Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e. V.
Bundesverband deutscher Banken e. V.
Bundesverband Öffentlicher Banken Deutschlands e. V.
Deutscher Sparkassen- und Giroverband e. V.
Verband deutscher Pfandbriefbanken e. V.

Die Deutsche Kreditwirtschaft

Comments

ESMA Consultation - Guidelines on certain aspects of the MiFID II suitability requirements

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Contact:
Martin Pietzner
Associate Director
Telephone: +49 30 1663-1554
E-Mail: martin.pietzner@bdb.de

Alissa Wiemann
Telephone: +49 30 1663-1510
alissa.wiemann@bdb.de

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

Coordinator:
Bundesverband deutscher Banken e. V.
Burgstraße 28 | 10178 Berlin | Germany
Telephone: +49 30 1663-0
www.die-deutsche-kreditwirtschaft.de
www.german-banking-industry.org

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

We agree with the suggested approach of making the concept of sustainability preferences easier to understand for investors. We also think it is good that the statement is general and how they implement this in practice will be at the discretion of the banks. We believe banks should retain this leeway in the final guidelines.

Re.: paragraph 16
However, the requirement to avoid using technical language needs qualification. Since the objectives of the SFDR, the Taxonomy Regulation and MiFID II Delegated Regulation (EU) 2017/565 differ, it may be necessary to use technical terms in order to give a sufficiently clear description. It must be possible to assume that, in accordance with the principle of clarity, the statutory provisions themselves are sufficiently clear and comprehensible that legal terminology can be used when explaining them to the client. It should not be the task of investment firms to clarify any ambiguities in the law to their clients. Consequently, we believe the statement about avoiding technical language should be limited to situations in which it is possible to do so and that investment firms are given the scope to do this at their own discretion.

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.

In our opinion, the information requirement does not need expanding further. The explanations are sufficiently clear and, at the same time, give the banks enough scope when implementing them. The specifications do not need any further clarification.

However, it would be useful to clarify that it is possible to provide an overview of the product universe with corresponding sustainability factors as preliminary information and that this is not seen as exerting undue influence on the client.

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.

We only partly agree with the suggested approach. We are very critical of the scope of the suitability assessment.

a) **General concerns about providing further details that go beyond the legal requirements**

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The legal requirements already burden the investment advice process with a very high level of detail that is unnecessary for achieving sustainability goals. Once again, the client receives a large amount of information which may result in the risk of information overload. Also, based on the legal requirements, the client is to be asked a larger number of questions and in more detail than has ever been the case with any other client information. Ultimately, the requirements should be designed in such a way that the request for sustainability preferences is also understandable for clients who use robo-advisors. This should also mean that clients are not overwhelmed by requests for information. This presupposes that the differences between the individual case scenarios, about which clients are requested to provide information, can be made sufficiently clear to them (and not become confusing due to overly detailed questions). Furthermore, the additional time needed to respond to the questions should be appropriate, so that clients are willing to give specific answers.

It is also important to take into account here that there are currently only very few products that cover all the specific goals of ESG. An unnecessarily detailed process would have to be set up to collect client preferences for which there may be no sustainable instrument in accordance with Article 2(7) of MiFID II Delegated Regulation (EU) 2017/565.

The ESMA guidelines should not add to the existing complexity. The legal requirements for taking sustainability preferences into account and the lack of coordination of these requirements with the other European requirements on sustainability in terms of content and timing already represent a considerable challenge for banks in the context of the current implementation. This should not be further compounded by requiring them to interpret the requirements as well. This is also not in the client's interest (see above). These aspects should be taken into account when finalizing the guidelines.

b) Basic structure for collecting information, paragraph 25

We are critical of the basic structure for collecting information from clients, arising from paragraph 25, on the following points:

- Banks should be permitted to put "not specified/no preference" for the initial question instead of just "no". The consultation paper also treated both "sustainability-neutral" and "no" the same, as in paragraph 83.

- In respect of the fourth bullet point, the wording goes further than the legal requirement in Article 2(7)c. There it talks about qualitative **or** quantitative criteria, while the guidelines refer to qualitative and quantitative criteria. The final guidelines should be amended here to reflect the legal wording, also in order not to further increase the complexity of the questions about sustainability preferences.

- The explanations in paragraph 25 should also include the indication contained in Article 54(5) of MiFID II Delegated Regulation (EU) 2017/565 that the information should only be collected "where relevant". This qualification by the legislator shows that sales offices should be given a certain degree of flexibility, which should also be reflected in the guidelines.

c) Example approach, paragraph 26

As initially mentioned, sustainability plays a very important role in client consultations. This complex topic places considerable challenges on both clients and advisors alike. For this reason, it is important that the requirements are not expanded further in the guidelines. We are therefore critical of the example approach outlined in paragraph 26. It is positive, however, that the process is referred to as a suggested approach and would therefore be optional. Nevertheless, the options presented here go well beyond the legal requirements and are not workable in practice. The suggested approach should therefore be curtailed. Furthermore, the suggested approach should be optional as envisaged in the consultation version. We are, however, not in favour of asking questions that go beyond concretising the legal requirements.

In our opinion, asking about E, S and G goes beyond the legal requirements and should not therefore be specified in the guidelines.

In addition, collecting information relating to governance criteria would make little sense, since the SFDR provides for companies to actively pursue environmental or social criteria. In contrast, the governance criterion is a necessary prerequisite for all sustainable products and is not intended to be an actively pursued objective. As a result, it is unrealistic to expect there to be products with a key focus on governance.

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

We do not believe that further guidance is needed. However, the explanation given in paragraph 26 should be shortened and be geared more towards the legal requirements (see answer to question 3 above).
Clients' sustainability preferences will very probably only match a small number of sustainable financial instruments initially.

We do, however, have some concerns about the application date of MiFID Delegated Regulation (EU) 2017/565 (2 August 2022) and the application date of MiFID II Delegated Regulation (EU) 2017/593 (22 November 2022). A lot of information will not be available by these dates, in particular the SFDR Delegated Regulation (RTS) (e.g., no binding agreements on minimum shares of sustainable investment and on consideration of certain PAIs in sales brochures of investment funds), meaning that implementation can only be based on SFDR interpretations. Furthermore, the technical implementation will need sufficient lead time. We therefore welcome the discussion at European level about postponing the application date of Delegated Regulation (EU) 2017/565. In our view, the application date of the MiFID II Delegated Regulation and Delegated Directive should be postponed until the information required under the SFDR and the taxonomy regulation has been made available.

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?

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We believe the current guidance and Guidelines are sufficient.

We refer to our initial comments in Q3 on the combination of aspects under letters a), b) and c) of Article 2(7) of Delegated Regulation (EU) 2017/565. There is no legal requirement on the part of the client or the advisor to prioritise any particular product categories. For this reason alone, we believe it is inappropriate to ask the client to prioritise any categories. This would unnecessarily complicate the process. Furthermore, it is likely that a client who wishes to prioritise his/her preferences, will do so without being asked.

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.

Please refer to separate comments submitted by the individual associations.

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

Re.: paragraph 55
The approach is sufficient and appropriate. It allows for the required scope to collect the client's sustainability preferences as part of investment advice and financial portfolio management.

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.

The additions to sustainability preferences in **paragraphs 70 and 71** are appropriate since they keep the current system of product governance and also give clients the option to form groups of financial instruments for investment preferences.

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

No, we don't believe that more detailed guidance is needed.

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

We are critical of some points in the additions to guideline 8, which we believe should be amended as follows in the final guidelines:

Paragraph 79 introduces the requirement to first assess suitability in accordance with conventional criteria, then select suitable products based on this assessment and then identify the product or investment strategy that meets the client's sustainability preferences. This is certainly one method that would work in practice. However, it should not be made mandatory.

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Providers should be free to ask detailed questions from the beginning (that means exploration of all criteria of the suitability assessment including sustainability preferences) and then move on to product selection on this basis. Both methods will have the same result: either the product matches the stated criteria, or it does not. The sequence in which this is done is not relevant. This applies, in particular, where a system-side check is carried out to determine which products can be recommended based on all the information given by the client.

The legislation makes provisions in Article 54(10) DelVO (EU) 2017/565 for the specificities of sustainability preferences to be taken into account.

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.

Please refer to comments submitted by the individual associations.

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.

Please refer to comments submitted by the individual associations.

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

Please refer to comments submitted by the individual associations.

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.

Re.: paragraph 83
We believe no further clarification is required.

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.

Please refer to comments submitted by the individual associations.

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?

Please refer to comments submitted by the individual associations.

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

In our opinion, the new wording in paragraph 97 is appropriate. However, the word "clear" should be deleted. Furthermore, it should be added that legal requirements also permit the suitability report to be made available retrospectively.

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.

Re.: paragraph 104
No, in our opinion, no further guidance is needed. We are, however, critical of the fact that these guidelines specify the required expertise of investment advisors and sales staff, in particular, although there are separate guidelines for this. We believe there is a risk of divergence of the different specifications and that this approach might lead to different interpretations.

On the statement that staff should be able to explain the various aspects to clients in non-technical terms, please see our response to Q1.

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

Please refer to comments submitted by the individual associations.

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.

Please refer to comments submitted by the individual associations.

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

The legal requirements already burden the investment advice process with a very high level of detail that is unnecessary for achieving sustainability goals. Once again, the client receives a large amount of information on a very complex subject which may result in the risk of information overload. Also, based on the legal requirements, the client is to be asked a greater number of questions and in more detail than has ever been the case with any other client information. Ultimately, the requirements should be designed in such a way that the request for sustainability preferences is also understandable for clients who use robo-advisors. This should also mean that clients are not overwhelmed by requests for information. This presupposes that the differences between the individual case scenarios, about which clients are

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The ESMA guidelines should not add to the existing complexity. The legal requirements for taking sustainability preferences into account and the lack of coordination of these requirements with the other European requirements on sustainability in terms of content and timing already represent a considerable challenge for banks in the context of the current implementation. This should not be further compounded by requiring them to interpret the requirements as well. This is also not in the client's interest (see above).

Against this background, ESMA should make the legal requirements more precise, but not extend them. This approach is taken in some of the guidelines, but in some places there should less concretisation (see comments on this in the individual responses).

In addition, there are a number of regulatory requirements for sustainability that are continuously being further developed. This makes it necessary to give banks sufficient leeway to be able to respond to these further developments. For this reason, too, the guidelines should not include mandatory requirements that go beyond the legal requirements.

Against this background, there should be a critical assessment as to whether it makes sense to publish guidelines on future regulatory requirements with regard to sustainability at this point in time. We would recommend first gathering practical experience to use as the basis for making appropriate interpretations, from the point of view of both clients and banks.

In practice, it is also difficult that ESMA interpretations are only available shortly before or when the regulatory requirements come into force. This generates the need for banks to make expensive adjustments that need to be implemented downstream. In future, the legislator should ensure that the implementation period also takes account of the time needed to issue guidelines and is correspondingly longer, so that IT systems only need to be amended once. Though this is aimed primarily at legislators, we would nevertheless welcome the support of ESMA on this aspect.

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

In our opinion, some of the examples are very granular, so it seems doubtful that they can be implemented on a large scale.

As the examples given emerged from the CSA practised by some market participants (but not by all, some have made other arrangements to implement the regulatory requirements), the examples should by no means be binding. That they are not mandatory should be mentioned in the final guidelines clearly.

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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.

Implementation and compliance with the guidelines will generate huge costs that we as associations cannot quantify.

One-off costs
From the distributors' point of view, the existing process would need to be expanded to include numerous aspects:

- Procurement of ESG information from manufacturers
- Product governance processes
- Questionnaires
- Suitability assessment
- Instruments that support the advisor in recommending a suitable financial instrument and/or the portfolio manager in selecting a suitable financial instrument.
- Suitability report, including ongoing suitability in asset management

In addition,

- All investment advisors and sales personnel need to be trained
- ESG information must be collected from all clients seeking advice or portfolio management, explaining the process of collecting information in each case, responding to questions from clients

Ongoing costs

- The client consultation will take longer
- Costs for (ESG) data queries from the manufacturer, expanding reports to include sustainability (more printing & postage costs)
- ESG data licences
- Ongoing IT updates due to future changes to the "sustainability world"