

**ABI's remarks to the  
ESMA Discussion Paper on MiFID II  
investor protection topics linked to  
digitalisation**

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## Foreword

This document is intended to provide ABI's contribution to ESMA Discussion Paper on "MiFID II investor protection topics linked to digitalization".

The responses provided to the questions, based on what has emerged within our interbank working groups, express a general view based on the prevailing market practice and approach taken by our member banks. This does not exclude, therefore, that different approaches to those described in this document may have been taken by individual banks. Questions that ask details information on procedures, data or other similar items which pertain to individual bank have not been answered.

## General remarks

This Discussion Paper represents an important opportunity to discuss topics linked to the different possible uses of digital tools related to the provision of investment services. Our considerations are in line with and further develop the previous considerations expressed with regard to the 2021 Call for evidence on certain aspects relating to retail investor protection, focused from the perspective of the Retail Investment Strategy.

As a starting point, we believe it is important to highlight that the issues raised by ESMA are undoubtedly relevant, but they mainly have a prospective impact, as most of the techniques analyzed in the discussion paper are currently scarcely used by banks in Italy when providing investment services.

As better highlighted in the answers to the specific questions, we believe it is appropriate to formulate observations aimed mainly at:

- better clarifying the scope of application of the suggestions proposed by ESMA with reference to layering information;
- highlighting that some questions posed in the Discussion Paper on marketing communications go well beyond current legislation and rather seem to take into account the proposals of the Retail Investment Strategy, which aim to possibly introduce new obligations. This specific point deserves particular attention considering that: i) the legislative proceeding related to the Retail Investment Strategy is still underway; ii) there is no guarantee that it will be finalized before the end of the current EU legislature, implying that there is no guarantee that the above-mentioned "Level 1" proposals will be adopted by the EU Co-Legislators; iii) in the end, it is of paramount importance to avoid a scenario where ESMA operates "ultra vires" i.e. where ESMA puts forth new obligations which do not find any legal ground in the EU legislation currently in force;
- better clarifying some aspects, such as: i) what is the boundary between marketing communications aimed at the public and at

potential clients and those aimed at a target of existing clients; ii) what is meant by 'vulnerable people' and therefore by 'marketing communications aimed at vulnerable people'.

## Answers to Specific Questions

### Online disclosures – Layering – Accessibility and Readability

**Do you already layer information provided to (potential) clients?**

**Do you create bespoke content and information for existing clients based on their preferences, risk profile and/or investment objectives?**

**What type of information would you deem vital to show in the first layer of information to investors with regard to the different instruments you offer?**

**What type of information do you observe your clients treat as the most important? (if known)**

**Which information on costs and charges belongs in the first layer?**

**Do you provide interactive or other graphic representations of information on financial instruments or investment services to your clients? Do clients perceive them as useful aids?**

**Should the vital information need to be the same for all MiFID financial instruments, or can it be different depending on the type of instrument? If so, how?**

**Do you already provide visual aids (support) to (potential) clients in order to help them better understand complex financial concepts, for example the use of a glossary? If you do, please mention which and explain.**

**How do you measure the effectiveness of the online disclosures you provide to clients? Do you identify problems clients encounter with language or structure of your disclosures? What are the most common issues identified?**

**What is your positive and negative experience with layering information?**

**Answer:** At present, banks in Italy make a very limited use of layering in the strict sense, intended as a reorganization of all information within multiple layers / levels within a unitary tool. To date, in fact, there are very limited examples of layering in the strict sense with reference only to:

- the precontractual information on services and financial instruments;
- the information relating to certain financial instruments (bonds and certificates) provided to clients in addition to the KID.

Moreover, sometimes the KID and product sheet are published at a first level, while at second level are published information/documents - such as the complete prospectus of the funds - through the use of links).

On the other hand, it is based on showing the information in the dedicated page in a "organized way" with the aim of facilitating the understanding of the information. This also includes the use of images, box, tables, documents, functional or educational video brochures, that generally offer more detailed information. Visual aids and glossaries are also used as educational tools with the intent to support clients and potential clients to better understand complex financial concepts.

Therefore, the hierarchy of the information and alternative formats can easily help customers to understand the described products/services.

However, the same essential (vital) information is generally published for all the financial products that fall under MiFID as the first information is always related to a short description of the product, key benefits, risks, pricing details and legal and compliance function reviews and approves all the content to make sure it complies with all the European and local rules.

However, as a general note on the hereby consultation paper, the draft suggestions proposed by ESMA do not clarify very well when the layering techniques are relevant for investor protection as they:

- mention, not only the information provided to retail investors, but also marketing communications;
- mention the possibility of providing additional layers of information through hyperlinks, QR codes, or other similar routes;
- focus their attention only on the information/marketing communications related to financial instruments as the "vital information" provided by the draft suggestions focus only on financial instruments.

In our opinion, ESMA should better detail the scope of the proposed suggestions clarifying first of all that layering relevant information for investors protection:

- includes any form of presentation of the information organized on different levels either within the same tool or connected each other through hyperlinks, QR codes, or other similar routes;
- affects not only the information required by MiFID provisions, but also marketing communications (in this case the marketing communications would represent the first layer which is linked to other detailed information);
- last but not least, we would like to add another argument that makes it particularly important to clarify the scope of the layering technique: when it comes specifically to marketing communication, disclosing information "in layered format" may turn out be i) particularly

challenging and, in the final instance, ii) also not necessarily consonant with the nature of the marketing communication "by itself" since by its own nature, marketing communication tends to be quite direct and immediate.

Furthermore, ESMA should clarify whether the proposed suggestions only regard the information required under MiFID II with reference to financial instruments or also the other disclosures required under MiFID II (such as the pre-contractual disclosure on services and characteristics of the different types of financial instruments, the reporting of costs and charges). In this latest case, the "vital" information provided by ESMA should be adjusted to fit into these other types of information.

## **Marketing communications – Targeted marketing**

**Do you currently have an overall register of marketing practices used? If you do, are there practices you follow-up on more frequently and if so, how do you decide which practices you follow-up on?**

**How do you ensure that marketing communications only reach the intended target market (especially in the case of higher risk/higher complexity products)?**

**How do you monitor the effectiveness of your marketing practices? For example, do you use targets such as clicks, views and/or number of complaints or how many new clients are part of the appropriate target market? Or do you test their effectiveness through consumer testing?**

**Do you review your marketing practices if complex and risky products are seemingly marketed outside the determined target market for these products?**

**Do you have in place controls dedicated to marketing practices targeted to vulnerable persons to ensure those practices are adequate? If so, please explain.**

**Answer:** Banks in Italy have internal rules and procedures aimed at regulating and tracking marketing communications. In this context, indications regarding marketing communications addressed to clients may differ from those addressed to those who are not clients.

The website is where most marketing material is posted, and it is accessible to anyone who searches for information on the internet, including current and prospective clients. In any case, the safeguards provided by MiFID II ensure, also by means of control procedures both in the pre-contractual and in the contractual phase, that clients are in the position to adopt intentional and informed decisions to purchase specific investment products among those which are marketed at a general level.

In addition, banks also use online marketing campaigns through other communication channels such as email, sms, and push notifications, that can target specific groups.

In this context, banks have specific internal rules aimed at measuring the effectiveness of their marketing practices and ensuring that marketing communications relating to the most complex and risky products are addressed only to those who are already clients. Accordingly, they are not massive communications.

On the other hand, an overall register of all communications and marketing practices rendered is not generally adopted by banks, also taking into account that it is not due under MiFID. Actually, such requirement goes far beyond current legislation and it rather reflects the proposals of the Retail Investment Strategy to introduce new obligations regarding marketing communications and practices. However, banks allow access to all previous versions of website product pages thanks to the use of specific tools adopted for website and content management.

In our opinion, the draft suggestions in the field of marketing communications should rather clarify some aspects and, in particular:

- what is the boundary between marketing communications aimed at the public and potential clients and those aimed at current target of clients, considering that for communications aimed at potential clients it is not actually possible to directly control the target audience if conveyed through third parties' platforms;
- what is meant by 'vulnerable persons' and therefore by 'marketing communications aimed at vulnerable people', taking into account that at EU level fragile categories and vulnerabilities have a specific declination based on the relevant regulatory context and there is not always uniformity. Given the very generic definition and the various categories that can potentially be included, it would therefore be necessary to clarify what is meant by vulnerable persons according to the objectives and topics of the Discussion Paper.

Moreover, the draft suggestions should take into consideration that according to the General Data Protection Regulation (GDPR), when clients do not grant their permission to the use of their information provided during the profiling, investment firms and banks cannot develop any targeted communications to those clients.

## **Content marketing**

### **What kind of educational material do you produce and publish?**

**Do you have educational material available to investors in which you actively promote specific instruments and/or firm(s)?  
Do you use content marketing on social media or in other types of video material?**

**Answer:** Banks in Italy offer various educational resources with different goals. When they also serve a marketing function they are marked as marketing material (e.g. aimed at showing some apps). They are mostly posted on the bank's website, seldom on social media, but, in any case, the content is fully checked by the bank's compliance and legal function, where necessary.

Some educational resources, for example, are video tutorials on a certain product or service and they are published on the bank's website or directly published within apps or internet banking profiles.

## **The use of affiliates - Fininfluencers**

**Do you make use of affiliates or affiliate marketing? Why, and if not, why not?**

**What kind of process do you follow to select/vet/approve the use of an affiliate? What internal functions are involved (please specify)?**

**Based on which criteria do you select affiliates?**

**How do you monitor the compliance of the communications and practices used by affiliates with the applicable requirements?**

**If you remunerate affiliates, how is the remuneration structured?**

**And for what type of action or result do you remunerate the affiliate (e.g., for generating clicks, leads or opening of accounts or a minimum deposit)? And how do you assess this is in the interest of your clients?**

**Do you ensure affiliates properly disclose their relationship with the firm and act based on the MiFID II rules?**

**What kind of content marketing do you prepare and publish? Is it prepared by relevant professionals in this area?**

**Do you pay finfluencers or affiliates soliciting clients only in the success fee formula? How do you measure success?**

**Answer:** Use of affiliates is overall not commonly used.

However, being an association we are not able to answer these questions as they relate to aspects which vary a lot and are constantly evolving.

That said, we would like to highlight the importance of setting up a regulatory framework that appropriately addresses the issue of the requirements, both of subjective and of objective nature, that the so-called "finfluencers" should abide by. In this respect, one critical point is to clearly define the boundaries

between i) on the one side, their role as “promoters” and ii) on the other side, their role in terms of “investment solicitation”.

We would also like to flag an additional practice that centers around the role of the so-called “creators”. The distinctive feature of “creators” – which also marks their difference vis-à-vis “influencers” – lies in the circumstance that these entities do not contribute to the substantive contents which, rather, are defined by the relevant financial intermediary.

As a final remark, we would also like to take this opportunity to highlight that, based on the regulatory framework currently in force, financial intermediaries are required to comply with a set of provisions which aims at attaining the objective of guaranteeing the highest levels of protection to the benefit of investors. The provisions which require activities – and related investments – aimed at improving the technical skills of advisors do constitute integral part of the above-mentioned set and are directed towards the above-mentioned objective. In this respect and to the benefit of investors’ interests, we deem it extremely important to ensure a real and effective level playing field vis-à-vis other operators which cannot be qualified as financial intermediaries and that, seemingly, are not subject to the above-mentioned set of requirements, including those relating to advisors’ financial skills.

## **Digital engagement practices - Social features of investment apps - Gamification – Gambling-like behaviour**

**Do you have a system in place to avoid clients from trading excessively, if so what kind? For example, do you contact or even (automatically) warn users when they trade on a very frequent basis? Do you incentivise your clients to log-in on a daily basis? For instance, by pop-up messages, frequent email updates etc.?**

**Do you use gamification techniques for client engagement? If so, what type of gamification techniques do you use and for what purpose (training, educational content, subscription process, other – if so, please explain)?**

**If you do not use above mentioned incentives and gamification techniques, have you observed problems or difficulties with any of them?**

**Answer:** Currently banks in Italy do not use these practices for investment services.

## **Choice architecture and nudging techniques**

**If you use nudges, please provide information on the process implemented to determine, validate and control these nudges.**

**Do you review the design of the choice architecture of your interface?**

**If so: How often do you review it? What are the reasons to review it?**

**Who is involved in such review?**

**What would be reasons for you to change the design of the choice architecture of your interface?**

**Do clients give feedback on the design of the choice architecture? If so, what kind of feedback do you receive and how do you follow up?**

**Do you observe increased trading activity induced by the use of the choice architecture?**

**Answer:** Currently these practices are rarely applied by banks in Italy for investment services.

## **Push notifications**

**What kind of push-notifications do you send?**

**For example, what type of information is included, are the push notification bespoke to the consumer?**

**Answer:** Currently these practices are not (or rarely) applied by banks in Italy for investment services. However, no communications related to specific investment are provided, but they are very high and mainly aimed at providing overall information to the customer.

## **Dark patterns**

**Which examples of dark patterns have you encountered?**

**Do you use or have you encountered any positive nudging in the interest of the client? Could you provide some examples?**

**Have clients complained of difficulties related to the online interface?**

**For example, difficulties in closing their accounts?**

**Answer:** Currently these practices are not (or rarely) applied by banks in Italy for investment services.