

CONSULTATION PAPER OF ESMA Draft guidelines on certain aspects of the MiFID II suitability requirements

AMAFI comments

Association française des marchés financiers (**AMAFI**) is the trade organisation working at national, European and international levels to represent financial market participants in France. It mainly acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 150 members operating in equities, fixed-income and interest rate products, as well as commodities, derivatives and structured products for both professional and retail clients. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI welcomes the opportunity to comment ESMA's Consultation paper (CP) regarding the draft guidelines on MiFID II suitability requirements built on the text of the 2018 ESMA guidelines¹. Before answering to the specific questions of ESMA's consultation document, AMAFI would like to point out the following general comments.

1. GENERAL COMMENTS

As introduced above, AMAFI welcomes the opportunity to comment these Draft guidelines and wishes to emphasise the following issues:

- First and foremost, the suitability requirements are an important piece of the legislation that governs retail clients' access to the financial markets. It should obviously be governed by the investor protection principle to build the trust needed for these retail clients to invest. In the case of ESG, AMAFI agrees that the suitability process should also be designed to help direct the flow of retail investments towards more sustainable investments. Nevertheless, AMAFI would also like to point out the complexity of the new ESG legal framework, the total lack of experience with it both from professionals and investors and the lack of maturity of the product offer. In such context, AMAFI fears the proposed suitability process is, as for now, far too ambitious and might at the end discourage clients to invest in ESG products or even firms to market their products with ESG characteristics.
This aspect should in our view be considered by ESMA in its proposed guidelines. It governs some of AMAFI's answers hereafter aiming to operationalize the processes while taking into account the difficulties pointed above.
- Secondly, AMAFI has a major concern with the expected date of application of those guidelines: sustainable finance regulatory framework is particularly complex and not yet finalized and major sets of data required to implement these new requirements are still missing and will still be missing for a while (first sets of Taxonomy² data will be available only as of 2023 and CSRD³ data will be

¹ Cf. ESMA Final Report, "Guidelines on certain aspects of the MiFID II suitability requirements", 28 May 2018 ([ESMA35-43-869](#)).

² Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ([link](#)).

³ Proposal for a Corporate Sustainability Reporting Directive (CSRD): proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting ([link](#)).

available only by 2025 at best). The work that has to be conducted to implement the processes that would result from such guidelines is extremely important and therefore has very little chance to be completed by the proposed application date. In this context, the date of application of these guidelines should not be too close and should leave sufficient time for investment services providers (ISPs) to develop all the necessary processes, systems and procedures. Therefore, it should not intervene before at least 12 months after the date of publication of the guidelines on ESMA website in all EU official languages.

- Then AMAFI is concerned about the revision of ESMA guidelines on MiFID II product governance requirements. In this regard, AMAFI hopes ESMA's review process (launch of the consultation, consultation period, publication of the dedicated ESMA Final Report) will be initiated sufficiently ahead of the entry into force of the new MiFID II ESG requirements⁴ so that firms are able to comply in due time.

In this regard, it also has to be noted that the industry, within the FinDatEx group, has been working for a long time on a common template to communicate ESG information on products (see the European ESG Template or "EET V1" published the 14th March 2022 together with an updated version of the European MiFID Template or "EMT V4": <https://extranet.findatex.eu/news/61/findatex-publishes-eet-v1-and-updated-emt-v4>). This work has been organised to allow for implementation by firms as at 2 August 2022. If the Guidelines on suitability or product governance were to significantly alter the understanding under which the EET and the EMT were developed, all this work would have to be re-started which would be a very poor outcome for the financial industry. In addition, the industry's ability to be compliant in due time would be greatly jeopardised. Therefore, AMAFI wishes to recommend ESMA to keep this in mind when drafting both finalised amended suitability guidelines as well as amended product governance guidelines.

- Fourthly, AMAFI wonders how the revision of ESMA guidelines on MiFID II suitability requirements articulates with the European Commission's targeted consultation on options to enhance the suitability and appropriateness assessments launched on 21 February 2022⁵ and sees important difficulties if selling processes, especially on ESG aspects, were to be reviewed all over again in a few months. Similarly, AMAFI wishes to draw ESMA's attention to the need for convergence of ESMA and EIOPA approaches (particularly since EIOPA also launched a public consultation on certain aspects relating to retail investor protection on 28 January 2022⁶ and on 13 April 2022 a consultation on draft Guidelines on integrating the customer's sustainability preferences in the suitability assessment under the IDD⁷). It is essential to AMAFI that selling processes are aligned between unit-linked insurance and financial products offered with advice to clients.

Finally, AMAFI considers **more flexibility should be provided in applying ESG suitability requirements in certain specific instances such as where:**

- The client is a **professional client**, potentially also subject, when it is a financial institution, to ESG requirements that may duplicate with the ones made on distributors: as an example, an asset manager requiring advice from an investment firm will be implementing its own ESG investment strategy under its own responsibility so that a new suitability check will most probably have no added value. Another example would be large companies subject to CSRD and Taxonomy regulations that will therefore be perfectly competent on ESG and hence could benefit from a leaner information process.

⁴ Introduced by the Commission Delegated Regulation (EU) 2021/1253 of 21 April 2021 amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms ([link](#)). As for now, amendments introduced by the Commission Delegated Regulation (EU) 2021/1253 shall apply from 2 August 2022 (see *EC Commission Delegated Regulation (EU) 2021/1253, Art. 2*).

⁵ See the EC's press release ([here](#)) and the consultation paper ([here](#)). Consultation to which AMAFI answered (see [AMAFI / 22-19](#)).

⁶ See EIOPA's press release ([here](#)).

⁷ See EIOPA's press release ([here](#)) and the consultation paper ([here](#)).

Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), also called "IDD" for "Insurance Distribution Directive" ([link](#)).

- A client might have expressed ESG preferences but may not wish to apply them to specific transactions, in which case the ISP should be able to disregard such preferences. This could be the case for instance where clients request a specific advice on a transaction aims at **hedging market risks without any ESG consideration**. In such a case, the ISP should be able to advise on the hedging solution without taking into account the client's ESG preferences expressed outside of the context of this specific transaction.

2. RESPONSES TO ESMA QUESTIONS

Guideline 1 – Information to clients about the purpose of the suitability assessment and its scope

A new paragraph has been added to the guideline 1 to clarify that, as part of the suitability assessment, firms should help clients in understanding the concept of “sustainability preferences”, the different types of products included under the definition of “sustainability preferences”, the features and the choices to be made in this context.

No further amendments have been introduced in guideline 1.

Q1 : Do you agree with the suggested approach on the information to clients about the purpose of the suitability assessment and its scope? Please also state the reasons for your answer.

AMAFI considers that:

- To keep the process as simple and feasible as possible and avoid overwhelming clients with information they may not be interested in, **detailed explanation on the assessment of clients' sustainability preferences should be provided only to clients who report having an interest in ESG**.
This is supported by the point made⁸ by the Commission in its Retail investment strategy Consultation paper which provides that “*Studies show that due to the complexity of products and the amount of the aggregate precontractual information provided to retail investors, there is a risk that investors are not able to absorb all the necessary information due to information overload. This can lead to suboptimal investment decisions*”.
- Before proceeding to the detailed assessment of client's sustainability preferences, **a general warning should be provided to clients** i) on the state of maturity of the market on ESG products' offer ii) on the specific risks potentially attached to the formulation of very ambitious ESG expectations: these risks (such as concentration or liquidity risks) may result from the scarce offer of financial instruments with a high alignment to Taxonomy, or from the fact that ESG products might not always be the cheapest products for a specific type of investment profile. By warning their clients, firms would avoid creating unrealistic expectations that may be confusing and even misleading to them.

Therefore, to AMAFI, clients', or at least retail clients' questioning on ESG expectations should be a four (4) steps approach:

- First, ISPs should provide general information to clients on the concept of “sustainability preferences” and the purpose of the assessment.
- Second, clients would be asked a general yes/no question to determine whether they have ESG preferences.

⁸ See the European Commission's Consultation Document - A retail strategy for Europe, Question 4.9.

- Third, clients who answered yes to this general question would be provided with more detailed information as proposed under draft paragraph (§) 16 of the guidelines and clients would be provided with a general warning i) on the state of maturity of the market on ESG products' offer (e.g. maximum taxonomy alignment offered), ii) on the specific risks potentially attached to the formulation of very ambitious ESG expectations.
- Fourth, clients would have to go through detailed questioning on their ESG preferences.

To avoid any risk of clients being driven towards one specific firm's offer, figures on the overall state of maturity of the market could be provided by ESMA or national competent authorities (NCAs,). Such figures should be regularly updated to provide a true image of market evolution towards more ESG concentrated products (e.g. this would include figures on the % of taxonomy aligned assets available in products, such figures being likely to evolve rapidly).

Q2 : Do you agree with the new supporting guideline in relation to the information to clients on the concept of sustainability preference or do you believe that the information requirement should be expanded further? Please also state the reasons for your answer.

As previously stated in its answer to Q1, AMAFI considers the **questioning process should be kept as simple and feasible as possible to avoid overwhelming clients with information they may not be interested in.**

This is supported by the point made⁹ by the Commission in its Retail investment strategy Consultation paper which provides that "*Studies show that due to the complexity of products and the amount of the aggregate precontractual information provided to retail investors, there is a risk that investors are not able to absorb all the necessary information due to information overload. This can lead to suboptimal investment decisions*".

If the detailed questioning was limited to clients having an interest in ESG, the whole process would also be lighter and more feasible.

Therefore, AMAFI's view is that detailed explanation on the assessment of clients' sustainability preferences should be provided only to clients who report having an interest in ESG.

Guideline 2 – Arrangements necessary to understand clients

The content of guideline 2 has been amended to incorporate the new requirement to collect information from the client on the sustainability preferences. In particular, the supporting guideline outlines the approach to be followed with regards to the collection of the client's sustainability preferences and the client's level of sustainability-related expectation. The guideline also outlines the process to be followed in the case of a portfolio approach.

ESMA considers that the level of information to be collected from clients should include all aspects mentioned in the definition of "sustainability preferences" and should be granular enough to allow for a matching of the client's sustainability preferences with the sustainability-related features of financial instruments and to allow for a combination of the different aspects included under the definition of sustainability preferences.

Firms should ensure the same level of granularity of information is collected on the client's sustainability preferences when providing portfolio management or investment advice with a portfolio approach.

⁹ See the European Commission's Consultation Document - A retail strategy for Europe, Question 4.9.

It should be noted that, in reflecting the legislative text, the approach suggested for gathering information from clients on their sustainability preferences is substantially based on self-assessment. This is different from the approach that firms are expected to adopt when collecting information on the ‘traditional’ parameters of suitability assessment. Firms are reminded that the existing ESMA guidelines focusing on the measures to be adopted to limit the risks of self-assessment remain confirmed and are not in any way impacted by the new guidance on collecting information on clients’ sustainability preferences.

Q3 : Do you agree with the suggested approach on the arrangements necessary to understand clients and specifically with how the guideline has been updated to take into account of the clients’ sustainability preferences? Please also state the reasons for your answer. Are there other alternative approaches, beyond the one suggested in guideline 2, that you consider compliant with the MiFID II requirements and that ESMA should consider? Please provide examples and details.

First of all, AMAFI wishes to draw ESMA’s attention on some reading difficulties of the expected process:

- Concerning the first (1st) step firms could choose to follow (see *Guideline 2, § 26, 1st bullet point*): how do the 1st indent (collection of information on “**the degrees of sustainability related expectations of the client**”) and the third (3rd) indent (ask the client “**to what extent financial instruments according to a) to c) should be included in client’s investment/portfolio**”) articulate? A reading might indicate that there are two (2) different proportionality steps in a row which seems to go beyond level 2 requirements.
- A similar question arises on proposed § 27 in guideline 2: is the question firms should ask the client about “*which part of the portfolio*” to be read as a way to implement the “*to what extent*” requirement aforementioned (see *Guideline 2, § 26, 1st bullet point, 3rd indent*) for services with a portfolio approach? If so, this should be clarified, as well as the consequence that sustainability preferences do not have to be considered for the rest of the portfolio.
- Then, AMAFI does not see why the portfolio approach would be limited to cases where several ESG preferences are expressed by the client (see *Guideline 2, § 26, 1st bullet point, second indent, second sentence*) and considers such approach should always be possible, whatever the client’s ESG preferences are.
- Concerning the 3rd step (see *Guideline 2, § 26, 3rd bullet point*): AMAFI enquires on the difference between ranges and sizes and therefore suggests that ESMA clarifies this point.

Secondly, AMAFI would like to stress the following points on which it does not share ESMA’s view:

- The second (2nd) suggested step (see *Guideline 2, § 26, 2nd bullet point*) would require a questioning on **whether the client’s preferences focus on environmental (E), social (S) or governance (G) criteria. AMAFI wishes to point out that this is not required by MiFID II Delegated Regulation¹⁰. It is also likely to bring more confusion to clients in a context where such clients will already have to grasp a whole lot of technical concepts they are not familiar with.** Therefore, even if drafted as a good practice (by the use of the verb “could” rather than “should”), according to AMAFI, this 2nd step should be deleted.

¹⁰ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council (referred to as “MiFID II”) as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, referred to as the “MiFID II Delegated Regulation” ([link](#)). As stated above (see footnote n° 4): the Commission Delegated Regulation (EU) 2021/1253 of 21 April 2021 amending MiFID II Delegated Regulation as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms ([link](#)).

- As for assessing clients' preferences for financial instruments that consider PAIs, it has to be noted that whereas MiFID II Delegated Regulation requires qualitative **or** quantitative elements to be taken into account (see *MiFID II Delegated Regulation amended, Art. 2 (7), c)*), the Draft guidelines (see *Guideline 2, § 26, fourth (4th) bullet point*) require both qualitative **and** quantitative elements ("the information collected should cover the PAI and qualitative and quantitative elements mentioned under c"). **AMAFI considers this goes beyond MiFID II Delegated Regulation and adds complexity to the process of collecting clients' preferences. To AMAFI, clients should have the possibility to express their preferences on c), either on a quantitative or qualitative manner. In this last case, the preference could be expressed in terms of a preference for a specific strategy (e.g an exclusion strategy) which might be the most understandable way for clients to express their preference on c).**
- In addition, AMAFI is unclear on what would the expected quantitative approach consist in. Therefore, AMAFI deems useful to point that such approach should in no case require a quantified assessment of externalities, as it is completely unworkable. Furthermore, AMAFI wishes to emphasize that it is primordial for firms to be allowed sufficient flexibility to tackle the PAIs in a comprehensible manner, which is intelligible for clients (and bankers). Indeed, and as it was in a way taken into account in the 4th bullet point of the proposed § 26 of the Draft guidelines, it is not reasonable to require from firms to outline every SFDR PAI (18 PAIs altogether) to clients in order to "rate" each of them. Therefore, AMAFI is in favour of **grouping the PAIs per categories.**

Finally, in AMAFI's view, since at least for a certain period of time, investors will probably not be able to grasp all the underlying ESG preferences concepts, it is essential for the guidelines to clarify that even if ISPs are required to question clients on a), b) and c), **clients should always be left the possibility to answer they do not have any preference (i.e. they are ESG "neutral") on some or all of these criteria.**

Q4 : Do you believe that further guidance is needed to clarify how firms should assess clients' sustainability preferences?

AMAFI considers that several points should be clarified:

- **Are answers to questions on a), b) and c) preferences intended to be alternative or cumulative when considered at the level of one specific financial instrument?** AMAFI's reading is that **positive answers to questions on a), b) and c) preferences should be read as allowing the ISP to provide advice on either financial instruments with a) or b) or c) characteristics.** Such reading is in line with the upcoming Article 2.7 of Delegated Regulation (EU) 2017/565 that requires clients to choose "*as to whether and, if so, to what extent, **one or more** of the following financial instruments shall be integrated into his or her investment (...)*". To AMAFI, such drafting, without any ambiguity, leaves room for achieving clients' ESG preferences either through **one or through several instruments** meaning that if the client chooses the 3 criteria a), b) and c), his/her preferences could be met through the provision of advice either only on financial instruments combining the 3 characteristics or on financial instruments that, all together, meet the 3 criteria. It also has to be noted that § 24 of section 2.2 of ESMA consultation paper states that "*information collected on clients' ESG preferences should allow for a combination of the different aspects included under the definition of sustainability preferences*". To us, such clarification only makes sense in case the preferences are viewed as alternate. Finally, such reading seems **essential to provide the necessary flexibility in advising clients on ESG investments, in order to meet the objective of directing retail investments towards sustainable activities and to take into account at the same time the lack of maturity of the market on ESG products and ESG criteria.**

- **What are the exact expectations on how firms should question clients who have ESG preferences, in relation to “to what extent” they have sustainability preferences?**
 - o In particular the guidelines should clarify that, **for services without a portfolio approach, the “to what extent” criterion should not be taken into account.** For such service, which is transaction based, to AMAFI, **the approach can only be binary: “yes or no** does the client have any ESG preference for a specific transaction?” In any case, AMAFI would like to draw ESMA’s attention to the fact that the possibility to provide “one shot” advice should be preserved, the reason being there is client demand for such service.
 - o **For services with a portfolio approach,** it should be clarified that the “to what extent” criterion could take the form of a **percentage of the portfolio** the client wishes to dedicate to ESG investments.
 - o Moreover, in case the alternative approach suggested above was not adopted, it should be clarified that, for services with a portfolio approach, **the preferences have to be achieved at the level of the portfolio and not necessarily on an instrument-by-instrument basis.** This would allow an ISP, in the case where a client would have expressed preferences cumulatively on the 3 criteria a), b) and c), to advise its client on financial instruments that might not all fulfil the 3 preferences as long as the portfolio, considered as a whole, reflects the client’s preferences on the 3 criteria.

Additionally, AMAFI considers **more flexibility should be provided in the two following instances:**

- The client is a **professional client**, potentially also subject, as a financial institution, to ESG requirements that may duplicate with the ones made on distributors: as an example, an asset manager requiring advice from an investment firm will be implementing its own ESG investment strategy under its own responsibility so that a new suitability check will most probably have no added value. Another example would be large companies subject to CSRD and Taxonomy regulations that will therefore be perfectly competent on ESG and hence could benefit from a leaner information process.
- A client might have expressed ESG preferences but may not wish to apply them to specific transactions for which the IPS should be able to disregard such preferences. This could be the case for instance where clients request a specific advice on a transaction aims at **hedging market risks without any ESG consideration.** In such case, the ISP should be able to advise on the hedging solution without taking into account client’s ESG preferences that do not make any sense in such circumstances.

These two points should, in AMAFI’s view, also be clarified in the guidelines.

Q5 : Where clients have expressed preference for more than one of the three categories of products referred to in letters a), b) or c) of the definition of Article 2(7) of the MiFID II Delegated Regulation, do you think that the Guidelines should provide additional guidance about what is precisely expected from advisors when investigating and prioritizing these simultaneous / overlapping preferences?

Yes. Three essential points, in AMAFI’s view, need to be expressly clarified in the guidelines:

- As previously stated under answer to Q4, AMAFI’s reading is that **positive answers to questions on a), b) and c) preferences should be read as allowing the ISP to provide advice on financial instruments with either a) or b) or c) characteristics.** Such reading is, according to AMAFI, in line with the upcoming Article 2. 7 of MiFID II Delegated Regulation that requires clients to choose “*as to whether and, if so, to what extent, **one or more** of the following financial instruments shall be integrated into his or her investment (...)*”. To AMAFI, such drafting, without any ambiguity, leaves room for achieving clients’ ESG preferences either through **one or through several instruments** meaning that if the client choses the 3 criteria a), b) and c), his/her preferences could be met either through advising only on financial instruments presenting the 3 characteristics or through advising on financial instruments that all together, meet the 3 criteria.

It also has to be noted that § 24 of section 2.2 states that “*information collected on clients’ ESG preferences should allow for a combination of the different aspects included under the definition of sustainability preferences*”. To us, such clarification only makes sense in case the preferences were to be viewed as alternate. Finally, such reading seems essential to **provide the necessary flexibility in advising clients on ESG investments, in order to meet the objective of directing retail investments to sustainable activities and to take into account at the same time the lack of maturity of the market on ESG products and ESG criteria.**

- **For services with a portfolio approach**, it should be clarified that the “*to what extent*” criterion could take the form of a **percentage of the portfolio** the client wishes to dedicate to ESG investments.
- Moreover, in the case where the alternative approach suggested above was not adopted, it should be clarified that, for services with a portfolio approach, **the preferences have to be achieved at the level of the portfolio and not necessarily on an instrument-by-instrument basis**. This would allow an ISP, in case a client would have expressed preferences cumulatively on the 3 criteria a), b) and c), to advise on financial instruments that might not all fulfil the 3 preferences as long as the portfolio, considered as a whole, reflects the client’s preferences on the 3 criteria.

Q6: Do you agree with the proposed approach with regard to the assessment of ESG preferences in the case of portfolio approach? Are there alternative approaches that ESMA should consider? Please provide possible examples.

According to AMAFI, the proposed approach with regard to the assessment of sustainability preferences in the case of portfolio approach is unclear and the guidelines should clarify that the “*to what extent*” criterion could take the form of a **percentage of the portfolio** the client wishes to dedicate to ESG investments. Moreover, in the case where the alternative approach presented under AMAFI’s answer to Q5 was not adopted, it should also be clarified that for services with a portfolio approach, **the expressed preferences have to be achieved at the level of the portfolio and not necessarily on an instrument-by-instrument basis**. This would allow an ISP, in the case where a client would have expressed preferences cumulatively on the 3 criteria a), b) and c), to advise on financial instruments that might not all fulfil the 3 preferences, as long as the portfolio, considered as a whole, reflects the client’s preferences on the 3 criteria.

Guidelines 3 and 4 – Extent of information to be collected from clients (proportionality) and reliability of client information

The content of guidelines 3 and 4 has been confirmed and no change has been introduced.

Guideline 5 – Updating client information

A new paragraph has been added to the existing guideline 5 to clarify that, in relation to the collection of the sustainability preferences of a client, this information could be updated as part of the next regular update of the client’s information or during the first meeting with the client following the entry-into-application of the amendments to the MiFID II Delegated Regulation.

Q7 : Do you agree with the suggested approach on the topic of ‘updating client information’? Please also state the reasons for your answer.

This proposal goes beyond what is currently provided for under Recital 4 of the Commission Delegated Regulation (EU) 2021/1253: “(...) *For existing clients, for whom a suitability assessment has already been undertaken, investment firms should have the possibility to identify the client’s individual sustainability preferences at the next regular update of the existing suitability assessment.*”

Thus, this Recital provides the possibility for firms to update the client’s sustainability preferences “*at the next regular update of the existing suitability assessment*”.

More particularly, AMAFI is not in favour of adding the necessity for firms to update the sustainability preferences “*during the first meeting with the client*”. As such update will require time and availability of mind from the client, it may not fit well in the “*first meeting*” to take place after the entry into application of these MiFID II amendments, as such meeting may be on very different matters or even of a duration that does not allow such discussion. In addition, such requirement is viewed as being too broadly expressed, potentially giving rise to many disputes about the terms “*meeting with a client*”.

Therefore, to us, in § 55 of the Draft guidelines, **the reference to “the first meeting with the client” should be deleted.**

AMAFI would also like to point out that it is essential that, for feasibility reasons, after the **initial client’s ESG preferences assessment, the processes for updating such preferences would be fully integrated to the general processes on updating other suitability criteria** and should not require any specific meeting with clients. AMAFI wishes to suggest ESMA to provide a clarification to this end in the guidelines.

Guideline 6 – Client information for legal entities or groups

The content of guidelines 6 has been confirmed and no change has been introduced.

Guideline 7 – Arrangements necessary to understand investment products

Regarding the arrangements necessary to understand investment products, the supporting guideline has been amended to ensure that the policies and procedures implemented by firms to understand the characteristics, nature and features of investment products take into consideration the investment products’ sustainability factors.

Q8 : Do you agree with the suggested approach with regards to the arrangements necessary to understand investment products? Please also state the reasons for your answer.

First of all, AMAFI is concerned about the lack of articulation of the ESMA proposed guidelines on suitability with the revision of the guidelines on MiFID II product governance requirements, which are very much related. In our view, both revisions should occur concomitantly. In this regard, AMAFI hopes ESMA’s review process of its Guidelines on Product Governance (launch of the consultation, consultation period, publication of the dedicated ESMA Final Report) will be initiated sufficiently ahead of the entry into force of the new MiFID II ESG suitability requirements so that firms are able to comply in due time.

Then, AMAFI considers **the scope of the proposed § 71 should be limited to the products that are marketed as having ESG characteristics and not extended to products that might have such characteristics but are not marketed as such.** The reason for this is that selling a product with ESG characteristics to a client can never be viewed as misselling on the basis of ESG characteristics. Therefore, Draft guidelines should **explicitly leave open the possibility to consider that a product is ESG neutral and to market it as such, even when it has some ESG characteristics.**

Q9 : Do you believe that further guidance is needed to clarify how firms should take into consideration the investment products' sustainability factors as part of their policies and procedures? Please also state the reason for your answer.

As mentioned by AMAFI in its answer dated 12 October 2017 to ESMA Consultation paper on draft guidelines on certain aspects of the suitability requirements, the topic of understanding investment products falls under product governance rules and should not be dealt with under the suitability guidelines (see [AMAFI / 17-66](#)).

Therefore, to AMAFI, no further clarification should be brought on this topic in the suitability guidelines.

Guideline 8 – Arrangements necessary to ensure the suitability of an investment

The content of guideline 8 has been amended to outline the approach to be used to assess the sustainability preferences of the client as part of the suitability assessment. The paragraph clarifies that the sustainability preferences of the client have to be assessed as a second step, once the suitability of the product has been first assessed in accordance with the criteria of knowledge and experience, financial situation and other investment objectives.

The guideline also addresses the situation where firm makes use of the possibility to recommend a product that does not meet the initial sustainability preferences of the client. ESMA considers that firms can still recommend products that do not meet the sustainability preferences of the client only once the client has adapted such preferences. The firm's explanation and the client's decision should be documented in the suitability report. It should be noted that this possibility should only refer to the sustainability preferences and not to the other criteria of the suitability assessment.

An additional paragraph has been also included to further clarify that the adaptation of the client's "sustainability preferences" where financial products do not meet such preferences should only refer to the suitability assessment in question/to the particular transaction and not to the client's profile in general.

ESMA is aware that, at this stage, the availability of financial instruments with sustainability features may be limited and the introduction of these financial instruments in the firm's product scope might be gradual. However, ESMA considers that where, at the time the information is collected from the client, firms do not have any financial instruments included in their product range that would meet the client's sustainability preferences, firms should nevertheless collect all information concerning sustainability preferences. In this situation, the firm should clearly indicate that there are currently no products available that would meet those preferences and the client should be given the possibility to adapt the sustainability preferences. This should be documented in the suitability report.

In this context, firms should monitor situations where there is a significant occurrence of clients adapting their sustainability preferences for the specific transaction. Indeed, this would seem especially important in the transitional stages towards a more sustainable financial system, where a wider offer of truly sustainable products will be available.

Lastly, the guidelines also address the situation in which a client does not express sustainability preferences.

Q10 : Do you agree with the additional guidance provided regarding the arrangements necessary to ensure the suitability of an investment concerning the client's sustainability preferences? Please also state the reasons for your answer.

Regarding the proposed § 81 of guideline 8: AMAFI's reading is that the adaptation by the client of his sustainability preferences will not impact the client's profile but will only be valid for a specific transaction. AMAFI is concerned that such an approach would not always be workable in practice:

- In case of ongoing advice: if a client previously performed transactions based on adapted preferences, and an ongoing advice is provided afterwards in consideration of the initial client profile, such transactions will necessarily appear unsuitable. This should then trigger a recommendation by the ISP to unwind such position and another adaptation of the client's preferences that is likely to result in the same conclusion as the previous one, providing no added value both for the client and for the ISP.
- For multiple transactions-based advice, such an approach will result in repeated adaptations by clients of their preferences, which is likely to cause them annoyance.

According to AMAFI, in such situations, this would not be a good outcome in a context where clients already complain about too much information being provided to and asked from them and burdensome processes to invest in financial markets.

Therefore, in AMAFI's view, **an alternative process should also be possible: as a result of the adaptation process** provided under 3rd indent § 10 of revised article 54 of Delegated Regulation 2017/565, **an adapted clients' ESG profile could be defined which would be valid until the next update**. In the situations listed above, this would avoid the drawbacks described without preventing the client's from benefiting from new ESG products made available, as the client's ESG profile would be regularly upgraded.

Accordingly, AMAFI considers that the **clarifications proposed in 1st indent § 82 of guideline 8** on how to match, in case of portfolio management, investment firms' offer with clients' preferences through the amendment by clients of the preferences expressed during the initial suitability assessment, **should be also available for advice, whether provided through a portfolio approach or "transaction-based"**.

Accordingly, **there would not be a documentation of the adaptation of clients' ESG preferences in the suitability report as required under draft § 80**, in case such preferences would be attached to the client's profile rather than to a specific transaction. In such case, nevertheless, as requested under the revised article 54.10 of Delegated Regulation 2017/565, ISPs should "*keep records of the decision of the client, including the reasons for that decision*".

However, AMAFI agrees with the underlying principle that **clients' ESG preferences expressed spontaneously by clients should be considered as the final goal to achieve** and the investment recommendations provided by ISPs should progressively adapt to industry's evolution towards more ESG-concentrated products.

Therefore, AMAFI wishes to recommend ESMA to allow ISPs to work with two different ESG profiles: the initial one (stemming from the first assessment of ESG preferences) and the operational one (stemming from the ESG preferences adaptation process), the "*operational profile*" being periodically reviewed by ISPs, based on the evolution of the market, with a view to getting closer to the initial client's profile. AMAFI would like to stress that this "*operational profile*" finally amounts to a streamlined version of the initial profile and ISPs' objective is to make sure these two profiles become one in the long term.

AMAFI would also like to point that, it is most likely that clients' spontaneous expectations will not match market offer for a significant period, thus requiring frequent adaptations in the meantime. Therefore, the **first sentence of § 81 stating that clients' adaptation of their ESG preferences should not be the standard procedure should be deleted**. All the more so as this is not provided for under amended delegated Regulation.

Another important point AMAFI would like to underline is the necessity **to add another step before the client is required to amend his/her sustainability preferences, involving a global presentation of the ISP's ESG offering for those ISPs whose offer is clearly defined**: thus, the client will be in a capacity, if he/she wishes, to amend his/her sustainability preferences in coherence with such offering. In the absence of this new step, there is very little chance, due to the current limited supply for sustainable products, that clients' expectations meet the ISPs' offering.

This will result either in investment firms not being in a position to sell any ESG products to clients, or having extremely long selling processes, the client having to endlessly amend his/her preferences until they finally match the investment firm's offering.

Conversely, ISPs offering services that are not limited to a subset of financial instruments would not be required to proceed to such information step, their offer being by essence extended to the whole market so that if they were to present their offer, this would duplicate with information AMAFI advocates to provide clients with before they fill in their questionnaire on their potential ESG preferences (see answer to Question 1). This would be notably the case for trading activities in the wholesale banking sector.

Therefore, to AMAFI, the guidelines should explicitly require **ISPs whose offer is clearly defined to provide information to clients on their ESG products' offering before the client is required to amend his/her sustainability preferences**.

On the contrary, AMAFI does not see any added value in requesting under § 83 that information on the ISPs' product offer should be provided to clients who expressed they have no ESG preferences. According to AMAFI, this duplicates the information provided in accordance with proposed § 16 of the Draft guidelines and is likely to trigger annoyance by clients who already complain about the quantity of information provided to them. Moreover, in AMAFI's view, such requirement goes beyond Level 2 requirements. Therefore, to AMAFI, **§ 83 should be deleted**.

Concerning the proposed **§ 84**, AMAFI understands that if the client has sustainability preferences and the firm does not have any ESG products, no advice should be possible and hence no suitability report would have to be elaborated and sent. **Therefore, in AMAFI's view, § 84 does not make any sense and should be deleted**.

Q11 : Do you agree with the approach outlined with regards to the situation where the firm can recommend a product that does not meet the client's preferences once the client has adapted such preferences? Do you believe that the guideline should be more detailed? Please also state the reasons for your answer.

No AMAFI does not agree with the fact that the adaptation of client's sustainability preferences "*should only refer to the advice in question and not to the client's profile in general*". See our answer to Q10 above.

AMAFI is concerned that such an approach would not always be workable in practice:

- In case of ongoing advice: if a client previously performed transactions based on adapted preferences, and an ongoing advice is provided afterwards in consideration of the initial client profile, such transactions will necessarily appear unsuitable. This should then trigger a recommendation by the ISP to unwind such position and another adaptation of the client's preferences that is likely to result in the same conclusion as the previous one, providing no added value both for the client and for the ISP.
- For multiple transactions-based advice, such an approach will result in repeated adaptations by clients of their preferences, which is likely to cause them annoyance.

According to AMAFI, in such situations, this would not be a good outcome in a context where clients already complain about too much information being provided to and asked from them and burdensome processes to invest in financial markets.

Therefore, in AMAFI's view, an alternative process should also be possible: **as a result of the adaptation process** provided under 3rd indent § 10 of revised article 54 of Delegated Regulation 2017/565, **an adapted clients' ESG profile could be defined which would be valid until the next update**. In the situations listed above, this would avoid the drawbacks described without preventing the client's from benefiting from new ESG products made available, as the client's ESG profile would be regularly upgraded.

If the solution proposed above was not retained, in the case where client's preferences do not match the ISP's offer, another solution would be to allow the ISP to recommend nonetheless an ESG product from their product assortment. The client's instruction to proceed with the corresponding transaction would then serve as an expression of the adaptation by such client of his/ her ESG preferences. In such a case, the adaptation process would be documented and explained to clients in the suitability report.

Q12 : Do you agree with the approach outlined with regards to the situation where the client makes use of the possibility to adapt the sustainability preferences? Please also state the reasons for your answer.

AMAFI wants to reiterate the fact that, to be workable, the adjustment by clients of his/her sustainability preferences should:

- **Possibly lead to the definition of an adapted client profile** (see answer to previous question and to Q10)
- **Follow a presentation by the ISP whose offer is clearly defined of its ESG offer.**

In AMAFI's opinion, this second point, consisting in the ISP **whose offer is clearly defined** describing its ESG offering, should constitute another step before the client is required to amend his/her sustainability preferences. This will allow the client, if he/she wishes, to amend his/her sustainability preferences in coherence with such offering. In the absence of this step, there is very little chance, due to the current limited offer for sustainable products, that clients' expectations would meet the investment firm's offering. This will result either in investment firms not being in a position to sell any ESG products to clients, or having extremely long selling processes, the client having to endlessly amend his/her preferences until they finally match the investment firm's offering.

Conversely, ISPs offering services that are not limited to a subset of financial instruments would not be required to proceed to such information step, their offer being by essence extended to the whole market, so that if they were to present their offer, this would duplicate with information AMAFI advocates to provide clients with before they fill in their questionnaire on their potential ESG preferences (see answer to Question 1).

Therefore, to AMAFI, the guidelines should explicitly require **ISPs whose offer is clearly defined to provide information to clients on their ESG products' offer before the client is required to amend his/her sustainability preferences**. Conversely, ISPs offering services that are not limited to a subset of financial instruments would not be required to proceed to such information step, their offer being by essence extended to the whole market so that if they were to present their offer, this would duplicate with information AMAFI advocates to provide clients with before they fill in their questionnaire on their potential ESG preferences (see answer to Question 1).

Finally, AMAFI does not see any added value in requesting under § 83 that information on the ISPs' product offer should be provided to clients who expressed they have no ESG preferences. According to AMAFI, this duplicates the information provided in accordance with proposed § 16 of the Draft guidelines and is likely to trigger annoyance by clients who already complain about the quantity of information provided to them. Moreover, in AMAFI's view, such requirement goes beyond Level 2 requirements. Therefore, to AMAFI, **§ 83 should be deleted**.

Q13 : Could you share views on operational approaches a firm could use when it does not have any financial instruments included in its product range that would meet the client's sustainability preferences (i.e. for the adaptation of client's preferences with respect to the suitability assessment in question/to the particular transaction and to inform the client of such situation in the suitability report)?

In AMAFI's view (see answers to Questions 10 to 12 above), the first step after the initial assessment which led to the conclusion that the ISP does not have any financial instruments in its product range meeting the client's sustainability preferences, should be for the ISP **whose offer is clearly defined** to present its ESG products' offer.

Then the client should be left the opportunity to amend his/her initial preferences.

According to AMAFI, this is the only way to avoid very lengthy processes that will last until clients finally express their preferences compatible with available products.

As requested under revised article 54.10 of Delegated Regulation 2017/565, ISPs should “*keep records of the decision of the client, including the reasons for that decision*”. This will provide a protection, both for clients and ISPs in case of complaints from clients.

Q14 : Do you agree with the proposed approach for firms to be adopted in the case where a client does not express sustainability preferences, or do you believe that the supporting guideline should be more prescriptive? Please also state the reasons for your answer.

No. As previously pointed out (see our answers to Q10 and Q12 above), AMAFI does not see any added value in requesting under § 83 that information on the ISPs' product offer should be provided to clients who expressed they have no ESG preferences. According to AMAFI, this duplicates the information provided in accordance with proposed § 16 of the Draft guidelines and is likely to trigger annoyance by clients who already complain about the quantity of information provided to them. Moreover, in AMAFI's view, such requirement goes beyond Level 2 requirements. Therefore, to AMAFI, **§ 83 should be deleted**.

Q15 : Do you agree with the proposed approach with regard to the possibility for clients to adapt their sustainability preferences in the case of portfolio approach? Do you envisage any other feasible alternative approaches? Please provide some possible examples.

First, as stated under its answer to Q10, AMAFI does not understand why such possibility should be restricted to cases where the service provided by the investment firm requires a portfolio approach.

Then (see answers to questions 10 to 13 above), AMAFI is not sure to understand what is expected from firms and has doubts on the operability of the proposals made:

- AMAFI's reading of the proposed § 81 of guideline 8 is that the adaptation by the client of his sustainability preferences will not impact his profile but will only be valid for a specific transaction. AMAFI has strong reservations on how this would work in practice
- Then, according to AMAFI, to be efficient, the “*matching process*” must incorporate another step in the case where clients' preferences are proven to be incompatible with the firm's offer. The ISP **whose offer is clearly defined** would then present its offer as well as the possibility for the client, if he/she wishes, to amend his/ her sustainability preferences.

In the absence of this second step, there is very little chance, due to the currently limited offer for sustainable products that clients' expectations would meet the investment firm's offer.

This will result either on investments firms not being in a position to sell any ESG products to clients, or having extremely long selling process, the client having to endlessly amend his/her preferences until they finally match the investment firm's offer.

Q16 : What measures do you believe that firms should implement to monitor situations where there is a significant occurrence of clients adapting their sustainability preferences? What type of initiatives do you envisage could be undertaken to address any issues detected as a result of this monitoring activity?

Since it is very likely that, as a first step, investment firms' offers will be less ambitious than client's expectations, it is also very likely that the use of the possibility for clients to adapt their sustainability preferences will be frequent. Therefore, it should not be viewed as an anomaly and AMAFI considers **it is unnecessary and overly burdensome to impose right away a close monitoring of these cases.**

AMAFI considers this should be kept for a future update of ESMA guidelines to be conducted when the market is mature enough.

Guideline 9 – Costs and complexity of equivalent products

The content of guideline 9 has been confirmed and no change has been introduced.

Guideline 10 – Costs and benefits of switching investments

Under the Capital Markets Recovery Package, the following new subparagraph has been added to Article 25(2) of MiFID II:

“When providing either investment advice or portfolio management that involves the switching of financial instruments, investment firms shall obtain the necessary information on the client’s investment and shall analyse the costs and benefits of the switching of financial instruments. When providing investment advice, investment firms shall inform the client whether or not the benefits of the switching of financial instruments are greater than the costs involved in such switching”.

A slight wording amendment has been introduced in the text of guideline 10 to align the guideline with Article 25(2) of MiFID II.

Q17 : Do you agree with the proposed amendment to supporting guideline 10? Please also state the reasons for your answer.

AMAFI's view is that a better alignment with client's initial sustainability characteristics should also, under 4th bullet point of § 96, be viewed as a potential benefit for a switch of financial instruments.

Guideline 11 – Qualifications of firm staff

ESMA has clarified in this guideline that staff giving investment advice or information about financial instruments should have the necessary knowledge and competence with regard to the criteria of the sustainability preferences and should be able to explain to clients the different aspects in non-technical terms. To that effect, firms should give staff appropriate trainings.

Q18 : Do you agree with the additional guidance regarding to the qualification of firms' staff or do you believe that further guidance on this aspect should be needed? Please also state the reasons for your answer.

Yes, AMAFI agrees with the additional guidance regarding to the qualification of firms' staff.

Guideline 12 – Record-keeping

ESMA has confirmed the content of the 2018 guidelines on the topic of ‘record keeping’, since the rationale behind them has not changed, but has clarified that the firms should keep records of the sustainability preferences of the client (if any) and any updates of these preferences.

Q19 : Do you agree on the guidance provided on record keeping? Please also state the reasons for your answer.

Yes, AMAFI agrees on the guidance provided on record keeping.

Other changes to the guidelines:

- **Planned alignment with ESMA guidelines on appropriateness and execution only**

When finalising these guidelines on suitability, ESMA plans to align them with the text of its MiFID II guidelines on appropriateness and execution only¹¹ (currently being finalised by ESMA) where MiFID has common provisions for both the assessment of suitability and appropriateness¹².

Q20 : Do you agree on the alignment of the two sets of guidelines (where common provisions exist for the assessment of suitability and appropriateness)? Please also state the reasons for your answer.

Yes, AMAFI agrees with the planned alignment with ESMA guidelines on appropriateness and execution only (where common provisions exist for the assessment of suitability and appropriateness).

Q21 : Do you have any further comment or input on the draft guidelines?

AMAFI regrets the deletion of § 7 and 8 in the Introduction of the 2018 ESMA guidelines and wishes to suggest to ESMA to reintroduce them (and more especially § 8¹³) at the end of the proposed Section II “Legislative references, abbreviations and definitions” of the Introduction of the Draft guidelines. Moreover, AMAFI wishes to suggest ESMA to clarify in the guidelines that the use of the term ‘could’ is meant to describe best practices.

- **Good and bad practices**

In February 2020 ESMA announced on its website the launch of a common supervisory action (CSA) with national competent authorities (NCAs) on the application of MiFID II suitability rules across the European Union (EU).

The CSA was set up to allow ESMA and the NCAs to assess the progress made by intermediaries in the application of this key requirement, including on whether and how the costs and complexity of investment products are taken into account by firms when recommending an investment product to a client. ESMA had updated its guidelines on the topic in 2018 and had also published a supervisory briefing on suitability, both of which were considered for the 2020 CSA.

¹¹ Ref: ESMA35-43-2938.

¹² See MiFID II Delegated Regulation, Art. 55.

¹³ See 2018 ESMA guidelines, § 8: “Guidelines do not reflect absolute obligations. For this reason, the word ‘should’ is often used. However, the words ‘shall’, ‘must’ or ‘required to’ are used when describing a MiFID II requirement.”

A Public Statement was published in July 2021¹⁴ summarising the results of the exercise.

The 2020 CSA has shown an adequate level of firms' compliance with key elements of the suitability requirements that were already regulated under MiFID I such as firms' understanding of products and clients and the processes and procedures to ensure the suitability of investments. However, shortcomings and areas of improvement have emerged with regard to some of the new requirements introduced by MiFID II, notably the requirement to consider the cost and complexity of equivalent products, the costs and benefits of switching investments and suitability reports.

To provide further guidance to firms and to increase convergence on these important MiFID II requirements, ESMA has included in the annex to the guidelines a list of good and bad practices emerged from the 2020 CSA.

Q22 : Do you have any comment on the list of good and poor practices annexed to the guidelines?

In AMAFI's view, some so called good practices are already legal requirements so that it may create confusion to publish them as simple good practices. This is notably the case for the 1st sentence of the 3rd § of the "client profiling" section.

Similarly, some behaviours that are presented as poor practices are already viewed as infringements to the current requirements so that again, the messages to professionals could in AMAFI's view, be blurred. This is the case for:

- 1st, 3rd and 5th § of the "client profiling" section,
- "Product mapping" section,
- 1st § of the "matching" section
- last § of the "costs and benefits of switching investments" section

Some good and poor practices also seem to go too far this is particularly the case for:

- the 2nd § of the "indicators/ monitoring control functions" good practice section promoting "frequent and thorough review of all aspects of suitability practices". Under ESMA's compliance guidelines, investment firms must have a risk-based and proportionate approach for controls. Therefore, under such principle, a frequent and thorough review of all aspects of suitability practices should only be required where and when the firm has assessed the related risks as mandating such thoroughness and frequency. The freedom (and resulting responsibility) of the firm in applying a risk-based approach to its control processes should apply to suitability practices, as with any other of its processes resulting from MiFID II. AMAFI also disagrees with the reference to compliance and internal audit for the conduct of continuous monitoring: internal audit is a periodic control function and therefore cannot be in charge of continuous monitoring; compliance function may not either necessarily be in charge of this monitoring which could be conducted by the internal control function provided under Article 21. 5 of delegated Regulation.

For these two reasons, AMAFI suggests **such good practice should be deleted.**

- The 2nd § on "cost/benefit analysis" of the section on "switch good practice" recommends "the provision of a simple and clear overview of the portfolio before and after the recommended transaction, which includes the expected (excess) return and costs related to the switch": AMAFI challenges the fact that an expected excess return should always be the expected benefit (or unique benefit) of a switch. Indeed, in some instances, the expected benefit could be a realignment of the portfolio with the client's risk profile, a better diversification or the integration of the client's ESG preferences. Therefore, in AMAFI's view, **such good practice should at a minimum be limited to situations where the expected benefit of the switch is to provide excess return.**

¹⁴ Ref. ESMA35-43-2748.

- The 2nd § on “client profiling” of the poor practice section “Not properly investigating the clients’ understanding of bail-in mechanism and its potential impact on the investments (...)”: AMAFI considers that this recommendation is too far reaching and should, in line with the upcoming amended Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements (Guideline 2, § 24), **be limited to clients “having an interest in” bail-inable financial instruments.**
- The 1st § on “Cost/ complexity of equivalent products” of the bad practice section stating “On the cost-complexity of products, comparing only products issued by one single-entity (or by entities of the same group)”: AMAFI considers that such recommendation runs against § 91 of the Draft guidelines and the 2018 version of these guidelines which acknowledges that in such a case the assessment would be limited and therefore requires ISPs to make clients fully aware of the restricted range of products offered. Therefore, in AMAFI’s view, **such bad practice should be deleted.**

Q23 : What level of resources (financial and other) would be required to implement and comply with the guidelines (organisational, IT costs, training costs, staff costs, etc., differentiated between one off and ongoing costs)? When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.

AMAFI is currently not in a capacity to provide cost figures to answer this question. That being said, AMAFI can nevertheless state that the necessary resources to implement the guidelines will be very high:

- systems and procedures will have to be significantly reviewed and amended,
- training will have to be developed and addressed to client facing staff as well as staff from support functions, and
- a whole set of new data will have to be acquired and processed to rank and group financial instruments in terms of ESG characteristics.

Therefore, AMAFI deems important to align as much as possible the dates of entry into force of new requirements (potential amendments stemming from European Commission’s targeted consultation on options to enhance the suitability and appropriateness assessments, revised suitability guidelines and revised product governance guidelines) so that such major efforts would not have to be made several times.

