**CONSULTATION PAPER OF ESMA**

**Draft guidelines on certain aspects of the MiFID II suitability requirements**

The French banking federation (FBF) 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]](#footnote-2).

1. **General comments**

As introduced above, FBF welcomes the opportunity to comment these Draft guidelines and wishes to emphasise the following issues:

* Primarily, the suitability requirements are an important piece of the legislation that governs retail clients’ access to the financial markets. It should obviously be governed by the investor protection principle to build the trust needed for these retail clients to invest. In the case of ESG, FBF agrees that it should also be designed to help directing the flow of retail investments towards more sustainable investments. Nevertheless, FBF would also like to point the complexity as well as the total lack of experience both from professionals and investors with the new ESG legal framework. In such context, FBF fears the expected process is far too ambitious and might in the end discourage clients to invest in sustainability products or even firms to market their products ESG characteristics.

This aspect should in our view be considered by ESMA in its proposed guidelines. It governs some of FBF’s answers hereafter.

A period of pedagogy vis-à-vis customers so that they appropriate the new dimensions deployed by European regulations will be necessary. This step will be fundamental to avoid the risk of customers who would lock themselves into requests whose ins and outs they do not control. The simple information of the customer, distinct from a real education, on these subjects is probably not enough.

French banking institutions therefore want to adopt the most pragmatic approach possible, more specifically to properly reconcile risk/return potential on the one hand and ESG preferences on the other.

* Secondly, FBF has a major concern with the expected date of application of these Draft guidelines: the work that has to be conducted to operationalise the processes that would result from such guidelines is extremely important and therefore has very little chance to be completed by the expected date. This is all the truer since sustainable finance regulatory framework is particularly complex and not yet finalized.
* Thirdly FBF wonders how the revision of ESMA guidelines on MiFID II suitability requirements articulates with the European Commission (EC) targeted consultation on options to enhance the suitability and appropriateness assessments launched on 21 February 2022[[2]](#footnote-3) to which FBF answered
* Fourthly, it is crucial to have an alignment between the ESMA guidelines and the EIOPA guidelines which is not the case. Any discrepancy between both guidelines would not be manageable neither for firms, nor for clients. 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 clients’ journey, this would be impossible to understand for them. 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.

Finally, the FBF strongly wishes to draw ESMA's attention to the problem of the absence of data during a long transitional period, whether under the SFDR Directive or the Taxonomy Directive. Therefore, if the implementation of these requirements is not operational and effective at the level of issuers, and able to be exploited by producers of financial products, a problem will persist on the investment universe presently available to customers. A disappointing entry into force for all the players concerned, particularly for customers, will leave an image of dysfunction that will be difficult to correct in the long run.

1. **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.**

FBF considers that:

* to keep the process as simple and operational as possible and avoid overwhelming clients with information they may not be interested in, **detailed explanation on the assessment of clients’ sustainability preferences should be provided only to clients who report having an interest in sustainability preferences.**

According to FBF, this is supported by the point made[[3]](#footnote-4) by the Commission in its Retail investment strategy Consultation paper which provides that “*Studies show that due to the complexity of products and the amount of the aggregate precontractual information provided to retail investors, there is a risk that investors are not able to absorb all the necessary information due to information overload. This can lead to suboptimal investment decisions*”.

* Before proceeding to the detailed assessment of client’s sustainability preferences**,** **a general warning should be provided to clients** i) on the state of maturity of the market on ESG products’ offer, and ii) on the specific risks potentially attached to the formulation of very ambitious ESG expectations: such risks (such as concentration or liquidity risk) may result from the scarce offer for highly taxonomy concentrated financial instruments, or from the fact that ESG products might not always be the cheapest products for a specific type of investment profile. By doing so, firms would avoid creating unrealistic expectations from clients that may be confusing and even misleading to them.

Therefore, to FBF, clients’ questioning on ESG expectations should be a five (5) steps approach:

1. ISPs should provide general information to clients on the concept of “sustainability preferences” and the purpose of this assessment.
2. The client would be asked a first general yes/ no question on any ESG preference.
3. Clients who answered yes to this first question should be provided more detailed information as provided under draft paragraph (§) 16 of the Draft guidelines.
4. Clients should be provided with a general warning i) on the state of maturity of the market on ESG products’ offer (e.g maximum taxonomy alignment offered) and ii) on the specific risks potentially attached to the formulation of very ambitious ESG expectations.
5. Clients would have to go through the detailed questioning on his/ her ESG preferences.

To avoid any risk of clients being driven towards one specific firm’s offer, figures on the overall state of maturity of the market could be provided by ESMA and regularly updated to follow market evolution.

In addition, on a formal standpoint, FBF also suggests ESMA adding complete reference to Article 2(7) MiFID II amended Delegated Regulation[[4]](#footnote-5) in the proposed § 16 of guideline 1.

**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.**

As previously stated under answer to Q1, in FBF’s view, the **questioning process should be kept as simple and operational as possible and avoid overwhelming clients with information they may not be interested in.**

According to FBF, this is supported by the point made[[5]](#footnote-6) by the Commission in its Retail investment strategy Consultation paper which provides that “*Studies show that due to the complexity of products and the amount of the aggregate precontractual information provided to retail investors, there is a risk that investors are not able to absorb all the necessary information due to information overload. This can lead to suboptimal investment decisions*”.

Therefore, FBF’s view is that detailed explanation on the assessment of clients’ sustainability preferences should be provided only to clients who report having an interest in such ESG preferences.

**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.**

First of all, FBF wishes to draw ESMA’s attention on some reading difficulties of the expected process:

* Concerning the first (1st) step, firms could choose to follow (see Guideline 2, § 26, first bullet point): How do the 1st indent (collection of information on “***the degrees*** *of sustainability related expectations of the client*”) and the third (3rd) indent (ask the client “***to what extent*** *financial instruments according to a) to c) should be included in client’s investment/portfolio*”) articulate? A reading might indicate that there are two (2) different proportionality steps in a raw which seems to go beyond level 2 requirements.
* A similar question arises on proposed §27 in guideline 2: is the question firms should ask the client about “*which part of the portfolio*” to be read as a way to implement the “*to what extent*” requirement aforementioned (see *Guideline 2, § 26, 1st bullet point, 3rd indent*) for services with a portfolio approach? If so, this should be clarified as well as the fact that sustainability preferences do not have to be taken into account on the rest of the portfolio.
* Then, FBF does not see why the portfolio approach would be limited to cases where several ESG preferences are expressed by the client (see *Guideline 2, § 26, 2nd indent, 2nd sentence*) and considers such approach should always be possible, whatever the client’s ESG preferences are.
* Concerning the 3rd step (see *Guideline 2, § 26, 3rd bullet point*): FBF enquires on the difference between ranges and sizes and therefore, suggests ESMA to clarify this point.

Secondly, FBF would like to stress the following points on which it does not share ESMA’s view:

* The second (2nd) step (see *Guideline 2, § 26, 2nd bullet point*) suggested would require a questioning on **whether such preferences focus on either environmental (E), social (S) or governance (G) criteria. FBF wishes to point out that this is not required by MiFID II Delegated Regulation. T**herefore, even if drafted as a good practice (by the use of the verb “could” rather than “should”), according to FBF, this 2nd step should be deleted.
* As for assessing clients’ preferences for financial instruments that consider PAIs, it has to be noted that whereas MiFID II Delegated Regulation requires qualitative **or** quantitative elements to be taken into account (see *MiFID II Delegated Regulation amended, Art. 2 (7), c)*), the Draft guidelines (see *Guideline 2, §26, fourth (4th) bullet point*) require both qualitative **and** quantitative elements (“*the information collected should cover the PAI and qualitative and quantitative elements mentioned under c*”). **FBF considers this goes beyond MiFID II Delegated Regulation.**
* In addition, FBF is unclear on what would the expected quantitative approach consist in. Therefore FBF deems useful to point that such approach should in no case require a quantified assessment of externalities as it is completely unworkable.

Furthermore, FBF wishes to emphasize the fact it is primordial for firms to be allowed sufficient flexibility to tackle the PAIs in a comprehensible manner, that is intelligible for clients (and bankers). Indeed, and as it was in a way taken into account in the 4th bullet point of the proposed § 26 of the Draft guidelines, it is not reasonable to require from firms to outline every SFDR PAIs (18 PAIs altogether) to the clients in order to “rate” each of them. Therefore, FBF is in favour of grouping the PAIs as per the SFDR RTS categories (9 categories) and to use for each of them a binary approach Yes/ No. This Yes/ No approach by families of PAIs would be workable both for clients to express their preferences with clarity and for firms to take them into account in their advice more easily.

Finally, in FBF’s view, since at least for a certain period of time, investors will probably not be able to grasp all the underlying sustainability preferences concepts, it is essential ESMA guidelines clarify that even if ISPs would be required to questions on a), b) and c) clients’ preferences, **clients should always be left the possibility to answer they do not have any sustainability preferences on some or all of these criteria.**

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

FBF considers that several points should be clarified:

* **Are answers to questions on a) b) and c) preferences intended to be alternative or cumulative when considered at the level of one specific financial instrument?** FBF’s reading is that **positive answers to questions on a), b) and c) preferences should be read as allowing the ISP to advice on either financial instruments with a) or b) or c) characteristics.** Such reading is, according to FBF, in line with the upcoming Article 2.7 Delegated Regulation (EU) 2017/565 that requires clients to choose “*as to whether and, if so, to what extent,* ***one or more*** *of the following financial instruments shall be integrated into his or her investment* (*…*)”. According to FBF, such drafting, without any ambiguity, leaves room for achieving clients’ sustainability preferences either through **one or through several instruments** meaning that if the client choses the 3 criteria a), b) and c), his/her preferences could be met either through advising only financial instruments presenting the 3 characteristics or through advising financial instruments that all together, meet the 3 criteria. It also has to be noted that § 24 of section 2.2 of ESMA consultation paper states that*” information collected on clients’ ESG preferences should allow for a combination of the different aspects included under the definition of sustainability preferences”.* In FBF’s opinion, such clarification only makes sense in the case the preferences were to be viewed, at first, as alternative.Finally, such reading seems **essential to allow more flexibility on the advice provided** to clients considering the **lack of maturity of the market on ESG criteria.**
* **What are the exact expectations on how firms should question clients who have ESG preferences on “*to what extent***” they have sustainability preferences?
	+ The guidelines should clarify that, **for services without a portfolio approach, the “*to what extent*” criterion should not be taken into account**. For such service, according to FBF, **the approach can only be binary: “yes or no** does the client have any ESG preference for a specific transaction?” In any case, FBF would like to draw ESMA’s attention to the possibility to provide “one shot” advice should be preserved, the reason being there is a client demand for such service.
	+ **For services with portfolio approach**, it should be clarified that the “*to what extent*” criterion could take the form of a **percentage of the portfolio** the client wishes to dedicate to ESG investments.
	+ Moreover, in case the alternative approach suggested above was not adopted, it should be clarified that, for services with portfolio approach, **the preferences have to be achieved at the level of the portfolio and not necessarily on an instrument-by-instrument basis**. This would allow an ISP, in case a client would have expressed preferences cumulatively on the 3 criteria a), b) and c), to advise on financial instruments that might not all fulfil the 3 preferences as long as the portfolio, considered as a whole, reflects the client’s preferences on the 3 criteria.

Additionally, FBF considers **more flexibility should be provided in the two following instances**:

* The client is a **professional client,** potentially also subject, as a financial institution, to ESG requirements that may duplicate with the ones made on distributors: as an example, an asset manager requiring advice from an investment firm will be implementing its own ESG investment strategy under its own responsibility so that a new suitability check will most probably have no added value.
* The advice requested by clients aims at **hedging an existing exposure**. In such case, ESG preferences, according to FBF do not make any sense.

This should, in FBF’s view, also be clarified in the Draft guidelines.

**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?**

Yes. Two essential points, in FBF’s view, need to be expressly clarified in the Draft guidelines:

* As previously stated under answer to Q4, FBF’s reading is that **positive answers to questions on a), b) and c) preferences should be read as allowing the ISP to advice on either financial instruments with a or b or c characteristics.** Such reading is, according to FBF, in line with the upcoming Article 2. 7 Delegated Regulation (EU) 2017/565 that requires clients to choose “*as to whether and, if so, to what extent,* ***one or more*** *of the following financial instruments shall be integrated into his or her investment* (…)”. According to FBF, such drafting, without any ambiguity, leaves room for achieving clients’ ESG preferences either through **one or through several instruments** meaning that if the client choses the 3 criteria a), b) and c), his/her preferences could be met either through advising only financial instruments presenting the 3 characteristics or through advising financial instruments that all together, meet the 3 criteria. It also has to be noted that § 24 of section 2.2 states that“*information collected on clients’ ESG preferences should allow for a combination of the different aspects included under the definition of sustainability preferences*”. In FBF’s opinion, such clarification only makes sense in the case the preferences were to be viewed, at first as alternative. Finally, such reading seems essentialto allow more flexibility on the advice provided to clients considering the lack of maturity of the market on ESG criteria.
* **For services with a portfolio approach**, it should be clarified that the “*to what extent*” criterion could take the form of a **percentage of the portfolio** the client wishes to dedicate to ESG investments.
* Moreover, in the case where the alternative approach suggested above was not adopted, it should be clarified that, for services with a portfolio approach, **the preferences have to be achieved at the level of the portfolio and not necessarily on an instrument-by-instrument basis**. This would allow an ISP, in case a client would have expressed preferences cumulatively on the 3 criteria a), b) and c), to advice on financial instruments that might not all fulfil the 3 preferences as long as the portfolio, considered as a whole, reflects the client’s preferences on the 3 criteria.

**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.**

According to FBF, the proposed approach with regard to the assessment of sustainability preferences in the case of a portfolio approach is unclear and the Draft guidelines should clarify that the “*to what extent*” criterion could take the form of a **percentage of the portfolio** the client wishes to dedicate to ESG investments.

Moreover, in the case where the alternative approach presented under FBF’s answer to Q5 was not adopted, it should also be clarified that for services with a portfolio approach, **the expressed preferences have to be achieved at the level of the portfolio and not necessarily on an instrument-by-instrument basis**. This would allow an ISP, in the case where a client would have expressed preferences cumulatively on the 3 criteria a) b) and c), to advice on financial instruments that might not all fulfil the 3 preferences as long as the portfolio, considered as a whole, reflects the client’s preferences on the 3 criteria.

**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.**

This proposal goes beyond what is currently provided for under Recital 4 of the Commission Delegated Regulation (EU) 2021/1253: “*To maintain a high standard of investor protection, investment firms should, when identifying the types of conflicts of interest the existence of which may damage the interests of a client or potential client, include those types of conflicts of interest that stem from the integration of the client’s sustainability preferences For existing clients, for whom a suitability assessment has already been undertaken, investment firms should have the possibility to identify the client’s individual sustainability preferences at the next regular update of the existing suitability assessment.*”

Thus, this Recital provides the possibility for firms to update the client’s sustainability preferences “*at the next regular update of the existing suitability assessment*”.

More particularly, FBF is not in favour of adding the necessity for firms to update the sustainability preferences of a client “*during the first meeting with the client*”. As such update will require time and availability of mind from the client, it may not fit well in the “first meeting” to take place after the entry of application of these MIFID II amendments, as such meeting may be on very different matters or even of a duration that does not allow such discussion. In addition, such requirement is viewed as being too broadly expressed, potentially giving rise to many disputes about the terms “*meeting with a client*”.

More generally, Guideline 5 already provides for updates to Suitability, the new ESG requirements must be integrated into the update process as provided for in this guideline and not be subject to a dedicated process.

**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.**

First of all, FBF is concerned about the lack of articulation of the ESMA proposed guidelines on suitability with the revision of the guidelines on MiFID II product governance requirements, which are very much related. In our view, both revisions should occur concomitantly. In this regard, FBF hopes ESMA’s review process of its Guidelines on Product Governance (launch of the consultation, consultation period, publication of the dedicated ESMA Final Report) will be initiated sufficiently ahead of the entry into force of the new MiFID II suitability requirements so that firms are able to comply in due time.

Then, FBF considers **the scope of the proposed § 71 should be limited to the products that are marketed as having ESG characteristics**. The Draft guidelines should explicitly leave open the possibility to consider that a product is ESG neutral and to market it as such even when it has some ESG characteristics.

It should be remembered that some products are not relevant in terms of ESG because of their intrinsic characteristics, for example hedging products including rates and exchange rates (e.g. rate swaps), and should be automatically qualified as “neutral” financial products.

**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.**

The topic of understanding investment products falls under product governance rules and should not be dealt with under the suitability guidelines

Therefore, according to FBF, no further clarification should be brought on this topic in the suitability guidelines.

**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 § 81 of guideline 8: FBF’s reading is that the adaptation by the client of his sustainability preferences will not impact the client’s profile but will only be valid for a specific transaction.

FBF is concerned that such an approach would not be workable in practice:

* In case of ongoing advice: if a client previously performed transactions based on adapted preferences, and an ongoing advice is provided afterwards in consideration of the initial client profile, such transactions will necessarily appear unsuitable. This should then trigger a recommendation by the ISP to unwind such position and another adaptation of the client’s preferences that is likely to result in the same conclusion as the previous one, providing no added value both for the client and for the ISP.
* For multiple transactions-based advice, such an approach will result in repeated adaptations by clients of their preferences, which is likely to cause them annoyance.

According to FBF, this is not a good outcome in a context where clients already complain about too much information being provided to and asked from them and burdensome processes to invest in financial markets.

It should also be possible to **adapt the client’s profile as a consequence of the adaptation process** provided under 3rd indent §10 of revised article 54 Delegated Regulation 2017/565. This would avoid the drawbacks described above without preventing the client’s from benefiting from new ESG products made available, as the client’s profile would be regularly upgraded.

Accordingly, FBF considers that the **clarifications proposed in § 82 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, **should be extended to advice, whether provided through a portfolio approach or “*transaction based***”.

**The adaptation of clients’ ESG preferences should not necessarily be in the suitability report as provided under draft paragraph 80, such preferences being attached to the client’s profile rather** than to a specific transaction. Nevertheless, as requested under the revised article 54.10 of Delegated Regulation 2017/565, ISPs should “*keep records of the decision of the client, including the reasons for that decision*”.

Indeed, the content of the adequacy report is contained in the delegated report, and it does not seem appropriate to modify this structuring document in level 3 texts.

However, FBF agrees with the underlying principle that clients’ preferences expressed on a theoretical basis should be considered as the final goal to achieve and the investment recommendations provided by ISPs should progressively adapt to industry’s evolution towards more ESG-concentrated products.

Institutions should be given the freedom to:

* adapt it for a given proposal only (ESMA proposal), if necessary by specifying for a particular operation that it does not have an ESG preference. This option is particularly necessary in the case of products that do not have eligibility for ESG criteria (rate swaps, etc.).
* modify the profile initially selected, knowing that the client has the possibility to retake and modify his questionnaire at each operation or on a recurring basis, which also makes it possible to respect the objective of ESMA that the customer can express (if necessary to each advisor) in a "neutral" way his "theoretical" preferences, even if they must subsequently be modified so that the bank can make a proposal to him

FBF would also like to point that in case the proposed approach described above was not retained and the transaction-based approach was maintained, it is most likely that clients’ theoretical expectations will not match market offer for a significant period, thus requiring adaptations for each piece of advice provided in the meantime. Therefore, the **first sentence of § 81 should be deleted to take into account that in such a case, adaptation of clients’ preferences will be frequent**.

Another important point FBF would like to underline is the necessity **to add** **another step before the client is required to amend his/her sustainability preferences, consisting in** **the ISP describing its ESG offer:** with this, the client will be in a capacity, if he/she wishes, to amend his/her sustainability preferences in coherence with such offer. In the absence of this new step, there is very little chance, due to the current limited offer for sustainable products, that clients’ expectations would meet the investment firm’s offer.

This will result either in investment firms not being in a position to sell any ESG products to clients, or having extremely long selling processes, the client having to endlessly amend his/her preferences until they finally match the investment firm’s offer. Therefore, the proposed § 83 stating “*The firm’s product offer should be documented and explained to the client with a mention of the products/portfolio’s sustainability features*”: should, in FBF’s view, apply to cases where the client has sustainability preferences, but such preferences do not meet the firm’s offer. On the contrary, FBF does not see any added value in providing such information (on the ISPs’ product offer) to clients who expressed they have no ESG preferences. According to FBF, this duplicates the information provided in accordance with proposed § 16 of the Draft guidelines. Therefore, in FBF’s view**, § 83 should be redrafted to apply only to cases where clients have expressed ESG preferences that do not meet the ISP’s offer**.

Concerning the proposed **§ 84**, FBF understands that if the client has sustainability preferences and the firm does not have any ESG products, no advice should be possible and hence no suitability report would have to be elaborated and sent. **Therefore FBF suggests such paragraph should be deleted**.

**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.**

No, FBF does not agree with the fact that the adaptation of client’s sustainability preferences “*should only refer to the advice in question and not to the client’s profile in general*”. See FBF’s answer to Q10 above.

FBF is concerned that such an approach would not be workable in practice:

* In case of ongoing advice: if a client previously performed transactions based on adapted preferences, and an ongoing advice is provided afterwards in consideration of the initial client profile, such transactions will necessarily appear unsuitable. This will then trigger another adaptation of the client’s preferences that is likely to result in the same conclusion as the previous one, providing no added value both for the client and for the ISP.
* For multiple transactions-based advice, such an approach will result in repeated adaptations by clients of their preferences, which is likely to cause them annoyance.

According to FBF, this is not a good outcome in a context where clients already complain about too much information being provided to and asked from them and burdensome processes to invest in financial markets.

Therefore, in FBF’s view, the only workable way to proceed **is adapting the client’s profile as a consequence of the adaptation process** provided under 3rd indent §10 of the revised article 54 of Delegated Regulation 2017/565. This would avoid the drawbacks described above without preventing the client’s from benefiting from new ESG products made available, as the client’s profile would be regularly upgraded to follow market evolutions.

Therefore, in FBF’s view, the only workable way to proceed **is adapting the entirety of clients’ profiles as a consequence of the adaptation process** provided under 3rd indent §10 of revised article 54 Delegated Regulation 2017/565.

If the solution proposed above was not retained, another possibility FBF would see, in case client’s preferences would not match the ISP’s offer would be to allow the IPS to recommend an ESG product, the client’s instruction to proceed with the corresponding transaction being then viewed as an adaptation of his/ her ESG preferences. In such case, the adaptation process would be documented and explained to clients in the suitability report.

**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.**

FBF wants to reiterate the fact that, to be workable, the adjustment by clients of his/her ESG preferences should:

* **apply to the client profile itself** (see answer to previous question and to Q10)
* **follow a presentation by the investment firm of its ESG offer.**

On this second point, in FBF’s opinion, another step should be added before the client is required to amend his/her sustainability preferences, consisting in the ISP describing its ESG offer: with this, the client will be in a capacity, if he/she wishes, to amend his/her sustainability preferences in coherence with such offer. In the absence of this new step, there is very little chance, due to the current limited offer for sustainable products, that clients’ expectations would meet the investment firm’s offer.

This will result either in investment firms not being able to sell any ESG products to clients, or having extremely long selling processes, the client having to endlessly amend his/her preferences until they finally match the investment firm’s offer. Therefore, the proposed § 83 stating “*The firm’s product offer should be documented and explained to the client with a mention of the products/portfolio’s sustainability features*”: should, in FBF’s view, apply to cases where the client has sustainability preferences, but such preferences do not meet the firm’s offer. On the contrary, FBF does not see any added value in providing such information (on the ISPs’ product offer) to clients who expressed they have no ESG preferences. According to FBF, this duplicates the information provided in accordance with proposed § 16 of the Draft guidelines. Therefore, in FBF’s view**, § 83 should be redrafted to apply only to cases where clients** have expressed ESG preferences that do not meet the ISP’s offer.

If the solution proposed above was not retained, another possibility FBF would see, in case client’s preferences would not match the ISP’s offer would be to allow the ISPs to recommend an ESG product, the client’s instruction to proceed with the corresponding transaction being then viewed as an adaptation of his/ her ESG preferences. In such case, the adaptation process would be documented and explained to clients in the suitability report.

**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)?**

In FBF’s view, the first step after the initial assessment which led to the conclusion that the ISP does not have any financial instruments in its product range meeting the client’s sustainability preferences, should be for the ISP to present its ESG products’ offer.

Then the client should be left the opportunity to amend his/her initial preferences.

According to FBF, this is the only way to avoid very lengthy processes that will last until clients finally express their preferences compatible with available products.

As requested under revised article 54.10 Delegated Regulation 2017/565, ISPs should “*keep records of the decision of the client, including the reasons for that decision*”. This will provide a protection, both for clients and ISPs in case of complaints from clients.

**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.**

No. As previously pointed out (see our answers to Q10 and Q12 above), FBF does not see any added value in providing clients who expressed they have no ESG preferences, with information on the ISP’s product offer as provided under draft § 83. To FBF, this duplicates the information provided in accordance with proposed § 16 of the draft guidelines. Therefore, in FBF’s view**, § 83 should be redrafted to apply only to cases where clients have expressed ESG preferences that do not meet the ISP’s offer**.

**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.**

First we don’t understand why the question is restricted to the portfolio approach, and as stated under its answer to Q10, FBF does not understand why such possibility should be restricted to cases where the service provided by the investment firm requires a portfolio approach.

Then, FBF is not sure to understand what is expected from firms and has doubts on the operationality of the proposals made:

* FBF’s reading of the proposed § 81 of guideline 8 is that the adaptation by the client of his sustainability preferences will not impact his initial profile. FBF has strong reservations on how this would work in practice.
* Then, according to FBF, to be efficient, the “matching process” must incorporate another step in the case where clients preferences are proven to be incompatible with the firm’s offer. The ISP would then present its offer as well as the possibility for the client, if he/she wishes, to amend his/ her sustainability preferences.

In the absence of this second step, there is very little chance, due to the currently limited offer for sustainable products that clients’ expectations would meet the investment firm’s offer.

This will result either on investments firms not being in a position to sell any ESG products to clients, or having extremely long selling process, the client having to endlessly amend his/her preferences until they finally match the investment firm’s offer.

**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 during a period of transition and adaptation to these new guidelines, investment firms’ offers will be less extended than client’s expectations, the use of the possibility for clients to adapt their sustainability preferences will be frequent. Therefore, it should not be viewed as an anomaly and FBF considers it is unnecessary and overly burdensome to impose right away a close monitoring of these cases.

FBF considers this should be kept for a future update of ESMA guidelines to be conducted when the market is mature enough.

The range of products distributed by distributors will evolve in accordance with the evolution of economy and consequently sustainable products.

**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.**

FBF’s view is that a better alignment with client’s initial sustainability characteristics should also, under 4th bullet point of § 96, be viewed as a potential benefit for a switch of financial instruments.

**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 nevertheless an update of the guideline for knowledge and competence … will be needed to be completed. 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 finalizing these guidelines on suitability, ESMA plans to align them with the text of its MIFID II guidelines on appropriateness and execution only*[[6]](#footnote-7) *(currently being finalized by ESMA) where MiFID has common provisions for both the assessment of suitability and appropriateness[[7]](#footnote-8).*

**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 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?**

FBF regrets the deletion of § 7 and 8 in the Introduction of the 2018 ESMA guidelines and wishes to suggest to ESMA to reintroduce them (and more especially § 8[[8]](#footnote-9)) at the end of the proposed Section II “Legislative references, abbreviations and definitions” of the Introduction of the Draft guidelines.

Ongoing advice:

We consider that the §6.f. of the “*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.’*” should be taken into consideration in the guidelines.

Our point of view is that neither the first expression of its sustainability preferences by an existing client, nor after this first expression 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 may be hugely expensive for the client.

This paragraph shall allow for a progressive alignment of the client’s portfolio with his sustainability preferences, taking into consideration the other element of the suitability assessment and the cost of the proposed alignment.

We would like ESMA’s to include in the guidelines these clarifications.

* **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[[9]](#footnote-10) summarizing *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?**

In FBF’s view, some so called good practices are already legal requirements so that it may create confusion to publish them as simple good practices.

This is the case for the 1st sentence of the 3rd § of the “client profiling” section.

Similarly, some behaviours that are presented as poor practices are already viewed as infringements to the current requirements so that again, the messages to professionals could in FBF’s view, be blurred. This is the case for:

* 1st, 3rd and 5th § of the “client profiling” section,
* “Product mapping” section,
* 1st § of the “matching” section
* last § of the “costs and benefits of switching investments” section

Some good practices also seem to go too far: this is particularly the case of the 2nd § of the “indicators/ monitoring control functions” section promoting frequent and thorough review of all aspects of suitability practices. Under ESMA’s compliance guidelines, investment firms must have a risk-based and proportionate approach for controls. Therefore, under such principle, a frequent and thorough review of all aspects of suitability practices should only be required where and when the firm has assessed the related risks as mandating such thoroughness and frequency The freedom (and resulting responsibility) of the firm in applying a risk-based approach to its control processes should apply to suitability practices, as with any other of its processes resulting from MiFID II.

We also have comments on the below good practices

“*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).

And on the below bad practices

 “*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-unable products. ESMA guidelines recently updated on non-advised services do not require such a specific questioning of clients on bail-unable products. This requirement, which would once again require modification of the questionnaires, is to 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.

" *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.**

As a professional organization, the FBF is not in a position to provide any answers to this question.

1. Cf. ESMA Final Report, “Guidelines on certain aspects of the MiFID II suitability requirements”, 28 May 2018 ([*ESMA35-43-869*](https://www.esma.europa.eu/sites/default/files/library/esma35-43-869-_fr_on_guidelines_on_suitability.pdf)). [↑](#footnote-ref-2)
2. Cf. the EC’s press release ([here](https://ec.europa.eu/info/consultations/finance-2022-suitability-appropriateness-assessments_en)) and the consultation paper ([here](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2022-suitability-appropriateness-assessments-consultation-document_en.pdf)). [↑](#footnote-ref-3)
3. See the [European Commission’s Consultation Document - A retail strategy for Europe](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2021-retail-investment-strategy-consultation-document.pdf), Question 4.9. [↑](#footnote-ref-4)
4. See the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council (MiFID II) as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, also known as the “MiFID II Delegated Regulation” ([link](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R0565)). It is the Commission Delegated Regulation (EU) 2021/1253 of 21 April 2021 which amended MiFID II Delegated Regulation as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms ([link](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32021R1253)). More particularly it is Article 1 (1) which adds (7) a) to c) to Article 2 of MiFID II Delegated Regulation. As for now, MiFID II Delegated Regulation amended by the Commission Delegated Regulation (EU) 2021/1253 shall apply from 2 August 2022 (see *EC Commission Delegated Regulation (EU) 2021/1253, Art. 2*). [↑](#footnote-ref-5)
5. See hereabove, the European Commission’s Consultation Document - A retail strategy for Europe, Question 4.9. [↑](#footnote-ref-6)
6. Ref: ESMA35-43-2938. [↑](#footnote-ref-7)
7. See MiFID II Delegated Regulation, Art. 55. [↑](#footnote-ref-8)
8. See 2018 ESMA guidelines, § 8: “*Guidelines do not reflect absolute obligations. For this reason, the word ‘should’ is often used. However, the words ‘shall’, ‘must’ or ‘required to’ are used when describing a MiFID II requirement*.” [↑](#footnote-ref-9)
9. Ref. ESMA35-43-2748. [↑](#footnote-ref-10)