

# Final Report

On the 2023 Common Supervisory Action and Mystery Shopping Exercise on marketing



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# 1 Executive Summary

## Reasons for publication

In 2023 ESMA launched a Common Supervisory Action (CSA) with National Competent Authorities (NCAs) and a Mystery Shopping Exercise (MSE) on the application of MiFID II disclosure requirements with regard to marketing communications. An important aspect of this exercise is to learn from each other's approach on how to conduct supervisory activities related to marketing communications (including advertisements).

The 2023 CSA covered firms' internal policies, processes and procedures adopted to ensure compliance with MiFID II requirements applicable to marketing communications including advertisements (in addition, the CSA considered governance aspects such as questions on the role of control functions and senior management). Part of the assessment of the NCAs for both the CSA and the complementary MSE was to review examples of marketing communications (including advertisements) and to assess their compliance with MiFID II disclosure requirements.

Both the CSA and MSE have been used to gather evidence on the topic of greenwashing.

This report sets out ESMA's analysis and conclusions on the CSA and MSE and presents ESMA's views on the findings. It concludes with the follow-up actions envisaged by NCAs.

## Contents

Section 2 explains the background and organisation of the exercises, Sections 3 and 4 set out the CSA's main findings complemented by the findings of the MSE.

More specifically, section 3 focusses on the organisation and procedures related to marketing, this includes processes and procedures regarding the drafting, approval and review of marketing communications including advertisements. The section also covers outsourcing arrangements in place, the recordkeeping and complaints handling and finally a part is included on the preapproval of marketing material by two NCAs.

Section 4 reports on the findings related to the review of the contents of marketing communications including advertisements to clients and potential clients, and whether they comply with MiFID II requirements.

Section 5 includes follow-up actions planned and or taken by NCAs and next steps.

## Next Steps

Building on the findings of both the CSA and MSE exercises, ESMA will continue liaising with NCAs on this topic and exchange on their (planned) follow-up actions.

Furthermore, ESMA will assess whether there is a need to use supervisory convergence tools to build a stronger supervisory culture across the EU and promote effective, sound and consistent supervision with regard to marketing communications including advertisements.

In addition, ESMA will stand ready to prepare Level 2 measures stemming out of the Retail Investment Strategy once it is finalised.

## 2 Background

1. In 2023 ESMA launched the Common Supervisory Action (CSA) and Mystery Shopping Exercise (MSE) with National Competent Authorities (NCAs) on the application of MiFID II disclosure rules with regard to marketing communications. The topic of marketing communications including advertisements<sup>1</sup> was selected for the 2023 CSA and MSE based, amongst others, on the fact that ESMA identified aggressive marketing practices as an investor protection related risk in the ESMA Strategy 2023-2028<sup>2</sup>. This risk is characterised by the risk of inappropriate products being purchased by new, young and/or first-time investors, who do not understand the characteristics and risks of the products they are investing in. There is likely an inadequate assessment of whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded. This can subsequently lead to the risk of unclear, unfair and misleading communications by investment firms to retail investors to nudge them to make decisions on a do-it-yourself basis. The CSA and MSE exercises do not assess the materialisation of these risk, but assess compliance of marketing communications with the applicable MiFID II requirements.
2. In addition, in its 2022 technical advice to the Commission<sup>3</sup>, ESMA noted the key role that marketing communications can play in determining consumer behaviour and influencing investment decisions, especially considering the phenomenon of ‘anchoring bias’ that makes people be over reliant on the first piece of information they receive. Retail investors who are subject to misleading marketing communications are more likely to be mis-sold an unsuitable/inappropriate financial product and service, even where correct information is provided through regulatory disclosures (such as PRIIPs KIDs). For many retail investors, decisions about if and how to invest are significantly influenced by information conveyed in marketing communications. Younger, less experienced investors, operating online are particularly vulnerable. Such investors are especially targeted by marketing on social media through for example influencers but also through other types of (private) messages on social networks.
3. The MiFID II framework includes provisions related to marketing communications, for example, MiFID II requires marketing communications to be clearly identifiable as such. In addition, the MIFID II Delegated Regulation clarifies that information contained in marketing communications needs to be consistent with any information the firm provides to clients in the course of carrying on investment and ancillary services. That being said, considering (aggressive) marketing has been identified as a risk, the CSA provided for a valuable

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<sup>1</sup> It should be noted that MiFID II framework only refers to marketing communications and it does not provide a legal definition on “advertising” or advertisements. A possible common understanding for this concept was suggested by ESMA in its 29 April 2022 [advice to the EC on certain aspects relating to retail investor protection](#) where it is stated that “advertising is a form of marketing in the form of a non-personal message to promote or sell a product or service”. In that document it is also explained that “online advertising is a part of the marketing communications tools (together with promotions, sales, branding and campaigning)”. NCAs referred to these clarifications by ESMA when identifying and assessing advertising cases for the purposes of 2023 CSA. If a national definition exists on ‘advertisements’ NCAs used these national definitions available to them when assessing marketing material as part of this CSA.

<sup>2</sup> [ESMA Strategy 2023 - 2028 \(europa.eu\)](#) p. 13

<sup>3</sup> ESMA35-42-1227

opportunity to exchange knowledge and experience amongst NCAs and to learn from each other's approach on how to conduct supervisory activities with regard to marketing communications including advertisements.

4. Both the CSA and MSE were performed based on a common approach and high-level methodology developed by ESMA.

## 2.1 Organisation of the Common Supervisory Action

5. ESMA coordinated the CSA, which was executed by NCAs in the course of the year. The timeline of the 2023 CSA was the following:

- May – December 2022: Preparatory work (definition of methodology/operational planning).
- January – October 2023: Execution of the common supervisory action by NCAs. This included the analysis of aggregated results of the national supervisory activity by NCAs.
- October – December 2023: Process evaluation and report of conclusions, this included NCAs providing the aggregated results of the national supervisory activity to ESMA by 31 December 2023.

6. The CSA covered firms' internal policies, processes and procedures adopted to ensure compliance with MiFID II requirements applicable to marketing. In addition, the CSA considered governance aspects such as questions on the role of control functions and senior management. Part of the assessment performed by the NCAs included whether the marketing communications (including advertisements) comply with the MiFID requirements. More specifically, the reviews contained:

- Whether the information was clearly identifiable as marketing communication;
- Whether the content of marketing communications (including advertisements) was provided in a fair, clear and non-misleading manner, regardless of the means of communication used;
- The criteria used by the firm for the selection of the target audience of the marketing communications (including advertisements) concerning financial instruments and investment services;
- The organisational requirements and processes of firms in relation to marketing; and
- The social media strategies of firms, including use of influencers or digital engagement practices.

7. Overall, 27 NCAs participated in the 2023 CSA. The exercise at national level was organised and run by the NCAs on the basis of the ESMA methodology. Wherever divergences existed in the execution of national actions, they were explained and justified by NCAs in their national reports to ESMA.



8. In order to ensure the representativeness of the firms in the sample for the 2023 CSA, NCAs included in their national samples both larger and smaller firms. In choosing the samples of firms in scope for the exercise, NCAs used various sampling techniques, taking into consideration the type, size and business model of firms, the types of the products and services offered, as well as the coverage of retail clients. A similar approach in selecting firms was handled for the MSE.
9. A total of 208 firms were included in the CSA sample (an average of 8 firms per participating NCA) and a total of 62 firms were included in the MSE sample (an average of 9 firms per participating NCA). The total sample for both exercises mostly comprised credit institutions (57% of firms in the CSA sample and 58% in the MSE sample). In addition, the samples included investment firms (accounting 43% of the CSA sample and 42% of the MSE sample).

## 2.2 Organisation of the Mystery Shopping Exercise

10. Since the MSE was complementary to the CSA, the timeline was the same as for the CSA. The methodology for the MSE differed slightly and included:
  - The scope of the exercise (in terms of which types of firms and services should be covered, MiFID requirements covered, and the type of information analysed);
  - The assessment framework (in terms of possible supervisory approaches and questions to ask); and
  - The characteristics of the sample firms and financial products to be covered.
11. A total of seven NCAs participated in the exercise. The exercise at national level was organised and run by the NCAs on the basis of the agreed methodology, while a number of small divergences from it were explained and justified by NCAs in their national reports to ESMA. NCAs involved their senior management, particularly in the stage of approval of results and that of initial planning of the exercise at the national level. Most NCAs reported to their Management Boards their results prior to sharing them with ESMA, while various divisions were internally involved in the planning and execution of the exercise steps.
12. Almost all participating NCAs did not announce in advance that they were performing the exercise nor notified the firms in scope, since they believed this could have altered the behaviour and jeopardised the accuracy of findings of the MSE.
13. The ESMA methodology allowed NCAs to outsource the exercise – or parts thereof – to external specialised firms. From the national reports, it emerged that the outsourcing option was used by two out of the seven NCAs. The majority of NCAs preferred to employ NCAs' resources to navigate the online marketing communications of identified firms.
14. The outsourcing included the organisation of training, meetings and consultations with the external service provider in order to align the scope and methodological approach, while

NCA kept the overall responsibility in overseeing the carrying out of the exercise. Public tenders were primarily used in order to identify suitable service providers for the exercise. The assessment of candidacies was based on the prior experience and expertise of external firms, their timing and methodological particularities, the availability of mystery shoppers, compliance with GDPR regulations, etc.

### **3 Organisation and procedures related to marketing**

#### **3.1 Internal controls and processes**

15. NCAs were asked to assess the types of arrangements and procedures firms had in place regarding the production, approval and review of the marketing communications- including advertisements. This included, amongst others, assessing which control functions were involved and whether all types of advertisements, including those on social media, would fall under the same or similar procedures. With regard to the processes of reviewing the marketing, NCAs looked at whether firms checked that the material was fair, clear, and not misleading, whether it reached its defined target audience, if information was up to date and distributed as was approved, and finally, if there was a process in place to take remedial measures.
16. When assessing the elements named above, NCAs considered whether firms had different internal systems and controls in place in relation to sustainability related claims. More specifically, if they had different processes in relation to sustainability claims related to a product or service offered by the firm or sustainability claims about the firm itself compared to sustainability claims related to third party products the firm distributes. This part is included in a separate sub-section below.

##### *3.1.1 Processes in place for the drafting of marketing communications including advertisements*

17. Overall, the assessments carried out by NCAs confirm that investment firms have procedures in place regarding the production of marketing communication -including advertisements. Responses described a general common approach in the arrangements and procedures that firms have in place regarding the production, review and approval process of marketing communications, including the involvement of both a business function (commercial and marketing units) and a control (compliance, legal and/or risk) function. Generally, processes are reported to be the same for all content.
18. However, some responses did show difference in approaches, namely:
  - The approaches adopted by firms may differ depending on the type of financial instrument or the distribution channel through which product advertisements or generic brand related (not product specific) marketing communications are published.

- The level of details of the internal procedures has been reported to differ between firms, as it may vary depending on the size of the firm or for firms that are part of a bigger group.

19. With regard to the definition of ‘marketing communications including advertisements’, responses highlighted that, overall, firms have an internal list with descriptions of what constitutes “marketing and advertisement” content but there is little conformity or convergence across firms with respect to it.

20. It was noted that a definition would be beneficial in this regard, to ensure that all firms are adopting similar practices and approaches to the different mediums they use to communicate with their target audiences.

### *3.1.2 Approval processes*

21. The assessments showed that generally approval procedures are the same for different types of marketing materials regardless of the communication channel used. Focusing in particular on the communication channel, responses confirmed that, in most cases, social media posts, pop-ups in apps, banners on websites are considered as marketing communications and they follow a similar definition, approval and review process as more traditional marketing communications.

22. In most instances, compliance and legal functions were involved in the approving and/or reviewing the marketing material and advertisements.

23. The following divergences were noted in the approval processes:

- Some firms adopted a different process in the definition phase depending on the distribution channel (e.g., TV advertisement) and in the case of more innovative types of tools such as advertisement through social media. In these specific cases, ad-hoc functions/structures are involved to make the necessary adaptations of the marketing communication to the specific channel/format used.
- In some cases, the control functions would only look at the marketing communications if they would be asked to do so by the marketing team.
- The involvement of senior management in the approval of marketing communications varied across firms. If senior management was involved this was mostly on an ad-hoc basis or when, for example, a new or a key campaign is developed.

24. Areas of improvement that were observed include examples in which a standard approval process by a control function was not implemented. For some of these, NCAs explained that while marketing communications were subject to a review by firms' control functions, no approval process was in place to ensure that these communications complied with the specific MiFID requirements, leaving a potential gap in oversight.

25. Some firms did not always consider the following types of advertising as marketing communications, for example, advertisements done through on-line (website based), social media, newspaper, radio or through educational campaigns (webinars) or marketing presented to the public. This led in some cases to differences in the drafting, approval and/or review processes.

### *3.1.3 Review Process*

26. The majority of NCAs reported that firms performed (themselves or through third parties) a review of marketing communications including advertisements. Where such reviews were performed, firms would generally check whether the material distributed was in line with how it was approved. When deficiencies were detected in the review process, most firms stated they would proceed taking remedial actions such as amending or withdrawing the information. Other remedial actions taken by firms included, depending on the significance of the deficiency, making amendments in processes or legal arrangements, enhancing the monitoring process for the given problem, implementing additional internal control processes and updating internal procedures.

27. In relation to the use of triggers by firms to assess the need to update marketing communications including advertisements, firms reported to be using several “tools”. These included a market scan (e.g. web search, website analytics for advertisements, monitoring trends using data analysis, assessing market dynamics), weekly media monitoring (including own marketing channels, competitors and overall market trends analysis and sentiments), customer service reports (containing information on social media channels, online forums, interaction with clients, etc), surveys to customers, analysis of clients' complaints, feedback from consumers, inquiries from clients and review against the relevant regulatory requirements. It was also reported that firms operating on the CFD market used triggers, which automatically lead to the update of the risk message in advertising materials with the current percentage of customers suffering losses when investing in CFDs.

28. Responses indicating a lack of convergence included examples in which the functions involved in the review process varied across firms between the compliance function and the marketing department.

29. Some of the firms in the sample had not planned to verify whether the marketing communications had been distributed as approved, this was considered to be a poor practice.

30. On the other hand, a good practice observed was the involvement of control functions in different stages of the drafting and approval processes, allowing the control functions to give ample feedback before taking a decision upon approval of the marketing communications including advertisements.

*Internal systems and controls in place to ensure marketing communications are compliant and up to date*

31. Part of the approval and review processes assessment by NCAs included whether the marketing material complied with applicable requirements including whether the marketing communication or advertisement is fair, clear and not-misleading.
32. NCAs reported on different measures used by firms to ensure that the marketing adheres to the requirements, in addition to the approval and review of control functions. For example, some firms use checklists which include criteria that marketing communications must fulfil. Such checklists are used by the departments drafting the material. Other measures included trainings and workshops provided by firms to staff. One NCA reported that when firms actively used checklists both at the content creation and the review and approval stage, fewer unclear or potentially unfair or misleading marketing communications cases were observed.
33. All NCAs reported that firms had periodic reviews in place to assess whether the information published is still up to date. Such reviews also seemed to include a process to take remedial actions when information was not up to date. The frequency of the reviews and by whom these are performed, did vary amongst firms.
34. NCAs highlighted the following examples of types of reviews that firms had in place to ensure that marketing communications are compliant and up to date:
  - Daily checks of social media content by firms.
  - Periodic reviews and 'ad-hoc' checks of the website and online content, whilst maintaining an audit trail for both live and archived versions of marketing and advertising content.
  - A weekly horizon scanning of the contents undertaken by the compliance function.
35. However, NCAs also identified the following shortcomings:
  - There were incidental cases in which firms did not carry out any consistency checks on the marketing documents that were distributed.
  - Mystery shoppers identified cases in which the figures used by firms in their marketing were out of date (e.g., figures used were from almost 10 years ago).
  - Some firms did not have processes and controls in place at all.
  - Other firms did not appoint a responsible contact within the organisation.
  - Firms did not specify what kind of measures were taken if the information is not up to date.
  - Quite passive monitoring of advertisements by firms, for example they only do so after receiving complaints on the advertisements.

- Furthermore, one NCA noted that distributors did not always consider themselves as responsible for the marketing communications made by manufacturers. As a consequence, the distributors did not carry out any due diligence to verify the contents of the marketing communications drafted by manufacturers which the distributors were transmitting.

### *3.1.4 Processes related to target audience of marketing communications*

36. Overall, the assessments by the NCAs made reference to firms having processes in place to determine the target audience for their products and services. NCAs specifically referred to the fact that firms would take into consideration whether the target audience would be likely to understand the marketing material. Some firms worked together with specialists and did research when drafting the marketing material to ensure the clarity of the content so that it is understandable to (potential) clients.
37. NCAs reported that firms do generally take into consideration the clients within the target market for specific services and products and adjust their marketing strategy and channels accordingly. For example, by not allowing targeted communications to clients who are not in the target market of the product.
38. A number of firms made a differentiation between potential clients and existing clients when defining the target audience. For instance, for existing clients, the firms took into consideration the group's characteristics, knowledge and experience levels, behavioural and quantitative data. Whereas for potential clients, the firms collaborated with external providers to determine socio-demographic profiles of the target audience and studied their consumption trends and social media behaviour.
39. A few responses did indicate the following areas of improvement:
- When target audiences were defined by firms for specific services and products, this did not always mean that the firms adjusted their marketing or distribution channel to this target audience.
  - Some firms considered that all public marketing communication is not directed at specific types of clients at all, meaning that no personalisation is required since the material can be accessed by anyone. Amongst these firms, a firm providing CFDs was mentioned which declared that public marketing is indeed of general nature and is therefore directed and accessible to unspecified recipients via the Internet.
  - Related to the previous point, there were also NCAs that reported that firms noted that they have limited control over their audiences on social media platforms. The audience can include (potential) clients that fall outside target audience who would still be able to follow the firm's accounts. Firms can reach not only their intended audience immediately, but also a wider unintended audience. This is considered to be a risk which should be mitigated by firms to the extent possible, especially considering that firms rely heavily on social media platforms to communicate with their audiences.

- There were limited cases mentioned in which there was no clear definition of the group to whom the information is directed or who is likely to receive the information.

40. A number of NCAs reported the trend of more and more marketing not being product specific. Instead, marketing communications (including advertisements) were general in nature or related to non-complex instruments which were considered suitable for all investors. For these marketing campaigns, NCAs mentioned that the characteristics of a target audience remain rather broad, if defined at all.

### *3.1.5 Adequacy and effectiveness of the arrangements and procedures*

41. Responses highlighted regular review by firms (some quarterly, most annually, some up to 3 years) of the arrangements and procedures in place related to the marketing materials by the compliance function and the internal audit function. Furthermore, such reviews aimed at identifying any deficiency that is recorded as part of the review process. More frequent controls or ad-hoc controls were also reported, for example in the case of regulatory changes.

42. When deficiencies were found, NCAs reported that the process is the same as when other deficiencies are identified. Generally, they are recorded in the internal registers and are communicated to the marketing department to be addressed. The results of the control may also, depending on the significance deficiency, be brought to the attention of senior management. Generally, firms reported that deficiencies, again depending on their significance, were escalated to compliance and risks committees and may be included for example in the annual report of the compliance function activity to the senior management.

#### **ESMA views**

ESMA stresses the importance of the involvement of the control functions and senior management in the internal processes and procedures related to the development, design and oversight of marketing communications including advertisements.

ESMA underlines that the firm's controls should include verifying that marketing communications are actually distributed as approved, i.e., without any changes being made subsequent to the assessment and approval by the control function.

ESMA reminds distributors that they are responsible for the compliance of all marketing communications they transmit to their clients, whether the marketing communications including advertisements are drafted by distributors themselves or by manufacturers.

## **3.2 Processes and procedures related to sustainability**

43. NCAs reported a limited availability in firms' offer of products with sustainability features and the intermediaries in the sample made limited use of sustainability-related marketing communications.



44. Responses submitted by NCAs, in relation to firms having products with sustainability features in their products' offer, show that, overall, firms do not have specific processes and procedures in place for sustainability related claims in marketing communications (including advertisements). Instead, firms usually applied the same process adopted for all other products. Moreover, no differences were reported in the internal systems and controls applied to sustainability claims about the firms themselves or related to a product or service offered by the firms, as opposed to the sustainability claims related to third party products that the firms distributed. Similarly, deficiencies in the marketing communication related to sustainability references were recorded and addressed in a similar manner as done with other deficiencies and with no specific controls implemented.

45. A few interesting findings were highlighted by NCAs, such as:

- Sometimes additional controls had been implemented. These additional controls included:
  - The involvement of a sustainability officer or unit when the marketing material includes ESG characteristics;
  - Carrying out consistency checks in the drafting, review and approval processes when sustainability claims are included in the marketing materials and relevant documentation (e.g., regulatory documents, product documentation, the European ESG template, publicly available information such as ESG ratings, etc);
  - Developing internal guidance specific to marketing campaigns concerning products with sustainability features, with particular attention to the risk of greenwashing.
- Specific ex-post reviews were put in place aimed at monitoring and mitigating the risk of greenwashing.
- Additional controls were set in place for the distribution of third-party funds, such as consistency checks between the marketing documentation and relevant documentation.
- Firms provided additional training to staff related to sustainability.
- The review and correction of deficiencies of marketing communications was done by, or input was asked of, sustainability experts.

46. As a general remark, a number of NCAs reported that some firms were not publishing sustainability claims relating to third-party products but only related to internal products stemming from the same group as the firm.<sup>4</sup>

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<sup>4</sup> The rationale is linked to the fact that the information on the ESG features of these products were available because the assessment was run by the group. Whilst for products from third parties, firms would not always have the data or would not be able to verify it



47. An issue or area of improvement which was reported included that firms that did not have specific controls such as consistency checks in place to check sustainability related claims.

#### **ESMA views**

ESMA stresses the importance of the involvement of the control functions and senior management in the internal processes and procedures related to the development, design and oversight of marketing communications including advertisements when these include sustainability related claims, in order to mitigate greenwashing risks and to safeguard that the sustainability claims are fair, clear and not misleading.

### **3.3 Outsourcing to and collaboration with third parties**

48. A large number of NCAs reported that at least one firm in their sample used third parties for activities related to marketing communications including advertisements.

49. The collaborations firms engaged in varied. For example, a number of firms worked together with marketing agencies to design the marketing materials, other examples included the cooperation with issuers and intermediaries (especially with regard to marketing communications related to products), or with affiliates and influencers. However, NCAs stated that not many firms had collaborations with influencers. A number of firms had outsourcing agreements in place with entities in the same group as the firm.

50. Overall, firms indicated to review and approve the communications produced by third parties before publication. In many cases the approval and review process were similar to those in place when no such agreements were in place. Firms indicated that they remained in charge of the drafting the information that will then be used by the third party in the marketing communications including advertisements.

51. NCAs reported that firms used criteria to select the third parties. The most used criteria were: the reputation of the party, their network, knowledge, experience, skills, price, their ability to monitor the effectiveness of the campaigns, past experience, the companies' strategies, and privacy and cyber security controls in place.

52. The agreements with the third parties were reviewed on a regular basis varying from, annual, biannual, quarterly and monthly reviews.

53. NCAs reported the following observed deficiencies and risks:

- Deficiencies were observed in the review procedures of some firms since they were not reviewing the content produced by the third parties and its identification as marketing material. NCAs indicated that they would follow up with the firms on this point.

- One NCA mentioned that firms were reviewing content created by third parties, however it was done by sampling in order to keep the review manageable. This method of reviewing carries the risk of providing non-compliant marketing communications including advertisements, because the company does not check all content provided by the third parties.
- In some cases, firms outsourcing the Marketing and Advertising function to a parent company or group entity do not have a documented Service Level Agreement (SLA) with that entity, whilst this was considered to be uncompliant with Article 31 of the MiFID II Delegated Regulation and applicable national guidance.
- Another example includes that the collaboration with affiliates was considered to be quite risky since affiliates can help distribute information fast, including when such information is not compliant with applicable requirements.

#### **ESMA views**

ESMA underlines the importance of an adequate review and approval process for the use of third parties for activities related to the provision of information through marketing communications including advertisements. In this case, the firm is still responsible that the marketing communications are fair, clear and not misleading.

### **3.4 Record-keeping and complaints handling**

#### *3.4.1 Record-keeping processes and practices*

54. Overall, NCAs reported that firms have recordkeeping systems in place to store marketing communications including advertisements. The recordkeeping systems varied amongst firms, for example, NCAs reported some firms that would store marketing communications on their servers, whereas others kept the information on marketing communications and advertising through an advertising agency. Other types of systems included the use social media platforms' or online news media platforms' record keeping services.
55. With regard to the storage of social media posts, NCAs generally observed that there was a form of recordkeeping process in place. For instance, some firms stored these posts online or the storage was maintained by the firms or third parties they worked with creating the social media posts, in some cases on shared drivers.
56. The following practices observed have been considered to be in line with the MiFID II requirements:
- Having processes and procedures in place prescribing the content, method and storage of marketing communications including advertisements and which also include documentation of the approval of the marketing communications.

- Having specific record keeping procedures in place for posts that were online for a limited number of time and/or accessible to a limited number of people and one firm extended such policy to posts of affiliates as well.

57. However, the following shortcomings were identified:

- There were cases in which, though firms kept records of the marketing in practice, they did not have written procedures stipulating the storage of marketing data.
- When firms were not able to provide evidence of the approval of specific marketing communications requested by the NCA for a specific period, or were only able to provide the latest versions of the marketing.
- Some firms did not store information on social media posts which were available for a limited time or to a limited number of people.

#### **ESMA views**

ESMA underlines the importance of the record-keeping of marketing communications including advertisements, including of social media posts. Since it ensures transparency and accountability, enabling NCAs to effectively supervise and verify that firms comply with the MiFID II requirements, and ultimately contributes to safeguard investors from misleading information.

### *3.4.2 Handling of complaints related to marketing and possibility to contact firms for additional information*

58. The majority of NCAs reported that firms in the sample had not received any complaints related to marketing communications including advertisements with regard to marketing related to ESG claims.

59. The few NCAs that did identify complaints received by firms, mentioned that these complaints concerned different topics, including, amongst others, complaints on:

- Information related to fees was unclear to complainants;
- The risk classification differed in the marketing from the underlying regulatory document;
- A chart was considered misleading by the complainant;
- Clients felt pressured purchasing a product as a result of a large number of marketing communications.

60. A number of NCAs did make note of the practice that a number of firms had created specific sustainability related categories to identify complaints on this topic.

61. Though the MSE did not specifically assess how to report complaints to firms, it did consider whether firms provided easy ways for clients to ask for explanations and clarifications. NCAs confirmed this was the case, (normally under the primary details about marketed products/services) by means of contact page that investors could access directly from the main menu of the firm's website, contact form, telephone, chat or email. In one jurisdiction, mystery shoppers reported that the responsiveness to these requests varied significantly. Call-backs were infrequent and when emails were received these were not always helpful in clarifying product characteristics or the language used was unclear to an inexperienced investor.

### **3.5 Pre-approval of marketing communications by NCAs**

62. A total of two NCAs preapprove marketing communications. As part of the CSA, these NCAs were asked how firms submit marketing communications for preapproval and whether this included advertisements as well.

63. One NCA carried out prior approval of marketing including advertisements related to products, more specifically products subject to the prospectus obligations and UCITS<sup>5</sup> and AIFs<sup>6</sup>. The other NCA also preapproved both marketing and advertisements relating to PRIIPs<sup>7</sup>, and material related to public offers.

64. The two NCAs had similar processes in place, in which the firms submit their material to the NCA and the NCAs need to give their final approval before the firm can use the marketing including advertisements. The firms cannot make alterations to the approved material.

## **4 Content of marketing communications including advertisements to clients and potential clients**

### **4.1 Assessment of whether information was provided in a fair, clear and not misleading manner**

65. The assessment of the information in marketing communications including advertisements included whether:

- The marketing and advertisements were clearly identifiable as such.
- The information was presented fair, clear and not misleading which included looking at whether information is balanced meaning that risks and benefits are equally prominent,

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<sup>5</sup> Undertakings for the Collective Investment in Transferable Securities.

<sup>6</sup> Alternative Investment Funds.

<sup>7</sup> Packaged Retail Investment and Insurance Products.

no information was obscured or disguised, the information was in line with (regulatory) product information and provided in the same language.

66. Overall, NCAs reported that marketing communications including advertisements complied with the MiFID II requirements. NCAs reported a number of positive examples, such as:

- No aggressive marketing practices were observed, instead the majority of marketing communications including advertisements were considered to be comprehensive and fair.
- Clear and prominent displays of warnings and short advertisements in which the information presented was brief yet clear.

67. That being said, both in the CSA and MSE review of marketing communications including advertisements observed areas in which there was room for improvement.

#### *4.1.1 Marketing communications, including advertisements, being clearly identifiable as such*

68. Overall marketing communications (including advertisements) were clearly identifiable as such. However, the following issues were observed, such as:

- Newsletters in which it was not clear that marketing material was included.
- Advertorials in magazines were not recognizable as such and did not contain a disclaimer.
- Marketing communications on third party websites were not clearly identifiable as such.
- Factual documents in which quite a number of adjectives were included indicating the inclusion of subjective opinion, therefore blurring the line between information (purely factual) and marketing.

69. A general trend was also pointed out by a number of NCAs, namely that more and more firms shy away from marketing specific products. Instead, the marketing focusses more on general serviced provided, brand awareness or is branded as educational material. In these instances, firms did not always classify this as marketing material.

#### *4.1.2 Balanced representation of the risks and benefits*

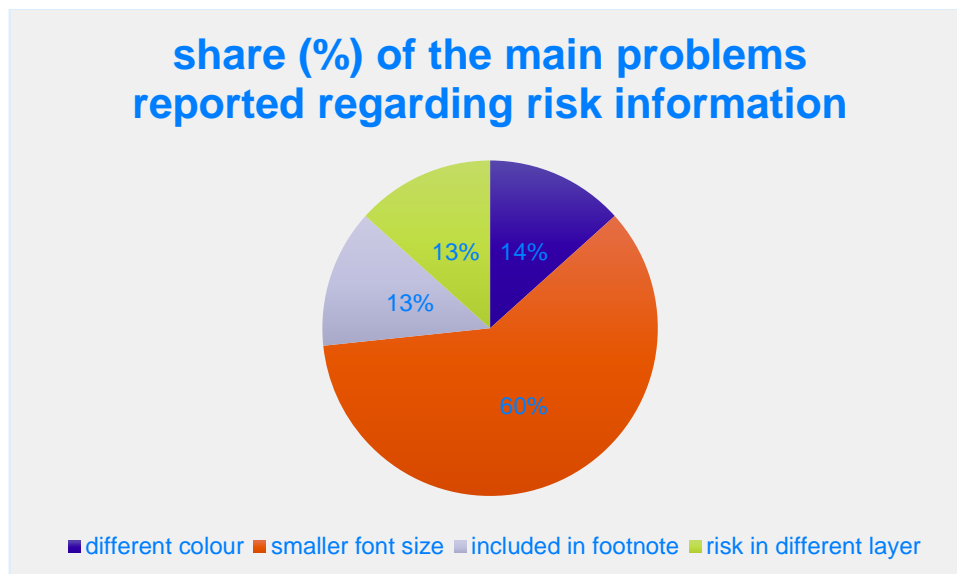
70. One of the main issues observed in marketing communications (including advertisements) concerned information on risks, particularly whether risks were presented in a balanced manner. Examples of cases in which risks were not portrayed in balanced manner included:

- Information on risks being shown in a different font size or different colour, making it stand out less than the mentioned benefits.

- Risks which were mentioned at the end of the text or even in a footnote, making it easy for the (potential) client to overlook this information.
- The information on risks was included in a different layer of information, meaning that the (potential) client needed to take action (such as click on for example a link) to access the risk information.
- In videos the risks were only shown for a very short period of time, making it hard to read, or they were mentioned at the end of the video. In some cases, the mentioning of the risk was being drowned out by music.
- In some isolated cases the information on risks was not included at all or there was a lack of clear indications of the risks.

71. These findings were confirmed by the MSE, for example:

- It was also noted that in some cases risks were presented in a smaller font and in a different (less prominent) font colour,
- Further activity was required to display relevant risk information.
- In some cases, firms mentioned the risks in the footnotes.



72. However, the following examples of compliant display of information were also observed:

- The advantages and risks were explained in a size equivalent to the rest of the text.
- Prominent display of the risks, for example because risk information was boxed-off in bold, static/non-collapsible text boxes on top of the webpage, presented against a different colour background etc., all in an effort to make sure this information stands out and is not ignored.

### 4.1.3 Risk warnings

73. Both NCAs and mystery shoppers assessed whether risk warnings were included and clearly visible when such warnings were required according to the applicable legal requirements.

74. NCAs reported positive adherence to the legal requirements mentioning that:

- The warnings were always visible on the webpage, for instance, the (risk) warning accompanying the past performance information was presented in a way in which it was always visible to the reader.
- The warnings were included effectively in a banner.

75. That being said, NCAs also reported non-compliant display of warnings, such as:

- The CFD risk warnings were not always included when they should have.
- Cases in which the risk warnings were not included in shorter messages such as in banners or in social media posts.
- The warnings were non-compliant with national requirements.
- The MSE also identified an example in which the risk warnings were hidden under a drop-down heading.
- The warning clarifying past performance is not a guarantee for future results was in some instances not shown at all or in a small font size.

76. The MSE indicated that overall firms accompanied information on past performance with a warning clarifying that historical returns are not an indicator of future returns. However, in some cases, firms failed to clearly state all the required information on past and future performance or to include the warning.



#### *4.1.4 Information related to costs, charges and special offers*

77. A number of NCAs observed room for improvement with regard to information in the marketing communications including advertisements related to costs and charges. Examples of when information on costs and fees was presented in an unclear and sometimes misleading manner include:

- Mentioning of zero costs claims without indicating that other fees did apply.
- Marketing referred to a subscription being free of charge whilst a distribution cost was included in the nominal value of the instruments.
- Mentioning only the management fee without reference to the fact there were additional costs.
- In one case a firm presented simulated results, however, this simulation did not include additional fees and it was not indicated how the fees affect the simulated result.
- In a video the information of costs was completely missing.

78. Furthermore, the MSE identified areas in which there is room for improvement, namely:

- Firms did not always specify that additionally to the information shown other costs and charges apply.
- In some cases, firms still use small prints or footnotes to complement the main communication on costs (e.g., “zero costs” while the footnote mentions some exceptions or further explanations).

79. In addition, mystery shoppers were asked to look at whether firms advertised special discounts and offers on social media. The majority of NCAs reported that firms did not refer to special discounts or offers for specific financial instruments or services in their product advertisements or generic brand marketing communications on social networks. In some cases, firms would offer a free trial demo of their services via their mobile app (rather than on social media). Mystery shoppers noted that this trial allowed the user to become familiar with the products on offer and how they are used. Some firms did post information on promotions or discounts (e.g., higher remuneration for cash for new clients, free training, rewards when bringing investment funds to the firm). In one case, the promotion of remuneration for cash offered by one investment firm was considered problematic (due to the lack of information regarding the guarantee-scheme applicable as it was not a banking deposit). In another case the firm had a special offer advertised on LinkedIn, offering “Happy Fridays” lower commission for trading ETF-s on local stock exchange every Friday until the end of the year.

#### *4.1.5 Comparisons and information on past and future performance*

80. Overall NCAs reported that when information included comparisons and references to past and future performance, this information was generally presented in a fair and balanced



way and cited sources (such as independent comparison websites or the websites of the competitors).

81. However, a number of NCAs made reference to cases in which this information did not fully comply with the conditions as set out in Article 44(3, 4, 6) of the MiFID II Delegated Regulation and/or the information was considered to be presented in a manner which is not fair, unclear and misleading. Some observations included:

- Cases of non-compliant information related to presented comparisons with other firms, historical actual or simulated results, and expected results, which were considered to have a possibly misleading effect.
- Past performance was shown for periods of time before the service that was being advertised was launched without a warning mentioning that figures refer to simulated past performance.
- Reference to only accumulated figures of the past performance data, without showing the annual variations as required.
- The past performance for a portfolio management service (model portfolio per level of risk) was shown for periods of time before the service that was being advertised was launched, using simulated past performance.
- The presentation of information on future performance without showing different scenarios (both negative and positive scenarios were missing).
- The required information was sometimes either presented at the end of the page or in some cases not published at all.
- When comparisons were made or past performance was shown, the sources on which this information was based were missing.
- When past or future performance information was included, it was not always made clear by firms whether the information was based on gross or net performance. The effects of costs were therefore not disclosed.

82. Mystery shoppers observed and confirmed similar practices, for instance:

- The source of information on performance data was not (clearly) disclosed.
- One NCA reported that for the majority of mystery shoppers, the information about potential future performance of a fund was seen as an indicator only and not a guarantee, and this point was also brought to their attention by the firms. Some investors did acknowledge that despite this knowledge, the promise of high returns does still grab their attention and entice their appetite to invest.
- Some firms had an internal search engine to compare their financial products. This enabled clients to filter and make their own comparisons based on certain key product characteristics (such as ISIN code, product type, SRI score, price, currency). However,

it was challenging for mystery shoppers to make meaningful comparisons between products provided and between firms, reasons being:

- Product information was hard to find on many websites as firms require investors to contact them for further information about products – this made product comparison difficult to achieve.
- Where product information was available, it was difficult to interpret and draw conclusions from, since information for each product was often presented separately and laid out differently compared to another firm's product information.
- In many cases, firms' websites proposed areas in which it is possible to invest or types of investments without a clear comparison of these investments.

#### *4.1.6 Other observations with regard to the assessment whether marketing communications were fair, clear and not misleading*

83. Other than the specific topics mentioned above, NCAs had reported on other observations whilst assessing the compliance of marketing communications including advertisements. NCAs mentioned examples including in which information lacked balance and neutrality or sometimes included misleading statements, examples included:

- A practice was observed in which firms were given ratings by companies. These scores were then used in marketing material in order to make the firm look reliable and trustworthy. However, this could be based on false assumptions. Another practice was the mentioning of the fact that the firm in question has a license or falls under the mentioned regulatory regimes.
- Advertisements in which the performance of companies listed on major stock exchanges were mentioned, without clarifying that the instruments offered by the firm in questions were not the shares mentioned but were different ones such as CFDs. A similar practice was observed by another NCA in which a product was presented as an opportunity to invest in the S&P500 index; however, this reference was considered misleading because the index was the base asset for the structured deposit in question and the client would not invest in it directly.
- The website of one firm suggested that an investor could become an experienced investor through the education material that was accessible on the same website.
- Misleading information about possible tax benefits.

84. Generally, NCAs reported consistency in the language used throughout the marketing material and appropriate terminology was used. A number of mystery shoppers did note that the language and tone of voice used on the website when describing the benefits was simple to understand while the language and tone used in the risks required some financial literacy as it uses terms specific to finance (e.g., hedging, derivatives, liquidity risk and the tone becomes more corporate and serious).

85. Another observation made as part of the MSE was among the mystery shoppers there were different opinions in relation to the importance of different pieces of information made available. For some, the rate of returns and the investment period were most important, while others, perhaps more experienced investors, looked for information in relation to past performance or future predictions in relation to a product or fund.

#### *4.1.7 Consistency of information used for marketing purposes with (regulatory) product information*

86. All NCAs that looked at product related marketing communications (including advertisements) reported that these often included links and/or references to both underlying legal and regulatory documents. In addition, NCAs reported that firms had processes and checks in place to ensure the information provided to (prospective) clients was in line with product information.

87. There were however some shortcomings in aligning the information in the marketing communications with the product information. For example, for Article 8 and Article 9 SFDR funds there was inconsistency between the content of the marketing and the underlying regulatory information, resulting in non-compliance. Examples included:

- the marketing contained more information and details than the regulatory document regarding for example the fund's management objective and description of the strategy, and
- potentially misleading marketing material since it mentioned a specific organisation to which the management fees collected would be transferred to, however, this partnership was not mentioned in the underlying regulatory document.

88. NCAs participating in the MSE also assessed accessibility to regulatory information. In general, firms indicated how to access regulatory information in their product advertisement (KID, prospectus, and other relevant documents, e.g., annual, and semi-annual reports). NCAs report that in the majority of cases, the mandatory documents could be downloaded from the firm's website. However, NCAs also noted there was room for improvement to help investors find and understand the regulatory information in the following examples:

- In some cases, references/hyperlinks were only available on firms' website while online flyers, brochures or fact sheets did not show simple or clear links to regulatory documents. In other cases, marketing communications only provided a general link to the firm's website without pointing the specific page where the information could be accessed, and vague references such as 'see the link in bio' were observed on social media.
- Mystery shoppers did not always have a clear understanding of the role of KID and whether it was important. Furthermore, it was not always clear how it could be accessed. A set position on the landing page of each product would considerably help investors to access the KID and to direct their attention to it.

#### *4.1.8 Observations with regard to short marketing messages including advertisements used in apps and social media*

89. The following interesting examples were shared by NCAs:

- Though messages were brief (for example in social media), the information presented was balanced.
- The compliance officer provided extensive guidance on how to include warnings in short messages to colleagues.
- Specific social media trainings and guidance were provided to marketing staff.

90. That being said, the following issues were reported:

- A number of reviewed short (social media) messages did not fully comply with the information requirements. For example, the omission of risk information and/or required risk warnings.
- The short messages were difficult to understand or to identify as marketing.
- There were also issues observed in the short advertisements provided on YouTube, these included: a lack of consistency between the marketing and regulatory information, statements were lacking nuance and neutrality, and emphasis was given on favourable tax framework without criteria or obligations mentioned.

91. In addition, it was mentioned that some firms seemed to restrict social media and app advertising to financial planning and brand awareness campaigns, therefore not publishing marketing material on specific products. This was confirmed in the MSE exercise, in which the NCA stated that the posts published on social media were often similar between platforms and mostly related to the firm and its services. They normally did not refer to specific financial instruments. The mystery shoppers examined the social media accounts of firms, which most firms had, and assessed the messages on social media. The following findings were shared:

- The social media accounts of firms were accessible via hyperlinks published on firms' websites (links to firms' social media are often found near the 'Contact Us' section).
- While the firms' websites generally contained more detailed company and regulatory information and FAQs, investors found that this type of content was not replicated on their social media channels, which generally focused on, i.e., market news and updates, trend reports.
- Mystery shoppers admitted that social media does not play a significant role in their ultimate decision to choose an investment company, though a company's social media presence still contributes to their overall perception of the company.
- At the same time, mystery shoppers noted the prevalence of investment and financial advice given out on social media by industry experts (even if they would always seek

to further validate this advice by conducting their own research online or by speaking with an advisor or another trusted contact). The mystery shoppers observed that social media platforms such as YouTube and TikTok were increasingly featuring this type of financial and investment advisory content more regularly from thought leaders who have expertise in personal finances and financial planning.

- Firms occasionally referred to general benefits in their communications on social media, such as portfolio diversification or the low management fees for trackers. Although firms did not disclose the risks associated with investing in their posts, they did mention them, where appropriate, later in the purchase flow at the level of the specific financial instrument/service.
- Mystery shoppers appreciated when messages included the potential risks in a separate box in a social media image or clearly in the text so that the information could not be missed.

92. Apart from the abovementioned general observations, the following areas for improvement were identified during the MSE:

- Marketing/advertisement of specific financial products via the Instagram posts that were examined were found to be unbalanced. For example, the potential advantages and prospective performance significantly surpassed any risks.
- Videos or posts on social media, or pop-ups where risk warnings were omitted or mentioned in the final image of the post (and were nearly unreadable on mobile screen due to the tiny font size used).
- Use of 'buzzword' terminology in posts that can easily engage and distract an investor.

#### **ESMA views**

ESMA is concerned by the following adverse findings that were highlighted by a number of NCAs:

1. The marketing material was not clearly identifiable as such.
2. Risks and benefits were not presented in a balanced manner, or in some cases, risk information was completely missing.
3. Marketing material stating that a service is free or has zero costs whilst failing to mention that other fees might apply.

With regard to the above, ESMA would like to draw to the attention that it should be clear to (potential) clients as to whether the information is part of marketing or not.

In addition, ESMA underlines that when risks and potential benefits are not presented in a balanced manner, the said information cannot be considered fair.

ESMA would like to draw the attention to the fact that certain marketing communications including advertisements, such as promotional material focused on brand awareness that is widely distributed, may result in the firm giving the misleading impression to its (potential) clients that the products and services they are mainly offering, such as CFDs or other speculative products, are appropriate for the mass retail market.

ESMA stresses the importance of displaying risk warnings (when required) in a prominent manner. For example, when the information includes past and/or future performance references, these should be accompanied by warnings to balance the information. Especially since the promise of high returns does tend to grab the attention of (prospective) investors.

ESMA acknowledges NCAs' general preference to use escalated supervisory measures instead of taking enforcement measures. In this context, ESMA reiterates the importance of using the full range of the supervisory and enforcement toolkit they have been provided with by the applicable legal framework. This is particularly important in light of the requirement under the MiFID II framework for Member States to ensure the existence of sanctions that are "effective, proportionate and dissuasive". Against this background, ESMA would like to encourage NCAs to consider the use of sanctions in case of breaches.

## **4.2 Observations with regard to whether information on sustainability related claims was provided in a fair, clear and not misleading manner**

93. NCAs assessed references in marketing communications (including advertisements) to the sustainability of the product or the firm, and whether this specific information was presented in a fair, clear and not misleading manner.
94. As already mentioned, NCAs reported a limited use of sustainability-related marketing communications by firms in the sample, in line with a limited availability in firms' offer of products with sustainability features. It should also be noted that the majority of this marketing material referred to funds with sustainability features, while few responses reported references in marketing communications to green bonds or to sustainability aspects when promoting certificates and structured bonds.
95. Responses, in relation to firms referring to the sustainability of product or of the issuers of the products, showed that the level of detail when dealing with ESG-related issues/features varied significantly from one entity to the other. Furthermore, they showed different approaches were followed by intermediaries depending on the types of the marketed financial instruments and investment services.
96. When assessing marketing communications including sustainability references, NCAs observed the following practices:



- The marketing communications included references which were rather *generic*. Meaning they would refer to general environmental, social and governance aspects without referring to the disclosures required under Article 8 or Article 9 SFDR. Nevertheless, in these cases NCAs reported that the marketing communication is substantiated by several documentation such regulatory documentation, educational and informative materials such as factsheets, brochures, articles, videos or reference to ESG ratings or to ESG standards, labels and benchmarks. NCAs noted that this information is made available in different ways through links, campaigns (mailings), specific sections on the website, social media accounts.
- Other NCAs observed room for improvement when mentioning generic sustainable claims since in some cases these claims were not backed by evidence.
- On the other hand, some NCAs reported more *specific* marketing materials, directly mentioning and addressing sustainability in relation to the product in the marketing communication. Some of these examples reported by NCAs include firms' marketing materials: making a reference for funds to disclosures required under Article 8 or Article 9 of SFDR, including: a brief illustration of the main contents of SFDR framework; making an explicit reference to the sustainability section of the fund's asset manager's website; specifying sustainability-related objectives of a product by referring to the sustainability data of the issuer of the product; and referring to internal labels developed by the firm to differentiate funds according to their characteristics. For green bonds, some examples of detailed marketing material illustrating the objectives pursued by the instrument or the allocation of proceeds were reported.

#### 4.2.1 *Observations with regard to the compliance of information on sustainability claims in marketing material regarding products*

97. NCAs assessed whether information, on sustainability claims was presented in fair, clear and not misleading manner. NCAs reported the following examples of sustainability claims that were not presented in a fair, clear and/or not misleading way:

- A number of NCAs reported examples in which ESG related information and claims were not backed up with the data or sources supporting such claims, for example:
  - References to ESG ratings or to self-set ESG scorings without providing information to clients to allow understanding the meaning of such ratings;
  - Referencing to sustainability statements in regulatory documents without linking these documents but by just naming the source without any further specification;
  - General statements on the impact of a fund (e.g., with reference to the sustainability goals of UN) without a precise description of what this means in concrete terms for the specific promoted product;
  - Publication of messages suggesting better performance or lower volatility for sustainable investments compared to traditional ones without enough substantiation;

- Publication of brochures outlining the firm' responsible objectives and aspirations, organizational framework, ESG analysis and integration, industry policies, exclusions, collaborations, products, and additionally covers reporting and transparency without proper hard data regarding sustainability or ESG metrics or mentions of real-world impact.
- Advertisements concerning UCITS ETFs with an ESG profile included references to past performance which did not comply with Article 44(4) of the MiFID II Delegated Regulation.
- A poster for a UCITS fund was considered as unclear and potentially misleading since it showed a green planet, windmills, the sun and a recycling sign even though the fund did not have an ESG profile.
- Information was not sufficiently balanced included the excessive emphasis on "sustainable" or "responsible" features of financial instruments or services without sufficiently nuance that promoted financial instruments or services also contain non-sustainable features (e.g.: "95% of investment offerings are sustainable and/or responsible"; "As a financial partner, we take responsibility and guide you in selecting sustainable and responsible investments for your investment portfolio"; "Discover our sustainable and committed investment platform").
- Claims implying that an investment choice can have a direct impact on environmental/social transition/improvement were considered as potentially misleading. These claims included statements such as: "Invest your money for a fairer, more sustainable and greener tomorrow."; "Investing in funds in a sustainable way is one of the tools for preserving our planet."; "Your lasting impact on the planet - With sustainable and responsible investment, you decide how far you want to go to create an impact. That's how you make a difference."; "... when investing, it is necessary to proceed not only with regard to the present, but also with regard to the future").
- A marketing campaign advertised a fund saving plan which included the whole range of investment funds, not only green funds. In case of closing a fund saving plan the client will get a backpack made out of recycled plastic as a goodie. This backpack was widely promoted throughout the campaign. Furthermore, the campaign explained that the fund company has long experience in managing sustainable funds. The campaign also promotes the company that made the backpack. In comparison to the usual marketing material, that specific marketing material was set up mostly in green. Even though the marketing included a list of general and sustainable sourced risks there was no further information regarding the other financial instruments involved. Therefore, the investment firm failed to present fair, clear and non-misleading content in the marketing communications by giving (potential) clients the impression that every investment in financial instruments of the fund investment company makes a contribution to sustainability, even though this issuer does not exclusively offer sustainable financial instruments.

98. That being said, both the MSE and CSA reported examples showcasing positive behaviour such as the use of factsheets by firms. These provided information on sustainability



characteristics and the UN sustainable development goals to which they related as well as firms' statement that the green bond in question was certified by an independent body and that the projects financed by the green bond were evaluated and selected on the basis of their compliance with the eligibility criteria.

99. In the CSA reports, three NCAs reported that they had published specific guidance in relation sustainability claims regarding products, namely:

- The publication of a specific FAQ on product advertisements with sustainability-related aspects. According to the FAQ, the information in the product advertisement should be consistent with the information included in the legal and regulatory documents of the fund being promoted. In addition, information on the sustainability-related aspects of the fund in question should not be disproportionate to the investment strategy of the product that includes sustainability-related characteristics or objectives. When they refer to the sustainability-related aspects of the promoted fund, product advertisements should indicate that the decision to invest in the promoted fund should take into account all the characteristics or objectives of the promoted fund as described in its prospectus. If a product advertisement refers to a reward, a rating or label relating to sustainability, it must also include the following disclaimer: "The fact that the fund has obtained this reward/rating/label does not mean that it meets your own sustainability goals."
- The publication of national Guidelines on sustainability claims, in which firms (but also other financial institutions) will find tools and examples to comply with the existing information requirements. The national Guidelines do so by means of three main principles. Claims must be:
  - Accurate, representative, and up to date;
  - Specific and substantiated;
  - Understandable, appropriate, and easy to find.
- Implementation of national rules regarding the use of disclaimers aimed at underlining differences between an allocation of proceeds to ESG projects (ex: Green bond) and a structured bond with underlying assets with ESG features but no proceeds allocation commitment (ex: a bond indexed to a Paris Aligned Benchmark). In this context, national rules require the firm to disclose such disclaimer in a prominent way in order to ensure the potential client clearly understand the sustainability feature of such financial instruments.

#### *4.2.2 Observations with regard to the compliance of statements made by firms in marketing related to the integration of sustainability in the provided services*

100. NCAs looked at whether firms referred to sustainability of the services they provide on their website, apps, social media etc. A number of firms referred to the integration of sustainability in portfolio management services or investment advice. However, approaches used by firms varied depending on the communication used, examples included:

- Firms made generic statements such as outlining that the portfolios managed, or the scope of investment advice provided, are directed towards products promoting environmental and social characteristics or aimed at satisfying clients interested in contributing to a sustainable growth; this type of marketing communications, generally used on the internet or posters/billboards in the intermediaries' branches, leaves room for improvements.
- Other examples showed a more analytical approach used, especially in marketing communications disseminated through paper/digital brochures where firms included details concerning the processes, procedures and approaches adopted within the firm to integrate sustainability in their services.
- Firms substantiated their statements by publishing supporting documents detailing this description such as policies on the integration of sustainability risks in their investment decision-making process, statements of principal adverse impacts of investment decisions on sustainability factors, sustainability reports, sustainability strategy and other supporting documentation.

101. The MSE reports confirmed that firms included sustainability claims in the investment services that they provided; notably with regard to the provision of investment advice and portfolio management (sustainable/green portfolio management). In these cases, NCAs positively remarked that some firms explained the sustainable features of the relevant service (e.g., how clients' sustainability preferences are taken into account in practice during the provision of the service). NCAs noted that in several cases, firms had specific sections of their website (called for example, "sustainable investment" or "sustainable investing") with a selection of sustainable products such as funds or insurance or pension products. In some cases, firms mentioned sustainable products or services, also referred to how their current sustainable investments are performing in the current market.

102. In contrast, a minority of NCAs explicitly mentioned that firms refer to "impact" in the name of financial instruments or services that they market without supporting such claims with references.

#### *4.2.3 Observations with regard to the compliance of information on sustainability claims in marketing material related to firms*

103. Finally, NCAs considered whether firms were promoting themselves as "sustainable" or mentioning in the marketing communications their adherence to voluntary ESG or net zero alliances or to reporting initiatives. Responses showed the following approaches by firms.

104. Positive examples included:

- While not promoting themselves directly as "green" or "sustainable", some firms did mention sustainability related claims in relation to the firms' business or provided more general information regarding sustainability in marketing material. In these cases,

reference was made regarding firms (or the wider group) following net zero plans or adhering to reporting initiatives such as UNPRI, TCFD, CDP, UNEP Finance Initiative, UN Global Compact and Net Zero Banking Alliance.

- The MSE confirmed that in some jurisdictions firms often mentioned their adherence to international principles or standards (such as sustainable development goals of the UN, the National Principles for Responsible Investment, UNPRI, the principles for Responsible Banking or the United Nations Global Compact, UNGC) as well as national local initiatives or to EU's climate commitments.
- A number of firms indicated that they selected their investments on the basis of the compliance with these principles by the firms in which they invest. When firms presented themselves as sustainable/responsible, they often supported such qualifications by providing information on their commitments, strategy and progress in such areas.

105. However, NCAs did observe a number of issues, for instance:

- In some cases, firms did not corroborate their sustainability claims. For instance, it was common to find social media posts about the green initiatives of the firm or sustainable awards (for example, one article published by one bank claiming to be “the most sustainable bank in the world”).
- Some firms compared themselves to other financial institutions without disclosing the sources of information and key facts and assumptions used for this comparison and by stating claims such as: “We pay above-average attention to social and environmental issues”; “We are the first sustainable bank [in a given jurisdiction]”; “Our firm has become the reference in the market of sustainable and responsible investments”.

#### **ESMA views**

ESMA stresses the importance that firms' sustainability claims, regarding financial instruments and services that are subject to MIFID II, need to be fair, clear and not-misleading.

ESMA is concerned by the non-compliant examples shared by NCAs regarding sustainability claims in marketing communications including in advertisements, including for example:

- Marketing material claiming the green nature of a product or service without supporting this claim with any evidence; and
- The sustainability features of financial instruments or services are not presented in a balanced manner compared with the other features of the products.

Such practices give the (potential) investors misleading impressions that the products, services or brand in question are ESG oriented in cases in which they are not.

## 4.3 Type of marketing communications including advertisements used and the presentation and accessibility thereof

106. Overall, NCAs reported that firms in the sample used different types of distribution channels and types of marketing communications including advertisements:

- Firms' websites;
- Emails;
- Newsletters;
- Social media posts, including targeted messages;
- Advertisements on other websites and search engines, including banners;
- Advertisements in classic news media such as newspapers and magazines, including advertorials in magazines;
- Printed and digital brochures;
- Television and radio advertisements;
- Posters, including billboards;
- Videos published on websites or on social media, including on YouTube;
- Influencer collaborations;
- Affiliates' websites, including incentive-based referrals;
- Webinars;
- Podcasts;
- Use of screens at ATMs and in branches;
- Customer events/roadshows;
- Pop-up messages on websites and push notifications in for example apps;
- Text messages;
- Sponsored articles;
- Postcards;
- Blog posts; and
- Sponsorships

107. The types of marketing material as listed above were not equally widespread. For example, only few examples of collaborations with influencers were highlighted.

108. Overall, the marketing communications including advertisements assessed were easily available, readable and understood regardless of the distribution channel used. There were some exceptions in which the language used was not easily understandable for retail clients, other communications were too long meaning some parts can easily be overlooked, whereas others were too short and included vague references.

## 5 Follow-up actions and next steps

### 5.1 Follow-up actions by NCAs

109. The majority of NCAs which took part to the CSA and the MSE reported that they took follow-up actions, which are either planned or have been already executed. Only a few of

them noted that, based on the results of the CSA, they are not going to take any subsequent action. While a few NCAs that took part in the MSE stated that they are still pondering subsequent actions.

110. Generally, all NCAs that took follow-up actions, reported that they communicated the results of both exercises, CSA and MSE, to the selected firms (normally using individual feedback letters or weaknesses notices) providing feedback of the findings along with recommendations for improvements or requests for remedial actions or specific measures in case of deficiencies detected or breaches.
111. NCAs will undertake follow-up actions on individual cases, where needed, to ensure that regulatory breaches as well as shortcomings or weaknesses identified are remedied.
112. Most of the NCAs have reported other follow-up actions, regarding the results of the CSA, like publishing a communication or organising workshops/seminar to share the findings, good and bad practices, trends, and supervisory expectations addressed with the market. One NCA stated to have updated the national Q&A, and another NCA noted to have disclosed its national guidelines on marketing communication requirements, including practices that should be avoided. Other NCA mentioned the plan to carry out a desktop-based thematic review of marketing communications including advertisements by surveying all market participants in 2024.
113. ESMA reminds market participants that they should ensure compliance with all relevant MiFID II regulatory requirements at all times.

## 5.2 Next steps

114. Building on the findings of both the CSA and MSE exercises, ESMA will continue liaising with NCAs on this topic and exchange on their (planned) follow-up actions. Furthermore, ESMA will assess whether there is a need to use supervisory convergence tools to build a stronger supervisory culture across the EU and promote effective, sound and consistent supervision with regard to marketing communications including advertisements.
115. ESMA stands ready to provide technical advice to the Commission to support the development of any delegated acts stemming from the Retail Investment Strategy once it is finalised.