

ESMA

Call for evidence

On the European Commission mandate on certain aspects relating to retail investor protection

Q1: Please insert here any general observations or comments that you would like to make on this call for evidence, including any relevant information on you/your organisation and why the topics covered by this call for evidence are relevant for you/your organisation.

The Consejo General de Economistas de España, a public law corporation that represents more than 80% of the Empresas de Asesoramiento Financiero registered with the Comisión Nacional del Mercado de Valores (hereinafter CNMV), appreciates the opportunity to respond to the consultation made by ESMA.

It is in the interest of this Board that the investment advisory activity is carried out in a professional manner, by entities duly authorized by the CNMV, whose managers must have not only the knowledge and experience but also the honorability to hold the positions for which they have been authorized. Compliance with these requirements is for the benefit of their clients, fundamentally in the protection of the retail investor.

However, excessive documentation provided to the client when making an investment recommendation can have the opposite effect. The client has to sign a large number of documents, generally of no relevance for decision making, which prevents him from analyzing the really important data. It must be borne in mind that, in the advisory activity, the advisor analyzes all the product information in order to make a reasoned recommendation to his client, who has hired him for that purpose. The overprotection of the advised client, who cannot have limited investment in certain complex products, clashes head-on with the new digital investment tools, where anyone can invest without any type of control.

The objective should be for retail investors to be sufficiently empowered to evaluate investment options and, if they are not, to be able to rely on professional advice to make informed investment decisions. The client may have a great knowledge of digital media but it does not imply that he/she knows the characteristics and risks of the products in which the client can invest.

2.1 Disclosures

Q2: Are there any specific aspects of the existing MiFID II disclosure requirements which might confuse or hamper clients' decision-making or comparability between products? Are there also aspects of the MiFID II requirements that could be amended to facilitate comparability across firms and products while being drafted in a technology neutral way? Please provide details.

MiFID II has implied that entities provide more information to investors (pre-contractual and post-contractual).

This information is positive for the client to have knowledge of the product in which he/she wishes to invest, but it becomes a difficulty when this documentation is very extensive, complex and difficult to compare.

For this reason, all products should tend to have the "Key Information Document", so that with the same format they can be comparable and also include, as its name indicates, the necessary and fundamental data for the investor to make a decision.

Q3: Are there specific aspects of existing MiFID II disclosure requirements that may cause information overload for clients or the provision of overly complex information? Please provide details.

Information on costs and expenses is very complex both for the entities and for the clients.

Also, in the case that the client has different intermediaries, the information is redundant, repetitive and in some cases can give rise to confusion.

Q4: On the topic of disclosures, are there material differences, inconsistencies or overlaps between MIFID II and other consumer protection legislation that are detrimental to investors? Please provide details.

No.

Q5: What do you consider to be the vital information that a retail investor should receive before buying a financial instrument? Please provide details.

The information included in the KIID is appropriate. It should include all important product information.

Q6: Which are the practical lessons emerged from behavioural finance that should be taken into account by the Commission and/or ESMA when designing regulatory requirements on disclosures? Please provide details and practical examples.

Behavioral finance has a great effect on investment decision making. Therefore, the information provided to the investor must be clear and efficient, mainly in terms of product characteristics and risks.

The knowledge that the advisor acquires of the client through the suitability test must be capable of recognizing the client's biases in order to help him in his decision making. For their part, The supervisory should establish a system of information and warnings that are easily accessible to all retail investors.

Q7: Are there any challenges not adequately addressed by MIFID II on the topic of disclosures that impede clients from receiving adequate information on investment products and services before investing? Please provide details.

NO.

As indicated above, the ex ante reporting obligations are very well defined for regulated entities. The case is different for other sales channels that are not regulated. In these cases the information is scarce and even misleading.

The national and European authorities should adopt measures to eradicate, or at least sanction, these channels that act outside regulation without the need for a prior complaint, but rather by reinforcing the ex officio application of the sanctioning regime provided in the Law.

Q8: In case of positive answer to one or more of the above questions, are there specific changes that should be made to the MiFID II disclosure rules to remedy the identified shortcomings? Please provide details.

Q9: On the topic of disclosures on sustainability risks and factors, do you see any critical issue emerging from the overlap of MiFID II with the Sustainable Finance Disclosure Regulation (SFDR) and other legislation covering ESG matters?

Investors are increasingly interested in sustainable finance. Therefore, information on these instruments should be brief, clear, non-complex and standardized.

In ESG matters, the regulation is complex, and given that the RTS developing SFDR have been delayed until January 1, 2023, it would be advisable to postpone the date of application of the Delegated Regulation 2021/1253 and the Delegated Directive 2021/1269 so that both have the same deadline and do not generate more confusion among clients.

Q10: Are there any other aspects of the MiFID II disclosure requirements and their interactions with other investor protection legislations that you think could be improved or where any specific action from the Commission and/or ESMA is needed?

Q11: Do you have any empirical data or insights based on actual consumers usage and engagement with existing MiFID II disclosure that you would like to share? This can be based on e.g., consumer research, randomized controlled trials and/or website analytics.

2.2 Digital disclosures

Q12: Do you observe a particular group or groups of consumers to be more willing and able to access financial products and services through digital means, and are therefore disproportionately likely to rely on digital disclosures? Please share any evidence that you may have, also in form of data.

Investors are becoming more and more familiar with digital means to make their investments, Although it is perhaps the younger audience who use it the most.

This carries a risk, they may also be the least informed and less risk averse, leading them to make unsuitable investments.

Q13: Which technical solutions for digital disclosures (e.g., solutions outlined in paragraph 27 or additional techniques) can work best for consumers in a digital - and in particular smartphone - age? Please provide details on solutions adopted and explain how these have proven an effective way to provide information that is clear and not misleading.

The digital signature facilitates the sending and receipt of documentation to entities and customers. In any case, through the Internet (duly marked) there is access to a large amount of information that previously could only be obtained on paper.

Q14: Would it be useful to integrate any of the approaches set out in paragraph 27 above in the MIFID II framework? If so, please explain which ones and why.

Q15: Should the relevant MIFID II requirements on information to clients be adapted in light of the increased use of digital disclosures? If so, please explain how and why.

Yes, the use of digital information should be promoted and secure and simple procedures should be established to make relevant information accessible to retail investors.

Q16: Do you see the general need for additional tools for regulators in order to supervise digital disclosures and advertising behind 'pay-walls', semi-closed forums, social media groups, information provided by third parties (i.e., FINfluencers), etc? Please explain and outline the adaptations that you would propose.

Yes, regulated entities are complying with the demands and requirements established by law, while FINfluencers are not. The supervisory entities could issue warnings for investors to identify the origin of the information.

In any case, clear rules would be of great interest.

Robo-advisers

Q17: To financial firms: Do you observe increased interest from retail investors to receive investment advice through semi-automated means, e.g., robo-advice? If yes, what automated advice tools are most popular? Please share any available statistics,

Q18: Do you consider there are barriers preventing firms from offering/developing automated financial advice tools in the securities sectors? If so, which barriers?

NO. We understand that the main barrier is the cost of developing digital tools.

In any case, the roboadvisor must be authorized by the supervisory entities. Currently a high number of roboadvisors provide services without being authorized and should be sanctioned.

Q19: Do you consider there are barriers for (potential) clients to start investing via semi-automated means like robo-advice caused by the current legal framework? If so, please explain and outline what you consider to be a good solution to overcome these barriers.

Clients have no barriers to investing through roboadvisors. Since there are few registered roboadvisors, they may cause more distrust among investors.

Q20: In case of the existence of the above-mentioned barriers, do you have evidence of the impact that they have on potential clients who are interested in semi-automated means? For instance, do they invest via more traditional concepts or do they not invest at all?

Q21: Do you consider the potential risks and opportunities to investors set out above to be accurate? If not, please explain why and set out any additional risk and opportunities for investors.

In the case of a licensed and supervised roboadvisor, the risks should be the same as for a traditional professional advisor.

Q22: Do you consider that the existing MiFID regulatory framework continues to be appropriate with regard to robo-advisors or do you believe that changes should be added to the framework? If so, please explain which ones and why.

Q23: Do you think that any changes should be made to MiFID II (e.g., suitability or appropriateness requirements) to adequately protect inexperienced investors accessing financial markets through execution only and brokerage services via online platforms? If so, please explain which ones and why.

Inexperienced investors who perform execution-only trades through digital platforms should be asked for the same information as in the face-to-face service.

Digital platforms should not have less requirements, especially when dealing with complex and illiquid products.

Q24: Do you observe business models at online brokers which pose an inherent conflict of interest with retail investors (e.g., do online brokers make profits from the losses of their clients)? If so, please elaborate.

Conflicts of interest should be managed like any other entity providing investment services. The supervisor must check how conflicts are being remedied so as not to harm the client.

Q25: Some online brokers offer a wide and, at times, highly complex range of products. Do you consider that these online brokers offer these products in the best interest of clients? Please elaborate and please share data if possible.

If the online brokers is regulated and supervised, it must offer products that are convenient and suitable for clients.

A client should not be allowed access to very complex instruments if the regulations do not allow it.

Q26: One of the elements that increased the impact on retail investors in the GameStop case was the widespread use of margin trading. Do you consider that the current regular framework sufficiently protects retail investors against the risks of margin trading, especially the ones that cannot bear the risks? Please elaborate.

Q27: Online brokers, as well as other online investment services, are thinking of new innovative ways to interact and engage with retail investors. For instance, with “social trading” or concepts that contain elements of execution only, advice, and individual portfolio management. Do you consider the current regulatory framework (and the types of investment services) to be sufficient for current and future innovative concepts? Please elaborate.

Q28: Are you familiar with the practices of payment for order flow (PFOF)? If yes, please share any information that you consider might be of relevance in the context of this call for evidence.

Q29: Have you observed the practice of payment for order flow (PFOF) in your market, either from local and/or from cross border market participants? How widespread is this practice? Please provide more details on the PFOF structures observed.

Q30: Do you consider that there are further aspects, in addition to the investor protection concerns outlined in the ESMA statement with regards to PFOF, that the Commission and/or ESMA should consider and address? If so, please explain which ones and if you think that these concerns can be adequately addressed within the current regulatory framework or do you see a need for legislative changes (or other measures) to address them

Q31: Have you observed the existence of “zero-commission brokers” in your market? Please also provide, if available, some basic data (e.g., number of firms observed, size of such firms and the growth of their activities).

Q32: Do you have any information on “zero-commission brokers” business models, e.g., their main sources of revenue and the incidence of PFOF on their revenue? If so, please provide a description.

Q33: Do you see any specific concern connected to “zero commission brokers”, in addition to the investor protection concerns set out in the ESMA statement that the Commission and/or ESMA should consider and address? Please explain and please also share any information that you consider might be of relevance in the context of this call for evidence. Please also explain if you consider that the existing regulatory framework is sufficient to address the concerns listed in the ESMA statement regarding zero-commission brokers or do you believe changes should be introduced in the relevant MiFID II requirements.

Q34: Online brokers seem to increasingly use gamification techniques when interacting with clients. This phenomenon creates both risks and potential benefits for clients. Have you observed good or bad practices with regards to the use of gamification? Please explain for

which of those a change in the regulatory framework can be necessary. Do you think that the Commission and/or ESMA should take any specific action to address this phenomenon?

Q35: The increased digitalisation of investment services, also brings the possibility to provide investment services across other Member States with little extra effort. This is evidenced by the rapid expansion of online brokers across Europe. Do you observe issues connected to this increased cross-border provision of services? Please elaborate.

P35: La mayor digitalización de los servicios de inversión también ofrece la posibilidad de prestar servicios de inversión en otros Estados miembros con poco esfuerzo adicional. Esto se evidencia en la rápida expansión de los corredores en línea en toda Europa. ¿Observa cuestiones relacionadas con este aumento de la prestación transfronteriza de servicios? Sírvanse dar más detalles.

Third country entities providing services to retail clients in the EU, should apply the applicable EU regulations, on a level playing field with other entities and ensure the protection of retail clients.

It would be desirable to provide information to retail clients on the legal regime and coverage when investing through third country entities or in some new products, such as some cryptoassets not yet regulated.

Role of social media

Q36: Do you observe an increasing reliance of retail clients on information shared on social media (including any information shared by influencers) to base their investment decisions? Please explain and, if possible, provide details and examples. Do those improve or hamper the decision-making process for clients?

The young investors can be the most influenced by social media.

Non-professional influencers pose a great risk to investors, since sometimes the information provided is false or misleading, thus impairing investors' decision-making process.

Influencers are not subject to supervision and therefore have no control over their activity, which implies greater risk.

For example, influencers could well be used to send messages and warnings to supervisors and regulators and to the general public.

Q37: What are, in your opinion, the risks and benefits connected to the use of social media as part of the investment process and are there specific changes that should be introduced in the regulatory framework to address this new trend?

The problem is not the social media. The problem is the lack of professionalism of the people who act, as well as the absence of control.

The advisory service is regulated and this obligation affects all actors involved regardless of the means by which they provide the service. Supervision must be consistent and enforce compliance with the rules in force for all current and future regulated actor.

Q38: Are you aware of the practices by which investment firms outsource marketing campaigns to online platform providers/agencies that execute social media marketing for them, and do you know how the quality of such campaign is being safeguarded?

The use of social media by investment services firms in their campaigns is positive, as it promotes awareness of the securities markets among the population and potential investors.

Q39: Have you observed different characteristics of retail clients, such as risk profiles or trading behaviour, depending on whether the respective client group bases their investment decision on information shared on social media versus a client group that does not base their investment decision on social media information? Please elaborate.

Q40: Do you have any evidence that the use of social media (including copy/mirror trading) has facilitated the spreading of misleading information about financial products and/or investment strategies? Please elaborate and share data if possible.

Q41: Have you observed increased retail trading of 'meme stocks', i.e. equities that experience spikes in mentions on social media? Please share any evidence of such trading and, if possible, statistics on outcomes for retail investors trading such instruments.

Risk warnings

Q42: Do you consider that the current regulatory framework concerning warnings provides adequate protection for retail investors? If not, please explain and please describe which changes to the current regulatory framework you would deem necessary and why.

The regulatory framework provides adequate and even excessive protection for retail investors, but when it comes to social media, it may not be being enforced.

The regulator and supervisor need to be more active on social media so that their intended audiences, the investors, reach their information, messages and warnings.

Open finance

Q43: Do you believe that consumers would benefit from the development of an 'open finance' approach similarly to what is happening for open banking and the provision of consumer credit, mortgages, etc? Please explain by providing concrete examples and outline especially what you believe are the benefits for retail investors.

Q44: What are, in your opinion, the main risks that might originate from the development of open finance? What do you see as the main risks for retail investors? Please explain and please describe how these risks could be mitigated as part of the development of an open finance framework.

Q45: Which client investor data could be shared in the context of the development of an open finance framework for investments (e.g., product information; client's balance information; client's investment history/transaction data; client's appropriateness/suitability profile)?

Q46: What are the main barriers and operational challenges for the development of open finance (e.g., unwillingness of firms to share data for commercial reasons; legal barriers; technical/IT complexity; high costs for intermediaries; other)? Please explain.

Q47: Do you see the need to foster data portability and the development of a portable digital identity? Please outline the main elements that a digital identity framework should be focusing on.

Q48: Do you consider that regulatory intervention is necessary and useful to help the development of open finance? Please outline any specific amendments to MiFID II or any other relevant legislation.

Q49: What do you consider as the key conditions that would allow open finance to develop in a way that delivers the best outcomes for both financial market participants and customers? Please explain.