

CONSULTATION PAPER OF ESMA Draft guidelines on certain aspects of the MiFID II appropriateness and execution-only 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 appropriateness and execution-only requirements. 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:

- The proposed guidelines do not take sufficient account of the presumption provided for in Article 56(1) of MiFID II Delegated Regulation 2017/565¹ related **to professional clients** enables investment firms to be exempted from the obligation to collect the necessary information for the purpose of the appropriateness assessment.
- AMAFI wishes to emphasise that the obligations of Product Governance (know your product), on the one hand, and Appropriateness (know your client/investor), on the other hand, are different requirements (even if they are complementary). With MiFID II, "know your product" features are now fully addressed and managed by Product Governance requirements and must not be maintained in the context of the Appropriateness regime. Therefore, **AMAFI proposes to fully delete Guideline 7.**
- Generally speaking, AMAFI considers that some of ESMA's proposals **go beyond level 1 & 2 requirements, are too burdensome and seem disproportionate.** Some measures are **over prescriptive in the context of the appropriateness regime, which presupposes a consequent flexibility compared with the suitability regime.** This is particularly the case for the **controls required on information collected from clients and on the effectiveness of warnings.**

¹ Commission Delegated Regulation (EU) 2017/565 of April 2016 supplementing [\[MiFID II\]](#) as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive ([link](#)).

2. RESPONSES TO ESMA QUESTIONS

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.

- AMAFI **partially agrees with this suggested approach**. AMAFI supports the fact that the realization of the appropriateness assessment is the responsibility of investment firms that they cannot transfer through a disclaimer. AMAFI is also supportive that such assessment should be done by the investment firm and not by the investor himself.
- However, regarding the second bullet point of § 14 of Guideline 1 proposal, AMAFI believes it is important to precise further that investors need to be informed of the consequences of providing incomplete or misleading information. Indeed, the provision of accurate and complete information remains the responsibility of the investor and not of the investment firm (in accordance with article 55.3 of MiFID II Delegated Regulation 2017/565). It should be remembered that the client has the right not to answer (in accordance with MiFID II Directive 2014/65 and article 56 of MiFID II Delegated Regulation 2017/565), without this prohibiting firms from providing their service.
- Finally, AMAFI considers that **requiring investment firms to include a summary of the differences between the requirements applicable to advised and non-advised services** is burdensome and disproportionate according to the nature of the activity of the investment firms concerned.
 - o In this respect, it is important to outline that this obligation goes beyond of what is required by Level 1 and 2 texts that (*i.e.* only inform clients about the services without this specific summary).
 - o Implementing this new level 3 “obligation” would involve disproportionate repapering of contractual documents with clients without any genuine added value for them.
 - o Finally, it should be outlined that some investment service providers never provide advised services. Therefore, AMAFI believes it is disproportionate to require them to include such summary.

Q2 Do you agree with the suggested approach on the arrangements necessary to understand or warn clients? Please also state the reasons for your answer.

- AMAFI **disagrees** with some of those arrangements. Generally speaking, most of the proposed arrangements seem to fit more adequately Suitability regime than appropriateness regime.
- In particular, we have concerns about the examples of policies and procedures which firms can put in place to **limit the risk of circumvention** of the requirements given in § 22 & 23 of Guideline 2 proposal (*i.e.* the cooling-off period; controls against repeating the questionnaire several times).
 - o Implementing such mechanisms go beyond regulatory requirements.
 - o It seems to be disproportionate in many situations and appears to be too restrictive in relation to the effectiveness of the appropriateness test.
 - o We doubt that those measures are feasible in practice for investment firms.
 - o **In any cases, such mechanisms imply to use online / digital questionnaires**. ESMA should be reminded that many firms use paper questionnaires for which these provisions cannot apply. Moreover, the paper format is required in the context of certain protection measures for vulnerable or ageing persons. In addition, some clients may not wish to use the paper questionnaire and require the questionnaire to be completed face-to-face.
- **AMAFI wishes to challenge** the developments of the Guidelines 2 §25 on **self-assessment as far as experience is concerned**. Indeed, and for assessing the experience of the client, it is necessary to provide some binary and “declarative basis” questions (*i.e.*, “*have you been dealing X?*” yes/no). Only the client himself can answer to what is his experience.

On the other hand, in dealing with knowledge, the questions should not be as broad and binary and can prevent any form of self-assessment of the client. Firms can and should assess the knowledge of their clients.

- Regarding the potential investors' "overestimation" of their knowledge and experiences (*Guideline 2 proposal, § 25*), AMAFI disagrees: assessment made by investment firms on this topic are especially used to evaluate the accurate knowledge of the investor. It is therefore actually unlikely to overestimate it, especially since the absence of self-assessment as specified by ESMA excludes this risk.

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.

- Furthermore, AMAFI considers that it would be useful to clarify the practical consequences of the presumption established by Article 56(1) of MiFID II Delegated Regulation **on the assessment in relation to professional client**. Indeed, if the conditions of the presumption are met, the investment firm does not have to collect information on the experience and knowledge of the client concerned, regardless of the complexity and risks of the proposed product or transaction, or investment services or transactions. Accordingly, it may also be specified that developments of Guideline 3 proposal are applicable to retail clients only.

For this reason, we suggest the following amendment:

30. It is reminded that according to Article 56(1), second subparagraph of the MiFID II Delegated Regulation, a firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or investment product, for which the client is classified as a professional client. **Therefore, if the conditions of the presumption are met, the investment firm does not have to collect information on the experience and knowledge of that client, regardless of the complexity and risks of the proposed product or transaction, or investment services or transactions. Thus, the rest of the development of this guideline is applicable to retail clients only.**

Q4 Do you agree with the suggested approach regarding the appropriateness assessment relating to a service with specific features (§ 34 of the Guidelines)? In particular, do you agree with the examples provided (bundled services and short selling), or would you suggest including other examples? Please also state the reasons for your answer.

- **AMAFI partially agrees** and supports an assessment of appropriateness for the entire package only if it consists of bundled services and if firms can make an overall assessment of the package. However, it should be further clarified in the Guidelines that a bundle of services is subject to appropriateness only if the **bundled service is closely and directly linked to the securities transaction** (e.g., financing prior to a securities transaction). On the other hand, if the two services are disconnected, it is not a package (e.g., a hedging operation 6 months after a loan is granted).
- AMAFI also confirms that the bundle of execution services and ancillary services of granting loans seems a relevant example of package.
- However, the example of **short selling does not seem relevant for retail clients**, for whom this type of transaction is very unlikely and reserved for professional clients. As seen above (see Q3), the knowledge and experience of the professional client are presumed, making the obligation to collect information relating to the assessment of suitability inapplicable. Therefore, AMAFI suggest removing this example from the Guidelines.

Q5 Do you agree with the suggested approach on the reliability of client information? Please also state the reasons for your answer.

- **AMAFI disagrees with some elements of this approach.**
- **We believe that a distinction should be made between the consistency** of the information provided by the client **and its reliability**. While consistency can be verified on the basis of all the client's statements, reliability is more challenging for the firm. In any case, Firms can only verify the information they can have access to.
- Thus, regarding the reliability and accuracy of information, it should be pointed out the investment firm cannot be **required to verify systematically and extensively the veracity of every piece of information collected** and provided by the investor. Moreover, the exchanges between the investment firm and the investor take place within the framework of a contractual relationship which therefore presupposes the good faith of both parties.
- The investment firm must only question the information provided if it is obviously false or manifestly inconsistent (according to article 55.3 of MiFID 2 Delegated Regulation 2017/565). Its responsibility cannot be held where investor deliberately furnishes false information, and the investment firm has no means of determining it. Nevertheless, the firm still retains the faculty to question the reliability of the information only on the basis of the elements available from the previous business relationship with the same client.
- Furthermore, AMAFI wishes to emphasize that **the consistency of the responses should be limited to the content of the questionnaire**. It would go beyond the regulatory obligation (see "*reasonable steps*") and in any case be disproportionate to expect firms to check the consistency of the client's answers in the light of all the information "as a whole" (e.g. information collected for banking services in addition to the financial services). Such a requirement could also be contrary to the GDPR as the information used would exceed the purpose of the questionnaire.
- Finally, **AMAFI challenges footnote 13 in that it lacks clarity**. Indeed, as seen above (cf. Q3) the applicability of the presumption provided for in Article 56(1) of MiFID II Delegated Regulation related to professional clients enables investment firms to be exempted from the obligation to collect the necessary information for the purpose of the appropriateness assessment. Thus, when dealing with professional clients, the proportion of information to be collected does not matter. In view of the importance of this point, it would seem appropriate to include this clarification in footnote 13 or directly in the body of Guideline 4.

For those reasons, AMAFI suggests the following changes in Guideline's wording:

37. Clients are expected to provide correct, up-to-date and complete information as is necessary for the appropriateness assessment. However, firms should take reasonable steps to check the ~~reliability, accuracy and consistency~~ of information collected about clients¹³. Firms remain responsible for ensuring they have the necessary information to conduct an appropriateness assessment, or they should issue a warning to the client.

[...]

39. In order to ensure the consistency of client information, firms should **compare all** ~~view~~ the information collected **in the questionnaire as a whole**. Firms should be alert to any relevant contradictions between different pieces of information collected and contact the client in order to resolve any relevant potential inconsistencies or inaccuracies. Firms should ensure that the assessment of information collected about their clients is done in a consistent way **and in a compliant way with GPDR requirements** ~~irrespective of the means used to collect such information~~.

[...]

⁽¹³⁾ **It shall be reminded that the applicability of the presumption provided for in Article 56(1) of MiFID II Delegated Regulation for professional clients allows investment firms to be exempted from the obligation to collect the necessary information from clients, and to check if information is complete, accurate and up-to-date, for the purpose of the appropriateness assessment.**

**Q6 Do you agree with the suggested approach on relying on up-to-date client information?
Please also state the reasons for your answer.**

- AMAFI considers that Guideline 5's arrangements for investment firms **to anticipate changing circumstances are inadequate in the context of the appropriateness assessment**. While that point makes sense for the client's investment objectives that may be impacted by changing circumstances, this would characterize very rarely an assumption regarding the client's experience and knowledge (sufficient criteria for the purpose of the appropriateness assessment). This is an example where guideline provide for suitability assessment is not relevant for appropriateness assessment. Otherwise, it would be disproportionate to require firms to provide a specific mechanism to anticipate such changes in circumstances for appropriateness purposes.
- On the contrary, it seems relevant to consider that the client's knowledge and experience of a given product or transaction, or of investment services or transactions, **can only improve over time**. AMAFI therefore suggests to precise this point in § 41 of Guideline 5 to which it refers.
- AMAFI fully supports the objective of avoiding abusive or "opportunistic" updating client profile but disagrees with the suggested approach in Guideline 5 especially with the one described in § 45. This paragraph implies that updates carried out concomitantly with a transaction are deemed to be performed inadequately and opportunistically and that investment firms must provide the evidence of the contrary. Operationally, it is very common that when investment advisors meet their clients, they take advantage of those meetings to update their information (and so, their assessments) and, additionally, to make decision to invest. The two actions are therefore simultaneous without the update being incorrect or even fraudulent. This presumption of bad faith is inappropriate in AMAFI's view. Consequently, in those situations, checks must not be carried out systematically but should rather take place within the framework of regular compliance monitoring. If an element jeopardizes the good faith of the update, an escalation could then be carried out for in-depth analysis as mentioned in § 45 of Guideline 5.
- AMAFI believes that requiring firms to have the update reviewed by two staff members is disproportionate.
- AMAFI also highlights the fact that the example of self-investment and investment products with inducement is irrelevant because it has no connection with the appropriateness questionnaires, and therefore proposes that it be deleted.

For those reasons, AMAFI suggests the following changes in Guideline's wording:

41. ESMA acknowledges that the issue of updating in the context of the appropriateness assessment has a different nature than for the suitability assessment, because the information on a client's knowledge and experience will tend to be less volatile than other elements of the suitability assessment, and knowledge and experience **can only generally** increases overtime.

[...]

45. Firms should adopt measures to mitigate the risk of inducing the client to update his level of knowledge or experience so as to make a certain investment product appear appropriate that would otherwise be inappropriate for him, without there being a real modification in the client's level of knowledge and experience. An example of a good practice to address this type of risk is that a firm could adopt procedures to ~~verify, before or after transactions are made,~~ **monitor ex-post** whether a client's profile has been updated too frequently or only after a short period of time from the last modification. **Based on results of those monitoring if breaches of accurate and suitable updating client profiles is detected, those breaches will be escalated in accordance with internal policies** ~~Such situations would therefore be escalated or reported to the relevant control function. To mitigate this type of risk, firms could also require, in cases where an update results in a higher level of knowledge and experience, that this change is reviewed and approved by two staff members.~~ These policies and procedures are particularly important in situations where there is a heightened conflict of interest risk, ~~e.g. in self-placement situations or where the firm receives inducements for the distribution of an investment product.~~ Another relevant factor to consider in this context is the type of interaction that occurs with the client (e.g. face-to-face or through automated assessment).

Q7 Do you agree with the suggested approach on client information for legal entities or groups? Please also state the reasons for your answer.

- AMAFI questions the relevance of §49 (Guideline 6), considering that if the firm is explicitly allowed to undertake the appropriateness assessment on behalf of the group representative, it is then not necessary to require firms to be prudent in the event of differences in experience and knowledge within the group or in the presence of risky products.

For this reason, we suggest the following amendment:

49. If the group of two or more natural persons involved have difficulties in deciding the person(s) from whom the information on knowledge and experience should be collected, the firm should adopt the most prudent approach by taking into account the information on the person with the least knowledge and experience. ~~Firms should at least be prudent whenever there is a significant difference in the level of knowledge and experience of the different clients part of the group, or when the intended transaction may include leveraged investment products or contingent liability transactions that pose a risk of significant losses that could exceed the initial investment of the group of clients and should clearly document the approach chosen.~~

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

- AMAFI **strongly and fully disagrees with this Guideline 7**. In fact, "Know your product" features are now, with MiFID II, fully addressed and managed by Product Governance rules. **Therefore, AMAFI proposes to fully delete Guideline 7.**
- Furthermore, the complexity as defined here in draft guidelines should be reviewed in the context of marketing of products (as it is done in product governance). This particular point shows the inconsistency to allow two separate sets of rules to coexist on the same subject. A same product

can be considered as "moderately complex" according to its target market definition drafted under product governance rules and plain "complex" under execution-only.

- Additionally, § 54 does not correspond to operational reality. In many cases, product information (including target market required by product governance) will be provided by the manufacturer to distributors via data providers. Distributors can and will obviously rely on such data. AMAFI would therefore suggest deleting § 54 of draft Guideline 7.
- Finally, AMAFI also disagrees with § 55, again because it is redundant with the requirements of the product governance provisions (namely the granularity requirement), which are not mentioned in the requirements of appropriateness.

Q9 Do you agree with the suggested approach on the arrangements necessary to assess the appropriateness of an investment or else issue a meaningful warning? Please also state the reasons for your answer.

- AMAFI very much welcomes § 57 of Guideline 8 that clarifies that disinvestment should not trigger the obligation for firms to conduct an appropriateness test.
- **AMAFI notes a lack of clarity in the wording of § 62 of Guideline 8.** Furthermore, the drafting of very precise guidelines for the relevant staff is not consistent with any practical reality and would even undermine the ability of such staff to identify vulnerable persons.
- Regarding the utilization of automatic tools, AMAFI considers that the details of § 63 of Guideline 8 are overly prescriptive, in particular with regard to the measures to be put in place to regularly monitor and test the algorithms.

Q10 Do you agree with the suggested approach on the effectiveness of warnings? Please also state the reasons for your answer.

AMAFI generally disagrees with the suggested approach:

- Regarding § 65, AMAFI would like to stress that requiring firms **to ensure over the telephone that clients have fully understood the warnings is disproportionate** in relation to the appropriateness requirements. While it is necessary for the warning to reach the client and for its content to be understandable, firms are not required to check whether the warning has been subjectively understood.
- AMAFI **contests the relevance of the distinction made in § 66 between the causes/reasons of the warnings** issued to clients, which are the total absence of information or the inadequacy of the information provided. According to AMAFI, such distinction has no practical impact on the effectiveness of the warning for clients and adds an unnecessary burden to the firms.
- AMAFI challenges § 69 since **educational tools are intended to train clients** to enhance their experience and knowledge and consequently to improve their ability to answer questions in appropriateness questionnaires.
- **AMAFI totally disagrees with § 71.**
 - o Indeed, it would be contrary to Articles 25(3) of MiFID II and Article 56(2)(b) of MiFID II Delegated Regulation 2017/565 to require firms to prevent the client from completing the transaction if the appropriateness assessment "fails" and a warning was issued. Indeed, these Articles do not explicitly prevent firms from providing the service in this case. Moreover, Article 56(2)(b) of MiFID II Delegated Regulation 2017/565 specifically states the case where the client asked to proceed with the transaction despite a warning was

given to him/her. Thus, according to Article 25(3) of MiFID II and Article 56(2)(b) of MiFID II Delegated Regulation 2017/565, in such hypothesis, firms must only warn the client of the inappropriateness of the transaction/product or investment service.

- Besides, under French law, refusing such a transaction in the absence of a legitimate ground (since this is not provided for in the regulations) would be contrary to consumer law (see *French Code de la consommation, art. L. 121-11*), which penalizes the "refusal to sell".
- AMAFI considers that the **example of the risk of a conflict of interest** is irrelevant since this risk cannot prevent the request to proceed with the transaction on the grounds of appropriateness. Firms are simply required to comply with the regulations in force and take all reasonable steps to prevent conflicts of interest from harming the client's interests, but this does not amount to preventing to proceed with a transaction involving a group of products, on the grounds of appropriateness.
- Finally, **AMAFI strongly disagrees with the proposed ex post evaluation of the effectiveness of warnings**. First, that goes far beyond the regulatory requirements. Then, calculating the ratio on which this assessment is based is difficult and requires the introduction of a system that appears disproportionate to its usefulness in terms of appropriateness. Indeed, it is important to remember that the **client is free to ignore this warning** and the firm is thus obliged to proceed with the transaction. On the other hand, even if warnings were increasingly given to clients and followed by them, it would be **counterproductive** to require firms to reduce the number of warnings accordingly. This highlights the fact that this *ex-post* evaluation is unreliable and that it is preferable to give firms some flexibility as long as they comply with their regulatory obligations.

For those reasons, AMAFI suggests deleting § 71.

Q11 Do you agree with the suggested approach on the qualifications of firm staff? Please also state the reasons for your answer.

AMAFI agrees with § 72 of Guideline 10 that staff should be sufficiently qualified to understand their role in the assessments and have an adequate level of skills, knowledge and expertise. However, AMAFI does not believe further detailed guidance is needed.

Q12 Do you agree with the suggested approach on record-keeping? Please also state the reasons for your answer.

AMAFI does not have any comment regarding Guideline 11.

Q13 Do you see any specific difficulties attached to the requirement to keep records of any warnings issued and any corresponding transactions made by clients?

As mentioned hereabove in Q12, AMAFI does not have any comment regarding Guideline 11.

Q14 Do you agree with the suggested approach on determining situations where the appropriateness assessment is needed? Please also state the reasons for your answer.

AMAFI does not have any comment regarding Guideline 12.

Q15 Do you agree with the suggested approach on controls? Please also state the reasons for your answer.

- AMAFI would like to emphasize that the wording of § 88 of Guideline 13 seems to create a kind of presumption of bad faith on sales staff that is not welcome.
- AMAFI disagrees with § 91 of Guideline 13 considering that the proposed monitoring of warnings effectiveness goes beyond regulatory requirements. Like answered in Q10, **this *ex post* evaluation is unreliable and can be counterproductive.**

Q16 When providing non-advised services, should a firm also assess the client's knowledge and experience with respect to the envisaged investment product's sustainability factors and risks? If so, how should such sustainability factors and risks be taken into account in the appropriateness assessment? Please also state the reasons for your answer.

- **AMAFI totally disapproves of this proposal.** Indeed, while ESG criteria may well be a subsection of the client's investment objectives, these objectives are only to be taken into account in the context of suitability requirements.
- Taking these criteria into account for appropriateness purposes would distort this regime, which was intended to be simplified (in comparison to the suitability regime) because of the category of services delivered by the investment firm concerned.
- Under no circumstances can be assessed the experience and the knowledge of the client with taking into account the sustainability factors. (see AMAFI's answer to ESMA consultation on integrating sustainability risks and factors in MiFID II ([AMAFI / 19-22](#)) and to the European Commission's consultation on sustainable finance ([AMAFI / 20-44](#) and [20-45](#)).

