

2022-04-27

SSMA's response to ESMA's consultation re. guidelines on suitability

The Swedish Securities Markets Association (SSMA) welcomes the opportunity to respond to ESMA's consultation regarding certain aspects of the MiFID II guidelines on suitability.

General comments

- The SSMA is concerned with the timelines for implementing the new requirements on sustainability preferences, in particular considering the lack of alignment between MiFID II delegated acts and other EU initiatives such as SFDR and the Taxonomy Regulation. We therefore fully support the European joint industry proposal to postpone the implementation of MiFID II delegated act until 1 July 2023.¹
- Implementing the new rules on suitability preferences requires investment firms to make substantive investments in IT solutions and staff training. However, in the absence of final rules (e.g. SFDR level 2 and ESMA guidelines), many important implementation decisions have to be based on draft rules and consultation papers. Therefore, although investment firms are doing their best efforts to be ready by 2 August 2022, there will be need for additional work and adjustments during the years to come. It is important that both ESMA and NCAs recognise the enormous challenges that industry face when implementing these rules in their forthcoming supervisory activities. It would be most welcome if ESMA, when publishing the final report (in Q 3 2022?), could make a clear statement recognizing that firms will need some time to adjust to the guidelines.
- Since the EU rulebook on sustainability is still evolving, it is important to allow investment firms and their clients some flexibility in how to comply with binding level 1 and level 2. In fact, the SSMA is concerned that too detailed guidance on level 3 will only add to the complexity and could be quite counterproductive. At this stage we therefore support a cautious approach, noting that nothing prevents ESMA from reviewing and fine-tuning the guidelines in a few years once the EU-rulebook is finalised and the market has settled.
- Sustainability-related data regarding financial instruments will to a large extent not be available by the 2 August 2022 and in most cases, it will therefore not be possible for investment firms to provide clients with instruments that meet their sustainability preferences. We see a significant risk that it from a client perspective will be both confusing and frustrating if investment firms are required to ask very detailed questions about something that is not even available on the market yet. In fact, too complex information

¹ [Actions to support the transition of the financial sector and deferral of the MiFID II and IDD DAs.pdf](#)

requirements could discourage clients from wanting to invest in sustainable products all together, which of course would be very unfortunate and counterproductive. In its continuing work, the SSMA would therefore like to encourage ESMA to keep the client perspective in mind so as to ensure that the Guidelines are proportionate, flexible and “make sense” from a client perspective.

- Under MiFID Quick Fix, the co-legislators made several amendments to the investor protection regime, considering that different types of clients have different needs. These considerations are also relevant for sustainability-related information. Too detailed and complex disclosures lead to information overload that should be avoided from an investor protection perspective. It is therefore important that the Guidelines allow firms to “translate” the requirements in article 2(7) a – c into a language that the retail client can understand. For professional investors we support a simplified process and/or possibility to opt-out of the information requirements.
- The new rules on sustainability preferences will have a big impact not only on investment firms subject to MiFID, but also on producers of financial instruments (e.g. companies and asset managers) that will need to provide large amount of data that is needed in order for investment firms to fulfil their requirements. The SSMA welcomes European-wide industry initiatives such as FinDatEx EET template² which we hope will facilitate transfer of necessary data between certain types of producers and distributors across EU.
- As a final general comment, it is important to ensure that the Guidelines are technology neutral and work for both digital channels and physical meetings. Thus, terminology that suggest the need for a physical contact with the client should be avoided (e.g. “discuss” in point 82).

Specific questions

[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.

The SSMA agrees.

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 mentioned under General Comments, it is important that ESMA Guidelines allow flexibility regarding the application of information requirements on sustainability preferences, in particular as regards explaining the three different criteria in 2(7) a – c to clients. Different types of clients have different needs (e.g. professional clients and retail clients).

² [FinDatEx](#)

As regards retail clients, the SSMA wants to underline that the policy objectives which underpinned the MiFID Quick Fix i.e. importance to avoid information overload and to ensure that the general principles that disclosures should be clear and easy to understand also must apply in the case of sustainability-related information. Technical language and jargon should, if possible, be avoided. In the SSMA's opinion, concepts such as "taxonomy", "article 2(17)" or "PAI" are far too complex and detailed for the average retail client. Firms should therefore be allowed to translate a – c into a more high level language that the client is able to understand, for example focusing on "ESG". It should then be up to the investment firm to "map" the preferences expressed by the retail client into the legal requirements "a", "b" or "c".

[Guideline 2]

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.

According to Guideline 2, para 25, identification of a clients sustainability preferences shall be made at a "sufficiently granular" level for all investment advice and portfolio management. However, it should be noted that when the delegated regulation start to apply there will be a very limited number of financial instruments available that match the three categories of preferences. The draft Guidelines suggests that firms nevertheless need to explain the different categories and ask clients if they are interested in such products without having any products to offer.

In fact, even in the future where we hope that more data regarding financial instruments is available, it must be recognized that product ranges of investment firms can still be limited and it will probably not be uncommon that only one product is suitable to recommend to the client after the first part of the suitability assessment has been made (i.e., knowledge and experience, financial situation, and investment objectives position). For these types of situations, we consider that, taking proportionality into account, it should be possible with a more simplified process i.e., that instead of asking detailed questions about the client's sustainability preferences, firms could explain in detail how the instrument in question meets (or does not meet) sustainability according to article 2 (7) a, b and c (in a language that the client understands) and ask the client to confirm whether this is in accordance with the customer's sustainability preferences or not.

It should be noted that for some investment services, it is clear from the outstart that sustainability considerations are not relevant at all. For example, when a professional client receives advice on investments in FX or interest rate derivatives for hedging purposes. For such services, it is not reasonable to require that the investment firm and client go through the whole process of providing and collecting detailed information on sustainability preferences. Instead, a simplified procedure should allow the firm to inform the client beforehand that sustainability considerations are not relevant for the type of service in question.

As mentioned in Q 2, the Guidelines should allow firms flexibility as regards differentiating between different types of clients when providing the information as retail clients typically have other needs than professional investors such as pension funds and asset managers.

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

Under Guideline 2, point 26, second bullet, it is stated that firms could collect information on whether the client's sustainability preferences with regard to b) and c) have a focus on either environmental, social or governance criteria or a combination of them. Sustainable investments under 2(17) SFDR is however defined as either an investment contributing to an environmental objective or a social objective. Good governance is a prerequisite for being a sustainable investment but is not an objective in itself. For the avoidance of doubt, this should be confirmed by ESMA in the final report.

In Guideline 2, point 26, third bullet, regarding the collection of client's preferences of "minimum proportion" in alternatives a) and b), it is stated that when collection takes place through ranges or sizes, the ranges should be presented in a neutral way to the client and should be sufficiently granular. Further clarification from ESMA what is meant by "neutral way" and that the ranges should be "sufficiently granular" would be welcome.

Under Guideline 2, point 26, fourth bullet, it is stated that when collecting client's preferences linked to alternative c) PAI, information shall be collected regarding qualitative **and** quantitative elements. However, article 2(7) c MiFID states that information must be collected regarding qualitative **or** quantitative elements. The SSMA proposes that the guidelines is aligned with text of the delegated regulation.

We also note in the same bullet point, there is a reference to draft SFDR RTS as regards PAI. We do not oppose this per se. However, since there is no reference to SFDR in article 2(7) c, also other ways could be used to demonstrate PAI, independent on if the financial instrument is a financial product in accordance with SFDR or not. For the avoidance of doubt this should be confirmed by ESMA in the final report.

What do you mean by the "families of PAI indicators" in Guideline, point 26, fourth bullet? Could this be the categories, i) green house gas emissions, ii) biodiversity, iii) water, iv) waste and (v) social and employee matters as set out in table 1 of the RTS?

As a general comment it is important that the Guidelines are technology neutral and work for both digital channels and physical meetings with clients.

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

In order to avoid legal uncertainty, more clarifications are needed as regards how a – c:

- It is not clear how each of a, b and c apply to direct investments in financial instruments that are not SFDR products (e.g. share or bond).
- To our understanding, an investment fund can simultaneously be covered by a) (regarding the % taxonomy alignment), b) (SFDR product) and c) (PAI)? In this case, the percentage under a) should also be part of the percentage for b) (as taxonomy investments are also sustainable investments under b). Please confirm.
- Since there is no reference to SFDR in article 2(7) c, also other ways could be used to demonstrate PAI, independent on if the financial instrument is a financial product in accordance with SFDR or not. Please confirm.

- [Mer]

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.

Yes, we agree.

It needs to be clarified what is meant by investment advice “with portfolio approach”.

In point 27 on page 30, ESMA states that firms should therefore ask the client which part of the portfolio (if any) the client wants to be invested in products meeting the client’s sustainability preferences. SSMA’s understanding is that a client can have different sustainability preferences for different parts of a portfolio, e.g. for different types of financial instruments or express an ESG preference for the whole portfolio. Please confirm.

[\[Guideline 5\]](#)

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.

[\[Guideline 7\]](#)

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 agree. However, as mentioned under general comments, it will take time and resources to get the information out in the organization, make necessary IT-adaptations and educate staff in order for them to handle the information in meetings with clients. Considering that we do not yet have final rules (e.g., SFDR level 2 and ESMA guidelines, product governance rules) and that there still are so many legal uncertainties how the rules should be interpreted, it will be almost impossible to have everything in place by 2 August 2022 and there will be need for additional work and adjustments during the years to come. It is important that both ESMA and NCAs recognise the enormous challenges that industry face implementing these rules and take a flexible approach in their forthcoming supervisory activities. It would be most welcome if ESMA, when publishing the final report (in Q 3 2022?), could make a clear statement recognizing that firms will need some time to adjust to the guidelines.

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 a general comment, implementation will be challenging as the product governance rules will become applicable after the rules on suitability and we do not know which data about financial instruments that will be available.

[\[Guideline 8\]](#)

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.

As a starting point we agree with the proposal to address sustainability preferences (stage 2) after all other suitability criteria have been assessed (stage 1).

However, there are unclarities in the guideline what the requirements are for investment firms in such case no financial instruments meet the client's or potential client's initial sustainability preferences. We see that two different alternatives are possible in these cases but ask for clarification on which alternative to apply.

Alternative 1

A financial instrument can still be recommended provided that it is clearly explained and documented to the client or potential client that the recommended financial instrument does not meet the client's or potential client's sustainability preferences. The client or potential client should be given the possibility to adapt the information on his or her sustainability preferences, but if the institute still does not have any instrument that meets the client's sustainability preferences, a financial instrument that does not meet the client's adapted preferences can be recommended anyway, provided that the instrument is suitable according to assessment in stage 1.

If this approach is to apply, it should be clarified in ESMA's guidelines that so is the case. Moreover, it should be clarified in the Guidelines that advice given on products which deviate from the originally expressed sustainability preferences must of course be suitable for the client in accordance with stage 1.

Alternative 2

Investment advice can only be given in such case the client or the potential client adapts his sustainability preferences in such manner that the investment firm has a financial instrument which meets the adapted sustainability preferences.

If this alternative is to apply, it is of utmost importance that ESMA clarifies that it is possible for the client to adapt his sustainability preferences to what the investment firm can offer, without this being considered unneutral or biased advice. Unless the investment firm may guide the client or potential client in this way when identifying the client's adapted sustainability preferences but must do it in the same manner as the identification of the client's initial sustainability preferences, the client may need to redo the suitability questionnaire multiple times. This would create frustration on the client's side, which could result in clients refraining from stating any sustainability preferences, which goes against the purpose of the regulation. If this approach is to apply, it is also unclear how point 84, which applies in relation to investment firms having no products with any sustainability related factors, align with the approach.

The SSMA prefers alternative 1 which we think is in line with recital 8 as well as the position in Commission's explanatory memorandum [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM:C\(2021\)2616](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM:C(2021)2616) (see section 3 page 5 "*However, such financial instruments can still be recommended within the suitability test, but not as financial instruments meeting individual 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.

See Q 10.

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.

The question of adaptation cannot be analyzed in isolation but is closely linked to the process of matching available products with the clients sustainability preferences (see Q 10 – 11).

The SSMA is concerned with the statement in point 81 (page 30) of the consultation paper stating that the possibility to adapt “should not be standard procedure”.

Although we have sympathy for the policy objective of this statement (which we understand to be avoidance of mis-selling and greenwashing) it is important to consider the practical reality: **there will be a very limited number of sustainable financial instruments available on the market, in particular that meet article 2(7) a and b.** This will not only be the case between 2 August 2022 and 1 January 2023 but probably for a few years to come. If a client is not able to amend its preferences to fit with this the market situation and the investment firms offering, he or she will not be able to invest in any financial instruments. Of course, this is not a desirable outcome.

Moreover, the SSMA would like to underline that it is the client that takes the decision to adapt or not and that since the level 2 rules allow this, firms are not in the position to refuse - even if it should happen often. The need to adapt will depend on the market situation and investment firms’ product offering which will be develop over time.

Based on the above, the SSMA proposes that the first sentence where reference is made to “standard procedure” in point 81 is removed. The requirement of documentation in the suitability report of a client’s adaptation should however be kept.

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

See Q 10-13.

Please also note that for some investment services, it is clear from the outstart that sustainability considerations are not relevant at all. For example, when a professional client receives advice on investments in FX or interest rate derivatives for hedging purposes. For such services, it is not reasonable to require that the investment firm and client go through the whole process of providing and collecting detailed information on sustainability preferences. Instead, a simplified procedure should allow the firm to inform the client beforehand that sustainability considerations are not relevant for the type of service in question.

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 more prescriptive rules are needed.

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.

We agree.

In point 81, the SSMA notes that ESMA underlines that the adaptation should only “refer to the suitability assessment/investment advice in question and not to the client’s profile in general”.

We are not quite sure about what ESMA’s intention is behind this statement as it must of course be possible also to update a clients general sustainability profile if there is reason to do so. Please clarify.

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?

The SSMA considers that monitoring of adaptation can be handled in the same way as ordinary monitoring of risk. No specific rules are necessary.

In point 81 (page 30) of the consultation paper Esma reminds firms that the possibility to adapt suitability preferences should not be “standard procedure”. The SSMA would like to underline that it is the client that takes the decision to adapt or not and that since the level 2 rules allow firms to adapt, firms are not in the position to refuse clients to do this, even if it should happen often. The need to adapt will depend on the market situation and investment firms product offering.

Considering that for the near future there will probably be a very limited number of products available that meet clients sustainability preferences, such adaptation is likely to be more the rule than an exemption. Based on these considerations, SSMA suggest that this comment in point 81 on “not standard procedure” should be deleted.

[\[Guideline 10\]](#)

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

[\[Guideline 11\]](#)

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.

- As mentioned under General Comments, implementing the new rules on suitability preferences requires investment firms to make substantive investments in IT solutions and staff training. However, in the absence of final rules (e.g. SFDR level 2 and ESMA guidelines), many important implementation decisions have to be based on draft rules and consultation papers. Therefore, although investment firms are doing their best efforts to be ready by 2 August 2022, there will be need for additional work and adjustments during the years to come. It is important that both ESMA and NCAs recognise the enormous challenges that industry face when implementing these rules and take a flexible approach in their forthcoming supervisory activities. It would be most welcome if ESMA, when publishing the

final report (in Q 3 2022?), could make a clear statement recognizing that firms will need some time to adjust to the guidelines.

[Guideline 12]

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

[To be discussed].

[Other issues]

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.

Generally speaking, we do not support a “copy paste” approach since there can be differences between advisory and non-advisory services that needs to be taken into consideration as well as the technological environment. Each guideline needs to be analyzed from the perspective of whether it works well in the context of suitability or appropriateness (respectively).

Where the provisions are identical, e.g. knowledge and competence, we see no reason that the guidelines differ.

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

See general comments.

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

SSMA’s members are concerned with the growing amount of non-binding guidance issued by ESAs such as Q&A, opinions, public statements, supervisory briefings and letters to/from the Commission. This large number of “Level 3 sources” makes the EU rulebook increasingly complex and creates undesired compliance risks. Moreover, it is not entirely clear to us what is the difference in “status” between guidelines, supporting guidelines and good & poor practices (if any). In Sweden, Finansinspektionen has taken the position that guidelines from ESAs has the same status as “allmänna råd” and expects firm to “comply or explain”. Would this apply also to good & poor practices? In order to avoid uncertainty, the SSMA think that it would be better to list the identified “good & poor” in a final report following a Peer Review rather than including them in the same document as ESMA Guidelines.

As a general comment, the SSMA considers that it should be avoided to repeat the text of level 1 and 2 rules in ESMA Guidelines since this makes the distinction between binding and non-binding rules less clear and also contributes to making the Guidelines too long. It is also very important to be careful with the wording in the guidelines and good & poor practices so as to avoid requirements that does not follow from level 1 and 2.

The SSMA has the following detailed comments.

Good practices

- Under "*Client profiling*" it follows it is good practice to identify client related events that should lead to update of the client profile. Such requirement can of course only be relevant in respect of ongoing advice and not one-off, which should be clarified.
- Under "*Indicators/monitoring/control functions*" it is stated that it is good practice to identify events that should lead to an update of a portfolio. According to SSMA this is a requirement applies to producers under product governance rules and not the distributors. Please also note that the compliance functions work follow a risk based approach in accordance with applicable rules. The frequency of such monitoring is therefore not something that should be determined in a list of "good & poor" practices. Moreover, the ESMA questions that it should be a job for the compliance function to monitor a clients return on investments.

Poor practices:

- Under *Cost and complexity*, we question the reference to "One single entity". The texts indicates that there is a requirement to compare products issued by a number of different producers. No such requirements follow from binding rules.

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
