

Submission Date

31/03/2021

ESMA_QA_1121

Status: Answer Published

Additional Information

Level 1 Regulation

Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries

Topic

Inducements

Subject Matter

Inducements

Question

How should the condition be applied that the inducement is justified by the provision of an additional or higher-level service to the relevant client, proportional to the level of inducements received, as referred to in Article 11(2)(a) of the MiFID II Delegated Directive?

31-03-2021

Original language

[ESMA 35-43-439 Investor protection Inducements Q&A 8]

Article 11(2)(a-c) of the MiFID II Delegated Directive lays down the conditions to be met in order for inducements to be considered to be designed to enhance the quality of the relevant service to the client. The condition laid down in Article 11(2)(a) of the MiFID II Delegated Directive has three important elements:

1. An additional or higher-level service;
2. Provided to the relevant client;
3. Proportional to the level of inducements received.

These requirements apply together with the other requirements in Article 11(2) of the MiFID II Delegated Directive, including that an inducement cannot be considered acceptable if the provision of relevant services to the client is biased or distorted as a result of the inducement.

The assessment whether a particular quality enhancement complies with these elements is ultimately a case-by-case assessment. However, in this assessment, ESMA considers that firms should take account of the guidance provided below in order to ensure a consistent application of the requirements.

Additional or higher-level service

According to ESMA, the reference to 'additional' or 'higher level' requires that the quality enhancement provided should go beyond aspects of the firm's organisation or services that are legally required or that can be considered as essential for its functioning. This is also apparent from the examples given in Article 11(2)(a) of the MiFID II Delegated Directive. For instance, the provision of non-independent advice on and access to a wide range of suitable financial instruments, including an appropriate number of instruments from non-affiliated

third-party providers, can be considered as an 'additional' or 'higher level' service because a firm providing non-independent advice is not otherwise legally required to assess a sufficient range of instruments from different providers.

Other examples of services that, depending on the specific circumstances (in particular the type of investment service at stake), could be considered as part of an 'additional' or 'higher level' include, amongst others, the provision of educational material or services aimed at increasing the financial knowledge of the client, such as free access to trainings, seminars or conferences or access to staff bringing specific expertise on special matters such as tax or inheritance law. Such services are neither legally required nor essential for the firm's functioning. The same goes for services such as free access to market data, investment research or the free provision of digital tools and apps aimed at helping clients to monitor their investments, such as tracking the valuation of their portfolio on a real-time basis, or portfolio simulation tools to help clients take investment decisions. However, in order for these services to be duly 'additional' or 'higher level', clients would otherwise normally have to pay for these services, i.e. in particular compared to the situation in which investment services are provided to clients in relation to which no inducements are received by the firm.

On the other hand, examples of services that should not be considered as 'additional' or 'higher level' include merely providing regulatory documents such as a prospectus or a KID or disclosure documents such as costs and charges disclosures. The reason is that such aspects are required by law. This also generally applies to organisational aspects such as a compliance, internal audit or complaints handling function. Equally, measures aimed at ensuring the necessary staff qualifications (e.g. education and training) that are required per Article 25(1) of MiFID II, should not be justified as 'additional' or 'higher level'.

Regarding essential aspects of the firm's organisation or service, which therefore should not be considered as 'additional' or 'higher level', examples would be common call-centres or general publicly available websites. ESMA considers that aspects such as these should not qualify as 'additional' or 'higher level' since the firm's organisation or service cannot do without these aspects.

ESMA notes that the examples of 'additional' or 'higher-value' services provided in this section are not relevant for those Member States that have implemented the list of examples provided in Article 11(2)(a) of the MiFID II Delegated Directive as an exhaustive list.

Provided to the relevant client

Services that can be considered as 'additional' or 'higher level' in theory, could still not be a quality enhancement for the client in question. Therefore, the 'additional' or 'higher-level' service should be provided to the relevant client.

For instance, the provision of advice about the suggested optimal asset allocation of the client, not relating to specific financial instruments but to asset classes in general, might not always be relevant for clients receiving the services of reception and transmission and/or execution of orders without investment advice that prefer taking their own investment decisions. Equally, value-added tools to help clients take investment decisions that in theory might be considered as 'additional' or 'higher level', might not always be relevant for clients receiving investment advice that prefer relying on the investment advice provided by the firm to take their investment decisions with no need to use any additional tool.

Furthermore, the provision of quality enhancing services to the relevant client means that the services should be actively and effectively offered and brought to the attention of the relevant client; therefore, an abstract offer of the quality enhancing service made to all clients and not adequately communicated to or brought to the attention of the relevant client should not be sufficient to comply with this requirement. For example, where a firm provides the client the possibility of a yearly meeting, but where it does not actually invite the client or in any other way effectively inform the client about this possibility, this meeting would not be considered to be a service that is actively and effectively offered and brought to the attention of the relevant client.

ESMA considers, as a good practice, that the quality enhancement can also be provided to a relevant segment of clients, provided that this segment is sufficiently homogeneous, i.e. the quality enhancements provided should be relevant for all clients that belong to this segment. When defining these client segments, factors to take into account include for example the investment or ancillary service provided, the distribution channel used, and the level of inducements received in connection with the service provided to the client. Importantly, a firm that provides different investment services and has different client segments should differentiate the quality enhancements according to the different client segments in its inducements policy.

Proportional to the level of inducements

The third element is proportionality. Services that can be considered as 'additional' or 'higher-level', and that are provided to the relevant client, should not be regarded as a quality

enhancement if the value-added is not proportional to the level of inducements received. It is important to underline that it is the level of inducements received by the firm that is of relevance, not the client's investment amount. ESMA emphasises that this is equally relevant for the examples given in Article 11(2)(a) of the MiFID II Delegated Directive, firms should thus always assess the proportionality of the inducements received.

ESMA expects firms to be able to demonstrate that the quality enhancements provided to the client are proportional to the level of inducements received.