Discussion Paper on MiFID II investor protection topics linked to digitalisation

FINANCE DENMARK

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As the Danish industry association representing banks, mortgage institutions, asset management, securities trading and investment funds in Denmark, Finance Denmark appreciates the opportunity to contribute with a collective response on behalf of our members to select questions as well as to provide some general remarks and concerns in answer to Question 40.

The majority of the answers to the questions are specific to the individual investment firm, and for this reason Finance Denmark are not able to answer these. However, regarding Question 1, it is our assumption that you will see some service providers using layering and somewhat bespoke information.

Generally, when developing rules for communication it is important to leave the rules neutral to the technology and medium. The mobile phone is increasingly becoming the preferred mean of interaction for retail investors, and as a medium the mobile phone requires information to be short and precise. Furthermore, the industry can observe that younger investors increasingly collect information from social media (including different online-forums and short TikTok/YouTube videos), which is a trend which should be addressed.

Online disclosures

Question 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?

In general, the information that should be included in the first layer should be presented in a clear and comprehensive manner for the investors, containing more general information about the product with the purpose of informing and educating investors about the product or service in question. As part of vital information in line with ESMA's discussion paper, this can include costs and charges and risks. However, in the first layer, this should be kept simple and at a general level. It does not seem appropriate for instance to present a detailed reporting on the risks associated with a product or service already in the first layer. As such, it must be possible to assess relatively flexibly on a case-by-case basis exactly how much detailed information is presented in the first layer.

Question 5:

Which information on costs and charges 'belongs in the first layer'?

As stated, it is important that the information in the first layer is relevant and easy to understand for the investor. Cost and charges are particularly relevant to layer, and it is our members' experience that the most important information in that regard for most costumers is the total costs. Therefore, in the first layer, it should be sufficient to provide only the total aggregated cost amount and percentage.

Question 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?

In general, it is important that the rules leave flexibility for the investment firms to use different methods of providing information as different customers may have different preferences, meaning it differs from customer to customer which way of communication that is best received. Furthermore, there should also be flexibility in terms of the purpose for which such representations are used – e.g. for educational purposes or to provide product information.

Question 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?

In our opinion, it should be possible to let vital information differ depending on complexity and risk. It is essential that the information provided to costumers is relevant for the product or service in question and for the intended customer as well.

Question 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 highlighted that gamification and engagement can be in the best interest of the investors particularly when it is used for financial educational purposes to help the investors make informed future investment decisions – but not necessarily related to executing a trade directly. It is our general understanding that the use of gamification techniques must be considered carefully for each type of financial instrument, where investment firms are responsible for assessing if the use of such techniques is appropriate for the product(s) in question. Thus, more caution must be taken from the investment firm and supervisors' side, when gamification techniques are used to e.g. incentivise investors to invest in a certain product or service, while using gamification generally to inform and educate investors should be possible.

Open question

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?
Finance Denmark has some general remarks related to the discussion paper:

- **Risks of creating an unlevel regulatory playing field between the financial sector and other sectors, including influencers, who make use of digitalization:** We agree with ESMA that it is necessary to have a framework to define how different digital techniques are used. However, we do not see this as something necessary specifically for the financial sector alone, and we believe that guidelines for layering, digital marketing and communication, use of influencers, use of social communities on apps, gamification, nudging and dark patterns could be regulated at a general level based on the use of such tools/services – rather than in regulation specific to investment service providers or the financial sector. In the interest of creating a level playing field in the regulatory framework, we would argue for harmonization in the legal requirements across sectors, since digital services are used by other players as well.

While recognizing it is a difficult task to balance ensuring clear and necessary regulation, it is also important not to restrict the investment firms possibility to make communication that (young) investors find relevant, as there otherwise is a risk that (young) investors will collect their information from unregulated information providers, who might neither possess the necessary competences and expertise nor knowledge and market insight, and who might have other motives.

- **Clarity in the terms and scope of the discussion paper**: Finance Denmark finds that the discussion paper and recommendations makes use of many terms without providing a proper definition of what these terms entail exactly. This includes broad terms such as "marketing", "fin-fluencers", "vulnerable persons", "complex and risky products", etc. This leaves room for different interpretations and makes it difficult for the sector to fully judge the precise implications of the recommendations made (and also to answer the other technical questions in the consultation). These terms must be defined clearly when used and implemented in regulation – particularly also since terms such as "marketing" already are defined and regulated in e.g. MiFID II (EU 2014/65) and in the Unfair Commercial Practices Directive (EU 2005/29).

  In that regard, we also want to highlight the interplay between this ESMA discussion paper and the upcoming new marketing rules in the Retail Investment Strategy (RIS). Although evidently RIS is not yet finalised, it does contain new provisions regulating marketing communications and particularly fin-fluencers. In line with the arguments presented above, we support that fin-fluencers are included in the new legislation. But we do wish to highlight the risks of creating a too restrictive regime especially around digital marketing practices, which does not necessarily take into account how the investors actually use such services. A too strict regulatory framework risks hampering both investors and investment firms in keeping up with the digital developments and making use of new technologies in the most beneficial way.

- **Sustainability in marketing and digital services**: Any further marketing regulation which will also fall on financial sector participants must take into consideration sustainability elements of products. Finance Denmark would like to highlight our general position that sustainability of financial products, instruments and services must be regulated through its designated regulation. Furthermore, sustainability is already regulated through general marketing regulation in the Unfair Commercial Practices Directive (EU 2005/29) and will be more specifically regulated in the upcoming Empowering Consumers for the Green Transition Directive. Thus, we would as a general comment like to highlight the potential risk of creating further unclarity in the web of regulation that governs sustainability in the financial sector, if further regulation on marketing also on sustainability is introduced.