ESMA CONSULTATION PAPER ON GUIDELINES RELATING TO CERTAIN ASPECTS OF THE MiFID SUITABILITY REQUIREMENTS (ESMA CP Nr 35-43-2998)

EUSIPA response

On EUSIPA: The European Structured Investment Products Association (EUSIPA) was founded in 2009 by the main trade bodies that at the time represented already the interests of structured product issuers in Europe's leading markets. Currently EUSIPA's full members are the national issuer associations from Austria, France, Germany, Italy, Sweden, Belgium, UK, Switzerland, The Netherlands and Luxembourg. EUSIPA is an international non-profit association registered under Belgian law and listed in the EU transparency register under number 37488345650-13. Our **contact details** can be found at the last page.

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

Reply EUSIPA:

EUSIPA, the European umbrella association bundling the voice of the structured investment products issuers in the EU, the UK and Switzerland to retail and institutional investors, greatly welcomes any guidance aiming at the clarification of how ESG aspects related to financial products are to be considered at the point of sale, both by way of the amended Delegated Act 2017/565 (DA) and the corresponding ESMA draft guidelines consulted here.

Having a solid framework for the identification of customer needs and their subsequent match with the available product offering is absolutely instrumental for the financial sector to successfully take its role in the transformation of the economy towards a more sustainable future.

However, as is demonstrated by the slow albeit steady inclusion of ESG aspects into the financial product landscape over the past decades, this transformation is bound to proceed on an incremental basis. While law-making institutions and regulatory rule-setters may legitimately seek to ever extend the reach and scope of the rules relevant for promoting ESG aspects, a balance always has to be struck as for matching the legislative/regulatory ambition with the (existing or realistically attainable) level of understanding of the encompassing technicalities and mechanisms at the end of affected individuals and entities.

EUSIPA wishes to draw the attention to the challenges posed by in practice, especially with a view to retail markets where it is of utmost importance to:

- Properly consider the very different levels of ESG-related knowledge of individual investors as are existing in reality,

- Correctly grasp the potentially very specific ESG-investment purposes followed by individual investors (for example such relating to specific PAIs but excluding certain taxonomy elements), as well as to
- Finally enable the advice-seeking investor, in a second step, to correctly understand what ESG promoting effect/impact specific products that seem to match the identified sustainability preferences, actually do offer (and what not).

EUSIPA finally wishes to insist on that it must be allowed to financial intermediaries to draw the attention of the customer to the fact that the more ambitious they set their selection criteria for sustainable-related features of financial products the less available products there will be. Ideally that aspect should be integrated into the guidelines.

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

Reply EUSIPA:

EUSIPA fundamentally agrees with the guideline in relation to the (provision of) information to clients on the concept of sustainability preference.

EUSIPA wishes to mark-up though that it should not be overlooked that identifying suitable investment solutions at the retail end must not be limited to one aspect of the suitability assessment, only. ESG characteristics as important as they are, strictly stand next to other aspects relevant for defining the range of the permissible choice of products for an investor, most notably market risk/profitability aspects of the envisaged investment solutions. The (unbiased) integration of these aspects into the advisory conversation hence needs to be ensured, also by not unduly focusing on the ESG side of the suitability assessment.

Q3. Do you agree with the suggested approach on the arrangements necessary to understand clients and specifically with how the guideline has been updated to take into account of the clients' sustainability preferences?

Reply EUSIPA:

While EUSIPA strongly supports, as set out above, the purpose of the Delegated Act and the ESMA guidelines namely to ensure that ESG investment decisions are made within the target market of specific financial products/instruments, numerous challenges remain when picturing the specific implementation of the DA with its dedicated concepts set out under the rules 7a-7c in practice. We wish to draw attention to two such aspects:

- 7a, 7b (no distinction between E, S and G)

EUSIPA is convinced that the collection of information on the customers sustainability preferences should not foresee a distinguished probing as for whether the preferences relate to environmental, social or governance aspects or a mixture of these. Not only are customers very likely lacking the detailed understanding of the EU taxonomy's scope (governance aspects, for example, are currently not yet part of it) and its single categories necessary to provide an answer. Ultimately such probing might lead to a situation where unrealistic expectations in terms of the available product landscape are created which then cannot be met running the danger to frustrate customers and impede the attractiveness of retail markets in ESG products. Furthermore, legal reasons also speak against such probing seeking to distinguish between E, S and G preferences as the references made in the DA, especially in 7b are kept deliberately on the level of "sustainability" without further taxonomy-specific distinctions.
EUSIPA consequently would argue to amend the draft guidelines in that regard (paragraph 26, 3rd bullet).

- 7c (Principal Adverse Impact indicators)

EUSIPA is convinced that the concept of "principal adverse impacts on sustainability factors" as well as "quantitative or qualitative elements demonstrating that consideration" are extremely challenging for retail investors to understand, in particular when PAI considerations stand next to aspects related to taxonomy eligibility or SFDR alignment.

The difficulties are rooted in the fact that the consideration of the PAIs at product level is not clearly defined in existing legal frameworks such as the SFDR, Taxonomy Regulation or MIFID. Conceptually, PAIs have initially been set up to allow a verification of specific ESG aspects from an entity- (ESG) reporting level point of view.
This will, as can be judged by the DA's mentioning of an optional quantitative evaluation of PAIs, in the foreseeable future go beyond their qualitative *prima facie* consideration (read: mere textual integration in the ESG policies of a corporate or financial institution). It might entail an evaluation of how far the business activity of a given corporate/financial institution actually has a measurable size and/or a measurable impact in terms of showing results (with regard to the specific PAI). Any such quantification of PAIs, the possibility of which is explicitly mentioned in the DA, however, currently lacks a standardized approach, be it of a regulatory kind or in market practice terms.

Furthermore, EUSIPA would argue against the integration of additional qualitative criteria for assessing PAIs. Not only are such criteria not covered by the Delegated Act, but their introduction actually runs counter to the idea of allowing to resort to a "qualitative or quantitative" assessment. Additional qualitative criteria also further burden the selection process of ESG products, thus leading potentially to an even further diminishment in the already stretched offer landscape.

EUSIPA would consequently ask for a deletion of the relevant wording in the draft guidelines (paragraph 26, bullet 4, last paragraph).
In order to facilitate the consideration of PAIs on product level, EUSIPA would also support the idea of meaningfully clustering (read forming families/groups of) PAIs, as also suggested by ESMA, in a way that makes them easier to understand and apply by retail investors.

Q 11. Do you agree with the approach outlined with regards to the situation where the firm can recommend a product that does not meet the client's preferences once the client has adapted such preferences? Do you believe that the guideline should be more detailed? Please also state the reasons for your answer.

Reply EUSIPA:
EUSIPA makes reference to the statements given above in response to question 3, in particular.
EUSIPA disagrees with the proposed approach (guideline 8, paragraph 81) insofar as a distinction is being made between sustainability preferences related to an investment advice and the customer sustainability profile in general. As it does no seem adequate to distinguish between two sorts of sustainability preferences at this point, any deviation from the profile due to an investment advice should also be updated in the customer profile, which is line with the broader idea that sustainability preferences are anyhow adaptable customer features and (foreseeably) subject to change.

More generally, EUSIPA would plead for a careful implementation of rules addressing the adaptation of customer preferences. Such adaptations are likely to occur on a frequent basis in particular in the early phase of the introduction of the new rules, given that the learning curve of investors on the one hand and a limited product offering on the other will almost necessarily lead rather often to revised sustainability preferences.

Question 12: Do you agree with the approach outlined with regards to the situation where the client makes use of the possibility to adapt the sustainability preferences?

EUSIPA makes reference to the answer provided to question 11, above.

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Contact details:

Mr Thomas Wulf, Secretary General
European Structured Investment Products Association (EUSIPA) | aisbl-ivzw
Rond Point Schuman 2-4 | Level 6 | B-1040 Brussels
Phone +32(0) 2550 3415 | Mobile +32(0) 475 25 15 99
Website www.eusipa.org.

EUSIPA is listed in the transparency register of the EU under number 37488345650-13.