14 December 2023
ESMA35-43-3682

Discussion Paper

On MiFID II investor protection topics linked to digitalisation

Practical information

Responding to this paper

The European Securities and Markets Authority (ESMA) welcomes comments on this Discussion Paper on digitalisation and in particular on the specific questions set out in this paper.

All comments can be submitted online following the instructions given on the ESMA website at www.esma.europa.eu under the heading 'Your input - Consultations'.

Please note that responses must reach us by **14 March 2024**. Comments submitted after this deadline, or submitted via other means may not be processed.

Comments are most helpful if they:

1. Respond to the question posed;
2. Indicate the specific question or point to which a comment relates;
3. Are supported by a clear rationale;
4. Provide evidence to support the views expressed or rationale proposed.

It is important to note that although you may not be able to respond to every single question, ESMA would encourage partial responses from stakeholders on those questions that they believe are most relevant to them.

All contributions received will be published following the close of the discussion period unless you request otherwise by ticking the relevant box in the online form. Please note that a request to access a confidential response may be submitted in accordance with ESMA's rules on public access to documents. We may consult you if we would receive such request.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

Who should read this paper?

This paper is primarily of interest to competent authorities, firms that are subject to Directive 2014/65/EU on Markets in Financial Instruments (MiFID II) and their clients. Due to its focus on investor protection issues, this paper is therefore addressed to investor and consumer organisations; to investment firms and credit institutions providing investment services and activities; to UCITS management companies and external Alternative Investment Fund

Managers (AIFMs) when providing investment services; and to any relevant trade association. The paper may also be of interest to firms that provide the digital engagement practices described in this paper.

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1 Executive Summary

Reasons for publication

1. The purpose of the Discussion Paper (DP) is to consult stakeholders and consumers, in an open and transparent manner, on the various examples and views expressed towards the topics listed in this DP. Respondents are encouraged to provide the relevant information to support their arguments or proposals.

2. As part of ESMA's commitment to fostering investor protection, it is specifically seeking input from investor and consumer organisations on the questions of the DP that specifically address matters significant to retail investors.

3. Additionally, ESMA aims to enhance this effort by supplementing the Discussion Paper with a distinct, concise survey tailored for retail investors. This survey aims to directly gather insights, experiences, and feedback from retail investors on the subject of digitalisation within investment services.[1] ESMA believes that the results of the DP and the retail survey will help enriching its understanding of the evolving landscape.

Contents

4. This Discussion Paper covers investor protection topics linked to digitalisation. The first part of the DP presents introductory remarks including further details regarding the reasons for publication as well as background information on recent developments and research published. The DP continues with presenting the various topics including observed practices, relevant literature etc. followed by first ESMA suggestions.

5. The DP topics include online disclosures, more specifically exploring ways in which this information can be improved by making use of techniques available to create more bespoke and interactive information to investors. Furthermore, the DP covers sections on marketing communications and practices used by firms, for instance on social media and through the use of third parties such as affiliates and finfluencers. Finally, the DP explores various digital engagement practices that are or can be used by firms, such as nudging techniques and design of choice architecture, the use of gamification techniques, push notifications and possible dark patterns to be aware of.

Next Steps

6. ESMA will use the feedback to this discussion paper to develop a position on the use of digital engagement practices, such as gamification, as well as on the use of marketing

[1] The survey will be published separately, at a later stage.

practices (including social media and affiliates) by firms, and in particular to assess whether a regulatory response may be needed.

2 Background

7. The European Securities and Markets Authority (ESMA) has been mandated in its founding Regulation to monitor new and existing financial activities. In addition, ESMA is to adopt measures, if any, with a view to promoting the safety and soundness of markets and convergence in regulatory practice.[2]

8. In order to fulfil this mandate, ESMA continuously monitors innovations in the financial market. In monitoring financial innovations ESMA has an interest in ensuring that market participants engaging with such innovations can do so with confidence. In particular, successful innovation can only be achieved and sustained where there is a high level of confidence amongst investors in such innovations.

9. To achieve this, ESMA assesses the benefits and risks of financial innovations. ESMA does so with a view to determine which (if any) regulatory and/or supervisory actions may be needed to mitigate any risks while at the same time striking a balance to harness the benefits.

10. This DP does refer to certain, current, MiFID II regulatory requirements related to marketing communications (fair, clear and not misleading information). However, this paper does not aim to provide a full analysis of MiFID requirements that might be applicable to the topics and examples discussed.

2.1 Introduction

11. One topic that ESMA has been observing is the digitalisation of financial services. The COVID pandemic has accelerated the trend amongst investors to use applications, websites and digital tools when managing their finances. These digital tools can also be used to seek recommendations or advice prior to purchasing or selling financial instruments. However, over the last years many retail investors also turn to social media to seek these recommendations.

12. In July 2021 the European Commission asked ESMA to provide technical advice on certain investor protection aspects, including online disclosures and digital tools and channels.[3] The technical advice was requested from ESMA (and EIOPA[4]) since it would be a key input

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[2] Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority (ESMA).
[3] call_for_advice_to_esma_regarding_certain_aspects_relating_to_retail_investor_protection.pdf (europa.eu)
[4] Call for advice to EIOPA regarding certain aspects relating to retail investor protection (europa.eu)

to the Commission's work to develop a strategy for retail investments and to make appropriate adjustments to the current legislative framework. On 29 April 2022 the advice was published.[5] The aim of this DP is to gather input from stakeholders on the various topics covered, in order to prepare ESMA for the possible mandate of drafting additional guidance but also to support ESMA's convergence work in these areas.

13. On 24 May 2023 the European Commission has published the Retail Investment Strategy (RIS) proposal.[6] The RIS proposal includes the proposal, amongst others, to amend MiFID II on certain aspects, including on topics with regard to digitalisation.[7] The RIS proposes, amongst others, changes related to online disclosures and marketing communications and practices. Such proposed changes contain for example providing definitions of marketing communications and marketing practices which would include advertisements but also include marketing through third parties such as affiliates (finfluencers) and clarify that firms are responsible for (and senior management has to approve) the marketing strategy. This paper focusses on the current state of play under the MiFID II framework, its content aims nor to interfere with neither to anticipate the contents of the RIS.

14. This discussion paper touches upon the main trends in digitalisation that are linked to the Markets in Financial Instruments Directive (Directive 2014/65/EU), or 'MiFID II' investor protection topics. MiFID II aims at being technology neutral (i.e., it does not favour or discriminate against any specific technology). This means that market participants are able to compete on same terms and are free to use the technology they want, as long as they comply with their legal obligations. It is, however, important to look at whether the current legislative framework[8] is still fit for purpose amidst the new technological developments, or whether it needs adjusting. For example, the increased use and reliance on social media and influencers by younger generations of investors. The discussed trends and background information include those observed by ESMA, EU NCAs as well as by supervisory authorities from countries (outside of Europe[9]) and other relevant (international) literature and articles.

15. The paper also looks at the design of digital engagement practices[10] by firms including of the choice architecture[11] and the use of certain techniques, such as gamification. The paper

[5] Final Report on the European Commission mandate on certain aspects relating to retail investor protection
[6] Retail investment strategy (europa.eu)
[7] This text is based on the RIS proposal as known to the public at the date of writing [15 November 2023]
IT is worth mentioning that Digitalisation has been a priority for the European Commission for a while as demonstrated by their Digital Strategy: Policies | Shaping Europe's digital future (europa.eu)
[8] Including delegated acts, technical standards, guidelines and level 3 publications.
[9] For example: Such as Ontario Securities Commission (Digital Engagement Practices in Retail Investing: Gamifcation & Other Behavioural Techniques - Research Report - November 2022 (osc.ca)), US Securities and Exchanges Commission (https://www.sec.gov/news/press-release/2021-167)
[10] Digital engagement practices (DEPs) are defined as the tools including behavioural techniques, differential marketing, gamification, design elements or design features that intentionally or unintentionally engage with retail investors on digital platforms as well as the analytical and technological tools and methods.
[11] The choice architecture, or choice environment, refers to the distribution channel (interface) used by the firm in which it interacts with the client.

aims to also focus on the opportunity digitalisation brings to both investors and firms since digitalisation has made the user experience of the retail investor a lot faster and smoother.

16. Even though the two main topics are online disclosures and the use of digital engagement practices, the paper will not be divided as such into two main chapters. Reason being there can also be some overlap between the two. Instead, the paper will be structured in several subsections including first suggestions proposed by ESMA.

17. These suggestions include first ideas to be possibly included in future work, including possible additional guidance to firms and NCAs, in order to ensure the protection of retail investors. Such future work could consist of supervisory convergence tools such as guidelines and Q&As, where the requirements already exist but clarifications are useful to ensure harmonisation in the way they are applied and supervised especially in the case of new business models. Alternatively, a technical advice to the European Commission to further improve and strengthen legal requirements could be developed. The content of the boxes should therefore not be read as final views nor legal requirements or guidelines. Following the publication of the Discussion Paper and the analysis of the responses received, ESMA will consider the most suitable tool to use in order to achieve the intended results.

18. As well as including observed good and poor practices, the DP contains questions to market participants, including consumers, to gather insights and input on the proposals.

2.2 Recent developments

19. Since ESMA published the technical advice to the European Commission on certain aspects relating to retail investor protection, other publications that touch upon the topic of digitalisation have been issued. ESMA has, for example, worked on the Guidelines on Product Governance which include a link to gamification techniques. Other organisations and national competent authorities have since then published several documents.

20. For instance, IOSCO has published the Report on Retail Distribution and Digitalisation in October 2022.[12] In this report, IOSCO analyses the developments in online marketing and distribution of financial products to retail investors in IOSCO member jurisdictions, both domestically and on a cross-border basis. It presents toolkits of policy and enforcement measures, which include seven and five measures respectively, that would help in addressing the issues and risks associated with online marketing and distribution.

21. The CFA institute has also published an article focussing amongst others on investment gamification techniques used by firms as well as social media on 16 November 2022. In the article, the CFA touches upon several recommendations on how regulators and

[12] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD715.pdf

industry could approach gamification. The recommendations span gamification and behavioural techniques as well as disclosures and conduct.[13]

22. Digitalisation is moreover a priority for EU national competent authorities. For instance, the AMF[14] has conducted consumer testing in order to examine whether the information provided by online financial service providers to retail investors allows the investors to make informed investment decisions.[15] This study highlights both good and bad practices observed in the market.[16]

23. Similarly, the AFM[17] performed a similar exercise in 2020 looking at the online digital journey of investors, by looking at the design of several online investment platforms and how this design potentially can influence investors' decision-making.[18]

24. In June, the AMF organised a Scientific advisory board dedicated to the impact of gamification and social media on retail investors. The AMF supported an experiment conducted by an academic researcher testing the impact of gamification on financial decision-making and investigating the individual determinants of copy trading with a specific focus on the role of influencers.

25. Furthermore, in France a law has been passed and came into effect is centred around transparency of influencer sponsored content or partnerships.[19]

26. Another interesting project worth mentioning is that in the Netherlands several regulators (the AFM, Authority for Consumers and Markets, Dutch Data Protection Authority and the Dutch Media Authority) have come together as the 'digital regulators'. As part of this cooperation, they are currently, amongst others, designing a study with regard to the effectiveness of transparency and information provision by (f)influencers. The aim is to investigate to what extent their followers notice and understand the information that the (f)influencers are obliged to provide and what form this works best (for instance, through the use of hashtags, an explanation in the description, etc.).

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[13] Investment gamification (cfainstitute.org)
[14] Autorité des Marchés Financiers
[15] Summary of consumer "digital journey" tests conducted under MIF2 | AMF (amf-france.org)
[16] Summary of consumer "digital journey" tests conducted under MIF2 | AMF (amf-france.org)
[17] Autoriteit Financiele Markten
[18] https://www.afm.nl/en/sector/actueel/2023/februari/bewustere-inrichting-online-beleggingsplatform
[19] Law n°2023-451 of June 9, 2023 (https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185 – only available in French). The law defines 'influencer' as : « *Les personnes physiques ou morales qui, à titre onéreux, mobilisent leur notoriété auprès de leur audience pour communiquer au public, par voie électronique, des contenus visant à faire la promotion, directement ou indirectement, de biens, de services ou d'une cause quelconque exercent l'activité d'influence commerciale par voie électronique.* » The unofficial translation would be: "Natural or legal persons who, to receive a remuneration, use their reputation among their audience to communicate content to the public by electronic means for the purpose of promoting, directly or indirectly, goods, services or any cause whatsoever, engage in the activity of commercial influence by electronic means."

3 ESMA suggestions and draft proposals

Online disclosures

27. Over the last years, consumers have changed their shopping habits and information sources to online environments. The same holds true for other parts of their life such as taking care of their finances. This has also led to changes in how firms provide information to (prospective) clients (from paper based to digital disclosures)[20].

28. The digitalisation of services has subsequently led to new ways in which firms attract clients, how they communicate with and inform them and how to keep them engaged. Firms have had to adapt and develop new knowledge and skills.

29. These new insights should not only be used for marketing purposes to attract new clients, but should also be used to improve regulatory information in the best interest of the client. Digitalisation brings new opportunities such as being able to provide more bespoke disclosures. Some advantages of digital information include, for example, the flexible structure and application of interactive elements, such as infographics, videos and images.

Layering

30. As underlined in the technical advice, digitalisation brings opportunities to mitigate information overload. It can do so by encouraging firms to use "layering techniques" in order to better manage the amount of information confronting investors. Layering is the concept of dividing information into a network of layers (or 'nodes'), which are very well connected to each other.

31. In case of information overload, the amount of information becomes unmanageable. This leads to people not being able to read or process information (sufficiently) and making it more difficult for them to distinguish between main and side issues. For a large group of people, too much information at once leads to poorer decision-making. Research shows that although people themselves often prefer extensive information, they objectively make better decisions based on simplified information.[21]

32. As the term layering suggests, it involves organising information into different levels. The most important and easily understandable information should be presented in the first layer. This should be followed by more detailed and technical content in subsequent layers

[20] The MiFID II requirements are drafted in a technological neutral manner, as such they remain future proof.
[21] For example: Bernales, Alejandro, Marcela Valenzuela, and Ilknur Zer (2023). "Effects of Information Overload on Financial Markets: How Much Is Too Much?," International Finance Discussion Papers 1372. Washington: Board of Governors of the Federal Reserve System, https://doi.org/10.17016/IFDP.2023.1372
And: '*Disclosure: Why it shouldn't be the default*.' A joint report from the Australian Securities and Investments Commission (ASIC) and the Dutch Authority for the Financial Markets (AFM).

and nodes. This can help to reduce overload and make it easier for retail investors to understand complex financial instruments and services.

33. Layered information can contribute to allowing investors to grasp the key points quickly and then delve deeper if they wish to do so. The aim is always to provide sufficient but concise information in the first layer, on the basis of which investors should be able to make a better financial decision, regardless of the required pre-contractual documentation availability. By linking to more detailed content, the information could become more readable.

34. One of the risks with layering is that too much information is found to be important, and all has to be mentioned in a first layer, thus leading to a concentrated information overload here as well. The starting point needs not to be how one can fill a first layer with information. Instead, the starting point is looking at the information at hand and looking at ways to divide the information in a network of nodes/layers that are well connected, and logical. It is therefore essential to test whether layering works in a specific context.

35. When presenting information in layers, careful design of references between layers is crucial. First of all, references to additional information should be placed at logical and accessible points. Second, the references need to make perfectly clear what information can be found in underlying layers. Links should therefore contain a sound and concise description of this information. And finally, references should be as direct as possible: when clicking on a link, people should not have to look around for information they had expected to find, and it should be made easy to switch back to previous layers. These three interventions help to make sure that the concept of layering is actually accessible to people and is as successful as possible.

36. By providing information in layers, retail investors can be provided with the most important information in a way that will attract their attention and contribute to focussing on the most important aspects. Thanks to such layering techniques, investors can quickly and easily access the information they want, to make better investment decisions. This approach can also help to improve transparency and trust between investors and financial institutions.

37. It is, however, important that layering is not used by firms to hide or disguise information. Considering information will always need to be fair, clear and not misleading. Clients and prospective clients should have easy access to all (layers of) information prior to committing to any subscription or purchase, independently of the channel used by the client accessing the information.

38. The main aim of layering information is not to limit the scope of information provided, but to organise it in order to manage its complexity and to enhance comprehension of the most important aspects. It is therefore key to inform investors where they can find all (essential) information, including the required pre-contractual documentation.

Accessibility and Readability

39. Firms could consider testing their digital disclosures (both in terms of layout and navigation) in order to ensure they are reliable, useful and understandable to the (prospective) clients. The testing should also take into account a diverse group of respondents.[22]

40. Furthermore, accessibility and readability should not be affected depending on the system used by the clients to access the information. For example, whether the client is using a tablet, phone or computer this should not affect the accessibility or readability of the information.[23]

41. Firms could consider making available visual aids to help (prospective) clients better understand technical information. One example could be a firm providing an interactive graph showing the impact of costs on the portfolio performance under different scenarios. When tables and graphs are presented by the firm, their readability has to be guaranteed. Additionally, it is highly encouraged that firms consider making the graphs and tables interactive when provided online and provide extra information explaining them to the investors.

42. Firms are encouraged to use simple and easily understandable language. The use of simplified language does however not solve the fact that financial instruments can still be regarded as complex.[24] Whether explained in simple language or not. That being said, the excessive use of technical terms and jargon as well as long sentences does often not contribute to a better understanding of the text by its readers.

43. Information should at all times be easily retrievable and investors should be able to store this information. PDF or other user-friendly types of formats of the online disclosures should be made available to the investors to download and made available and storable in the client (log-in) area in real-time.

Firms should be allowed to layer the information provided to retail investors. For example, additional layers of information could be provided through hyperlinks, QR codes, or other similar routes. As long as they do not render the communication misleading or obscure important information. Layering should always be used in the best interests of investors.

All information provided to retail investors needs to be fair, clear and not misleading, regardless of the layer in which the information is provided. For example, firms should not be allowed to inform clients of the benefits of an instrument or service in one layer and then use a hyperlink to explain the risks.

[22] This includes but is not limited to users who might have low literacy or a disability or can include elderly clients.
[23] This does not mean that firms have to guarantee their apps work on phones that have not been updated over several years.
[24] Ben-Shahar & CE Schneider, 'More than you wanted to know: The failure of mandated disclosure', University of Pennsylvania Law Review, vol. 159, 2011, pp 647- 749.

"Vital information" (i.e., information that responds to investors' key questions) should always be presented clearly and prominently in the first layer and in marketing communications and advertisements. It should not be presented separately through hyperlinks, QR codes, pop-up windows, or other routes.

Vital information should, at least, include the following information that the investor should not be able to skip:

- the name of the firm and a brief description of the financial instrument or service;
- any mandatory risk warning (if applicable);
- major risks and benefits;
- (aggregated/total) costs and charges.

Links and signposts to different or deeper layers should clearly indicate where they are taking the investor; what information they will be accessing.

The technical design of links and signposts should take into account behavioural aspects. For example, graphical placement, colour and size, number and prominence, and timing or order are all relevant here.

Firms should consider the use of images, tables, graphs, audio, and video to explain the more complex topics to clients. Such media should also be fair and clear and should not be misleading.

Firms should use simple and understandable, language. They should avoid the use of jargon or excessive technical terminology. Firms could consider making summaries of long and technical documents and explaining difficult terminology.

Layering should not diminish the comparability of information with other instruments and services. Nor should it diminish machine readability.

(Layered) information should be easily accessible and downloadable.

Questions[25]

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

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

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?

[25] A complete and numbered list of the questions is also included in the annex

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

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

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?

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?

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.

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?

What is your positive and negative experience with layering information?

Marketing communications and practices

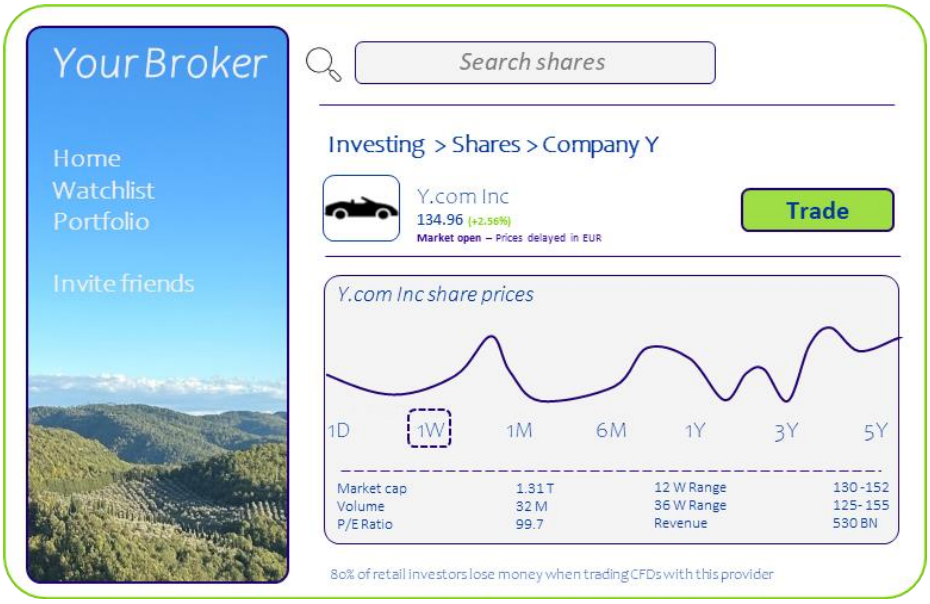
44. When looking at the development of online information, one should also include the marketing of financial instruments or services by firms. Online marketing practices have become more widespread and sophisticated. The have allowed firms to reach and attract a wide audience of (potential) investors. Through the availability of additional digital distribution channels, firms are able to mass market[26] financial instruments and services.

45. In this context, it is important to ensure that (digital) marketing practices and advertisements remain compliant with relevant regulations by ensuring that these messages are fair, clear and not misleading. One of the aspects of clear and fair presentation is comprehensible and clear wording and presentation of the investment firms' offer, including with regard to financial instruments.

46. As an example, firms offering contracts for difference (CFDs), Structured retail products (SRPs) or Exchange traded products (ETPs[27]) may market these products alongside "typical" shares or bonds on the same webpage, listing them in the same tab or webpage, including presenting them as equal or similar alternatives. Shares and CFDs on those shares may be labelled with the same or a similar code in the transaction system. In such situations, it is very likely that the customer will make a mistake and buy the wrong financial instrument. Furthermore, marketing communication may be structured in such a way that does not facilitate distinguishing whether the instrument marketed is a CFD, retail

[26] Mass marketing as used here refers to a marketing strategy that aims to reach the largest possible audience. The goal is to appeal as many people as possible by focusing on a communality rather than focusing on the specific needs and preferences of the investors.
[27] Exchange traded products are types of securities that track underlying securities, an index, or other financial instruments. ETPs trade on exchanges similar to stocks meaning their prices can fluctuate from day-to-day and intraday. However, the prices of ETPs are derived from the underlying investments that they track.

structured product or its underlying, because the advertisement or communication includes only (or mostly) information on shares or commodities that are the distributed product's underlying. In fact, the firm may market products not actually offered by them.[28]



Illustrative example of a webpage where it is not easy to distinguish whether the product the investor will invest in is a share or a CFD

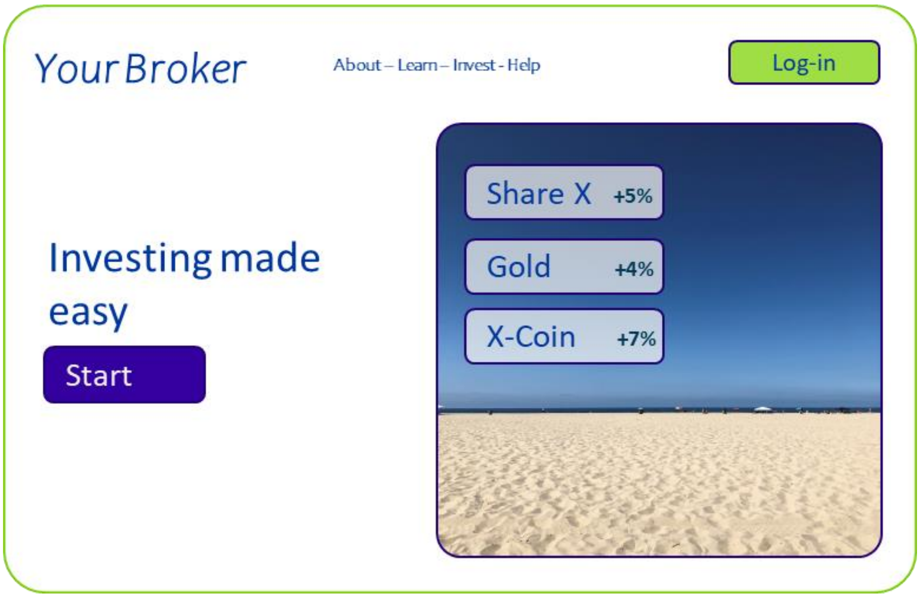
47. It is necessary to balance the information and indicate all the necessary information in a clear manner. When for example a firm in its advertising uses ambiguous language such as “the possibility of choosing investment strategies on shares” or “access to investments on ETFs” whilst not making clear that they are advertising CFDs, then this provision of information is not clear and misleading. In this case, the client is not able to directly see or understand the type of product that is offered. Let alone understand the risks related to such investments. A more extreme scenario is when the content of the message suggests that less complex instruments such as shares are offered when in fact, options or CFDs are sold.

48. In the illustrative example[29] below, the display of both regulated and unregulated products is presented to the (prospective) client on the same page. The sale of such unregulated products by regulated firms may increase likelihood of potential investors confusing un-

[28] An example would be the offering of ‘ETFs DMA’ or ‘Shares DMA’ (direct market access ETFs or Shares). This is not an appropriate label for these instruments, since, depending on the case, they may not have a link to the direct market access feature as referred to in Article 4 (1)(41) MiFID II, considering they are (in many cases) not real shares or ETFs as the label would suggest but instead financial instruments providing synthetic/indirect exposure to the underlying shares or ETFs instead, by tracking their price, such as unleveraged derivatives. Practices like the one mentioned here would need to be assessed on a case-by-case basis, meaning it would need to be assessed whether the instrument presented or advertised corresponds with the instrument provided/sold.

[29] All illustrative examples included in this DP are not based on real-life examples by specific firms, but they are inspired by practices observed in the market.

regulated products with regulated ones.[30] This may lead to mis-selling of such products, especially if the unregulated products and/or services are provided on the same webpage as regulated ones. Information displayed on an investment firm's website related to unregulated activities should be distinguished from regulated activities.



Illustrative example of regulated and unregulated products set out on the same page

49. Another example is when an investment firm is paying an affiliate[31]/finfluencer for advertising. Then the firm's investment services should ensure that the affiliate presents the firms services in a fair and balanced manner. A presentation where the affiliate praises advantages of the firm's services only without giving a fair and prominent indication of any relevant risks is in breach with the requirement that information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument.[32] The affiliate should, in any case, mention in their publication that it is as an advertisement.

[30] The risks to investors of the sale of unregulated products/services by regulated firms are set out in the published statement: ESMA highlights the risks arising from the provision of unregulated products and/or services by investment firms (25 May 2023): https://www.esma.europa.eu/sites/default/files/2023-05/ESMA35-36-2813_Statement_on_investment_firms_providing_unregulated_services.pdf

[31] The term affiliates refers to individuals, companies or organisations that are closely associated with another entity typically through commercial and contractual agreements. Affiliate marketing is a type of online marketing where a firm will reward one or more affiliates for each client brought to the firm through the affiliate's own marketing efforts/campaign. The affiliate is typically paid a commission for each sale or lead that is generated through them. This arrangement often allows firms to expand their reach and promote their instruments or services through an affiliate or a network of affiliates

[32] Article 44(2)b delegated regulation (EU) 2017/565

Illustrative example[33] of finfluencer disclosures. In Example A the disclosure of the fact that this is an advertisement is simple, clear and prominent[34]. In Example B it is vague and included in a general disclosures screen.

The following marketing practices are some examples of not admissible practices:

The practice materially distorts or is likely to materially distort the behaviour of the client with regard to the financial instrument or investment service aimed or addressed to the retail investor. For example, the marketing communication or advertisements creates a sense of urgency for investors to act now.

Vital information regarding the financial instruments or services is omitted by the marketing communication and advertisements.

The marketing communication or advertisement is not clearly identified as such (for example by clearly indicating "advertisement" in the content).

Clients have to be provided with information for the proper understanding of the nature and character of instruments offered. All the important products' features, benefits and risks must be presented in a clear manner.

Instruments should always be noticeably labelled with the categories to which they belong (e.g., CFD on shares, futures, options) and its labelling with the underlying cannot make it unclear that the instrument is a derivative (including CFD).

[33] This example only focusses on whether it is clear to the consumer whether the finfluencer is advertising or not. The example, especially Example A, is deliberately simplified and purely illustrative. It is not intended to demonstrate a practice that aligns with all MiFID requirements regarding fair, clear, and non-misleading information.
[34] Whether or not the entire message, including all information provided, is balanced, clear and not misleading needs also to be assessed on a case-by-case basis. however, this example focusses on the disclosure of the message that this is an advertisement.

Targeted marketing[35]

50. The messages used in the marketing directly by firms is only one aspect. Digitalisation has also brought new types of distribution strategies to the marketing toolkit of firms. This includes paying for the position on search engines, social media advertisements or on other websites or apps. Furthermore, through the use of 'targeted marketing', firms have been able to increase the effectiveness of marketing to the target market with the personalised advertisements. For example, by gathering data on investors through the firm themselves but also by using third parties (and cookies). Thanks to these advanced data gathering abilities firms can create more bespoke advertisements and increase their marketing effectiveness. However, there can be a fine line between gathering data in the best interest of the client (getting the right advertisement to the right target market) and gathering data used to market more intensely and aggressively.

51. For example, when investors search for a particular type of financial instrument or investment service targeting can lead to 'aggressive'[36] practices. There can be a higher chance that they will be overloaded with targeted advertisements they see on search engines and on social media which include references to the financial instruments they had searched before. Misleading and deceptive results may occur when an investor is conducting online research and keeps on being rerouted to a specific instrument, investment service or firm. This could then force (potential) investors from an information funnel into sales funnel[37]. These practices appear to be common regardless of the type of instrument. This should not be made possible for risky instruments that do not have broad target markets.

52. While targeted marketing, especially personalisation[38], can be an effective way to reach the right audience, firms must take necessary measures to ensure that they do not engage in aggressive marketing practices. Especially, as mentioned above, when promoting high-risk financial instruments such as CFDs instead of pushing financial instruments that speak to a broader target market. Firms should promote their instruments and investment services in a responsible and compliant manner by providing fair, clear and not misleading

[35] Targeted marketing is also known as targeted digital marketing. It refers to a marketing strategy that uses various digital channels to reach a specific audience based on their demographics, interests, behaviour, or other relevant criteria. It involves using data-driven approaches to identify and segment (potential) investors based on their online behaviour and characteristics, such as for example the search terms used by the (potential) investors.

[36] The notion of 'aggressive commercial practices' as such are defined in Article 8 of the Unfair Commercial Practices Directive (UCPD), however, for the purpose of this DP we do not use the definition as provided in the UCPD. Instead, when referring to aggressive marketing practices we refer to practices by firm used to push products through for example targeting methods in such a manner that the products are likely to be pushed to investors to whom the products are not suitable and a 'tunnel vision' is created. Meaning that the investor in question is likely to be overflooded with sponsored posts in relation to this type of product.

[37] A funnel is used as a metaphor in digital marketing, to illustrate the journey that online consumers make from being completely unaware a product exists to making their first and subsequent purchase. The first stage is providing information, through marketing. The information funnel is about creating awareness about a product or a service. Once informed, the consumers are lured to a website in order to get into the sales funnel. The aim of the sales funnel is for the consumer to become a customer, hence making a sale. The metaphor of a funnel is used because some consumers will leave (and get filtered out, they lose interest and will not make a purchase) whilst others go down the funnel, as if they were being sucked in, and will become clients making a or multiple purchases.

[38] Personalisation is a form of online marketing which uses data points to collect personal information about the (potential) investor or client in order to increase the relevance of the advertisement or service provided

information in a balanced manner, targeting the right audience in accordance with the determined target market[39], and monitoring their marketing practices.

53. A general good practice would be for a firm to monitor the resources used to the support of its current clients compared to the resources used to recruit new clients.

Firms should have proper internal rules, policies, processes and tools for their online marketing and distribution, and review them on a regular basis.

Including on the use of specific marketing practices such as targeting, and distribution channels selected by the firms for their marketing.

Firms 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).[40]

Additionally, firms 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.

Questions

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?

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

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?

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

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

Content marketing including social media

[39] In accordance with Articles 9(3). 16(3), 16(6), 24(1) and 24(2) of MiFID II; Articles 9 and 10 of the MiFID II Delegated Directive and Guidelines on MiFID II product governance requirements
[40] In accordance with Articles 9(3). 16(3), 16(6), 24(1) and 24(2) of MiFID II; Articles 9 and 10 of the MiFID II Delegated Directive and Guidelines on MiFID II product governance requirements

54. As mentioned, digitalisation opened up new ways to market and promote services and instruments. Content marketing is the reference to the general marketing strategy used to attract, engage and retain (potential) clients by creating and sharing videos, podcasts, social media posts, blogs, other types of relevant articles and other media. The aim of content marketing is often to create content to drive brand or product awareness; to generate demand. Social media is often regarded as an integral part of content marketing.

55. As discussed by Baltes (2015), digitalisation affected the way firms market themselves and requires the use and existence of content marketing. Therefore, it is vital for the content marketing not only to be of high quality but also to adapt its content and to choose the proper way of promoting it. Content marketing has become a very important marketing tool and it indeed may help investors with understanding of issues related to investing as well as to get deeper into the firms' offer.

56. Content marketing in relation to financial services includes investor or analysts blogs and news articles, training videos such as webinars on different instruments and services, market events or trading strategies, infographics, social media posts and newsletters (for example on the most traded instruments or recent market opportunities). The content published may help firms to achieve high positioning in search engines, to be frequently cited on other webpages or to regularly remind the investor of firm's services.

57. Sometimes content marketing is not published as marketing. Instead, it could concern financial education material because it includes informative videos explaining a financial instrument to the investor, for example. But the distinction is not always so easily made between what is marketing and what is purely educational. Even when publishing factual information, this may include some kind of promotion (content marketing), since the investor may get the instrument only through the broker that is responsible for the publication of content. Or the investor might be nudged towards making certain trades as result of watching the educational material. Another example is a webinar that may nudge, attract or stimulate the investor to start investing in the particular investment firm, including if it is carried out by the firm's affiliate or a finfluencer. When such nudging of the investors into making trades at a specific firm is present, the firm in question should clearly identify the material as marketing material.

58. Part of the "educational" content marketing are webinars or trainings provided by investment firms or other persons. It is vital to distinguish webinars provided by traders or non-professionals that are not associated with a particular investment firm but work on their own account only, from webinars provided by persons employed or otherwise linked to the regulated entities (for example, they are an affiliate). In the first case, this content is neither covered by regulations nor supervised by investment firms and the revenue model is based mostly on obtaining profit from the number of participants. But in some cases, these webinars may include investment advice or include offering or selling of financial instruments. Speakers may then forward the webinar participants to firms (including unregulated ones) they have an arrangement with. In any event, investors should be aware

that such content needs to be treated with caution and should be followed by more detailed personal research, including regarding the status of the entity.

When firms create and publish educational material that includes (content) marketing and/or may nudge, attract or stimulate the investor to invest in a certain financial instrument and/or become a client of the specific firm, then the material should also be labelled as marketing material.

Questions

What kind of educational material do you produce and publish?

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

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

The use of affiliates

59. As part of the marketing strategy, firms may use different types of distribution channels. This includes using social media as well as using third parties (such as affiliates[41]) to market their instruments and services. Generally speaking, the firm is likely to have an agreement in place to pay commission to a person (natural or legal) which is based on business that is generated from referrals.[42]

60. Affiliate marketing comes in different types of business models (for example pay-per-click, pay-per-product-lead, pay-per-sale) and may be offered by different types of actors (influencers, affiliate marketers and even affiliate networks[43] that may act as intermediaries between firms and affiliates).

61. Examples of affiliate marketing strategies used by firms do not only include influencers promoting financial instruments, but can also include affiliate agreements between firms and comparison websites[44] or social media platforms[45].

[41] The term affiliates refers to individuals, companies or organisations that are closely associated with another entity typically through commercial and contractual agreements. Affiliate marketing is a type of online marketing where a firm will reward one or more affiliates for each client brought to the firm through the affiliate's own marketing efforts/campaign. The affiliate is typically paid a commission for each sale or lead that is generated through them. This arrangement often allows firms to expand their reach and promote their instruments or services through an affiliate or a network of affiliates.
[42] Whether this compensation is an unauthorised inducement would need to be assessed on a case-by-case basis.
[43] Affiliate networks provide a pool bloggers, influencers and social media content creators to refer potential customers to the firm. Instead of firms having an agreement in place with an individual affiliate, here the firm will have an agreement with the platform (the affiliate network).
[44] There are many comparison websites to be found that compare brokers based on different criteria. These websites can include for example affiliate links to firm mentioned, in other cases firms sometimes pay the comparison website to appear higher on lists than competitors. In this last case the comparison website is not an independent one.
[45] See for example the past cooperation between eToro and X (formerly Twitter): eToro partners with Twitter $Cashtags to further financial education - eToro. The cooperation between eToro and X was for 3months only and has ended at the time of publishing this paper.

62. Comparison websites are often regarded by consumers (in general) as a useful tool. Comparison websites for financial services in particular aim at comparing brokers based on different criteria such as residence of the investor, instruments and services offered and costs etc. However, such websites may operate thanks to the remuneration of the entities listed there. Therefore, comparison websites may provide clients with their affiliate links when redirecting to the firm's webpage (and get money for every registered client from the firm) as well firms may pay for being listed more visibly.

63. The same applies to the paid promotion practice, which includes websites or blogs that publish articles on finance since some of the content posted may be either sponsored or prepared by the investment firm. In case these articles or comparisons are not properly labelled as sponsored or somehow linked to the firm, it creates an unfair image of the investment firm's position on the market.

64. Considering that firms select the affiliates and reach agreements with them, it is only logical that the firms are and remain responsible for how the selected affiliates communicate about the firm and the financial services. Firms should therefore monitor the marketing communications and practices of the affiliates they have partnered with in order to ensure compliance with the applicable requirements.

65. It is important to note that in some jurisdictions there might already be requirements related to affiliates. For example:

66. In Portugal firms may be required to notify the affiliates as tied agents. In Portugal the use of affiliates or similar entities is restricted. Since the Portuguese securities code establishes that advertising and prospecting with a view to executing financial intermediation contracts or collecting information on current or potential clients may only be carried out by: a) A financial intermediary authorised to carry out the activities at stake; or b) A tied agent. So, in Portugal, affiliates must be a tied agent or, in alternative, a mere channel for the spread of advertising contents (in which case the contents spread by them are the firm's responsibility and need to be clearly identifiable as advertising).[46]

67. According to the Spanish Securities Market Act, the marketing of investment services and client recruitment may only be carried out professionally by investment firms or through tied agents. The CNMV clarified this requirement in an Public Statement on certain bad practices in cross-border marketing of investment services by firms located in other EU countries dated 24 November 2020[47], in which it was stated that: "It is considered that engaging in these types of remunerated activities for the marketing of investment services and client acquisition for investment firms via an affiliate or similar programme, only

[46] The CMVM has issued warnings to firms regarding advertising contents (including in social networks or online channels):
15/06/2022 - CMVM - The CMVM warns on dissemination of contents concerning investment services by financial intermediaries on social networks or online channels
14/02/2023 - CMVM - CMVM warns about advertisements stating "Invest in CTT" or similar message, encouraging investors in Portugal to invest in complex investment products
[47] bvxczb (cnmv.es)

complies with prevailing legislation when such activities are carried out by firms authorised to provide investment services or by their tied agents. Accordingly, except for this case, the use of affiliate programmes for client acquisition in Spain by investment firms is considered unacceptable, given that it implies allowing or promoting unauthorised third parties to professionally engage in the marketing of investment services and client acquisition."

68. In France a law dedicated to influencers that includes specific requirements in relation to financial influencers came into force. In summary, the law states that influencers are not allowed to promote highly complex/risky products (as defined in article L.533-12-7 of the French Financial and Monetary Code) as well as digital assets and provision of services on digital assets (unless the issuer/provider is duly registered by the AMF). For authorised marketing communications, as mentioned previously the influencer shall indicate in a visible way "advertisement" or "commercial collaboration" throughout the video / on all the photos used.[48]

69. In Poland, soliciting clients or potential clients for investment services, including presenting information about the scope of brokerage services provided by an investment firm or the financial instruments involved may be performed only by the investment firm itself or by an agent of that investment firm, unless it is targeted to a broad group of clients or potential clients of the investment firm or to an unspecified group of addressees. In the latter case, the marketing may be performed also by other entities.[49]

70. In Italy, the online promotion of financial instruments and services (intended as an offering or invitation to enter into an agreement for the provision of investment services and the purchase of financial instruments) can only be conducted by authorised entities, pursuant to Article 32 of Legislative Decree 58/1998 (Italian Consolidated Law on Finance) and Consob's Regulation 20307/2018 (Intermediaries Regulation)[50]. Therefore, in the current Italian legal framework, natural or legal persons defined as "affiliates" for the purposes of this paper cannot promote the services/products of investment firms/banks on whose behalf they act. They would only be allowed to present the name of the firm/bank and their qualities, in a generic way. In this context, there are some elements that can help identify whether the scope of activities allowed for this type of affiliates may have been exceeded (e.g., where their remuneration is based on the results of the activity conducted, for example in terms of the number of transactions closed with the firm/bank resulting from the interaction with the affiliate)[51].

[48] Please refer to the Law: LOI n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux (1) - Légifrance (legifrance.gouv.fr)

[49] https://www.knf.gov.pl/knf/en/komponenty/img/Position%20of%20the%20UKNF%20on%20referral%20programmes%20and%20affiliate%20programmes_84448.pdf

[50] In particular, it is required that the entity is authorised to the provision of the investment services of placing of financial instruments with or without a firm commitment or underwriting.

[51] This type of affiliates are commonly known as "segnalatori di pregi " and the limitations to the activities that they can conduct are set out through soft law measures (in particular, Consob's Communication DIN/2049119 del 15-7-2002).

Finfluencers

71. More and more investors turn to social media, blogs, podcasts and online trainings to gather information on financial instruments and services. Finfluencers cater to those who wish to gain stock tips and investment advice. (F)Influencers do, however, contribute to making investing more accessible to new (younger) investors.

72. The Australian Securities and Investments Commission (ASIC) conducted a survey in 2021 that confirmed that almost 64% of young Australians (between the age of 15 and 21) had reported having changed at least one of their financial behaviours as a result of the opinion or advice provided by a finfluencer.

73. The Polish Association of Individual Investors (SII) in its research on use of digital sources of information among investors estimated that almost every one of the respondents used Internet website when looking for information on investing. The respondents found it to be the most relevant source of information, but use of streaming services (such as YouTube and podcasts for example) was also reported as highly preferred.[52]

74. Customers search for information online, including short videos, as they need fast, packaged and synthesised information 'on demand'. As an example, the study of Stålnacke (2019) shows that Swedish investors use filtered financial information (e.g., information packaged by a professional intermediary) more often than unfiltered financial information (e.g., information from annual reports and financial statements). The investors who use filtered financial information, according to the research, tend to take larger risk in their stock portfolios.[53]

75. The study by Ammann and Schaub (2021)[54] found that it were primarily unsophisticated individuals who relied on investment-related internet postings when making investment decisions.[55] The study found experimental evidence confirming that postings affect individuals' decision making and that the effect of these postings is stronger among the less financially literate. Social media provide a platform where investors can find, amongst many other things, investment related opinions. But it also provides users with opportunities to seek validation and have influence over others. This has led to increasing trends of social media influencers advertising financial instruments. In turn firms are using these influencers as part of their marketing strategy considering posts by influencers can often reach a big audience.

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[52] https://www.sii.org.pl/15945/aktualnosci/badania-i-rankingi/oto-najpopularniejsze-zrodla-informacji-dla-inwestorow-obi-2022.html

[53] Stålnacke O. (2019). Individual investors' information use, subjective expectations, and portfolio risk and return, *The European Journal of Finance*, *25*(15), 1351-1376

[54] Ammann, M., & Schaub, N. (2021). Do individual investors trade on investment-related internet postings?. *Management science, 67*(9), 5679-5702

[55] However, the study shows that by relying on online postings, this did not help these unsophisticated investors in identifying better investment strategies.

76. Social media, blogs and forums are making it increasingly difficult for individuals to filter information. Both the individuals involved and the false information they are spreading can hinder price discovery (Jia et al., 2020)[56]. The Pedersen (2022)[57] study highlights the difficulties for retail investors to identify and distinguish fake news from rational (reliable) information on social media. The filtering of information is increasingly important for individuals, as rumours and fake news are often spreading faster than verified information.

77. In addition, Pedersen (2022) described there are two (simplified) categories of influencers, those spreading verified (reliable) information and other ones diffusing unverified information. For instance, some influencers may have direct relationships with firms. These firms could help draft or approve the messages being spread. This influencer is compensated for promoting the firm to their network. And even though they are often not financial experts, they do aim to persuade their followers into making financial decisions. In this case, responsibility of the posts lies with the firms involved.

78. The other group of influencers promotes financial instruments, investment services on their own initiative. The finfluencers in this group might present themselves as having financial expertise (finfluencers) and share their recommendations and opinions with regard to specific firms and financial instruments. Though they are not cooperating with the firms they could recommend. These finfluencers are, for the purpose of this DP, left out of scope. However, that does not mean these influencers are not bound by any rules.[58]

79. What both groups of influencers do have in common in the examples provided above, is that they are recommending a certain financial instrument, services and/or firm and that their audience often looks up to them and trusts their recommendations.

80. It is important to enhance the transparency on the use of (f)influencers by firms, considering this can help investors better distinguish advertisements or product placements[59] (for which the influencers are paid) from pure gossip or independent reviews of the financial instruments by the influencers.[60] It is also necessary for the firms to ensure that influencers always clearly communicate to the clients their relationship with the particular investment firm, including, when publishing paid content or forwarding the client to the firm, always disclose this information as it is particularly relevant for the client's decision process. Firms

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[56] Jia, W., Redigolo, G., Shu, S., & Zhao, J. (2020). Can social media distort price discovery? Evidence from merger rumors. *Journal of Accounting and Economics*, *70*(1), 101334.
[57] Pedersen, L. H. (2022). Game on: Social networks and markets. *Journal of Financial Economics*, *146*(3), 1097-1119.
[58] See for example: ESMA addresses investment recommendations made on social media platforms (europa.eu), which explains what the consequences of possible breaches of MAR can be
[59] Product placement is a form of content marketing/advertising that involves a specific product in a scene (for example in a video or story). Unlike advertisements, where it is clear to the viewer that whatever they are watching is centred around a particular product, product placements are less clear. The viewer will be watching a story for the story and not for the advertised product. One obvious example of a product placement is James Bond drinking a Heineken in the film Skyfall (2012) instead of his usual martini drink. On social media an example would be an influencer making a video about their day in which they use a specific trading app for their finances, or go to a certain restaurant for lunch (for which the app provider and restaurant would pay in this example).
[60] 60 Finfluencers are already obliged to disclose whether or not they are being paid for a collaboration, for example, the Unfair Commercial Practices Directive already requires this disclosure in accordance with Annex I.

shall also ensure that there is no conflict of interest in the remuneration scheme of the influencer.

81. Considering the part affiliates can play in the marketing strategy of firms, management of the firm should assume responsibility for the selection of the marketing affiliates, including finfluencers. In addition, the firms should assume responsibility for the compliance of the information provided by the affiliates on behalf of the firm. Meaning that the information provided should be fair, clear and not misleading.

82. Firms should carefully assess whether their financial instruments can be marketed/advertised through influencers, as this may not be an appropriate way to market certain products or services. Therefore, for example, certainly risky and/or complex financial instruments should not be marketed through finfluencers since the followers of the influencers might not all fall within the instrument's target market.

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.

Firms should ensure that the information provided through affiliates is compliant with MiFID II requirements. Firms should therefore monitor activities by affiliates to ensure such compliance.

Firms should have clear policies and procedures in place for working with affiliates, such as (f)influencers, proper disclosure of their affiliations and possible conflict of interest in terms of e.g., remuneration. Firms should keep clear records of the contracts they have with affiliates.

This includes policies and procedures in place for selecting and vetting influencers, as well as internal processes in place for reviewing and approving their content.

Whenever someone, such as a finfluencer, is remunerated to disseminate any type of marketing/advertising (or training) on behalf of the firm, this should be prominently stated in addition to being compliant with MiFID II requirements.

Questions

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

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

Based on which criteria do you select affiliates?

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

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?

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

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

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

Digital engagement practices

83. For the purpose of this DP, digital engagement practices (DEPs) are defined as the tools including behavioural techniques, differential marketing, gamification, design elements or design features that intentionally or unintentionally engage with retail investors on digital platforms as well as the analytical and technological tools and methods.[61]

84. Many different types of companies and firms use a wide range of DEPs in order to increase user engagement. They can choose to do so for a variety of reasons, for example to attract consumers and to keep them engaged, to increase revenue and profitability. This also holds true for firms offering investment services that use DEPs. And when such DEPS are applied, they are not necessarily used to improve long-term outcomes for the investors. Meaning that the use of these techniques could negatively impact investor outcomes. In fact, digital engagement practices but also dark patterns, (described and discussed below) may aim at benefiting firms from customers' cognitive biases.

85. DEPs can be a very successful tool to attract new clients but also to retain current clients by keeping them engaged. According to the CFA biennial Investor Trust Study, 92% of respondents investors aged 25–34 expressed their trust towards digital nudges (at the same time only 33% of investors over 65 years expressed the same view). However, around 75% of the investors aged 25–34 also reported that the use of apps increased their frequency of trading.[62]

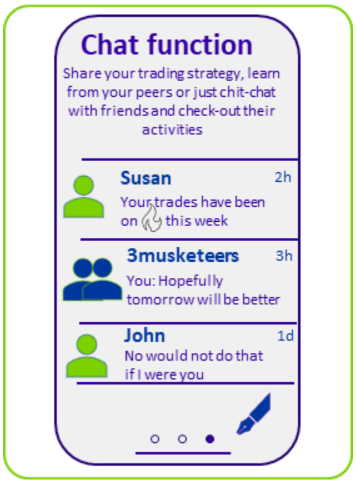
86. A similar conclusion was reached by the Behavioural Insights Team (BIT) in collaboration with the Ontario Securities Commission in their Research Report.[63] In their assessment of

[61] This definition is consistent with the definition as used by the U.S. Securities and Exchange Commission.
[62] https://www.cfainstitute.org/-/media/documents/article/Enhancing-Investors-Trust-Report_2022_Online.pdf
[63] https://www.osc.ca/sites/default/files/2022-11/inv_research_20221117_gamification-of-retail-investing_EN.pdf

the impact of two techniques; giving investors points as a form of reward and showing investors in a leader board 'top traded list'. The participants who were rewarded the points made almost 40% more trades than investors who were not rewarded points. And the participants who saw the top traded lists were 14% more likely to buy and sell those listed stocks.

Social features of investment apps

87. Another form of DEPs that can be used by firms is the addition of social features. Such design elements can enable clients to interact with other clients by sharing content, reacting on content or actions by other users, using hashtags (to easily find topics of your interest or fellow investors with similar interests) or directly engaging with other users through direct messaging.



Illustrative example of what a social feature may look like

88. Studies indicate that this type of social features, as also found on social media, contributes to the addictive nature of apps using these techniques.[64] Having social interactivity increases user engagement in applications. When it comes to financial services, this impact may be problematic considering that investors who are likely to log in more, often trade more which in turn means a worse performance.[65]

89. It is also important to note that investors may seek for investment tips or answers to their problems from other investors which may not be educated professionals or which in some cases may try to exploit them by marketing themselves (e.g., their educational material,

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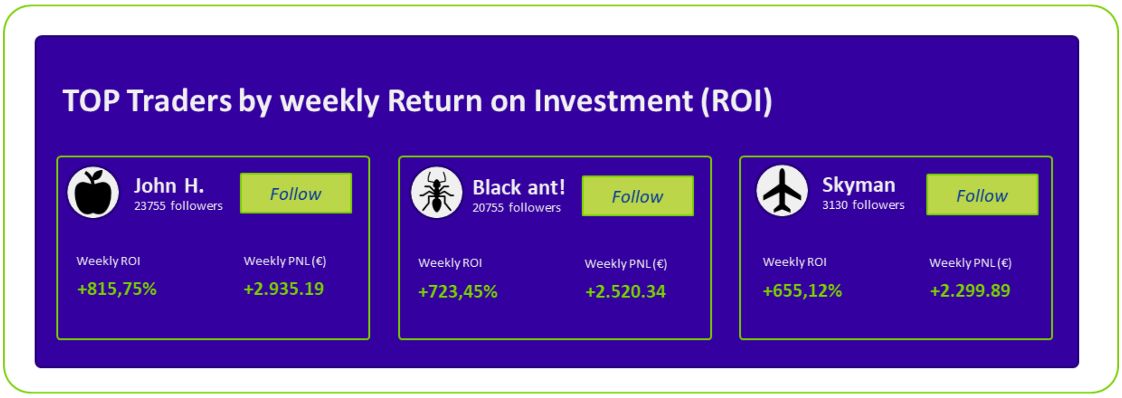
[64] C. Montag, A. Markowetz., K. Blaszkiewicz, I. Andone, B. Lachmann, R. Sariyska, ... & S. Markett, (2017). *Facebook* usage on smartphones and gray matter volume of the nucleus accumbens. Behavioural brain research, 329, 221-228
[65] Barber, B.M. and Odean, T. (2000), Trading Is Hazardous to Your Wealth: The Common Stock Investment Performance of Individual Investors. The Journal of Finance, 55: 773-806.

investment ‘tips’ or shared copy trading portfolios). In some cases, it may lead to unregulated investment advice which *de facto* takes place within the investment firm’s systems. Therefore, a problem of the responsibility of investment firm and their clients for the unauthorised investment advice arises.

90. Trend of ‘socialisation’ of investing also resulted in rise in popularity of so-called *social* or *copy* trading which includes providing investors with a tool to execute the same trades or invest in the same sets of financial instruments as other investors that shared their portfolios.[66]



Illustrative example of “Copy trading” leader boards that can entice retail investors

Gamification[67]

91. Gamification techniques in client interfaces are used for various reasons by firms. There are used for example as part of investor education initiatives, to attract a younger audience, to increase engagement or to improve investor retention.

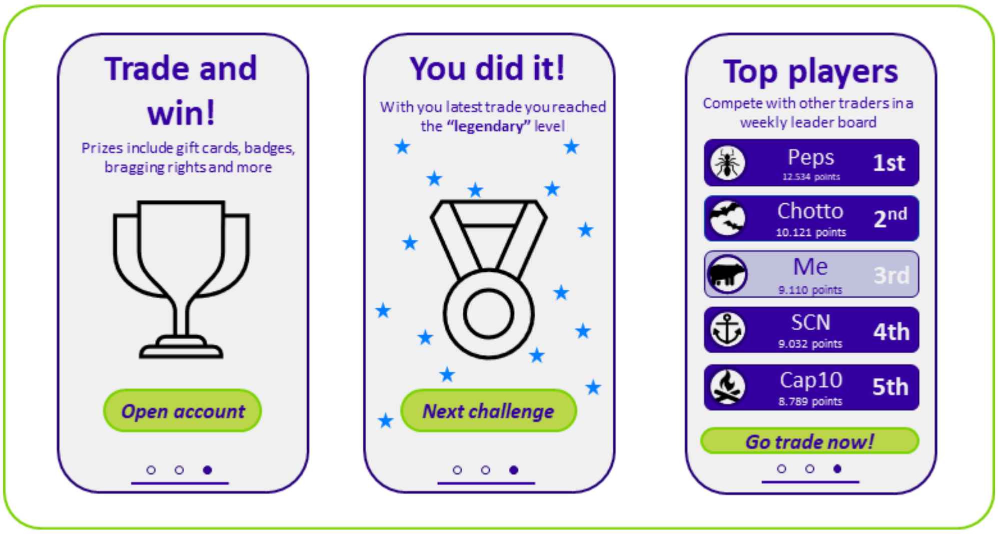
92. Gamification techniques come in a variety of forms.[68] Examples include rewards or praise for the investor for finishing tasks, quizzes or for discovering and using different features of the app. Gamification may also be applied in the design of the app when its interface focuses on deeper engagement of the user, making it more pleasant and often very easy to invest.

[66] Described thoroughly in ESMA’s Supervisory Briefing on Copy Trading, ESMA35-42-1428 https://www.esma.eu/document/supervisory-briefing-copy-trading
[67] Gamification techniques add games or game-like competitive elements to non-game contexts such as financial services. Examples of game-like elements are earning of points or badges; keeping score or leader boards; showing performance graphs; by using meaningful stories or avatars to engage users; or introducing teammates to either induce conflict, cooperation, or competition.
[68] Partially already discussed in the Technical Advice to the Commission on certain investor protection aspects (2022).

93. Gamification can make financial tasks more fun and engaging or help users learn about (complex) financial concepts in an interactive manner.[69] There are firms that offer demo accounts as a learning tool, to introduce investors to investing. These demo accounts can also include gamified elements. By treating investing as a game already at an early stage it could be a difficult first impression to shake off by a new investor. Demo platforms provided by firms should therefore not differ substantially from the real ones. The consequence of trades in real life should be made clear. When gamification techniques are used in educational format, firms should always assess whether the use of these DEPs is in the best interest of the client.

94. Gamification can lead to effects that might not always be in the best interest of the investor. That is why it is key for firms to carefully assess the effects of the techniques used.

95. Easy, fast and a game-like experience can lead to negative effects such as poor investment outcomes due to the fact they might entice excessive trading. Such game-like features could include for example either be rewarded after trading, or be provided with widgets or other features. Such incentives can motivate the investor to continuously observe the portfolio and trade frequently which can make investors sensitive to even the slightest price movements. This may lead to a focus on short-term gains (the reward of trading) instead of focussing on long-term investments.



Illustrative examples of gamification techniques used to push retail investors to execute more trades and focus on short term goals

[69] M. Krause, M. Mogalle, H. Pohl and J.J. Williams (2015) in their article: *A playful Game Changer: Fostering Student Retention in Online Education with Social Gamification´* looks at the impact of social game elements on students in online environments. Though their article does not look financial education, their results are nevertheless interesting. They saw that the students in their experiment showed a significant increase of 25% in retention period and 23% higher average scores when the course interface included gamification techniques. When social game elements were used, students showed an increase of 50% in retention period and a average of 40% higher test scores.

96. An example in which gamification techniques could be used positively is incorporating them in feedback given to the investors. For example, instead of celebrating individual trades made through confetti or rewarding points to the investor, celebrating the reaching of a long-term investment goal or the diversification of a portfolio should be encouraged. This way, the gamification techniques can still provide users with an interactive experience, but the use of the techniques is more likely to be aligned with the investors' best interests and less focused on the short term or on individual trades.

97. Another example where investors could be guided towards long-term investing instruments using gamification techniques, include the access tools that enable them to calculate their long-term profits based on the scenarios and different investing approaches undertaken and then to 'subscribe' to those strategies. One could think of leader boards where not the investors are shown that have traded the most or had the most turn-over recently, but instead traders who have the most diversified portfolio.

Gambling-like behaviour

98. Certain digital engagement practices used are techniques that stem from gambling. An example of such practice is when (prospective) clients can receive variable rewards based on certain actions. Other gambling-like techniques used (sometimes also referred to as 'gamblification') include the type of images or even language used derived from gambling practices as, for example, using expressions such as 'hitting a jackpot', having a 'spin the wheel' element or introducing scratch cards to reveal a reward etc.

99. It is becoming increasingly common that investors with high-risk appetite engage in trading in "gamblified" investment products. These are products promising high returns, but associated with a significantly high probability of loss. This may raise questions about the relation between gambling and risky investing is also an area of research. Even though there is only limited research available suggesting that the gamification of financial services could lead to possible gambling-like behaviour or in extreme cases addiction, some studies however have found a link between the use of gamification techniques and addictive behaviours.

100. In one study, research from the University of Bergen (Norway) have found that individuals who enjoyed playing mobile games that incorporated gambling-like features were more inclined to develop a gambling addiction compared to other individuals who played games without such features.[70] The study concludes that the gamification features (such as the use of rewards, leader boards and social (validation) rewards) can increase the risk of addictive behaviour, which is of course never in the best interest of the user/client/investor.

[70] Source: https://www.uib.no/en/spillforsk/136119/gambling-and-video-game-problems-general-adult-population-norway

101. Another similar study was conducted by the University of Wolverhampton and the University of Plymouth. Here the researchers found that use of gamification techniques (such as pop-ups, creating avatars, rewarding users with bonuses etc.) by online gambling websites can contribute to the development of a gambling addiction by their users.[71] Results of research conducted by Arthur et al. (2016) proved that high-risk traders have a higher frequency of gambling, including engagement in a more significant number of gambling activities as well as that they present higher probability to become problem gamblers.[72]

102. The article of Mosenhauer et al. (2021) also supports the hypothesis that behavioural addiction to gambling-like activities is associated with frequent stock market trading.[73] Kamolsareeratana and Kouwenberg (2023) state that speculative trading behaviour such as frequent trading or buying high-risk "lottery" stocks is explained by overconfidence and high risk-tolerance and trading addiction is positively related to high levels of stress and alcohol use, problems also often associated with gambling disorders.[74] The quoted research here demonstrates that there can be a connection between gambling-like behaviour and short-term trading.

103. The article '*Excessive trading, a gambling disorder in its own right? A case study on a French disordered gamblers cohort*' (2017)[75] states that the results of the case study support the idea of an addictive-like trading behaviour as a subset of gambling disorders. They state that investing should not be considered as a form of gambling, but indeed that there are people who gamble with investments. Such behaviour can be facilitated by apps incorporating similar digital engagement practices.

104. While not all these studies focus on the link between gamification in trading and the development of a gambling addiction in the context of mobile games and online gambling, there can be some concern that similar features in financial apps and services could contribute to addictive behaviour as well. This is also supported by research on relation between gambling and risky investing. This is because investing and gambling can share key features.[76] Both involve risk coming together of two or more people, they are voluntary activities[77], and they are motivated by financial gains[78]. Hence, some financial economists

[71] Source: [JCM | Free Full-Text | "It's the Attraction of Winning That Draws You in"—A Qualitative Investigation of Reasons and Facilitators for Videogame Loot Box Engagement in UK Gamers (mdpi.com)]

[72] Arthur, J., Delfabbro, P., & Williams, R. (2015). Is there a relationship between participation in gambling activities and participation in high-risk stock trading?. *The Journal of Gambling Business and Economics, 9*(3), 34-53.

[73] Mosenhauer, M., Newall, P. W., & Walasek, L. (2021). The stock market as a casino: Associations between stock market trading frequency and problem gambling. *Journal of Behavioral Addictions, 10*(3), 683-689

[74] Kamolsareeratana, A., & Kouwenberg, R. (2023). Compulsive Gambling in the Stock Market: Evidence from an Emerging Market. *Economies, 11*(1), 28.

[75] Grall-Bronnec, M., Sauvaget, A., Boutin, C., Bulteau, S., Jiménez-Murcia, S., Fernández-Aranda, F., ... & Caillon, J. (2017). Excessive trading, a gambling disorder in its own right? A case study on a French disordered gamblers cohort. *Addictive Behaviors, 64*, 340-348

[76] Newall, P. W., & Weiss-Cohen, L. (2022). The gamblification of investing: How a new generation of investors is being born to lose. *International Journal of Environmental Research and Public Health*, *19*(9), 5391.

[77] Neal, P.N.; Delfabbro, P.H. & O'Neil, M.G. (2005) Problem Gambling and Harm: Towards a National Definition; Office of Gaming and Racing, Victorian Government Department of Justice: Melbourne, Australia.

[78] Tabri, N.; Xuereb, S.; Cringle, N.& Clark, L. (2022) Associations between financial gambling motives, gambling frequency and level of problem gambling: A meta-analytic review. *Addiction*, 117, 559–569.

have tested their theories on sports betting markets as an analogous but simpler version of a stock market.[79]

105. Financial institutions should be mindful of these risks and take steps to ensure that their gamification features are used responsibly and do not encourage risky behaviour or addiction.

106. In France, the regulator responsible for online betting and the gaming industry developed the possibility for clients to ask to be banned from gaming and betting websites (or only to be allowed access for a limited time) so that they will not be tempted to go gamble whilst recovering from their addiction. Firms could introduce a similar policy where, upon request from the investor, they could limit the number of trades per day, week or month.

Firms should have proper internal rules, policies, processes and tools for their use of DEPS including the use of behavioural techniques and gamification elements.

DEPs should not intentionally favour more costly products or products that are simply more remunerative for firms to distribute.

Firms using gamification techniques should focus on long-term investor outcomes depending on the investor's profile and investment strategy (if known). Firms should not merely focus on high-risk investments, short-term outcomes and/or on individual transactions.

Firms should use DEPs and gamification techniques to encourage informed and sensible investment decisions which lead to well-diversified investment portfolios and long-term investing.

Use of gamification techniques that encourage investors to trade more should not be allowed in the case of risky products. This includes using techniques such as positive reinforcement immediately after financial transaction (such as messages to congratulate the investor/trader, use of confetti or badges).

Firms must allow the client to exit the process at any point, without having to complete the transaction.

When firms use gamification techniques, firms should display a message that excessive trading may lead to financial harm to investors.

[79] Sauer, R.D. (1998) The Economics of Wagering Markets. *J. Econ. Lit.*, 36, 2021–2064.
Williams, L.V. (1999) Information efficiency in betting markets: A survey. *Bull. Econ. Res.*, 51, 1–39.

Firms should not influence the clients' choices through DEPs such as gamification. Instead, firms should be neutral and unbiased.

Firms are encouraged to use DEPs to provide (prospective) clients with educational content, in a neutral manner, or when used in ways to guide investors to make better investment decisions and thus acting in the best interest of the client.

Questions

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?

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

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)?

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

Choice architecture and nudging techniques

107. The choice architecture, or choice environment, refers to the distribution channel (interface) used by the firm in which it interacts with the client. This can be an interface of a website or an app for example. This interface often makes use of DEPS including different styles or techniques to enhance the investor's experience and attract their attention.

108. Firms can use certain defaults in their choice architecture to nudge investors, and they can decide on for instance the number of clicks it takes to execute or cancel an order. These types of different nudging techniques can be effective tools to encourage positive behaviour among investors.

109. For example, firms can nudge investors to non-complex and less risky financial instruments by making these the default option in the choice architecture instead of highlighting (only) more risky instruments. This way, firms can simplify the investment options presented by providing a default investment option that is easy for customers to understand and offers low fees. This can help customers avoid analysis paralysis and make better decisions.

Illustrative example of a choice environment designed to give more prominence to riskier and more complex products

110. Another example of a positive nudge in the choice architecture in an execution-only environment, is to first show the investment products that can be considered a good fit, based on the investor's experience and knowledge as well as on other relevant information, if these are collected dependant on the service provided (such as for instance risk profile or investment goals). Firms may use algorithms and data analysis to provide such suggestions. This can help investors make better and informed investment decisions that align with their individual needs and circumstances.

111. By using nudges responsibly and ethically, firms are able to provide education and guidance to help investors understand their investments options, which will help the investors to make better decisions. This way, firms can, by the design of the choice architecture, help investors to achieve better financial outcomes and build long-term wealth.

112. On the other hand, a popular practice observed of nudging clients towards certain categories of instruments is the categorisation of instruments in the trading apps or systems. This includes displaying financial instruments not only in categories depending on their underlying but also in categories called "most popular", "hot", "trending" or "top movers". These types of categories often include instruments that have high trading volumes, or which are momentarily actively traded or instruments that observed a significant volatility or had a single but huge rise (or drop) in the price.

113. The choice process of the client may be influenced by the way the charts or categories are presented. For example, the instrument may continuously drop in price over the preceding period, but the chart may only present the high rise in price that occurred at a daily interval and does not show the client the full picture. The client would then have to individually check other time intervals to fully understand the price movements.

114. Some investment firms also predetermine leverage without possibility of changing it as well as set the default amounts of investment at high levels. In some cases, clients may invest with an "instant" feature that requires only one click to open a position in the instrument. However, the positions opened "quickly" may be pre-set at high levels and cannot be or are difficult to be changed by the investor.

115. Instead of promoting quick decision-making, it could be considered to encourage informed and unbiased decision-making process by investors. Another nudging technique that could be used in the design of the choice architecture is one that allows for review and reflection by users. This can include adding an additional step consisting of the order summary and trade confirmation.

Firms should design the choice architecture of their interface to enable and support investors to make informed and sensible investment decisions

Use of features likely to influence investor choice such as setting levels of leverage by default, to high amounts should be avoided as they are not in the client's best interest.

Questions

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

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?

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

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?

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

Push notifications

116. When discussing the choice architecture and nudging, it is important to mention other features of trading systems or apps that may encourage risk-taking behaviour. Barber et al. (2022) using data from one American investment firm found that customers of this firm engaged in more attention-induced trading than other retail investors. Their explanation for

this was the firm's focus on attracting relatively inexperienced investors but also the app's unique features.[80]

117. Push notifications (in the form of messages, pop-ups etc.) can contain invitations to participate in a special deal, alert the investor they have not logged in in a while, inform investors about given market events etc. Push notifications can indeed increase customer engagement and may be helpful for the investors and keep them informed. However, as discussed by Moss (2022), push notifications can significantly increase retail investor trading in a short period after receiving a notification compared to non-retail investor trading.[81]

118. When an investment firm sends information on a significant change of the financial instrument's price or value (the same with providing best movers) this can nudge clients towards executing an impulsive trade and, in the worst-case scenario, exploit cognitive bias of the investor. Some of these assets may not be in fact 'blue chip' stocks or shares that are components of big indices but often small companies, even including penny stocks, volatility of which is much higher. Investors that act based on the notifications, may act impulsively based only on such information, not being aware of all the circumstances of that stock price movement. Combined with the previously mentioned focus on short time interval, this may lead to an uninformed and unsuitable investment decision.

119. If the push notification sent by the firm are uniform (i.e., all clients receive the same notification) the firm needs to assess beforehand whether the information contained in that notification is aligned with the target market. Since alerting investors on a price movement of a volatile and risky instrument is not likely to be information that is relevant and aligned with the interest of all clients that would be receiving the message.

<u>Questions</u>

What kind of push-notifications do you send?

For example, what type of information is included, are the push notification bespoke to the consumer?

Dark patterns

120. The term **'dark patterns'** covers interface design elements that are incorporated into the design of digital interfaces which harm users but benefit vendors.[82] Dark patterns could

[80] Barber, B. M., Huang, X., Odean, T., & Schwarz, C. (2022). Attention-induced trading and returns: Evidence from Robinhood users. *The Journal of Finance*, *77*(6), 3141-3190
[81] Moss, A. (2022). How Do Brokerages' Digital Engagement Practices Affect Retail Investor Information Processing and Trading? (Doctoral dissertation, The University of Iowa).
[82] Stuart Mills , Richard Whittle, Rafi Ahmed, Tom Walsh and Martin Wessel, *'Dark pattens and sludge audits: an integrated approach'* Behavioural Public Policy (2023), 1-27: *S2398063X23000246jra 1..27 (cambridge.org)

be data-driven and personalised, or implemented on a more general basis, tapping into heuristics and behavioural biases, such as default effects[83] or scarcity biases.

121. Some examples of 'dark pattern design elements' are the size and or colour of buttons compared to others, or pre-ticked boxes since this will guide users to one specific button. An example of a dark pattern process related to financial service provision could for instance include hiding fees, or that it is a lot more difficult to cancel a pending order than it is to place it.

122. The difficulty to leave a subscription or a service is also an example of a dark pattern. In the article by S. Mills et al. (2023) a case study was done in the UK on activating and deleting user accounts (how many clicks were needed to do so)[84]. The study explored the use of behavioural techniques such as dark patterns by social media and streaming mediums but also two financial firms were included (Trading 212 and eToro). From this clicks perspective the general audit (review) suggests that popular online services are easier to join than they are to leave. For example, for eToro the number of activation clicks were 5 and the number of deletion clicks were 9. Making it harder to delete the account than it was to set up. Whilst generally speaking ideally it should take the same number of clicks to join as it would to take to leave a service, one would expect to see a higher number of clicks would be needed to set up an account in financial services. Reason being that more data needs to be collected to set up trading accounts (i.e., relevant data for the appropriateness or suitability test depending on the service and client).

123. Dark patterns can therefore also be found in financial services and legislative measures are already being taken to ban these practices. For example, in the newly adopted directive concerning financial services contracts concluded at a distance[85] an article is included with regard to the additional protection regarding online interfaces. This Article 16e addresses dark patterns and reads as follows:

"1. *Without prejudice to Directive 2005/29/EC*[86] *and Regulation (EU) 2016/679*[87]*, Member States shall ensure that traders, when concluding financial services contracts at a distance, do not design, organise or operate their online interfaces, as defined in Article 3(m) of Regulation (EU) 2022/2065 of the European Parliament and of the Council******, in a way that deceives or manipulates consumers who are recipients of their service or otherwise*

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[83] The 'default effect' refers to the tendency of individuals to stick with options that are assigned to them by default due to inertia. The 'scarcity bias' refers to the tendency of individuals to place a higher value on things that are scarce.

[84] Stuart Mills , Richard Whittle, Rafi Ahmed, Tom Walsh and Martin Wessel, *'Dark pattens and sludge audits: an integrated approach'* Behavioural Public Policy (2023), 1-27: *S2398063X23000246jra 1..27 (cambridge.org)

[85] Repealing the existing legislation from 2002 (Directive 2002/65/EC) and introducing new provisions for financial services contracts concluded at a distance as an additional chapter of the consumer rights directive (CRD) which protect consumers in all kinds of commercial practices.

[86] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22).

[87] Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016. Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data

materially distorts or impairs their ability to make free and informed decisions. In particular, Member States shall adopt measures that, in accordance with Union law, address at least one of the following practices by traders:

(a) giving more prominence to certain choices when asking the consumers who are recipients of their service for a decision;

(b) repeatedly requesting that consumers who are recipients of the service make a choice where that choice has already been made, especially by presenting pop-ups that interfere with the user experience; or

(c) making the procedure for terminating a service more difficult than subscribing to it.

2. *Member States may adopt or maintain more stringent provisions regarding the requirements for traders set out in paragraph 1, when the provisions are in conformity with Union law*"

124. An example of a dark pattern observed by BaFin when reviewing trading apps is having no or a barely perceptible button to cancel a transaction while having a strikingly designed button to conclude a transaction.

125. Another example of the use of a dark pattern is when a client is typing a search prompt with the company name in order to find the share. While typing, the leveraged and/or derivative products are displayed on top as best search results instead of the regular shares.

126. Dark patterns could also be incorporated in an app design for instance by making it hard for the investor to find information. This may include for example the need to scroll a lot or having to click many times to access the KID, the costs information or other information related to the nature of the instrument.

Firms should use the structure, design, function or manner of operation of their online interface in a way that encourages investors to make informed and sensible investment decisions.

Questions

Which examples of dark patterns have you encountered?

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

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

4 Annex: Questions

Online disclosures

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

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

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?

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

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

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?

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?

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.

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?

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

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?

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

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?

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

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.

Content Marketing and Social Media

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

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

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

Affiliates and Social Media

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

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

21. Based on which criteria do you select affiliates?

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

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?

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

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

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

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?

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

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)?

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

Choice architecture and nudging

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

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?

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

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?

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

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?

Dark Patterns

37. Which examples of dark patterns have you encountered?

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

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

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