

Response

Association of German Banks
Discussion Paper on MiFID II
Investor Protection Topics Linked to Digitalisation
ESMA35-43-3682

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

Layering is already being used in practice today. However, this is primarily used in the context of general information. For example, the websites of many investment firms offer the option of providing additional layers of information by "unfolding" if there is particular interest. In addition to pure text content, for instance, explanatory films are also offered.

Particularly during transactions investment firms provide all sufficient information on and about the financial instrument (e. g. aggregated costs, other legal information, any special risks) on a first layer. On deeper layer-levels, clients can then obtain detailed information, e.g., on costs, market analyses, and so on. Some of those information is also available as a pdf download.

However, a synchronisation of layering between paper-based and digital or online information cannot be guaranteed (see also answer 40).

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

Marketing information and advertising are usually designed in such a general way that they appeal to a broad audience. When designing client campaigns, however, differentiation can be made by taking into account the aforementioned criteria for the potentially addressed clients in order to only address them.

Against the background of implementing ESMA35-43-3861, "Supervisory briefing on understanding the definition of advice under MiFID II", we are not in favour of creating bespoke content for existing clients as there is a risk that we could end up providing investment advice. In addition to the regulatory risks, there are also considerable risks relating to compliance with German civil law (recipient's viewpoint).

With regard to mandatory information, the criteria mentioned above are taken into account in the suitability statement, for example, on the basis of current legal requirements and, where necessary, made available online in the electronic mailbox.

3 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?

The question can hardly be answered in general terms, as a distinction must be made between different document types. One key aspect is the type of information (advertising/marketing, mandatory documentation). It is also not possible to give a generalised answer for all product types. Furthermore, it must be taken into account that the assessment of information may well be subjective and/or situation-dependent (e. g. in the case of hedging transactions). As a consequence, in case of doubt, a great number of information would be presented on the first

layer, which would run counter to the intended concise presentation. Finally, it should be noted that MiFID assumes that the client is provided with all "required" information. Consequently, it must not be suggested that by moving to another layer, information is lesser important and therefore not "required".

Especially with regard to online brokerage it is important for clients to be able to place their orders quickly. Several criteria, such as finding a certain security, finding market information, for instance an analyst's assessment, finding the execution modalities (type, location, etc.) and information about the price of the execution of the transaction are important (especially in the case of non-advisory transactions). Many investment firms display these important information, which partly are based on regulatory requirements, on the first layer.

A further distinction must be made in marketing communication. In the case of a banner advert/teaser/ad tips, for example, which succinctly draws attention to a product/service, it is simply impossible to provide further comprehensive information. Due to this specific type of marketing communication those information are not necessary. Due to the lack of space and the limited number of characters, further information can only be resolved on subsequent pages (landing pages).

In our view, a banner or similar a tool can only be used as a first layer of information about the general content of the marketing measure, but not as an element for mandatory documentation and legal information.

It is also important to consider the increased use of mobile devices or accessibilities in the evaluation. In this context, information overload occurs very quickly and this tends to lead to the opposite of what is intended. However, if particular advantages are presented in marketing information, any risks are also pointed out (Art. 44 para. 2 b of the Commission Delegated Regulation [EU] 2017/565). In the case of layering, both benefits and risks would have to be presented at the same level in order to ensure equivalence of the information. However, mandatory references in any information, e.g. on costs, as discussed on page 14 of the discussion paper (DP), would be misplaced here. The client already receives information on costs due to regulatory required specifications. There is a risk that clients will no longer take full account of this detailed information on costs if they receive those information already in advance as part of advertising. This information (as it is detached from a specific order) could only be of a very general nature and must therefore fall well short of the specific, very concrete and detailed information required by law.

In general, the aim should be to create concise and short information documents that contain all relevant information. At the same time these information shall not deter clients with their length or complexity (in our view, this also includes information embedded as links) which could keep clients off reading the information (unfortunately, this is often the case with mandatory information).

The layering of information could at best make sense for documents that are very extensive per se, such as longer information brochures, in order to shorten the overall document by presenting only the most important aspects on the first layer.

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

There is no general answer to this question either.

Different information is relevant in marketing information that offers a client, for example, an investment advice on a specific product, than in mandatory information that the client receives as the basis for his investment decision.

Apart from marketing communication, experience has shown that individual documents, such as contract documents with the client's individual data or cost reports based on individual agreements, are the most important basis for a concrete investment decision. According to the feedback from many clients, quarterly reports and the like are rather uninteresting. However, our understanding is that only general information can be layered and not individual information.

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

This cannot be answered generally either. Contrary to what the DP suggests in the box on page 14, we do not consider information on the costs of the advertised product or service in a general marketing communication to be appropriate for all products, whereas information on the costs is a relevant aspect for many clients in the context of a specific investment decision (which is why the legislator has obliged investment firms in MiFID to provide clients with comprehensive information on the costs of the specific investment service). Furthermore, it would not be possible to provide individual, specific cost information in general presentations such as adverts or other general information.

We would like to emphasise once again that we are only referring to the known MiFID cost information, as individual cost details in other information are not possible.

6 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?

Yes, such content and graphic/interactive presentations are welcome by clients and are often accepted as a helpful medium.

In the area of education as well as in online advisory sections on securities (ancillary) services, graphic and interactive content is sometimes presented to the client in an appealing way and flanked by regularly provided texts/documents. Graphic representations can visualise opportunities and risks in a concise manner, particularly in the case of possible performance scenarios.

7 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?

In terms of manner, MiFID stipulates that all information must be fair, clear and not misleading. No further requirements are necessary for general marketing information, where comparability is not important and the company's aim is often to differentiate itself from its competitors. In particular, investment firms should not be obliged to use standardised formats for general marketing information.

When defining key information, it is essential to bear in mind that financial instruments comprise very different products, so that standardised requirements across all types of products would not be very expedient. Depending on the asset class / product type, it should remain possible to address specific information. This is because both securities, which are classic investment products, and OTC derivatives, which are used for hedging purposes are classified as financial instruments. For these products, where the client does not pay an initial investment amount, for example, it makes no sense to present them in the same way.

8 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.

In practice, it has proven useful to convey basic knowledge to the client partly through information brochures. In longer information brochures, an easy-to-understand glossary is sometimes included as a reading aid. This is intended to make it easier for the client to understand the information contained in the brochure and thus goes beyond what is required by law.

Distributors sometimes use videos and information documents that explain the functionality of structured products or certain funds. Product group videos (e.g. on non-complex products) are also sometimes used to impart knowledge.

A stock exchange encyclopaedia, for example, which explains technical terms and other reference works, is also used on an investment firm-specific basis.

In the case of online offers, FAQs or a glossary are regularly made available on the respective websites. Information on financial knowledge is also part of the website.

9 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?

Our member investment firms have developed various measures to review the effectiveness of their information materials. The aim is to continuously improve the information. Many investment firms focus on client feedback. Queries or even possible misunderstandings that may result from the materials also play an important role. In practice, these are taken as an opportunity to revise the information materials, e.g. by including a supplementary passage on an aspect about which there has been an increase in queries.

Possible examples of effectiveness measurements, which are not used by all investment firms, include product-related final measurements, A/B testing (test method for evaluating two variants of a system in which the original version is tested against a slightly modified version) and the data traffic analysis of websites via Google Analytics. In order to evaluate the effectiveness / success of marketing measures, for example, the conversion rate (the approach to the sale) can be measured. Likewise information how long a client is staying on the webpage or the click paths (web tracking) of the clients can provide important conclusions about the effectiveness of marketing measures.

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

Many clients complain about the mass of information that investment firms have to provide them due to regulatory requirements (so-called information overload). To remedy this, the currently very extensive mandatory information would have to be reduced. Using Layering in order to distribute the large amount of information on different layers will further increase the complexity of the information and have a deterrent effect on many clients., We therefore do not consider this approach to be effective in reducing the current information overload, which overwhelms many investors.

Marketing communication

11 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?

For the German market, BaFin has published a minimum record list in accordance with Section 83 (11) WpHG [Art. 72 (2) DELEGATED REGULATION (EU) 2017/565 in conjunction with Annex I DELEGATED REGULATION (EU) 2017/565]. Annex I DELEGATED REGULATION (EU) 2017/565]. Accordingly, all investment firms are obliged to publish marketing communications that are not made orally in accordance with Section 63 (6) WpHG in conjunction with Articles 36 and 37 of the DELEGATED REGULATION (EU) 2017/565. Art. 36 and 37 DELEGATED REGULATION (EU) 2017/565. For this reason, the investment firms have records - but not necessarily a complete list - for this purpose.

In addition, marketing measures are subject to regular monitoring by the compliance function in accordance with MiFID II. Accordingly, there is also a list as part of the compliance monitoring plan, which - at least in Germany - is also part of the annual WpHG audit by external auditors.

This practice has proved successful on the German market. In contrast, more extensive formal requirements for records, such as in the form of an overall register, give rise to fears of a further increase in bureaucracy and effort for investment firms, without any corresponding benefit for clients.

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

Firstly, it should be emphasised that distributors often do not advertise the purchase of an investment product, but rather encourage clients to seek advice on the product in a consultation. In these constellations, the consultation and the subsequent suitability test ensure that the recommended product is suitable for the client.

For constellations in which marketing communication only relates to the purchase of a specific product, ESMA has recently issued separate requirements in the amended guidelines on product governance. We assume that distributors observe the following requirements in Guideline 59 in practice:

"Considering the nature of the product and the investment service, distributors should refine the distribution strategy as identified by the manufacturer taking into account the characteristics of the distributor's client base. In particular, in making such a refinement, where the distributor

considers that a more complex product with a relatively narrow target market can also be distributed under non-advised services, it should identify additional measures to ensure that the distribution strategy is compatible with the product's target market. In such cases, distributors should consider aspects such as:

- What marketing strategy should be followed for the product (e.g., active marketing, the use of nudging and/or gamification techniques, 'finfluencers'⁴⁰, and so on). For example, a distributor could decide to make a more complex product only available when requested by the client and not to actively market it or use any gamification techniques or finfluencers in the distribution of such a product to its clients; and
- Whether and how the product should be displayed in the client's choice environment. For example, a distributor could decide not to show a more complex product on a prominent place on the website or at the top of a client's search results or could decide to show such a product only if the client specifically requests it."

Product-independent marketing that addresses current topics (e. g. infrastructure, renewable energy, ...) or the core specialisation of a company (e. g. shares) is also frequently carried out.

13 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?

If the marketing measures relate to a consultation, it is discussed in detail with the client whether the product in question is actually suitable for them. This is additionally verified by the subsequent suitability test.

If the marketing measures are aimed at the purchase of a product, the target market test and the appropriateness test are used to check whether the client has the necessary knowledge and/or experience with the type of financial instrument. Marketing measures are limited to product groups rather than a single financial instrument that can be assigned to an international securities identification number.

If there are any complaints about the advertised product, these would also be an opportunity to review the existing measures and take remedial action if necessary. In order to evaluate the effectiveness / success of marketing measures, the conversion rate (the approach to the sale) can be measured. Likewise information how long a client is staying on the webpage, or the click paths (web tracking) of the clients can provide important conclusions about the effectiveness of marketing measures.

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

The relevant criteria/requirements for the respective target market are taken into account in marketing practices. However, it is important to note here that with non-advisory business it is only possible to compare target markets to a limited degree because, among other things, there is no information available about the client's risk appetite.

We do not believe it is necessary to undertake a special review of marketing practices in respect of sales outside the determined target market.

According to the product governance guidelines, investment firms are generally obliged to deal with products that are regularly sold outside the target market. This obligation applies regardless of whether they are actively promoted through marketing measures. Guideline 72 states the following in this regard:

Furthermore, firms should reconsider their distribution strategy for more complex products distributed through non-advised sales, if, for example, the review shows that such products are too often distributed outside the positive target market (or even in the negative target market).

We assume that, as part of their product governance obligations, the investment firms would also review any active marketing measures when reviewing their sales strategy.

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

As far as we are aware, advertising measures aimed specifically at vulnerable clients or customers with a low-risk affinity primarily relate to the offer of advice on a potentially interesting product. In these constellations, the investment advice interview and the subsequent suitability test ensure that only suitable products are recommended to clients.

It should also be noted that advertising is also subject to the obligation to provide clear and non-misleading information, so that marketing practices are effectively monitored by the compliance function in general, i.e. not only in relation to vulnerable persons. They form part of the annual compliance report and - if deficiencies become apparent - ad hoc remedial measures are defined and implemented within a specific deadline. This in turn is monitored by the compliance function and included in its compliance report.

Content Marketing and Social Media

16 What kind of educational material do you produce and publish?

German banks and savings banks use numerous and varied teaching materials to explain the securities business to their clients as clearly as possible. Each investment firm decides which materials to use based on the respective client structure and the products and services offered or any focal points in the offering. These include

- Central information brochures, such as "Basic information on securities and other investments"
- "Basic information on forward transactions"
- "Basic information on financial derivatives"
- Customised in-house documents that convey basic knowledge
- External cooperation on online courses for certain financial instruments
- Keynote presentations on investment topics
- Glossaries, explanations of publications
- Information material on new topics, such as sustainable investments
- Information documents on the functioning of structured products, in some cases also for certain fund types
- Product group videos (e.g. on non-complex products) for knowledge transfer
- Stock market encyclopaedias
- Reference works

17 Do you have educational material available to investors in which you actively promote specific instruments and/or firm(s)?

As far as we are aware, the purely educational materials used in practice do not contain any advertising for individual products, but at most a reference to the possibility of obtaining individual advice on securities.

18 Do you use content marketing on social media or in other types of video material?

In some cases, content is also played via social media, e.g. the product type is explained in video exposés on funds.

Affiliates and social media

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

In the German market, many product manufacturers that do not maintain their own sales organisation make use of the infrastructure of distributors that offer their clients advice on these products, among other things. In this respect, these constellations can also fall under the aspect of affiliate marketing. In these constellations, however, it should be noted that the distributors, as investment firm, are themselves subject to MiFID and therefore also have to comply with the extensive requirements on client information, so that the measures described in the DP are not necessary here.

In some cases, there are sales organisations that use regional partners based in regions or countries without their own sales structure to sell their products.

However, it can be assumed that some investment firms also use affiliates that are not subject to MiFID II or comparable regulations. Insofar as ESMA considers precautions to be necessary in this regard, any measures should be limited to these constellations. It should also be noted that the ESMA guidelines on product governance also contain provisions on the use of fintechs (see Guideline 59 cited above).

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

In the first constellation in particular (previously question 19), product manufacturers look for affiliates that provide high-quality advisory services. In many cases, they provide additional information that goes beyond the legal requirements so that the clients of the distributors in question receive high-quality advice. There is a detailed tendering and onboarding process as well as close monitoring of the affiliate (due diligence/business partner review).

21 Based on which criteria do you select affiliates?

See question 20.

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

Insofar as the affiliates are investment firms that are themselves subject to the extensive requirements of MiFID, it can be assumed that they fulfil the obligations incumbent upon them,

which are already subject to annual monitoring. The situation is different for affiliates that are not subject to MiFID or comparable regulations.

If a savings bank/banks uses marketing material from an affiliate, we understand that there are contractual agreements between the commissioning company and the affiliate in which the key points of the cooperation are regulated. These agreements also contain provisions on the quality of the services to be provided. In the relationship between the manufacturer and the distribution centers involved, these are known as distribution agreements.

23 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?

Affiliates, in the sense of sales partners, are regularly remunerated irrespective of the advertising measures used. Where they sell a manufacturer's product, they receive a regular corresponding remuneration for the successful sale.

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

Insofar as affiliates are subject to MiFID, the comprehensive investor protection regulations apply directly to them, compliance with which is already subject to annual monitoring. In addition, there are often contractual agreements that aim to ensure proper implementation of the requirements.

If the affiliates are not subject to MiFID, we understand that it is often agreed in the contracts that they fulfil the services in accordance with the legal requirements.

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

Usually, content marketing for social and online media is created and published by trained employees in close cooperation with compliance units.

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

Affiliates are also sometimes paid a kind of minimum remuneration, this can be fixed or variable depending on the conditions of the contract.

Digital engagement practices (including gamification)

27 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?

Investment firms have different procedures for this. For example, day trading (buying and selling within one day) is permitted in some investment firms, in others only in relation to a specific client group. In some investment firms, this is not permitted at all. If there are restrictions, clients are regularly informed of this in advance.

In our opinion, there are also sufficient requirements in place to warn users; for example, in connection with illiquid assets (MaComp).

28 Do you incentivise your clients to log-in on a daily basis? For instance, by pop-up messages, frequent email updates etc.?

We are not aware of any such practices by German banks.

29 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)?

To our knowledge, German banks do not use such practices.

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

No, we are not aware of any problems in this regard. The topic of gamification is also dealt with in the above-mentioned Guideline 59 of the ESMA Guidelines on Product Governance, so that distributors who use such sales incentives must take special precautions when defining their sales strategy.

Insofar as ESMA should consider measures on the topic of gamification, it is essential to ensure that there is a certain tension between this and a user-friendly and effective user interface in online brokerage ("usability"), which the investment firms endeavour to achieve in the interests of their clients. Any measures should be based on a precise and narrow definition of "gamification", so that only constellations in which clients are encouraged to trade frequently are actually covered.

Choice architecture and nudging

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

We are not aware that the German savings banks and banks use nudges. The topic of nudges is also dealt with in the above-mentioned Guideline 59 of the ESMA Guidelines on Product Governance, so that distributors who use such sales incentives must take special precautions when defining their sales strategy.

32 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?

The online interface is the central point of communication with clients operating in online brokerage. The relevant processes and displays are therefore selected very carefully in order to meet regulatory requirements and client expectations for good user guidance and comprehensible communication. In addition, it is often reviewed on an ad hoc basis and revised if necessary. Occasions may include an increase in client enquiries due to possible ambiguities, but also new regulatory requirements that make adjustments necessary.

Adjustments are made in close dialogue with the responsible legal departments.

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

There are various possible reasons for this. These include changes to the legal framework, deficiencies identified as part of compliance monitoring or an increase in queries from clients regarding certain content.

34 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?

Clients contact the investment firms in particular if they do not understand certain brokerage content. These queries are regularly taken as an opportunity to edit the relevant point in the order process in order to avoid these ambiguities in future. In addition, client surveys are occasionally carried out in the event of frequent client cancellations in systems (e. g. order cancellations).

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

We are not aware of any such constellations at the German banks.

Push notifications**36 What kind of push-notifications do you send?**

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

Examples of push notifications in connection with marketing activities:

- Selected marketing push notification
- General marketing teasers
- Partly for portfolio management event-related push notifications

Push notifications are always topic-specific, but do not contain any individual information. These are only displayed after opening the app.

Dark patterns**37 Which examples of dark patterns have you encountered?**

We are not aware of any practical examples of dark patterns at German banks.

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

39 Have clients complained of difficulties related to the online interface? For example, difficulties in closing their accounts?

No, we are not aware of any client complaints from German banks in this regard.

Open question

40 Do you have any (other) observations with regard to the topics covered under this discussion paper that you would like to share with ESMA?

The Executive Summary states that, in the course of monitoring the current market situation with regard to MiFID II, the DP is intended to prepare possible further regulatory measures, which have not yet been precisely defined, on the basis of an analysis of the feedback on the DP and in connection with a further survey yet to be launched ("survey tailored for retail investors", see DP recital 3). On this basis, it is difficult to already derive specific new regulatory requirements without it being clear that there are gaps in the current regulatory framework. However, if there are to be any new rules at all, a generally abstract, principles-based specification of regulatory content rather than end-to-end detailing seems preferable to us. This can be justified in particular by the dynamic development in the area of digitalisation. Furthermore, experience shows that the increasing tendency towards detailed regulation is also associated with a considerable increase in bureaucracy, which is not linked to a corresponding client benefit.

As a standardised level of protection is required from a consumer perspective regardless of the legal nature of a financial product, EIOPA and EBA should - if at all - set similar new requirements for their divisions (keyword: ensuring a level playing field).

In some places, the DP gives the impression that ESMA is using very specific and particularly conspicuous practices, especially with regard to CfDs, to justify general regulatory deficits. However, CfDs in particular have already triggered various supervisory measures in the past. In our opinion, it remains to be seen whether the shortcomings identified there also have a similar impact on advertising for less risky (standard) products such as funds. However, "outliers" in advertising that are associated with clear breaches of the rules should not also serve as a basis for assessing the effectiveness of the existing rules for the broad mass of products available on the market. It also remains questionable whether terms such as "high-risk features" or the term "more complex financial instrument" (see DP recital 53.) are suitable for differentiation.

Regarding the considerations on layering: We take a fundamentally critical view of the layering approach in particular, as layering without media discontinuity is only possible for electronic documents. If - as currently envisaged in MiFID - many clients continue to receive information in paper form, layering will not be possible everywhere. The synchronisation of paper and electronic information would not be guaranteed, as clients would receive different information (at least in the formatting).

Layering alone would not lead to the desired reduction in the flood of information (DP recital 30), but only to a shift. There is also a risk that the principle laid down in MiFID of providing all "necessary" information would be watered down, as the client would differentiate between the

value of the information depending on its findability (layer). It is also to be feared that clients will not read the entire document as they cannot see how long it is. This can only be avoided by providing short, concise and clear information. Instead of further considerations on layering, regulation should instead focus on reducing mandatory content.

Also, it must be taken into consideration that - taking into account equal/parallel information channels - the scope of easily perceptible text content and the use of several information layers without impairing user-friendliness is only possible to a limited extent when using apps via the smartphone, for example.

In the case of further concretising regulatory requirements, it should be noted that they must not go beyond the regulatory content of the Level 1 and Level 2 measures.