

# Responses

to the ESMA Discussion Paper on MiFID II  
investor protection topics linked to  
digitalisation

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The German Structured Securities Association (Bundesverband für strukturierte Wertpapiere – “BSW”) is the industry body which represents the leading issuers of structured securities in Germany. Its work is supported by more than twenty sponsoring members, amongst which are the exchanges in Stuttgart, Frankfurt and gettex as well as direct banks and online brokers.

By establishing industry standards and through active communication with politicians, supervisory authorities and international institutions, the Association aims to improve the political and regulatory framework for structured securities in Germany and Europe.

For more information, please consult [www.derbsw.de](http://www.derbsw.de).

German Lobby Register: R001411

EU Transparency Register: 377055313623-72

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

As far as we know, layering is not yet used by the members of the BSW to provide product information to (potential) customers.

On the one hand, there is concern about an increase in complexity if this type of customer information were to be introduced. On the other hand, the requirements formulated by ESMA in the Discussion Paper should first be analysed in more detail.

For example, paragraph 33 demands that the information in the first layer should already enable the client to make a better investment decision. At the same time, investment firms should be encouraged to use simple and easily understandable language and ESMA points out that the excessive use of technical terms and jargon as well as long sentences do not contribute to the comprehensibility of the information (see paragraph 42).

Depending on the characteristics of individual products, it may be difficult to describe them in the first layer in such a way that an investment decision can be made if technical terms are to be largely avoided.

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

Ensuring that marketing communications only reach the intended target market is, in our view, not without challenges.

On the one hand, we understand that it is not unproblematic for investors to search online for products with certain characteristics and then be referred to the same products again and again. On the other hand, the boundaries between undesirable "funnelling" and useful decision support could be blurred. This is particularly true if a provider only offers structured products and not government bonds, for example.

## **Based on which criteria do you select affiliates?**

In the recommendations following paragraph 82, ESMA clarifies, among other things, that investment firms are and remain responsible for the accuracy of information provided to potential investors on behalf of the firm, including information provided through various distribution channels such as social media and (f)influencers in the context of marketing communications.

In addition, firms should ensure that information provided via affiliates complies with the relevant MiFID II requirements. To this end, they should monitor the activities of affiliates to ensure compliance with these requirements.

Against the background of these far-reaching requirements, a key criterion for the selection of affiliates would be the possibility of concluding robust contracts with them. The investment firm should be granted contractual rights that enable it to monitor an affiliate's compliance with the legal requirements and to take effective action against infringements.

**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?**

Paragraph 110 of the discussion paper describes as an example of positive nudging a practice in which customers are shown appropriate products based on their individual knowledge and experience.

At the same time, new regulatory requirements from the ESMA Appropriateness Guidelines stipulate that further information on customers' knowledge and experience must be provided beyond the current scope, for example through a knowledge test.

It would therefore be necessary to check whether the supervisory authority would require this further information to be used in the context of nudging. This could give rise for a review of the existing choice architecture of such interface.

