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**Ref: Consultation on options to enhance the suitability and appropriateness assessments**

Dear Mr. Berrigan,

On 21 February 2022 the European Commission (Commission) published a consultation document<sup>1</sup> to complement the 2021 Commission consultation on its retail investment strategy and explore the feasibility of a new retail assessment to improve the current suitability and appropriateness tests. The published consultation document states that the suggested approach might “*modify the current MIFID II/IDD suitability and appropriateness tests with the view to no longer differentiate among the various investment services offered to retail investors*”, and it might replace the current “*per product*” approach with a new element, a *personalised asset allocation strategy*.”

ESMA is fully supportive of Commission’s objective to take a holistic view of investor protection rules and to make the EU an even safer place for individuals to save and invest long-term and thus to increase participation of retail investors in capital markets. MiFID II has already taken important steps towards putting clients’ interest at the heart of the provision of investment services and ESMA supports further emphasis on a client-focused approach.

ESMA observes that the suitability assessment, together with appropriateness, are two of the key requirements for investor protection in the MiFID II framework and both have been at the centre of supervisory and policy work over the past years. On these topics, ESMA has issued two sets of guidelines<sup>2</sup>, various Q&As<sup>3</sup>, two supervisory briefings<sup>4</sup> and has conducted two

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<sup>1</sup> [Consultation document - Targeted consultation on options to enhance the suitability and appropriateness assessments \(europa.eu\)](https://ec.europa.eu/easf/consultation/targeted-consultation-on-options-to-enhance-the-suitability-and-appropriateness-assessments)

<sup>2</sup> Ref: ESMA35-43—869 and ESMA35-43-2938

<sup>3</sup> Ref: ESMA35-43-349

<sup>4</sup> ESMA35-43-1206 and ESMA35-36-1640.

Common Supervisory Actions (CSAs) to ensure consistent implementation and application of EU rules and to enhance the protection of investors.

With this in mind, we welcome any proposal to strengthen this crucial framework and would be happy to contribute to the Commission's further thinking in this area.

At this stage, some key elements of the Commission's proposal appear open, understandably, in the consultation document including, among others, on who should prepare the clients' assessment and their asset allocation strategy, on the articulation of responsibilities among various entities potentially involved in the value chain<sup>5</sup>, the methods for determining the asset allocation strategy, the investors' level of discretion concerning the proposed investment strategy, the extent of information to be transferred. It is therefore challenging to clearly identify and analyse all supervisory and investor protection aspects stemming from the envisioned framework. Nevertheless, ESMA would like to use the opportunity of this letter to convey its observations on some elements of the Commission proposals.

More specifically, ESMA would like to bring to the Commission's attention the following points:

- The proposal to apply a unique and standardised retail investor assessment regime that no longer differentiates among the various investment services might raise questions of whether a "one size fits all" approach can effectively serve all different types of retail investors and situations. The existing regulatory regime has been designed to serve retail clients with different needs and approaches to investing. It encompasses services such as portfolio management (that implies a full delegation of investment decisions to the investment firm), investment advice (that is based on a personal recommendation proposed to the client) and services of reception, transmission and/or execution of orders that allow self-directed investors to independently make their own investment decisions (with or without an assessment of the client's ability to understand the risk of a given investment opportunity, on the basis of its complexity and the initiative of the client).

ESMA supports the simplification of the regulatory framework. At the same time, ESMA notes that the design of a new standardised regime would need to fully take into account the needs of the different kinds of investors and safeguard the principle of proportionality.

- The proposals would have a significant impact on the current model for the provision of services. If the new framework were to be adopted, sufficient guidance and information would need to be provided to clients to help them understand the implications of the regime change and sufficient time should be given to firms for the implementation of the new rules which would seem to require significant IT changes to existing systems (also taking into account that firms are currently adapting their IT systems to integrate clients' sustainability preferences into the suitability test).

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<sup>5</sup> The consultation document envisages that assessments and plans could be prepared alternatively by any intermediary chosen by the client, and independent function/Intermediary or other (such as a public entity).

- Linked to the previous points, ESMA is fully supportive of the aim to increase competition amongst intermediaries and to allow investors to easily switch between or using multiple brokers/financial intermediaries. ESMA notes that the proposals imply a willingness of retail clients to fully share their personal investor data (in the context of an open finance framework). The results of supervisory experience and the recent ESMA Call for evidence<sup>6</sup> show however some resistance from clients to share personal information such as investment history/transaction data and suitability profiles due to different factors, including cultural ones, lack of trust and fear of cyber risks. ESMA believes that such concerns should be taken into account in order for any such initiative to be successful. Furthermore, if the Commission proceeds with its proposal, GDPR implications should be further assessed, as the right to data portability set out in Article 20 of GDPR does not seem to include personal data which are derived, computed or inferred from the data provided by the client (for example the personalized asset allocation strategy/personal investment plan set up by a firm).
- The proposals appear to target the distribution of shares, bonds and funds and also other types of instruments such as insurance-based investment products with the purpose of increasing the level of intelligibility and comparability of investments and limiting risks of mis-selling or ill-advised investments by an enhanced suitability and appropriateness assessment. In this respect, ESMA fully supports the intention of aligning the requirements for the distribution of investment products that currently fall within different regimes (MiFID and IDD) as long as such alignment does not lead to any reduction of the existing investor protection safeguards in either regime. ESMA believes that this would be an important step in creating a level playing field and avoid regulatory arbitrage.  
ESMA notes that if MiFID and IDD instruments were to be assessed jointly for the purpose of the suitability assessment, it would be essential to also ensure alignment of other relevant requirements (for example on the disclosure of information on costs and charges<sup>7</sup>; reporting requirements on the depreciation of the client's portfolio<sup>8</sup>, where applicable) as it would be very confusing to clients, and also could be operationally difficult for firms, if different parts of the client's portfolio (managed under a unique asset allocation) were subject to different disclosure and reporting requirements.
- On a more specific item, the existing regime requires firms assessing suitability to take into account cost and complexity of products, to assess whether equivalent financial instruments can meet their client's profile. The current regime also requires firms to undertake an analysis of the costs and benefits of any switch recommended to the client, such that they are reasonably able to demonstrate that the benefits of switching are greater than the costs. ESMA considers that these key investor protection controls are an important (while improvable) part of the suitability assessment, and wonders

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<sup>6</sup> Ref: ESMA35-43-2827.

<sup>7</sup> See Article 50 of the MiFID II Delegated Regulation

<sup>8</sup> See Article 62 of the MiFID II Delegated Regulation



how they could be performed by firms in the new proposed regime especially when providing non-advisory services to self-directed investors.

- Furthermore, ESMA notes that, in its consultation the Commission does not mention knowledge and experience among information to be collected from clients. This information, that in the existing regime is assessed both under the suitability and appropriateness tests, is important in assessing accurately clients' profiles. ESMA therefore expects that knowledge and experience is included in the key components of a standardised personal investment plan.

We hope that the above reflections are useful to progress the Commission's work. ESMA remains fully available to support any further thinking in developing a new model of interaction between firms and their clients.

Yours sincerely,

[signed]

Verena Ross