ESMA Call for Evidence on Investor Protection
(ESMA consultation document Nr 35-43-2827, published 1 October 2021)

EUSIPA response
FINAL
Latest update: 21 December 2021

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.

EUSIPA, the association bundling the voice of the issuers of structured investment products in Europe's main markets including the United Kingdom and Switzerland, welcomes the endeavours of ESMA and the EU Commission to thoroughly prepare any review of and potential update to the investor protection rules in the area of financial services.

EUSIPA uses the occasion of this Call for Evidence to mark-up again concerns of an overarching nature which in the eyes of her members deserve a somewhat stricter consideration than was the case in the past with similar legislative reviews and their preparation.

1) **A review of the investor protection regime, understood as the sum of provisions set out in various different rulesets, needs a wholistic evaluation across these.**

Investor protection rules relevant for retail distribution are embedded in a number of regulatory frameworks and rulesets originating at the EU level. They often apply cumulatively as they are addressing different legislative needs.

Their bandwidth extends from rather principle-based general rules, such as the MIFID Appropriateness verification, for example, over specific technical provisions in the format of the Regulatory Technical Standards meant to provide clarity on the application of the EU PRIIPs Regulation's rules onto, to give other examples, the product-specific disclosure regime for ESG aspects under the SFDR by way of a simplified layout or the White Paper requirement for the issuers of crypto-assets under the upcoming Markets in Crypto-Assets Regulation (MiCA)

a) Example 1: disclosure rules MIFID/Prospectus/PRIIPs

The before situation is exemplary illustrated by the fact that there is currently no clear distinguishment or segregation between the information requirements under relevant EU regulations and directives, particularly regarding the underlying standard deciding about which information needs to be disclosed in what depth/detail. To be more specific, currently information on a financial instrument is, for example, required under the PRIIPs Regulation, MiFID and the Prospectus Regulation, with the latter two comprising more than one standard for providing such. This situation presents itself in more detail, as follows:

- The Prospectus Regulation requires, for the main part of the prospectus, the disclosure of all necessary information which is material to an investor for making an informed assessment of the issuer, the securities and the issuance of the relevant securities (Article 6), and for the prospectus summary the key information that investors need in order to understand the nature and the risks of the issuer and the securities (Article 7).
- Under MiFID rules there is on a general basis, "appropriate information" required with regard to financial instruments, including relevant risks and targeted investor type, as well

as bespoke information on cost and charges for individual financial instruments (Article 24.4).

- Finally, the PRIIPs Regulation again requires the disclosure of "key information" regarding the relevant financial instrument (Article 8).

The before clearly illustrates, that there is a multitude of competing information requirements regarding product information and underlying standards.

The situation of overlapping disclosure requirements further is illustrated by the fact that there is currently only one rule seeking to avoid or at least reduce duplication of information in above area - the EU Prospectus Regulation allows to replace part of the prospectus summary by referring to a KID. However, this optionality does not alter the mentioned multitude of competing information requirements and underlying standards. In practice, the different underlying standards tend to be regarded as interchangeable, based on an underlying notion that under all mentioned disclosure requirements investors need to receive all (product-related) information required for an informed investment decision, with the focus increasingly being put on readability and understandability at the same time. This is problematic, not least due to the page limits in place both for the KID and the prospectus summary. It also is a main reason for the afore-mentioned duplication of information, in practice.

b) Example 2: bespoke financial instruments and general background information

Another source for information inconsistencies and/or duplication can be seen in the current absence of a clear distinguishment between information describing a bespoke financial instrument, and information meant to helping investors understand certain types of financial instruments on a general level (as covered by MiFID). This situation might in practice lead to the misunderstanding, for example, that a PRIIPs KID also has to provide a sort of "background understanding" with regard to how a certain type of financial instrument works "in general". On the other hand, only the PRIIPs KID contains the highly necessary information regarding the expected performance and overall risk class of the bespoke financial instrument. The before illustrates that general information of the mentioned kind is currently not integrated with information on the bespoke financial instrument.

c) Example 3: MIFID/IDD

As for further inconsistencies which may come about even as a result of a review, it may be useful to recall that while MIFID investor protection rules are, due to their general nature, obviously of paramount importance in any review of the investor protection principles, it should not be overlooked that the MIFID-originating rules stand next to equivalent provisions of the Insurance Distribution Directive (IDD) which applies as soon as a financial product, for reasons mostly unrelated to its pay-off's and underlying's characteristics, such as national tax provisions, is embedded in an insurance contract.

Summarizing and concluding on the above, EUSIPA wishes to underline that any review of investor protection rules should as a matter of principle not be handled with a singular focus on

a specific "investor protection chapter" contained in one legal act but rather follow a holistic review of the regulatory implementation under the commonplace business and market practices in the EU retail markets.

Methodologically any such review should always aim at probing which information provided to the retail markets for regulatory or commercial reasons actually is effectively used by the retail investor with which intention/purpose and with which result (measured against the intended purpose).

EUSIPA understands and would explicitly support that the EU's Retail Investment Strategy is specifically used in this context to address the above situation thus ensuring that potential amendments to the single acts dealing with investor protection, including but clearly not limited to MIFID rules, are put forward in a consistent and harmonised manner.

A last aspect EUSIPA wishes to ESMA to draw into consideration is that any measures seeking to improve the level of investor protection in the EU's internal markets ultimately needs to be sense-checked against equivalent rules in place in OECD markets of a similar sophistication and development as the EU, most notably the UK, Switzerland and the US so to avoid the EU regulatory framework putting excessively high burdens on retail investors compared to before markets outside the EU. This aspect is in our eyes of a particular and increasing relevance when considering the proliferation and market penetration of digital business tools, including online order platforms, which are accessible to customers independent of their country of residence.

2) Review of MIFID specific provisions dealing with investor protection should consider the integrated functioning of all relevant mechanisms in place

Insofar as, more specifically, MIFID originating rules dealing with investor protection are being reviewed, EUSIPA reiterates its previously stated opinion that the single elements of the investor protection mechanism already applied in practice under MIFID should not be amended on an individual basis without carefully evaluating their functioning from an overall perspective.

To these elements belong, at least:

- the client categorisation rules,
- the target market indication requirement,
- the appropriateness and suitability tests/verification, including the application of the complexity criterion.

From a EUSIPA perspective, it seems evident that changes made to one of the before elements are likely to trigger a re-evaluation of the scope and functioning of the other mechanisms. By way of an example, any refinement of the client categories might likely impact the target market as well as definitions/practices used to evaluate suitability and appropriateness, all with regard to a whole range of different financial products.

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3) Quantitative evidence across EU markets needs to substantiate current shortcomings in investor protection that justify a change of current rules

Finally, and as a remark also made already by EUSIPA repeatedly as a response to various consultations in the past, EUSIPA wishes to insist that legislative proposals leading to a change of the current practice, especially in the area of investor protection are being underpinned by sufficient and adequate quantitative evidence suggesting a strong need to deviate from the current rules and practices.

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EUSIPA is listed in the transparency register of the EU under number 37488345650-13.

On EUSIPA:

EUSIPA, the European Structured Investment Products Association was founded in 2009 and represents the interests of the European structured investment products business and unites associations from Austria, Belgium, France, Germany, Italy, Luxembourg, Sweden, Switzerland, The Netherlands, The United Kingdom. The focal point of its activities are derivative instruments such as structured investment products and warrants. EUSIPA aims to create an attractive and fair regulatory framework for these financial products. The umbrella association acts as a contact for politicians, the EU Commission and the European Securities and Markets Authority (ESMA) in all questions concerning structured products. Whenever the need arises, the association is at hand to provide expert advice and opinions, thus playing an active role in the policy dialogue. Greater protection for investors as well as a comprehensible and transparent product landscape, are important concerns for the association. Together with its members, it is actively engaged in promoting Europe-wide standards throughout the sector. These include clear product classification, standardised technical terms, and a broad commitment among the member associations to abide by a code of conduct for the sector.

More information under: www.eusipa.org