

ESMA Call for evidence On the European Commission mandate on certain aspects relating to retail investor protection

Comments from ADICAE, Asociación de Usuarios de Bancos, Cajas y Seguros (Association of Users of Banks, Savings Banks and Insurance Companies)

Q1: Please enter here any general remarks or comments you would like to make about this call for evidence, including any relevant information about you/your organisation and why the topics covered by this call for evidence are relevant to you/your organisation.

ADICAE, the Association of Users of Banks, Savings Banks and Insurance Companies, considers this consultation to be of vital importance as it deals with issues related to the protection of financial consumers. In this sense, as we are dealing with a financial consumer, the association, representing the consumers' collective in Spain, demands that the general consumer rights, such as those existing in various non-sectorial European regulations and those contained in various national regulations (in the Spanish case, in the Consolidated Text of the General Law on Consumers and Users), be applied to the figure of the financial consumer, which is the subject of this consultation.

Coordination with the Consolidated Text of the General Law on Consumers and Users is necessary, as there are serious inconsistencies and clashes between the legislative texts, as in the specific case of the possibility of the consumer being treated as a professional investor, making it possible to waive consumer rights, which is prohibited by the general consumer protection regulations.

The excessively technical nature of the information provided to consumers - small savers-investors - often renders it ineffective. In most cases it is necessary to have a university degree and specific training in finance to be able to understand the information provided by the institutions, and it is necessary to change consumer communication policies so that they can be understood by the majority of consumers. In a survey carried out by ADICAE with more than 1500 consumers, 40% of them do not understand the communications of their institution and 82% recognise having signed a contract with their institution without understanding the contract.

One of the points to be improved in the current model is that financial institutions only address the disadvantages and problems of the products in the information

provided to the consumer with the sole purpose of complying with the obligation to inform, but with an approach aimed not so much at making the consumer aware of the risks of the product or the convenience or inconvenience and suitability, but presented in a way that does not discourage the contracting of the product.

A clear example of consumer misinformation is the current suitability and appropriateness tests, where a change in methodology is necessary in order to make them truly effective, preventing consumers from contracting products that are unsuitable or unsuitable for their knowledge, investment experience, training and risk profile.

An interesting initiative to study is the Norwegian financial information portal that allows a quick comparison of different financial products to the consumer, from the profitability of the product to its fees, not forgetting the impact of fees on long-term investments and the reduction in the final profitability of the product.

Another important handicap is the processing of consumer personal data. With the use of Big Data and data analysis through Artificial Intelligence, coupled with the huge volume of data handled by consumer entities that allow them to detect and predict consumer behaviour and abnormal events, a parallel and continuous development of consumer data protection rules becomes necessary, avoiding misuse, data transfers and trade with the same, in order to give greater confidence in the system.

In any case, and although the consultation mainly deals with aspects relating to the information provided to savers and investors, we consider it necessary to explicitly address the issue of commercial practices, which in many cases are the key element by virtue of which consumers make their savings and investment decisions without any documentary support. The existence of commercial campaigns that have led to massive abuses has been amply proven in Spain, and would require consumer protection measures to avoid their repetition in the future.

Q2: Are there specific aspects of the current MiFID II disclosure requirements that may confuse or hinder client decision-making or comparability across products? Are there also aspects of the MiFID II requirements that could be modified to facilitate comparability across firms and products, while being drafted in a technology-neutral manner? Please provide details.

The first premise is that the provision of irrelevant information creates confusion, therefore, it is necessary to 1) review and simplify the content of the different standardised information sheets and the information (and its form of presentation)

contained therein and 2) harmonise the different sheets to allow comparison of financial products so that the consumer can make an informed decision.

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

There is an overload of information in different areas of investment product contracting, which is very marked by the incorporation of information that is of little or no use when taking contracting decisions and by the presentation of information in different formats and technical languages that make it difficult to understand.

On the other hand, the delivery to the consumer of different documents (suitability/convenience test, KID, product prospectus in the case of investment funds, etc.) makes them less useful from the point of view of adequate attention and comprehensibility of the fundamental aspects of the product or service being contracted, often leading the consumer to sign without analysing the decision properly.) make them less useful from the point of view of adequate attention and comprehensibility of the fundamental aspects of the product or service being contracted, often leading consumers to sign without properly analysing their decision.

Q4.- On the issue of disclosure, are there any material differences, inconsistencies or overlaps between MiFID II and other consumer protection legislation that are detrimental to investors? Please provide details.

By way of example, Spanish consumer protection legislation provides safeguards that are not respected in the current regulation of the securities market, such as the nullity of any waiver by the consumer of his rights (which in the securities market is contemplated when a consumer requests to be treated as a "professional") or, more importantly, the contradiction that exists in the drafting of general conditions in adhesion contracts, where the general consumer regulation requires clarity and comprehensibility that is lacking in contracts and information documents for investment products and services.

This is related to the tendency in securities market and investment services regulation to speak of "retail investors", when this category can include both consumers and non-consumers. We therefore consider it necessary to address and develop the figure of the financial consumer, and its inclusion in all regulation, who enjoys both the specific rights and safeguards established by sectoral regulation and the same rights granted by general consumer protection regulations.

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

The consumer needs to be provided with comprehensive product information, but in an easily understandable form, highlighting key aspects such as profitability, risks, guarantees, disclaimers and redemptions, and costs of the product or service.

Along with the content, the way it is presented is of enormous importance. The information must be written in such a way that the consumer can understand the product or service, which requires greater standardisation, greater simplification (highlighting the fundamental aspects) and greater clarity, using language that avoids as far as possible the use of technical terms or financial jargon that discourage reading and analysis.

Q6: What are the practical lessons from behavioural finance that the Commission and/or ESMA should take into account when designing regulatory disclosure requirements? Please provide details and practical examples.

Q7: Are there any issues that have not been adequately addressed by MiFID II on information that prevent clients from receiving adequate information on investment products and services prior to investing? Please provide details.

Q6 and Q7.- In our daily practice, consumer associations come across many cases of consumers who have contracted products without really understanding the product contracted and the risk assumed. In some cases, these are people who need to recover the capital invested and who have not understood or have not had the conditions they signed up for properly explained to them, and when they try to recover this capital out of necessity, they have been refused. The necessary suitability and appropriateness tests should be highlighted, since, if properly carried out, they should be a sufficient argument to prevent the contracting of a product that is not suitable or appropriate for the consumer, thus becoming a guarantee instrument for the consumer instead of the current protection or guarantee tool for the marketer (in Spain, at least, we have witnessed how banks that abusively marketed complex products tried to appeal to the tests as an element of exoneration from their own liability). But this requires making it easier for the consumer to have access to all the contractual documentation for a calm analysis at home prior to contracting, and even to seek possible independent advice regarding their rights and/or the risks of the product.

On the other hand, the various provisions on pre-contractual and contractual information established in the current regulation constitute obligations to guarantee formal, documentary transparency, but do not guarantee compliance with the principle of material transparency which has been consolidated by the Court of Justice of the European Union in the field of consumer protection. If, despite the provision of documents, the consumer cannot reasonably understand the legal and economic scope and consequences of the product or service for him, the desired transparency is truncated.

Finally, Mifid II has not addressed the problem of marketing practices. In too many cases, the verbal information provided by the seller to the consumer takes precedence, precisely because of the complexity of the documents drafted, which leads to greater attention being paid to the verbal explanations which, in a more colloquial and less technical manner, are provided prior to contracting. This creates a field of significant risks for consumers, who will have formally signed the receipt of the documents, thus accrediting the seller's formal compliance with the obligations imposed by Mifid II, but who will at the same time have made their decision on the basis of information whose content, in the event of conflict or discrepancy, will be difficult for the consumer to accredit. For practical purposes, a "transfer" of savings instrumented in sight accounts and term deposits to investment funds is taking place in Spain, a transfer conditioned by the commercial and guidance work of the employees involved (especially in the banking sector).

Q9: In terms of reporting on sustainability risks and factors, do you see any critical issues arising from the overlap of MiFID II with the Sustainable Finance Disclosure Regulation (SFDR)¹⁴ and other legislation covering ESG issues?

Q9.- Failure to complete the taxonomy aspects creates risks about the correct and truthful advertising of an investment or product as sustainable or green, exposing consumers to highly negative greenwashing practices in shaping a framework for promoting socially and environmentally sustainable investment.

In this context, the risks arising from the overlap between MiFID II and SFDR lie in the quality of the information to be provided to the potential consumer subscribing to savings and investment products or services.

On the other hand, ESG criteria should include those related (from a good governance perspective) to the treatment of customers and out-of-court conflict resolution mechanisms.

Q10.- Are there other aspects of MiFID II disclosure requirements and their interactions with other investor protection legislation that you

consider could be improved or where specific action is needed by the Commission and/or ESMA?

We refer to the previous answers provided, in particular with regard to question 7.

Q11: Do you have empirical data or insights based on actual consumer usage and engagement with existing MiFID II information that you would like to share? This could be based, for example, on consumer research, randomised controlled trials or website analysis.

Although ADICAE has various analyses of the forms of marketing and the information offered to consumers, they are still being updated and we will send them as soon as they are available.

Similarly, some data from ADICAE's surveys on financial education offer some interesting conclusions from the point of view of consumers' use and understanding of the financial information they are offered. (Link to latest survey)

Q12: Do you observe any particular group(s) of consumers who are more willing and able to access financial products and services through digital means and who are therefore disproportionately likely to use digital information? Please share any evidence you may have, including in the form of data.

Q12.- Younger generations are digitally savvy and have the necessary skills to access financial products and services. In many cases they would need to acquire the specialised knowledge to make the decision that best suits them, but the vast majority lack sufficient capital to invest. On the other hand, the profile of older financial consumers with savings and willing to invest lacks the necessary skills to access digital financial products and services. We also reiterate the importance of clarity of information and understanding on the part of the people accessing these products; age is no guarantee of understanding, only specialised financial training and experience.

We find ourselves in antagonistic positions. On the one hand, we have digital natives and digitally literate consumers who have a remarkable ease of access to this information and the necessary hardware, but who run the great risk of not accessing or reading the information and directly ticking the confirmation of reading and acceptance boxes, without having read and understood the documents. This should be avoided at all costs.

On the other hand, there is the serious problem of the comprehension of the information provided, which, as pointed out in the text of this consultation, can be overcome with the implementation of videos and other forms of transmitting information. It is necessary for training and information to be transmitted in a critical manner and taking into account the main problems faced by the consumer, for which the participation and involvement of consumer associations is necessary.

Of greater importance is the problem of consumers at risk of financial exclusion due to lack of education or digital literacy that limits their access to financial services.

Q13.- Which technical solutions for digital disclosure (e.g. solutions listed in section 27 or additional techniques) may work best for consumers in the digital age, and in particular for smartphones? Please provide details on the solutions adopted and explain how these have proven to be an effective way of providing clear and non-misleading information.

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

It is appropriate to consider incorporating the approaches set out in paragraph 27, but tailored to individual consumers through standard profiling and in the awareness that too much ancillary information leads to misinformation. There are two key concepts in the approaches set out in paragraph 27 that concern financial consumers in a very important way: information handling and the security of browsing in the digital environment. Businesses should make an effort to provide essential information in a clear and understandable way and to protect consumers from fraud that could put their personal data and finances at risk.

In this respect, some of the guidelines contained in paragraph 27 (such as the possibility to store information, the establishment of measures to limit security risks, etc.) should go further in their scope, and be configured as requirements or obligations contained in the standard and not as mere recommendations of free application.

Q15: Should the relevant requirements of the MiFID II Directive on customer information be adapted in light of the increased use of digital information? If so, please explain how and why.

Anyone under 30 years of age would be able to receive the information digitally, but we are concerned about and want to emphasise the comprehensibility of the information provided. ADICAE also advocates that consumers should always be given the option of receiving printed information, and that they should always be able to access all information quickly and easily. This reduces the digital divide between the more digitally literate and the less digitally literate generations.

In any event, and referring to the issue raised in this question, it would indeed be necessary to adapt various Mifid II requirements to the dissemination of information and trading through digital channels. These are channels in which the risks of insufficiently weighed, impulsive or mistaken trading are increased, and in which even the way the information is arranged on the device or website may condition the way in which the consumer interacts with it. For this reason, a detailed analysis would be necessary in order to determine some basic requirements in this respect. This is without prejudice, moreover, to the approaches contained in the aforementioned paragraph 27 of the consultation and the comments made in this respect in the previous question.

Q16.: Do you see a need for regulators to have additional tools to monitor disclosures and digital advertising behind "paywalls", semi-closed forums, social media groups, information provided by third parties (i.e. FINfluencers), etc.? Please explain and outline the adaptations you would propose.

The use of surreptitious or subsidised advertising must be prosecuted and sanctioned in an expeditious and dissuasive manner. There must be an obligation to give a clear and explicit warning that an advertising message is being conveyed. Disclosure and advertising monitoring tools are necessary to identify false or malicious information. In this sense, the profiles and persons who lead this advertising are also responsible for the information they disseminate to the public.

In this respect, supervisors are limited by jurisdictional issues, which would require legislative adjustments that would enable the supervisor to carry out its work not only according to the agent issuing the message, but also according to the content of the message, so that if an "influencer" makes investment recommendations, the supervisor could intervene. Moreover, the very framework of these disclosures (increasingly the internet) requires the development of AI systems and software to facilitate the work of supervisors in this regard.

P17 to 22.

It is important to note that with regard to robo-advisors, there is a growing need for the consumer to be properly informed and for their use to result in a real benefit for the consumer with a reduction in the fees charged.

Moreover, the algorithms, design criteria and programming in this type of service must be evaluated in order to avoid attempts at exemption from liability or, above all and fundamentally, a lack of transparency in the operation of robo-advisors and therefore undesirable and unacceptable conditioning of the consumer's decision to contract these services.

Q23: Do you consider 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 and intermediation services via online platforms? If so, please explain which ones and why.

Yes, online platforms are currently offering all investors (without first assessing their experience) a range of products that in many cases are difficult to understand for people without specific financial training. In the case of cryptocurrency exchanges, the range of products on offer is very varied (staking, P2P, liquidity pools, farming, etc.) We believe that these exchanges should be obliged to assess the suitability of their potential investors and the suitability of the products they are going to purchase.

Q24: Do you observe business models in online brokers that pose an inherent conflict of interest with retail investors (e.g. online brokers making profits from their clients' losses)? If yes, please explain.

Yes, in the case of cryptocurrency exchanges, a fairly obvious case is that of futures and leverage trading. In this system, when the client opens a trade, he/she sets a stop loss to limit the loss of the trade and a take profit to close the trade in case of profit. From the moment the investor sets the stop loss, the exchange knows the leverage and the liquidation position: it therefore knows perfectly well that if the price of the asset falls to price "x" there will be massive liquidations of positions, benefiting the exchange with respect to retail investors who have this data.

ADICAE insists that the consumer must be informed of the remuneration or the mode of remuneration perceived by the Agent in order to be able to make his information decision consciously and according to his preferences and

investment profile and not guided by the Agent towards those products where the Agent perceives a higher remuneration.

Q25: Some online brokers offer a wide and sometimes very complex range of products. Do you consider that these online brokers offer these products in the best interest of customers? Please explain and share data if possible.

No. In order for the products offered to be considered as being offered in the interest of customers, it would be necessary to first assess the suitability of the customer and the appropriateness of the product in question for this customer.

Although we do not have specific data on this issue at this stage, it is certain that, on the one hand, there is a risk that product governance criteria could be violated by transferring the responsibility for accessing and contracting a given product to the consumer. On the other hand, it seems extremely risky to set up, without any specific control, "virtual shop windows" for financial products that do not take into account the characteristics of the potential customer when displaying one type of product or another, or to avoid displaying unsuitable products or products that could mislead or confuse the consumer.

Q26: One of the elements that increased the impact on retail investors in the case of GameStop was the widespread use of margin trading. Do you consider that the current regulatory framework sufficiently protects retail investors against the risks of margin trading, especially those who cannot afford to take them? Please explain.

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

We understand that the current legislation is not sufficient for the new concepts, and that it must be adapted to new technologies and new forms of contracting and new service offers.

P28 to P35

Q35: The increased digitisation of investment services also brings with it the possibility to provide investment services in other Member States with little additional effort. This is evidenced by the rapid expansion of online brokers across Europe. Do you see problems related to this increased provision of cross-border services? Please explain.

In practice, banking competition in the Member States is facing a process of concentration that requires the adoption of measures to ensure adequate levels of competition. It is in the consumer's interest for new players to compete with each other in order to avoid uncompetitive practices, to avoid concentration of supply in a few institutions and to encourage lower fees and transactions that provide better value for money for the consumer.

On the other hand, the foreseeable different development of specific regulations (for example in relation to crypto-assets) in the different Member States may lead to distortions of competition and risks to the effective application of consumer rights. For example, in the case where there is a specific regulation for a product in the consumer's State of residence, the consumer accesses the contract through an online platform that offers the product registered in another Member State where there is no such regulation.

Q36: Do you see an increase in retail clients' reliance on information shared on social media (including any information shared by influencers) to inform their investment decisions? Please explain and, if possible, provide details and examples. Do they enhance or hinder customers' decision-making process?

Yes, they make it difficult to make conscious decisions by seeing only the good side, and excessive positive publicity by celebrities or influential people, but they do not get to know the real risks of the products they buy.

It is important to improve consumer education and information, so that consumers can categorise the reliability of sources, while at the same time monitoring networks (where the implementation of technological tools at the service of supervisors will be necessary) to detect cases where obvious risks to consumers are detected.

Q37: What do you see as the risks and benefits associated with using social media as part of the investment process and are there specific

changes that should be made to the regulatory framework to address this new trend?

It is important to define rules for the use of social media in this area, explaining clearly when it is being used for advertising and paid purposes (either directly or indirectly). The advantage of social media is that the information they disseminate has a wide reach and reaches many users, although due to the digital divide and the lack of literacy in this area of a significant part of the population, it is information that is not accessible to everyone. Risks centre on the content of the information disseminated and the opacity that may lie behind the profiles that promote it, as well as on determining in which cases it is advertising and subject to applicable regulatory requirements.

Q38: Do you understand the practices whereby 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 a campaign is 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 its investment decision on information shared on social media versus a client group that does not base its investment decision on information from social media? Please explain.

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

Q41: Have you observed an increase in retail trading of "meme stocks", i.e. stocks that experience spikes in social media mentions? Please share any evidence of this type of trading and, if possible, statistics on the performance of retail investors trading these instruments.

Q42: Do you consider that the current regulatory framework for warnings provides adequate protection for retail investors? If no, please explain and describe what changes to the current regulatory framework you would consider necessary and why

Not enough. The fact of reflecting a warning in a contractual document is usually ignored or underestimated by the consumer, who, as we indicated in the answer to question 7, in many cases bases his opinion and decision on information provided verbally "face to face". A specific example of this is the obligation imposed in Spain for the consumer to sign and reflect in handwritten form that he is aware of the risks he is assuming, an obligation which has been practically ineffective in certain segments of the population.

We reiterate the general proposition that the contracting of a product that is not suitable or appropriate for the consumer cannot be allowed.

Q43: Do you believe that consumers would benefit from the development of an "open finance" approach similar to open banking and the provision of consumer credit, mortgages, etc.? Please explain with concrete examples and outline in particular what you see as the benefits for retail investors.

It is important to make a good definition of the new model to be implemented in a way that safeguards the rights of consumers and the protection of their personal data, making good use of them.

In any case, the application of an Open Finance approach requires the establishment of mechanisms that give the consumer saver-investor a governance role in the use of his or her data. This is particularly necessary if we take into account the fact that "open banking" has brought benefits mainly to the entities offering loans and credit, rather than to consumers (the degree of benefit for customers exists but is significantly lower than for credit institutions). Moreover, there are significant differences between the application of this approach to the strictly banking and payment services sector and the investment sector, where the direct benefits for consumers in a risk-benefit balance are more doubtful. Therefore, a development of open finance will require, on the one hand, the establishment of sufficient safeguards on the granting of consent for the use of data, so as to avoid "induced" consents, either by mistake or without an effective understanding of the scope of the decision. On the other hand, it will be necessary to determine in detail the scope of the transfer of data, the use of the data, etc.

Given that the provision of advisory services is very limited in Member States such as Spain, the benefits for consumers in this area are understood to be limited; a priori it seems that "open finance" could serve to tailor the commercial offer to the characteristics of the consumer in some cases, but this is an aspect that still requires further analysis.

Q44: What do you see as the main risks that may arise from the development of open finance? What do you see as the main risks for retail investors? Please explain and describe how these risks could be mitigated as part of the development of an open finance framework.

The implementation of this system makes it necessary to establish a clear traceability of access to the data, requiring an authorisation or request for access by the consumer so that the consumer provides it to the institution, which can verify its authenticity by means of a secure verification code. Another option would be to transfer the current access requirements to the CIRBE data request.

Q45: What investor client data could be shared in the context of developing an open financial framework for investments (e.g. product information; client balance information; client investment/transaction history data; client suitability/suitability profile)?

Providing information on customer balances seems extremely excessive and adds little value when assessing the offer or contracting of products, other than from the point of view of strictly commercial interests, which is why we believe that this information should not be passed on. As for the suitability/suitability profile, if it is shared, it should be determined as a merely indicative element, without this information exempting the obligation of a new assessment (both because there is no guarantee of adequate prior assessment and because the circumstances of affinity or aversion to risk and others may vary over time).

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

The first problem is to define the standard of the report and data to be included, as well as the interoperability between the different databases to be included, but apart from defining them, it is necessary to create specific working groups made up not only of financial institutions but also of supervisory authorities, administrations and consumers represented by consumer associations in order to be able to shape the standards of the new model.

On the other hand, the development of open finance faces challenges related to data protection, decision-making on the use of such data (which should always

be the customer's responsibility), how to obtain authorisations for the use of data, etc. In short, one of the major challenges faced, beyond those of a technical nature, focuses on the consumers, i.e. the data subjects, and on the security and correctness of the use of such data.

Q47: Do you see a need to promote data portability and the development of a portable digital identity? Describe the main elements on which a digital identity framework should focus.

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

Regulatory intervention is essential for the development of open finance, given the risks to consumers inherent in this model, but more needs to be done on the detail of what rules would need to be changed and in what direction.

Q49: What do you see 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.

Establishing data protection safeguards and limiting the data to be shared, incorporating the possibility to freely choose what data or range of data is shared and for what purpose is a key element to gain the trust of consumers, who are likely to be more reluctant to provide this information as they are not aiming to obtain a loan but are providing data for purposes that they will not perceive as beneficial or useful to them.

In the same vein, the benefits and benefits of open finance for consumers will need to be made clear and will depend on the approach with which it is developed.