

BVI's¹ position on ESMA's Discussion Paper on MiFID II investor protection topics linked to digitalisation (ESMA35-43-3682)

Online disclosures

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

In general, we agree with ESMA to introduce common standards for layering of legally required content and further information for digital uses. However, we request ESMA to **avoid fragmentation of European regulation and to yield the potential of digitalisation in terms of layering** with clear provisions using a coherent and systematic approach. To warrant the success for introducing such rules, the following key principles should be considered.

The legislator should ensure that **any standard for layering contains a certain level of flexibility to allow for some discretion in implementation**. To achieve this essential flexibility, at first the information to be allocated to each layer should be clearly stated, but at the same time the provision should be formulated as a non-exhaustive rule. Second, the provision should only contain a modest number of conditions that must be considered for implementation.

Having said this, we support the list of "vital information" proposed by ESMA on page 14 in its Discussion Paper on MiFID II investor protection topics linked to digitalisation ("**Discussion Paper**"), encompassing significant information which serves the objective of investor protection and should therefore be presented in the first layer, such as the name and brief description of the firm and financial instrument or service, mandatory risk warnings, major risks and benefits and cost and charges.

In addition, to **avoid a patchwork of regulations for layering techniques**, each provision on layering should be introduced in the thematically related legal act. For instance, the Commission proposal for a Retail Investment Strategy amending the PRIIPs -Regulation (2023/0166 (COD)) provides for requirements for an electronic format of the key information document that may be provided by means of an interactive tool (Art. 14 (2) of the Commission's proposal).

¹ BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 114 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.



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?

Unlike ESMA, we are of the view that there is no need for a comprehensive set of provisions linked to digitalisation in form of Guidelines or multiple Q&As. Rather, it should be borne in mind that, in particular, MiFID II and its Delegated Regulation (EU) 2017/565 (“**DelReg MiFID II**”) already provide for an appropriate regulatory environment. In addition, the Commission's proposal for a Retail Investment Strategy will introduce new provisions for marketing communications and provisions relating to digitalisation in MiFID II.

On the basis of our analysis of the Discussion Paper with a focus on the MiFID II framework, we would like to point out the following:

- (1) ESMA's approach of introducing another comprehensive set of multiple provisions into the broad MiFID II environment linked to digitalisation is rather surprising (see point 4 below) and, at the end, **may lead to overregulation for the parties concerned**. Contrary to ESMA, we consider the non-technology specific nature of MiFID II to be a major advantage, as such a legal framework provides for **essential flexibility for different applications and thus may prevent overregulation** (No. 14 of the Discussion Paper). In terms of **regulatory coherence and stability**, we advocate to focus on the unaltered, appropriate application of the MiFID II Directive. Further, prior to introduction of new rules, it should always be borne in mind that it is essential to consider both needs, in particular the need to avoid investor vulnerability in the context of digitised financial services on the one hand, and the industry's need for practicality when providing financial services on the other. As most of the questions raised in the Discussion Paper can already be solved today by an appropriate application of the MiFID II framework, no benefit or need for publishing a whole new set of specific rules linked to digitalisation can be identified.
- (2) **We expect ESMA to liaise with the EU Commission in order to ensure that a possible adoption of ESMA Guidelines or Q&As will not pre-empt fundamental policy decisions that shall be discussed as part of the general legislative procedure/regulatory process of the Retail Investment Strategy to avoid disorder and fragmentation in the EU market and regulation.** Unlike ESMA, we are of the view that the consultation should not only focus on the current MiFID II framework (No. 13 of the Discussion Paper) and, in particular, **that the consultation cannot be read without considering the Commission's proposal for a Retail Investment Strategy**. As explicitly described by ESMA itself, the draft proposal encompasses, *inter alia*, topics with regard to digitalisation, a definition of marketing communications and marketing practises which would include advertisements but also include marketing through third parties, such as affiliates, as well as clarifications with regard to the responsibility thereof. Hence, many aspects addressed in the Discussion Paper may soon be covered by MiFID II, which means that parallel discussions in this regard should be avoided.
- (3) We have outlined our view on layering in our response to Q3.



- (4) ESMA should avoid duplicating existing legislation as this would lead to **significant uncertainties about the application of provisions and foster the fragmentation of European regulations**. As a result of our analysis of the Discussion Paper, we can conclude that most of the digital issues addressed in the Discussion Paper can already be solved today by **still** applying the technology neutral MiFID II and its respective DelReg MiFID II. In this regard, we would like to provide a number of examples that oppose the introduction of new mandatory guidelines in the **current MiFID II framework**.
- First, the Discussion Paper states that 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 (e.g. No. 45 of the Discussion Paper). These well-known requirements are already set out in the general clause of MiFID II, which is applicable to all technologies, and are specified by the provisions of the DelReg MiFID II (Art. 24 (3) of MiFID II, e.g. Art. 44 (2), (3) of the DelReg MiFID II).
 - Second, ESMA requests that information should be presented in an easily understandable language and in an accessible and readable manner. Further, the use of visual aids to help clients to better understand technical information by providing, *inter alia*, interactive tools should be considered (e.g. No. 39 et seq. of the Discussion Paper). Yet, the requirement that information should be presented to the customer in the best way and as clearly as possible is already embedded in the provisions mentioned above. We are of the view that no guidelines are needed to duplicate these requirements and to point out that graphics that serve the purpose of a better understanding can also be designed interactively for technical applications.
 - There is also no need to provide further provisions on target markets in new guidelines as comprehensive specifications on this topic can already be found in the Guidelines on MiFID II product governance requirements. In addition, only about 3 months before publishing the Discussion Paper, ESMA has already introduced specific provisions in the aforementioned guideline in terms of digital engagement practices (raised in No. 83 et seq. of the Discussion Paper), in particular, provisions with respect to target market in conjunction with using gamification and nudging techniques (No. 39, 59 of the aforementioned guidelines). Thus, once again, we are of the view that the issues in terms of target market raised in the Discussion Paper can already be answered by consulting the existing guidelines. In the event that ESMA recognises the need to amend these newly introduced rules in the near future, these amendments should be implemented in the same existing guideline in order to prevent ambiguity between the application of different guidelines.
- (5) It should be noted that in regard of manufacturers, ESMA has already published Guidelines on marketing communications under the Regulation on cross-border distribution of funds, which would then have to be amended accordingly to ensure alignment with the MiFID II provisions relating to marketing communications.



In view of these arguments, we reject the idea of introducing a mandatory new set of guidelines or other regulation linked to digitalisation that would not add value compared to the current rules in MiFID II. Although we understand that ESMA's intention is to increase investors protection, investment firms should rather be asked to focus on implementing the current MiFID II framework appropriately, including the respective guidelines, than facing new regulation burdens. Further, ESMA should wait until the legislative procedure of the Retail Investment Strategy has been concluded before taking the next steps in order to avoid duplication and fragmentation of European regulatory environment.