

CONSUULTATION AFG'S. RESPONSE

**Guidelines ESMA
On Crossborder
Marketing**
AFG's response

February 8, 2021

Q1 : In light of the fact that the Guidelines should apply to all marketing communications relating to investment funds and that distribution of funds is often carried out by distributors, the requirements set out in the Guidelines were inspired by those set out in Article 44 of the Commission Delegated Regulation (EU) 2017/565. Against this background, please specify whether:

- a) You agree that the requirements set out in the Guidelines are in line with those set out in the provisions of Article 44 of the Commission Delegated Regulation (EU) 2017/565;**
- b) You see any gap between the guidance provided under the Guidelines proposed in this consultation paper and the rules applying under the provisions of the aforementioned Article. If so, please justify the reasons and specify which gaps you have identified, including if you consider that the guidance provided under the proposed Guidelines is more comprehensive than the rules applying under the provisions of the aforementioned Article; and**
- c) Any requirements of the proposed Guidelines should be further aligned with the provisions of the aforementioned Article.**

<ESMA_QUESTION_CPMC_1>

IMPORTANT: Before answering this question, we would like to inform you that AFG's proposed changes to the draft guidelines are included in an additional document sent with this response form.

We partially agree, a clarification must be made in the responsibilities incumbent on fund distributor and on management company. Regarding the management company, its own responsibility must be limited to the one given through the license it received, in the limits of the scope of activities it received a license for. On their side, fund distributors must bear their own responsibilities as defined and given through their own licensing.

Indeed, you want the guidelines to be as close as possible to article 44 of the Commission Delegated regulation (EU) 2017/565. However, in this article, in paragraph 1, it is clearly stated that investment firms *“shall ensure that all information they address to, or disseminate in such a way that it is likely to be received by, retail or professional clients or potential retail or professional clients, including marketing communications, satisfies the conditions laid down in paragraphs 2 to 8.”* Investment firms are therefore not responsible for the marketing documents produced by their distributors. Consequently, why do you want to make the management companies responsible for these documents?

The management company cannot be responsible for the distributor's marketing documents. This topic has been put on the table with the AIFM Directive. Some interpretations of the Directive would suggest that marketing is an activity incumbent on the management company, an activity that the management company delegates to its distributors for which it would be responsible. However, this is not the case.

On the spirit of the Directive, in Recital 30 of the AIFM Directive, the legislator

suggests that the management company must be responsible for the delegation of a function incumbent on her. Then in Recital 31 of the Directive, the legislator suggests that the limitations and requirements of the delegation regime should only apply to the management functions referred to in Annex I of the Directive. This articulation between the two recitals is logical. Indeed, the management company is only responsible for the management functions. The other activities are only complementary and optional. It is therefore logical that Recital 31 limits the delegation regime to the mandatory functions from the management company.

On the letter of the Directive, the Article 20 of the AIFM Directive governs the delegations to third parties. This article covers all the functions of Annex 1 that the company may delegate, at the same time the management functions and the additional functions. In consequence, this Article 20 goes further than what is announced in Recitals 30 and 31.

However, Article 20 of the Directive includes a fundamental clarification. It specifies that delegations are only regulated when managers plan to delegate to third parties the execution of functions on their behalf.

Marketing is therefore only concerned by this regulation if the third-party markets on behalf of the management company (e.g. a sales representative acting on behalf of a management company).

But a distributor (Investment advisor, Investment firm ...) will act on its own behalf and not on behalf of the management company because it acts at the request of its own clients. In consequence, the distributor does not act in delegation and the management company cannot be responsible of its actions. Plus, in France, for example, making the management company responsible for acts committed by third parties would be legally delicate. Indeed, it would require the adoption of a law rule to create a third party responsibility regime.

Moreover, there is an increase of clean shares in the funds. As a result, management companies no longer have links with fund distributors. It is therefore technically impossible to require management companies to check the marketing documents of the distributors.

<ESMA_QUESTION_CPMC_1>

Q2 : Do you agree with this all-encompassing approach as regards the definition of marketing communications?

<ESMA_QUESTION_CPMC_2>

We believe that the definition of marketing communications is very important. It would be useful to clarify that marketing communications are all communications that promote a financial product. It would also be useful to exclude from these marketing communications regulatory documents and regulatory and non-regulatory reports sent to clients for example. For exclusions, please refer to our answer to question 5

<ESMA_QUESTION_CPMC_2>

Q3 : Do you agree that a non-exhaustive list of marketing communications should be included in the Guidelines? If yes, please specify whether any element should be added to, or withdrawn from, this list, as set out in the Section 1 of Annex IV below.

<ESMA_QUESTION_CPMC_3>

We agree with the establishment of a positive and non-exhaustive list of documents that are considered as marketing documents. Nevertheless, what seems most important to us is to establish a non-exhaustive negative list of all documents that are not marketing documents. On this last point, our answer can be found in question 5<ESMA_QUESTION_CPMC_3>

Q4 : Do you agree that the Guidelines appropriately take into account the on-line aspects of marketing communications? If not, please specify which aspects should be further detailed.

<ESMA_QUESTION_CPMC_4>

We believe that it is unreasonable, for certain media, to impose a list of mentions to be imperatively included in marketing communications. Indeed, for marketing communications carried out via LinkedIn, Twitter or Facebook for example, or carried out via advertising banners on press sites for example, there are technical limits in terms of number of characters, space and layout.

We are aware that it is imperative that a disclaimer be visible on the communication, but its size and format must be adapted according to technical constraints. For example, we could imagine creating a "one click" rule, i.e. a rule according to which the investor must have access to all mandatory information in terms of marketing communication in just one click.

<ESMA_QUESTION_CPMC_4>

Q5 : Do you agree that the Guidelines should include a negative list of the documents that should not be considered as marketing communications? If not, please provide details on your views. If yes, please specify whether any element should be added to, or withdrawn from, this list, as set out in Section 1 of Annex IV below.

<ESMA_QUESTION_CPMC_5>

It is very important to establish a negative list of documents that do not constitute a marketing communication.

Let us specify that this negative list must be non-exhaustive, as it would be also the case for the positive list.

At a minimum, this list must include all regulatory documents (for example KIID/KID, MMF reporting) as well as regulatory and non-regulatory reports: e.g.

factsheets, as well as periodic reports to clients.

Press releases should also appear in the negative list and not in the positive list as suggested in the draft guidelines in section 4 point 6 page 31 and 32 of the consultation document. Indeed, press releases are to be considered as pre-commercial documents not subject to the guidelines as long as they specify that these documents are subject to approval by the regulator.

<ESMA_QUESTION_CPMC_5>

Q6 : Do you agree that a short disclaimer is the most appropriate format to identify marketing communications as such and that the disclaimer should mention the existence of the prospectus of the fund?

<ESMA_QUESTION_CPMC_6>

We believe that for certain marketing materials, it is more appropriate to use the one-click rule, presented in our answer to question 4, to refer to the existence of a fund's prospectus or to the prospectus itself. Indeed, the constraints of number of characters, space and layout do not allow us to add too many mentions on the marketing document.

We propose to impose a general disclaimer on the communication where the investor or potential investor has the possibility to click to access more information.

On the other hand, we are open to mention the existence of a prospectus of the presented fund in a longer written marketing communication or in a marketing communication in video format.

In addition, we propose to specify where the disclaimer should appear in a marketing video. Indeed, we think that this disclaimer should appear at the beginning of the video, and in small (by reference to website, etc.).

<ESMA_QUESTION_CPMC_6>

Q7 : Do you agree with the approach on the description of risks and rewards in an equally prominent manner? If you do not agree, please indicate your proposed approach to ensuring that all marketing communications describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner.

<ESMA_QUESTION_CPMC_7>

Yes, we agree. But for an online marketing communication, in the form of an advertising banner for example, there are space constraints. It is therefore not necessarily possible to describe the risks and rewards. We therefore believe it is important to establish a "one click" rule with which the investor will be able to access this information in a single click via a link inserted in the communication.

In section 5 point 11 of the draft guidelines, on the presentation of relevant risks and rewards equally, it is mentioned that, to ensure an equal presentation, relevant risks and rewards can, for example, be presented on a single page. We think it should be made clear that this presentation on a single page should remain an example only, that might be adapted according to the types of marketing communications and the circumstances. Otherwise, some NCAs might have a strict reading and require that risks and benefits always be presented on a single page. This could lead to difficulties in practice, and would raise a level playing field issue between countries. Especially since Article 44 of the Commission Delegated Regulation (EU) 2017/565 does not say that the font, size and position must be the same for the presentation of risks and rewards. We have therefore proposed an amendment to section 5 point 11 of the draft guidelines.

In addition, the project proposes here to disclose all risks. However, we believe that it should be aligned with the MIFID II regime, in particular with the article 44 of the Commission Delegated Regulation (EU) 2017/565, which requires which requires only relevant risks to be disclosed. We have therefore proposed an amendment to section 5 point 10 of the draft guidelines.

<ESMA_QUESTION_CPMC_7>

Q8 : Please specify whether any specific requirements should be set out in the Guidelines for the description of risks and rewards in an equally prominent manner in marketing communications developed in other media than paper (e.g. audio, video or on-line marketing communications).

<ESMA_QUESTION_CPMC_8>

Please refer to our answer to question 7

<ESMA_QUESTION_CPMC_8>

Q9 : What are your views on this approach? Do you agree that the fair, clear and not misleading character of the information may be assessed differently for marketing communications relating to funds open to retail investors and marketing communications relating to funds open to professional investors only?

<ESMA_QUESTION_CPMC_9>

Yes, we agree that the fair, clear and not misleading character of the information may be assessed differently for marketing communications relating to funds open to retail investors and marketing communications relating to funds open to professional investors only.

Furthermore, we suggest deleting the second sentence of point 27 of section 6

of the draft Guidelines as drafted in the Annex: « *When the marketing communication promotes a fund open to retail investors, it should provide additional wording to ensure that the meaning of all terms describing the investment are clear* ».

Indeed, this point does not define terms that could be considered unclear. It would then oblige management companies to explain all the terms used in marketing communication, even if these terms are basic and therefore known to retail investors.

<ESMA_QUESTION_CPMC_9>

Q10 : Do you agree that marketing communications should use the same information as that included in the information documents of the promoted fund?

<ESMA_QUESTION_CPMC_10>

No, we do not agree that marketing communications should use as it stands the “same” information as that included in the information documents of the promoted fund. There is indeed a problem with the format of marketing communication. In conclusion, we think that marketing communications should simply not contradict or be consistent with the information documents of the promoted fund.

In addition, Point 19 of Section 6 of the draft Guidelines in the Annex states that “ *Where indicators, simulations or figures relating to risks and rewards, costs, or past and expected future performance returns are mentioned or disclosed in marketing communications, they should be the **same** indicators, simulations or figures as those used in the information documents of the fund.* ”. However, in a marketing communication the indicators, simulations or figures may not always be strictly identical in all cases to those mentioned in the funds' information documents. It must be possible to adapt them according to the constraints of marketing communication. We therefore propose to specify that the indicators, simulations or figures must be consistent with those mentioned in the funds' disclosure documents and not necessarily identical.

Last, the draft Guidelines, in Point 30 of section 6 of the Annex, prohibit the use of the term “*high yield*” in marketing communications if this term is not accompanied by further explanation. This term, according to the draft Guidelines, could imply to the investor that the fund would generate high returns in all situations. However, the term “high yield” is commonly used in finance as it corresponds to a market segment that does not necessarily imply a high return - it is a specific segment of the Fixed Income market. We therefore propose to delete the end of the second sentence of point 30 of the draft guidelines

<ESMA_QUESTION_CPMC_10>

Q11 : What are your views on this approach? Do you agree that no minimum set information on the characteristics of the promoted investments should be

required in marketing communications as this should depend on the size and format of the marketing communication?

<ESMA_QUESTION_CPMC_11>

Yes, we agree that no minimum set information on the characteristics of the promoted investments should be required in marketing communications, as this should depend on the size and format of the marketing communication.

The level of information contained in a marketing communication should be fit to the size and format of the marketing communication and not be a copy-paste of the KID/KIID.

Furthermore, the Point 24a of section 6 of the draft Guidelines in the Annex provides that marketing communications should include a disclaimer informing the investor that *"the investment which is promoted concerns the acquisition of units or shares in a fund, and not in a given underlying asset such as building or shares of a company, as these are only the underlying assets owned by the fund"*.

For clarity we suggest removing this disclaimer. A reference in the marketing communication to the legal documents of the fund explaining its investment policy seems clearer and sufficient.

<ESMA_QUESTION_CPMC_11>

Q12 : What are your views on these requirements relating to the fair, clear and not misleading of the information on risks and rewards?

<ESMA_QUESTION_CPMC_12>

We believe that marketing communications promoting funds which draw up a KIID should display the past performance of the promoted fund over a 5 year period in accordance with Article 44 of MiFID II delegated regulation. We also believe that retaining a 5 year period is more protective for the client. To retain a 10-year period would be counterproductive because many products change their investment strategy at a higher frequency than every 10 years.

Furthermore, retaining a longer period than 5 years for funds than for other investment products subject to MiFID II would make things less clear to clients: based on MiFID, a common 5-year period for all products – i.e. funds as well as non-funds – would guarantee a better comparability by investors when taking investment decisions.

Moreover, Points 31 and 36 of section 6 of the draft Guidelines in the Annex, as drafted too strictly, restrict the possibility of comparing funds in marketing communications. First directly by the management company in point 31 and then indirectly by restricting the use in marketing communications of rankings provided by external rating companies (e.g. Morningstar). In practice, being able to compare two funds that do not have strictly the same investment strategy gives the client a broader information on its investment opportunities. What is critical is to ensure that information is fair, clear and not misleading. In addition, rating providers like Morningstar base their ratings on additional

risk/reward elements to make their rankings. This is why these rankings are used by all management companies to provide investors with complete information.

We therefore propose to delete points 31 and 36 of section 6 of the draft Guidelines.

<ESMA_QUESTION_CPMC_12>

Q13 : Do you agree with this approach on the presentation of costs?

<ESMA_QUESTION_CPMC_13>

Partially. As regarding the one off costs we want to be able to show the client the real one off cost and not only the maximum one off cost. Indeed, all studies show that the maximum amounts of one off costs are never reached. This is for example demonstrated in the 2018 European Commission study "Distribution systems of retail investment products across the European Union". Therefore, if the legislation obliges management companies to display the maximum one off costs in their KID PRIIPS, management companies must have the possibility to adjust the one off costs to the various real cases in their marketing communications.

Furthermore, we propose to remove Points 39 and 40 from section 6 of the drafts Guidelines in the Annex. Indeed, for more clarity and consistency, we propose to stick to the MiFID II legislation concerning the information of the client on costs.

<ESMA_QUESTION_CPMC_13>

Q14 : Do you agree with this approach relating to the information on past and expected future performance?

<ESMA_QUESTION_CPMC_14>

We believe that it is necessary to align with the MIF II regime, in particular the 5-year period.

Furthermore, we propose to remove the second sentence of Point 42 in section 6 of the draft Guidelines in the Annex, which states that the source of past performance must be "clearly" mentioned in marketing communication and not in a footnote. The practice today is to mention it in a footnote (e.g. the name of the asset management company; the date: these footnotes are used for giving references as sources) and the client can consult the management company's website if he wants more information. The content of the marketing communication in its main body should not be burdened with this information. Moreover, the idea of footnotes is not to make reading documents heavier and more difficult to read and understand by investors. This is why footnotes are used in the majority of written documents that we all consult daily – which is also the case when ESMA issues documents, including this Consultation Paper.

<ESMA_QUESTION_CPMC_14>

Q15 : Do you agree with this approach relating to the information on the sustainability-related aspects of the investment in the promoted fund?

<ESMA_QUESTION_CPMC_15>

Regarding sustainability, such a specific fund regulatory approach should be avoided:

- While the Sustainability Action Plan has not been implemented yet (e.g. still to come: SFDR implementation; Taxonomy);
- While the ESG MIF II preferences are not implemented yet.;
- While we need in that area a regulatory level playing field vis-à-vis other products.

There is no urgency today to integrate ESG rules on marketing communications. Indeed, national rules already now ensure that there is no green washing in commercial documents.

Thereafter, it is desirable that the ESG rules regarding marketing communications apply uniformly in all countries of the European Union, across all financial instruments.

<ESMA_QUESTION_CPMC_15>

Q16 : What is the anticipated impact from the introduction of the proposed Guidelines? Do you expect that the currently used practices and models of marketing communications would need to be changed?

<ESMA_QUESTION_CPMC_16>

For certain management companies, which operate, for example on an affiliate based model, the way that certain aspects are presented on a fund in marketing material are not necessarily uniform/harmonized from one affiliate to another. Therefore, there would be an impact on our organization in terms of harmonizing the way marketing materials are created and what is displayed across the different affiliates.

Furthermore, the proposed guidelines, as drafted today, would have a negative impact on management companies. For example:

- management companies would be responsible for the marketing documents issued by the distributors even though they would have no knowledge of these documents and would not have validated them in any way.
- factual reporting would now be considered as marketing

documentation and would have to be revised to meet the requirements of the guidelines;

- commercial communications would lose their value as too many mandatory statements would have to be made. This would undermine the message. Especially for short and constrained communication formats such as posts on social networks or videos;

- marketing documents would lose clarity in their message if they have to include the same information as the information included in regulatory documents. In our view, marketing materials should simply not contradict the information mentioned in the regulatory documents;

- Creating rules that differ from those in MiFID II would be detrimental to the customer understanding, particularly in terms of the period for displaying past performance. Indeed, funds would be subject to 10 years and other instruments to 5 years;

- Implementing ESG-specific rules before waiting for the releases of the Sustainability Action Plan and MiFID II rules on ESG preferences would generate different and consecutive updates for management companies, along the rhythm of the new text publications.

<ESMA_QUESTION_CPMC_16>

Q17 : What additional costs and benefits would compliance with the proposed Guidelines bring to the stakeholder(s) you represent? Please provide quantitative figures, where available.

<ESMA_QUESTION_CPMC_17>

According to a compliance specialized service provider, the costs associated with revising documents depend on the number of pages, the number of countries and the complexity of the content. There are therefore several variables to take into account. To take into account the changes made by the guidelines:

- a revision of a few pages would be charged between €500 and €1500.
- the update on a factsheet for 3 countries would be charged between €1000 and €2000.

This service provider reviews the documents when they are distributed in several countries, and the presentation of the information must take into account the regulatory and marketing rules mandatory for each country.

To these costs will obviously have to be added the human and IT development costs that management companies will have to bear to update these Guidelines.

In conclusion, the costs are proportional to the activity of the management company in its distribution and can be significant if the volume is large

<ESMA_QUESTION_CPMC_17>