16 December 2021

EBF REPONSE TO ESMA'S CALL FOR EVIDENCE ON RETAIL INVESTOR PROTECTION

The EBF welcomes the opportunity to respond to ESMAs Call for Evidence on the European Commission's mandate on certain aspects relating to retail investor protection.

1. General comments

Through many years EU investor protection regulation has focused on protecting retail investors from mis-selling, but in a way which has promoted disclosure of all potentially relevant information to all investors under the perception that if retail investors are given all information, they will read and understand the information before making their investment decisions. Adding to the complexity, different products and distribution channels are regulated by different EU-legislative acts, and processes governing the especially advisory service have grown in complexity due to MiFID II and are expected to grow even more in complexity when ESG is integrated into the framework. These facts have led to a very complex and not always consistent landscape of regulatory acts with the overall effect that investors receive too much information, which is not always consistent and leading to information overload. We consider the investor protection framework in MiFID II is sufficient and considering the existing problems with information overload for retail clients, we believe that the focus should be on simplification rather than the creation of new detailed and complex information. The problem of unregulated entities and products needs to be addressed at EU-level.

A priority in the forthcoming work on an EU retail investment strategy should be to ensure that the **disclosure/information requirements in EU legislation are sufficiently calibrated, taking** both the type of clients and type of financial instrument into account. The EBF therefore supports a review of the requirements in annex II to MiFID II in order to allow more experienced and sophisticated retail clients to be treated as professionals. In this context and in line with the CMU objectives, we support consumer testing to make sure rules are tailor made for consumers/investors and are efficient to protect them while ensuring not preventing them from taking part to financial markets.

Derivatives which are used for mitigating risk (hedging derivatives) should be excluded from the PRIIPs scope as these are not "investments". For such instruments it should be sufficient to provide information under MiFID II. Moreover, it should be noted that FX forwards are considered as means of payments in MiFID II which makes it very odd to treat them as investments under PRIIPs.

Furthermore, there should be **horizontal alignment between legislation** to ensure transparency and comparability, especially uniform information for similar investment products and services. E.g., there is a gap between IDD and MiFID II investor protection requirements. Harmonization of rules is only effective when supervision is harmonized as well. This is unfortunately not the case and therefore regulatory arbitrage is widely spread throughout the European Union. We see several regulatory arbitrage areas, for example regarding MiFID II (Suitability)[1], Product Intervention measures (local restriction on pan-european products) and inducements. This is unacceptable in order for a single market to function properly.

In addition, we would like to stress the need to avoid regulatory instability. The publication of new regulations and the periodic review of those already in force give rise to continuous changes in the "rules of the game". These changes require time and significant efforts (economic, administrative, technological, etc.) in order for firms and other market operators to implement the new regulatory requirements and, in addition, gives rise to a lack of legal certainty regarding which will be the applicable framework in the short/medium term. Consequently, in this regard we would like to stress that, although we understand that there is still room for reviewing certain aspects described below, any potential amendments should be carefully analyzed in order not to impose new burdens and relevant costs to the financial industry.

We agree with ESMA that it is very important to ensure that the disclosure requirements are **technology neutral** so that it is easy for clients to understand and access the information also in an online environment. Legal requirements such as a maximum "number of pages" should be avoided.

Finally, we want to underline that disclosures do not automatically lead to increased investor protection. In order to ensure that clients *actually understand* the information that they receive, more focus should be on increasing financial literacy e.g. in schools. In this context, it should be underlined that also investment firms can fulfil an important function by educating their clients when explaining the different functions and features of financial instruments. It is therefore important to avoid that the EU legislation unduly restrict this educative function e.g. by making it more difficult for clients to invest in new types of financial instruments after e-learning etc. ESMA, for example, recently proposed in their Consultation Paper on Appropriateness that 'it must be avoided that investors are encouraged to increase the level of their knowledge and experience in order to gain access to complex financial instruments that would otherwise not be appropriate'. Educating clients on both complex- and noncomplex products is one of the core elements of non-advised services.

2. Specific questions

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.

Most investors or future investors are using/will use digital tools such as the internet bank or apps to place orders. In our view, it is therefore most welcome that the EU-legislators focus on digital aspects in a forthcoming review. It is very important to ensure that investor protection rules are technologically neutral.

The EBF agrees that MiFID II rules have resulted in information overload for retail clients. We therefore fully support amendments which aim at simplifying the disclosure rules in MiFID II and other EU-legislations such as PRIIPs. In our view, it is more important to ensure that the information received is relevant and understandable for the retail client

[1] Pan European Research: How is Investor Protection (MiFID II) implemented?', by Prof. Dr. Tom Loonen (Vrije Universiteit) and Ronald Jansen (Ortec Finance).

when making an investment decision than to focus on comparability between different types investment products.

A very important part of the forthcoming work is therefore to analyze which information is actually relevant for retail clients (e.g. total costs/fees) and to delete those rules which are of little benefit to clients (e.g. granular breakdowns of costs, illustration of cumulative effects on return, RTS 27 reports). In this context, it is important to take into consideration that information that is relevant for financial instruments used for investment purposes is not necessarily relevant for financial instruments used for hedging or as means of payment. Consumer testing of the proposals for amendments is important and should include different types of financial instruments.

Furthermore, there should be horizontal alignment between legislation to ensure transparency and comparability, especially uniform information for similar investment products and services. E.g., there is a gap between IDD and MiFID II investor protection requirements. We therefor welcome ESMA's intention to coordinate closely with EIOPA, who have received a call on similar aspects regarding protection of retail investors (investing in insurance-based investment products).

Although targeted amendments to the disclosure regime is a priority, the EBF wants to underline that this is only one piece of the puzzle. In order to ensure that the retail client actually understand the information, measures also need to be taken to improve financial literacy. Moreover, it is important to ensure that EU clients continue to have access to advisory services. A cautious approach should therefore be taken in relation to any amendments of EU law which could make the provision of investment advice more cumbersome and costly for retail clients.

As a final remark, the EBF wants to underline that retail investors is a wide concept that also includes very experienced consumers as well as smaller SME businesses. In some situations, such clients may want to be treated as professional clients instead. We therefore support a review of Annex II to MiFID in order to ensure that the "opt up" criteria are fit for purpose.

I 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.

General message:

When a retail investor repeats a transaction again and again it seems unnecessary that the retail investor receive the same information again and again and often the retail investor finds it inconvenient and irritating, especially in the concept of 'advice'. It should be considered that some retail investors under certain criteria based on i.e. knowledge and experience or simply their preference, should be able to opt out/choose not to receive all disclosures.

Finally, we also see a problem in the lack of a level playing field in relation to unregulated entities and assets e.g., crypto assets. Retail investor should receive the same information or equivalent information on investment products regardless of which financial legislation that regulates the investment product.

In more details, we believe that some requirements are confusing and should be amended:

1) **Harmonizing of disclosure obligations:**

- MiFID II and PRIIP as well as other relating cost information should be harmonized. We should avoid providing the client with differing, not comparable information.
- Discrepancies in the sustainability regime in MiFID II and SFDR should be addressed, for example we believe the reporting frequency of individual portfolio management services under SFDR art. 11 should be annually, not quarterly or monthly. There is also great concerns relating to the overlapping implementation period of the SFDR level 2 requirements (1 jan 2023) and MiFID II rules on suitability assessment (3 aug and 22 nov 2022). **The EBF strongly support postponing the MiFID II level 2 requirements until 1 jan 2023.**
- the MiFID Quick fix introduced digital information as a standard for the provision of information in MiFID II. We welcome this improvement and suggest widening the scope on all applicable information, including PRIIP, Prospectus Reg, SFDR etc). Clients should receive all information through one specified channel. Since the rule also refers to "potential clients", the website should be a suitable way of reaching people who are not clients of the intermediary and, as such, cannot be reached by personal communications. We therefore expect that retail investors will be facilitated in comparing the information available on the website of the intermediaries.

2) **Lift unnecessary disclosure information:**

Clients are significantly burdened by the constant provision of information. Especially for experienced clients this does not seem to be justifiable. Banks should have the possibility to adjust the amount of information a less vulnerable client receives.

Besides the aforementioned improvements we suggest lifting the following informational duties we deem to be unnecessary and burdensome for clients:

- Quarterly reporting (Art. 63 MiFID II Del. Reg): The client always has the chance to inquire about his current status
- The information about costs when selling is unnecessary. These costs are usually neglected by clients as it is not of importance. Especially in turbulent times ex ante cost information cause a latency that might cause the client to lose more value on his trade.
- Reporting on losses might have adverse impacts: i.e., more vulnerable tend to sell in depreciating markets after receiving a loss notification. We believe that further research should be done to the effectiveness of MiFID II loss reporting. If these reports indeed have an adverse impact on investor protection of prove of little use, the requirements should be lifted all together.
- Securities saving plans should be made it easier by
  - Giving the basic information as regulated by the PRIIP Reg only once at the beginning of the savings plan

- Quarterly reporting is not necessary as the clients have a long term perspective.

We therefore strongly suggest to redraft the aforementioned Article 48 by clarifying that: i) for financial instruments within the PRIIPs scope intermediaries must provide retail clients with the relevant KID; ii) only for financial instruments without a KID intermediaries must provide information according to the provisions of the same Article.

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.

General comments:

The cost disclosures should be simplified for retail clients. Our members deal with a lot of confused clients and almost no retail clients ask for greater detail in the cost disclosures as they are entitled to according to MiFID II. A single cost figure is enough for the vast majority of all retail clients. Hence the minimum legally required granularity should be minimized to fewer, and perhaps just one cost figure with supplementary information on the amount of inducements received by the investment firm.

The strengthened requirements on disclosing information about cost and charges to clients introduced with MiFID II has shown to be interpreted in a variety of ways resulting in the fact that the shown cost are not comparable across different distributors. For that reason, we see a need for more guidance on the interpretation of the regulation. The amount of disclosure requirements has increased. It should be kept in mind that these are additional to disclosure requirements under other regulations (cookie, personal data etc.). The information disclosed to retail investors may be perceived by the retail investors as overwhelming.

Bearing in mind that the retail investor category is very wide, some retail investors experience that they overloaded with information that they neither ask nor care for. It could be considered if some retail investors fulfilling certain criteria should be allowed the option to opt out of specific disclosure requirements. However, we do not support the creation of a new client category.

In more details:

Investments vs hedging

MiFID II is not sufficiently calibrated for different types of products (e.g. investments vs hedging). To apply some of the information requirements aimed at investments when clients buy instruments only to hedge risk or as a means of payment lead to information overload since the information is not well-suited for this type of instrument. Please note however that we do not suggest exempting hedging instruments from MiFID II information requirements in general but to be able to adapt the information in order to ensure that it is relevant for the product in question. (As an example, it makes no sense to provide information on the "expected return" of a hedging derivative)

Cost & Charges

The information requirements in MiFID II regarding costs & charges are too complex. In our experience, the average retail client is mostly interested in the total costs, not in granular information on different components of the costs or calculation methodologies. Moreover, for professional clients and eligible counterparties as well as more experienced segment of retail clients, the information is of little added value and increase the administrative burden. We therefore generally support:

(1) simplification of the MiFID II requirements on cost & charges, and

(2) review of annex II to MiFID II so as to enable more experienced clients to request treatment as professional clients.

Cumulative effects on return

The EBF questions whether the illustration of cumulative effects on return has any benefits for the clients or if it only leads to confusion, also considering that distributors cannot determine which performance is the most reliable information within the four provided by manufacturers in the KID performance scenarios. We therefore support the deletion of this requirement from the ex-ante disclosure on costs and charges. Besides, the requirement of an illustration of cumulative effects on return is not well suited for products where the purpose is hedging and not trading (e.g. FX and interest rate derivatives).

Use of Percentages

For some services it is very unclear how to calculate the cost as a percentage (%). It does not make sense to calculate the customer's total cost as a percentage of the total "investment amount" on an aggregated level, mixing different types of trades and costs (equity, derivatives used for hedging etc.).

<u>Overlapping EU-rules on disclosure</u>

One factor that contributes to the information overload and/or overly complex information is that the EU disclosure rules overlap and are inconsistent, see Q 4.

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.

<u>MiFID II/PRIIPS:</u>

The EBF generally supports a closer alignment between MiFID II and PRIIPs e.g. as regards the calculation methodology for product costs. It is confusing for clients to receive different cost information for the same instrument depending on if MiFID II or PRIIPs is applied.

In particular, the EBF proposes that the Commission looks into:

- Transaction costs ("market value" vs "arrival price")
- Inducements (product cost rather than service cost)
- The redundancy related to showing cost components which are zero

For all intents and purposes, the product costs disclosed by the manufacturer in the PRIIPS KID are those to be aggregated by the distributor when he prepares its PRIIPS KID by adding the distribution costs, in a single document. It would be useful to clarify this consolidation at the regulatory level. Moreover, there is some uncertainty as regards the treatment of FX contracts which are considered as "means of payment" under MiFID II (art 10 delegated regulation) but can still be considered as an investment product under PRIIPs.

In more details, there are some inconsistencies between the PRIIPs KID and the ex-ante disclosure on costs and charges required by MiFID II to investment firms regarding:

- the cost of products, due to the fact that according to the ESMA Q&A No 13, third party payments received by investment firms in connection with the investment service provided to a client shall be itemised separately within the aggregated costs and charges and deducted from the relevant product costs. This implies that product costs illustrated in the ex-ante costs and charges disclosure provided by investment firms are different and lower than those illustrated in the PRIIPs KID;

- the ex-ante costs and charges disclosure provided by investment firms illustrates costs expressed both as a cash amount and as a percentage, while the PRIIPs KID illustrates costs in terms of Reduction in Yield (RIY);
- the ex-ante disclosure on costs and charges provided by investment firms, that must illustrate the cumulative effect of costs on the return of the investment without any clarifications regarding the assumptions to be used in order to calculate the potential return. We have to underline that it is not possible for investment firms to refer in any case to the return reported in the KI(I)D, taking into account that: i) the PRIIPs KID reports 4 performance scenarios, the structured UCITS KIID reports 3 performance scenarios and it is not possible to determine which of them is the most reliable; ii) the UCITS KIID does not show any prospective performance; iii) there are financial instruments without KID and KIID and consequently without any perspective performance. For this reason, most investment firms have decided that it is more correct to avoid any indication of the potential return of the investment (i.e., considering a zero return) and have illustrated the impact of the different types of aggregated costs on the amount invested.

Further inconsistencies exist between the UCITS KIID and the ex-ante disclosure on costs and charges required by MiFID II to investment firms regarding transactions costs borne by the funds, which are excluded by the KIID and on the contrary included in the ex-ante costs and charge disclosure required by MiFID II.

On this regard we deem at least necessary:

- to review the relevant MiFID II provisions deleting from the ex-ante disclosure on costs and charges the requirement of proving the impact of the total costs on the return of investments and leaving it exclusively in the ex-post periodic costs and charges disclosure;

- to retain in the PRIIPs relevant provisions only the obligation to include in the KID the information regarding the ex-ante impact of the total costs of each investment product on the return of this latter, given the fact that this information is produced by manufacturers who have i) the obligation to test the product in order to comply with the product governance requirements and to develop the performance scenarios and ii) consequently, the possibility to correctly integrate the information on costs with the expected returns.

<u>Point of time to provide information</u>

MIFID 2 and PRIIPs should be aligned with regards to the possibility of providing the KID/information on the financial instrument/service after the conclusion of the transaction/service.

There are cases where due to the nature of the activity (for instance because immediacy is required or is a recurrent activity) it is essential to keep the possibility to provide with the Key Information Document (or other pre-trade information) after the conclusion of the transaction under certain circumstances (i.e. art. 13.3 of PRIIPs Regulation, MIFID Quick Fix, etc.). The conditions to provide the KID after entering into a transaction are very strict and should be made more flexible for clients that trade on a certain family of product quite often (for example, FX derivatives). In particular, we believe that the requirement of article 13.3 (b) should be deleted as it imposes an obligation to assess that it is not possible to provide the KID.

This should be equivalent to the amendments set out in Article 1(4) of Directive 2021/338 (the "MiFID quick fix") on the delivery of information on costs and charges after the conclusion of a transaction under certain circumstances.

Language requirements

The language requirements should be revised so that they are the same in the respective EU disclosure rules. The authorised languages for the information documents can differ under PRIIPs and UCITS in members states. For example, in the Netherlands a situation exists where for the UCITS KII English and Dutch versions are both authorised languages, whereas under PRIIPs a KID in the Dutch language is mandatory. With other words, the Netherlands has not used it's 'member state option' under article 7 of the PRIIPs Regulation EU 1286/2014 to allow for other languages. The ESAs should be aware of the possible differences in implementation between member states and the possible negative side-effects this might entail. If a member state chooses not to use the member state option, this might be a barrier to the freedom of capital movement in general and a shrinking range of investment options for retail investors more in particular.

MiFID II/SFDR:

There is a concern regarding unintended negative consequences from the complexity of the new sustainability rules e.g. interaction between SFDR and MiFID II. One issue that the EBF considers should be further clarified relates to portfolio management. Portfolio management is an investment service in MiFID II but classified as a financial product in SFDR. At the same time, the rules on sustainability preferences in MiFID II apply to financial instruments – not investment services such as portfolio management or financial products as defined under SFDR.

Moreover, it is not clear under which circumstances financial instruments, in particular those which are not covered by SFDR, can be referred to as "sustainable" or can be compatible with clients sustainability preferences. The complexity of the interaction between SFDR and MiFID II will put a lot of burden on the advisors vis-à-vis their clients. The classification may also differ depending on if an investment firm offers advisory services (and are subject to the MiFID II rules on clients sustainability preferences) or execution only.

We also believe that if SFDR implementation has been postponed to 1st January 2023. MIFID II suitability should also be postponed at the same date for consistency reason.

Discrepancies in different parts of MiFID II

Within the MiFID II disclosure framework there is a need for clarifications relating to the concept of 'cost' e.g. the interaction between the rules on MiFID II cost & charges, best execution and SI quotes.

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

First of all, the main policy objective from an investor protection perspective should be that the information is understandable and relevant in order for the client to make a well-informed investment decision.

What is considered "vital pre contractual information" depends on the financial instrument in question. It is therefore crucial that there is flexibility in the EU rules which allow firms to adapt the information to the product at hand.

- Main product features and where applicable special features such as guaranteed returns, capital protection

- Costs (total costs, not granular breakdowns and calculation methodologies)
- Risks (if relevant illiquidity should be mentioned as a risk)
- Expected or historical returns depending on the financial instrument or product
- ESG

As mentioned above, we are in favor of a flexible approach regarding disclosures where the harmonization is limited to the headings and main contents and where the investment firm can adapt the information to the type of instrument in question. The main policy objective from an investor protection perspective should be that the information is understandable and relevant in order for the client to make a well-informed investment decision.

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.

Behavioural finance is already considered by intermediaries in drawing up the questionnaire to profile clients.

Some of the practical lessons learned emerged from behavioral finance are that more information is not always the most effective. Through many years EU investor protection regulation has focused on protecting retail investors from mis-selling, but in a way which has promoted disclosure of all potentially relevant information to all investors under the perception that if retail investors are given all information, they will read and understand the information before making their investment decisions. Experience have shown that when you keep adding on information to retail investors it will end in information overload and result in retail investors not reading and make deciding based on the disclosed information.

Article 62 of the delegated Regulation is an example of concrete rule that could leave to unintended behaviour by retail investors. According to MIFID II clients who receive the service of portfolio management or retail clients invested in leveraged instruments receive loss reports when their portfolio has declined 10 pct. in value. These reports are confusing especially for retail clients, and especially when markets are extremely volatile, as was the case during the COVID-19 pandemic. The main issue however is the risk of retail investors acting against better judgement upon reception of such information. There is a real risk of so-called "herd-behavior" since especially less experienced retail investors might trade based on this information in the event of market turmoil and this might not be in their best interest, as they might be better off maintaining a longer investment horizon. The rules thus risk to enforce short-termism in investment behavior, but also pro-cyclical behaviour and unnecessary losses for clients. The 10 % Loss Threshold Reporting for portfolio management (all clients) and leveraged instruments (only retail client), currently required according to article 62 of the Delegated Regulation should be reviewed and an opt-out possibility for clients should also be considered.

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.

Annex II to MiFID II: the opt-up rules could allow sophisticated/experienced retail client to be treated as a professional client (and hence be able to invest in corporate bonds etc.) but are not sufficiently calibrated for all types of assets. The EBF therefore supports that annex II is revised. However, we do not support the creation of a new client category.

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.

Annex II to MiFID II which allow experienced retail clients to be treated as professionals

Cost & Charges;

(i) Align MiFID II and PRIIPs disclosures

(ii) exclude hedging derivatives from PRIIPs scope as not investments

(iii) delete information of little use to retail clients e.g. on cumulative effects on return, percentages, descriptions of calculation methodologies – focus on total costs, risk and key features.

As mentioned earlier when retail investors repeat the same actions all the time, the retail investors should be able to opt out of certain information if the meet certain criteria. Opting up and be categorized a professional investor is not necessarily the solution for all retail investors that might also considered semi-professional/sophisticated/experienced investors.

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)31 and other legislation covering ESG matters? 31 Regulation (EU) 2019/2088. 24

Abandoning the "one-size fits all" approach

First of all, due to the new regulations on the query of sustainability preferences and excessive demands on the client (e.g. on determining a minimum proportion of the financial instrument or principal adverse sustainability impacts), we have great doubts that a client can assess the quality of the sustainability of the product against the background of its individual sustainability preference. Overweighting of sustainability needs must be avoided.

In addition, we are concerned about the fact that new regulations on sustainability adopt a "one-size fits all" approach and, therefore, do not take into account the different nature and characteristics of certain financial instruments which are not under the scope of SFDR. Delegated Regulation (EU) 2021/1253 amending Delegated Regulation (EU) 2017/565 includes a definition of "sustainability preferences" where the concepts of "sustainable investment" and "environmentally sustainable investment" are defined by reference to Regulation (EU) 2019/2088 or Regulation (EU) 2020/852, respectively. However, it becomes highly difficult or even impossible to meet such a definition in respect to certain financial instruments under the scope of MiFID II. For example, amongst others, this would be the case of derivative instruments concluded for hedging purposes. It is not clear how these instruments would fit within the new regulation as, due to its particular features, it would be difficult to meet the definition of sustainability preferences in practice. In this regard, it should be noted that: (1) the definition of sustainability preferences would generally require investing in some way in sustainable activities; a requirement that would be difficult to meet in most of financial derivatives; and (2) when the client's main objective is to hedge its financial risks, sustainable preferences would, in principle, have little relevance. In fact, regarding point (2), it should be borne in mind that, as per the European Commission, sustainability preferences should only come into play once other suitability criteria have been fulfilled, meaning that they would serve as a final set of considerations rather than narrowing the options earlier on the process; therefore a more flexible approach should be considered with regards to the sustainability preferences within the suitability assessment with regards to certain financial instruments.

Harmonization

Harmonization between MiFID and SFDR is necessary. Currently we see the following problems:

- Art. 8 and 9 SFDR: Two categories for sustainable financial products (i.e. also funds).
- Art. 2 No. 7 amended MiFID II Delegated Regulation (EU) 2017/565: Three categories of sustainable financial instruments (mostly) deviating from the SFDR - these will have the greatest practical relevance for manufacturers and distributing banks/savings banks. Further Level III measures by ESMA are planned.

What counts as a sustainable product is inconsistently regulated in the various EU rules (SFDR, MiFID II Delegated Regulation, Taxonomy). For example, the future query of the investor's sustainability preferences under MiFID II places different requirements on sustainable products than the SFDR. SFDR and Taxonomy do not provide for a certain minimum proportion of (environmentally) sustainable investments either in Art. 8 and 9, Art. 2 (17) or Art. 2 (1) Taxonomy Regulation.

Due to the new regulations on the query of sustainability preferences and excessive demands on the client (e.g. on determining a minimum proportion of the financial instrument or principal adverse sustainability impacts), we have great doubts that a client can assess the quality of the sustainability of the product against the background of its individual sustainability preference. Overweighting of sustainability needs must be avoided.

Lack of data

Due to the obligation of MiFID manufacturers to provide the required ESG data via the target market, it can be assumed that the required data will be available to distributors Given the late publication of the delegated acts with technical criteria for environmentally sustainable economic activities contributing to either climate change mitigation or adaptation, it should be clear that even those companies covered by technical criteria will not be able to report reliable data on Taxonomy alignment of their activities until end 2021 or shortly afterwards. This means that by 1 January 2022 manufactures will lack the necessary data basis for assessing their holdings against the EU Taxonomy, yet alone to commit to certain minimum shares of Taxonomy-aligned investments. The Delegated Regulation under Art. 8 of Taxonomy Regulation accounts for this challenge by requiring only generic disclosures in relation to the EU Taxonomy by 1 January 2022 for non-financial undertakings (eligibility only, not the alignment). The alignment will have to be reported by non-financial companies as of January 2023 and financial companies as of January 2024. It should be clear that before that date hardly any financial product will be able to assess the likely share of Taxonomy-aligned investments in order to make firm commitments as regards their minimum proportion to clients. This also means that from 2 August 2022 (time of entry into force of the new provisions on sustainability preferences under MiFID II) there will be hardly any product that offer clients a minimum proportion of investments in line with the EU Taxonomy according to Art. 2 (7)(a) of MiFID II Delegated Regulation.

Apart from that, a corresponding obligation to provide the required ESG data via the target market is missing for companies in the real economy. It is therefore to be feared that the relevant ESG data will be lacking for shares and corporate bonds.

In view of the above, we understand that an alignment of the application dates of the different regulations regarding sustainability would be desirable. In particular:

- it would make sense that the implementation date of Delegated Regulation 2021/1253 was aligned with the application date of Delegated Directive 2021/1269 as regards the integration of sustainability factors into the product governance obligations. Given that both, Delegated Regulation 2021/1253 and Delegated Directive 2021/1269, pursue the objective of incorporating sustainability factors, preferences and risks into the MIFID 2 framework we understand that what would make sense is that they apply from the exact same date;

- taking into account that: (i) the definition of sustainability preferences incorporated in MIFID 2 for the purposes of the suitability assessment refers to the Taxonomy and SFDR regulations; and (ii) the regulatory technical standards developing SFDR have been delayed (what also impacts in the Taxonomy framework) we understand that it would make sense to postpone the date of application of Delegated Regulation 2021/1253 and Delegated Directive 2021/1269 until the level 2 of SDFR regulation has been completed. Otherwise, the misalignment of the application timelines of the aforementioned rules will create great legal uncertainty for investment firms and a huge confusion for their clients.

Excessive requirements

Undoubtedly, the new disclosure obligations regarding the sustainability of financial products, introduced by the SFDR, have significantly increased the information that must be provided to investors. Specifically, according to the JC 2021 Final Report on draft RTS regarding the content and presentation of disclosures pursuant to Article 8(4), 9(6) of SFDR, a new standardised precontractual template, focused on the sustainability information of the relevant financial product, will have to be provided to investors in addition to the further pre-contractual information required by the PRIIPs KID and Article 48 of MiFID II Delegated Regulation 2017/565(EU). Of course, this new precontractual document is not relevant for all financial instruments nor all PRIIPs, but only those which are considered financial products by the SFDR (investment funds, portfolio managed on individual basis).

The interaction of the many pieces of legislation implies that retail investors with regard to:

- investment funds having some sustainable aspects will receive the KI(I)D and the specific SFDR template;
- the other financial instruments which are within the PRIIPs scope (e.g. structured products, some bonds and OTC derivatives) having some sustainable aspects will receive the KID which, within the Section 'What is this product?', indicates the objectives, "included where applicable, specific environmental or social objectives targeted by the product". In case of green bonds and social bonds eventually available to retail investors it would be also possible to provide investors with the

green or social framework, which is a specific document focused on the relevant ESG aspects of the bonds and of their issuers;
- portfolio managed on individual basis, which are considered as financial products by the SFDR, when having sustainable aspects will receive the specific SFDR template.

Having said that we consider at least necessary to better coordinate the PRIIPs KID with the SFDR template in order to help retail investors to understand how to combine the different documents. By way of example, one could consider the hypothesis of including in the KID a reference to SFDR template in order to get deeper information on ESG aspects.

Moreover we believe it is necessary to clarify that the new provisions on the electronic format introduced by the Directive 2021/338/EC shall also apply to the provisions of Article 2 of the RTS (still in draft form) regarding the content of Articles 2a(3), 4 (6-7), 8 (3), 9(5), 10 (2) and 11 (4) of the SFDR, which establishes that the information on sustainability risk, the consideration of the main adverse impacts and the characteristics of the products qualified under Articles 8 and 9 must be provided to clients in electronic form (subject to exceptions) and must expressly refer to Article 24(4) of the MiFID II Directive regarding the place where such information should be included, as well as the method used to provide it. This is because the new paragraph 5-bis is also valid for the purposes of the information provided under the preceding paragraph 4 of Article 24.

SFDR periodic reporting frequency of MiFID Portfolio Management services

Another important issue is the frequency of SFDR periodic reporting of MiFID 'individual portfolio management' services. The SFDR level 1 text does not provide direct clarity on this issue. SFDR Art. 11(2)(h) refers to MiFID II Art. 25(6), but here no mention is made of the frequency with which the reports must be provided. There appears to be a regulatory "flaw" in the integration of MiFID II into SFDR. Therefore, banks are currently assuming an annual reporting obligation as opposed to a, as usual on the basis of MiFID II, quarterly or monthly reporting obligation. Based on recital 21 of SFDR we conclude that an annual periodic reporting frequency is intended. In addition, we assume that SFDR Art. 11(2) addresses the method of distribution, not specifically the frequency thereof. If the MiFID frequency were to be followed then, in our opinion, there would be inexplicable and undesirable differences between different financial products. The monthly or quarterly reporting frequency, for example, compares poorly with the frequency of reports on other financial products that fall within the scope of SFDR, for example those products on which banks depend in their individual portfolio management services (think of the annual reporting frequency for UCITS and AIFs which compares poorly with reporting on a monthly or quarterly basis for individual portfolio management services). This while the reports from UCITS and AIFs will also have to serve as input for asset management portfolios consisting wholly or partly of investment funds.

In summary, banks - based on the interpretation of the SFDR and client interests - are currently assuming an annual reporting frequency. We are aware that clarification of the frequency in the text of the SFDR Regulation is beyond the mandate of the NCA's/ESAs. Therefore, we urge ESMA to propose to the Commission an annual reporting frequency for individual portfolio management in scope of SFDR. We propose to have the SFDR periodic reporting requirements distributed annually. This is in line with other financial products in scope of SFDR, like UCITS. To achieve this for investment firms which provide portfolio management, in a periodic report as referred to in Article 25(6) of Directive 2014/65/EU, that article could be changed.

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?

No commments

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.

Not applicable to EBF

II 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.

One group of consumers which are in particular willing to use digital means to access financial services and products are younger consumers.

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.

As a general comment, the EBF wants to underline that it lies in the investment firms own interest to make information accessible to clients. There are already legal requirements that information should be easy to understand, provided in durable format etc. In our view there is no need for more rules in this respect. Focus should be on supervision of the existing regime.

New rules are needed to adapt the provision of information to digital channels, while simplifying and reducing the information to be provided in digital channels in order to safeguard the investor's user experience, without being detrimental to the quality of the information provided to the investor.

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.

General comment

As a general comment, the EBF wants to underline that it lies in the investment firms own interest to make information accessible to clients. There are already legal requirements that information should be easy to understand, provided in durable format etc. In our view there is no need for more rules in this respect. Focus should be on supervision of the existing regime.

To ensure a level playing field there generally not be more requirements nor different requirements for disclosures depending on whether the distribution channel is digital or not. A solution could be more guidance on what one should pay attention when implementing the rules in a digital solution.

Specific comments

We support the following:

- Retrievability of information. But it is already a requirement of Art. 3 Par. 2 lit. c) MiFID Del. Reg
- Obligation to provide the possibility to save information. But it is already a requirement under Art. 3 Par. 1 MiFID II Del. Reg.
- Presentation and format. But it is regulated in Art. 4 Par. 5 PRIIP Reg. In case of any changes, the rules should be harmonized

We do not support the following:

- Easy navigability of information: we should focus on reducing the information load. If we reduce the amount of unnecessary information, there will be no need for navigability
- Versioning: it should be the obligation of every client to save a version. The client can access, store and save the information documents, therefore it should be his responsibility to retrieve these information. Otherwise, banks will be burdened by high storage costs.
- Use of different means: all communication channels should be the same with the banks and clients having the right to alter that basic constellation.
- Monitoring effectiveness: banks provide their clients with information. Therefore, it is in their own interest to keep clients well informed and satisfied. A legal obligation to test the effectiveness would hinder the provision of new information.

We do not believe that this should be integrated into MiFID II Level 1 and 2 provisions. We believe that the issuance of Guidelines or Q&As by ESMA would have the merit to:

- guide intermediaries towards an adequate management of risks and opportunities provided by the use of digital communication channels and

- provide intermediaries with flexibility in the implementation of adequate measures in accordance with their business model and IT systems.

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.

In our view it is important to ensure that MiFID II is technologically neutral and to avoid the creation of new administrative and complex processes for online services since this could have unintended negative consequences for clients and also go against the policy objectives of the Capital Market Union and Digital Action Plan.

- Avoid requirements "number of pages"
- Trading in financial instruments normally takes place online or over the phone. A clarification in the supporting text to Guideline 1 that "in good time" should be interpreted in a proportionate manner taking the type of investment service into account would be welcome.

- Uncertain if the use "pop-up" boxes to provide clients with information is always a workable solution, considering other requirements such as the record keeping obligations.
- Clarification that execution-only services where the client log-on and trade without any personal contact with the firms' staff is provided at a client's own initiative.
- Clarification regarding provision of information via webpage. According to MiFID II, investment firms should keep the information updated. At the same time clients should be able to go back to the information provided. It should be clarified whether this possibility relates to the original information or the updated information.

The MiFID Quick fix introduced digital information as a standard for the provision of information in MiFID II. We welcome this improvement and suggest widening the scope on all applicable information, including PRIIP, Prospectus Reg, SFDR etc.). Clients should receive all information through one specified channel. The provisions should cease to give the client the right to ask for paper-based information. This possibility would still be offered under contractual clauses.

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 adaptions that you would propose.

The EBF agrees that there can be a need to increase competent authorities' supervision of digital disclosures and advertising behind 'pay-walls', semi-closed forums, social media groups, information provided by third parties (i.e., FINfluencers). This is important from a market integrity (MAR) perspective, in particular where retail clients invest in unregulated products and trade though unregulated platforms.

We consider this point of outmost importance in order to ensure a level playing field between investment firms and unregulated entities which can provide any kind of information related to financial instruments.

In this respect, the recent ESMA Statement on Investment Recommendations on Social Media represents a very important step.

III Digital tools and channels

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, data, or other evidence on the size of the market for automated advice.

According to EBF members, the use of robo-advisors has increased during the past years but still represent a relatively small part of the market (number of actors and volume).

The experience gained by investment firms highlights that:

- robot for advisors can support the activity of human resources providing investment advice;
- retail investors are more confident if they interact with the persons who provide investment advice.

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

As a general comment it is important to safeguard the proportionality principle as regards suitability assessment in order for more simple and automated advice to develop further in the market and to become even better at reaching a wider audience of retail investors. In our view, MiFID II leaves ample room for relaxing the existing suitability requirements or take a more risk-based approach instead of 'ticking all the boxes'. An amendment to the law that makes the suitability test more flexible could therefore help.

The legislation is based on physical advice. It should also be able to accommodate the digital advice in a better way.

- As a general concern and for any type of distribution channel, we deem it extremely important to avoid informational overload and excessive safeguards which may deter retail investors from investing and
- hinder the retail clients' access to any distribution channel including new models of robo-advice.

Q19: Do you consider there are barriers for (potential) clients to start investing via semiautomated 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.

The EBF considers that the differences as regards the development of robo-advisors on EU markets has a lot to do with clients digital experience and tax related issues, not regulation.

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?

No comments.

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.

We agree with the picture of potential risks and opportunities to investors set out by this consultation paper. We believe Roboadvice is in our view suitable for simple products which can be offered at low costs. The risks depend on the products offered rather than on the distribution channel.

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

Yes, it is important to safeguard the proportionality principle as regards suitability assessment in order for more simple and automated advice to develop further in the market and to become even better at reaching a wider audience of retail investors. **To ensure a level playing field there generally not be more requirements nor different requirements for disclosures depending on whether the distribution channel is digital or not. A solution could be more guidance on what one should pay attention when implementing the rules in a digital solution.**

In the Guidelines on certain aspects of MiFID II suitability requirements issued by ESMA in 2018, ESMA aimed, inter alia, at considering recent technological developments of the advisory market, i.e. the increasing use of automated or semi-automated systems for the provision of investment advice or portfolio management (so called 'robo-advice).

In this regard, the Authority expressed a fundamental "neutrality principle" which, in our view, deserves to be properly underlined in the context of this response: these guidelines apply to all firms offering the service of investment advice and portfolio management, irrespective of the format used for the provision of these services, i.e the means of interaction with clients.

This is the reason why the only adaptations required by ESMA Guidelines regard the need for:

- emphasising the relevant information (e.g., through the use of design features such as pop-up boxes);
- considering whether some information should be accompanied by interactive text (e.g., through the use of design features such as tooltips) or other means to provide additional details to clients who are seeking further information (e.g., through F.A.Q. section);
- ensuring the consistency of the suitability assessment conducted through automated tools (even if the interaction with clients does not occur through automated systems) through regular monitoring and testing of the algorithms that underpin the suitability of the transactions recommended or undertaken on behalf of clients. When defining such algorithms, firms are required to take into account the nature and characteristics of the products included in their offer to clients. In particular, firms are required at least:
    - ✓ to establish an appropriate system-design documentation that clearly sets out the purpose, scope and design of the algorithms. Decision trees or decision rules should form part of this documentation, where relevant;
    - ✓ to have a documented test strategy that explains the scope of testing of algorithms. This should include test plans, test cases, test results, defect resolution (if relevant), and final test results;
    - ✓ to have in place appropriate policies and procedures for managing any changes to an algorithm, including monitoring and keeping records of any such changes. This includes having security arrangements in place to monitor and prevent unauthorised access to the algorithm;
    - ✓ to review and update algorithms to ensure that they reflect any relevant changes (e.g. market changes and changes in the applicable law) that may affect their effectiveness;
    - ✓ to have in place policies and procedures enabling to detect any error within the algorithm and deal with it appropriately, including, for example, suspending the provision of advice if that error is likely to result in an unsuitable advice and/or a breach of relevant law/regulation;
    - ✓ to have in place adequate resources, including human and technological resources, to monitor and supervise the performance of algorithms through an adequate and timely review of the advice provided;
    - ✓ and to have in place an appropriate internal sign-off process to ensure that the steps above have been followed.

All in all, we deem the existing principles are sufficient.

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.

As a general comment the EBF notes that there is no EU definition of "online brokerage services" and it is difficult to understand exactly which type of service/actors that ESMA refers to in the consultation paper.

As soon as an investment firm accept orders from a client online (rather than in face-to-face meetings or over the phone) and transmits it for execution on a venue, the firm is performing a type of online brokerage services. Similarly, it is very common that investment firms enable for clients to execute transactions in non-complex instruments such as UCITS though self-serving channels without provision of investment advice. Thus, both execution only and brokerage services online are core services which regular investment firms provide under MiFID II.

The MiFID framework contains a lot of protection for inexperienced investors e.g. though disclosures, best execution requirements and appropriateness tests/warnings. In our view no more rules are needed for regulated firms. Instead, targeted amendments should focus on facilitating for clients to understand the information that they receive (see above re. financial literacy and information overload). We do not see the need to introduce appropriateness- and suitability tests for execution only services.

More importantly we think that the regulatory focus should be to ensure an equivalent level of investor protection for clients accessing unregulated online platforms and/or unregulated products such as crypto.

The MiFID II appropriateness and execution-only framework is an important element of investor protection in the case of the provision of services other than investment advice or portfolio management (''non-advised services'', e.g., reception and transmission of orders, execution of orders on behalf of clients, dealing on own account). When providing 'non-advised services', firms are required to ask the client or potential client to provide information regarding his knowledge and experience relevant to the specific type of product or service offered or demanded to enable the firm to assess whether the envisaged investment service or product is appropriate for the client.

While the appropriateness and execution-only framework confirms the regime already applicable under MiFID I, some aspects of the requirements have been further strengthened in MiFID II. In particular, this regards record-keeping obligations related to appropriateness and an improvement of the conditions for the provision of services under the execution-only exemption.

Indeed, the level of investor protection afforded by the suitability assessment is higher compared to the appropriateness assessment and the execution-only exemption, but this is consistent to the different nature of investment services which are covered by the two different assessments: i) the appropriateness assessment applies only to reception and transmission of orders, execution of orders on behalf of clients and dealing on own account; ii) the main aim of gathering the information for the appropriateness test is to gauge the clients' capacity to understand the essential characteristics of the investment service or product offered or requested as well as the risks involved therein. We believe that the appropriateness assessment is fit for the purpose it aims at achieving and offers a considerable degree of protection to the benefit of clients. As far as it regards the execution-only regime we recall that it applies in very limited circumstances properly defined by MiFID II, which inter alia ensure that it cannot be applied to any complex financial instruments.

Regulators have had a strong focus on investor protection for a longer period. This has resulted in a wide range of regulations which to some extent have become very complex and also in some situations resulted in an overload of information to investors. EBF is of the opinion that it is not in the interest of investors to increase the regulation. Therefore, we do not see a need – in general - for a change in the MiFID II rules. Instead, we believe that amendments focusing on making it easier for retail investors to understand the information they are provided would be more beneficial.

In the consultation paper ESMA touches upon some recent cases regarding U.S. shares such as GameStop. In our view, the behavior that was identified with GameStop is a behavior that potentially is covered under the market abuse regulation and therefore should not be dealt with under the MiFID II regulation.

ESG integration in appropriateness test

Recently ESMA consulted the guidelines on appropriateness, and whether or not ESG should be integrated in the knowledge and experience test.

Although we see merit in adding sustainability factors to the appropriateness assessment in the future, we believe it is highly premature now to require firms to assess the client's knowledge and experience with respect to investment products' sustainability factors and risks when execution only services are rendered. The main argument to refrain assessing clients' knowledge and experience on sustainability factors is that sustainability definitions are still evolving in the regulatory ESG-landscape. We suggest that after evaluating SFDR (that at this moment clearly is not applicable on execution only services) pre-contractual and periodic disclosures and MiFID II ESG amendments (i.e., to Product Governance and Suitability) ESMA could investigate amending the appropriateness guidelines. Firms should not confuse clients in the present with testing appropriateness when the relevant knowledge and experience that needs to be assessed is evolving significantly. One of the first consumer tests on periodic- and pre-contractual information in SFDR points out that even well informed, highly (financially) educated clients have problems understanding ESG factors. Many found the SFDR templates for example complicated and hard to read. Another, quite large, portion of the respondents to the consumer test were not interested or simply did not know. As stated above, the ESAs should research how ESG-information is processed by retail investors by means of evaluating SFDR pre-contractual and periodic information about ESG information in advised investment services before turning her attention to non-advised services. Furthermore, as knowledge and experience in non-advised services are only tested with regards to complex financial instruments, most relevant sustainable products (for example UCITS) will fall out of scope of the appropriateness process. Therefore, testing knowledge and experience will proof to be burdensome but not very helpful to steer consumers towards more sustainable investments.

We therefore propose not to require investment firms – at least in the short term - to assess the client's knowledge and experience with respect to investment products' sustainability factors and risks when execution only services are rendered. This can be done at a later stage when there is less (legal) uncertainty around SFDR and the EU Taxonomy.

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.

See comment above regarding the concept of "online brokers".

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.

See comment above regarding the concept of "online brokers".

MiFID II rules regarding complex products apply.

Today there are already rules in the MiFID II regulation regarding complex products which put an extra layer of protection on retail clients, such as no execution-only trading in complex products. We do not see a need for further regulation.

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.

As a general comment the EBF notes that there is no EU definition of "margin trading" and it is difficult to understand exactly which type of service/actors that ESMA refers to in the consultation paper. If the reference relates to clients who use equity as collateral to borrow in order to purchase more securities, we consider that there are already rules to cover this situation. Rather than drafting new rules we think it is important to increase supervision by competent authorities.

Related to the "Gamestop"-Case, we agree with February '21 ESMA-statement, which sees the following issues related to investor protection:

- **Episodes of very high volatility in trading of certain stocks**: Retail investors should be careful when taking investment decisions based exclusively on information from social media and other unregulated online platforms, if they cannot verify the reliability and quality of that information.
- **Price volatility increases investors' risk of loss**: Retail investors face significant risks when investing in stocks characterized by very high price volatility. Volatility could be increased by many factors including when stocks are subject to heavy short selling. Price trends can suddenly come to a halt and reverse, quickly exposing retail clients to heavy losses. Those using trading strategies that involve leverage are exposed to even greater risks as leverage increases investor's exposure to potential losses. Examples are day-trading strategies in which margin trading, i.e. trading with money borrowed from the firm, or derivatives are used. Hence, trading with leverage is complex and should be entered into with a full understanding of the risks.
- **Market abuse risks**: Discussing the opportunity to buy or sell the shares of an issuer does not constitute market abuse. However, organizing or executing coordinated strategies to trade or place orders at certain conditions and times to move a share's price could constitute market manipulation.

We also recall that related regulation of MAR also lays down some points regarding use of social media: given the rise in the use of websites, blogs and social media, it is important to clarify that disseminating false or misleading information via the internet, including through social media sites or unattributable blogs, should be considered, for the purposes of this Regulation, to be equivalent to doing so via more traditional communication channels.

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.

As stated above we do not believe that changes to the MiFID II regulation is needed for the regulated entities.

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.

PFOF is a practice used by some of EBF members.

Evidence based rule making

We ask the Commission to rely on evidence-based rule making. We suggest analyzing and gathering further evidence that support the claim of PFOF being disadvantageous to the client before further considering a ban on PFOF. If deemed necessary by the Commission, it should also respect the proportionality principle and further evaluate other measures to mitigate assumed negative impacts rather than an outright ban of PFOF.

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.

No reponse

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

No comments

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).

As a general comment the EBF notes that there is no EU definition of "zero-commission brokers" and it is therefore difficult to understand which type of services/actor that ESMA refers to in the consultation paper. We do not have experience from PFOF/zero commission as in the case of Robin Hood. However, it should be noted that also "ordinary" investment firms sometimes let new retail clients to trade for free or at a very low commission for marketing purposes. But this is very different from the experience in the Gamestop case.

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.

See Q 31.

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.

No comments

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?

As a general comment the EBF notes that there is no EU definition of "gamification techniques" and it is therefore difficult to understand which type of services/actor that ESMA refers to in the consultation paper.

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.

No comments

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?

Undoubtedly the role played by social media platforms is becoming more and more important in influencing retail investment behaviour. This phenomenon exposes retail investors to the risk that they rely on unverified information or on information not appropriate to their individual situation.

Investment advice plays an important role as a counterweight to social media since it mitigates the risks and influences exerted by social media, which can be misleading in some respects.

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?

We see some merits in the use of social media as a way to attract new categories of investors to capital markets.

While this is a global phenomenon, we believe the EU can aim at creating a level playing field across the EU and set standards at global level useful to properly address this new trend. In this regard it should be stressed that disseminating false or misleading information via the internet, including through social media sites or unattributable blogs, should be considered, for the purposes of this Regulation, to be equivalent to doing so via more traditional communication channels.

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?

No comments

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.

No comments

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.

No comments

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.

No comments

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.

For regulated entities such as banks and investment firms that disseminate investment related information via social media platforms there is no need for more rules or warnings. The applicable regulation e.g. in MiFID and MAR also apply to business conducted through social media. It could be considered whether such disclosure requirements should apply to a wider range of entities/persons/forums etc.

Actually, there may be reason to further analyze which responsibility, if any, that should be placed on unregulated social media platforms e.g. to ensure that investors do not breach market abuse rules when they communicate with each other on the platform. Also increase regulators supervision.

IV 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.

The benefits of an open finance approach in the field of retail investment (and in any other area of financial services) will strongly depend on how an open finance policy is implemented in the EU and whether the initiative is limited to data that is now held by banks instead of all the data that is useful in the financial ecosystem, including data from other sectors. Valuable opportunities for data driven innovation in financial services will come from reusing and combining data, particularly across sectors and different market participants, including the public sector. Combining financial and non-financial data can allow investors and companies to better deliver on changing customer needs, providing the opportunity to personalise their advice and product offering to better cater for the expectation of investors. Access to different types of data from different sectors could, for example, enable investment firms to better calculate the carbon footprint of different investments or understand their clients' cash flows and liabilities. It is important to emphasize that users – consumers and businesses must be at the centre of this must be at the centre of any data sharing frameworks.

With regards to the mention of open banking, this has been introduced with the revised Payment Services Directive (PSD2). However, it should be noted that payment transactions differ significantly from transactions with financial instruments. While payment transactions usually concern payment for a service, transactions with financial instruments involve investment decisions and the generation of returns. Given the much greater regulatory burden associated with transactions with financial instruments, it is not appropriate to transfer the requirements introduced under PSD2 to transactions in financial instruments. Overall, the PSD2 framework should not form the basis of any Open Finance Framework.

In addition, the experience of the 'grey' capital market has shown that without adequate supervision, providers can cause significant damage. There is fierce competition among investment service providers, including with regard to technological innovation, as clearly demonstrated, for example, by the recent emergence of 'neo-brokers'.

Furthermore, we do not see any benefit for the investor if a third party is able to check his securities account. In contrast to payment accounts where the knowledge that there is enough money enables the third party to initiate a credit transfer and constitute an alternative to other payments (i. e. credit card), the knowledge which instruments the client has purchased in the past does not enable the third party to recommend a certain transaction. Such a recommendation can only be given after the current preferences of the client have been explored. We could not find any benefits in ESMA`s introduction to the chapter on open finance and once again would like to stress the importance of taking an open data sharing economy perspective which is not siloed.

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.

First of all, where an open finance policy is not implemented as part of a broader cross-sectoral framework to enable data sharing across different types of firms, this will place existing financial services firms at a disadvantage in terms of access to data, with possible impacts on future competition and European competitiveness, particularly in light of the growing dependence among financial service providers vis-a-vis digital platforms and ecosystems.

Therefore, a correct sequencing of proposals is needed – open finance should not, notably, precede the proposal for a Data Act or the review of PSD2.

Second, there are risks related to security, fraud, and data protection, as also mentioned in the Consultation paper (see para 52) when granting third parties access to securities accounts. In this regard, we want to highlight that ESMA has proposed a recommendation that investment firms inform their clients when communicating via email that they will not ask the clients to provide their personal financial details online. The idea of allowing third parties to ask the client for his details runs counter this approach and could possibly increase fraud and data misuse.

It should also be observed that retail investment service offerings are highly dependent on the actual set-up, reliability, accuracy, and granularity of data processing and tailored to the needs and the complexity of the services offered, the internal organization of the service provider and/or the context of the client relationship. Data sharing could enhance certain vulnerabilities and competitive disadvantages, stemming from differences in risk-based approaches applied by market participants to the identification of clients, to the collection of their consents or to updates of client data. We would therefore recommend focusing on data sharing across sectors, with the consent of users, for the maximum benefit for them and with mutual benefits for businesses. This would give users the opportunity to have an entire view of their arrangements and optimise their financial situation. Other elements to consider for any data sharing framework are the importance of a robust consent management framework, as well as measures for security to prevent from unauthorized data sharing. Including the principle of the fair distribution of value and risks among all participants is also vital, learning from the PSD2 experience.

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)?

It is important to make a distinction between provided and observed data on the one hand, and derived or inferred data on the other hand. Sharing of derived and inferred data would require specifical conditions, agreements and incentives.

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.

We believe in an open data economy approach able to facilitate the development of innovative services in a level playing field for all actors. This requires a horizontal approach rather than proceeding a sector at a time (e.g., by moving from PSD2 to other financial data in isolation). The economic use of data should be inspired by a set of principles that balances trade-offs between innovation, opportunities for consumers and the protection of businesses and stakeholders' rights. There should also be a fair distribution of value and risks among all participants.

Moreover, it's worth highlighting the issue of the confidentiality of information regarding costs and inducements of investment services. These data are provided to individual customers as it is their right to have full disclosure of the costs incurred. It must be considered, however, that such information cannot be openly shared as they constitute intrinsic elements of the business model adopted by each intermediary. Another element to be considered is the centrality of the role played by the advisor in the provision of investment services. While, on one hand, free access to various databases creates the room for increasing the added value of the advice provided to the client by broadening its scope, on the other hand it is necessary to take into account that the value of the advice provided is mainly driven by the role of the consultant who manages the relationship with the customer.

Other potential barriers include the risk of the misuse of client data and fraud, which might also hinder clients to share their securities account data, the lack of secure access and transfer mechanisms for the sharing of data (e.g., APIs), standardization, and in light of the data protection risks, clear consent management frameworks.

Taking all the elements above together, most importantly there should be a benefit for the investor – a clear value proposition. The lack of potential benefits is probably the main barrier for investors to share their data. If the legislator really intends to start an initiative in this aspect, the benefits should be identified and communicated, for example, **through clear use cases.**

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.

Developing an enhanced data portability right that can be applied on a cross-sectoral basis and the establishment of an interoperable digital ID and wallet can play a key role in creating a user-centric data ecosystem. Key elements to consider in the development an enhanced data portability right include secure data sharing mechanisms (e.g. APIs) security and standardization. Enhancing the existing portability right under GDPR would give individuals the practical tools to play a more active role in today's digital economy, particularly if coupled with a wider use of digital identities. Any new rules should not prescribe a particular business model or create new barriers to sharing. Users should always be able to choose whether they share their data via an intermediary, or directly between two firms.

DIGITAL ID

In a digital society, a trusted digital identity is key for citizens to access digital services, as well as for companies to unambiguously identify their customers.

The new Digital ID framework proposed by the Commission is a welcome step, setting a framework that will enable citizens to identify and share personal attributes to access digital services. An effective cross-border framework for trusted and secure digital identity solutions will foster digital businesses across the EU. Particularly in the financial sector it would translate into a quicker onboarding process and a better customer experience while ensuring the same level of security as face-to-face onboarding processes and will in the end contribute to further adoption of digital banking services.

To be successful, a digital identity scheme should be:

- Cross-sectorial, and open to any business. Only a harmonized cross-sectoral approach will provide for the required market penetration.
- Include both public and private sectors to enable sufficient scale of adoption. In order for an eID system to be adopted by users and therefore entities can benefit from its use in on-boarding processes, it is essential that users can also use it in their daily life. Digital Identity schemes issued by Member States should be open and propagated to be used in both public and private sectors.
- Being inclusive. Digital identities are the key to operate in the digital economy, and it must be ensured that anyone could benefit from using them.
- Protects citizens' privacy, giving users full control over his/her identity attributes.
- Built on a common technical architecture avoiding fragmentation and adoption barriers due to diverging standards. This common architecture should build upon existing (and upcoming) national notified e-ID solutions and extend the possibility for their use to the private sector, respecting current solutions and a level playing field.
- Provide for a business model to drive adoption across the private sector. There should be the incentives for its development and to promote its use among the private sector.

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.

Horizontal legislation designed to unlock data sharing across different sectors, such as the Data Act, should be in place and implemented ahead of having an Open Finance proposal. As already commented, a cross-sectoral approach to user data sharing is needed to maximize its potential and avoid introducing asymmetries between different players. We encourage the European Commission to intensively involve a wider range of stakeholders from different sectors in any reflection on the design of an Open Finance Framework, including exploring market led initiatives, that both deliver new opportunities for all stakeholders, but also manages the potential risks of third-party data access related for example to consumer protection and privacy.

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

Any proposal on Open Finance needs to be part of a wider, data sharing ecosystem, and should help financial institutions and other actors to reap the potential business opportunities an open data economy can offer, in a sustainable manner and with a fair distribution of risks and value among all participants, ensuring a level playing field and addressing the current asymmetries in data sharing. A sound user centric cross-sectoral data sharing framework should be designed before any further initiatives for the financial sector are implemented.

For Europe to keep up to speed in the field of financial innovation, clarity and incentives are crucial – both for financial institutions (as banks are already sharing part of their core customer data according to PSD2 rules) and for their customers, with a high level of security and privacy protection.

An Open Finance framework should therefore be considered around four objectives which can only be fully attained in the framework of an open data economy:

1. Strengthening the role of the consumer through user-centric data sharing
2. Enabling Data-driven innovation
3. Enhancing fair competition between market participants
4. Consistency with other data-sharing initiatives

The opportunity to combine data from other sectors with financial data can create new opportunities in the field of retail investment, such as in improving asset allocation.

A lack of information or individual expertise has resulted in individual investor portfolios which are not always balanced with their future needs and actual preferences. Financial information, together with customer interviews, is the basis on which current portfolios have been built, yet this composition does not always offer the best picture. For example, the current composition could be more linked to the last occasion the customer spent time to review the portfolio or recommendations in investment newsletters or media, instead of financial needs of the customer. Current roboadvisors are facing the same issue since they rely on the same kind of financial information.

Other information sources can help to refine portfolio allocation. Data that could be used to improve portfolio allocations includes data from social platforms (particularly on consumer behaviour and risk aversion), search engines (particularly useful for understanding consumer knowledge on available investment products) marketplaces and utilities (for expected consumption), and public data (for future public pension streams).

It must be stressed that access and or transfer data must always be done on behalf of and be authorised by the customer, and in line with the GDPR. The direct potential benefit for the customer is a holistic view of their future financial needs and resources which helps make better asset allocation decisions for the future. It could also have a broader economic impact, helping to channel funds to long term investments, which is one of the objectives of the Capital Markets Union.

The above demonstrates the importance of looking at use cases and, as mentioned above, if there is a value proposition for the customer.

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About EBF

The European Banking Federation is the voice of the European banking sector, bringing together national banking associations from across Europe. The federation is committed to a thriving European economy that is underpinned by a stable, secure, and inclusive financial ecosystem, and to a flourishing society where financing is available to fund the dreams of citizens, businesses and innovators everywhere.

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