ESMA CALL FOR EVIDENCE
THE EUROPEAN COMMISSION MANDATE ON CERTAIN ASPECTS RELATING TO RETAIL INVESTOR PROTECTION

Q1. Please insert here any general observations or comments that you would like to make on this call for evidence, including any relevant information on you/your organisation and why the topics covered by this call for evidence are relevant for you/your organisation.

ACEPI consider this Call for evidence very important as it offers the possibility to further analyze and contribute on some crucial issues already arisen in the context of the recent consultation of the European Commission on the Retail Investment Strategy.

DISCLOSURES

Q2. Are there any specific aspects of the existing MiFID II disclosure requirements which might confuse or hamper clients' decision-making or comparability between products? Are there also aspects of the MiFID II requirements that could be amended to facilitate comparability across firms and products while being drafted in a technology neutral way? Please provide details.

ACEPI believe that the present EU investor protection framework is globally satisfactory and ensures an effective protection to retail investors.

However, this framework could be improved in terms of:

- Flexibility, so to allow retail investors to access to a broader range of investments, and
- simplification and consistency of disclosure requirements.

This would enhance efficiency of the market and facilitate access to higher yields for retail end-investors.

In fact, retail investor protection rules under MiFID II generally work well for retail clients with low level of knowledge and experience, but they are overly burdensome and restrictive for more sophisticated clients.

ACEPI therefore believe that MiFID II client classification criteria should be improved by:

1) reviewing the opt-in procedure, and
2) introducing a more flexible definition of professional/professional upon request clients.

Furthermore, costs and charges disclosure regime under MiFID II should be simplified, by applying more proportionality, based on the type of product and its complexity. Tariff grids should be used for (simpler) financial instruments that are not packaged products under PRIIPs regulation. Otherwise, a specific disclosure of the products costs and charges in the PRIIPs KID would still be provided to retail investors.

It is advisable to extend to PRIIPs the new MiFID II provisions regarding the adoption of an electronic format to provide information to clients (except where retail clients specifically ask for receiving the information in paper form).

Q3. Are there specific aspects of existing MiFID II disclosure requirements that may cause information overload for clients or the provision of overly complex information? Please provide details

Disclosure requirements under MiFID II regarding costs and charges are generally too detailed and complex; this lead to an information overload for retail clients, which runs contrary to investors' protection.

ACEPI would recommend simplifying this regime and amending Article 50 of the MiFID II DR to set out in Level 2 text the possibility to use tariff grids for simple financial instruments, when they are not a packaged product within the meaning of the PRIIPs Regulation.

Furthermore the current wording of Article 50 of the MiFID II DR lacks clarity as it is linked to several set of rules that cannot be superimposed: ex-ante information (total i.e., both services and product costs) or only service costs), ex-post information and limited application. This means having to differentiate between nine situations, implementation hurdles and disproportionality, in light of the objectives pursued. Therefore, it seems appropriate to simplify this regime for both ex-ante and ex-post information.

Finally, the current Article 50(10) of MiFID II DR 2017/565 required ISPs to provide their clients with an illustration of the impact of aggregate costs on return. Experience shows that this concept (also used in the current PRIIPs KID) is not well understood by investors, especially retail investors

Q4. On the topic of disclosures, are there material differences, inconsistencies or overlaps between MIFID II and other consumer protection legislation that are detrimental to investors? Please provide details.

Yes, ACEPI believe there are some regulatory inconsistencies between PRIIPs KID regime and MiFiD II, namely relating to:

- **Product cost information, its calculation and presentation**

  1) product costs showed in the ex-ante costs and charges disclosure provided by investment firms are different and lower than those showed in the PRIIPs KID. This is due to the fact that, according to the ESMA Q&A No 13, third party payments received by investment firms in connection with the investment service provided to a client have to be itemised separately within the aggregated costs and charges and deducted from the relevant product costs.
  2) the ex-ante costs and charges disclosure provided by investment firms shows costs expressed both as a cash amount and as a percentage, while the PRIIPs KID shows costs in terms of Reduction in Yield (RIY).

- **Risk information, its calculation and presentation**

  Calculation and presentation of risk information are thoroughly detailed under PRIIPs regulation and lead to the Summary Risk Indicator (SRI), while MiFID II only requires a general disclosure on risk information.

When both PRIIPs and MiFID II regimes apply, however, market participants generally use the PRIIPs SRI as a means to comply with MiFID II. This is also due to industry guidelines issued in the context of EMT (European MiFID Template - drafted by FinDatEx) in order to define target markets (which is a MiFID II requirement).

- **Performance information, its calculation and presentation**

  No substantial changes should be made to the way performance in PRIIPs KIDs is calculated and presented: as it stands, it is well understood by investors and distributors.

  RTS V2 changed performance methodologies for structured auto-callable products in a way less understandable for retail investors.

  In addition, since also MiFID II requires investment firms to provide information on product returns, but not in the same prescriptive way than PRIIPs, there is a redundancy, which may lead to inconsistencies. Simplification and rationalization of this regime could be achieved, for example, by providing for the use of product performance under PRIIPs KID also for MiFID II purposes where PRIIPs regulation applies.

  This is actually the approach used in the EMT (European MiFID Template - drafted by FinDatEx) that relies on PRIIPs SRI in order to define target markets (which is a MiFID II requirement).

- **Target market definition:**

  Manufacturers should use target market definitions and information under MiFID II when drafting the PRIIPs KID, for simplification and harmonization purposes.

Q5. What do you consider to be the vital information that a retail investor should receive before buying a financial instrument? Please provide details.

ACEPI believe that the following elements are the most essential to promote comparability considering retail investment products: products objectives/main product features information, costs information, capital protection information (for structured products), and risk information.

Consequently, ACEPI believe that such information under the current regime is properly provided to retail investors.

Information on ESG-related aspects is at present scattered across various texts (e.g., MiFID II, SFDR, Taxonomy) and significantly complex; it is crucial to simplify and harmonize this regime so to ensure that retail investors are provided with crucial and intelligible ESG information.

Q6. Which are the practical lessons emerged from behavioural finance that should be taken into account by the Commission and/or ESMA when designing regulatory requirements on disclosures? Please provide details and practical examples.

ACEPI agrees that common biases and errors that may emerge from financial behavior studies may be, to a certain extent, one of the various elements concurring to the design of certain rules, such as those on financial education, KYC etc. At the same time ACEPI would like to stress the limits of behavioral finance studies and the risks entailed in drawing general conclusion from certain limited empirical observations.

Also, these kind of studies are generally ambiguous and cannot justify by themselves a legislative or regulatory change, which must mainly be driven by impact assessment, costs/benefits analysis as well as a genuine consultation process of all relevant stakeholders.

Based on experience of feedback from advisors and distributors, ACEPI believe that at present there is an overload of information given to retail investors. To give "more information that one need to know" is never effective and does not provide actual retail investors protection. In these circumstances, financial advisors often become key to help navigating an excess of information that are difficult to understand and make it difficult for retail investors to take appropriate and rational decisions.

Q7. Are there any challenges not adequately addressed by MIFID II on the topic of disclosures that impede clients from receiving adequate information on investment products and services before investing? Please provide details.

Yes.

ACEPI recommend simplifying further the regime and for retail investors' protection and amending Article 50 of the MiFID II DR to recognise in the Level 2 text the use of tariff grids for simple financial instruments (where it is not a packaged product within the meaning of the PRIIPs Regulation) and removing the requirement to provide an illustration of the impact of aggregate costs on return. Experience shows that this concept (also used in the current PRIIPs KID) is not well understood by investors, especially retail investors.

Q8. In case of positive answer to one or more of the above questions, are there specific changes that should be made to the MiFID II disclosure rules to remedy the identified shortcomings? Please provide details.

Yes.

See Q7 above.

Furthermore, for consistency reasons ACEPI propose to amend Article 29bis of Directive (EU) 2021/338 amending "MiFID II" ("Quick Fix"), to specify that information on inducements is required insofar as information on costs and charges is required. The disclosure of information on inducements to clients will in any event continue to apply under the conflicts of interest regime, as provided for in Article 23 of MiFID II, which has not been impacted by the Quick Fix (i.e., it has been kept unchanged to date).

Finally, Article 50 of MiFID II Delegated Regulation should be amended to take into account the exemptions granted by the Quick Fix on costs and charges disclosure for wholesale clients.

Q9. On the topic of disclosures on sustainability risks and factors, do you see any critical issue emerging from the overlap of MiFID II with the Sustainable Finance Disclosure Regulation (SFDR)14 and other legislation covering ESG matters?

ACEPI identify the following critical issues:

1) Complexity and inconsistencies of concepts and definitions / Lack of guidelines

Classification criteria of ESG preferences in MiFID II are overly complex and highly difficult to implement and explain to retail investors. Retail investors hardly know and understand Taxonomy and SFDR concepts or definitions like “PAI”.

Manufacturers and distributors struggle to “translate” those categories into clear and comprehensible concepts and are trying to elaborate easy to use and understand industry-wide standards.

Delegated Regulation (EU) 2021/1253 amending the MiFID II Delegated Regulation (EU) 2017/565 requires that firms providing financial advice assess the potential “sustainability preferences” of their clients, which leads to the following issues:

- on the one hand, the notion of “sustainability preference” uses the nomenclature of the Taxonomy Regulation by making reference to “sustainable investments” (Art. 2 (7) (a))
- on the other hand, by making reference to “sustainable investment” as defined by SFRD Regulation (Art. 2 (7) (b))
- but also referring to “principle adverse impacts” (PAI) as defined by SFRD (?) but as another MiFID II ESG category (Art. 2 (7) (c)).

Hence, ESG categorization of products by SFDR (articles 6, 8 and 9) do not correspond to ESG categorization of clients as per MiFID II.

Lastly, the scope of financial products is not aligned between MiFID II (that covers all financial instruments) and SFDR (financial products). Therefore, manufacturers of non-SFDR-products (being nevertheless financial instruments) might be obliged de facto to comply with the disclosure obligations under the SFDR if they want their product to be eligible for the ESG suitability test under MiFID II.

2) Timing mismatches between MiFID and SFDR

Certain disclosures brought about by the latest RTS of SFDR aim at having implications on the ESG related updates to the MiFID suitability assessment. Moreover, SFDR regime is not stabilized yet whereas MiFID II “ESG enhanced” is entering into application in August 2022. As some of the provisions of these RTS align with the concept of sustainability preferences, such as products that invest a minimum proportion in sustainable investments or taxonomy-aligned investment, an alignment of the application dates of MiFID II and the SFDR RTS would be beneficial to the FMPs (Financial Market Participants) in order that the legal frameworks fit together.

From a technical implementation standpoint, more specifically in exchange templates (namely EMT/EET), the significant overlap between MIFID II and SFDR induces a complex implementation associated with higher costs due to the multiplicity of expected template versions.

(3) National Goldplating

Some NCA issued national doctrine that creates additional requirements in that matter. Such national requirements create goldplating, which is an issue in itself.

Q10: Are there any other aspects of the MiFID II disclosure requirements and their interactions with other investor protection legislations that you think could be improved or where any specific action from the Commission and/or ESMA is needed?

Disclosure requirements regarding the expected returns under different market conditions are relevant for investment products only and should be exclusively with PRIIPs scope.

PRIIPs cost methodology should not apply MiFID II to calculate the costs of all financial instruments.

It is sensible to allow ISPs to use the costs information of the PRIIPs KIDs for the cost disclosure under MiFID II when the product is within the scope of PRIIPs; it is not, however, appropriate to require ISPs to use the cost methodology set out in the PRIIPs regulations when the transaction is out of scope.

MiFID II must not bring into the scope of PRIIPs products and/or transaction that were not initially included in it.

Q11: Do you have any empirical data or insights based on actual consumers usage and engagement with existing MiFID II disclosure that you would like to share? This can be based on e.g., consumer research, randomized controlled trials and/or website analytics.

No

DIGITAL DISCLOSURES

Q12: Do you observe a particular group or groups of consumers to be more willing and able to access financial products and services through digital means, and are therefore disproportionately likely to rely on digital disclosures? Please share any evidence that you may have, also in form of data.

Not applicable.

Q13: Which technical solutions for digital disclosures (e.g., solutions outlined in paragraph 27 or additional techniques) can work best for consumers in a digital - and in particular smartphone - age? Please provide details on solutions adopted and explain how these have proven an effective way to provide information that is clear and not misleading.

Not applicable.

Q14: Would it be useful to integrate any of the approaches set out in paragraph 27 above in the MIFID II framework? If so, please explain which ones and why.

Not applicable.

Q15: Should the relevant MIFID II requirements on information to clients be adapted in light of the increased use of digital disclosures? If so, please explain how and why.

Not applicable.

Q16: Do you see the general need for additional tools for regulators in order to supervise digital disclosures and advertising behind 'pay-walls', semi-closed forums, social media groups, information provided by third parties (i.e., FINfluencers), etc? Please explain and outline the adaptions that you would propose.

Not applicable.

DIGITAL TOOLS AND CHANNELS

Robo-advisers

Q17: To financial firms: Do you observe increased interest from retail investors to receive investment advice through semi-automated means, e.g., robo-advice? If yes, what automated advice tools are most popular? Please share any available statistics, data, or other evidence on the size of the market for automated advice.

There are an increasing interest of robo-advisors and opportunities for retail investors but, at this stage, robo-advice shall be complementary to human one.

Q18: Do you consider there are barriers preventing firms from offering/developing automated financial advice tools in the securities sectors? If so, which barriers?

ACEPI do not believe that there are unnecessary barriers hindering the development of robo-advice. Moreover, such barriers do not correspond to an economic reality and are not a regulatory issue.

Q19: Do you consider there are barriers for (potential) clients to start investing via semiautomated means like robo-advice caused by the current legal framework? If so, please explain and outline what you consider to be a good solution to overcome these barriers.

ACEPI would like to underline that not all on-line communication tools are robo-advisers (e.g., information collecting via the Internet, Internet catalogues).

Thus, an increasing use of electronic communication tools does not mean *per se* an increasing use of robo-advisors.

Q20: In case of the existence of the above-mentioned barriers, do you have evidence of the impact that they have on potential clients who are interested in semi-automated means? For instance, do they invest via more traditional concepts or do they not invest at all?

Not applicable.

Q21: Do you consider the potential risks and opportunities to investors set out above to be accurate? If not, please explain why and set out any additional risk and opportunities for investors.

Yes, ACEPI agree with the picture of potential risks and opportunities to investors set out by this consultation paper.

Q22: Do you consider that the existing MiFID regulatory framework continues to be appropriate with regard to robo-advisers or do you believe that changes should be added to the framework? If so, please explain which ones and why.

ACEPI believe that regulation should be technology neutral and should not lead to the creation of a specific regime for robo-advisors. The current MiFID II regime should be sufficiently robust to protect retail investors and therefore no reform of the regulation of advisory services is needed.

Classification : Internal

Q23: Do you think that any changes should be made to MiFID II (e.g., suitability or appropriateness requirements) to adequately protect inexperienced investors accessing financial markets through execution only and brokerage services via online platforms? If so, please explain which ones and why.

On-line investment brokers, platforms or apps, which offer execution only services to retail investors, are subject to the relevant investor protection rules for such services under the MiFID framework.

Q24: Do you observe business models at online brokers which pose an inherent conflict of interest with retail investors (e.g., do online brokers make profits from the losses of their clients)? If so, please elaborate.

The rules currently in force established by MiFID II are well suited to avoid that any potential conflict of interest may damage the client.

ACEPI are not in favor of a legislative change to address any best execution issues.

It would rather welcome the issuance of a Q&A to clarify the objective criteria that financial intermediaries need to consider to justify their execution policy.

Q25: Some online brokers offer a wide and, at times, highly complex range of products. Do you consider that these online brokers offer these products in the best interest of clients? Please elaborate and please share data if possible.

Retail investors are adequately protected when buying on-line on the secondary market through duly authorised investment firms' digital trading platform, to the extent relevant products fall under the scope of PRIIPs regulation.

Furthermore, the majority of investment firms selling complex products make available on their websites – in addition to the relevant legal documentation – educational materials, Q&A etc, where products payouts and key features are further explained for the benefit of potential investors.

Q26: One of the elements that increased the impact on retail investors in the GameStopcase was the widespread use of margin trading. Do you consider that the current regular framework sufficiently protects retail investors against the risks of margin trading, especially the ones that cannot bear the risks? Please elaborate.

See answer to Q.25

Q27: Online brokers, as well as other online investment services, are thinking of new innovative ways to interact and engage with retail investors. For instance, with "social trading" or concepts that contain elements of execution only, advice, and individual portfolio management. Do you consider the current regulatory framework (and the types of investment services) to be sufficient for current and future innovative concepts?

See answer to Q.25

Q28: Are you familiar with the practices of payment for order flow (PFOF)? If yes, please share any information that you consider might be of relevance in the context of this call for evidence.

Not applicable.

Classification : Internal

Q29: Have you observed the practice of payment for order flow (PFOF) in your market, either from local and/or from cross border market participants? How widespread is this practice? Please provide more details on the PFOF structures observed.

Not applicable.

Q30: Do you consider that there are further aspects, in addition to the investor protection concerns outlined in the ESMA statement with regards to PFOF, that the Commission and/or ESMA should consider and address? If so, please explain which ones and if you think that these concerns can be adequately addressed within the current regulatory framework or do you see a need for legislative changes (or other measures) to address them.

Not applicable.

Q31: Have you observed the existence of "zero-commission brokers" in your market? Please also provide, if available, some basic data (e.g., number of firms observed, size of such firms and the growth of their activities).

We do not have any information on the existence of "zero-commission brokers" in the Italian market"

Q32: Do you have any information on "zero-commission brokers" business models, e.g., their main sources of revenue and the incidence of PFOF on their revenue? If so, please provide a description.

See answer to Q.31

Q33: Do you see any specific concern connected to "zero commission brokers", in addition to the investor protection concerns set out in the ESMA statement that the Commission and/or ESMA should consider and address? Please explain and please also share any information that you consider might be of relevance in the context of this call for evidence. Please also explain if you consider that the existing regulatory framework is sufficient to address the concerns listed in the ESMA statement regarding zero-commission brokers or do you believe changes should be introduced in the relevant MiFID II requirements.

Not applicable.

Q34: Online brokers seem to increasingly use gamification techniques when interacting with clients. This phenomenon creates both risks and potential benefits for clients. Have you observed good or bad practices with regards to the use of gamification? Please explain for which of those a change in the regulatory framework can be necessary. Do you think that the Commission and/or ESMA should take any specific action to address this phenomenon?

Not applicable.

Q35: The increased digitalisation of investment services, also brings the possibility to provide investment services across other Member States with little extra effort. This is evidenced by the rapid expansion of online brokers across Europe. Do you observe issues connected to this increased cross-border provision of services? Please elaborate.

Classification : Internal

Not applicable.

Role of social media

Q36: Do you observe an increasing reliance of retail clients on information shared on social media (including any information shared by influencers) to base their investment decisions? Please explain and, if possible, provide details and examples. Do those improve or hamper the decision-making process for clients?

The role played by social media platforms is becoming more and more important in influencing retail investment behavior. This phenomenon exposes retail investors to the risk that they rely on unverified, fake or not appropriate/unsuitable information coming from unverified and not reliable sources.

Investment advice plays a crucial role against such misinformation spread by social media and mitigates risks and bad influences from social media.

Q37: What are, in your opinion, the risks and benefits connected to the use of social media as part of the investment process and are there specific changes that should be introduced in the regulatory framework to address this new trend?

Several investment firms are explicitly targeting social media to advertise their products towards retail investors.

While this is a global phenomenon, the EU could aim at creating a level playing field across the EU and set standards.

On-line investment brokers, platforms or apps, which offer execution only services to retail investors, are subject to the relevant investor protection rules for such services under the MiFID framework.

While such on-line investment platforms may offer advantages for retail investors, including a low level of fees and the ease of access to a large variety of investment products, such platforms may also present risks, such as:

1) **Information risk:** the accuracy and reliability of the information should be guaranteed, so to avoid inadequacy of appropriateness checks, lack of understanding by individual investors, lack or inadequate disclosure of costs,
2) **Security risk:** adequate protection from hackers attempting to breach firewalls, passwords and other security measures to compromise the account must be in place,
3) **Privacy risk**: properly manage and protect data to prevent, amongst other problems, leakage of private information and unauthorised/illegitimate use of customer information.
4) **IT relatability risk:** ensure use of adequate IT infrastructure, so to avoid occurrence of system errors, in particular during high market volatility and around market opening and closing, when investors may lose critical market access and trading opportunities.

Q38: Are you aware of the practices by which investment firms outsource marketing campaigns to online platform providers/agencies that execute social media marketing for them, and do you know how the quality of such campaign is being safeguarded?

Not applicable.

Q39: Have you observed different characteristics of retail clients, such as risk profiles or trading behaviour, depending on whether the respective client group bases their investment decision on information shared on social media versus a client group that does not base their investment decision on social media information? Please elaborate.

Not applicable.

Q40: Do you have any evidence that the use of social media (including copy/mirror trading) has facilitated the spreading of misleading information about financial products and/or investment strategies? Please elaborate and share data if possible.

Not applicable.

Q41: Have you observed increased retail trading of 'meme stocks', i.e. equities that experience spikes in mentions on social media? Please share any evidence of such trading and, if possible, statistics on outcomes for retail investors trading such instruments.

Not applicable.

Risk warnings

Q42: Do you consider that the current regulatory framework concerning warnings provides adequate protection for retail investors? If not, please explain and please describe which changes to the current regulatory framework you would deem necessary and why.

ACEPI believe that the current regulatory framework concerning warnings is globally satisfactory and ensures an effective protection to retail investors.

OPEN FINANCE

Q43: Do you believe that consumers would benefit from the development of an 'open finance' approach similarly to what is happening for open banking and the provision of consumer credit, mortgages, etc? Please explain by providing concrete examples and outline especially what you believe are the benefits for retail investors

Open finance can help financial intermediaries to analyze and predict investors' behaviors and needs in order to offer more tailored services and products, improving in this way a correct match between demand and supply.

Q44: What are, in your opinion, the main risks that might originate from the development of open finance? What do you see as the main risks for retail investors? Please explain and please describe how these risks could be mitigated as part of the development of an open finance framework.

ACEPI believe that many regulatory barriers exists in the EU that prevent the entry of new market actors in this field.

In this context, partnerships between the banking actors and market entrants (such as major internet players) could be implemented and new platforms operated by digital economy actors could be used as new distribution channels and offer new distribution opportunities, while clients would have a more direct access to investment products.

The downside of this scenario could be that if there are no clear rules, data protection for retail clients could be decreased. For this reason, the economic utilization of clients data should be inspired by a set of general rules/principles given at EU level (applying at a general level and not only in certain specific sectors, such as payment services as PSD2), which should be a trade-off between innovation, opportunities for clients and businesses and investors rights protection.

It is worth noting that existing investment firms are very cautious of their clients' data, which are pivotal in their relationship with them. Consequently, it is likely that investment firms favour the development of digital solutions for their exclusive account rather than using standardized existing solutions.

Q45: Which client investor data could be shared in the context of the development of an open finance framework for investments (e.g., product information; client's balance information; client's investment history/transaction data; client's appropriateness/suitability profile)?

See answer to Q.44

Q46: What are the main barriers and operational challenges for the development of open finance (e.g., unwillingness of firms to share data for commercial reasons; legal barriers; technical/IT complexity; high costs for intermediaries; other)? Please explain.

See answer to Q.44

Q47: Do you see the need to foster data portability and the development of a portable digital identity? Please outline the main elements that a digital identity framework should be focusing on.

See answer to Q.44

Q48: Do you consider that regulatory intervention is necessary and useful to help the development of open finance? Please outline any specific amendments to MiFID II or any other relevant legislation.

See our answer to Q44

Q49: What do you consider as the key conditions that would allow open finance to develop in a way that delivers the best outcomes for both financial market participants and customers? Please explain.

See our answer to Q44.