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ESMA's CONSULTATION
Review of the Guidelines on MiFID II product governance requirements
AMAFI's answer

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 160 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 review of the ESMA's Guidelines on MiFID II product governance requirements[1]. Before answering the specific questions of ESMA's CP, 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 (the Guidelines) and wishes to emphasise the following issues:

- On the future date of application

The future date of application of the Guidelines is a major concern: the sustainable finance regulatory framework is particularly complex and not yet finalized, as major sets of data required to implement these new requirements are still missing and will still be missing for a while (the first sets of Taxonomy[2] data will be available only as of 2023 and CSRD[3] data will be available only by 2025 at best). The work needed to implement the processes that would result from the Guidelines is extremely important. 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**.

- On the necessity to provide regulatory stability as much as possible

As previously expressed in many instances, AMAFI calls for regulatory stability as much as possible, every amendment brought to the regulatory framework leading to structural changes to processes, procedures and IT systems, which are sometimes very significant.

[1] Cf. ESMA Final Report, "Guidelines on MiFID II product governance requirements", 2 June 2017 (*ESMA35-43-620*).

[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)

Therefore, without denying the necessity to integrate in the Guidelines the ESG considerations stemming from the amendments made to the Delegated Directive, AMAFI questions some of the proposed changes to the Guidelines, which go beyond these level 2 changes. This concern is heightened by the observation that further regulatory changes are expected in the near future as a result of the Commissions' Retail investment Strategy[4], which will undoubtedly require further adaptations from ISPs, potentially significant. **AMAFI therefore asks for a balanced approach to the proposed changes of the Guidelines, which considers the EC's current reflection on RIS,** to avoid subsequent changes to the same topics (e.g. on distribution of complex products).

- On the articulation with industry standards

- The industry, through the FinDatEx group, has organised itself well in advance to establish a common template for manufacturers 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 was planned carefully to enable firms to comply with the suitability requirements as at 2 August 2022 and with the product governance requirements as at 22 November 2022. If the final ESMA's 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-done which would be a very poor outcome for the financial industry. In addition, the industry's ability to be compliant on 22 November would be greatly jeopardized. Therefore, **AMAFI wishes to recommend ESMA to be attentive not to introduce provisions that would be at odds with those templates when drafting both suitability and product governance guidelines.**

- AMAFI would also like to question the case studies presented under annex V of the Guidelines, that provide a level of detail (sometimes one or 2 pages) for the determination of the target markets) of different products, that goes far beyond the industry actual standards, as illustrated by the Findatex initiative. Such standards have been used for funds, ETFs, and structured securities sold in the EU since 1.1.2018, and have been overall working well, allowing for the creation and distribution of millions of diversified financial instruments, with comparable target markets and efficient distributor feedbacks. They are essential to deal with product governance requirements efficiently in a digital environment, as they allow machine readability, convergence of standards in the various EU countries, and automated reporting on a large scale. On the contrary, the approach developed under the case studies does not take into consideration the reality of the market where millions of products exist, which require, an industrialized approach. Therefore, in this context, one could **question the relevance of the details provided under these case studies, which legal effect is unclear, and which are at odds with market standards used by the European industry.**

- On proportionality

In several instances, the Guidelines do not sufficiently take into account the proportionality principle that should apply to such guidelines:

- Due to the lack of available ESG data[5], ISPs will necessarily encounter difficulties to put in place right away ESG product governance processes that will be aligned with ESG suitability requirements. Therefore, **they should be allowed to define their ESG target markets based on alternative data,** provided e.g. by data providers. As long as these data are reliable enough[6], such possibility should be recognized in the Guidelines.

[4] See recent work from the European Commission on VFM and enhanced suitability and appropriateness regime.

[5] Major sets of data required to implement these new requirements are still missing and will still be missing for a while (the first sets of Taxonomy data will be available only as of 2023 and CSRD data will be available only by 2025 at best)

[6] AMAFI stands ready to help defining the conditions under which such data would be viewed as reliable enough.

- Furthermore, as regards the use of these data, *i.e.* the methodology designed by ISPs to assess the sustainability of products, AMAFI believes that the Guidelines should allow for some flexibility so that ISPs can define the best methodology for this assessment.
  This is especially true for **equities and bonds,** whose sustainability assessment is certainly not straightforward nor standardised in any way at the moment.
  Requiring the application of **a sustainable investment or taxonomy proportion for these products is in our view too prescriptive.** A binary approach is also possible, hence the need for the Guidelines to allow different approaches. This is illustrated in SFDR, where even for the products in scope of this regulation, there is no technical prescribed methodology to assess what activities could be considered as "sustainable" and then, how these products contribute to a sustainable investment objective as per the definition of a sustainable investment in Article 2.17.

- The Guidelines should bring clarity on the application of product governance requirements to vanilla bonds and equities. The MiFID II Quick Fix published on 26 February 2021 has brought several welcome reforms, in particular the alleviation of the product governance requirements for simple corporate bonds with make-whole clauses. However, such amendment did not embark other simple bonds nor shares, whereas product governance requirements are not suited to these securities, especially when traded on the secondary market. An ISP advising an issuer on a new issuance of such financial instruments on the primary market should not be viewed as the manufacturer of such products when it comes to the secondary market. Indeed, on the secondary markets, all securities are fungible so that in case of capital increase, it would not make any sense, nor bring any enhanced investor protection to view the ISP having advised on the last capital increase, or former capital increases, as the manufacturer of all outstanding securities. This issue will be even more crucial when it comes to the sustainable characteristics of such bonds or shares, which should not only be determined at the time of the issuance but also regularly.
  Keeping in mind that the scope of application of the product governance requirements relates more to level 1 discussions, AMAFI suggests ESMA bring some clarification in the Guidelines on the practical way to apply product governance requirements to vanilla bonds and equities, which is fully in its remit. Therefore at least the Guidelines should clarify that **an ISP advising an issuer on a new issuance of such financial instruments on the primary market should not be viewed as the manufacturer of these products when it comes to the secondary market**.

- Along the same line, and consistently with a comment already made by AMAFI in its answer to ESMA's consultation on the revised suitability guidelines, more flexibility should be afforded for products intended to be distributed exclusively **for hedging purposes.**
  This is typically the case for a majority of interest rate or currency swaps that do not have any direct ESG alignment but may nevertheless be used as part of an ESG strategy. Such products would necessarily have to be classified as "non ESG" products, which would result in preventing (or at least unduly complexify) their sale to clients with positive ESG preferences. This is to us a very negative outcome. Therefore, the Guidelines should acknowledge the possibility not to define any ESG characteristics for such products, without preventing their sale to clients with ESG objectives, as long as these clients also have hedging needs. It should also be noted that the portfolio approach suggested in ESMA's suitability guidelines is not suited to wholesale markets, where the relationship is transaction based. In such situations, the Guidelines should recognize that the sale of a derivative, whose ESG characteristics cannot be assessed (*i.e.* the target market is thus not ESG positive) for hedging purposes to a client who has expressed ESG preferences remains possible. This is to us a very negative outcome. Therefore, the Guidelines should acknowledge the possibility not to define any ESG characteristics for such products. It should also be noted that the portfolio approach suggested in ESMA's suitability guidelines[7] is not suited to wholesale markets, where the relationship is transaction based.

[7] ESMA notes that *"it has considered the request to provide further clarifications on how a client's sustainability preferences should be considered in connection with derivatives contracts. In this respect, ESMA confirms that a suitability assessment (including the consideration of "sustainability preferences") should always be performed when providing investment advice or portfolio management services, and this includes transactions on derivatives (i.e.*

In such situations, **the Guidelines should recognize that the sale of a derivative, whose ESG characteristics cannot be assessed** (*i.e.* the target market is thus not ESG positive) **for hedging purposes to a client who has expressed ESG preferences remains possible.**

- Another concern lies with the impact of the Guidelines on the provision of non-advised services. Whereas AMAFI agrees with the idea that each ISP's products and services assortment should be defined in consideration of its clients' characteristics, it should also be acknowledged that, depending on the type of investment services offered, the ISP does not necessarily have all information on its clients' characteristics and needs. In AMAFI's view, although this potential absence of information should be considered to define the extent of the offer and the distribution strategy of each product or type of products, especially the most complex ones, **it should not be expected from firms that they should distribute all their complex and/or risky products under the suitability regime.** To AMAFI, clients should always have the liberty to purchase any financial instrument they wish, after having been duly warned and informed. To AMAFI, this has to do with personal freedom. It should also be kept in mind that in the wholesale markets, some clients are classified as retail clients but still need to access the services offered without wishing to be in an advisory relationship and product governance requirements should consider the wide scope of MiFID activities concerned. It should also be kept in mind that complexity does not necessarily imply risk. A structured product with an equity underlying, offering some capital protection through e.g. an optional component, will without any doubt be complex, but at the same time it provides increased protection to clients compared to a direct investment in the underlying equities. In the period of heightened inflation we are currently experiencing, it is vital that the regulatory framework does not have unintended consequences such as preventing retail clients from accessing such products that provide them with both performance and security.

2. Responses to ESMA Questions

I. Guidelines for manufacturers

Identification of the potential target market by the manufacturer: categories to be considered.

Q1: Do you agree with the suggested clarifications on the identification of the potential target market by the manufacturer (excluding the suggested guidance on the sustainability-related objectives dealt with in Q2)? Please also state the reasons for your answer.

AMAFI has the following comments:

- The MiFID II Quick Fix published on 26 February 2021 has brought several welcome reforms, in particular the alleviation of the product governance requirements for simple corporate bonds with make-whole clauses. However, such amendment did not embark other simple bonds nor shares, whereas product governance requirements are not suited to these securities, especially when traded on the secondary market. To AMAFI, an ISP advising an issuer on a new issuance of such financial instruments on the primary market should not be viewed as the manufacturer of such products when it comes to the secondary market.
  Indeed, on the secondary markets, all securities are fungible so that in case of capital increase, it would not make any sense, nor bring any enhanced investor protection to view the ISP having advised on the last capital increase, or former capital increases, as the manufacturer of all

there is no "exemption" from asking clients about their sustainability preferences when dealing with specific types/categories of financial instruments). That said, ESMA notes that clients will potentially have different objectives and needs (including hedging needs) and it will be the responsibility of the adviser/portfolio manager to identify the various investment product(s) to be offered to the client to fulfil those needs/objectives (i.e. in the clients' portfolios, for example, a derivative might be used to hedge the interest rate or currency risks while other instruments, such as funds or green bonds can be used to ensure the clients' sustainability preferences are met)."

outstanding securities. This issue will be all the more crucial when it comes to the sustainable characteristics of such bonds or shares, which should not only be determined at the time of the issuance but also regularly.
Keeping in mind that the scope of application of the product governance requirements relates more to level 1 discussions, AMAFI suggests ESMA bring some clarification in the Guidelines on the practical way to apply product governance requirements to vanilla bonds and equities, which is fully in its remit. Therefore at least the Guidelines should clarify that an ISP advising an issuer on a new issuance of such financial instruments on the primary market should not be viewed as the manufacturer of these products when it comes to the secondary market.

- Regarding the amendment brought to paragraph 14 (addition of second sentence) that requires manufacturers, in the determination of their TM, to take into account both the charging structure analysis and the results of the performance scenario, AMAFI has several observations:
    - As for the charging structure, we read this proposed clarification as a mere repetition of the content of Article 9.12a) of the Delegated Directive, which questions its added value. Moreover, we question the intention behind the reference made in foot note 21 to ESMA's Questions and Answers on MiFID II and MiFIR investor protection and intermediaries' topics section 16. To AMAFI, ESMA should better clarify its intentions as to the legal effects of such reference.
    - As for the performance scenario, the proposed drafting goes beyond Level 2 requirements set under Article 9.10 of the Delegated Directive that requires "*investment firms to undertake a scenario analysis of their financial instruments which shall assess the risks of poor outcomes for end clients posed by the product and in which circumstances these outcomes may occur*" and does not require to take such analysis into account in the determination of the TM.
    - In any case, it should be made clear that for assessing scenario and charging structure, firms could rely on PRIIPS data. AMAFI would also welcome a clarification that performance and cost structure assessment should not lead to any additional disclosure to clients or additional target market criteria.

- As for the addition made to paragraph 19 d) with regard to taking into account, if needed, other risks that are not embedded in the PRIIPS or UCITS risk indicators, to AMAFI there is no doubt that such indicators are built with the aim to catch any possible risks attached to the products. Consequently, in case ESMA has doubts on the exhaustivity of the risks considered to calculate these indicators, this should be dealt with under the UCITS or PRIIPS regulations.
AMAFI nevertheless acknowledges that extra risks can arise from the distribution of such products, as in the example provided in the draft amended GLs with currency risks: in such an example, to AMAFI, it cannot be expected from manufacturers to take into account currency risks that typically depend on the country where such products will be marketed. Such a risk will then have to be assessed and taken into account[8] at the distribution point, by the various distributors.
Therefore, to AMAFI the sentence added to paragraph 19d) should be deleted.

Q2: Do you agree with the suggested approach on the identification of any sustainability-related objectives the product is compatible with? Do you believe that a different approach in the implementation of the new legislative requirements in the area of product governance should be taken? Please also state the reasons for your answer.

- AMAFI would like to make the following general comments:

- AMAFI views favourably the fact that the approach suggested in the Guidelines builds on the 3 criteria retained for collecting clients' ESG preferences under the suitability regime, which is essential for a smooth distribution process.

[8] Depending on the service provided, either through disclosure or suitability test

- However, due to the lack of available ESG data[9], as well as guidelines on the required methodologies[10] ISPs will necessarily encounter difficulties to put in place right away ESG product governance processes that will be aligned with ESG suitability requirements for all products, either falling under SFDR or not. Therefore, the Guidelines should provide sufficient flexibility for firms to define their ESG target markets, both on the methods and on the data (provided e.g. by data providers) used for this purpose. They should therefore be allowed to define their ESG target markets based on alternative data, provided e.g. by data providers. As long as these methods and data are robust and reliable enough[11], such possibility should be explicitly recognized in the Guidelines.

- Furthermore, as regards the use of these data, i.e. the methodology designed by ISPs to assess the sustainability of products, AMAFI believes that the Guidelines should allow for some flexibility so that ISPs can define the best methodology for this assessment. This is especially true for equities and bonds, whose sustainability assessment is certainly not straightforward nor standardized in any way at the moment. Requiring the application of a sustainable investment or taxonomy proportion for these products is in our view too prescriptive. A binary approach is also possible, hence the need for the Guidelines to allow different approaches. This is illustrated in SFDR, where even for the products in scope of this regulation, there is no technical prescribed methodology to assess what activities could be considered as “sustainable” and then, how these products contribute to a sustainable investment objective as per the definition of a sustainable investment in Article 2.17.

- Consistent with a similar comment we made on the draft suitability guidelines: product manufacturers and distributors should not be expected to assess if the products have a focus on either environmental (E), social (S) or governance (G) criteria as required under draft §20.
  Such an assessment of clients’ ESG preferences is not required by MiFID II Delegated Regulation and therefore no such assessment should be conducted on products either.

• As concerns the assessment of ESG characteristics for non SFDR products, AMAFI welcomes the opportunity given by ESMA to provide input on possible approaches and would like to suggest the followings:

  ○ For Structured Notes (*i.e.* a fixed rate bond which coupons payments are based on the performance of an underlying component (equity, equity indices, credit…):

An appropriate methodology could be one whereby the ESG characteristics of both components of the Notes would be assessed and combined:

(i) the bond component contribution, which could be reflected either by its issuer’s ESG characteristics or by its ESG use of proceeds,
(ii) the underlying’s contribution that could be reflected proportionally to the exposure to the underlying, such proportion being measured through the note’s delta. The underlying contribution to the structured note’s ESG characteristics would then be equal to the delta multiplied by the underlying’s ESG characteristics (e.g. the taxonomy alignment).

Such methodology would have the merit to provide a level playing field with the calculation methodologies adopted for investment funds such as UCITS and AIFs.

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[9] Major sets of data required to implement these new requirements are still missing and will still be missing for a while (first sets of Taxonomy data will be available only as of 2023 and CSRD data will be available only by 2025 at best)
[10] For SFDR products, there is no prescribed methodology to assess how the product contributes to a sustainable investment objective with the meaning of SFDR Art. 2.17 definition.
[11] AMAFI stands ready to help defining the conditions under which such data would be viewed as reliable enough.

- For derivatives:

Derivatives and structured products can be beneficial for sustainability purposes because they are necessary to hedge sustainable strategies or projects, can contribute to the funding of sustainable initiatives, and can act as enablers to sustainable investments. Sustainability linked derivatives are an illustration of derivatives which participate in sustainability. It is therefore important that the regulatory framework acknowledges the role of derivatives in sustainability (*please see AMAFI/21-47 on the role of derivatives in sustainable finance*), and the Guidelines in particular should bring such clarity.

Therefore, AMAFI urges ESMA to acknowledge, in some circumstances, the possibility for a derivative to be categorized in full or in part as sustainable, as well as to work with the industry on criteria that could allow such categorization. If such clarification was not brought upon, some sustainable projects may not be financed because their hedging component would not be considered sustainable.

Moreover, and consistent with a similar comment we made on the draft suitability guidelines, more flexibility should be afforded for products intended to be distributed exclusively for hedging purposes.
This is typically the case for a majority of interest rate or currency swaps that do not have any direct ESG alignment but may nevertheless be used as part of an ESG strategy. Such products would necessarily have to be classified as “non ESG” products, which would result in preventing (or at least unduly complexify) their sale to clients with positive ESG preferences. This is to us a very negative outcome. Therefore, the Guidelines should acknowledge the possibility not to define any ESG characteristics for such products, without preventing their sale to clients with ESG objectives, as long as these clients also have hedging needs. It should also be noted that the portfolio approach suggested in ESMA’s suitability guidelines[12] is not suited to wholesale markets, where the relationship is transaction based. In such situations, the Guidelines should recognize that the sale of a derivative, whose ESG characteristics cannot be assessed (ie the target market is thus not ESG positive) for hedging purposes to a client who has expressed ESG preferences remains possible.

Q3: What are the financial instruments for which the concept of minimum proportion would not be practically applicable? Please also state the reasons for your answer.

As previously stated under answer to question 2, requiring the application of a sustainable investment or taxonomy proportion for shares and bonds is in our view too prescriptive and a binary approach should also be possible.
However, to AMAFI, the Guidelines should clarify that where such a proportionate (and not binary) approach would be used for shares and vanilla or structured products (either bonds or derivatives), the terms “minimum proportion” should be read as “actual proportion”. This is in line with footnote 13 in paragraph 26 of the background section of the Consultation paper stating **“***The concept of “minimum proportion” does not apply to financial instruments for which it is not practically possible to define such minimum proportion. These types of products could refer to the actual proportion instead of the minimum one*”. AMAFI indeed agrees with the fact that, differently from funds that need to be managed and for which it makes sense to require some form of commitment towards investors on the future management, it does not make sense to refer to minimum proportion for products that are not as such managed during their lifetime such as shares and vanilla or structured products (either bonds or derivatives).

[12] ESMA notes that *“it has considered the request to provide further clarifications on how a client’s sustainability preferences should be considered in connection with derivatives contracts. In this respect, ESMA confirms that a suitability assessment (including the consideration of “sustainability preferences”) should always be performed when providing investment advice or portfolio management services, and this includes transactions on derivatives (i.e. there is no “exemption” from asking clients about their sustainability preferences when dealing with specific types/categories of financial instruments). That said, ESMA notes that clients will potentially have different objectives and needs (including hedging needs) and it will be the responsibility of the adviser/portfolio manager to identify the various investment product(s) to be offered to the client to fulfil those needs/objectives (i.e. in the clients’ portfolios, for example, a derivative might be used to hedge the interest rate or currency risks while other instruments, such as funds or green bonds can be used to ensure the clients’ sustainability preferences are met).”*

Identification of the potential target market: differentiation on the basis of the nature of the product manufactured

Q4: Do you agree with the suggested guidance on complexity in relation to the target market assessment and the clustering approach? Please also state the reasons for your answer.

AMAFI fully agrees with the following ideas reflected under the suggested guidance on complexity in relation to the target market assessment and the clustering approach:

- the more complex or risky a product , the narrower the target market should be (§25 on CFDs)
- the clustering approach should not lead to mixing up, in the same cluster, products having different characteristics and therefore the clusters should be defined with a sufficient level of detail (§ 27 to 30)

However, the last sentence of §27 raises questions when it states that "*a clustering approach will not be appropriate for OTC derivatives and structured products*". AMAFI is in favour of clarifying that such a clustering approach would be available for any type of sufficiently standardized financial instruments, whatever their level of complexity and their nature. Hundreds of thousands of structured products or derivatives are issued every year by some financial institutions, such that a clustering approach is the only workable way to cope with such a volume of such products. Such approach should also be available e.g. for bonds either plain vanilla, contingent or lower tier 2 products that are frequently issued by banks' ALM desks.

This approach, which is already used at present, would consist in grouping standardized products with the same characteristics into different categories, each corresponding to a specific TM. These categories need to be precisely defined with a numerous criteria so that each of them is solely composed of products that are eligible to the same target market. As an example, there would be no added value in having a detailed approach for optional products that do not have any other difference than a slightly different termination date or other minor different technicalities that are not likely to impact their target market.

To AMAFI, as long as the clustering process is granular enough, well documented, regularly reviewed and subject to a robust audit trail, it is not likely to harm the target market assessment process.

Conversely there would be no added value attached to a product-by-product TM assessment from an investor protection point of view, while it would be unfeasible operationally.

As a consequence, to AMAFI, **the last sentence of § 27 should be deleted,** especially since for bespoke products, the Guidelines already clarify (see § 31) that *"for bespoke or tailor-made products, the target market of the product will usually be the client who ordered the product unless the distribution of the product to other clients is also foreseen".*

As concerns § 28, AMAFI fully agrees with the general idea that in case a clustering approach is used for the purpose of determining the products' target market, the clusters should be granular enough not to encompass products with different characteristics and ISPs should be able to document that this is the case. However, with regard to the proposed criteria (§28) firms should consider for the purpose of the clustering approach, more flexibility should be left to ISPs to appreciate the relevant criteria depending on the type of products. Whereas the proposed list of criteria makes full sense for complex products, it could be shorter for simpler products. For instance, it seems overly burdensome to require from firms to consider (and to document in their procedures the result of such consideration) all the listed criteria for simple shares. Therefore, AMAFI suggests the scope of § 28 should be limited to structured products.

II. Guidelines for distributors

Timing and relationship of the target market assessment of the distributor with other product governance processes

Q5: Do you agree with the suggested guidance on the assessment of the general consistency of the products and services to be offered to clients, including the distribution strategies used? Please also state the reasons for your answer.

Whereas AMAFI agrees with the idea that each firm’s product and service assortment should be defined in consideration of such firm’s clients’ characteristics, it should also be acknowledged that, depending on the type of investment services offered, a firm does not necessarily have all information on its clients’ characteristics and needs.
Whereas this potential absence of information should be taken into account in the decision made on the extent of the offer and the determination of the distribution strategy for each product or type of products, and specially the most complex ones, it should not be expected from firms that they should distribute all their products under the suitability regime.
To AMAFI, clients should always have the liberty to purchase any financial instrument they might wish to purchase, after having been duly warned in case their knowledge is not sufficient. This has to do with personal freedom. It should also be kept in mind that complexity does not necessarily imply risk. A structured product with equity underlying, offering protection through e.g. an optional component, will without any doubt be complex, but at the same time will provide increased safety to clients, compared to a direct investment in equities. In the time of inflation we are currently experimenting, it seems vital to preserve a broad access by retail clients to such products that would provide both performance and security.
Therefore, articles 34 and 35 should take this into account and, when referring to clients’ needs, **the terms “where relevant “should be added.**

However, AMAFI supports the developments made under § 39 about gamification techniques that should not be used to sell financial instruments, investing in financial instruments being a serious matter. That said, AMAFI also wishes to draw ESMA’s attention to the definition given for gamification, and the necessity not to mix up techniques that are likely to result in an alteration of clients’ free choice in their decision-making process, and investment firms advertising their products or services in an attractive manner. To AMAFI, the latter basically amounts to proper management.

Finally in the last sentence of § 35, the terms “firm’s policy” should be a plural (‘firm’s policies’) since most ISPs have a whole set of different policies.

Identification of the target market by the distributor: categories to be considered

Q6: Do you agree with the suggested guidance on the identification of the target market by the distributor? Please also state the reasons for your answer.

First of all, AMAFI considers that the scope of § 47 should be limited to situations where distributors have to define their target markets by themselves, when the products’ manufacturers are non-MiFID firms.
Differently, for products manufactured by MiFID firms, as clarified under § 46, the distributor is only expected to refine the manufacturer’s target market.

In addition, AMAFI is not in favor of clarifying, as stated under § 46, that distributors “should determine “*whether […] they need access to underlying assessments such as the outcomes of the manufacturer’s scenario and charging structure analyses*”, since those data are extremely sensitive, and manufacturers are therefore very reluctant to let such information out. However AMAFI acknowledges that distributors should be granted the possibility to reach out to manufacturers in case they need more explanations on performance or charging structures. However, manufacturers should be free to answer the way they deem most satisfactory. Therefore, to AMAFI, the 5th sentence of § 46 should be amended as follows: “*To ensure*

a proper scrutiny of such more complex products, distributors should also determine whether, next to the manufacturers' target market description, they need access to ***more information or explanation from*** *~~underlying assessments such as the outcomes of~~ the manufacturer~~'s~~* ***on the*** *scenario* ***calculation or on the*** *~~and~~ charging structure analyses".*

Finally, on § 47, AMAFI must reiterate the preceding comment made on § 26 on the clustering approach (see above answer to question 4): AMAFI is of the view that more flexibility should be left to ISPs to appreciate which criteria are relevant per product type and they should be free to determine, per product type, what should be the list of criteria to consider for the purpose of determining the relevant product governance clusters.

Distribution strategy of the distributor

Q7: Do you agree with the suggested approach on the determination of distribution strategy by the distributor? Please also state the reasons for your answer.

AMAFI has the following comments on the proposed amendment (including § 56 in the "identification and assessment of the target market by the distributor: interaction with investment services):

- §56 states that "*products should not be distributed under non-advised sales if the distributor cannot reasonably expect (i.e. ex ante) that the distribution strategy for the product (including its marketing and information strategy) will generally enable the product to reach the identified target market."* To AMAFI, this assumption de facto results in requiring firms to collect with their clients all the information required under the suitability regime, which they may not have collected if they provide only non-advised services. To AMAFI, such a requirement is too far reaching and goes beyond MiFIDII requirements: therefore, to AMAFI, **such sentence should be deleted.**
- § 59 requires ISPs to take additional measures when they intend to *distribute "more complex products"* under non advised services.
  To AMAFI, such a requirement is too far reaching and goes beyond L1 and L2 requirements. Moreover, its scope is not clearly defined (what exactly is meant by "more complex products"?).
  The proposal under the second bullet point to consider whether a product should be displayed in the client's choice environment or only if the client requests amounts to preventing clients from trading these products

Portfolio management, portfolio approach, hedging and diversification

Q8: Do you agree with the suggested approach on the deviation possibility for diversification or hedging purposes when providing investment advice under a portfolio approach of portfolio management? In particular, do you agree that a deviation from the target market categories "type of client" and "knowledge and experience" cannot be justified for diversification or hedging purposes, neither in the context of investment advice under a portfolio approach, nor portfolio management? Please also state the reasons for your answer.

In § 64, line 4, AMAFI suggests **replacing the terms "only" by "primarily"** for more consistency with the following guidelines that do not require an outright ban for sales outside the target market.

More importantly, AMAFI would look favorably on the fact that ESMA would reflect the clarifications brought under the suitability guidelines (second bullet point § 38 "*when portfolio management is to be provided, as investment decisions are to be made by the firm on behalf of the client, the level of knowledge and experience needed by the client with regard to all the financial instruments that can potentially make up the portfolio may be less detailed than the level that the client should have when an investment advice service is to be provided. Nevertheless, even in such situations, the client should at least understand the overall risks of the portfolio and possess a general understanding of the risks linked to each type of financial instrument that can be included in the portfolio. Firms should gain a very clear understanding and knowledge of the investment profile of the client),* that the level of knowledge and experience required from a client being provided a portfolio management service is not expected to be as extensive as the one

required from a client who makes his own investment decisions. Therefore a client with low experience and knowledge should be able to invest in relatively complex products through his portfolio manager taking the decision on his behalf. However, such products might have a target market which is limited to professional and or knowledgeable clients, which will trigger deviations from the target market in such case. Therefore, to us, the last sentence of § 64 should be amended as follows: "*a deviation from the product's target market categories "client type" and "clients' knowledge and experience" cannot be justified for diversification or hedging purposes,* ***but might be legitimate in case a portfolio manager would invest on behalf of his client".***

Regular review by the manufacturer and distributor to respectively assess whether products and services are reaching the target market

Q9: Do you agree with the suggested approach on the requirement to periodically review products, including the clarification of the proportionality principle? Please also state the reasons for your answer.

- For proportionality reasons, § 68 last sentence: the possibility offered not to conduct any regular review for simple products distributed under the execution only regime **should be extended to all situations where such products are distributed passively**. It is to us not proportionate for those products for which ISPs merely provides RTO or execution facilities, to require a thorough and frequent review process. Such requirement could also serve as an incentive for firms to distribute such products under the execution only regime, thus depriving clients from the protection afforded by the appropriateness regime. Therefore AMAFI suggests the following amendment: *"For example, for certain simpler products distributed under the execution-only or appropriateness regime, product reviews can be less frequent and require less depth, and ad-hoc reviews* ***can be sufficient****.*
- *-~~In~~ such cases, to a large extent****, such reviews could*** *be driven by client complaints and/or market events that significantly affect the product's risk-return profile".*
- §72: AMAFI disagrees with this paragraph for the same reasons as mentioned in our answer to Q7: again, AMAFI strongly opposes the attempt by ESMA to introduce suitability requirements in all circumstances. This would be inconsistent with level 1, as for now, MiFID II allows any financial product to be distributed under the appropriateness regime, without the ISP having to check the compatibility of the product's characteristics with the client's, after warning the client in case he or she does not have sufficient knowledge to understand the financial instrument he or she intends to invest in (or has decided not to provide information on his knowledge). In addition, gathering *"further information about their clients*" who have invested under the non-advised regime is likely to create confusion on the service provided, which is at odds with regulatory requirements. Therefore, to AMAFI, § 72 should be deleted.
- §73: AMAFI does not see any good reasons for which the developments under such § would not be extended to manufacturers. To us, manufacturers reviewing products pursuant to Article 9.14 of the Delegated Directive should also be granted the right to limit their review to products that are still offered, sold or recommended. Moreover, last sentence § 73 should in our view be deleted, since a recommendation to hold a product, while being **recommendation on such product,** cannot be viewed **as an offer, sale or recommendation of such product** which is the scope for applying product governance requirements. Therefore to us, such requirement runs contrary to L1 and L2 and **the last sentence of § 73 should be deleted.**

III. Guidelines on issues applicable to both manufacturers and distributors

Identification of the 'negative' target market and sales outside the positive target market

Q10: Do you agree with the suggested approach on the negative target market assessment in relation to a product with sustainability factors? Please also state the reasons for your answer.

AMAFI supports the clarification introduced by the Guidelines in §81 relating to the fact that " *for products which consider sustainability factors, the firm should always perform a negative target market assessment with respect to the five target market categories (client type, knowledge and experience, financial situation, risk tolerance and objectives and needs), but should not consider the sustainability-related objectives of the products*", as the drafting of the delegated directive was unclear. On the opposite, AMAFI is not supportive of the very restrictive drafting used at the end of the paragraph and considers that the terms "clients ***willing*** *(…) to lose their investment amount*" do not make any sense.

Application of the target market requirements to firms dealing in wholesale markets (i.e. with professional clients and eligible counterparties)

Q11: Do you agree with the suggested updates on the application of the product governance requirements in wholesale markets? Please also state the reasons for your answer.

AMAFI agrees with the clarifications brought.

IV. Good practices & Case study

Annex with good practices

Q12: Do you have any comment on the suggested list of good practices? Please also explain your answer.

The first comment AMAFI would have on the list of good and poor practices lies with the fact that their legal effect is unclear.
AMAFI even has doubt on the legal ground for issuing such good and poor practices that are not foreseen under amended Regulation 1095/2010 establishing the European Securities and Markets Authority.
Therefore, to AMAFI, such good and poor practices should be deleted or at a minimum their legal effect should be specified.

If such good and poor practices were nevertheless to be maintained, AMAFI would have the following detailed comments:

- Third good practice of the section "Target market assessment by the distributor" : such good practice should be deleted because agreements between manufacturers and distributors are required in y the Guidelines (§75), only in cases where manufacturers are not subject to MiFID II. Moreover, if such details were to be included in distribution agreements, this would require overly burdensome repapering.
- Second good practice of the section "distribution strategy-distributor" : it is unclear what the consequences of the suggested blocking mechanism are. If the consequence is to prevent the client from trading, this, to AMAFI goes too far since it is essential to preserve the possibility for clients to trade under their own responsibility on whatever financial product they may wish (as long as they have been provided with all the relevant information and warnings).

- First good practice of the section" timing and relationship with other product governance processes": it is unclear to AMAFI what type of improvements is expected from such good practice. In any case, to be relevant, more criteria should be added to the situation described. To AMAFI, ISPs, should legitimately be free to add any new product to their offer, as long as it is not unduly complex or charged and as long as it is marketed in an appropriate way. Additionally, some new products might have the same characteristics as existing ones in terms of level of costs, risks and complexity and still be of interest for clients either because of their financial characteristics (underlying, management strategy…) or their return expectations. Therefore, to AMAFI, such good practice should be deleted. In any case and at a minimum, it should be limited to active distribution because in other cases, clients make their own choice and take their own decision to trade.

Case study on options

Q13: Do you have any comment on the suggested case study on option? Please also explain your answer.

First of all, AMAFI is in favor of a clarification of the scope in terms of financial instruments: it should be made clear that the case study on option is not applicable to options wrapped in a securities format (*i.e.* a warrant call or put issued under a issuance program with an ISIN). The reason is that investing in such financial instruments can never lead to contingent losses because the investor can only have a long option position and cannot short (or write) a naked warrant. Therefore we deem useful to clarify that exchange listed securities (like warrants and turbos) are not in the scope of case study 6.

Secondly, to us, a difference should be made between buying or writing an option when opening a position or when unwinding a former position.

As a matter of fact, since options are contracts and not securities, a usual way to unwind an open optional position is to write or buy another option with opposite characteristics. However, the unwinding of a former position should not be captured by product governance rues since it does not result in any exposure for clients.

As concerns the section dealing with distribution strategy, AMAFI has the same comment as above: requiring additional measures that result in a suitability test in case of distribution of risky products via non advised services runs contrary to the distinction made under MiFID II between the two regimes. For the same reason, AMAFI does not agree either with the proposal to require the client's express consent or to provide specific target markets taking into account client's objectives. Nonetheless AMAFI would agree with the proposal made to assess client's specific knowledge of optional products.

Finally, and as previously stated under the general comments section, the table presented under page 56 is far too detailed in terms of the definitions provided for the different target markets' criteria and therefore is most unlikely to serve as a model in real life automated processes that must be standardized for comparability reasons.