ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS

FINANCIAL MARKET PROFESSIONALS

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ESMA CALL FOR EVIDENCE
THE EUROPEAN COMMISSION MANDATE ON CERTAIN ASPECTS RELATING TO RETAIL INVESTOR PROTECTION

AMAFI comments

INTRODUCTION

- **About AMAFI**

Association Française des Marchés Financiers **(AMAFI)** is the legal trade organisation representing financial market participants in France. AMAFI members are investment firms and credit institutions (French, European and global firms), operating in and/or from France (corporate and investment banks (CIBs), brokers-dealers, market-infrastructures, exchanges and private banks). AMAFI has been extremely active on MiFID II issues. We are involved in all regulatory matters that concern commercialization of financial instruments. As far as financial products are concerned, we mostly represent all issuers/manufacturers of products (CIBs) but, through our private bank members, distributors as well. AMAFI has more than 150 members operating in equities and fixed-income and interest rate products, as well as commodities, derivatives and structured products for both professional and retail clients.

RESPONSES TO ESMA QUESTIONS

I. Disclosures

Question 2: Are there any specific aspects of the existing MiFID II disclosure requirements which might confuse or hamper clients' decision-making or comparability between products? Are there also aspects of the MiFID II requirements that could be amended to facilitate comparability across firms and products while being drafted in a technology neutral way? Please provide details.

Yes.

Disclosure of costs is essential for investor protection purposes. However, this obligation did not take sufficient account the very heterogeneous nature of financial instruments, as outlined in our response to the EC consultation in 2020 (*AMAFI / 20-32*), its MiFID II revision position paper (*AMAFI / 21-35*) and our response to the EC consultation in 2021 (*AMAFI / 21-46*).

AMAFI believes that disclosure of costs and charges is absolutely essential for investor protection purposes. However, this obligation is difficult to implement given the complexity caused by the number of parameters to be taken into account in identifying the obligation applicable to each situation. It does not take sufficient account of the principle of proportionality underlying MiFID II and the very heterogeneous levels of complexity between the various financial instruments. Therefore, it seems appropriate to introduce greater proportionality in the implementation of these information obligations depending on the type of financial instruments and the complexity of the product.

Indeed, while providing information on a trade-by-trade basis seems relevant where the products is complex and the investor is a non-professional, it is disproportionate where the product is very simple, and the costs are substantially the same from one trade to another. To simplify further the regime and for retail investors' protection, AMAFI considers appropriate to amend Article 50 of the MiFID II Delegated Regulation (DR) 2017/565 to recognise in the Level 2 text the legitimacy of using tariff grids[1] for simple financial instruments (where it is not a packaged product within the meaning of the PRIIPs Regulation).

In addition, the current Article 50(10) of MiFID II DR 2017/565 requires ISPs to provide their clients with an illustration of the impact of aggregate costs on return. Experience shows that this concept (also used in the current PRIIPs KID) is not well understood by investors, especially retail investors. In line with the current European-wide discussions questioning the presentation of the effect of aggregate costs in PRIIPs KIDs, it seems opportune to remove this requirement from MiFID II, as it creates more confusion than transparency for retail investors.

Question 3: Are there specific aspects of existing MiFID II disclosure requirements that may cause information overload for clients or the provision of overly complex information? Please provide details.

Yes.

AMAFI considers that disclosure requirements in MiFID II regarding costs and charges are too complex and lead to an information overload for retail clients. Like said above, AMAFI would recommend simplifying further the regime and for retail investors' protection and amending Article 50 of the MiFID II DR to recognise in the Level 2 text the legitimacy of using tariff grids[2] for simple financial instruments (where it is not a packaged product within the meaning of the PRIIPs Regulation).

Furthermore, as it is currently drafted, Article 50 of the MiFID II DR is difficult to understand because of the need to link several regimes that cannot be superimposed: *ex-ante* information (total (i.e. both services and product costs, or only service costs), *ex-post* information and limited application. This means having to differentiate between nine situations, which seems difficult to implement and disproportionate given the objectives pursued. Therefore, it seems appropriate to simplify this system for both *ex-ante* and *ex-post* information.

Finally, the current Article 50(10) of MiFID II DR 2017/565 required ISPs to provide their clients with an illustration of the impact of aggregate costs on return. Experience shows that this concept (also used in the current PRIIPs KID) is not well understood by investors, especially retail investors.

Question 4: On the topic of disclosures, are there material differences, inconsistencies or overlaps between MiFID II and other consumer protection legislation that are detrimental to investors? Please provide details.

Yes, according to AMAFI.

- **On the way product cost information is calculated and presented**

AMAFI considers that the methodology used to present costs in PRIIPs KIDs should be changed to a Total Expense Ratio (TER) approach, which then enables the addition of services costs.

[1] This tariff grid should be broken down by asset class; the amounts shown in it may be fixed amounts or, where applicable, ranges or maximum amounts (provided that the latter reflect the economic reality of the costs as closely as possible). This grid, which must be sufficiently granular to reflect the activities of the ISP, must be communicated at the time of entering into the relationship or concluding the first transaction. It must be updated at least annually.
[2] See *Above*.

Indeed, the current PRIIPs KID methodology, which looks at the impact on yield (Reduction in Yield or RiY method) leads to inconsistencies, toughly understandable for retail investors, in the figures disclosed to investors in PRIIPs KIDs and the required disclosures under MiFID II. Accordingly, AMAFI believes that the methodology of calculating product costs using the RiY method is overly complex for retail investors.

AMAFI recognises that the RTS (*Delegated Regulation (EU) 2017/653*) as amended (Draft "RTS V2", cf. *Draft Final Report, JC 2020 66, P. 51 to 108*) will allow better harmonisation between the PRIIPs regime of costs presentation and the MiFID's one and thus will make it simpler and more understandable for retail investors. Indeed, the KID Costs table achieves this objective showing both raw cost in EUR and impact on annual return in % terms.

Nevertheless, AMAFI outlines that these RTS V2 raise very important issues related to autocallable products because a specific costs presentation for autocallable products contradicts the principle of comparability and non-annualization of costs impact below 1 year and leads to inconsistencies regarding MiFID II regime.

- **On the way risk information is calculated and presented**

In situations where both PRIIPs and MiFID II regimes apply, the practice shows that financial institutions use the PRIIPs SRI (*Summary risk indicator*) to comply with MiFID II. This is therefore consistent. Besides, this is actually the approach used in the EMT (*European MiFID Template* -drafted by FinDatEx) in order to define target markets (which is a MiFID II requirement).

Yet, AMAFI wishes to underline that, in theory, the MiFID II and PRIIPs risk information disclosures regimes are not in line. Indeed, while the calculation and presentation of risk information are prescribed in a very precise manner by PRIIPs, notably through the SRI, MiFID II provides for a general disclosure requirement on risk information.

- **On the way performance information is calculated and presented**

Presentation of performance in PRIIPs KID, now seems relatively well understood and adopted by distributors of products designed for retail investors. For regulatory and legal stability purposes, no substantial changes should be expected. With that in mind, AMAFI deeply regrets that RTS V2 changed performance methodologies for structured autocallable products in a way even less understandable for retail investors.

It could be noted however that MiFID II also requires information on product returns, not in a same perspective way than PRIIPs, and could raise some redundancies. There might be ways to simplify and rationalise better the regime in that perspective. For instance, it could be contemplating that where PRIIPs applies, all information about product performance is presumed to be provided through the PRIIPs KID and in compliance with MiFID II.

Besides, as mentioned above, this is actually the approach used in the EMT (*European MiFID Template* – drafted by FinDatEx) that relies on PRIIPs SRI in order to define target markets (which is a MiFID II requirement).

Question 5: What do you consider to be the vital information that a retail investor should receive before buying a financial instrument? Please provide details.

AMAFI believes that the following elements are the most essential to promote comparability considering retail investment products: products objectives/main product features information, costs information, capital protection information (for structured products), and risk information (e.g. SRI).

On that basis, AMAFI believes that retail investors are provided such information through the current regime.

Nevertheless, we would like to emphasise the existence of many ESG -related obligations. In the future, it will be necessary to ensure that the various texts (e.g., MiFID II, SFDR, Taxonomy)[3] lead to simple, consistent, and intelligible information for retail investors on that matter.

Question 6: Which are the practical lessons emerged from behavioural finance that should be taken into account by the Commission and/or ESMA when designing regulatory requirements on disclosures? Please provide details and practical examples.

AMAFI has not identified practical lessons from behavioural finance that should be taken into account by the Commission and/or ESMA.

We would like to bring to the attention of the Commission that conclusions from such studies on behavioural finance are generally ambiguous and therefore cannot justify by themselves a legislative or regulatory change. Any change of the regulatory framework should be subject to impact assessment and costs/benefits analysis as well as a genuine consultation process of all relevant stakeholders.

Question 7: Are there any challenges not adequately addressed by MiFID II on the topic of disclosures that impede clients from receiving adequate information on investment products and services before investing? Please provide details.

Yes.

Like said above, AMAFI would recommend simplifying further the regime and for retail investors' protection and amending Article 50 of the MiFID II DR to recognise in the Level 2 text the legitimacy of using tariff grids[4] for simple financial instruments (where it is not a packaged product within the meaning of the PRIIPs Regulation) and removing the requirement to provide an illustration of the impact of aggregate costs on return. Experience shows that this concept (also used in the current PRIIPs KID) is not well understood by investors, especially retail investors.

Question 8: In case of positive answer to one or more of the above questions, are there specific changes that should be made to the MiFID II disclosure rules to remedy the identified shortcomings? Please provide details.

Yes.

Like said above, AMAFI would recommend simplifying further the regime and for retail investors' protection and amending Article 50 of the MiFID II DR to recognise in the Level 2 text the legitimacy of using tariff grids for simple financial instruments (where it is not a packaged product within the meaning of the PRIIPs Regulation) and removing the requirement to provide an illustration of the impact of aggregate costs on return.

[3] See Answer n° 9 below.
[4] See *Above*.

Furthermore, the new article 29a as written in Directive (EU) 2021/338 amending "MiFID II" ("Quick Fix")[5] provides that the obligations regarding costs and associated charges laid down in point (c) of Article 24(4), "*shall not apply to services provided to professional clients except for investment advice and portfolio management.*" In accordance with Article 50 of MiFID II Delegated Regulation 2017/565, which governs information on costs and associated charges, communication on inducements paid or received[6] is a "*standard*" element of disclosures to clients on all costs and associated charges. This information on inducements will no longer need to be disclosed to professional clients and eligible counterparties under this new Article 29a(1) of MiFID II. However, Article 24(9) of MiFID II still requires the disclosure of such inducements under the client information regime provided for by MiFID II. For reasons of consistency, AMAFI proposes to amend Article 29a(1) to specify that information on inducements is required insofar as information on costs and charges is required. The disclosure of information on inducements to clients will in any event continue to apply under the conflicts of interest regime, as provided for in Article 23 of MiFID II, which has not been impacted by the Quick Fix (i.e. it has been kept unchanged to date).

Finally, Article 50 of MiFID II DR should be amended to take into account the exemptions granted by the Quick Fix on costs and charges disclosure for wholesale clients.

Question 9: On the topic of disclosures on sustainability risks and factors, do you see any critical issue emerging from the overlap of MiFID II with the Sustainable Finance Disclosure Regulation (SFDR)[7] and other legislation covering ESG matters?

AMAFI identified many issues in that matter.

(1) Timeline issues between MiFID and SFDR requirements

Certain disclosures brought about by the latest RTS of SFDR aim at having implications on the ESG related updates to the MiFID suitability assessment. Moreover, SFDR regime is not stabilized yet whereas MiFID II "ESG enhanced" is entering into application in August 2022. As some of the provisions of these RTS align with the concept of sustainability preferences, such as products that invest a minimum proportion in sustainable investments or taxonomy-aligned investment, an alignment of the application dates of MiFID II and the SFDR RTS would be beneficial to the FMPs (Financial Market Participants) in order to make legal frameworks fit together.

From a technical implementation standpoint, more specifically in exchange templates (namely EMT/EET), the significant overlap between MIFID II and SFDR induces a complex implementation associated with higher costs due to the multiplicity of expected template versions.

(2) Inconsistencies within concepts and definitions / lack of guidelines

Delegated Regulation (EU) 2021/1253 amending the MiFID II Delegated Regulation (EU) 2017/565 requires that firms providing financial advice assess the potential "sustainability preferences" of their clients, which leads to the following issues:

- On the one hand, the notion of "sustainability preference" uses the nomenclature of the Taxonomy Regulation by making reference to "sustainable investments" (Art. 2 (7) (a));
- On the other hand, by making reference to "sustainable investment" as defined by SFDR Regulation (Art. 2 (7) (b));

[5] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (Text with EEA relevance) "Quik Fix".
[6] See MiFID II, Article 24(9). "*Inducements*" means any fee or commission paid or received, or any non-monetary benefit provided or received by an investment firm in connection with the provision of an investment service or an ancillary service, to or by any party, except the client or the person acting on behalf of the client.
[7] Regulation (EU) 2019/2088.

- But also referring to "principle adverse impacts" (PAI) as mentioned in SFDR (?) but as another MiFID II ESG category (Art. 2 (7) (c)).

Hence, the ESG categorization of products by SFDR (articles 6, 8 and 9) does not correspond to the ESG categorization of clients as per MiFID II.

Worse, such classification of ESG preferences in MiFID II are considered as overly complex and highly difficult to explain to retail investors. It should be outlined that retail investors do not know and cannot understand Taxonomy and SFDR concepts or definitions like, and for example, "PAI". Firms should be able to "translate" in a more simple and understandable way those categories.

Lastly, the scope of financial products is not aligned between MiFID II (that covers all financial instruments) and SFDR (financial products). Therefore, manufacturers of non-SFDR-products (being nevertheless financial instruments) might be obliged *de facto* to comply with the disclosure obligations under SFDR if they want their product to be eligible for the ESG suitability test under MiFID II.

To conclude, many questions are yet to be answered and further explained on those ESG issues. AMAFI believes that Guidelines should be issued to help firms understand, articulate, and implement those requirements.

(3) National Goldplating

On top of those issues, some NCAs issued national doctrines that create additional requirements in that matter. Such national requirements create goldplating (which is an issue in itself). But it also further complicates the task of ISPs to articulate and comply with all ESG requirements. For instance in France, AMF published a national framework for marketing documentation and commercialization of ESG financial products (Position AMF 2020-03) with its own ESG classification. It would be more efficient to address on a European Level the question of marketing ESG features and risk of greenwashing if needed be.

Indeed, in the future, it would be certainly relevant for retail investors to develop a robust understanding of their investments' ESG features through unambiguous information (see answer to Question 5).

Question 10: Are there any other aspects of the MiFID II disclosure requirements and their interactions with other investor protection legislations that you think could be improved or where any specific action from the Commission and/or ESMA is needed?

On disclosure requirements regarding the expected returns under different market conditions, such requirement is relevant for investment products only and should be exclusively within PRIIPs scope.

Moreover, it seems inappropriate to import PRIIPs costs methodology into MiFID II to calculate the costs of all financial instruments. Indeed, while it seems consistent to allow ISPs to use the costs information contained in the PRIIPs KIDs to disclose the product costs information required under MiFID II where the product is within the scope of PRIIPs (i.e. packaged products made available to retail investors), it does not seem acceptable to require ISPs to use the costs methodology set out in the PRIIPs regulations when the transaction is out of scope. MiFID II must not bring into the scope of PRIIPs products and/or transaction that were not initially included in it.

Question 11: Do you have any empirical data or insights based on actual consumers usage and engagement with existing MiFID II disclosure that you would like to share? This can be based on e.g., consumer research, randomized controlled trials and/or website analytics.

AMAFI does not have any empirical data or insights based on actual consumers sage and engagement with existing MiFID II disclosure.

II. Digital tools and channels

- **Robo-advisers**

Question 17: To financial firms: Do you observe increased interest from retail investors to receive investment advice through semi-automated means, e.g., robo-advice? If yes, what automated advice tools are most popular? Please share any available statistics, data, or other evidence on the size of the market for automated advice.

We would like to underline that not all online communication tools are robo-advisers (e.g. information collecting via the Internet, Internet catalogues). Thus, an increasing use of electronic communication tools does not mean an increasing use of robo-advisors.

In or view, the increasing of robo-advisors demonstrated that it can be sources of opportunities for retail investors but it probably, at this stage, cannot fully replace human advisors but can be complementary to one another.

Question 18: Do you consider there are barriers preventing from offering/developing automated financial advice tools in the securities sectors? If so, which barriers?

No, AMAFI does not believe that there are unnecessary barriers hindering the take-up of robo-advice. Moreover, such barriers do not correspond to an economic reality and are not a regulatory issue.

However, we believe that the development of robo-advisors is not technologically easy and that investors may still be reluctant to be in a fully electronic model.

Question 19: Do you consider there are barriers for (potential) clients to start investing via semi-automated means like robo-advice caused by the current legal framework? If so, please explain and outline what you consider to be a good solution to overcome these barriers.

Like said above, in or view, the increasing of robo-advisors demonstrated that it can be sources of opportunities for retail investors but it probably, at this stage, cannot fully replace human advisors but be complementary to one another. We would like to underline that not all online communication tools are robo-advisers (e.g. information collecting via the Internet, Internet catalogues). Thus, an increasing use of electronic communication tools does not mean an increasing use of robo-advisors. However, we believe that the development of robo-advisors is not technologically simple and that investors may still be reluctant to be in a fully electronic model.

AMAFI does not believe that there are unnecessary barriers hindering the take-up of robo-advice. Moreover, if such barriers exist, it might be a technological one but not a regulatory issue in our view.

Question 20: In case of the existence of the above-mentioned barriers, do you have evidence of the impact that they have on potential clients who are interested in semi-automated means? For instance, do the invest via more traditional concepts or do they not invest at all?

Like said above, in or view, the increasing of robo-advisors demonstrated that it can be sources of opportunities for retail investors but it probably, at this stage, cannot fully replace human advisors but be complementary to one another. We believe that the development of robo-advisors is technologically challenging and that investors may still be reluctant to be in a fully electronic model.

AMAFI does not believe that there are unnecessary barriers hindering the take-up of robo-advice. Moreover, if such barriers exist, it might be a technological one (and/or a lack of demand for fully digital advice) but not a regulatory issue in our view.

Question 21: Do you consider the potential risks and opportunities to investors set out above to be accurate? If not, please explain why and set out any additional risk and opportunities for investors.

Question 22: Do you consider that the existing MiFID regulatory framework continues to be appropriate with regard to robo-advisers or do you believe that changed should be added to the framework? If so, please explain which ones and why.

AMAFI believes that regulation should be technology neutral and should not lead to the creation of a specific regime for robo-advisors. The current MiFID II regime should be sufficiently robust to protect retail investors and therefore no reform of the regulation of advisory services is needed according to AMAFI.