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Sustainability requirements in the distribution of financial instruments: update on upcoming legislation and its implementation dates

On 2 August 2022, Delegated Regulation (EU) 2021/1253 comes into force, amending the MiFID II framework by introducing sustainability preferences. Further legislation will subsequently come into force, affecting not only investment services providers (ISPs) from 22 November 2022, but also financial investment advisers (FIAs) from 1 January 2023.

Amendment of MiFID II delegated acts for ISPs

Following the publication of its action plan on Financing Sustainable Growth, which aims to redirect capital flows towards sustainable investments, the European Commission adopted two regulations on 21 April 2021 relating to the distribution of financial instruments:

- Delegated Regulation (EU) 2021/1253 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms. In particular, it includes client sustainability preferences as part of (i) the identification of the types of conflicts of interest that may arise in the course of providing investment services and (ii) the suitability requirements for the financial instrument or service when providing investment advice or portfolio management services on behalf of third parties. This Delegated Regulation will apply directly to ISPs providing investment services from 2 August 2022;

- Delegated Directive (EU) 2021/1269, which adds sustainability factors and sustainability objectives to the considerations relating to product governance requirements. The directive, which applies to ISPs providing investment services, must be transposed into French law by 21 August 2022 for the new provisions to come into force on 22 November 2022. This was the purpose of the public consultation launched by the AMF on 4 May 2022 and completed on 3 June 2022. This process is expected to culminate shortly in the approval of amendments to the AMF General Regulation by an order of the Minister for the Economy.

Changes to the framework applicable to FIAs

FIAs are subject to a French regime that derogates from MiFID II, but they apply certain rules analogous to those applicable to ISPs. During the public consultation launched on 4 May, the AMF proposed that sustainability requirements be applied to FIAs when:

- assessing the suitability of the advice they provide to their clients;
- identifying the types of conflicts of interest that may arise;
- implementing product governance.

Based on the responses to the public consultation, the AMF proposed that the new requirements for FIAs come into force on 1 January 2023. The amendments to the FIA regime are subject to approval by order of the Minister for the Economy.

ESMA's forthcoming guidelines

ESMA held a public consultation between 27 January and 27 April 2022 on the review of its guidelines on suitability assessment requirements to reflect the amendments to the above-mentioned Delegated Regulation (EU) 2021/1253 and include good and bad practices that emerged from the common supervisory action (CSA) conducted in 2020.

In addition, ESMA launched a public consultation on 8 July 2022 on the review of its guidelines on product governance requirements to reflect the changes in the above-mentioned Delegated Directive (EU) 2021/1269. The AMF encourages the various stakeholders affected by these provisions to contribute to this consultation so that the proposed wording of the revised guidelines accommodates their operational perspectives to ensure they can be implemented properly. Contributions can be sent to ESMA until 7 October 2022. ESMA plans to publish its final report and the revised guidelines in the first quarter of 2023.

Once these two sets of guidelines have been published in their revised versions in all European Union languages, the AMF will have two months in which to inform ESMA whether it complies with them.

Read more

Commission Delegated Regulation (EU) 2021/1253 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms

Commission Delegated Directive (EU) 2021/1269 of 21 April 2021 amending Delegated Directive (EU) 2017/593 as regards the integration of sustainability factors into product governance obligations

Public consultation on the amendments to the AMF General Regulation relating to sustainability (in french only)

Consultation on review of the guidelines on Mifid ii product governance requirements

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Head of publications: The Executive Director of AMF Communication Directorate. Contact: Communication Directorate – Autorité des marchés financiers 17 place de la Bourse – 75082 Paris cedex 02