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Securities and Markets Stakeholder Group

Advice to ESMA

SMSG advice to ESMA on its Discussion Paper on Digitalisation and Retail Investors Protection

1 Executive Summary

The SMSG acknowledges the transformative impact of digitalisation on retail financial services, offering increased accessibility, speed, and personalisation. However, it recognises potential investor protection challenges in the digital environment. The SMSG highlights asymmetry in power, control, and knowledge, emphasising the need for regulatory actions to address this digital asymmetry.

The SMSG advocates for regulatory exploration beyond ESMA's focus, encompassing MICA and MAR due to potential market stability consequences. The group urges the inclusion of digital practices in the Consumer Protection framework and supports gap analysis initiatives.

In general, the SMSG encourages ESMA to cooperate with other regulators, such as competition, consumer and data protection bodies to ensure that interventions are effective to protect retail investors.

With specific reference to the topics addressed in the discussion paper, the SMSG put forward several comments and remarks.

In addressing information display, the SMSG supports layering, but proposes modulation based on service types. However, it is concerned that layering might hide dark patterns which may lead to conflicts of interest and manipulation. The SMSG encourages ESMA to provide guidelines, particularly on the display of vital information and ensuring clarity without excessive simplification.

For digital marketing communication, the SMSG highlights the risk arising from the potential exploitation of online behavioural biases. It recommends clear guidelines on concurrent product display and it advocates a separate display of regulated and non-regulated products. More in general, in the case of non-regulated products the SMSG would welcome an investigation on the compliance of advertising and marketing practices with the unfair commercial practices and distance selling of financial services legal framework. In addition, it agrees that (fin)influencers' activities should be disclosed, and investment firms engaging them should be made liable for their activities. It also highlights that digital distribution strategies must be aligned with target markets.

In the field of content marketing, the SMSG suggests treating educational material on company platforms as marketing material and recommends disclaimers to avoid investors being nudged into buying certain products. It recognises the usefulness of just-in-time education for immediate financial decisions, but it highlights the risk that online educational material might frame choices in favour of specific products. The SMSG underscores the importance of clear labelling and disclaimers in financial education delivered through content marketing.

Regarding choice architectures, the SMSG advises creating a comprehensive taxonomy for online choice architecture practices. It recognises harmful practices and gamification's transformative potential, urging ESMA to issue guidelines. Recommendations include warnings on addictive trading, monitoring customer use patterns, and clarifying when behavioural designs could be treated as implicit recommendations

The SMSG concludes by advising ESMA to monitor excess volatility resulting from digital trading and consider temporary product intervention measures.

2 Background

1. In the ESMA Technical Advice to the Commission on certain aspects relating to retail investor protection (April 2022) ESMA already touched upon some digitalisation aspects for the Commission to consider in the RIS.

2. This discussion paper is based on trends and observations by ESMA, EEA NCAs and supervisory authorities from third countries. Additionally, it draws from international scientific and experimental literature

3. The discussion paper consultation and the call for evidence results are aimed at developing supervisory convergence tools (guidelines and Q&A) and/or technical advice to EC to improve/strengthen legal requirements

3 General considerations

4. Digitalisation in retail financial services has significantly facilitated and transformed the way financial transactions are conducted, services are delivered, and customer interactions take place. Additionally, it has also expanded access to financial products and services for a broader population, mainly unexperienced and young investors. The SMSG perceives all the advantages of this increased digitalisation, just to name a few: increased accessibility, speed of interaction, personalisation, customer engagement and experience, but it also acknowledges that some investor protection issues might be magnified by the new digital environment.

5. McKinsey (2009) has been among the first to highlight that in a digital environment consumers appear to follow a non-linear customer journey. Customers don't necessarily follow a predefined or linear path from awareness to purchase, instead, their interactions with a brand or product are dynamic, influenced by various touchpoints, channels, and experiences. In a non-linear customer journey, customers may loop back and forth between different stages, skip steps, or engage with a financial firm in unexpected ways. This has led financial institutions to a more granular mapping of customer journey and to changes in the paradigm they use to deal with clients. Businesses can gather detailed information about how consumers respond to practices to set new standards for engagement (such as requiring that consumers hand over personal data in exchange for key services). On the other hand, consumers often have limited knowledge and understanding about how and when their personal data is collected and used. For example, in Germany, Finanztest (a magazine of Stiftung Warentest, a consumer organisation with a government mandate and supported by taxpayers‘ money) in a test in 2021 has found that robo advisors‘ data protection

declarations show serious deficiencies . As with many data-driven services, the consumer interaction is controlled by a complex system that is too difficult for the consumer to understand, let alone to make an informed decision. The SMSG believes that a strong asymmetry of power, control and knowledge (digital asymmetry) exists that is rooted in traders' control over choice architectures, their power to (dynamically) shape the contractual relationship and a profound imbalance of knowledge about the processing of data at suppliers' level. The SMSG agrees on the need of regulatory or supervisory action useful to bridge that gap. For this reason it strongly supports the call for evidence present in the discussion paper.

6. The use of smart framing, salience of messages/messengers and processes aimed at enhancing cognitive ease are not specific to the digital world, but there they find a very fertile environment. The boundaries between persuasion and manipulation can be blurry and both regulated entities and regulatory bodies need to have a clear understanding of the consequences of a specific choice architecture in the digitalisation of retail financial services. The SMSG thinks that these changes in the business model can enhance convenience and must be preserved without harm to the innovation process, at the same time financial firms must have a clear understanding of the consequences of the adoption of any type of nudging practices.

7. ESMA discussion paper limits its area of investigation to financial instruments and investment services falling under MIFID II regulatory framework, but the SMSG thinks that the scope of such an exploration should be broader and more systemic and include, when pertinent, MAR, given the possible consequences of some of the practices presented on the stability of markets, and MICA, as a large use of digital engagement practices is found in the crypto environment. Indeed since regulated products and non regulated products might be treated as substitutes and offered by the same provider.

8. In general, the SMSG believes that the digital practices used in the provision of financial services might be considered within the general framework of Consumer Protection rules and more specifically under the Unfair Commercial Practices Directive (UCPD), which complements the MIFID rules. The SMSG fears that, due to the progressive digitalisation in investments services, the current framework of investor protection has blind spots and leaves space for arbitrage opportunity. In this respect, it welcomes any gap analysis or equivalent initiative, such as the one by the European Law Institute (2023) offering a review of existing key EU consumer law directives to determine whether, and to what extent, they could deal with the use of deep- learning AI or deterministic algorithms in automating elements of the contracting process.

9. Additionally, with the progressive use of generative AI and LLM in financial services,

the SMSG believes that new questions arise on various area such as the accuracy/reliability of information provided to clients or the general governance of AI application with final clients. In this regard, it is important to underline that the scope of the AI Act is not broad enough (e.g., it does not put investment services - suitability assessment- within the area of high-risk services) and the adoption of sectoral rules will be necessary.

10. Furthermore, the SMSG points out the need to keep an eye on competition issues. Digital markets often exhibit network externalities – the more users a platform has (be it a social media website, a peer-to-peer marketplace or a search engine), the more valuable that platform is to other users. Digital marketing practices might be used to unfairly acquire or retain consumers in markets with network externalities, they can make it harder for rivals or entrants to compete. Additionally, online choice architecture can weaken or distort the competitive process by shifting the incentive to compete on product attributes that benefit the consumer, such as quality and price, towards less relevant or beneficial attributes, such as salience.

11. In conclusion, the SMSG encourages ESMA to cooperate with other regulators, such as competition, consumer and data protection bodies to ensure that interventions are effective to protect retail investors. This is particularly important due to the complementarity between horizontal regulations such as the Unfair Commercial Practices Directive, competition law and the General Data Protection Regulation and financial frameworks.

4 Discussion paper specific points of attention

4.1 Information display in digital environment

12. The first area of investigation in ESMA discussion paper refers to information display and language simplification in digital financial media. Digitalisation allows for a more effective organisation of information through a well designed layering system. The SMSG agrees that information layering should be encouraged as a tool to reduce information overload and to help clients discern between vital and non vital information. That said, the SMSG believes that the display of information regarding financial products across the different layers should be moduled according to the type of services provided: execution possibly without man in the loop and advised services where investors can be assisted in the surfing of digital media.

13. Additionally, the SMSG believes that in each layer it has to be clearly pointed out if the information provided is mandatory /regulatory or if it is not mandatory and represents marketing material.

14. The SMSG would like to highlight that, as testified by the European commission (2022), 97% of the most popular websites and apps used by EU consumers deployed at least one dark pattern and among the most prevalent were hidden information/false hierarchy and preselection. In this respect a risk that the SMSG envisages is that of conflict of interest for example through payments of brokers from product providers which may lead brokers to more prevalently display these products compared to those from non-paying providers. In a 2023 BEUC survey of 8 EU countries, 41% consumers reported they have at least once made a choice online (e.g. bought a product or service) they did not want because the website or app had confused them. More than half (55%) of consumers (rising to two thirds in the 25–34 age group) have lost trust in a company because they felt they were manipulated or deceived by its website or app.. A poorly designed or biased system of layering can indeed put consumer at risk of such dark patterns. The SMSG welcomes level 3 intervention in the matter of digital layering to clarify on fair and compliant way to display information.

15. In this respect, the SMSG agrees that vital information is to be provided in the first most prominent layer. Additionally, it believes that vital information provided in the first layer should allow a comparability of risk across different instruments, however it points out that: vital information could be different depending on target markets; and risk features different from market risk (such as counterparty risk) should be prominently disclosed in the first layer, if existing.

16. With respect to clarity of information, evidence from laboratory experiments, polls and consumer reports (Jabr 2013) indicates that modern screens and e-readers prevent people from navigating long texts in an intuitive and satisfying way. In turn, such navigational difficulties may subtly inhibit reading comprehension. Compared with paper, screens may also drain more mental resources while reading and make it a little harder to remember what read. Based on these findings, the SMGS points out the outmost relevance of simplification in digital communication. It fully agrees upon the need to avoid overtechnical language, jargon and too lengthy text specifically for the provision of vital information (layer one). However, it underlines that relevant information must remain included and not get lost through excessive simplification. Additionally, it warns that, especially in the case of complex products, excessive simplification might lead to overconfident attitudes among investors, specifically the least experienced. The SMSG believes that language used must be tuned with the target markets and that, apart from vital information, in the subsequent layers a balance might be struck between a proper display of the technicality of the financial instruments and the abuse of overtechnical language. It supports the use of glossaries accessible via hyperlinks or sidebars.

4.2 Marketing communication practices

17. Art.24(3) of MiFiD II and art.44 of the Delegated regulation set the regulatory framework regarding marketing communication and clearly state that "all information ...should be clear, fair and not misleading". Research suggests (Firth et al 2019) that people often behave differently online and make a novel use of the information provided: are quicker to act, have shorter attention spans, scan and skim rather than read, and are more likely to rely on the recommendations of strangers. Moreover, with digitalisation trading might take place outside traditional trading hours, e.g. in the evening when people are at home and relaxed, leading to additional fees and charges (for example higher spreads) of which consumers are not warned prominently enough. The diffusion of digital communication enhances the concern that marketing practices by financial institutions might exploit retail investors' behavioural biases breaching the regulatory principles reminded above.

18. The SMSG agrees that because of heuristics such as salience and representativeness, investors browsing webpages, where both simple and more complex products with the same underlying assets are on display, might be led into the wrong conclusion that instruments are equivalent or get confused if tickers name bear limited points of distinction. However, it points out that, because of limited attention and availability heuristics, the fair and clear presentation of a full range of instruments with the same underlying assets might ease the research, facilitate the comparison and lead to a more balanced decision. With this in mind, the SMSG would welcome clear guidelines on concurrent display of simple and more complex products.

19. Nonetheless, the SMSG points out that in some case concurrently displayed financial products might be targeted to different target markets and such marketing practice might go against product governance requirements.

20. Regarding the practice to display simultaneously both regulated and non regulated products, the SMSG points out the existence of possible harmful asymmetries. For regulated products, firms must comply with a full range of rules regarding the information provided, and this is not the case for non regulated products. This practice might lead to confusion and possibly to comparison not complaint with art.44(3) of the delegated regulation. The SMSG thinks that regulated and not regulated products should not be displayed on the same webpage. More in general, in the case of non regulated products the SMSG would welcome an investigation on the compliance of advertising and marketing practices to consumer protection and financial services at distance legal framework. As an example, in 2023, following the intervention of the UK FCA, over 10,000 financial adverts and other promotions were withdrawn or changed, an increase of 17%, year-on-year.

21. At various points (paragraphs 40, 61, 71-82) in the discussion paper, ESMA makes specific mention to (Fin)influencers communication activities. The SMSG fully agrees that, in line with art.24(3), this form of communication must be clearly disclosed and firms should be deemed liable for the marketing and information provided. It also agrees with ESMA that influencers should prominently disclose if and how they are (or have been) remunerated by investment firms.

22. More in general, in order to catch crypto promotions via unregulated channels, e.g. influencers on social media, the SMSG believes there is a need for a 'catch all' regime that would regulate/prohibit all commercial crypto promotions via internet means. IOSCO could be the best forum for such regulatory discussions. Such law would have an extra territorial effect in the same way the GDPR has, and ESMA could, at some point, negotiate the effect of such law with key international regulators, such as the SSC and the PBoC or the UK's FCA.

23. (Fin)influencers, targeted marketing are just some of the many examples of how digitalisation can create new or more effective distribution strategies. These have clear advantages for both clients and financial firms, just to name a few: better clients profiling, personalisation of services and cost reduction in marketing efforts. Nevertheless, the SMSG believes that these strategies might not be beneficial for all target markets, in particular for unexperienced investors and very complex products. In this respect, in line with product governance requirements, firms should make clear which and if digital distribution strategies are consistent with the target markets for the products and services offered.

24. A final remark relates to content marketing and financial education. OECD (2022) has released a guidance on digital delivery of financial education stating that technology offers the promise of making financial education more effective in supporting citizens in building financial resilience and achieving financial well-being. Content marketing features can help with financial literacy initiatives by creating valuable, informative, and engaging contents. Content marketing practices can make personal finance content more interesting and engaging. In this respect, the blurring distinction between “pure” marketing and education material can be somehow beneficial. A meta-analysis of over 200 prior studies on financial literacy programmes (Fernandes et al 2014) finds that providing long-term financial education is remarkably ineffective. In fact, the researchers found that interventions to improve financial literacy explain a statistically significant but practically irrelevant 0.1% of subsequent financial behaviours. Financial education decays overtime, and possible solution for adults is to adopt an approach called just-in-time education, which aims to provide financial education at its moment of maximal relevance and usefulness – when the financial decision itself arises and the education can be immediately applied. Still, there is a risk that the financial services company could frame the financial choices in a manner that “nudges” the consumer

towards a specific firm or product. For these reasons, the SMSG thinks that education material which is displayed on the website of the firm or on other media directly related to the firm (for example social media institutional accounts or tagged to the firm) should be treated and labelled as marketing material. The SMSG suggests that educational material provided within the practices of content marketing should also contain a disclaimer, similar to the one used for medical education, that explicitly state that the information provided on the site is for education purposes only and does not substitute for professional advice.

4.3 Choice architecture features on digital platform

25. Choice architecture is a neutral term. A well-designed website, app or digital service built with consumers' interests in mind will help consumers choose between suitable products, make transactions faster, and recommend new relevant products or services. The speed and scale of data collection, experimentation, and targeted personalisation available to businesses online also facilitates the development and optimisation of choice architecture in real time. However, choice architecture can also hide crucial information, set default choices that may not align with our preferences, or exploit our attention being drawn to scarce products. The SMSG advises ESMA, together with the other ESAs, to produce a comprehensive taxonomy of online choice architecture (OCA) practices to frame those adopted in the financial industry. Such a taxonomy may help to recognise, categorise and explain the impact of harmful practices. For example, the UK competition and market authority (CMA 2022) categorises practices according to whether they affect choice structure (the design and presentation of options), choice information (the content and framing of information provided), and choice pressure (through indirect influence of choices).

26. Certain practices, such as those codified within dark patterns, are likely to be harmful or deceptive all the time, but if some are transparently fraudulent and include those labelled by Mathur (2019) "deceptive activity notifications" shenanigans like using a random number generator to (falsely) show how many other people are "currently viewing" a product or passing off fictitious customer testimonials as genuine, other such as nagging are a nuisance but doubt remains if "abusive" asking of questions can be treated as illegal with current consumer protection legislation. Some other practices can be harmful only in certain circumstances (for example, ranking). An agreed taxonomy can help both regulators and industry participants to define compliant behaviour.

27. Additionally, research shows (Di Geronimo et al 2020) that awareness of some OCA practices tends to be low. When encountering a harmful OCA practice, such as a dark pattern, most individuals are unlikely to realise they were under the influence of a bias

or heuristic that drove their decision making. The SMSG advises ESMA, and possibly the NCAs, to launch a campaign to raise consumer awareness around harmful practices and conduct further initiatives to raise awareness across relevant more vulnerable groups. Making consumers aware is not always sufficient to protect them from harm. For this reason, measures to improve awareness of practices are often combined with other initiatives, including offering consumers the tools to avoid harm. The SMSG welcomes any field or experimental initiative aimed at testing remedies and understanding of consumer behaviour into the design of disclosures.

28. Moving to digital engagement practices (DEP), and particularly gamification, these can be seen as forms of choice architectures for 'nudging', incentivising and rewarding user actions. It is estimated (B2Binpay, 2023) that by 2028, the worldwide gamification industry could reach a staggering $58.8 billion, representing a growth rate of 26.8% per year from 2022 to 2028. This suggests that gamification is not just a passing trend but a transformative force.

29. The SMSG agrees that gamification can be beneficial when used extensively to educate consumers, to make mundane tasks fun and more importantly to map functional benefits to consumer benefits. Through gamification, investment firms can enhance customer engagement, simplify complex processes, stimulate investments, and gather valuable user insights. Behavioural design in investing apps might also have some role (desirable on its own) in broadening participation in equity markets. However, the SMSG acknowledges that some DEP might encourage people to trade excessively in an otherwise apparently self-directed account. All the same, the SMSG would like to highlight that retail investors cannot be treated as an invariable group as they are quite heterogeneous in their intention to trade. Academic literature (e.g. Dorn and Sengmueller, 2009; Grinblatt and Keloharju, 2009) studying those traders identified three plausible reasons for entertainment trading: "recreation, sensation seeking, and an aspiration for riches." Additionally, Anderson et al (2022) reckon that others might derive expressive or affinity benefits from coordinating with likeminded traders online. These nonpecuniary aspects in investor behaviour reflect that some people have preferences for speculative trading, while others are essentially duped into trading, falling prey to "behavioural churning" (Langvardt and Tierney, 2022).

30. The SMSG believes that the use of "game design" should not itself be of concern to lawmakers, or an object of regulatory intervention. Some of these design features are the natural evolution of sales techniques that have long existed in physical space. Behavioural design should not be primarily objectionable because it is digital, flashy, or appeals to children. In spite of this, the SMSG believes that certain digital engagements practices could be objectionable because they encourage excessive patterns of trades and trading in unsuitable securities. As in other markets, for complex financial products and services retail investors—ordinary consumers—are overconfident in their abilities,

myopic about the consequences of their action, and avoid the cognitively complex tasks required to assess financial choices.

31. The SMSG thinks that justifications for regulatory action might be found in “principal-agent problems (such as economic conflicts of interest), and asymmetric information”. To duly address the complexity of digital environments and the cognitive overload of consumers, regulation needs to move beyond the disclosure paradigm and towards requiring fairness by design and by default. This entails a horizontal obligation for providers to protect choice - which should include taking active measures to counteract known decision-making biases of and ensuring a safe and fair environment for consumers – without them needing to be on a constant lookout for traps, or analysing complex disclosures.

32. To facilitate compliance: guidance should be provided to avoid, as proper subject of unfair trade, commercial strategies meant to activate or alter consumers’ behavioural or cognitive processes, and eliciting behaviour that generates private profit.

33. The SMSG believes that ESMA, and possibly NCAs, might consider issuing guidelines on topics such as mandatory disclosure, responsible use devices, counter-addictive design.

34. Within current mandatory disclosure framework, regulators might require digital platforms to prominently warn consumers of the negative consequences of excessive and addictive trading. Within product governance requirement, firms could be asked to extend their monitoring of customer use patterns and intervening in problematic use with warnings, salience shocks, default mandatory downtime (for example based upon daily number of trades) or other smart disclosure and smart default techniques (Costa and Halpern, 2019) Through the same mechanism as behavioural design, consumer financial behaviour might be addressed through just-in-time interventions. Warnings, salience shocks, and downtime might focus attention to non-salient attributes investors are overlooking.

35. More in general, when used as a tool in distribution, gamification strategy can be designed to stimulate responsible financial behaviour. For instance, some existing practices linking credit card expenditures to reward-based savings could motivate customers to save more and spend wisely. Within specific target markets, firms should also ensure they are providing support to their customers, particularly those in vulnerable circumstances or those showing signs of problem gambling behaviour. In the best interest of investors, firms could also be asked to monitor clients’ transactions to determine whether some threshold had been reached.

36. Additionally, as some design features appear to bring certain items to the customer's attention, the SMSG would consider beneficial clarification and guidance by ESMA on when and if behavioural designs, including engagement practices and personalisation algorithms, could be treated as implicit recommendations.

37. As a concluding remark, based on the GameStop and the other "meme stocks" extreme volatility experiences, the SMSG advises ESMA to monitor possible excess volatility conditions on "meme stocks" considering temporary product intervention measures.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 10 March 2024

[signed]	[signed]
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