

Marisa Delgado, Jon Marina

## Green MiFID and Sustainable Finance. New CNMV criteria and clarifications

### 1. Introduction

In August 2021, a significant regulatory development in the area of sustainability for investment firms took place: the adoption on 2 August of the Delegated Regulation (EU) 2021/1253 of the Commission of 21 April 2021, amending the Delegated Regulation (EU) 2017/565 of the Commission of 25 April 2016 regarding the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions of investment firms (“**Green MiFID II**”), and which will be applicable as of 2 August 2022.

The main new feature introduced by Green MiFID II is the obligation for institutions to integrate client sustainability preferences into the client suitability assessment process when providing investment advice or discretionary portfolio management. In other words, the client suitability assessment, which seeks to recommend or integrate into clients’ portfolios suitable financial instruments tailored to their investment objectives, financial situation and knowledge and experience, must now also take into account the client’s sustainability preferences. Such preferences, if any, will further narrow the range of financial products eligible for the provision of advisory or portfolio management services.

Given the magnitude of the impact of Green MiFID II and the practical difficulties and uncertainties about what new content to include in client suitability assessments, the European Securities and Markets Authority (“**ESMA**”) is revising its 2018 ESMA Guidelines on the client suitability assessment<sup>1</sup>. As a result of this work, on 27 January, ESMA published draft Guidelines<sup>2</sup>, which have been the subject of public consultation between February and April this year (the “**Draft Guidelines**”). However, the Final Report of the Guidelines is still awaiting publication and is not expected to be published until at least autumn 2022, after which it will be translated. It will enter into force six months after the publication of its translation into the official languages of the European Union.

As a result, investment firms do not yet have clear guidance on how to incorporate client sustainability preferences into the suitability assessment process.

### 2. CNMV statement of 18 July 2022

Because of this uncertainty, the National Securities Market Commission (“**CNMV**”) has published a statement<sup>3</sup> setting out its position on the implementation of Green MiFID II and how institutions should proceed in terms of integrating sustainability factors, risks and preferences. In the statement,

<sup>1</sup> Final Report Guidelines on certain aspects of the MiFID II suitability requirements ([link](#)).

<sup>2</sup> Consultation Paper - Guidelines on certain aspects of the MiFID II suitability requirements ([link](#)).

<sup>3</sup> Communication on the forthcoming implementation of the amendment of Delegated Regulation 2017/565 as regards the consideration of clients’ sustainability preferences in the suitability assessment ([link](#)).

the CNMV also sets out the essential features of Green MiFID II and provides a practical description of the status of the regulation and the Draft Guidelines. In particular, the CNMV:

- (i) Confirms that the measures will apply from 2 August 2022, so institutions must have adapted their systems and processes by that date.
- (ii) Clarifies that the new questions for the identification of clients' sustainability preferences should be included in the assessments of new clients or when renewing the suitability assessment. In other words, a general update of the assessments carried out to date will not be necessary, except for those clients who request it.
- (iii) Intends to incorporate ESMA's Final Report on the Guidelines into its supervisory procedures.
- (iv) Recommends, until then, that investment firms refer to the content of the Draft Guidelines, while noting that the content of the Draft Guidelines may change with regard to their final version.
- (v) Stresses the importance of adequate training of institutions' staff regarding these new obligations.

### **3. Draft guidelines**

---

In view of the CNMV's statement, investment firms must have a clear understanding of the content of the Draft Guidelines to be able to navigate the period between 2 August and the publication of ESMA's Final Report on the Guidelines with as little regulatory risk as possible.

For a proper understanding of the Draft Guidelines, it should be noted that Green MiFID II has introduced a definition of the concept of "sustainability preferences" that investment firms should take into account when collecting information (the "**Definition**"), meaning the decision of a client or potential client on whether, and to what extent, to integrate one or more of the following financial instruments into their investment:

- (a) a financial instrument in relation to which the client or potential client decides that a minimum proportion is to be invested in environmentally sustainable investments as defined in Article 2(1) of Regulation (EU) 2020/852 of the European Parliament and of the Council;
- (b) a financial instrument in relation to which the client or potential client decides that a minimum proportion is to be invested in sustainable investments as defined in Article 2(17) of Regulation (EU) 2019/2088 of the European Parliament and of the Council;
- (c) a financial instrument that takes into account the main adverse impacts on sustainability factors, with the client or potential client determining the qualitative or quantitative elements that demonstrate such consideration.

The Definition seeks to ensure the eligibility of all financial instruments with sustainability-related features for clients expressing their preferences, taking into consideration the differences at the financial product regulatory level between MiFID II, SFDR and the Taxonomy Regulation.

Taking into account the Definition, the main new features introduced by the Draft Guidelines are listed below.

- (i) ESMA notes that the assessment of sustainability preferences should in any case be carried out after assessing the client's knowledge, experience, financial circumstances and investment objectives. Once a range of products that is suitable for the client has been identified, based on these factors, the client's sustainability preferences will be identified.

- (ii) In the event that none of the available instruments matches what is declared, clients may at any time adapt their sustainability preferences.
- (iii) Investment firms should provide the client with an understanding of the concept of “sustainability preferences”, the product classes included under that definition and their possible choices, to enable the client to make an informed self-assessment in this regard.
- (iv) When obtaining information on sustainability preferences from their clients, investment firms should ensure that they collect the following information in an unbiased and uninfluenced manner:
  - (a) If the client has sustainability preferences (yes/no). If the client responds in the negative, he/she will be considered “sustainability neutral” and any product can be recommended to him/her, provided it meets his/her suitability profile.
  - (b) If the client’s sustainability preferences are in relation to (a), (b) or (c) (or possible combinations thereof) of the Definition, and if so, in what proportion.
  - (c) In relation to (a) and (b) of the Definition, the client shall determine the lowest proportion of his/her sustainability preferences. Namely, the minimum proportion of the financial instrument to be invested in environmentally sustainable investments (Article 2(1). Taxonomy Regulation) or sustainable (Article 2.17. of SFDR).
  - (d) In relation to paragraph (c) of the Definition, which are the main adverse effects to be considered in relation to these criteria (including qualitative and quantitative data).
- (v) To facilitate the achievement of the contents of point (iv) above, the Draft Guidelines set out a 6-step roadmap that consists of:
  - (a) Gathering information on the degree of sustainability-related expectations that the client has in relation to one or more of the items of the Green MiFID II Definition. In doing so, firms can confirm whether clients’ preferences relate to one or more of the items in the Definition by using binary (yes or no) questions.
 

In addition, firms could ask, in this first step, the proportion of instruments aligned with items (a) to (c) of the Definition they wish to include in their investment or portfolio.
  - (b) Firms could, as a second step, collect information on whether the client’s sustainability preferences with respect to (b) and (c) of the Definition, if any, focus on environmental, social or governance criteria, or a combination of these.
  - (c) Investment firms may then seek information on the smallest proportion of assets with a sustainable focus, under points (a) and (b) of the Definition, which the client wishes to hold in their portfolio or in relation to which he/she wishes to be advised.
  - (d) Fourth, if the client wishes to introduce a financial instrument into the service that takes into account the main adverse effects (in accordance with point (c) of the Definition), the information collected should include qualitative and quantitative data.

In this regard, firms can assess client preferences and interest in integrating key adverse effects into their preferences using the categories presented in Annex I to the SFDR<sup>4</sup> RTS (rather than an approach based on each of the key adverse effects indicators), such as emissions, energy efficiency, water and waste, etc.

A qualitative assessment could then be initiated to determine which categories are essential for the client. This may be based on the criteria against which the financial instruments assess the main adverse effects (e.g. exclusion strategies or voting policies).

- (e) As a fifth step, investment firms should have procedures in place for cases where the client states that he/she has sustainability preferences, but does not expressly align themselves with any of the points (a) to (c) of the Definition. ESMA proposes that the firm, after informing the client, should select any of the types, but without including a minimum proportion for the suitability assessment.
- (f) Finally, firms should ensure that information regarding sustainability preferences is collected with the same level of detail when providing portfolio management or investment advice at the portfolio level.

Preferences must be sought in relation to the entire portfolio while retaining the option of receiving instructions relating to individual financial instruments. To this end, investment firms could ask clients what proportion of the portfolio, if any, they would like to see allocated to financial instruments with sustainability features.

- (vi) The obligation to include information on client sustainability preferences in the next renewal of their assessment and suitability, for existing relationships, or in the first client meeting or investment advice after 2 August, is confirmed.
- (vii) The Draft Guidelines also include the obligation for investment firms to ensure that their employees and those providing advisory and/or portfolio management services on their behalf have the necessary expertise to adequately assess the sustainability factors of the instruments they recommend or in which they invest on behalf of clients (in compliance with Article 25.1 of MiFID II). Such knowledge must also be sufficient to explain these factors to clients in a clear and understandable way, using non-technical terms.
- (viii) Finally, ESMA confirms that investment firms should keep records of client sustainability preferences.

#### **4. More developments related to sustainability - CNMV Q&A**

---

Furthermore, on 20 July, the CNMV published an update of the “[Questions and Answers on the sustainability regulation applicable to financial products: Regulation 2019/2088 \(SFDR\) and Regulation 2020/852 \(taxonomy\)](#)”.

The main new features and criteria introduced to promote the integration of sustainability risks by fund managers include the following:

---

<sup>4</sup> Commission Delegated Regulation (EU) XX/XX. of 6.4.2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of ‘do no significant harm’, specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports ([link](#)).

- (i) The CNMV confirms that the SFDR obligations apply to all closed-end collective investment vehicles (Law 22/2014), and not only to those with an open-ended marketing or investment period.
- (ii) The CNMV establishes a series of guidelines on the use of ESG expressions or elements in the commercial name of financial products, as well as general limitations on commercial communications. We highlight the following:
  - Terms such as “impact” or “impact investments” should only be used by funds whose investments are made with the intention of generating a positive and measurable social or environmental impact.
  - Other terms such as “ESG”, “ASG”, “green”, “social”, “ethical” or similar may only be included if duly justified and can be proven to be consistent with the fund’s investment characteristics and policy.
  - Terms such as “sustainable” and “sustainability” should only be used in the naming of those investment funds under Art. 9 of SFDR (Art. 5 of the Taxonomy Regulation) and Art. 8 (Art. 6 of the Taxonomy Regulation) that have sustainable investments.
- (iii) The CNMV points out that only those expenses listed in the prospectus that correspond to services effectively provided to the fund, that are essential for the normal performance of the activity, and that do not represent an additional cost with respect to the remuneration charged by the fund manager or depositary in their respective fees, may be charged to the investment funds.

Regarding the costs of sustainability analysis, the CNMV considers that these can be charged to the investment fund as long as they are disclosed in the prospectus and provide meaningful insights which are not self-evident. Under these requirements, they could be considered comparable to financial analysis expenses.

- (iv) The CNMV confirms that entities providing investment advice, exclusively on products not covered by Article 2.12 of SFDR, will also be affected by the transparency obligations of SFDR: as the provision of investment advice is not restricted to such products, neither should the transparency obligations of SFDR.
- (v) The CNMV specifies that pre-contractual information on the integration of sustainability risks (Article 6.2 of SFDR) must be provided to clients to whom the advisory service is already being provided, when recommendations are made as of 10 March 2021. However, the entity-level information referred to in Articles 3.2, 4.5 and 5 of the SFDR must be available on the entity’s website from 10 March 2021.
- (vi) The CNMV has set 2 August 2022 as the date of application of level two of the UCITS<sup>5</sup> and AIFMD<sup>6</sup> Directives.

Regarding the AIFMD, its level two<sup>7</sup> is directly applicable, however, in the case of level two of UCITS (the Delegated Directive (EU) 2021/1270), if it has not been transposed into national legislation by that date, the CNMV considers that the direct effect that European Directives may have in certain cases may be invoked in accordance with the case law of the Court of Justice of the European Union.

---

<sup>5</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

<sup>6</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

<sup>7</sup> Commission Delegated Regulation (EU) 2021/1255 of 21 April 2021.

Therefore, from 2 August onwards, in addition to financial risks, all collective investment undertakings will have to integrate sustainability risk into their investment decision-making policies and procedures, due diligence, risk management policies and procedures, as well as the overall governance structure. The CNMV adds that, to this end, management companies must have staff with the necessary capacity and expertise to analyse and manage these risks.

## CONTACTS



**Josefina García Pedroviejo**  
Partner, Financial Services and  
Investment Funds  
[jgarcia@perezllorca.com](mailto:jgarcia@perezllorca.com)  
T. +34 91 389 01 09

[www.perezllorca.com](http://www.perezllorca.com) | Madrid | Barcelona | London | New York | Brussels

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice.  
This document was prepared on 27 July 2022 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.