

# POSITION PAPER



## **ESBG response to the ESMA consultation on MiFID II investor protection topics linked to digitalisation**

ESBG (European Savings and Retail Banking Group)

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## Questions for consultation

### ONLINE DISCLOSURES

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

Yes, savings banks do layer information in their website already, primarily in the contest of general information, where, among others, risks of product are duly highlighted. Then the granularity of information increases scrolling down into the website. Websites of many institutions offer the option of providing additional levels of information by "unfolding" if there is particular interest. Information is layered also in some cases in the advertising materials available on websites depending on their dimensions.

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

In general, savings banks currently are not providing bespoke content geared at specific target groups of clients.

With regard to marketing information and advertising materials, the contents are usually designed in a general way to a broad audience. However, when designing customer campaigns, it is possible to differentiate by taking into account some specific criteria for potential customers to be addressed mainly online.

#### 3. What type of information would you deem vital to show in the first layer of information to investors with regard to the different instruments you offer?

The question can hardly be answered in general terms, as a distinction must be made between different document types. One key aspect is the type of information (advertising/marketing, mandatory documentation). It is also not possible to give a generalized answer for all product types. Furthermore, it must be taken into account that the assessment of information may well be subjective and/or situation-dependent (e.g. in the case of hedging transactions). Consequently, in case of doubt, a great deal of information would be presented at the first level, which would run counter to the intended concise presentation. Finally, it should be noted that MiFID assumes that the client is provided with all "necessary" information. Consequently, it must not be suggested that by moving to another level, information is of lesser importance and therefore not "required".

A further distinction must be made in marketing communication. If it is merely a banner advert, for example, which concisely draws attention to a product/service, comprehensive further information is simply impossible, but is also not necessary due to the nature of the marketing communication. However, if particular benefits are presented in marketing information, the risks are already weighted equally. In the case of layering, both benefits and risks would have to be presented on the same level in the interests of equivalence of information. Mandatory references in any information, e.g. on costs, as discussed on page



14 of the DP, would be out of place, however. The customer receives these by means of separate cost information provided for by law. There is a risk that customers will no longer take full account of this detailed information if they receive information on costs in advance as part of advertising. Information on costs that can only be of a very general nature (as it is detached from a specific order) and must therefore fall well short of the specific, very concrete and detailed information prescribed by law.

On the other hand, it is appropriate that legally required product information such as the basic information sheet, which the customer receives during the consultation or before placing an order to support a specific investment decision, contains information on costs, for example.

In general, the aim should be to create concise and short information documents that contain all relevant information and at the same time do not deter customers with their length or complexity (in our view, this also includes information embedded as links) so that they are not read in the first place (which is unfortunately often the case with mandatory information).

Embedding information only makes sense for documents that are very extensive per se, such as semiannual/annual reports or longer information brochures in order to shorten the entire document by presenting only the most important aspects on the first level.

Having clarified the above, we can say that in general, website pages and advertising material follow this structure:

- A description of a product/financial instrument/name of the firm
- If necessary, a description of mandatory risk warnings and advantages

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

Although it is difficult to generalize on this question, it is observed that information “above the fold” (i.e. visible at first glance on desktop or mobile) is most frequently viewed. Further analytics differ according to the individual website.

Indeed, in marketing information in which the customer is offered a consultation on a specific product, for example, different information is relevant than in mandatory information that the customer receives as a basis for his investment decision (the topics described in the basic information sheet have proven very useful here).

Special terms and conditions are instead the least interesting for most customers.

#### **5. Which information on costs and charges ‘belongs in the first layer’?**



In general, basic charges on some products for marketing purposes. Contrary to what the Discussion Paper in the box on page 14 suggests, we do not consider information on costs of the advertised product or service in a general marketing communication to be expedient for all products, while information on costs in the context of a specific investment decision is a relevant aspect for many customers. In the latter case, we consider the four items mentioned by ESMA in its Q&A on investor protection (total costs, product costs, service costs and benefits) to be important information. We do not consider it necessary to provide further information on the costs, which are only one aspect among many when making an investment decision, as they "obscure" the view of the important content. For this reason, more detailed information is usually placed in a second layer of information since - according to the legal framework - quite articulated and complex.

This applies both to information that is displayed directly in the website or visible via a link at a downstream level.

**6. Do you provide interactive or other graphic representations of information on financial instruments or investment services to your clients? Do clients perceive them as useful aids?**

Yes, savings banks use interactive and graphic representation which the customers particularly appreciate. The choices made by each institution are of course different: dynamic graph, charts, scales, and tables for instance could be used for representing costs, performance scenario, degree of risks.

**7. Should the vital information need to be the same for all MiFID financial instruments, or can it be different depending on the type of instrument? If so, how?**

Financial instruments comprise very different products for which standardised requirements are of little use.

In general, less stringent requirements should be provided for less complex products. The degree of information could also be connected to the service provided: for instance, less information could be envisaged when no investment advice activity is provided.

Moreover, for financial products where the customer does not pay an initial investment amount (i.e. OTC derivatives for hedging purposes) could be presented in a different way.

**8. Do you already provide visual aids (support) to (potential) clients in order to help them better understand complex financial concepts, for example the use of a glossary? If you do, please mention which and explain.**

Yes, in some cases saving banks provide basic educational information in their website, including glossary, explanatory videos and webinars. These instruments are intended to make it easier for customers to understand basic concept and information contained in brochure, marketing communication, etc. and go well beyond what is strictly required by law.



**9. How do you measure the effectiveness of the online disclosures you provide to clients? Do you identify problems clients encounter with language or structure of your disclosures? What are the most common issues identified?**

Institutions have developed various measures to review the effectiveness of the information provided, with the aim of continuously improve the information quality. Many institutions focus on customer feedback. Queries or even possible misunderstandings that may result from the materials also play an important role. In practice, these are taken as an opportunity to revise the information materials, e.g. by including a supplementary passage on an aspect about which there have been more queries.

Furthermore, advertising activities are measured through common digital marketing metrics. A range of instruments is used to track the performance of the websites, including analytics tools. Ongoing search engine optimization are also performed (keyword research, optimization of meta descriptions, etc.).

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

Positive experience: Structured and cohesive presentation results in credibility, better information and increased conversions. Layering information helps to simplify complex content. Positive also is the possibility to overlink and/refer to other documents (i.e. prospectus) when the customers so wish they can find more detailed and/or additional technical information.

Negative experience: Too many layers may deter customers from going deeper if they deem the user journey too long. Many customers complain about the overload of information. Distributing the large amount of information across different levels via layering will further increase the complexity of the information and have a deterrent effect on many customers.

**MARKETING COMMUNICATIONS**

**11. Do you currently have an overall register of marketing practices used? If you do, are there practices you follow-up on more frequently and if so, how do you decide which practices you follow-up on?**

In some Member states, for instance in Germany, BaFin has issued a minimum recording list, so that institutions are obliged to record marketing communications that were not made verbally. For this reason, the companies have records - but not necessarily a complete list.

Marketing measures are subject to regular monitoring by the compliance function in accordance with MiFID II. Accordingly, firms could have a register as part of the compliance monitoring plan.

In some other cases, evaluation could be performed in case-by-case basis without an overall register for marketing practices.



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

Savings banks have strict internal policies to this regard, based on the segmentation and classification of customers depending on their risks awareness and assessment. Level 1 regulation and ESMA guidelines are fully applied and help firms on design, apply and monitor their internal policies, processes, and procedures.

Where communication only relates to the purchase of a specific product, ESMA has recently issued separate requirements in the amended guidelines on product governance (Guideline no. 59), according to which:

"Considering the nature of the product and the investment service, distributors should refine the distribution strategy as identified by the manufacturer taking into account the characteristics of the distributor's client base. In particular, in making such a refinement, where the distributor considers that a more complex product with a relatively narrow target market can also be distributed under non-advised services, it should identify additional measures to ensure that the distribution strategy is compatible with the product's target market. In such cases, distributors should consider aspects such as:

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

The question implies that marketing communication often refers to specific products (especially in cases ...). However, it should also be taken into account that product-independent marketing that addresses current topics (e.g. infrastructure, renewable energy, ...) or the core specialization of a company (e.g. shares) is often pursued. In these cases, a target market plays no or a completely different role than in the case of specific product advertising.

**13. How do you monitor the effectiveness of your marketing practices? For example, do you use targets such as clicks, views and/or number of complaints or how many new clients are part of the appropriate target market? Or do you test their effectiveness through consumer testing?**

Generally, in the review of product governance, the institution tackles the target market deviations (product purchased by customers outside the target market). In addition, marketing activities are measured through common metrics. A range of instruments are used to track the performance of entities' website, including analytics tools. Ongoing search engine optimization is performed as well



(keyword research, optimization of meta descriptions). However, conclusions about the effectiveness of online disclosures cannot be explicitly deduced with such data.

Moreover, if there is any complaint about the marketed product, the complaint is also an opportunity to review the existing measures and take remedial action if necessary.

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

In general, high-risk products are not advertised in an untargeted manner or are not played out to the wrong target group.

Marketing communications undergo a strict compliance process.

According to the product governance guidelines, institutions are generally obliged to deal with products that are regularly sold outside the target market. This obligation applies regardless of whether they are actively promoted through marketing measures. ESMA guidelines on product governance (Guideline no. 72) state that 'firms should reconsider their distribution strategy for more complex products distributed through non-advised sales, if, for example, the review shows that such products are too often distributed outside the positive target market (or even in the negative target market)'.

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

To the best of our knowledge, advertising measures specifically towards vulnerable customers (or customers with a low affinity for risk) primarily relate to the offer to seek advice on a potentially interesting product. In these cases, the consultation and the subsequent suitability check ensure that only suitable products are recommended to the customer.

In addition, it must be taken into account that advertising is also subject to the obligations to provide clear and non-misleading information, so that marketing practices in general, i.e. not only with regard to vulnerable persons, are effectively monitored by the compliance function. They are part of the annual compliance report and – if deficiencies become apparent – remedial measures are determined on an ad hoc basis and implemented within a specified period of time. Any form of marketing communication is running through the compliance process and its assessment is included in the compliance report. Guidelines provided by NCAs also applied.

Moreover, effective complaints management procedures ensure that banks analyze claims regarding services provided and products targeted to vulnerable persons as well.

**CONTENT MARKETING AND SOCIAL MEDIA**

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



Educational information on the website, glossary, explanatory videos, and webinars. More specifically, consider the following although non-exhaustive list of materials:

- Information on transactions in securities and other investments
- Customised in-house documents that convey basic knowledge
- External co-operation on online courses for complex financial instruments
- Keynote presentations on investment topics
- Glossaries, explanations of publications
- Material on new topics as sustainability investments
- Videos on how structured products work, sometimes also for specific funds
- Information documents on the functioning of structured products, partly also for certain funds
- Product group videos (e.g. on non-complex products) for knowledge transfer
- Stock market encyclopedias
- Reference works

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

Educational material is made financial literacy purposes broadly speaking. Therefore, savings banks do not have material aiming at promoting specific instrument/product or firm(s).

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

Yes, in some cases marketing material is also used in social media and video.

**AFFILIATES AND SOCIAL MEDIA**

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

Yes, and in general to ensure better reach of specific target groups.

It should be considered also that many manufacturers that do not maintain their own sales organization and therefore make use of the infrastructure of sales outlets, which offer their customers advice on these products, among other things. The marketing activities of the distribution centers therefore relate to the provision of advice or the purchase of third-party products. In this respect, these cases can also fall under the aspect of affiliate marketing. In these instances, however, it should be noted that the distributors, as investment service providers, are themselves subject to MiFID in the context of affiliate advertising and therefore also must comply with the extensive requirements on customer information. There are also sales organizations that use regional partners based in regions or countries without their own sales structure to sell their products.





In case affiliates are not subject to MiFID II (or comparable regulations) ESMA recommend additional precautions measures.  
In addition, ESMA guidelines on product governance also contain provisions on the use of fintech entities (Guideline no. 59).

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

Especially in the first constellation (refer to previously question no. 19), manufacturers look for affiliates who provide high-quality consulting services. In many cases, they provide additional information that goes beyond what is required by law, so that customers of the sales outlets concerned receive high-quality advice. Affiliates are approved, following a strict assessment, based on a detailed and strict tendering and onboarding process, followed up by a close monitoring activity of the affiliate (due diligence/business partner review). This process involves in general the participation of dedicated business units, as well as marketing, legal, risk management and compliance functions.

**21. Based on which criteria do you select affiliates?**

Some members use as criteria on which affiliates are selected the affiliation program terms conformity, the compliance conformity, the brand match, as well as price level and scope of service. In addition, please, refer to answer to the above question no. 20.

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

The process is different among members since regulated by contractual agreement with affiliates, which are of course different. These agreements contain provisions on the quality of the services to be provided and the obligations to be fulfilled.  
Regular exchanges take place during the term of the contract to ensure the conformity and compliance with the agreed services.  
More generally, firms apply their structured process and compliance requirements, in a regular basis.

**23. If you remunerate affiliates, how is the remuneration structured? And for what type of action or result do you remunerate the affiliate (e.g., for generating clicks, leads or opening of accounts or a minimum deposit)? And how do you assess this is in the interest of your clients?**

There are ESG members that remunerate affiliates based on conversion events and clicks. These processes are monitored and assessed on a regular basis. Meanwhile, other members remunerate their affiliates independently of advertising measures based on distribution activities carried out.

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



Yes. In line with the structured process, in compliance with legal requirements and law provisions.  
These aspects also are in general contractually regulated in the affiliation agreement.

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

Some members created the content marketing in their own by trained employees in close coordination with the compliance unit. Some others create their content in cooperation with relevant professionals in this area.

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

Some members do not work with influencers in this sector. Some others do and not remunerate them on the basis of an entirely success fee formula. Currently, success fee formula constitutes only a minimum part of the remuneration agreement for entities that work with influencers.

**DIGITAL ENGAGEMENT PRACTICES (INCLUDING GAMIFICATION)**

**27. Do you have a system in place to avoid clients from trading excessively, if so what kind? For example, do you contact or even (automatically) warn users when they trade on a very frequent basis?**

Institutions have different procedures in place. For example, day trading (buying and selling within one day) is permitted in some institutions, in others only in relation to a specific customer group. In some institutions, this is not permitted at all or is permitted to put orders within the clearing accounts coverage. If there are restrictions, customers are regularly informed of this in advance.

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

No. Currently savings banks do not incentivise clients to log-on on a daily basis.

**29. Do you use gamification techniques for client engagement? If so, what type of gamification techniques do you use and for what purpose (training, educational content, subscription process, other - if so, please explain)?**

No. Currently savings banks do not use gamification methods.

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

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



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

## **CHOICE ARCHITECTURE AND NUDGING**

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

Savings banks in general do not use nudges. The topic of nudges is also dealt with in the above-mentioned ESMA Guidelines on Product Governance (Guideline no. 59) so that distributors who use such sales incentives must take special precautions when defining their sales strategy. In some case, a reminder to customers who have shown interest but have not purchased could be sent. If a customer cancels the purchase process, we provide re-entry links.

### **32. Do you review the design of the choice architecture of your interface? If so: How often do you review it? What are the reasons to review it? Who is involved in such review?**

Savings banks continuously strive to optimize the customer journey on their website and involve external agencies in the process as well (SEO, CRO, UX optimizations). Moreover, adjustments are made in close dialogue with the legal department. Since the online interface is the centralised communication with customers, processes and displays are therefore selected very carefully in order to comply with regulatory processes. It is often reviewed on an ad hoc basis and/or revised if necessary. Occasions may include an increase in customer queries due to possible ambiguities, but also new regulatory requirements that make adjustments necessary.

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

There are various possible reasons, including: i) changes in the legal framework; ii) identified deficiencies as part of compliance monitoring process; ii) increased queries from customers regarding certain content.

### **34. Do clients give feedback on the design of the choice architecture? If so, what kind of feedback do you receive and how do you follow up?**

Customers contact the institutions in particular if they do not understand certain broker-age content. These queries are regularly taken as an opportunity to edit the relevant point in the order process in order to avoid these ambiguities in future.



In addition, in the product purchase process (store solution) some institutions put in place a star rating system as well as a text input area for addressing any issues. This feedback is regularly sent to product department.

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

No in the savings banks experience.

**PUSH NOTIFICATIONS**

**36. What kind of push-notifications do you send? - For example, what type of information is included, are the push notification bespoke to the consumer?**

In general, information concerning the status of transactions (purchase/sell). Push notifications are always topic-specific, but do not contain any individual information. These are only displayed after opening the app.

Common examples of push notifications concern:

- approvals such as two-factor authentication
- important documents notification
- digital signature requests
- maturities

**DARK PATTERNS**

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

Savings banks so far have not knowingly encountered dark patterns. They have processes in place to ensure compliance of the website with regulatory requirements as stipulated and monitored at national level.

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

N/A

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

Savings banks so far have not observed any specific problems regarding this issue.

**OPEN QUESTION**

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

This consultation is intended to prepare possible further regulatory measures. Due to the dynamic developments on the technological and digital environment, we point out to the need to have principal-based rules instead of very prescriptive regulation on this matter.



We also recall that layering is advisable for electronic documents. However, many clients prefer to continue to receive information in paper form, where layering will be difficult and/or counterproductive.

In general, layering alone would not lead to the desired reduction in the flood of information (refer to paragraph 30 of the Discussion Paper), but only to a shift. There is also a risk that the principle laid down in MiFID of providing all "necessary" information would be watered down, as the customer would differentiate between the value of the information depending on its findability (level). It is also to be feared that customers will not read the entire document as they cannot see how long it is. This can only be avoided by providing short, concise and clear information.

It should also be considered that - taking into account equal/parallel information channels - the scope of easily perceptible text content and the use of several information levels without impairing user-friendliness is only possible to a limited extent when using apps via the smartphone, for example.



## **About ESBG (European Savings and Retail Banking Group)**

ESBG is an association that represents the locally focused European banking sector, helping savings and retail banks in 20 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 873 banks, which together employ 610,000 people driven to innovate at 41,000 outlets. ESBG members have total assets of €6.38 trillion, provide €3.6 trillion loans to non-banks, and serve 163 million Europeans seeking retail banking services.

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