

Guidelines on certain aspects of the MiFID II suitability requirements

[Consultation paper](#) deadline 27 April 2022

Executive Summary:

AMIC is supportive of the ambition to incorporate sustainability when providing financial advice as part of the wider European Commission 2018 “Financing Sustainable Growth” Action Plan and welcomes the opportunity to respond to this consultation paper. The AMIC response based on AMIC members’ input, is broadly supportive of the additional guidance to support the application of the changes to the MiFID suitability requirements, and the introduction of an obligation to gather clients’ sustainability preferences. We do however have a number of concerns we would like to raise with ESMA and we provide some suggestions on how we think these might be mitigated.

We outline:

1. Implementation challenges of 2 August 2022 application date from product manufacturer, distributor and end-investor perspective;
2. Suggestions on the proposed draft guidelines to help the clients assessment process and align the final guidelines to the Delegated Act (DA).

ESMA has confirmed during its 18 March Open Hearing that the final guidelines will only be published at some point after the 2 August 2022 application date of the delegated act, which leads to considerable double implementation issues. We note that in the EIOPA [consultation](#)¹ addressing similar requirements under IDD² which was published on 12 April 2022, EIOPA has committed to publish final guidelines in July 2022, which is likely to result in further fragmentation and complexity in the distribution chain, as distributors and product manufacturers may need to consider both sets of guidelines depending on their clients and as referenced in the EIOPA consultation “the implementation of these initiatives does not converge at the same points in time”. **Some of the implementation challenges can be addressed with a no action letter from the ESAs advising NCAs to not prioritize supervisory action towards implementing sustainability preferences in the MiFID II suitability assessment as of 2 August 2022.**

This de- prioritization would enable:

- Firms to implement the final guidelines avoiding the burden and risks arising from double implementation;
- Wider availability of products to offer to clients following their suitability assessment as the necessary (corporate related) data should become available and more reliable in 2025 the earliest;
- End- investors growing better understanding and having greater choice in products.

¹ [Public consultation on draft Guidelines on integrating the customer’s sustainability preferences in the suitability assessment under the IDD | Eioipa \(europa.eu\)](#)

² Insurance Distribution Directive

At the ESMA open hearing, a number of concerns and requests for clarity were raised by advisors which are also shared by AMIC members.

On the detail of the suggested approach, **key AMIC suggestions include:**

- **The guidelines taking into consideration the distinct knowledge and experience between retail and non-retail investors thus allowing the flexibility for firms to adapt their assessment approaches based on their client segment.**
- **Aligning wording exactly to the DA to avoid divergence between the DA requirements and the final guidelines.**
- **Allow for much greater flexibility in permitting dialogue between the clients and distributors which will help clients’ understanding of the concepts and the limited but evolving product availability .**
- **Recognizing the likelihood that clients will need to adapt their sustainability preferences as standard procedure and accordingly lighten some of the record keeping requirements.**
- **Instead of a prescriptive sequence of questions, advisers could adopt a “menu” driven approach or present a cross-referencing between available products and the extent to which each criteria is met. These approaches would allow distributors to reference existing market practices and the currently available investment products to help the client understand the nuances and differences in the products available under each of the three offered options, as opposed to being limited to explaining the concepts in theoretical terms as they are defined under the Taxonomy and SFDR.**
- **Forbearance period: The risks and challenges arising from the sequencing issue of this DA as of 2 August 2022, can be addressed with a no action letter from the ESAs advising NCAs to not prioritize supervisory action towards enforcing those provisions as of 2 August 2022. This forbearance period of at least one year will:**
 - **Avoid the double implementation difficulties arising from the final guidelines being published only after the 2 August 2022 application date and facilitate consistency of application between ESMA Guidelines and Level 2;**
 - **Ensure wider product availability as the data set from large corporate underlings will extend and become more reliable with the first Taxonomy Art.8 reporting in 2023 and 2024, and then with the standardization of corporate reporting, likely from 2025 onwards.**

GUIDELINE 1: INFORMATION TO CLIENTS ABOUT THE PURPOSE OF THE SUITABILITY ASSESSMENT AND ITS SCOPE

In order to help clients understand the concept of “sustainability preferences” and the choices to be made in this context, firms should explain the term and the distinction between the different elements of the definition of sustainability preferences under a) to c) and also between these products and products without such sustainability features in a clear manner, avoiding technical language. Firms should also explain what environmental, social and governance aspects mean.

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.

We generally agree with the suggested approach on the information to clients about the purpose of the suitability assessment and its scope. In the first instance, a clear distinction should be made between the requirements directed at retail investors and the requirements directed at non – retail

investors – being either in the context of investment advice or in the context of discretionary portfolio management. The guidelines should allow for firms to have flexibility in tailoring the terms used and their explanations based on their clients’ sophistication and existing knowledge and experience. Due to these critical distinctions in the client base, the requirements to (1) avoid technical language and (2) explain what ESG aspects are, should apply mainly to retail investors.

We have several additional concerns about paragraph 16 which we explain in our response to Q2.

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.

It is important for clients to understand the three concepts they are to base their sustainability preferences on in non-technical terms – proportionally depending on their retail vs non-retail nature.

Communicating to clients complex and theoretical concepts based on unfinished regulation:

Firms are missing clarity on critical elements of the options presented to clients as the underlying legislations are not yet finalised:

- The Taxonomy Regulation to date, only covers environmental objectives (and only two out of the six environmental objectives are in the process of finalisation), whereas a sustainable investment under the SFDR covers both environmental and social objectives.
- Investee companies will start their first quantitative reporting on taxonomy alignment for non-financial undertakings as of 1 January 2023 when Article 8 of the TR applies to non-financial undertakings.
- The disclosures in relation to the percentage of sustainable investments under SFDR will only be available once the SFDR RTS apply from 1 January 2023.

The concepts of a sustainable investment (SI) as currently defined under the different regulations have to pass conditions which have distinct but also some overlapping criteria. The Taxonomy Regulation to date, only covers environmental objectives (and only two out of the six environmental objectives have been finalised), whereas a sustainable investment under the SFDR covers both environmental and social objectives. The environmental objectives under SFDR can be Taxonomy and non-Taxonomy aligned. The complexity of the interplay between the TR and SFDR adds further difficulty in explaining clear distinctions between the options to the clients.

Ultimately basing explanations and figures using missing data in the suitability assessment risks misinforming and confusing clients when explaining the different elements of the definition of “sustainability preferences”. These concepts remain theoretical until the necessary data becomes available and the market becomes more mature. There is a clear risk of confusing and even deterring investors when trying to explain these consequences of “in flight”, unfinished and very technical regulations.

Data gap and product availability:

- Given the considerable data gap where the full data set will not be available until 2025, asset managers are not yet in the position to offer suitable products for the distributors to present to clients. Asset managers are very much working on new products and it is a top priority, but the existing product investment universe is very narrow and there is a considerable risk of no product availability to match clients’ sustainability preferences according to the 3 criteria a) - c). Thus not only are the multiple definitions and criteria confusing and complex to explain to

clients, but because of the extended coverage (to social objectives also) of SFDR compared to the corporate market coverage of public/actual data – the product availability for each considered option is different and the investment universe will be very narrow to start with, particularly for environmentally sustainable investments under the TR.

Final Guidelines publication sequencing issue:

- The ability to offer an appropriate and wide range of products to match clients' preferences is further challenged by the timing of publication of the final guidelines. Based on the current implementation timeline, the final guidelines will be published after the 2 August 2022 application date. The product manufacturers and distributors need to take the final guidelines into consideration to ensure their products meet the requirements, that the necessary data between manufacturers and distributors is transferred, and that the firms have sufficient time to train their client facing staff. There is a strong likelihood that the industry will be exposed to double implementation. Processes will need to be adapted once the final guidelines are published and there is a considerable additional administrative and implementation cost burden with the resulting systems and processes that will need to be updated. This double implementation also increases risk of confusing end-investors even further. On 12th April 2022, EIOPA published a similar consultation on draft guidelines for integration of sustainability preferences in the suitability assessment under the IDD. We note that EIOPA are committing to publish final guidelines in July, before the application of the sustainability preferences. This difference in timing may further add to the lack of consistency between interlinking regulations and introduces further complexity.
- The EIOPA draft guidelines also make a differentiation between where information is to be sourced from between 2 August 2022 and 1 January 2023, and after 1 January 2023, recognising that the SFDR RTS will not be in effect until the later date. A clear statement of forbearance for FMPs during this period, recognising that certain rules are incomplete or have not come into effect would provide some level of comfort to the industry and allow them to operate with more confidence in the early phase.
- Alternatively an implementation period of twelve months would allow the industry to adapt, for the application of the SFDR RTS more detailed disclosure requirements to come into effect and for the first taxonomy alignments of corporate companies to be made public.

Proposed approaches:

Communicating these options to clients, while the necessary data to match products to the proposed options a)-c) is not yet available and not standardised risks compromising the quality and reliability of the information provided to clients and ultimately not having any products to offer. We would thus suggest:

- **Flexibility on the client journey through assessment:** allow firms to offer market context in their explanations and inform their clients upfront on the market reality when explaining the available options a)-c) on (1) the current level of data availability and reliability regarding Taxonomy alignment; (2) explain that there is currently a limited investment universe given the data gaps and unfinished regulation. Thus explaining that the scope of available products will grow in the future as the regulations are finalised and data, which products rely on, becomes available.

- When explaining the proposed options, instead of a prescriptive sequence of questions, advisers could adopt a **“menu” driven approach** where they should be able to **reference existing market practices** and the currently available investment products to help the client understand the nuances and differences in the products available under each (or in combination) of the three offered options, as opposed to be limited to explaining the concepts in theoretical terms as they are defined under the Taxonomy and SFDR. Another option would be to present the client with a cross-referencing between available products and the extent to which each criteria is met.
- **Forbearance period:** The risks and challenges arising from the sequencing issue of this DA as of 2 August 2022, while the final ESMA guidelines will not be issued and complied with (or not) by National Competent Authorities (NCAs) before the end of this year, should be addressed with a letter from the ESA’s advising NCA’s not to prioritize supervisory action towards enforcing those provisions as of 2 August 2022. This forbearance period, **of at least 12 months**, will facilitate consistency of application between ESMA Guidelines and Level 2, as well as higher availability of the necessary Taxonomy and SFDR data. Thus product manufacturers and distributors will be better able to collect, validate, consolidate data and integrate the final Guidelines to offer the desired and compliant products in the most proper way.

GUIDELINE 2: ARRANGEMENTS NECESSARY TO UNDERSTAND CLIENTS

The information on the sustainability preferences of the client should include all aspects mentioned in the definition of “sustainability preferences” according to Article 2(7) of the MiFID II Delegated Regulation and should be sufficiently granular to allow for a matching of the client’s sustainability preferences with the sustainability-related features of financial instruments. Granularity of information should also allow for a combination of the different aspects mentioned in Article 2(7). Firms should collect the following information from clients:

- Whether the client has any sustainability preferences (yes/no).
- Whether – and if so, to what extent - the client has sustainability preferences with regard to aspect a), b) or c) of the definition according to Article 2(7) MiFID II Delegated Regulation and if the client has a preference for, where relevant, a combination of one or more of the three aspects.
- For aspects a) and b), the minimum proportion.
- For aspect c), which principal adverse impacts (PAI) should be considered including quantitative and qualitative criteria demonstrating that consideration. Throughout the process, firms should adopt a neutral and unbiased approach as to not influence clients’ answers.

To achieve this, firms could choose the following approach:

- First, firms could collect information on the degrees of sustainability related expectation of the client which would refer to one or more of the aspects expressed through a) to c) of Article 2(7) of the MiFID II Delegated Regulation (“qualitative aspect of sustainability preferences”).

When doing so, firms could also assess whether the client would only prefer one certain degree of sustainability-related expectation or whether more or all of them should be part of its preferences. This aspect could be assessed through closed ended yes/no-questions. Where the client wishes to include more or all of the aspects mentioned under a) to c) of Article 2(7) of the MiFID Delegated Regulation, this could be either assessed and matched on portfolio level or on the level of the financial instrument, depending on the service provided.

When providing portfolio management or investment advice (with or without portfolio approach) the firm could also ask the client to what extent financial instruments according to a) to c) should be included in client's investment/portfolio.

- Firms could, as a second step, also collect information on whether the client's sustainability preferences with regard to b) and c), if any, have a focus on either environmental, social or governance criteria or a combination of them or whether the client does not have such a focus.
- As a third step, firms could collect information on the client's preferences in terms of the "minimum proportion" as mentioned in a) and b) if the client requested to include these financial instruments in the investment. Where a firm decides to collect this information not in terms of particular percentage but by ranges or sizes, these ranges should be presented in a neutral way to the client and should be sufficiently granular.
- In case the client wishes to include a financial instrument that considers PAI, the information collected should cover the PAI and qualitative and quantitative elements mentioned under c). Firms could test the client's preferences and appetite for PAI integration with regard to the families of PAI indicators as whole, based on a possible focus of the client on environmental, social or governance aspects, using the categories presented in the SFDR RTS (instead of an approach based on each PAI indicator) such as emissions, energy performance, water & waste, etc.

A qualitative evaluation could then be initiated for each category that is important/key for the client or not. This qualitative evaluation could be based on the approaches in which products consider PAI (e.g. exclusion strategies / controversies policies / voting and engagement policies).

- Firms should have policies and instructions for their client-facing staff in place for situations where clients answer that they do have sustainability preferences but do not state a preference with regard to any of the specific aspects mentioned under a) to c) or with regard to a minimum proportion. For example, the firm could consider any of the aspects under a) to c) or a combination thereof and could consider that it is not bound by any minimum proportion of sustainability-related expectation for the purpose of conducting the suitability assessment. Where firms make use of this possibility, they should inform the client about their choice and the level of the sustainability-related expectation of the product and document in the suitability report the client's choice not to further specify the sustainability preferences.

Firms should ensure the same level of granularity of information is collected on the client's sustainability preferences when providing portfolio management or investment advice with a portfolio approach. The client's sustainability preferences should be collected with regard to the portfolio (whereas the possibility of specific individual instructions remains, e.g. if a client asks for specific ESG-related products in the portfolio). Firms should therefore ask the client which part of the portfolio (if any) the client wants to be invested in products meeting the client's sustainability preferences. Where firms work with model portfolios that combine some or all of the criteria listed under paragraph 25 above, these model portfolios should allow for a granular assessment of the client's preferences and should not be translated into a questionnaire that pushes the client into a certain combination of the criteria that would not meet the client's sustainability preferences (i.e. all preferences need to be asked for and matched with the sustainability-related features of the model portfolio).

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? Please also state the reasons for your answer. Are there other alternative approaches, beyond the one suggested in guideline 2, that you consider compliant with the MiFID II requirements and that ESMA should consider? Please provide examples and details.

The suggested approach assumes clarity on all three concepts and product availability for each concept. There are several factors which impede the ability of firms to appropriately communicate with clients and to offer suitable products which have been highlighted in Q2.

Concerning the specific detail highlighted in Guideline 2:

- Paragraph 25: This paragraph insists on granularity as if it should be additional to all aspects mentioned in the definition of sustainability preferences in the MiFID DA. The guidelines should not add more granularity than required, more particularly in the context where clients have to self-assess their preferences on criteria they hardly understand and will need time to have explained.
- Paragraph 25, bullet point 2: there is an issue about the articulation between “to what extent” (in case of criteria a and b) and the sentence in para.27 requiring that “Firms should therefore ask the client which part of the portfolio (if any) the client wants to be invested in products meeting the client’s sustainability preferences”. This double request may be quite complicated to implement and also to be understood by the client.
- Paragraph 25, bullet point 4: On PAI, the guidelines indicate that “qualitative AND quantitative elements” should be used to demonstrate the consideration of PAI whereas the MIFID DA mention “qualitative OR quantitative elements”. The guidelines should be modified to align with the Article 2(7) MIFID II DA wording.
- Paragraph 26, bullet point 1: When collecting information on the degrees on sustainability-related expectations of the clients, we must anticipate the case of clients expectations that go beyond the minimum options provided in a) to c). We would advise replacing the wording “more or all” with “one or more” which would limit the scope thus reducing ambiguity, and avoiding letting clients raise other criteria beyond a, b or c. Firms generally should be allowed to not react to such a request of additional granularity from the client, as it would be in practice very difficult and burdensome to apply, it may lead to a huge number of combinations that would not bring real value for end-clients (and actually may end up as not diversified enough to be suitable).
- Paragraph 26, bullet point 2: in respect to the client being asked on whether their preferences focus on E,S or G criteria. The reference to “G” is problematic as this does not exist under Article 2 (17) of the SFDR (only reference to E and S). In addition, the Taxonomy exists only today for E and maybe will develop for social aspects in the future. We would recommend removing the explicit reference to the governance aspect which is a transversal one embedded in the E and S criteria. Beyond that, the MIFID delegated acts on ESG preferences do not make reference to the E, S and G criteria. The proposed guidelines go beyond the MIFID delegated acts on this point.
- Paragraph 26, bullet point 3: on minimum proportion, we welcome the flexibility to collect this information by ranges or sizes as opposed to particular percentages. We understand the desire for the ranges to be sufficiently granular, but we would welcome the ability for the advisor to have the flexibility to inform the client, when presenting the ranges if they represent high/moderate/low alignment to reflect the current market reality (e.g 10% Taxonomy alignment is a high alignment in today’s market). Clients are likely to be very ambitious when presented with ranges so the added context of the state of play of the market will help manage their expectations and inform their options.
- Paragraph 26, bullet point 4: we welcome the reference to “families of PAIs” instead of a PAI by PAI approach (as referred to in the 4th bullet point of para.26). However, flexibility should

be left on the definition of these families with no reference as such to the SFDR PAI determination. We would recommend removing the reference “using the categories presented in the SFDR RTS” from this bullet point. The guidelines should allow firms to have flexibility in tailoring their explanations based on their clients’ sophistication and existing knowledge and experience.

However, other than risk of confusion by introducing assessments on new technical concepts, the biggest challenges in implementing this DA are linked to the regulations which are not yet fully adopted or implemented and thus have not yet been operationalised by the concerned market participants. Hence the necessary disclosures/reports and products are not yet available as highlighted in Q2 and a forbearance period would help for effective and satisfactory implementation.

When explaining the proposed options, instead of a prescriptive sequence of questions, advisers could adopt a “menu” driven approach where they should be able to reference existing market practices and the currently available investment products to help the client understand the nuances and differences in the products available under each of the three offered options, as opposed to be limited to explaining the concepts in theoretical terms as they are defined under the Taxonomy and SFDR. Presenting cross-referencing between available products and the extent to which each criteria is met is another solution to avoid unintended consequences.

Q4. Do you believe that further guidance is needed to clarify how firms should assess clients’ sustainability preferences?

No further formal guidance is necessary and in fact we would prefer more flexibility in the assessment process as outlined in Q2 and Q3. As the regulatory framework is still in development and incomplete, it is important to allow the industry to adjust and to provide sufficient flexibility for market practices to emerge which may in turn influence further formal guidance, or ESMA Q&As. Flexibility is critical in light of how suitability preferences are extremely diverse and it is not possible to meet every single set of preferences with a product.

EIOPA have recognised the limits in the formal drafting of Guidelines in facilitating understanding and will consider the possibility of developing more user-friendly guides/tools for both firms and consumers to facilitate the sales process. This is an interesting proposal as although more prescriptive formal guidance is not suggested at this point, as the industry understanding matures, there may be a role for supplementary guidance to harmonise best practices that may emerge.

Q5. Where clients have expressed preference for more than one of the three categories of products referred to in letters a), b) or c) of the definition of Article 2(7) of the MiFID II Delegated Regulation, do you think that the Guidelines should provide additional guidance about what is precisely expected from advisors when investigating and prioritizing these simultaneous / overlapping preferences?

In parallel to explaining the categories of products referred to in options a)-c), the distributors could present a table of products already available which match the defined criteria and highlight, among the products which meet each of the criteria where the client has expressed a preference, where there are possible combinations of such criteria. Combinations could then be at the choice of the client for a given transaction (e.g. purchase of an instrument, or new portfolio agreement) based on the indication of product availability i.e what is possible.

Otherwise it would not be manageable. There are so many possible combinations, exacerbated by the granularity in terms of qualification and quantification, that it is very unlikely all combinations can be

met by a product (more particularly at a single instrument level). Also, combinations could involve some diversification issues: the more granular and specific the combination, the less diversified the product/portfolio may be and therefore the less suitable it may be. As indicated in the guidelines (paragraph 25), combinations can only be made “where relevant”.

Therefore, preferences in terms of combinations should not be made “ex nihilo” but should rather be understood and determined in line with the market reality in terms of product availability.

Q6. Do you agree with the proposed approach with regard to the assessment of ESG preferences in the case of portfolio approach? Are there alternative approaches that ESMA should consider? Please provide possible examples.

We generally agree to applying the same approach for collecting client preferences regarding portfolio management or investment advice with a portfolio approach. Our comments regarding client preferences and assessment in our response to ESMA’s consultation should therefore also apply in case of portfolio approach.

GUIDELINE 5: UPDATING CLIENT INFORMATION

With regard to the sustainability preferences of a client, this information should be updated - for ongoing relationships - through the next regular update of client information or during the first meeting with the client/the first investment advice following the entry into-application of Commission Delegated Regulation 2021/1253.

Q7. Do you agree with the suggested approach on the topic of ‘updating client information’? Please also state the reasons for your answer.

Yes we agree with the approach and are supportive specifically on the suggestion that the profiles will only be updated at the next regular update and not on the DA implementation date. We would also suggest deleting “first meeting” as this is too vague.

It should also be recognised that initially clients may not be willing or feel ready to select sustainability preferences given they have limited time to develop their understanding and given data gaps and misalignment of various implementation timelines.

GUIDELINE 7: ARRANGEMENTS NECESSARY TO UNDERSTAND INVESTMENT PRODUCTS

Firms should adopt robust and objective procedures, methodologies and tools that allow them to appropriately consider the different characteristics, including sustainability factors, and relevant risk factors (such as credit risk, market risk, liquidity risk, ...) of each investment product they may recommend or invest in on behalf of clients. This should include taking into consideration the firm’s analysis conducted for the purposes of product governance obligations.

In this context, firms should carefully assess how certain products could behave under certain circumstances (e.g. convertible bonds or other debt instruments subject to the Bank Recovery and Resolution Directive which may, for example, change their nature into shares). Considering the level of ‘complexity’ of products is particularly important, and this should be matched with a client’s information (in particular regarding their knowledge and experience). Although complexity is a relative term, which depends on several factors, firms should also take into account the criteria and principles identified in MiFID II, when defining and appropriately graduating the level of complexity to be attributed to products for the purposes of the assessment of suitability.

When considering the sustainability factors of products in view of the subsequent matching with the client’s sustainability preferences, firms could, for example, rank and group the financial instruments included in their product range in terms of: i) the proportion invested in economic activities that qualify as environmentally

sustainable (as defined in Article 2, point (1), of Taxonomy Regulation); ii) the proportion of sustainable investments (as defined in Article 2, point (17), of SFDR); iii) the consideration of principal adverse impacts. Such grouping should also be consistent with the firm's analysis conducted for the purposes of product governance obligations. Firms are reminded that a grouping of financial instruments for the purpose of the suitability assessment cannot replace the collection of information from clients as described in paragraphs 25 and 26 above).

Q8. Do you agree with the suggested approach with regards to the arrangements necessary to understand investment products? Please also state the reasons for your answer.

On paragraph 70, we disagree with graduating the level of complexity of the products for the purpose of the assessment of suitability. The complexity of a product defined in MiFID drives the appropriateness test in case of execution services. Apart from this, there is no agreed guidance as to what product would be more or less complex than another. Therefore, we propose the following sentences shall be removed: "In this context, firms should carefully assess how certain products could behave under certain circumstances (e.g. convertible bonds or other debt instruments subject to the Bank Recovery and Resolution Directive which may, for example, change their nature into shares). Considering the level of 'complexity' of products is particularly important, and this should be matched with a client's information (in particular regarding their knowledge and experience). Although complexity is a relative term, which depends on several factors, firms should also take into account the criteria and principles identified in MiFID II, when defining and appropriately graduating the level of complexity to be attributed to products for the purposes of the assessment of suitability".

On paragraph 71, it must be noted that there will be overlap between these categories as one product classified in categories (a) for example could also match with categories (b) and/or (c). It is important that these categories are not exclusive from each other, which should facilitate the offering of products that fit with the clients' sustainable preferences. Any grouping ultimately should not limit the range of products that can be offered to one client depending on his/her preferences.

Q9. Do you believe that further guidance is needed to clarify how firms should take into consideration the investment products' sustainability factors as part of their policies and procedures? Please also state the reason for your answer.

No further guidance needed.

GUIDELINE 8: ARRANGEMENTS NECESSARY TO ENSURE THE SUITABILITY OF AN INVESTMENT

Sustainability preferences should only be addressed once the suitability has been assessed in accordance with the criteria of knowledge and experience, financial situation and other investment objectives. Once the range of suitable products has been identified following this assessment, in a second step the product or, with regard to portfolio management or investment advice with a portfolio approach, investment strategy that fulfils the client's sustainability preferences should be identified.

Where a firm intends to recommend a product that does not meet the initial sustainability preferences of the client in the context of investment advice as referred to in Recital 8 of the MiFID II Delegated Regulation, it can only do so once the client has adapted his/her sustainability preferences. The firm's explanation regarding the reason to resort to such possibility as well as the client's decision should be documented in the suitability report.

Firms are reminded that this possibility only refers to the sustainability preferences and that with regard to the other criteria of the suitability assessment, the product has to meet the client profile and otherwise shall not be recommended as stated in Article 54(10) of the MiFID II Delegated Regulation.

With regards to the possibility for the client to adapt the sustainability preferences referred in Article 54(10) of the MiFID II Delegated Regulation, firms are reminded that this possibility **should not be the standard**

procedure. Where a client adapts the sustainability preferences, this adaptation should only refer to the suitability assessment/investment advice in question and not to the client's profile in general. In case of investment advice, it should also be documented in the suitability report and be subject to the regular monitoring procedures.

In case of portfolio management, the client's sustainability preferences, **including the minimum proportion that shall be invested in sustainable investments, need to be collected and assessed when agreeing on the mandate and the investment strategy.** If the firm cannot meet those preferences, it should discuss this with the client when agreeing on the mandate in which the investment strategy is defined and ask the client to adapt his/her preferences. The decision of the client should be documented. When providing ongoing investment advice with a portfolio approach, firms should assess the client's sustainability preferences including the minimum proportion when conducting the initial suitability assessment. Then the firm should monitor whether those preferences are still met or not at portfolio level and issue appropriate recommendations as the case may be. In case of portfolio management or ongoing investment advice with a portfolio approach, if the client adapts the sustainability preferences after the initial suitability assessment, firms should evaluate the impact of this change and whether this triggers a rebalancing of the portfolio.

Where a client does not answer the question whether it has sustainability preferences or **answers "no"**, the firm may consider this client as "sustainability-neutral" and recommend products both with and without sustainability-related features. The firm's product offer should be documented and explained to the client with a mention of the products/portfolio's sustainability features.

If the client states that he/she has sustainability preferences, and the firm does not have any products with sustainability related factors available, this should also be documented in the suitability report.

Q10. Do you agree with the additional guidance provided regarding the arrangements necessary to ensure the suitability of an investment concerning the client's sustainability preferences? Please also state the reasons for your answer.

We agree that sustainable preferences should not prevail over other suitability criteria as defined today under MIFID 2. However we consider that the two-step approach presented in the guidelines is not relevant as it would result in conducting two suitability assessments with the client. This would be quite long and burdensome for the client and also quite confusing. The guidelines should be amended on this part to allow for a more relevant client journey.

As mentioned in response to previous questions, we are not in favour of a general approach that would lead to the absence of products matching with the client's sustainable preferences. This could be very discouraging for the client and lead to a wrong perception on the availability of sustainable products. In the end, the guidelines could have counterproductive consequences. We consider that the guidelines should permit more interactions between the clients and the distributors instead of an imposed self-assessment approach by the client who would not be sufficiently well informed in terms of existing offering and options available.

Q11. 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.

We welcome the ability for clients to adapt their sustainability preferences, but in order to avoid the onerous exercise between the client and adviser, the client's expectations on product availability should be managed upfront where the adviser can inform the client of the current limited product availability as explained in the responses to Q2 and Q3. This would help the client make a better informed decision when considering their sustainability preferences from the start and reduce the

risks of greenwashing. Overall the guidelines need to be more flexible in allowing more interactions between the clients and distributors as highlighted in response to the previous Q10.

We do not think that this guidance should be more detailed. In fact, we question whether the reference to documenting decisions in this section is needed (end of paragraphs 80, 81, first paragraph 82, second sentence paragraph 83).

Guideline 8 paragraph 81: Regarding the possibility for the client to adapt their sustainability preferences without it being standard procedure: the narrow scope of existing products on offer matching the options proposed would make the necessity to adapt preferences an operationally standard procedure. We would thus recommend removing this reference in paragraph 81.

In addition, if adaptation of sustainable preferences is needed on a too frequent basis, this could be detrimental to the perception of the role of and added-value provided by advisors. This could lead investors to turn to non-advised financial services as RTO while they need to be properly informed on these totally new sustainable concepts and criteria for making the most relevant investment decisions (i.e. in accordance with their risk profile and expectations).

Q12. 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? Please also state the reasons for your answer.

See our response to Q.11.

Q13. Could you share views on operational approaches a firm could use when it does not have any financial instruments included in its product range that would meet the client's sustainability preferences (i.e. for the adaptation of client's preferences with respect to the suitability assessment in question/to the particular transaction and to inform the client of such situation in the suitability report)?

See our response to Q.11 and Q.12.

Q14. Do you agree with the proposed approach for firms to be adopted in the case where a client does not express sustainability preferences, or do you believe that the supporting guideline should be more prescriptive? Please also state the reasons for your answer.

We agree with the proposed approach in the case where a client does not express sustainability preferences except on one item: "The firm's product offer should be documented and explained to the client (...)" should be replaced by "the products recommended by the firm should be documented and explained to the client (...)". Obviously, the firm shall not provide information on all the referenced products but on the products with or without sustainability features that suit the client knowledge, risk appetite, etc.

Q15. Do you agree with the proposed approach with regard to the possibility for clients to adapt their sustainability preferences in the case of portfolio approach? Do you envisage any other feasible alternative approaches? Please provide some possible examples.

See response to Q11.

Q16. What measures do you believe that firms should implement to monitor situations where there is a significant occurrence of clients adapting their sustainability preferences? What type of initiatives do you envisage could be undertaken to address any issues detected as a result of this monitoring activity?

See our response to Q12. Given that we expect, particularly in the first years as the sustainable product universe grows, for it to be standard procedure that clients will be adapting their sustainability preferences on a regular basis. As this is a rapidly evolving situation, we do not think it is appropriate (nor proportionate) that any additional measures are implemented at this time to monitor these situations.

If the guidelines are explicit in allowing firms to explain to their customers the issues arising with the Taxonomy Regulation, lack of data and wider market context highlighted in previous questions, then the instances of clients having to adapt their sustainability preferences will be less than if the guidance does not refer to discussing such market context with clients.

GUIDELINE 10: COSTS AND BENEFITS OF SWITCHING INVESTMENTS

When providing investment advice, a clear explanation of whether or not the benefits of the recommended switch are greater than its costs should be included in the suitability report the firm has to provide to the retail client before the transaction is made.

Q17. Do you agree with the proposed amendment to supporting guideline 10? Please also state the reasons for your answer.

We are concerned about how sustainability features would be considered (how is the benefit assessed if there is a switch from one sustainability preference to another?) and suggest they can be excluded from a cost/benefits analysis.

GUIDELINE 11: QUALIFICATIONS OF FIRM STAFF

Staff giving investment advice or information about financial instruments, structured deposits, investment services or ancillary services to clients on behalf of the firm (including when providing portfolio management) must possess the necessary knowledge and competence required under Article 25(1) of MiFID II (and specified further in ESMA Guidelines for the assessment of knowledge and competence, including with regard to the suitability assessment. Staff should also have the necessary knowledge and competence with regard to the criteria of the sustainability preferences as specified in Article 2(7) of the MiFID II Delegated Regulation and be able to explain to clients the different aspects in non-technical terms. To that effect, firms should give staff appropriate trainings.

Q18. Do you agree with the additional guidance regarding to the qualification of firms' staff or do you believe that further guidance on this aspect should be needed? Please also state the reasons for your answer.

We agree in principle that advisory staff need to have the necessary knowledge and competence with regard to the criteria of the sustainability preferences. As highlighted in Q2, explanation to clients "In non-technical terms" should mainly be addressed to retail clients and the assessment approach should allow the flexibility for distributors to tailor their approaches to the different client segments.

However, as outlined in responses to Q2 and Q3, the different aspects and criteria of the relevant regulations have not yet been finalised and are subject to interpretation, which is a significant barrier in the ability to explain these concepts and puts the staff at risk of misinforming and confusing clients. Firms should be allowed to mention that some regulations are still in the final adoption process and that this has some impact on the scope of available products.

No formal further guidance is necessary on this aspect. Investment firms providing product information and investment advice already have an obligation to ensure their staff have an adequate level of skills, knowledge and expertise. We agree that investment firms should implement training

programs to ensure their staff also understand sustainability preferences and can provide clients with clear explanations and information on the topic. Assessment of their knowledge and expertise on the matter should form part of the initial and ongoing competency assessments run by investment firms. What would be most helpful is for ESMA to confirm that investment firms can deviate from using the existing legal definitions when introducing and explaining sustainability preferences to clients.

GUIDELINE 12: RECORD-KEEPING

Therefore, a firm is required to record all relevant information about the suitability assessment, such as information about the client (including how that information is used and interpreted to define the client's risk profile), and information about financial instruments recommended to the client or purchased on the client's behalf, as well as the suitability report provided to clients. Those records should include:

- any changes made by the firm regarding the suitability assessment, in particular any change to the client's investment risk profile;
- the types of financial instruments that fit that profile and the rationale for such an assessment, as well as any changes and the reasons for them.
- The situations where a client's sustainability preferences are adapted in accordance with Article 54(10) of the MiFID II Delegated Regulation, including a clear explanation of the reasons for such adaptation.

Q19. Do you agree on the guidance provided on record keeping? Please also state the reasons for your answer.

The requirement of compulsory information keeping regarding the suitability assessment and suitability reports should be made lighter in case of non-retail clients.

QUESTIONS NOT RELATED TO SPECIFIC PROVISIONS

Q20. Do you agree on the alignment of the two sets of guidelines (where common provisions exist for the assessment of suitability and appropriateness)? Please also state the reasons for your answer.

Q21. Do you have any further comment or input on the draft guidelines?

The risks and challenges arising from the sequencing issue of this DA as of 2 August 2022, can be addressed with a no action letter from the ESAs advising NCAs to not prioritize supervisory action towards enforcing those provisions as of 2 August 2022. As highlighted in previous questions, this forbearance period will:

- Avoid the double implementation difficulties arising from the final guidelines being published only after the 2 August application date and facilitate consistency of application between ESMA Guidelines and Level 2,
- Ensure wider product availability as the full data set of the necessary Taxonomy and SFDR data which will only become available as of 1 January 2025.

Alternatively, an implementation period of twelve months would allow the industry to adapt for the application of the SFDR RTS more detailed disclosure requirements to come into effect and for the first taxonomy alignments of corporate companies to be made public.

Q22. Do you have any comment on the list of good and poor practices annexed to the guidelines?

N/A

Q23. What level of resources (financial and other) would be required to implement and comply with the guidelines (organisational, IT costs, training costs, staff costs, etc., differentiated between one off and ongoing costs)? When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.

N/A

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