

Stockholm, 11 March 2024

SSMA's comments to the ESMA's Discussion Paper on MiFID II investor protection topics linked to digitalisation

The Swedish Securities Markets Association (SSMA)¹ welcomes the opportunity to respond to the ESMA's Discussion Paper on MiFID II investor protection topics linked to digitalisation (the DP).

SSMA would like to point out the strong position of Sweden with respect to digitalisation of financial services as well as the importance of having safeguards in place in order to ensure investor protection linked to such digitalisation. However, an unclear scope as well as unclear definitions used in the DP, is making the content of the DP somewhat difficult to analyze, especially as the same definitions (e.g. "marketing") are used in the Retail Investment Strategy proposal which, on the one hand, is not agreed upon and, on the other hand, the content of the DP should not interfere with. Also, the existence of other European legislation, such as MiFID II, the Digital Markets Act and the European Accessibility Act, which to some extent is targeting the same matter, is making the content of the DP difficult to analyze.

SSMA further notes that most of the questions seek input from individual members. To a large extent such information is sensitive to share from a competition law perspective. This means that these questions cannot be discussed within SSMA. Instead, most of our input to the content of the DP is given in the form of general comments. The term "N/A" is used to indicate those questions which we consider must be answered by the members individually.

1. General comments

1.1 Unclear scope and definitions

As mentioned above, the scope of the DP is somewhat ambiguous, which makes it difficult to fully assess the content of and the consequences of the proposals in the DP.

First of all, the term "marketing" used in the DP is not defined. In this context, SSMA e.g. notes that it is not clarified in the DP whether ESMA's intention is to include *all* kind of disclosure or only marketing of products and services and, in such case, which services (e.g. advisory or execution-only).

It is e.g. proposed in the DP that "*[f]irms should not use marketing communications relating to financial instruments with high-risk features and/or the more complex financial instruments that are addressed to, or disseminated in such a way that they are likely to be received by, a broad range of retail clients (for example through mass-marketing).*" Depending on how "marketing" is interpreted in such context, it could lead to unintended consequences, such as limiting the members' ability to provide regular information about its risky and/or complex products through digital channels, which should not be the case.

¹ The SSMA is a trade association representing the interests of investment firms active on the Swedish securities market. The term "members" are hereinafter used when referring to the investment firms represented by SSMA.

It is also somewhat unclear if the content of the DP aims at retail clients only or also professional/eligible clients, especially as the term “*retail*” is used in some contexts but not in others.

Further, the undefined terms, such as “*risky*”, “*certainly risky*”, “*complex*”, “*vulnerable*”, “*human interaction*” and “*finfluencer*”, used in the DP would risk leading to different interpretations and unintended consequences as well as difficulties to assess the content and proposals in the DP.

Thus, SSMA sees a need for *clarifications* from ESMA with respect to the scope of as well as the terms used in the DP in order to fully assess the content and proposals in the DP.

1.2 Other legislation

As touched upon above, it does already exist European legislation with regard to *marketing* in MiFID II, the Digital Markets Act and the European Accessibility Act. Also, it does already exist legislation, e.g. in MiFID II, that the supervisory authorities and ESMA can utilize in order to in different ways prohibit marketing as well as sale of “*harmful*” products (e.g. product ban, product control, suitability assessment). It could therefore be questioned whether further legislation and supervision is necessary and how the different legislations should work together.

2. Specific questions

Online disclosures

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

Layering is widely used among the members. However, as pointed out by ESMA in the DP, it is important that the requirements are technology/system neutral. This means that the requirements must be adjusted to fit *all* devices (e.g. phones, tablets, computers). Thus, the requirements must not depend on which device the client is using but also fit e.g. phones on which the information space is limited.

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

Subject to boundaries set up in applicable legislation (e.g. the Swedish Marketing Act), personalized and targeted content is created based on available client and online data. Both the members and their clients have a need for diverse types of content, depending on the clients’ level of knowledge and interest in investing.

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 members agree that the information proposed by ESMA in the DP should be considered as vital when layering.

It is however noted that, when layering is used on the members’ webpages, “*name of the firm*” might be already obvious information at the webpages. Therefore, SSMA would like ESMA to clarify that such information is only required where the information is not obvious in the context.

Moreover, as regards costs and charges, SSMA assumes that a requirement to include such information is only applicable if there is a legal requirement in current legislation to include such information.

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

N/A

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

Information on costs and charges is particularly suited to be layered in a digital environment. However, as mentioned above, SSMA assumes that a requirement to include such information only applies if there is a corresponding legal requirement in current legislation. Moreover, a distinction must be made between requirements to include such information according to *general marketing rules* and mandatory disclosure requirements in *MiFID II/MiFIR*.

As stated by ESMA in the DP, it is important to focus on the most important and easily understandable information in the first layer. In the context of costs and charges required to be disclosed according to *MiFID II/MiFIR*, the main focus point for the vast majority of clients is the total costs for a relevant transaction or recommendation, and not individual cost components. Therefore, the first layer should only contain the *total* aggregated cost amount and percentage (i.e. aggregating all product costs and service costs into one sum and one percentage).

The second layer could then include information in accordance with the existing structure as outlined by article 50(2) in the MiFID II Delegated Regulation (EU/2017/565), i.e. showing a specification of aggregated service costs and product costs respectively and with a separate itemisation of third party payments.

An optional third layer could then include an itemised breakdown. By structuring the layering in this way, clients would get instant knowledge about the total costs and charges and can easily dig into the more detailed information if they want to.

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?

Graphic illustrations and interactive elements usually create valuable feedback and are consumed actively. Members use these for educational purposes as well as to provide product information.

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?

It is more important to ensure that the information provided to clients is relevant for the type of instrument and client in question than to impose identical rules. The understandability of the information is more important than the comparability between

products, and comparability at the cost of precision and adequate information must not be the result. Trying to define requirements which apply in the same way to all types of products in the name of comparability leads to unintended consequences with the outcome that certain information is not understood and/or that the information does not fit with the nature and characteristics of the product in question. Therefore, the information should not have to be the same for all financial instruments.

Two examples:

1. There is a principal difference between financial instruments used for investment purposes (i.e. products meant to generate a return on investment) and financial instruments used for hedging or risk management purposes. The members should be able to take into account the difference in nature between these two product types when designing online disclosures, simply because 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. This could for example relate to how product information is shown and the data used to provide the information.
 2. Different instrument types carry different cost components. In the context of cost disclosures, and bearing in mind that information should be easy to read and understand, it is then important that the disclosures only focus on the cost components which are actually charged. One example that currently presents a challenge here is the ESMA Q&A 35-43-349, chapter 9, Q&A 20 which requires disclosure of cost components which are zero. In light of the attempt to simplify and make information easier to understand for retail clients, it would be advisable that ESMA revokes this type of Q&As.
- 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.**

Members provide graphs, video material and calculators for educational purposes. Visual aids are also used in the provision of digital and human-assisted investment services to illustrate various things, e.g. long-term benefits of monthly savings.

- 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?**

Language in disclosures has sometimes been perceived as difficult to grasp for retail clients. Language used in disclosures should strive to be as accessible as possible.

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

Layering typically provides a better client experience. Layering information is recommended for mitigating information overload and improving accessibility.

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?

N/A

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

The term “*target market*” in a MiFID II context can only mean the formal target market under the product governance rules and therefore only relate to the target market for financial instruments. There is no requirement to ensure that *marketing* is solely provided to clients for which the financial instrument is intended to be distributed (the marketing and information strategy is one aspect of the distribution strategy). The requirement is to ensure that distribution (i.e. buy/sell) is made to the target market. The members acknowledge that marketing communications can or should have a “*target audience*”. However, in contrast to the defined “*target market*” for a financial instrument, this targeted audience is not defined by MiFID II and it should in any case be possible for the members to view the targeted audience in a different manner than a financial instrument’s target market. Any other view to this would severely restrict members’ ability to do marketing in EU markets and, as a consequence, members would not be able to attract new types of clients.

In regards to defining the “*target audience*”, members can use certain standard exclusions, e.g. underaged clients and clients not residing in the relevant country, and positive inclusions, e.g. clients within a certain age span and known interests. Thereby, marketing communications would not be visible to the excluded audience but to the targeted audience that also have consented to the type of marketing measure in question.

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?

N/A

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

To be able to respond properly to this question, and for any related regulation to serve its purpose, terms such as “*risky*”, “*certainly risky*”, “*complex*” need to be clearly defined.

The members ensure that their marketing is fair, clear and not misleading for all product offerings. For certain marketing practices the audience is pre-selected based on the identified targeted audience, such as events, but for certain channels, such as podcasts, it would be difficult to restrict and review if the audience corresponds with the identified target audience. It should be considered that such marketing measures may serve the

purpose to make the investors better understand the risks, costs and triggers for expected returns to be able to make an informed investment decision. The members would also like to emphasise that relevant reviews (e.g. appropriateness and suitability) are being made before an actual trade can be placed.

The members strongly disagree with the statements that risky and/or complex products should not use marketing communications that are likely to be received by a broad range of clients or that such products should not be marketed through influencers. It should be sufficient to make the assessment if this is an appropriate way to market the product and to be able to ensure that the marketing is fair, clear and not misleading. The members must be able to use their webpages and e.g. podcasts can serve two purposes; marketing as well as educating and informing clients of risks, cost etc. It would be a clear disadvantage to place general marketing restrictions on these types of products and potentially limit the product offerings to retail clients. Being in the marketing audience does not entail a right to trade. Pre-trade checks, such as appropriateness and suitability assessments, need to be conducted and the instruments are subject to regular review under the product governance regime to ensure that they reach the target market and are not sold into the negative target market.

Please also see comment to question no. 12 regarding the use of the term “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.

It is noted that the term “*vulnerable*” is not defined in the DP. The answer to the question as well as the understanding of the implications of the proposals laid down by ESMA in the DP depend on the interpretation of “*vulnerable*”. It is e.g. proposed in the DP that “*[f]irms should adapt their marketing communications directed to vulnerable persons, for example by giving them the ability – throughout the entire process – to stop the digital process and continue it with human interaction.*” Without a definition of “*vulnerable*” (as well as “*human interaction*”), such proposal would risk leading to unintended consequences, including discrimination.

Content Marketing and Social Media

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

N/A

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

N/A

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

N/A

Affiliates and Social Media

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

It is noted that ESMA seems to draw an equal sign between “affiliate” and “influencer” in the DP. There is however a difference between internal and external influencers with respect to *direct* applicable legislation and consequently in applicable supervisory actions available (although the *indirect* applicable legislation is the same). This should be considered when developing any positions and assessing whether further regulatory responses may be needed. In that context, SSMA would like ESMA to clearly define the terms “affiliate” and “influencer” in order for the members to properly assess the content of the DP in this regard.

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

N/A

21. Based on which criteria do you select affiliates?

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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

N/A

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?

N/A

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

N/A

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)?

It is noted that the term “*gamification*” is not defined in the DP. The members would however like to highlight that they see clear benefits of using *some* type of gamification techniques in relation to pure investor education initiatives (educational format only) to increase the engagement in financial learning, hence acting in the investors’ best interest and enabling future informed actual investment decisions.

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

N/A

Choice architecture and nudging

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

N/A

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?

N/A

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

N/A

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?

N/A

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

N/A

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?

N/A

Dark Patterns

37. Which examples of dark patterns have you encountered?

N/A

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?

N/A

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

SSMA would like to point out that digitalisation brings opportunities to provide retail investors with relevant information in a clear and structured manner, which is easily accessible and in a format suitable for the client. The digital environment also serves a great purpose from an educational point of view, with the aim of enhancing investor protection.

However, as mentioned in the introduction, an unclear scope ("*marketing*") as well as unclear definitions (e.g. "*risky*", "*certainly risky*", "*complex*", "*vulnerable*", "*human interaction*" and "*finfluencer*") used in the DP, is making the content of the DP somewhat difficult to analyze, especially as the same definitions (e.g. "*marketing*") are used in the Retail Investment Strategy proposal which, on the one hand, is not agreed upon and, on the other

hand, the content of the DP should not interfere with. Also, the existence of other European legislation, such as MiFID II, the Digital Markets Act and the European Accessibility Act, which to some extent is targeting the same matter, is making the content of the DP difficult to analyze.
