Frankfurt,
30 December 2021

BVI[1] response to the ESMA Call for evidence on retail investor protection aspects (ESMA35-43-2827)

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.

In the context of the revision of MiFID II and the Commission's consultation on the Retail Investment Strategy for Europe, a ban of inducements has been discussed again. Even though it is not explicitly part of this consultation, we would like to point out that a ban on commission-based investment advice would have major disadvantages for retail investors.

The criticism of inducements is based on the assumption that because the commissions paid to the advisor may lead to conflicts of interest, commission-based investment advice is of inferior quality compared to fee-based investment advice (so-called independent investment advice) and should be abolished. We do not share this view; on the contrary, both advisory models must continue to coexist.

Investment advice is not automatically better just because it is paid with a fee instead of a commission. The idea of strengthening fee-based investment advice stems from a time when it was not sufficiently clear to clients where and which commissions were paid. As a result of the disclosure requirements introduced by MiFID II, the types and quantities of commissions are now clearly presented to the clients so that they can make their decisions freely in the knowledge of this. It goes without saying that the interests of the client are also taken into account by the advisor in any commission-based investment advice: on the one hand, this is stipulated in Art. 27 MiFID II Delegated Regulation in conjunction with Art. 16, 23 and 24 MiFID II; on the other hand, the advisor also has an interest on her or his own in advising the clients in line with their interests because after all she/he wants the client to come back. Furthermore, it is a common misconception that fee-based advisors are free of conflicts of interest. For example, an advisor might restructure a portfolio because he or she can generate additional fee-based advice.

Clients should be free to decide which type of investment advice they wish to make use of. The fact that clients often do not want to receive investment advice on a fee basis is not recognised. In Germany for example the demand for this type of investment advice as an alternative is very low. If one type is abolished in order to promote the other, clients are deprived of their freedom of choice. Here too, however, it is true that clients being patronised does not equal protection of clients.

Commission-based investment advice can be very beneficial for retail investors, particularly for those with smaller amounts of money to invest. Since commissions are based on the investment amount, the advice can be offered to investors with small amounts as well as to investors with higher amounts to invest. With fee-based investment advice, on the other hand, it is to be expected that advisors will focus

[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 116 members manage assets of more than EUR 4.1 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.

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on wealthy clients. Access to advice for less wealthy clients will therefore be cut off. From the perspective of many clients, fee-based investment advice can also be extremely expensive in relation to the concrete investment amount because the fee is set in absolute terms. It is to be feared that retail investors with smaller amounts will no longer make use of an investment advice service of their own accord. This would counteract one of the objectives of the EU Retail Investment Strategies, namely to facilitate access to the markets for retail clients. Retail investors might be tempted to invest money by way of execution only instead of following individual advice tailored to their needs. This entails a considerable risk, especially for inexperienced investors.

In the UK, these assumptions are supported by the “Evaluation of the impact of the Retail Distribution Review and the Financial Advice Market Review” of the FCA published in December 2020. For example: “Our firm survey shows that even firms without a formal minimum threshold generally have high average pot sizes among their current customers. This indicates that access to advice is, in practice, limited for consumers with smaller pots.” (p. 33)

Also the KPMG-Study “The future of advice”, published in November 2021, supports these assumptions (https://hub.kpmg.de/the-future-of-advice?utm_campaign=FS%20-%20Studie%20-%20Zukunft%20der%20Beratung&utm_source=AEM&__hstc=214917896.dfdf59f7dca8e2bbccd29b0ed5828c35.1638957760981.1638957760981.1638957760981.1&__hssc=214917896.1.1638957760981&__hsfp=3662856533):

- “Asked about their reaction to the introduction of an advisory fee, 35% of respondents said they would no longer seek advice.” (p. 24)
- “In addition to the willingness to use investment advice, the introduction of advisory fees would also reduce the willingness to buy financial products. Just under a quarter of respondents said they would buy financial products less frequently (12%) or stop buying them at all (12%) in this case. The correlation between the use of advice and participation in the capital markets is shown by the above-mentioned FCA study from 2020.” (p. 24)
- “The commission-based model has clear cost advantages over fee-based investment advice for smaller investment amounts; only for investment amounts above €25,000 do the benefits exceed the fees payable. In relation to the typical investment amount of retail clients, the costs of fee-based investment advice are disproportionately high.” (p. 29)

The FCA report and the above-mentioned study show that fee-based investment advice does not only fail to solve but also generates additionally new problems.

Commission-based investment advice also offers another advantage: Clients can obtain advice from different advisors several times before investing without incurring additional costs. Clients who have to pay a fee would certainly refrain from doing so. In addition, clients can decide against an investment after receiving advice without incurring any costs. Abolishment of commission-based investment advice would also create a further distortion of competition compared with insurance distribution regulation, where commission-based advice is still permitted – even under less stringent regulatory conditions than under MiFID II.

The coexistence of commission-based investment advice and fee-based investment advice is proven and tested, creates choice for clients and ensures that all clients have access to high-quality investment advice. Knowing all the costs involved, the mature investor can decide which type of investment advice he/she wants to take advantage of. We therefore expressly oppose a ban on commission-based investment advice.

At this point we would also like to point out that the existing client categories need to be revised. The category of institutional investors covers a very broad spectrum of clients. In the case of pension funds, foundations and family offices, for example, treatment as professional clients within the meaning of MiFID II would make sense under certain conditions, but they do not always meet the requirements for upgrading to a professional client “on request“. Furthermore, in the case of illiquid assets it is nearly impossible to carry out an average of 10 transactions of significant size per quarter over the preceding four quarters. The existing MiFID classification of clients into retail, professional and, where appropriate, eligible counterparties does not provide an adequate and satisfying level of flexibility. You can find more details in our response to question 8.

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.

While comparability between different investment products is a desirable objective, it should be clear that full comparison is basically not possible for different kinds of investment products. Subject to this reservation, we welcome the alignment of information requirements as far as it is possible, having regard to the specific features of the respective products. In principle, this is achieved by the PRIIPs regulation. The approach for the presentation of costs to differentiate between the securities and insurance sectors, for example, is exactly right. Comparability should only be striven for as long as it does not compromise the accuracy of information and has no potential to mislead investors.
It is thus important not to suggest to the investor that there is full comparability across different investment products. This would not be helpful at all from the point of view of investor protection. Rather, it is important that investors understand the different products.

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.

In principle, the measures introduced by MiFID II are suitable for fostering investor protection. In particular, meaningful cost information for retail clients serves the purpose of transparency and is therefore welcome. However, some of these requirements have gone beyond the objective. After all, an overflow of information is just as detrimental for clients as restricting their freedom of decision as to whether they even desire certain information. According to a study by the Ruhr University Bochum [https://die-dk.de/media/files/Auswirkungsstudie_MiFID_II_Prof_Paul.pdf], clients sometimes feel overwhelmed by the sheer mass of information and would like to be able to abstain from certain information. Another study commissioned by the German supervisory authority BaFin comes to a similar conclusion. Clients would like to have the option of waiving certain information, for example the suitability report. The broad range of the information is also viewed critically by clients in this study. However, MiFID II does not provide flexibility with regard to a waiver. Such flexibility would be in the interest of the individual client and would ensure adequate investor protection.

This is especially true because a broad variety of different investors are covered by the term „retail client“. These may be investors who have no or just little experience with the capital markets, others are experienced traders who observe the market continuously and know exactly what financial instruments they want to acquire, when and why. From the point of view of the latter group, recurring information of the same kind, such as cost information, is superfluous, creates unnecessary costs and can even be time-killing, e.g. in the telephone business (see also our response to question 5). We therefore advocate for giving retail clients the freedom to decide whether they want to receive certain information or not. We believe that investor protection should not mean restricting customers' freedom of choice too much.

Particularly in the case of professional clients and eligible counterparties, many requirements are excessive and superfluous. A different level of protection must apply to these clients. The changes introduced with Directive 2021/338 (Covid recovery package) were a first step in the right direction, but do not adequately solve the problem of superfluous cost information under Article 50 (1) MiFID II for professional clients and eligible counterparties. Cost information must still be provided for the services of investment advice and portfolio management. We do not share the opinion that professional clients and eligible counterparties do not have sufficient expertise or knowledge per se in the context of these MiFID services. It must be possible for such clients to waive the cost information. In principle, investor protection must not lead to investors being patronised. Blanket regulations do not always do justice to the individual interests of clients. For further comments on requirements for professional investors and eligible counterparties, see also our answer to question 10.

We are of the opinion that the language used in the pre-contractual documents is sometimes too complicated. For KIIDs/PRIIPs-KIDs, and partly also for the prospectuses, there are many specifications and wordings that must be used. There is little leeway for own (simpler) wordings. The use of jargon and sector-specific terminology is thus already encouraged at this level. The limitation of pages for the KIID/PRIIPs-KID also promotes the use of jargon and sector-specific terminology – a paraphrase requires more words and thus space. Insofar as the language is to be simplified in order to promote the comprehensibility of information documents, it is imperative that this is taken into account in the regulatory requirements.

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.

We strongly support the ESAs' intentions to align PRIIPs cost figures with MiFID II disclosures. Due to the vast majority of funds being distributed in a MiFID II environment, it is absolutely crucial that investors receive consistent cost disclosures at the point of sale. Such cost disclosures will comprise both the PRIIPs KIDs and the ex-ante information prepared by the distributor. Hence, it is essential that the figures on product costs presented in both disclosures interrelate in a consistent way and provide investors with a meaningful overview of costs related to a specific investment service.

However, we see major problems with presentation of relative costs as monetary amounts based on a number of assumptions. The difficulty can be best illustrated by reference to the presentation of performance fees for funds under MiFID II and PRIIPs. The current market standard under MiFID II is presentation of costs assuming a net zero performance over the relevant time period. The same approach is proposed to be applied for the PRIIPs cost calculations under the final ESA report from July 2020. While appreciating the intended alignment of product cost calculations under both frameworks, we are concerned about the implications of this approach for the overall comprehension by investors. Performance fees have to be presented under PRIIPs as the average of the last five years, i.e. by reference to fees accrued on the basis of the actual fund performance. However, if such average is shown under the scenario of zero net performance, investors will likely get the impression that performance fees will in any case drag down the net yield of their investment, even though in such circumstances performance fees will never be incurred.

In our view, it is essential to inform investors about the key features of a product by explaining the general mechanism of calculating and charging performance fees in line with the current practice in the UCITS KIID. Presentation of specific monetary figures might appear plain and easily to understand at first glance, but will never accurately reflect the actual amount of charges that will be incurred in future by the individual investor.

Directive 2016/97 (IDD, Insurance Distribution Directive) and MiFID II should be aligned. MiFID II is significantly more restrictive than the IDD in several areas (e.g. investor categories, inducements). Since insurance and other investment products are in direct competition with each other, this leads to an unlevel playing field. This is also to the disadvantage of investors: Irrespective of their objectives, wishes and needs, insurance products could become much more prominent due to the lower requirements. However, the aim should be to focus solely on the investor's perspective.

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

It is obvious that the retail investor must have the opportunity to obtain the Key Information Document before he makes his investment decision. However, it is also clear that he is always free to make his investment decision without taking notice of any kind of Key Information Document.
The prospectus provides further background information, but in our opinion is not of great relevance for the investment decision.

The consultation on the Retail Investment Strategy also asked whether access to outdated versions of PRIIPs KIDs would be useful. We would like to reiterate that the PRIIPs KID is a pre-contractual information document and is intended to support the investor in his investment decision. The provision of outdated versions of the PRIIPs KID does not help for this decision and may even be confusing for the investor. As a matter of fact, providing outdated information to (potential) investors might pose a liability risk to the PRIIPs provider.

For other information, however, we see the need to create more flexibility in the way it is made available in the interests of investors. The restrictive requirements deter customers and finally lead to less customer participation in the capital market.

Here it is particularly necessary to make it easier to acquire financial instruments by using telephone and fax – this is particularly important for customers in more rural areas. A mandatory provision of cost information (in writing) prior to the execution of an order by telephone for example leads to dissatisfaction and lack of understanding among clients. In addition, clients currently have to put up with delays or receive multiple information several times in the case of several purchases.

ESMA has already included the case of an order by telephone in the Q&A on MiFID II and MiFIR investor protection and intermediaries topics, Section 9, Question 28, 29 May 2019. A corresponding provision should be made at Level 1. Clients use the telephone precisely because an order can be placed and executed in a relatively short time. Thus, for example, conversations are also possible when clients are on the road. Since the time delays caused by the prior provision of cost information are sometimes enormous, the retrospective provision should not be regulated too restrictively. Of course investment firms should inform their clients that they are generally obliged to provide the cost information before executing an order. However, clients should be given the opportunity to decide whether they wish to receive the cost information before or after the order is executed. For reasons of legal certainty, this must generally be the case, regardless of the financial instrument in question or whether a client has provided an e-mail address or has an electronic mailbox to receive information. If the client wishes so, the information can also be provided orally. The client's decision as to whether he wishes to have the information made available subsequently must be documented. In cases where a specific order is received by letter, e-mail or fax, it is not necessary to provide the ex-ante cost information. The client has already made his investment decision and has not given the investment firm the opportunity to provide him or her with the cost information before placing the order. This is already common practice in Germany and is also stipulated in the relevant Q&A by the German supervisory authority BaFin with regard to the provision of the legal sales documents under the German investment law (“Kapitalanlagegesetzbuch”) (https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/FAQ /faq_kagb_vertrieb_erwerb_130604.html, see no. 3.2).

A further adjustment should be the independent waiver of the provision of information (cost information, sales documents like KID and prospectus) by clients, or the subsequent provision of this information at the request of the client must be possible.

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.

An understanding and know-how of capital markets as well as financial products cannot solely be achieved by increased product transparency. Instead, early education – be it at schools and/or via common electronic platforms – is required to lay the foundation. Established and trending communication means a language should be used to reach teenagers as well as young adults.

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.

MiFID II introduced comprehensive protection for retail investors. From our perspective, the main objective is to enable the investors to attain an informed decision about their investments. The requirements of MiFID II provide the investors with all the information needed. Furthermore, they are supported in their investment decisions by being provided high-quality investment advice. However, in doing so, the client must not be put under tutelage. The investor must be left with the decision what information and what type of investment advice he/she wishes to obtain.

While current regulation provides for protection, measures on empowering retail investor participation in capital markets is required via e.g. automatic enrolment in capital market-based pensions and/or further incentives.

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.

We strongly advocate the review of the existing investor categorisation or the introduction of a new category of qualified investor in MiFID II.

Certain institutional investors cover a very broad spectrum of clients. In the case of pension funds, foundations and family offices, for example, treatment as professional clients within the meaning of MiFID II would make sense under certain conditions, but they do not always meet the requirements for upgrading to a professional client “on request“. The existing MiFID classification of clients into retail, professional and, where appropriate, eligible counterparties does not provide an adequate and satisfying level of flexibility. On the contrary, European requirements in the EuSEF and EuVECA Regulations already show that there is a need for further differentiation of investor types. A new category of a "semi-professional investor" would therefore be a possible solution. The classification of investors should be based on the requirements of the EuSEF/EuVECA Regulations. In any case, varying definitions in the different legal requirements must be avoided. Alternatively, the requirements for professional clients “on request“ could be revised. In many cases, there is a concern that mistakes will be made in the process of upgrading to a professional client „on request“, leading to liability risks, as the criteria are not sufficiently clearly defined. For this reason, the possibility of upgrading is often not used, although it would also be in the interest of potentially professional clients “on request“. Pension funds, pension schemes, foundations and family offices should be able to be classified as **professional clients “on request“**. This could also be achieved by revising the existing criteria.

This could be:

Paragraph II of Annex II to MiFID II sets out three criteria, two of which must be complied with in order to classify a client as a **professional client “on request“**. These criteria have turned out to be problematic in practice in various ways:

Criterion 1:
“The client has carried out transactions in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters.”

In the case of illiquid assets, for example, it is nearly impossible to meet this criterion, so it is not suitable for the classification of a client as a professional client ”on request”.

Criterion 2:
“The size of the client’s financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500,000.”

We are of the opinion that the sum of EUR 500,000 should be lowered. Even a financial portfolio of EUR 200,000 is significantly higher than what an average retail investor would normally invest.

Criterion 3:
“The client work or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.”

The third criterion is clearly too narrow. There are a large number of clients who do not qualify as working in the "financial sector", but who undoubtedly have professional expertise equivalent to that. Family offices, pension funds, asset managers, corporate treasurers, municipal treasurers, pension funds and foundations, among others, should be given sufficient consideration here. We therefore recommend extending the options of proving the necessary expertise. For example, the criterion could be supplemented with „… or has worked in fields that involve financial expertise for at least 3 years or has managed a portfolio of more than EUR 200.000 over the last five years or is holding an academic degree in economics or finance.”

In this context, we suggest revising the criteria for **professional clients "per se"** (Paragraph I of Annex II to MiFID II).

Criterion 2: „Large undertakings meeting two of the following size requirements on a company basis: …."

We propose replacing the term "undertakings" with „entities". Currently it is not clear whether all large entities would fall under this type of investors. This would e.g. clarify that large family offices would fall under this category.

Criterion 3: „National and regional governments, including public bodies that manage public debt at national or regional level…"

It is not clear why this should be limited to management of public debt. We propose to add the following:

„National and regional governments, including public bodies and that manage public debt or funds at national or regional level…"

Criterion 4 says: "Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions." The category is generally very broad, but due to the additional sentence it is unclear what type of investors could be covered. We suggest a clear threshold which would also cover e.g. large family offices. The wording of the criterion should be as follows: "Other institutional investors whose main activity is to invest in financial instruments, managing a portfolio of at least EUR 10 Million."

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) and other legislation covering ESG matters?

The SFDR includes requirements for disclosure of information when financial products promote, among other characteristics, environmental or social characteristics, or a combination of these characteristics. Clients are thus informed if sustainable characteristics are included. According to general understanding, these products are perceived as sustainable products. However, for products to be suitable for clients with sustainability preferences, the MiFID II Delegated Regulation stipulates that further characteristics must be fulfilled (a minimal proportion shall be invested in environmentally sustainable investments as defined under SFDR or Taxonomy or/and the financial instrument considers principal adverse impacts on sustainability factors). This can lead to products being described as sustainable under the Disclosure Regulation, but not being classified as suitable for clients with sustainability preferences in the advisory service. This is particularly difficult to explain to clients who inform themselves about funds beyond the scope of the advisory service and is likely to lead to considerable uncertainty among clients in the future. It is essential that legal requirements regulating a topic are better aligned.

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?

There are some aspects of EU regulation regarding distribution which hinders retail investor participation in capital markets without needed for investor protection. For example:

ESMA's assessment that all alternative investment funds ("AIFs") are obligatory complex without recourse to an individual complexity test (see ESMA MiFID II / MIFIR Investor Protection Q&A, Section 10, Question 1) hinders investors to participate in the capital markets. The category of AIFs covers a wide variety of fund vehicles, ranging from strictly regulated and supervised mutual funds which differ from UCITS investment policies only in certain details (e.g. so called „Gemischte Sondervermögen" under the German investment law ("Kapitalanlagegesetzbuch")), to funds for professional investors which are not subject to investment restrictions (including hedge funds). In order to take account of this diversity and not to bring AIFs in a worse position than investment products without risk spreading and prudential supervision, but with issuer risks (e. g. equities), AIFs should have access to the complexity test under Art. 57 of the MiFID II Implementing Regulation. This would allow an individual classification based on the characteristics of the respective product. Such "simple" AIFs could be distributed without an appropriateness test and would be more easily available for retail investors.

We would also like to point out that the obligations may be excessive not only towards retail clients, but also in relation to professional clients. How little the current MiFID II standards account for the practices and needs of business transactions between per se professional clients is particularly evident in the delegation of fund management functions. This concerns the contractual relationship between a fund management company that launches a fund and a financial portfolio manager that the management company commissions to manage the fund. According to the German Investment Law, the activity of the financial portfolio manager is classified as a service of (individual) portfolio management within the meaning of Article 4(1)(8) MiFID, which leads to a number of problems.

Since in the context of portfolio management rules of MiFID II facilitations do not apply to eligible counterparties, and many detailed requirements cannot be waived even by professional clients, the portfolio manager often has the same obligations to the management company as to private clients. This applies in particular to the information and reports to be provided under MiFID II, for which management companies have no application. The exchange of information between the management company and the portfolio manager is stipulated in the outsourcing contract in accordance with the investment law requirements. The classification of the delegated fund management as a service of portfolio management within the meaning of MiFID also hinders the commissioning of service providers from third countries, to which the requirements for "reverse solicitation" in terms of MiFIR then apply. According to the interpretation of ESMA, it is de facto impossible in the context of reverse solicitation to offer investment advice for a fund portfolio ("advisory services") or to provide information about the range of services offered in third countries through group companies in the EU. This makes it more difficult for management companies to make use of the available expertise for the management of funds with an investment focus on global markets or markets outside the EU (see Art 46 (5) subparagraph 3 MiFIR and ESMA Q&A on MiFID II and MiFIR investor protection and intermediaries topics, Section 13 Questions 1 - 3.

Furthermore, in this context we strongly advocate that the contractual relationship between a management company that launches a fund and a portfolio manager that the management company commissions to manage the fund under a delegation agreement pursuant to the national investment law should not be regarded as a service portfolio management within the meaning of MiFID. This should be made clear at Level I. UCITS Directive and AIFMD already provide comprehensive rules and conditions for delegation, in particular by stipulating that collective portfolio management may only be delegated to authorised and supervised financial market participants.

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.

According to a study by the Ruhr University Bochum [https://die-dk.de/media/files/Auswirkungsstudie_MiFID_II_Prof_Paul.pdf], clients sometimes feel overwhelmed by the sheer mass of information and would like to be able to abstain from certain information.

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.

Digital access to financial products is becoming increasingly important. Younger investors in particular are used to using digital media. However, it is important to allow both digital access to financial products and traditional distribution channels to coexist in order to meet the different interests of investors. We would like to point out that it is important to avoid creating different rules for different distribution channels. Instead, the regulatory requirements must be flexible enough to ensure that they fit for all distribution situations.

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.

Please see our response to question 14.

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.

The approaches set out in paragraph 27 are already relevant for the disclosure of information in the digital context and do not represent any innovations in our view. Therefore it is not necessary to supplement MiFID II with regard to the requirements for the disclosure of information in a digital context. The existing requirements are technology-neutral. Specific requirements would also have to be adapted again and again in case of doubt, and it must be prevented that there are different obligations depending on the distribution channel. See also our response to question 15.

At this point we would like to draw attention to the following: Directive 2021/338 (Covid recovery package) stipulates that information should no longer be provided on paper but should, as a default option, be provided electronically. Retail clients should however be able to request the continued provision of information on paper. As electronic access for investors becomes more and more the norm, we welcome this innovation. In order to ensure that the regulatory requirements are aligned, it is necessary that the PRIIPs Regulation is also adapted accordingly. In addition, Article 3 of the MiFID II Delegated Regulation must be adapted to the new requirements of MiFID II. Right now, Article 3 still provides for certain requirements for the electronic provision of information which are based on the fact that the provision in paper has been the normal case up to now.

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.

It is important to avoid creating different rules for different distribution channels. Instead, the regulatory requirements must be flexible enough to ensure that they fit for all distribution situations. To what extent this is currently the case in the light of digital disclosure is beyond our knowledge. In addition, it is important that legal requirements are comparable for all investment products. The same level of investor protection must apply for all investment products. See also our response to question 14.

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.

ESMA's approach is understandable, but currently we see no need for additional tools, at least for the German market. The national supervisory authority BaFin can already intervene in the case of non-regulated financial market participants if they offer unauthorised financial services. Furthermore, we have substantial concerns regarding data protection and the personal rights of the persons when accessing social media groups and comparable non-open communication between persons. The ESMA statement on Investment Recommendations on Social Media published earlier this year shows that there are already regulatory requirements that affect the use of social media.

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 is definitely an ongoing, increased interest in digital services from retail customers. Some members experienced a steady stream of customers that convert their deposits from offline to online access. Further, there is a strong interest in digital discretionary portfolio management.

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

Q19: Do you consider there are barriers for (potential) clients to start investing via semi-automated 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.

Knowledge barriers: Robo-advisory investing per se is rather simple, clients only need to send their money and the portfolio manager does everything else. But the service is not easily to be understood as clients struggle with constructs as simple as a custody account, investment funds, portfolio management, risk classes and so on. Clients with little knowledge or no experience in investing have to be turned down in the suitability journey, which poses a burden for providers who want to offer low-entry barriers to investors just starting out with investment products.

Technology barriers: Retail clients often have very limited knowledge on IT tools and onboarding processes. User experience has to be designed in a way that enables users to very easily comprehend the required activities or questions asked in every screen. Ideally there should be only few inputs required or information displayed on every page in order to not overload the small screen especially of mobile devices.

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?

The current view gained from e.g. client interviews in user testing is that clients who are interested in investing but get scared by the complexity or their lack of comprehension of the products offered choose to not invest at all, continuing to save in a cash account only. Also, they sometimes go back and seek more traditional concepts (e.g. in-person advisory in a branch or an IFA).

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.

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.

In general, our view is that the MiFID II rules regarding discretionary portfolio management, which apply to typical robo-advisors, remain to be adequate for robo-advisors, be it algorithm-based or based on active portfolio management decisions. This is also important in order to maintain a regulatory level playing field among various techniques for providing certain MiFID services.

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.

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.

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.

Q26: One of the elements that increased the impact on retail investors in the GameStop case 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.

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? Please elaborate.

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.

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.

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

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).

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.

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.

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?

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.

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?

Social media play an increasing role in influencing retail investors' behaviour. Therefore, it is paramount to use social media for educational purposes around capital markets, financial instruments as well as specific use cases (e.g. saving for retirement, inflation, zero or negative interest environment) to increase awareness and know-how rather than for promoting specific products. As recent experiences show, there is a risk that retail investors and especially vulnerable customers are mis-lead by inadequate promotion of investments (e.g. crypto-assets, specific stocks) by mainly unregulated parties (e.g. "celebrities", influencers – with partly unknown incentives) that entirely miss out elaborating on the risks these investments carry as well as addressing any suitability/appropriateness concerns.

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?

On the risks, please see our response to question 36.

Benefits could be that with increasing content on investing, finance and capital markets the population of retail clients using investing to their benefit increases. Germany traditionally has a low percentage of the population that actively invests via funds or equities. If this share is increased and accompanied by a solid regulatory framework safeguarding them from mistakes it will be to the benefit of retail investors.

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?

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.

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.

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.

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.

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.

We feel that open finance is already reality in many areas of financial services on a voluntary basis. Many distribution channels are open to different product providers. This why we do not see that a mandatory open finance approach would necessarily lead to better financial products and services. In addition, we do not think that the rationale of PSD II for introduction of "Open Banking" can reasonably be applied to the area of securities services and products. While payment services are highly standardised and should always lead to the same economical result (execution of the financial transaction), irrespective of the service provider, other financial services, such as asset management, are forward-looking and highly individualised. Finally, we see unresolved issues regarding data protection and data privacy that pose a significant challenge for regulatory changes.

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.

We see the main risks for the security of IT systems in the transmission of data and orders as well as cyber risks in general. Therefore, special attention should be paid to client protection. In the case of an open finance approach, the legal process should allow actions against providers in any EU jurisdiction.

The completeness and timeliness of the collected data is also relevant. Financing is also unclear. It would be disproportionate if the one that is collecting, recording, storing and securing the data should provide them free of charge for third parties.

The customers' point of view must also be considered. We assume that many customers do not agree to sharing personal data, they do not understand the scope of the consent or the content is used like a “mechanical exercise” (like a Cookie consent on a web page). A clear explanation of the importance of open finance is therefore imperative. On top, there could be a misunderstanding about the content of services offered: open finance cannot replace advice, which many customer surveys indicate that it is wanted.

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)?

As we pointed out in our answer to question 43, we do not see that a mandatory open finance approach would necessarily lead to better financial products and services. However, a basic stock of client data, for example, that is generally collected from all distributors could be useful. Customers would not have to communicate their basic data over and over again vis-à-vis various service providers, and distributors can supplement these individually if necessary. In any case, it is important that the individuality of the customers is not put at stake. In addition, there are currently differences in the recording of client data, e.g. in the risk classification. In these cases, a sharing cannot be carried out in a meaningful way.

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.

In the case of an open finance approach, it is imperative that a level playing field exists for all financial market participants and all products. In addition, it would have to be clarified how to deal with third-country issues.

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.

Digital identities could work to the benefit of users. They would save time to go through extensive onboarding questionnaires with every new provider they approach.

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.

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.
