

25 September 2023

ESMA Publishes the Main Findings from the Common Supervisory Action (CSA) for the year 2022 and the Mystery Shopping Exercise on Information on Costs and Charges Emanating from MiFID II Requirements.

Background

Enhancing investor protection plays an integral role in ESMA's on-going supervisory work. During 2022, [ESMA's Common Supervisory Action \(CSA\)](#) focused on the application of MiFID II costs and charges, and recently ESMA published its [main findings](#). The main scope of this CSA focused on the importance of ex-post information and disclosures provided to retail clients whilst ensuring better supervisory convergence.

The CSA was complemented by a mystery shopping exercise to understand better arising risks and issues (such as possible areas where mis-selling can occur) and how the licence holders apply the requirements in practice. However, the scope of the mystery shopping exercise related to the ex-ante costs and charges information given to the retail clients.

CSA & Mystery Shopping Exercise

For the purpose of both exercises, ESMA adopted a common approach and a high-level methodology. All EU-27 National Competent Authorities (NCAs) participated in the CSA and shared knowledge to ensure better supervisory convergence. NCAs used different criteria to select a representative sample for their market. Criteria used included total number of clients, market share (in terms of investment services), and overall size of the firm. The CSA sample of firms consisted of both credit institutions and investment firms. Different supervisory approaches, such as desktop reviews and on-site inspections, were used to test the overall effectiveness of firms' policies and procedures.

On the other hand, ten NCAs¹ (including the MFSA) were involved as part of the Mystery Shopping exercise coordinated by ESMA. Here, the focus was on what the mystery shopper

¹ The ten NCAs are: Belgium- FMSA; Cyprus - Cyprus Securities and Exchange Commission; Germany – BaFin; Spain – CNMV; France – AMF; Hungary – MNB; Latvia – FKTK; Malta – MFSA; Netherlands – AFM; and Portugal – CMVM.

was actually provided with and whether s/he found the information understandable and useful. The goal of this exercise was to get a better picture of how the ex-ante MiFID II requirements are perceived by the investor and to a lesser extent to assess whether firms comply with the applicable requirements. To conduct this exercise, NCAs had the option to either cover both, or one, of the following scenarios:

- **Scenario One:** An onsite visit to the physical branch where a retail investor was looking for an investment advice.
- **Scenario Two:** A remote visit focusing on online distribution of services whereby a retail investor was looking to trade on investment products without advice and on his/her own initiative.

The main findings of the two exercises are presented below.

CSA Exercise

Although there is an adequate level of compliance with most elements related to the ex-post costs and charges in line with MiFID II requirements; ESMA identified a number of shortcomings which hinder supervisory convergence, such as:

- a) Costs not always shown as a percentage;
- b) Cost allocation between service and product costs varies;
- c) Differing inducements practices and sometimes lack of disclosure;
- d) Implicit costs are not always shown;
- e) Differing and lack of compliant practices in the cumulative effect of costs on return;
and
- f) Format and context of ex-post disclosures differ widely.

Similarly, ESMA expressed its concerns on how licence holders are informing retail clients on the ex-ante costs and charges. In most cases, mystery shoppers were provided with some information on costs and charges in a durable medium. Otherwise, ESMA noted that the costs and charges information is incomplete, provided orally or else disclosed late in the sales process.

ESMA noted that licence holders are not disclosing in an adequate manner whether the investment advice was independent or not. Lack of inducements disclosure was another shortcoming noted by ESMA, since licence holders are disclosing the inducement at a later stage of the sales process.

Mystery Shopping

As a preliminary remark, it should be noted that there are some reservations on the results obtained from this first coordinated mystery shopping exercise, given factors that may have conditioned the interpretation of responses submitted by mystery shoppers (for example, limited use of real accounts/transactions, technicality of some aspects related to costs and charges disclosure, difficulty to compare results from different outsourced providers).

As to the results, in most cases, mystery shoppers were provided with some information about costs and charges prior the provision of the investment service. However, only in approximately half of the cases, proper MiFID II ex-ante information about costs and charges was provided, in a durable medium. In the other cases, the information was incomplete (e.g. only a KIID/KID was provided, or only marketing material containing some cost information) or provided just orally. Moreover, ex-ante costs and charges were at times only disclosed late in the client's decision process, impairing the client's ability to make an informed investment decision based on this information.

Furthermore, when providing investment advice, firms did not always disclose in an adequate manner whether their investment advice was independent or not. Firms were also not always forthcoming with respect to the disclosure of inducements; in some cases, such information was not provided at all, while in cases in which the information was provided, sometimes only late in the process. Such a practice would not amount to providing the information in good time before providing the service and may result in inducements only being disclosed at a time when the client has already decided on a specific product.

Target Audience

This circular is addressed to all investment firms and credit institutions that provide investment services activities which are subject to MiFID II (Directive 2014/65/EU).

Way Forward

Following the publication of the main findings, ESMA shall focus its supervisory convergence efforts on the following:

- a) Developing a limited number of Questions and Answers (Q&As), or reviewing the existing ones,² to address some issues identified in the two exercises that are relatively simple and straightforward to solve; and

² ESMA had previously published Q&As on MiFID and MiFIR investor protection and intermediaries topics, available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf (as at 13th July 2023).

- b) Additional preparatory work on the provision of information about costs and charges to clients in a more standardised EU format.

Contacts

Should you have any queries regarding the above, please do not hesitate to contact: csuinvestments@mfsa.mt.