BNP PARIBAS

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CONSULTATION PAPER OF ESMA
Draft guidelines on certain aspects of the MiFID II suitability requirements

BNP Paribas contribution

BNP Paribas welcomes the opportunity to comment ESMA's Consultation paper (CP) regarding the draft guidelines on MiFID II suitability requirements built on the text of the 2018 ESMA guidelines[1.] Before answering to the specific questions of ESMA's consultation document, BNP Paribas would like to point out the following general comments.

BNP Paribas has a long-standing **commitment to sustainability**. Since 2011, the bank has committed to **strong CSR policies driven** by the UN Sustainable Development goals and the desire to help clients through their low-carbon transitions. BNP Paribas strongly supports to any initiative favouring the investment of banks and clients in sustainable products.

BNP Paribas has an ambition to contribute to the Commission's goal by reorienting capital flows to more sustainable investments by distributing sustainable financial instruments to its clients by way of providing investment advice and discretionary portfolio management. In addition, distribution of insurance life contracts by way of the IDD amendments will also be impacted. On this issue, and taking in particular into consideration the huge complexity of the concepts which are to be explained to the clients, BNPP would like to stress the need to align the requirements applicable to the sale of sustainable investment products under IDD or MiFID, in order not to complexify even more the customer journey.

The role of distributors is to provide suitable personal recommendations to their clients or to make suitable investment decisions on behalf of their clients.

The level of complexity and granularity introduced by ESMA guidelines draft through a client's questionnaire does not seem to meet the key objective of strengthening investor protection. The investment firms' role regarding the definition of client's sustainability investment profile is limited by the guidelines as they cannot fulfil their duty by effectively explaining to the clients the potential consequences of their sustainable preferences choices on their investments including the related risks. Some of the guidelines seem to beyond the new MIFID Delegated Regulation text and could on our opinion contravene the intention of the text.

1. General comments

As introduced above, BNP Paribas welcomes the opportunity to comment on these draft guidelines and wishes to first emphasise the following issues:

Firstly, BNP Paribas has a major concern about the regulations' application misalignment.

It should be noted that the sustainable finance regulatory framework is not yet finalised:

- the SFDR level 2 is not yet adopted even if the final draft has just been published;
- the Taxonomy Regulation applies only on the two first environmental objectives;
- at entity level the information on the Taxonomy alignment under article 8 will only be published in the coming years;
- the data at corporate level are not yet available as the CSRD is not finalised.

[1] Cf. ESMA Final Report, "Guidelines on certain aspects of the MiFID II suitability requirements", 28 May 2018 (*ESMA35-43-869*).

Secondly, in respect of the entry into force of these draft guidelines, the application date of the Level 2 text is August 2022 whereas the guidelines are expected to be published in September or October. From an operational perspective, it is not feasible to implement the new requirements in two steps. Firms will have to wait for the ESMA guidelines publication and then, a work will have to be conducted to operationalise the processes that would result from such guidelines.

Thirdly, it is crucial to have an alignment between the ESMA guidelines and the EIOPA guidelines which is not the case today. Any discrepancy between both guidelines would not be manageable for firms. The additional questions on the client's sustainability preferences must have to be same for the clients. It would be impossible to manage different questions if the client invests through an insurance life contract or via a securities account. In respect of the client's journey, this would be impossible to understand for the client. It would also contradict the ongoing work conducted by the European Commission in its retail investment strategy, which aims to facilitate the investors' decisions by avoiding discrepancies among similar products.

Fourthly, we understand that the use of "should" means that a requirement is mandatory, when "could" only designed some possible ways to implement Level 2 requirements but are not mandatory. This should be clarified in the document. The clarification should either indicate that these proposals are no more than examples, or move these examples in the Annexe IV of the guidelines.

Lastly, SFDR and Taxonomy regulations, which constitute the cornerstone of the new MIFID Delegated Regulation are very complicated to explain and to understand at this stage, both for investment adviser/portfolio managers and for their clients.

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Under the current guidelines' approach, BNP Paribas considers that the following elements will deter clients from expressing their sustainability preferences:

- Excessive granularity for getting client's sustainability preferences;
- Unrealistic expectation from clients: if the firm must accept as such unrealistic preferences expressed by the client (due to its own offer or to the highly probable lack of products in the market) and, after having agreed to provide advice on this basis, the firm is not able to provide it and has to require a modification of these preferences for (almost) each advice provided;
- Excessive complexity to assess suitability against these client's sustainability preferences.

This process would lead to client disappointment and probably in a significant number of cases an absence of expression of sustainability preferences in the format required by the guidelines.

It would be better to adopt a more general approach with much more flexibility given to investment advisers and portfolio managers. It is too early to adopt such prescriptive and complicated guidelines on some key aspects, especially when most clients are not yet familiar with the most basic criteria for assessing the sustainability of product.

A less granular and less complicated approach is therefore needed for the time being in order to assess client's sustainability preferences.

2. Responses to ESMA Questions

Guideline 1 – Information to clients about the purpose of the suitability assessment and its scope

A new paragraph has been added to the guideline 1 to clarify that, as part of the suitability assessment, firms should help clients in understanding the concept of "sustainability *preferences", the different types of products included under the definition of "sustainability preferences", the features and the choices to be made in this context.*

No further amendments have been introduced in guideline 1.

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 share the view that we should accompany our clients in their journey towards more sustainable investing. We want however to share some attention points:

The way product eligibility is defined in the Level 2 text is very complex. It will be challenging to explain to the client the different types of eligible products in a clear manner avoiding technical language.

In order to choose the type of financial instrument the client intends to invest, the firm will have to explain the concepts of Taxonomy with the environmental objectives, of sustainable investment as defined in SFDR and finally the principal adverse indicators. The dialogue with the client would be facilitated if the firm could use terms that are not too technical to explain these concepts.

In addition, the firm will have to provide the client with another layer of explanation with the different choices that he will have to make:

- The part of his/her portfolio he/she wishes to invest in sustainable investments,
- The concept of proportion of sustainable investment within the products (a) and the products (b)
- The PAI's choice.

We believe that a more pragmatic approach, in which the firm would have the possibility to present its strategies and the different levels of sustainability of the services (on boarding the a/b/c products) it can offer, would be better understood by the client and would favour his expression of sustainably preferences, while sticking to the sustainability preferences that the client express and using directly the abstract concepts of the level 2 MiFID regulation does not.

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.

Yes, we agree. Nevertheless, the ESMA should adopt less complex requirements under Guideline 1 in order for firms to really help clients to understand the different sustainability concepts.

We share the views that the designation of sustainable preferences shall not contravene the suitability risk assessment. In the interest of the clients, firms should be authorised to provide not only generic information to clients but should also explain to clients the consequences of choosing (a), (b) or (c) financial instruments and if they are compatible with their risk profile. It is crucial that clients can understand the impacts of their sustainability preferences on their existing portfolio or investment and in terms of portfolio diversification. Accordingly, firms should be able to have a discussion with the client to explain the consequences of an increased concentration risk especially for clients that desire to invest significantly in category (a) financial instruments, given the limited number of companies that have taxonomy aligned activities (certainly at a first stage).

We therefore do really think that clients should not be left under a self-assessment regime of their sustainability investment profile. Clients should be guided by investment firms to define a workable and risk consistent sustainability investment profile. It is only after the preliminary exchange between the investment firm and its clients regarding client's sustainability preferences that the client's sustainability investment profile should be assessed and determined by the investment firm. The authorities could provide at regular intervals an assessment of the sustainable market that will allow clients to understand the current depth of the market.

We are particularly supportive of existing paragraph 14 of the guidelines, stating that "*Firms should avoid stating, or giving the impression, that it is the client who decides on the suitability of the investment, or that it is the client who establishes which financial instruments fit his own risk profile*." Indeed, firm could not accept to advice a client on a profile requiring together full liquidity, huge potential earning, and absence of risk. The objectives of the client would have to be reviewed with him/her before accepting to provide him/her with advice, to prioritize his/her objectives and draw-up a realistic profile on which advice can be provided. For the same reason, we consider that the firm can't accept to advice a client presenting unrealistic sustainability expectations but needs to discuss them with the client to draw up a realistic investment profile.

We consider that for professional clients a less granular approach will be more adequate.

In addition, we consider that a clarification that the approach can be proportionate should be added in this supporting guideline. When after a generic presentation the client indicates that he/she doesn't want to define specific sustainability preferences, the firm shouldn't have to present with more details what the choices can be. The absence of proportionality would contradict the European Commission's ongoing work conducted through its Retail Investment to limit the provision of burdensome and useless information to investors.

Guideline 2 – Arrangements necessary to understand clients

The content of guideline 2 has been amended to incorporate the new requirement to collect information from the client on the sustainability preferences. In particular, the supporting guideline outlines the approach to be followed with regards to the collection of the client's sustainability preferences and the client's level of sustainability-related expectation. The guideline also outlines the process to be followed in the case of a portfolio approach.

ESMA considers that the level of information to be collected from clients should include all aspects mentioned in the definition of "sustainability preferences" and should be granular enough to allow for a matching of the client's sustainability preferences with the sustainability-related features of financial instruments and to allow for a combination of the different aspects included under the definition of 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.

It should be noted that, in reflecting the legislative text, the approach suggested for gathering information from clients on their sustainability preferences is substantially based on self-assessment. This is different from the approach that firms are expected to adopt when collecting information on the 'traditional' parameters of suitability assessment. Firms are reminded that the existing ESMA guidelines focusing on the measures to be adopted to limit the risks of self-assessment remain confirmed and are not in any way impacted by the new guidance on collecting information on clients' sustainability preferences.

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.

As a preamble, we consider necessary to recall the need to have the same approach for this assessment under MiFID and under IDD. Any discrepancy would not be workable for firms, nor understandable by clients.

The global approach suggested in the draft guidelines is too granular and add to the MIFID II text additional requirements, making them even more difficult to understand for retail clients. In addition, the guidelines emphasize the fact that the client's questions should be raised in a neutral way in order to avoid influencing the client. However, for the time being the clients are not familiar with these concepts. For instance, last year, the AMF conducted a consumer survey which showed that most retail investor do not understand the basic sustainable finance concepts as ESG or ISR. It will be very complex for the client to distinguish the different product categories and make the appropriate choices. This is why, as stated in Q1, we consider that a better approach would be to allow firms to present their strategies and the different levels of sustainability of the services (onboarding the a/b/c products) they can offer, and let the client choose among the different levels proposed – or select another firm if no offer suits him. This approach would be clearer than letting the client express preferences on characteristics he does not master, for being disappointed at each advice when he is informed that no suitable product suits his sustainable preferences.

- It is important to note that the products a), b) and c) are not exclusive from one to the other. For instance, most products belonging to the "a" category will also comply to "b" and "c" specificities.
- Clients are allowed to choose financial instruments (a), (b) or (c) or a combination of those products. If clients choose a combination of product (a), (b) and (c), this means that any product belonging to one another of these categories can be recommended to clients to answer their sustainable preferences. When clients receive investment advice service, the firm will provide him/her with all the information to enable him/her to make his/her choice. This point should be clarified in the guidelines in order to avoid ambiguity.

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The second (2nd) step (see Guideline 2, § 26, 2nd bullet point) requires a questioning on whether such preferences focus on either environmental (E), social (S) or governance (G) criteria. **This is not required by MiFID II Delegated Regulation and should be removed**. Moreover, the definition of "sustainable investment", as per Article 2 (17) of SFDR referred to in Article 2 (7) b) of MiFID II Delegated Regulation, only includes environmental or social objectives. While Governance aspects are indeed important ESG indicia to promote, Governance matters are indeed more a way to achieve Environment and Social matters rather than as a specific sustainable goal to achieve. In addition, the SFDR level 2 draft pre-contractual document does not refer to governance aspects.

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Concerning the fourth (4th) bullet point: The concept of "*principal adverse impacts on sustainability factors*" as well as "*quantitative or qualitative elements demonstrating that consideration*" are extremely difficult for a client to understand. Consideration of the PAIs at product level is not clearly defined in SFDR and in the MIFID text are not limited to the indicators defined in SFDR RTS. Further, the PAI as listed in Annex to the draft SFDR RTS are drafted from a reporting perspective at entity level. Some indicators are not that meaningful from the perspective of client that wants to limit the adverse impacts of his/her investments.

We support the idea of families of PAIs that should be easier for the client to understand. However, their definition should not be constrained by the SFDR PAIs denomination. It is primordial for firms to be allowed to sufficient flexibility to tackle the PAIs in a comprehensible manner, less granular, and more intelligible for clients.

MiFID II Delegated Regulation requires qualitative **or** quantitative elements to be taken into account (see MiFID II Delegated Regulation amended, Art. 2 (7), c)) whereas the Draft guidelines require both qualitative and quantitative elements. It contradicts MiFID II Delegated Regulation and should be corrected.

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Regarding point § 27 (portfolio approach), ESMA should clarify the articulation of the "*minimum proportion*" for aspects a) and b) requirements with this second sentence "*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)*".

In addition, the sentence "*all preferences need to be asked for* ***and matched*** *with the sustainability-related features for the model portfolio*" should be amended. Indeed, as acknowledged by ESMA "*at this stage, the availability of financial instruments with sustainability features may be limited and the introduction of these financial instruments in the firm's product scope might be gradual. (…) firms should nevertheless collect all information concerning sustainability preferences.*" If there is no product which fulfill the client preferences, it is just impossible to match them with the sustainability-related features for the model portfolio. Under the portfolio approach, the criteria determined by clients should be considered as targets to achieve progressively: all advices and trades that contribute to that target should be deemed to satisfy client's sustainability preferences.

ESMA should also clarify the articulation of the "*to what extent*" requirement with this third sentence "*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*."

In accordance with bullet 5 of point 26 of the draft ESMA guidelines, financial institutions "*should have policies and instructions for their client-facing staff in place for situations where clients answer that they do have sustainability preference 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*".

We support this approach and are of the view that this option should also be integrated directly in the client's questionnaire and not only in internal procedures or policies. This should be also available in case of a digital flow; if not, clients while having an appetite for sustainable preferences, could sadly be keen to express a 'no' answer, in order to avoid more detailed questions.

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

No. The suggested guidance should be nuanced to take into consideration the issue we have raised in our response to Q3.

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?

Additional guidance is not necessary. Firms should be allowed flexibility on how to address and articulate these preferences notably to take into account its suitability assessment profile as long this is done transparently.

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 support the fact that portfolio approach is allowed by the guidelines. That being said, portfolio approach is not clearly defined. The link with the 'to what extent", if any, should be clarified.

The articulation between this portfolio approach and the MIFID Delegated Regulation text requirements related to the minimum proportions to be determined by the client (category a) and b) financial instruments) should be also clarified.

We understand that, also in case of a portfolio approach, the client must be inquired on his or her sustainability preferences in a neutral, unbiased way, however:

- **Alignment of MiFID Sustainability Preferences and SFDR**

We believe that – in the interest of the client – financial institutions should be allowed to bring MiFID ESG preferences and disclosures under SFDR in line.

Pursuant to SFDR, a portfolio managed under 'portfolio management' is considered as a Financial Product. Hence portfolio managers will be required to make pre-contractual and periodic disclosures on, amongst others, the (minimum) percentage of sustainable investments with an environmental objective (whether or not taxonomy aligned) and the (minimum) percentage of sustainable investments with a social objective, and not on the percentage of financial instruments with a (minimum) proportion of such (taxonomy aligned) sustainable investments.

Consequently, the disclosure requirements under SFDR (one step: (minimum) proportion of (taxonomy aligned) sustainable investments) are not in line with the sustainability preferences as literally described in MiFID ESG Delegated Act (two steps reasoning: "the extent of the ESG portfolio" and "the minimum proportion at the level of an individual financial instrument"). To remain consistent and not to confuse clients, we are of the view that we should be allowed to inquire our clients on their sustainability preferences by asking them about their desired minimum proportion of (taxonomy) aligned sustainable investments at their portfolio level (in line with SFDR disclosures).

- **Investment advice at portfolio level to be treated as portfolio management**

Given the enhanced transparency under SFDR (percentage of (taxonomy aligned) sustainable investment being calculated at the level of the portfolio and not at the level of a specific financial instrument within an, ESG sub portfolio determined by the client), we are of the view that a financial adviser should have this option not only in case of portfolio management, but also in case of investment advice with a portfolio approach.

Guidelines 3 and 4 – Extent of information to be collected from clients (proportionality) and reliability of client information

The content of guidelines 3 and 4 has been confirmed and no change has been introduced

Guideline 5 – Updating client information

A new paragraph has been added to the existing guideline 5 to clarify that, in relation to the collection of the sustainability preferences of a client, this information could be updated as part of the next regular update of the client's information or during the first meeting with the client following the entry-into-application of the amendments to the MiFID II Delegated Regulation.

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 suggested approach. We appreciate that not all existing clients need to be updated instantly and agree that the update should be made at the next regular update of client information, i.e. when the other suitability characteristics of the client are updated.

Nevertheless, BNP Paribas will ask its clients to complete the new questionnaire as soon as possible. As meetings are not always in relation with an investment advice or a regular update, we propose to clarify the guideline as follows:

"*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 following the entry-into-application of Commission Delegated Regulation 2021/1253.*"

This amendment is consistent with the recital (4) of the Level 2 text.

Guideline 6 – Client information for legal entities or groups

The content of guidelines 6 has been confirmed and no change has been introduced.

Guideline 7 – Arrangements necessary to understand investment products

Regarding the arrangements necessary to understand investment products, the supporting guideline has been amended to ensure that the policies and procedures implemented by firms to understand the characteristics, nature and features of investment products take into consideration the investment products' sustainability factors.

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.

Yes. We are however awaiting the consultation on the announced guidelines on the integration of sustainability factors in product governance. The information will be provided by financial instrument manufacturers to the distributors.

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 is needed.

Guideline 8 – Arrangements necessary to ensure the suitability of an investment

The content of guideline 8 has been amended to outline the approach to be used to assess the sustainability preferences of the client as part of the suitability assessment. The paragraph clarifies that the sustainability preferences of the client have to be assessed as a second step, once the suitability of the product has been first assessed in accordance with the criteria of knowledge and experience, financial situation and other investment objectives.

The guideline also addresses the situation where firm makes use of the possibility to recommend a product that does not meet the initial sustainability preferences of the client. ESMA considers that firms can still recommend products that do not meet the sustainability preferences of the client only once the client has adapted such preferences. The firm's explanation and the client's decision should be documented in the suitability report. It should be noted that this possibility should only refer to the sustainability preferences and not to the other criteria of the suitability assessment.

An additional paragraph has been also included to further clarify that the adaptation of the client's "sustainability preferences" where financial products do not meet such preferences should only refer to the suitability assessment in question/to the particular transaction and not to the client's profile in general.

ESMA is aware that, at this stage, the availability of financial instruments with sustainability features may be limited and the introduction of these financial instruments in the firm's product *scope might be gradual. However, ESMA considers that where, at the time the information is collected from the client, firms do not have any financial instruments included in their product range that would meet the client's sustainability preferences, firms should nevertheless collect all information concerning sustainability preferences. In this situation, the firm should clearly indicate that there are currently no products available that would meet those preferences and the client should be given the possibility to adapt the sustainability preferences. This should be documented in the suitability report.*

In this context, firms should monitor situations where there is a significant occurrence of clients adapting their sustainability preferences for the specific transaction. Indeed, this would seem especially important in the transitional stages towards a more sustainable financial system, where a wider offer of truly sustainable products will be available.

Lastly, the guidelines also address the situation in which a client does not express sustainability preferences.

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.

Regarding the proposed § 79 of guideline 8, we agree that sustainability preferences shall not take the lead on classic knowledge, experience and risks suitability criteria. But we don't think that this should be identified as being a second different step of the suitability, as this could be interpreted as requiring a second suitability assessment with a second suitability report. The sustainability preferences are part of client's objective. § 79 should be reworded to reflect this.

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In § 80, if the client has to respond to questions raised in a neutral way, this could raise to the impossibility to provide any advice which fits its sustainability preferences. If the client intends only to invest in products (a) while investing 100% of its portfolio, it is quite easy to understand that the investment firm will be obliged to advise financial instruments that do not match with client's 'sustainability preferences'. This means that the client will have to perpetually modify his/her 'initial sustainability preferences' in order to accept the financial instruments advised by the firm. This point should be documented in the suitability report which is not satisfactory in term of client's relationship. In addition, the client's agreement cannot be documented in the suitability report as it is provided before the trade: The execution of the advised transactions by the client should be deemed the client's acceptance.

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In § 81, we understand that the modification of the 'initial sustainability preferences' should not be a 'standard procedure'. Wording should be as such adapted to specifically apply to "initial sustainability preferences". From a practical perspective, what does it mean? Does this mean that after a certain number of advices which do not match with the 'initial sustainability preferences', then the firm could ask the client to change its 'initial sustainability preferences'? Clarification is needed on this guideline.

As indicated in Q1 and Q3, we consider that this difficulty results from a confusion in the wording of the guidelines between the "initial preferences" of the client (which have to be collected and taken into consideration) and his "sustainable investment profile" definition, which is under the firm's responsibility. The firm can't accept to advise a client presenting unrealistic sustainability expectations but needs to discuss them with the client to draw up a realistic sustainable investment profile, which result from the confrontation of the client's preferences and the financial products available in the market. Not doing so would necessarily lead to modify the sustainability preferences of the client for each advice, which would not be in line with § 81, would be burdensome, and would result in a huge disappointment for the client who should have been warned when expressing his sustainability preferences that they cannot be fulfilled. The regular review of the client's sustainable investment profile would allow, when the offer of sustainable products on the market will be more developed, to align more and more this sustainable investment profile with the sustainability preferences of the client.

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We strongly support the clarifications brought by the proposed § 82 first indent of guideline 8 on how to match, in case of portfolio management, investment firms' offer with clients' preferences through the amendment by clients of the preferences expressed during the initial suitability assessment, and consider that they should be extended to investment advice services.

§ 82 third indent indicates that "In case of portfolio management or ongoing investment advice with a portfolio approach, if the client adapts his/her initial sustainability preferences after the initial suitability assessment, firms should evaluate the impact of this change and whether this triggers a rebalancing of the portfolio."

§ 82 third indent should be limited to adaptation of (if any) "initial sustainability preferences".

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 understand that in first instance clients should be inquired on their sustainability preferences in a neutral way without taking into consideration the existing market offer.

Meanwhile, we fully agree with the first acknowledgment made by ESMA in its introductive wording: "*ESMA is aware that, at this stage, the availability of financial instruments with sustainability features may be limited and the introduction of these financial instruments in the firm's product scope might be gradual*." According to this statement, we believe that the best way would be to match the client's questionnaire with the existing offer within the market in order to define a consistent and realistic sustainability investment profile, and to have the flexibility to adapt this sustainability investment profile in the future when new products will be offered or when more data will also be available.

We also agree with the second acknowledgement made by ESMA: "*However, ESMA considers that where, at the time the information is collected from the client, firms do not have any financial instruments included in their product range that would meet the client's sustainability preferences, firms should nevertheless collect all information concerning sustainability preferences*". As a consequence, we consider that this information should not be considered as the "sustainability investment profile" of the client, as it is the responsibility of the investment firm to, taking into account the client's expectations and circumstances, to define the client's sustainability investment profile. Investment firms cannot use unrealistic sustainability expectations as a suitable profile for a client. Agreeing to provide investment advice based on unrealistic sustainability client's expectations without discussing them with the client would be misleading for him.

As such, we consider that some of the ESMA guidelines will have counterproductive effects.

Moreover, the way investment advisors and portfolio managers should be allowed to interact with their clients on the basis of these initial sustainability preferences should be more fluid and less cumbersome if we still want investors to be guided towards sustainable or ESG financial products.

Current ESMA guidelines would cause endless interaction with clients to adapt his/her sustainability preferences: Firms would indeed need to require client's agreement to adapt his/her sustainability preferences for each advised transaction. This may be a source of confusion for clients which may discourage them to invest in sustainable financial products.

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Regarding the proposed § 80 of guideline 8, the client's decision to adapt his/her sustainability preferences cannot moreover be documented in the suitability report as this document is provided to the client before the advice: Investment Firms should be allowed to advise financial instruments that are not aligned with client's sustainability preferences, the client being informed by the suitability report that the advice provided is not aligned with his sustainability investment profile. Should the client nevertheless decide to execute the advised transaction, the change of his sustainability investment profile should be deemed to be accepted by the client for this transaction.

Accordingly, wording of this § 80 should be modified:

"*80. Where the firm consider that due to its offer or to market circumstances the initial sustainability preferences of the client can't be fulfilled on a regular basis, it should discuss this with the client when agreeing on the sustainability investment profile on which the investment advice will be provided and ask the client to adapt his/her sustainability preferences. The decision of the client should be documented. If the firm intends to recommend a product that does not meet the sustainability investment profile agreed with 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 if it is clearly explained and documented in the suitability report. The client, by eventually agreeing to execute the advised transaction, is then deemed to have adapted his/her sustainability preferences, but only for the related advised transaction. 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.*"

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.

Yes, we agree, but for the same reason as stated in Q11, part of ESMA guidelines will have counterproductive effects and should be as such modified. Indeed, it is very likely that, initially financial products offers will be less ambitious than client's sustainability expectations. It is also very likely that the use of the possibility for the clients to adapt their sustainability preferences will be frequent if the sustainability profile is the result of the client's self-assessment, without taking into account also the reality of the market and the existing offer. We believe that such an approach would not be in line with the duty of pedagogy required from investment firms in their relationship with their clients.

There's indeed a significant risk to create an advisory gap and to deviate existing clients under advisory services towards non advised investment services like RTO, and towards non-sustainable products which would be the exact opposite of the goal of regulation.

As a consequence, regarding the proposed § 81 of guideline 8, taking into account the general comments in Part 1, first sentence should be removed and the wording should be specified as bellow:

"81. [First sentence removed] - Where a client adapts the sustainability preferences this adaptation should only refer to the suitability assessment/investment advice in question and not to the initial sustainability preferences. In case of investment advice, it should also be documented in the suitability report and be subject to the regular monitoring procedures."

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)?

Please refer to Q 11 and Q 12 answers. We wish to outline that to be efficient, the adaptation by a client of his/ her sustainability preferences can only follow a presentation, by the investment firm, of its ESG offer in a clear and not misleading way.

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.

If clients do not express sustainability preferences, there is no reason to explain firm's product offer. Second sentence of § 83 should be removed.

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.

Yes, we agree. For sake of clarity, last indent of § 82 should be reworded to relate to the initial sustainability preferences:

In case of portfolio management or ongoing investment advice with a portfolio approach, if the client adapts **its initial sustainability preferences** after the initial suitability assessment, firms should evaluate the impact of this change and whether this trigger a rebalancing of the portfolio.

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?

Since it is very likely that, as a first step, financial products offers will be less extended than client's expectations, it is also very likely that the use of the possibility for the clients to adapt their sustainability preferences will be frequent if the wording of the draft guidelines is not modified as proposed in Q1, Q3, Q10, Q11 and Q12.

Therefore, we consider it is unnecessary and overly burdensome to impose right away a close monitoring on these cases.

On the opposite, if the guidelines are adapted as we propose in Q11 and Q12, the monitoring of the deviation between the advice provided and the realistic sustainability profile agreed on with the client should be monitored to identify the reason of this deviation and correct it.

Guideline 9 – Costs and complexity of equivalent products

The content of guideline 9 has been confirmed and no change has been introduced.

Guideline 10 – Costs and benefits of switching investments

Under the Capital Markets Recovery Package, the following new subparagraph has been added to Article 25(2) of MiFID II:

"When providing either investment advice or portfolio management that involves the switching of financial instruments, investment firms shall obtain the necessary information on the client's investment and shall analyse the costs and benefits of the switching of financial instruments. When providing investment advice, investment firms shall inform the client whether or not the benefits of the switching of financial instruments are greater than the costs involved in such switching".

A slight wording amendment has been introduced in the text of guideline 10 to align the guideline with Article 25(2) of MiFID II.

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

Yes, we agree. A better alignment with client's sustainability preferences should also be inserted under 4th bullet point of § 96, to clarify that it is viewed as a potential benefit for a switch of financial instruments.

In order to be consistent with § 97, § 94 should be reworded as follows:

"Firms should have adequate policies and procedures in place to ensure that an analysis of the costs and benefits of a switch is undertaken such that firms are reasonably able to demonstrate that the expected benefits of switching are greater ***or not*** *than the costs."*

Guideline 11 – Qualifications of firm staff

ESMA has clarified in this guideline that staff giving investment advice or information about financial instruments should have the necessary knowledge and competence with regard to the criteria of the sustainability preferences and should 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.

Additional guidance is not required. Some NCAs have already set-up trainings and certifications.

Guideline 12 – Record-keeping

ESMA has confirmed the content of the 2018 guidelines on the topic of 'record keeping', since the rationale behind them has not changed, but has clarified that the firms should keep records of the sustainability preferences of the client (if any) and any updates of these preferences.

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

Yes, we agree. Record keeping is mandatory on any investment service provided to allow investment firms to have efficient internal control framework and to be able to demonstrate that they comply with their regulatory obligations.

Other changes to the guidelines:

- **Planned alignment with ESMA guidelines on appropriateness and execution only**

When finalising these guidelines on suitability, ESMA plans to align them with the text of its MIFID II guidelines on appropriateness and execution only[2] *(currently being finalised by ESMA) where MiFID has common provisions for both the assessment of suitability and appropriateness*[3]*.*

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.

Yes, we agree. Assessment of knowledge and experience of client is a component of the suitability checks as of the appropriateness ones. While clients may require, and staff may

[2] Ref: ESMA35-43-2938.

[3] See MiFID II Delegated Regulation, Art. 55.

provide, both types of services, it would be burdensome and difficult to understand for everybody that i) the collection of information and/or ii) the assessment of the consistency of the products bought/sold with the level of knowledge and experience of the client is different from one situation to the other one.

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

Regarding periodic suitability assessment (article 54.13 of MiFID 2017/565 Delegated Regulation):

We consider that the meaning of (6).f of Delegated Regulation 2021/1253. "*Article 54 is modified as follows: (…) in paragraph 13 a new subparagraph is added: 'The requirements to meet the sustainability preferences of clients or potential clients, where relevant, shall not alter the conditions laid down in the first subparagraph'*." is unclear. We consider that the guidelines should provide clarifications regarding this new subparagraph.

Our understanding is that neither the first expression of client' initial sustainability preferences, nor the regular review of the recommendations provided should lead to advise a full immediate alignment of his portfolio with his sustainability preferences, as such an advice would be hugely expensive and totally unrealistic for the client.

Our understanding is that this paragraph allows for a progressive alignment of the client's portfolio with his sustainability preferences, taking into consideration the other elements of the suitability assessment and the costs of the proposed alignment.

We would like ESMA's to clarify in the guidelines the meaning of this paragraph.

- **Good and bad practices**

In February 2020 ESMA announced on its website the launch of a common supervisory action (CSA) with national competent authorities (NCAs) on the application of MiFID II suitability rules across the European Union (EU).

The CSA was set up to allow ESMA and the NCAs to assess the progress made by intermediaries in the application of this key requirement, including on whether and how the costs and complexity of investment products are taken into account by firms when recommending an investment product to a client. ESMA had updated its guidelines on the topic in 2018 and had also published a supervisory briefing on suitability, both of which were considered for the 2020 CSA.

A Public Statement was published in July 2021[4] summarising *the results of the exercise.*
The 2020 CSA has shown an adequate level of firms' compliance with key elements of the suitability requirements that were already regulated under MiFID I such as firms' understanding of products and clients and the processes and procedures to ensure the suitability of investments. However, shortcomings and areas of improvement have emerged with regard to some of the new requirements introduced by MiFID II, notably the requirement to consider the cost and complexity of equivalent products, the costs and benefits of switching investments and suitability reports.

To provide further guidance to firms and to increase convergence on these important MiFID II requirements, ESMA has included in the annex to the guidelines a list of good and bad practices emerged from the 2020 CSA.

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

<u>We have comments on the bellow good practices:</u>

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[4] Ref. ESMA35-43-2748.

“*On the cost/benefit analysis of the switch, the provision of a simple and clear overview of the portfolio before and after the recommended transaction, which includes the expected (excess) return and costs related to the switch. By doing so, a client will understand what the effect of the switch would be on the expected return of his portfolio*”: In several situation, the switch is not driven by the expectation of an higher return but, for instance, by the alignment of the portfolio to the risk profile of the client, the diversification of the assets, etc…. Also any expected return/costs would need to be expressed on an certain period, and choosing this period may be very challenging (in particular if the product sold has a risk profile different from the product bought, or if the switch result from a change in the client investment profile…).

We therefore recommend deleting this example of “good practice”, which may be misleading for the client.

“*Continuous monitoring by control functions ~~(compliance and internal audit)~~ of advisors' performance to assess advisory activity and behaviors by taking into account client outcomes in the form of qualitative elements (e.g. complaints, satisfaction surveys) and quantitative metrics (e.g. return on investments, level or risk, cost and complexity of products, compatibility of investments with client profile)*.”: Internal audit is usually conducting periodic control and not continuous monitoring, when compliance may not be in charge of this monitoring (which is not included neither in the regulation nor in ESMA's guidelines relating to compliance function).

<u>We have comments on the bellow bad practices:</u>

1- “*Not properly investigating the clients' understanding of bail-in mechanism and its potential impact on the investments, e.g. where questionnaire presented to clients do not include questions specifically focused on the potential impacts for investments in a bank bond where the bail-in tool is activated*.”. Specific information is already provided to clients investing in “bail-inable” products. ESMA guidelines recently updated on non-advised services do not require such a specific questioning of clients on “bail-inable” products.

This requirement, which would once again require modification of the questionnaires, is too prescriptive. Such questions should not be systematically asked to each client, but, as for other specificities of investments products, can be raised when firms, depending on the products sold, the percentage of the investment of the clients in each product, etc… consider that additional questioning on specific topics is proportionate to the investment envisaged. We consider that this “bad practice” should be removed.

2 - " *On the cost-complexity of products, comparing only products issued by one single-entity (or by entities of the same group)*.” Some firms only offer products issued by one single-entity or by entities of the same group. The clients are clearly informed of the offer of the firms. Therefore, firms do not have to conduct a large assessment of the market offer when the range of product they offer is limited. We consider that this “bad practice” should be removed.

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.