

MEMO# 33921

November 23, 2021

ESMA Call for Evidence on Retail Investor Protection - Member Call on 1 December 2021

[33921]

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TO: Global Advocacy Coordination Advisory Committee
Global EU Capital Markets Union Task Force
Global Operations Advisory Committee
Global Regulated Funds Committee RE: ESMA Call for Evidence on Retail Investor Protection - Member Call on 1 December 2021

On 1 October 2021, the European Securities and Markets Authority (ESMA) published^[1] a call for evidence (CfE) on certain retail investor protection issues.^[2] The CfE is described in detail below. ESMA is accepting contributions submitted via an online form^[3] by 2 January 2022. ICI Global will respond to the CfE. ICI Global is organising a member discussion on the CfE via Zoom on 1 December 2021 at 3:00-4:00 pm GMT/10:00-11:00 am ET. Details for the Zoom discussion are below:

- Link: <https://ici-org.zoom.us/j/92991618134?pwd=ZnFNNFpzLzVTcjAzYUh1c3RsYzlkUT09>
- Meeting ID: 929 9161 8134
- Passcode: 842812
- Dial-in numbers: <https://ici-org.zoom.us/j/92991618134?pwd=ZnFNNFpzLzVTcjAzYUh1c3RsYzlkUT09>

The first half of the member discussion will focus on the interoperability challenges of SFDR and MiFID suitability or other requirements (in response to question 9 in the CfE.) The remainder of the member discussion will cover the other questions in the CfE.

Background

On 27 July 2021, the European Commission ("the Commission") sent a request for advice^[4] to ESMA to assist the Commission in the development of its strategy for retail investments, under the auspices of the new Capital Markets Union Action Plan.^[5] In response to this request for advice, ESMA is seeking to gather views and qualitative/quantitative information from stakeholders through a CfE. As outlined in greater detail below, in the CfE ESMA is requesting information on the following three topics:

- Disclosures: identification of any significant overlaps, gaps, redundancies and inconsistencies across investor protection legislation that might have a detrimental effect on investors. In particular, the call for evidence seeks input on how the rules work from a retail investor perspective - whether consumers can make informed choices, avoid information overload and overly complex information while ensuring investor protection;
- Digital disclosures: an assessment of how regulatory disclosures and communications can work best for consumers in the digital age, and proposes options as to how existing rules might be adapted, such as allowing layered information; and
- Digital tools and channels: an assessment of both risks and opportunities with respect to retail investing stemming from both the increasing availability of digital tools and the increasing levels of direct investor participation via online trading platforms and robo advisors. In addition, the call for evidence also explores the topic of open finance i.e. how far value chains should be opened up by sharing specific investor data amongst investment firms and third party providers.

Overview

In the first section of the CfE, ESMA provides background information, including the consultation launched by the Commission on its overarching strategy for retail investments on 11 May 2021^[6] to which ICI Global responded.^[7] ESMA notes that the Commission has also submitted a request for advice to the Joint Committee of the European Supervisory Authorities (ESAs) on the PRIIPs Regulation,^[8] on which they have published a separate call for evidence.^[9] Furthermore, the Commission has submitted a request for advice on digital finance and related issues,^[10] on which a workshop was organised.^[11] In addition, the Commission has launched a study examining disclosure, inducements and suitability rules for retail investors.^[12] From an international perspective, ESMA also notes ongoing work by the US Securities and Exchange Commission on the use of digital engagement practices by broker-dealers and investment advisers.^[13]

ESMA acknowledges the importance and complexity of the topics set out in the Commission's request for advice and asks stakeholders for any general observations or comments they would like to make (Q1).

Disclosures

ESMA notes that pre-contractual and on-going disclosure requirements are set out in MiFID II as well as other sectoral investor protection legislation and horizontal legislation. In particular, ESMA notes importance of the PRIIPs Regulation,^[14] given its objective to provide short, pertinent, and clear information to retail investors and its direct impact on the distribution of retail investment and insurance-based investment products.

ESMA recalls other aspects of the MiFID II framework, including the requirement for marketing communications to be identifiable as such, be fair, clear and not misleading,^[15] and be provided in good time to clients or potential clients.^[16] Furthermore, ESMA notes the need for "information to be provided in a comprehensible form in such a manner that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis."

ESMA recalls the advice it has already provided to the Commission on the MiFID II inducements and costs and charges disclosure regime,^[17] including its recommendation

that the MIFID II and PRIIPs disclosure regimes should be aligned and consistent. Furthermore, ESMA notes the ESAs' final report^[18] on draft technical standards to improve certain sections of the PRIIPs Key Information Document (KID) including proposals to align the cost disclosure requirements of the PRIIPs and MiFID frameworks.^[19]

ESMA is seeking input through the CfE on significant overlaps, gaps, redundancies and inconsistencies between MiFID II and other investor protection legislation that might have a detrimental effect on retail investors. In this regard, ESMA raises the following nine questions:

- Q2: Are there any specific aspects of the existing MiFID II disclosure requirements which might confuse or hamper clients' decision-making or comparability between products? Are there also aspects of the MiFID II requirements that could be amended to facilitate comparability across firms and products while being drafted in a technology neutral way? Please provide details.
- Q3: Are there specific aspects of existing MiFID II disclosure requirements that may cause information overload for clients or the provision of overly complex information? Please provide details.
- Q4: On the topic of disclosures, are there material differences, inconsistencies or overlaps between MIFID II and other consumer protection legislation that are detrimental to investors? Please provide details.
- Q5: What do you consider to be the vital information that a retail investor should receive before buying a financial instrument? Please provide details.
- Q6: Which are the practical lessons emerged from behavioural finance that should be taken into account by the Commission and/or ESMA when designing regulatory requirements on disclosures? Please provide details and practical examples.
- Q7: Are there any challenges not adequately addressed by MIFID II on the topic of disclosures that impede clients from receiving adequate information on investment products and services before investing? Please provide details.
- Q8: In case of positive answer to one or more of the above questions, are there specific changes that should be made to the MiFID II disclosure rules to remedy the identified shortcomings? Please provide details.
- Q9: On the topic of disclosures on sustainability risks and factors, do you see any critical issue emerging from the overlap of MiFID II with the Sustainable Finance Disclosure Regulation (SFDR) and other legislation covering ESG matters?
- Q10: Are there any other aspects of the MiFID II disclosure requirements and their interactions with other investor protection legislations that you think could be improved or where any specific action from the Commission and/or ESMA is needed?
- Q11: Do you have any empirical data or insights based on actual consumers usage and engagement with existing MiFID II disclosure that you would like to share? This can be based on e.g., consumer research, randomized controlled trials and/or website analytics.

Digital Disclosures

ESMA notes that MiFID has historically required information disclosures to be provided to clients on paper except in certain limited circumstances.^[20] ESMA previously recommended that e-delivery^[21] should become the default option and not require "an active choice of the client, provided, however, that the client has provided the firm with a valid email address."^[22] ESMA has also maintained the "the client should retain the right to receive information on paper."

ESMA recalls that the so called "MiFID Quick Fix"[\[23\]](#) updated the MiFID provisions to enable investment information to be provided electronically as the default option, with the ability for retail investors to request the provision of that information on paper.[\[24\]](#)

ESMA notes the significant changes that technology is bringing about in the way firms interact with their clients and potential client. ESMA notes that this enables firms to adopt various new approaches to communicate and provide regulatory disclosures. However, ESMA notes that existing regulatory disclosures and communications are often lengthy, printed documents that many retail clients find difficult to understand and engage with. ESMA sets out various benefits and risks of digital means of communication and notes the need for clients to be able to save relevant information e.g., PDFs for access in the future.

ESMA has analysed existing guidance in the area of digital disclosures, noting that the following elements are typically included:

- Easy navigability of information;
- Retrievability of information;
- Obligation to provide the possibility to save information;
- Presentation and format;
- Versioning;
- Limiting of security risks for clients;
- Use of different means; and
- Monitoring effectiveness.

ESMA notes that some of the above elements could be imported into the MIFID framework. ESMA is seeking input from stakeholders on practical solutions implemented by firms to deliver regulatory disclosures and information to clients with an explanation of if, and how, these have fared when communicating with clients. ESMA is also seeking suggestions on how the MiFID II regulatory framework could be adapted to take into account technological changes in the way firms deliver regulatory disclosures and information to clients. In this context, ESMA raises the following five questions:

- Q12: Do you observe a particular group or groups of consumers to be more willing and able to access financial products and services through digital means, and are therefore disproportionately likely to rely on digital disclosures? Please share any evidence that you may have, also in form of data.
- Q13: Which technical solutions for digital disclosures (e.g., solutions outlined in paragraph 27 or additional techniques) can work best for consumers in a digital - and in particular smartphone - age? Please provide details on solutions adopted and explain how these have proven an effective way to provide information that is clear and not misleading.
- Q14: Would it be useful to integrate any of the approaches set out in paragraph 27 above in the MIFID II framework? If so, please explain which ones and why.
- Q15: Should the relevant MIFID II requirements on information to clients be adapted in light of the increased use of digital disclosures? If so, please explain how and why.
- Q16: Do you see the general need for additional tools for regulators in order to supervise digital disclosures and advertising behind 'pay-walls', semi-closed forums, social media groups, information provided by third parties (i.e., FINfluencers), etc? Please explain and outline the adaptations that you would propose.

Digital Tools and Channels

ESMA examines various different digital tools and channels in the CfE including, of greatest relevance to regulated funds and their managers, robo-advisers, risk warnings and open finance, as set out below.

ESMA notes the potential opportunities and risks from robo-advisers. ESMA recalls the changes that have been made to its guidelines on certain aspects of the MiFID II suitability requirements[\[25\]](#) to take account of the development of robo-advice and other changes. ESMA raises the following six questions about the robo-advice market and the existing regulatory framework:

- Q17: To financial firms: Do you observe increased interest from retail investors to receive investment advice through semi-automated means, e.g., robo-advice? If yes, what automated advice tools are most popular? Please share any available statistics, data, or other evidence on the size of the market for automated advice.
- Q18: Do you consider there are barriers preventing firms from offering/developing automated financial advice tools in the securities sectors? If so, which barriers?
- Q19: Do you consider there are barriers for (potential) clients to start investing via semi-automated means like robo-advice caused by the current legal framework? If so, please explain and outline what you consider to be a good solution to overcome these barriers.
- Q20: In case of the existence of the above-mentioned barriers, do you have evidence of the impact that they have on potential clients who are interested in semi-automated means? For instance, do they invest via more traditional concepts or do they not invest at all?
- Q21: Do you consider the potential risks and opportunities to investors set out above to be accurate? If not, please explain why and set out any additional risk and opportunities for investors.
- Q22: Do you consider that the existing MiFID regulatory framework continues to be appropriate with regard to robo-advisers or do you believe that changes should be added to the framework? If so, please explain which ones and why.

ESMA is seeking input through the CfE on the effectiveness of the warnings provided to retail clients when accessing MiFID investment services other than investment advice or portfolio management ("non-advised services"). ESMA recalls the existing MiFID requirement for firms to ask the client or potential client to provide information regarding their knowledge and experience relevant to the specific type of product or service offered or demanded. This information enables the firm to assess whether the envisaged investment service or product is appropriate for the client.[\[26\]](#)

ESMA notes its ongoing work to develop guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements.[\[27\]](#) ESMA is seeking feedback through the CfE on the effectiveness of warnings in ensuring sufficient protection for retail investors when accessing `non-advised` services. ESMA raises the following question (Q42): Do you consider that the current regulatory framework concerning warnings provides adequate protection for retail investors? If not, please explain and please describe which changes to the current regulatory framework you would deem necessary and why.

ESMA is seeking input on open finance (i.e. the sharing and use of customer-permissioned data held by financial institutions with third-party providers.) ESMA notes the potential benefits for innovation: the development and availability of better financial products; and the potential for investment advisers to offer more targeted advice. ESMA also notes the potential risks of open finance, including the misuse of client data: increased risk of fraud;

incorrect advice to clients; and generally poor consumer outcomes. ESMA is seeking opinions and observations in relation to open finance on whether and how value chains should be 'opened' up to allow the sharing of specific investor data amongst investment firms and third-party providers. ESMA raises the following seven questions:

- Q43: Do you believe that consumers would benefit from the development of an 'open finance' approach similarly to what is happening for open banking and the provision of consumer credit, mortgages, etc? Please explain by providing concrete examples and outline especially what you believe are the benefits for retail investors.
- Q44: What are, in your opinion, the main risks that might originate from the development of open finance? What do you see as the main risks for retail investors? Please explain and please describe how these risks could be mitigated as part of the development of an open finance framework.
- Q45: Which client investor data could be shared in the context of the development of an open finance framework for investments (e.g., product information; client's balance information; client's investment history/transaction data; client's appropriateness/suitability profile)?
- Q46: What are the main barriers and operational challenges for the development of open finance (e.g., unwillingness of firms to share data for commercial reasons; legal barriers; technical/IT complexity; high costs for intermediaries; other)? Please explain.
- Q47: Do you see the need to foster data portability and the development of a portable digital identity? Please outline the main elements that a digital identity framework should be focusing on.
- Q48: Do you consider that regulatory intervention is necessary and useful to help the development of open finance? Please outline any specific amendments to MiFID II or any other relevant legislation.
- Q49: What do you consider as the key conditions that would allow open finance to develop in a way that delivers the best outcomes for both financial market participants and customers? Please explain.

Next Steps

ICI Global is organising a member discussion on the CfE via Zoom on 1 December 2021 at 3-4pm GMT/10-11am ET. ICI Global will submit its response to the CfE to ESMA by the 2 January 2022 deadline. ESMA will deliver its advice to the European Commission by 30 April 2022.

Giles Swan
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ICI Global

endnotes

[1] ESMA Call for Evidence: On the European Commission mandate on certain aspects relating to retail investor protection, 1 October 2021, *available from* https://www.esma.europa.eu/sites/default/files/esma35-43-2827_call_for_evidence_on_retail_investor_protection.pdf

[2] ESMA Press Release: ESMA Seeks Stakeholder Input on Shaping Advice on Retail

Investor Protection, dated 1 October 2021, *available from* <https://www.esma.europa.eu/press-news/esma-news/esma-seeks-stakeholder-input-shaping-advice-retail-investor-protection>

[3] <https://www.esma.europa.eu/press-news/consultations/call-evidence-retail-investor-protection-aspects>

[4] European Commission: Call for advice to the European Securities and Markets Authority (ESMA) regarding certain aspects relating to retail investor protection, available from https://www.esma.europa.eu/sites/default/files/library/call_for_advice_to_esma_regarding_certain_aspects_relating_to_retail_investor_protection.pdf

[5] European Commission: Capital markets union 2020 action plan: A capital markets union for people and businesses, 24 September 2020, *available from* https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-2020-action-plan_en

[6] ICI Memorandum No. 33532, RE: European Commission Consultation on a Retail Investment Strategy...., dated 12 May 2021, *available from* <https://www.ici.org/memo33532>

[7] ICI Memorandum No. 33710, RE: European Commission Consultation on a Retail Investment Strategy: ICI Global Response, dated 2 August 2021, *available from* <https://www.ici.org/memo33710>

[8] European Commission: Call for advice to the Joint Committee of the European Supervisory Authorities regarding the PRIIPs Regulation, *available from* <https://www.eiopa.europa.eu/sites/default/files/publications/letters/20210726-call-for-advice-on-priips-cfa.pdf>

[9] Joint Committee of the European Supervisory Authorities: Call for evidence on the European Commission mandate regarding the PRIIPs Regulation, 20 October 2021, *available from* https://www.esma.europa.eu/sites/default/files/library/jc_2021_61_priips_call_for_evidence.pdf

[10] European Commission: Request to EBA, EIOPA and ESMA for technical advice on digital finance and related issues, *available from* https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/210202-call-advice-esas-digital-finance_en.pdf

[11] ESA workshop on the Call for Advice on Digital Finance, *available from* https://www.eiopa.europa.eu/media/event/esa-workshop-call-advice-digital-finance_en

[12] <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=5959>

[13] US Securities and Exchange Commission: Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice, *available from* <https://www.sec.gov/rules/other/2021/34-92766.pdf>

[14] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26

November 2014 on key information documents for packaged retail and insurance-based investment products, *available from*

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R1286>

[15] Article 24(3), Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("MiFID II"), *available from*

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>

[16] Article 24(4), MiFID II

[17] ESMA Final Report: ESMA's Technical Advice to the Commission in the impact of the inducements and costs and charges disclosure requirements under MiFID II ("ESMA's MiFID Advice"), 31 March 2020, *available from*

https://www.esma.europa.eu/sites/default/files/library/esma35-43-2126_technical_advice_on_inducements_and_costs_and_charges_disclosures.pdf

[18] Joint Committee of the European Supervisory Authorities, Final Report following consultation on draft regulatory technical standards to amend the PRIIPs KID ("JC ESA Draft PRIIPs RTS Report"), 30 June 2020, *available from*

https://www.esma.europa.eu/sites/default/files/library/jc_2020_66_final_report_on_draft_rts_to_amend_the_priips_kid.pdf

[19] Section 4.7, JC ESA Draft PRIIPs RTS Report

[20] Article 3(1), Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms ("MiFID Delegated Regulation"), *available from*

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0565>

[21] *i.e.*, the provision of information by means of electronic communication.

[22] "Durable Medium" Technical Advice, p45, ESMA's MiFID Advice

[23] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis,

available from <https://eur-lex.europa.eu/eli/dir/2021/338>

[24] Article 24 amendments in the MiFID Quick Fix.

[25] ESMA Final Report: Guidelines on certain aspects of the MiFID II suitability requirements, 28 May 2018, *available from*

https://www.esma.europa.eu/sites/default/files/library/esma35-43-869-_fr_on_guidelines_on_suitability.pdf

[26] Article 25(3), MiFID II

[27] ESMA Consultation Paper: Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements, 29 January 2021, *available from*

https://www.esma.europa.eu/sites/default/files/library/esma35-36-2159_-_cp_gls_appropriateness.pdf

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