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European Securities and Markets Authority
201-203 rue de Bercy
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France

Per online submission filed on 27 April 2022

Subject: response to the Consultation Paper on Guidelines on certain aspects of the MiFID II suitability requirements of 27 January 2022 (ESMA35-43-2998)

Dear Sirs,

in responding to the questions stated in the above-mentioned consultation paper (the “**Consultation**”), Associazione Italiana Private Banking (the Italian Private Banking Association, hereinafter “**AIPB**” or the “**Association**”) would first of all like to thank you for this opportunity and to express its appreciation for the proposed amendments to the above-mentioned guidelines on the suitability and sustainability assessment ⁽¹⁾.

However, by way of general and overriding requests, details of which will be provided below, AIPB considers it important that the guidelines presented for consultation be amended as follows:

- by giving the possibility to **collect sustainability preferences expressed by clients in a “qualitative”** and not overly “quantitative” and granular manner, as, conversely, is currently provided for. It will then be up to intermediaries to sort these preferences into the categories set out in Article 2, paragraph 7, of Regulation (EU) 2017/565;
- subordinately, by **outlining a gradual pathway to application of the rules to intermediaries**, similarly to what is happening – from a different point of view, but in the same sphere – with regard to the process of implementing the detailed rules of Regulation (EU) 2088/2019;
- **by clarifying whether only financial instruments that are also “financial products” as set out in Regulation (EU) 2019/2088 fall under the notion of “sustainability preferences” or whether this is a broader category.** If this were not the case, and hence if these instruments only comprised those mentioned in Regulation (EU) 2019/2088, one should, for example, come to the presumably unsupportable conclusion that bonds and equities may not fall under financial

⁽¹⁾ From a methodological perspective, AIPB has decided to answer some of the questions stated in the consultation paper and to group them by similarity of content. More specifically, questions 1 to 16, 18 and 19 have been answered.

instruments that can be recommended to clients expressing sustainability preferences;

- by confirming that clients may adapt their sustainability preferences without limitation if a security is suitable but not “sustainable”, and that this remedy should not be an exception to the general rule (as is conversely provided for by the Consultation’s supporting guideline 81), because this is the mechanism for managing possible conflicts between sustainability preferences and the other indicators used as reference for the suitability assessment.

That being stated, by this response we would therefore like to submit for your kind attention our answers and remarks in respect of the Consultation.

Hoping that the input from our Association can contribute to the evaluations to be made by the Authority, we remain available for any clarifications you may need.

Yours sincerely,

QUESTIONS AND ANSWERS

Q1: Do you agree with the suggested approach on providing information about the purpose of the of the suitability assessment and its scope? Please also state the reasons for your answer.

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.

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, it should be noted that it is not clear how all the envisaged types of financial instruments can be assigned to categories a), b) and c) of the notion of “sustainability preferences” contained in Article 2(7) of Regulation (EU) 2017/565 – also on account of the fact that the definition of “financial instruments” contained in Annex I, Section C of Directive 2014/65/EU (“**MiFID II**”) is broader than that of “financial products” set out in Regulation (EU) 2019/2088. In other words, we ask to clarify whether only financial instruments that are also “financial products” as set out in Regulation (EU) 2019/2088 fall under the notion of “sustainability preferences” or whether this is a broader category. If this were not the case, and hence if these instruments only comprised those mentioned in Regulation 2088, one should, for example, come to the presumably unsupportable

conclusion that bonds and equities may not fall under financial instruments that can be recommended to clients expressing sustainability preferences.

Conversely, if it were confirmed that there are other instruments that can meet “sustainability preferences” besides those provided for by Regulation (EU) 2019/2088, it would then be useful to know the exact scope of this category or the conditions which need to be met in order for them to be recommended when the client has expressed sustainability preferences.

In substance, this is a highly technical categorisation on which, in our view, it is not easy for retail clients to express their preferences after an articulate and complex explanation. As a matter of fact, understanding the notion of sustainability preferences implies the knowledge of technical categories that are peculiar to Regulation (EU) 2019/2088 and Regulation (EU) 2020/852. On the other hand, information overloading would be likely to compromise the possibility – first for the financial advisor and then for the client – to disclose the range of investment choices available to the latter.

Alternatively, one could possibly explain the definition of sustainability preferences to the client in a simplified manner, avoiding an overly “granular” level of detail. This would make it possible to better approach the client’s education/background. In other words, it is preferable to assume that the client should only be asked if he has any sustainability preference, without going into detail about the three distinct cases set out in the definition contained in Article 2(7) of Regulation (EU) 2017/565, and leaving greater discretion to the intermediary to assess the product’s (or portfolio’s) “ESG suitability” for the client’s profile, according to the general principle that supervised entities are in any case required to look after the best interests of investors.

In our view, in the immediate future the approach laid down in the MiFID II rules, which is aimed at investigating all the aspects of the definition of “sustainability preferences”, may also entail particular difficulties in offering products that can meet the aforesaid preferences, because the ranges of most intermediaries include products covering mainly the Environment pillar and to a considerably lower or no extent the remaining two pillars (i.e., Social and Governance) – also considering the fact that no social taxonomy has been developed yet.

Moreover, as has already been mentioned, we are of the view that problems may arise in getting first intermediaries’ staff and then clients to understand the differences among aspects a), b) and c) laid down in Article 2(7) of Regulation (EU) 2017/565, and, consequently, in enabling the latter to make an informed choice to that effect. In this case, too, information overloading is likely to be counterproductive for investors, even if they were interested in making an investment with sustainability features.

Even assuming that intermediaries can make the differences among the above-mentioned categories understood, investors can hardly be expected to be able to express their views about a financial product’s minimum eligibility concerning sustainability. This is a very technical element that hardly fits the concept of “preference”, which has an essentially qualitative connotation. As a matter of fact, the difficulty in understanding the individual items of the notion of sustainability preferences inevitably also reflects on the conscious statement of a minimum proportion. Most clients may not clearly perceive the differences among the three types of sustainable financial instruments and, consequently, the weights to be assigned to them within their portfolio. Detailed information, if any, would therefore

be provided to clients who do not have any substantial awareness of the effects connected therewith.

Besides, the concept of “minimum proportion” should be explained in more detail in order to avoid different interpretations; if necessary, it should be made clear that one may not be bound by the fact that a specific percent range has been stated.

With regards to possible alternative approaches on recording clients’ sustainability preferences, as has already been mentioned, we suggest a simplified, merely qualitative approach concerning information to clients, where no minimum proportion should be stated and intermediaries should be entrusted with the task of making a more discretionary assessment of the instruments reflecting the clients’ ESG preferences.

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

Besides what has already been clarified as to the desirably qualitative nature of expressed sustainability preferences, it is not clear how intermediaries should “translate” the quantitative aspects related to the principal adverse impacts (“PAI”) referred to in letter c) of the notion of “sustainability preferences” under Article 2(7) of Regulation (EU) 2017/565; we ask you to provide additional explanations on this point.

We also ask you to make clear that an investment recommendation may be considered to be consistent with the client’s sustainability preferences if it meets even only one of the characteristics set out in the points stated in the amendments to Article 2(7) of Commission Delegated Regulation (EU) 2017/565.

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?

We ask you to make clear that the intermediary may decide to collect sustainability preferences for one or more of the points stated in the amendments to Article 2(7) of Commission Delegated Regulation (EU) 2017/565, and not necessarily for all the points, depending on its service model, product range and data availability, in order to make the service more customised and to avoid collecting information about financial instruments that the intermediary knows *ex ante* that it does not currently have within its range of recommendable products.

Otherwise, we ask you to specify that intermediaries may make questions available progressively, even after the effective date of the Regulation, without having to submit these questions to their clients prior to the natural expiry of the questionnaire. Finally, we ask you to make clear that an investment recommendation as referred to in the definition of investment advice under Article 4, par. 1(4) of MiFID II may be considered to be consistent with the client’s sustainability preferences if it meets even only one of the characteristics referred to in the points stated in the amendments to Article 2(7) of Commission Delegated Regulation (EU) 2017/565.

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 ask you to be more precise as to how the client's preferences should be collected and used for the suitability check if advice services are provided under a "*portfolio approach*".

We also ask you to specify that, if the intermediary adopts a "portfolio" approach to the provision of advice, the concept of "minimum proportion" may be understood to refer to the aggregate portfolio, and not necessarily to the individual products – because the portfolio approach assumes that the assessment of sustainability preferences should be conducted aggregately, and not only with regard to each individual product.

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

First of all, it should be noted that, as has been mentioned, we would find it preferable to revise the guidelines by introducing a qualitative concept of sustainability preferences, which could therefore be more easily obtained from the client's questionnaire at the earliest opportunity. However, if the current granular quantitative approach is maintained, we suggest a gradual approach under which the client may be re-profiled at the earliest opportunity by introducing a general qualitative question relating to sustainability preferences. Action could then be taken, always under a gradual approach, with regard to all the aspects of the definition of sustainability preferences set out in Article 2, paragraph 7 of Regulation (EU) 2017/565.

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.

Please see our answers to questions 1, 2, 3 and 4.

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.

As to the actual assessment of sustainability factors, intermediaries are required to adopt sound and objective procedures, methods and tools that will allow them to adequately assess the different characteristics and the relevant risk factors (such as credit risk, market risk, liquidity risk, etc.) for each investment product that they may recommend or in which they may invest on behalf of their clients.

On this point, we ask you to specify the actual methodology through which the sustainable instruments assessment may be conducted, and, in particular, based on which criteria the products shall be grouped into the different categories of instruments mentioned in the definition of sustainability preferences. *Prima facie*, one could assume using third-party

ESG ratings, as most intermediaries appear to be doing, also considering the difficulty for intermediaries to classify a financial instrument as environmentally sustainable without resorting to external outsourcers. It may also be assumed that financial products which already qualify as sustainable on the basis of other rules (*e.g.*, products under Article 9 SFDR) will be presumed to be sustainable without the need for further assessment by intermediaries. On the other hand, it may also be possible to envisage a “hybrid” sustainable instruments assessment process, based on which intermediaries will devise an internal process integrating not only the ratings received from third parties, but also assessments made according to internal methodologies, possibly for securities for which there is no adequate rating coverage. However, this requirement shall be modified depending on the response that will be given with regard to the exact scope of the financial instruments that may fall under the notion of sustainability preferences (see our answer to questions n. 1, 2 and 3).

Finally, we ask you to specify what is meant by PAI-related “quantitative aspects”. It is not clear how these should be “translated” into the policies and procedures of intermediaries, and this circumstance is likely to result in an unharmonized approach, with a consequent risk of greenwashing. On this point, we ask you whether it would be possible to have an example of correct translation of PAI-related quantitative aspects.

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.

First of all, we take due note of the fact that the possibility to adapt sustainability preferences is an option for the client, not an obligation. Hence, unless we have misinterpreted this, it follows that if the client decides not to adapt his sustainability preferences, the intermediary may not provide a recommendation.

We also ask you to clarify that the adaptation of sustainability preferences will not require amending the questionnaire, but should consist in the client’s decision to carry out the recommended transaction anyway, on condition that clear and comprehensive information is provided in the suitability report, as, on the other hand, is underlined in the Consultation’s supporting guideline 32.

We ask you to confirm that the intermediary may decide to collect sustainability preferences for one or more of the points stated in the amendments to Article 2(7) of Commission Delegated Regulation (EU) 2017/565 (and not necessarily for all the points), depending on its service model, product range and data availability.

Otherwise, should the requirement to collect preferences for all the points stated in the amendments to Article 2(7) of that Regulation be confirmed, we ask you to specify – again on account of the described complexity in managing this phase – that intermediaries may make questions available progressively, even after the effective date of the Regulation, without the need for them to submit these questions to clients prior to the natural expiry of the questionnaire.

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.

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.

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)?

First of all, as has already been stated in our answers to questions n. 5 and 10, we ask you to confirm that sustainability preferences may be adapted without limitation if a security is suitable but not "sustainable", and that this remedy should not be an exception to the general rule, because this is the mechanism for managing possible conflicts between sustainability preferences and the other indicators used as reference for the suitability assessment.

Then, we ask you to make clear that, if there are no products meeting both the client's investment objectives and sustainability preferences, the intermediary may proceed with an investment proposal that only meets investment objectives, without the need for the client to adapt his sustainability preferences. Alternatively, we ask you to make clear that the intermediary may make an investment proposal that only meets the client's investment objectives, and not his sustainability preferences, also in cases other than when "there are no products", on the sole condition that these circumstances are expressly stated in the advice report and that the client has adapted his sustainability preferences – in order not to excessively limit intermediaries' operations.

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

We welcome the possibility to freely recommend sustainable financial products to a client who has declared himself neutral, or who has not expressed any sustainability preference, or anyway in the case where no information has been provided in this regard (supporting guideline 83) – in order to avoid any limitations to intermediaries' operations or barriers to entry into the investment advice and individual portfolio management markets.

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, insofar as this is the only way to be able to recommend a suitable instrument that does not meet sustainability preferences – although an accurate reading of the regulatory provisions seems to presuppose a product and not portfolio approach.

We ask you to clarify whether the approach to be followed should be both a product and a portfolio approach according to the example below: one should check that the product individually meets first the sustainability preferences expressed by the client (*i.e.* PAI, minimum proportion, type of product) and then the portfolio's alignment with the desired proportion.

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?

We are of the view that the possibility to adapt sustainability preferences is the only ordinary way to recommend an instrument which does not meet those preferences if the intermediary does not have such instruments in its product range; as a consequence, although these actions can be actively monitored, they should not be considered as abnormal activities, because otherwise one would risk paralysing advice activities.

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.

With regard to training, we agree; nevertheless, we suggest considering the introduction of a training process. However, since this is specialist training whose successful implementation takes time, a gradual approach to staff training ought to be introduced in this respect, too, so as to make it possible to achieve an adequate level over time.

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

We ask you to specify how long (in terms of years) the relevant records should be kept.