

Comments of the Fédération Bancaire Française (FBF) on the ESMA Discussion Paper on MiFID II investor protection topics linked to digitalisation

The FBF would like to thank ESMA for its attention to the following general and detailed comments on certain topics of the ESMA Discussion Paper.

General comments

The FBF shares EIOPA's observation that retail investors are increasingly using digital means to obtain information and subscribe to financial instruments.

However, it considers that it is not necessarily appropriate to add additional Level 3 texts to the existing body of rules. Indeed, the legislative proposal on RIS is still being examined by the European co-legislators and, if the general principles set out in this Discussion Paper are relevant, they are already included in the existing texts (MiFID and its delegated acts).

Overly detailed measures also seem superfluous, as the supervisory authorities already have the means to crack down on commercial practices that contravene the regulations. These irregular practices are the work of a small number of investment firms operating in the EU under the freedom to provide services; the problems they pose could rather be solved by more targeted supervision rather than more regulation for all.

Excessive textual clarification could run counter to the principle of proportionality and call into question practices that are perfectly in line with regulatory requirements, by generating unnecessary costs for investment firms, at a time when the draft Omnibus Directive (RIS) is likely to call into question these new rules.

Overall, the abuses identified by national supervisory authorities rarely concern regulated products, which seems to show that the current regulations are effective and proportionate and that the supervisory authorities are able to apply them.

More generally, it appears that new investors are attracted by atypical investment products marketed online, in particular because of their appeal for playful and/or amusing communication¹. While information must remain clear, fair and not misleading, as already provided for in the regulations,

¹ See the report describing recent trends in retail investment in France published by the Autorité des marchés financiers (AMF) with the support of the DG Reform of the EC and the OECD
<https://www.oecd.org/daf/fin/financial-education/new-retail-investors-in-France.pdf> (November 2023)

creating constraints that make it more difficult to market products that are already closely regulated will only increase the tendency for investors to turn to products that benefit from a more flexible and attractive framework.

Information overload has already been criticized by investors and has been identified as a concern by national and European supervisors. Some of the proposals in the Discussion Paper seem to us to be counterproductive in this respect, as they risk driving investors away from traditional products or discouraging them from seeking relevant information in a disproportionate flood of information. This is particularly true in the digital domain, where users tend to skip texts that are too long. Despite the stated objective, some of the proposals seem to us to generate risks in this respect.

Finally, we believe that too many prescriptions in a field where technological developments are frequent run the risk of being quickly overtaken by these developments and becoming obsolete.

Detailed comments on certain topics

Online disclosures (paragraphs 27 to 29)

In our view, proposals to provide interactive and personalised information to retail clients may conflict with the desire expressed elsewhere in the regulations to allow comparison of financial products and services through standardisation of the information provided (see the PRIIPS regulation). Furthermore, the proliferation of possible scenarios is not necessarily likely to help investors make decisions, with professional and direct advice seemingly better placed to assist clients in this regard.

Layering (paragraphs 30 to 38)

It seems to us that layering may also be difficult to reconcile with the regulatory obligations to provide complete information in a format that is already standardised (see the KID). The layered approach envisaged by ESMA implies a selection or even a deletion of information considered "non-vital", with the risk that investment firms will be criticised for not providing complete information as required by the regulations or that this approach will be superimposed on existing rules. In the latter case, the objective of simplifying information would not be achieved.

In short, we are of the opinion that layering must remain a technique in the hands of investment firms, in compliance with existing regulatory requirements.

Marketing communications and practices (paragraphs 44 to 49)

While we broadly agree with the developments on the subject, it seems to us that the recommendations concerning fininfluencers are ahead of the European work in progress on RIS.

Furthermore, the recommendation to include "vital information" in marketing communications and advertisements, when this concept is not precisely defined, seems to us likely to:

- be difficult to reconcile with the current regulatory requirements for clear, accurate and non-misleading information, which are the subject of a clear, abundant and satisfactory doctrine from national competent authorities

- make marketing documents even more burdensome than regulatory documents, which could further divert investors from regulated products in favour of unregulated or less regulated financial products presented in a more attractive manner.

Targeted marketing (paragraphs 50 to 53)

We do not believe that this section adds anything new to the product governance requirements set out in MiFID2, its delegated acts and ESMA's guidelines on the same topic.

The aggressive commercial practices denounced in paragraphs 51 and 52 may concern or may have concerned certain financial firms acting in EU under the freedom to provide services, but they have not affected all firms across the EU. With regard to firms with aggressive commercial practices, ESMA has product intervention powers that it has already used.

Finally, some of the recommendations seem to us to anticipate what will be decided by the European co-legislators in the context of the RIS. Possible contradictions between ESMA's recommendations and the provisions of the future directive could lead to the drawbacks described above.

Content marketing including social media (paragraphs 54 to 58)

The statement indicated after paragraph 58 (“When firms create and publish educational material that includes (content) marketing and/or may nudge, attract or stimulate the investor to invest in a certain financial instrument and/or become a client of the specific firm, then the material should also be labelled as marketing material”) is not clear or goes too far. Any educational content does not constitute marketing information or advertising as well as any information on the interest of a product or its use cases or on the conditions of access to it via the services or tools of the firm cannot be qualified of “marketing material”.

The clear, precise and not misleading communication requirements already provided for in the regulation seem sufficient, the creation of a dichotomy between the different types of marketing or advertising communications might lead to a multiplication of rules and to a complexification of the client journey to reach the relevant information.

The use of affiliates (paragraphs 59 to 70) and fininfluencers (paragraphs 71 to 82)

We fully share ESMA’s concerns about affiliates and fininfluencers (a law was enacted in France in 2023 to regulate the activities of the influencers), but ESMA’s recommendations anticipate the provisions of the RIS.