather than opting for an execution-only/non-advised distribution. Insofar as ESMA would indeed see a reason for promoting the advised distribution over self-execution-based distribution in particular out of consumer protection concerns, any corresponding proposals should strictly be rooted in evidencing the shortcomings of the current distribution landscape in that respect. EUSIPA would however not be aware of any such evidence for any of the single EU markets represented under its umbrella nor would such assumption (that the current distribution reality requires an enlargement of advised sales so to prevent customers from ending up with products not appropriate for them) be in line with the experience of our members in terms of customer feedback and complaint levels.

4) (Appropriateness applied in practice)

- ESMA rightly stresses in its consultation paper that the specific requirements resulting from the legal provision need to be in line with the principles of proportionality.

- EUSIPA rather wishes to underline in that context that the level of consumer protection in the retail distribution of financial products always has to balance the interest of the investors who have decided against obtaining advice, while safeguarding an adequate level of protection any bank needs to provide in terms of a establishing a solid distribution governance. The before in practice comes down to matching specific customer/investor features with relevant product information based at both ends on the information available under all relevant regulatory requirements. (e.g., by way of illustration, the MIFID target market indication of the product is to be matched with the order instruction of a self-identified execution-only investor who is eligible, under the appropriateness test, for trading in the asset class the ordered product belongs to).

- EUSIPA warns against applying an automatic and non-reflected understanding in a way that in case of a non-advised distribution of financial products clients always need a certain increased level of protection. To the best of our members' experience, retail investors who opt for non-advised sale have primarily an interest in swift and "unbureaucratic" execution of their orders which mostly relate to financial instruments these investors are very familiar with. The before aspect seems also to have been noted incidentally by ESMA given that draft guideline 8 does not require a specific verification of the client's interest in case of a divestment.

5) (Appropriateness as part of a broader product governance framework)

- EUSIPA also is convinced that the existing legal framework that sets the rules for the distribution of financial products to retail investors, which includes but is not limited to the appropriateness and suitability criteria, is sufficient in scope and density to safeguard the retail investors interest.

- The above in particular applies to the aspects of product governance which under various legal rulesets frames the relevant manufacturing and distribution requirements thereby ensuring that only products within a certain range are made available to an investor and that investors are correctly, fair and in a non-misleading manner informed about these products made available to them. (By way of example, the target market indication ensures the first aspect while the product-specific information flow is ensured by the delivery of a PRIIPs KID or, on ESG aspects, the future SFDR information sheets.) Both elements apply and thus also carry a particular weight, within a non-advised sales situation. Any standards meant to set guidelines for the appropriateness test in a non-advised sales situation should thus be conform to these existing framework provisions and not set up their own (new) levels of distribution barriers.

- It follows from the above that taking MIFID suitability standards as starting point for judging whether the appropriateness testing practice is adequate to consumer interests is an ill-conceived approach. A solid regulatory guidance on distribution governance should rather respect the consumer choice (of renouncing on product-specific advice) and set out the rules that are adequate for this type of distribution. For example, it would, following level 1 and 2 rules, be perfectly acceptable for banks to set up one general common

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		approach for the appropriateness test (aiming to assess a client's knowledge and experience) that covers all potential financial instruments, without having to obtain additional information on specific (types of) products. Such a differentiated approach between an advised and non-advised sales situation is, as demonstrated above, perfectly acceptable as it is adequate to the diverging customer interest and resulting protection needs in both situations. **6) (Appropriateness and customer information)** • Especially in the area of non-advised distribution where the appropriateness concept is applied to the sale of complex products, it seems for the reasons mentioned before, inadequate to foresee extensive requirements to verify consumer-sourced information. • First of all, it needs to be borne in mind that the provision of accurate and complete information remains fundamentally the responsibility of the investor and not of the investment firm (in accordance with article 55, section 3 of MiFID II Delegated Regulation 2017/565). While investment firms surely need to act if they are certain that the provided information is wrong, the draft guideline proposals, in particular those in guidelines 2, 4 and 5, are in that context unduly stretched up until a level where they seem to assume that the information provided by the retail investor is highly likely to be incorrect. EUSIPA does not see any factual evidence in the EU-27 retail distribution landscape that could justify such a general assumption in the area of non-advised sales, though. • EUSIPA would also urge caution against assuming, what probably lies behind the suggested extensive probing rules, that the proliferation of online order platforms within the past years per se justifies the concern that as such tools have become easily and broadly available, the average (retail) investor is using them without having the sufficient knowledge. To the best of our knowledge this assumption is wrong already as it grossly neglects the learning and information opportunities that are also available online and which usually go hand-in-hand with the readiness (and the level at which) investors engage in active online investment activity without seeking advice. • It seems therefore particularly misguided to require investment firms to include a summary of the differences between the requirements applicable to advised and non-advised services (page 26, paragraph 14, 3rd bullet). Not only would such request be administration-heavy and of limited use for the end investor, whose information sources include online resources as mentioned above. It would also simply neglect the commercial reality that many investment firms do not offer advice. **7) (Closing statement)** By way of summarizing our position, EUSIPA wishes to emphasize again that the existing Level 1 and 2 rules clearly indicate the necessary and appropriate standardisation levels for categorising both the clients' knowledge and experience and relevant (range of eligible) financial instruments. The existing MIFID rules do not allow for enlarging the appropriateness test into an exercise meant to assess a retail client's knowledge by way of compulsory examination-style probing or for differentiating financial products according to selective criteria (such as complexity) with the intention to broaden the scope of responsibilities for the financial service provider the customer seeks to engage with. Consequently, EUSIPA clearly positions itself against any interpretative guidance on the level of the ESMA guidelines that would introduce an advisory relationship between a bank and retail investor through the backdoor by unnecessarily increasing the appropriateness test requirements for non-advised distribution of financial products.
Q1	Do you agree with the suggested approach on providing information about the purpose of the appropriateness assessment? Please also state the reasons for your answer.	EUSIPA refers to the argumentation outlined in its general introduction remarks (see above) which include the statements answering this question, but which also put them into context with the broader picture of applying the MIFID appropriateness test in the EU capital markets.
Q2	Do you agree with the suggested approach on the arrangements necessary to understand or warn	EUSIPA refers to the argumentation outlined in its general introduction remarks (see above) which include the statements answering this question, but which also put them into context with the broader picture of applying the MIFID appropriateness test in the EU capital markets.

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	clients? Please also state the reasons for your answer.	
Q3	Do you agree with the suggested approach on the extent of information to be collected from clients? Please also state the reasons for your answer.	EUSIPA refers to the argumentation outlined in its general introduction remarks (see above) which include the statements answering this question, but which also put them into context with the broader picture of applying the MIFID appropriateness test in the EU capital markets.
Q5	Do you agree with the suggested approach on the reliability of client information? Please also state the reasons for your answer.	EUSIPA refers to the argumentation outlined in its general introduction remarks (see above) which include the statements answering this question, but which also put them into context with the broader picture of applying the MIFID appropriateness test in the EU capital markets.
Q8	Do you agree with the suggested approach on the arrangements necessary to understand investment products? Please also state the reasons for your answer.	EUSIPA refers to the argumentation outlined in its general introduction remarks (see above) which include the statements answering this question, but which also put them into context with the broader picture of applying the MIFID appropriateness test in the EU capital markets.

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