



FSUG opinion on the Commission's forthcoming Retail Investment Package

BACKGROUND

The Financial Services User Group welcomes the European Commission's ongoing work on the Retail Investment Package as one of the major initiatives in this legislative mandate. For too long, EU legislation in the field of financial services has been reactive, from addressing the financial crisis to dealing with greenwashing, instead of presenting a horizontal harmonised retail investor-centric view on financial services legislation. The forthcoming Retail Investment Package should address the inconsistencies, gaps and overlaps in the consumer perspective of financial regulation, which too long has been an afterthought in the silo-based approach of EU financial product legislation.

In this short position paper, the FSUG reviews the Commission's "long list" of retail issues to be addressed as listed in the Commission's April 2021 roadmap and consultation, assessing whether and how the Retail Investment Package is expected to address the topic and what could be done to further improve the initiative. We take into account recent developments as well as policy announcements, including those presented in the second roadmap (Call for Evidence) published in May 2022, which explicitly mentions that the Commission would appreciate the FSUG's written input.

Financial literacy (Consultation chapter 2)

One of the main pillars of the Commission's package continues to be the promotion of financial literacy, including through non-legislative and "*non binding actions in the area of financial literacy*" for advisors and consumers. We agree with the Commission that measures aimed at promoting financial literacy need to be combined with an improved disclosure framework but warn that financial literacy on its own can never address the root cause of consumers taking wrong or suboptimal investment decisions. The idea that risk is strongly mitigated by increasing financial literacy is both a simplification of the issue and for the majority of retail investors not true. It can rather lead to increasing confidence and risk taking, creating false expectations of high returns and little actual understanding of an individual product. Continued overreliance on financial literacy also reinforces national traditional contract law principles of freedom of contract and informed consent, which is in the long run is detrimental to achieving EU-wide harmonisation.

Therefore, financial literacy initiatives must be accompanied by strong investor protection measures. This includes issues such as tackling conflicts of interest in the sales process (see below) and reducing **the education gap on the "advisor" side, particularly in the field of sustainability impact as well as risk** and complexity of the investment products that they sell. In line with recommendations by individual FSUG members¹, the Commission should include mandatory sustainability trainings and/or certification processes for advisors in the forthcoming review of the consumer provisions in MiFID, aligned to the minimum amount of annual training defined in the IDD. Furthermore, from a user standpoint, access to reliable and independent sources of information is key to taking informed investment decisions and should be fostered by the EU Commission.

Digital innovation (consultation chapter 3)

The Commission identifies several digitalisation trends that impact retail investments: open finance and data sharing, increased digital distribution of investment products and disclosure documents, new channels for the promotion and marketing of retail investments (social media), and new comparison

¹ NGO recommendations for a sustainable EU retail investment policy, June 2021, <https://betterfinance.eu/publication/ngo-recommendations-for-a-sustainable-eu-retail-investment-policy/>



and advice tools. However, the latest policy announcements in the Call for Evidence lack forward-looking proactive measures and seem to be focused at reacting to external technological developments (e.g., removing the requirement for paper-based disclosure, ensuring that existing marketing rules are applied **on social media, ...**). **The FSUG recommends the Commission to take a more proactive** approach and build a future-proof framework that 1) protects consumers from too liberal data sharing rules that lead to financial exclusion and/or mis-selling due to the use of irrelevant data and/or consumers not wanting to share their data; 2) ensures disclosure documents are machine-readable so new services for consumers can be built on them, without impacting the readability for consumers; 3) actively regulates online advertising for and promotion of investment products, including through consumer testing, and 4) discloses and regulates the use of automated advice. While promoting digital distribution can improve accessibility of financial investment services, the Commission should also ensure that financial services remain accessible through other channels².

Disclosure requirements (consultation chapter 4)

Over the last decade, the EU has taken a step-by-step approach of improving pre-contractual disclosure of retail financial products, integrating new concepts and behavioural insights from consumer testing with each iteration. It is now time to consolidate the effort and harmonise Key Information Documents across asset classes. This is not only important because some products are economic substitutes, but also because a harmonised disclosure system will make it easier for consumers to recognize and identify the most important information elements they need to consider when making an investment decision or contracting another financial service. Harmonised EU disclosure regimes in other fields such as the Ecolabel, EPC and Energy Efficiency Label also show citizens a concrete form of EU added-value. Unfortunately, the Call for Evidence shies away from confirming a legislative omnibus that would revise **sectoral disclosure regimes, even though it mentions “making improvements to the current disclosure regimes” (in plural)**. **FSUG members³** have provided suggestions for individual product regimes as well as horizontal disclosure needs such as those related to sustainability information, with a particular emphasis to SFDR Article 8 and 9 products⁴.

The PRI I Ps Regulation (consultation chapter 5)

The PRI I Ps Regulation is the latest major piece of sectoral legislation that regulates a retail investment product, and represents the latest thinking on consumer disclosures, consumer testing and behavioural science. The programmed review of PRI I Ps is an ideal opportunity to upgrade the framework to become the gold standard in consumer disclosure, with a Key Information Document that could serve as a model for other product legislation. In addition to revising the disclosure of Multi Option Products and PRI I Ps-specific issues such as past performance and the inclusion of sustainability-related information, PRI I Ps should set the new standard for the disclosure of sustainability impacts and risks, including the disclosures required by the SFDR and related to the Taxonomy Regulation, which should apply to all products covered by an extended PRI I Ps scope. The use of graphical elements such as colour-coded scales and pie charts should be used to make disclosures more engaging. As highlighted in the study commissioned by DG FISMA on disclosure, inducements, and suitability rules for retail investors, the current legal framework is not conducive to giving consumers the right disclosures, as it fails to provide sufficient detail while avoiding information overload. Getting consumers to study pre-contractual

² FSUG position paper on financial exclusion linked to broader accessibility issues, May 2021, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/fsug-opinions-210712-broader-accessibility-issues_en.pdf

³ See responses to the Call for Evidence 2022: [Finance Watch](#), [BETTER FINANCE](#) and [BEUC](#)

⁴ Joint NGOs and consumer recommendations for minimum criteria for sustainable investments and products with ESG characteristics, March 2022 <https://www.finance-watch.org/publication/joint-ngos-and-consumer-recommendations-for-minimum-criteria-for-art-8-9-sfdr-products/>



information, however, is a precondition for their understanding and subsequent decision-making.⁵ In terms of scope, along with the recent inclusion of UCITS in the PRIIPs framework, other products need to be brought in scope of PRIIPs including national law pension products, to better help consumers understand the financial and sustainability profile of their entire retirement savings⁶.

Suitability and appropriateness assessment (consultation chapter 6)

In the Commission's 2022 Call for Evidence, the key initiative in the field of the suitability and appropriateness test seems to be a proposal to move from a product-centric to a client-centric approach. We agree that a more holistic approach to suitability will help consumers. However, this development should not encourage the inclusion of individual products in portfolios that could be detrimental to a consumer's interest and preferences on a stand-alone basis. Products that have biased outcomes, poor sustainability performance or high fees should not be "hidden" in between more suitable products in a portfolio proposal. Product "quality" should be seen as an integral part of suitability – inferior products by design are simply never suitable. In addition, the resulting shift of the responsibility on suitability and appropriateness from the product manufacturer to the distributor will make it even more important to address fundamental conflicts of interest in the sales process (see below).

Furthermore, some intermediaries act as a counter-party to their own customers to whom they sell investment products under non-transparent conditions. Such a situation should not be considered suitable and appropriate. Following the example of collective investment vehicles where the daily price under which the investor is entitled to exit his investment with a particular asset management company is perfectly defined as well as following the example of best price guarantees in take-over procedures, a similar approach (objectively defined price or best price guarantee) should also be applied to providers of investment services when they act as a counter-party to their own customers.

Reviewing the framework for investor categorisation (consultation chapter 7)

Investor classification is supposed to better reflect the fact that there is a heterogeneity between investors based on their investment experience, track record, education, and financial resources. Investors would be subject to different levels of protection reflecting such characteristics. However, EU policy should avoid encouraging the use of simplistic models of categorisation, which would lead to a risk of abuse by providers, with non-expert investors being classified as experts e.g. because of limited past investments, investments in low-risk products or their level of education. While more sophisticated investors should not be overly protected, all investors need a certain degree of protection, and investor protection should not be limited to the least educated and poorest⁷. As the CJEU has stressed in the context of consumer protection, even when an individual demonstrates a high level of technical knowledge, they can still be considered as a consumer that needs to be protected⁸. The Commission should avoid risking the protection of thousands of relatively uninformed consumers to suit a few expert investors.

⁵ *Disclosure, inducements, and suitability rules for retail investors study*, Centre for European Policy Studies (CEPS), Kantar and Milieu, <https://op.europa.eu/en/publication-detail/-/publication/5d189b3c-120a-11ed-8fa0-01aa75ed71a1/>

⁶ FairFin response to the Public consultation on a retail investment strategy for Europe, 3 August 2020, available at <https://drive.google.com/file/d/1bZSS9h4kkenGeA64QV9TKsLuwqwsUjQK/view>

⁷ *"Input from stakeholders suggests that, in the category of "retail" clients, there is a subgroup of non-professional individual investors that possesses a higher degree of understanding and knowledge of financial products and markets. For this sub-group, identifiable as non-professional qualified investors, the informational needs and protection requirements are not the same as for the other "retail" investors. Different eligibility criteria can be considered to identify and categorise a qualified investor. The establishment of an 'investor license' obtained through an EU-wide exam on financial knowledge was reflected upon, however, was not retained due to a lack of EU competence in this area."*; Final Report of the High Level Forum on the Capital Markets Union, https://finance.ec.europa.eu/system/files/2020-06/200610-cmu-high-level-forum-final-report_en.pdf

⁸ Case C-110/14 *Costea v SC Volksbank România SA*



Consumers that do actively choose to opt-out from the default "retail" client category should remain subject to safeguards not only to compensate for the lack of knowledge or experience as described above, but also to reflect the unequal negotiating power with an investment services provider or firm⁹. In addition, the investor categorisation framework must be considered holistically with the distribution (advice/selling) process. From the outset, manufacturers or providers should not be allowed to propose re-categorisation (either as a direct proposal or under the form of nudging) as it will conflict with their duty to act in the best interests of clients and with the suitability or appropriateness assessments, rendering the former null. Increased categorisation can also lead to weaker collective representation of retail investors. The Commission should enhance the possibilities for collective representation of investors, and ensure that collective entities that reach certain levels of representation can formally take part in proceedings deliberating the public interest in respect of financial markets (see also comments on chapter 10 below).

Inducements and quality of advice (consultation chapter 8)

The Financial Services User Group¹⁰ and several of its members¹¹ have repeatedly expressed their support for a full EU-wide ban of all inducements related to retail investment "advice". We appreciate that the Commission recognizes that the problems in investment advice need to be addressed but are disappointed that the Call for Evidence suggests that the Commission will again focus on symptoms such as fixing the "poor quality" of advice, instead of addressing the root cause of the problem: the existence of conflicts of interests in the sales process. In fact, inducement-based financial advice is not advice at all – it is a sales push¹². Genuine financial advice is largely unavailable to most citizens in the EU, and citizens that at their own expense choose to procure such advice, on a cross-border basis, end up paying for inducements anyway when they purchase investment products on an execution-only basis. As evidenced by a recent report commissioned by the European Commission, the products with inducements are on average 35% more expensive for the consumer than products on which no inducements are paid. Moreover, the same study shows that in the Netherlands and the UK, where inducements have been banned, retail investors get lower costs and better value for money and the ban has not put retail investors off from investing.¹³

Addressing the complexity of products (consultation chapter 9)

Standard and basic products have started to prove their added-value in retail financial services. The Payment Accounts Directive (PAD) adopted in 2014 not only makes a difference for EU citizens, but it has also demonstrated its usefulness for the integration of Ukrainian refugees. The Personal European Pension Product (PEPP) derives part of its popularity from the harmonised provisions and low fees. Basic products do not only cater for a certain demand in the market; they also provide a benchmark for other products to do better: it forces financial market participants to justify the higher cost and fee structure

⁹ For instance, the Unfair Contract Terms Directive 93/13/EEC reflects this objective in relation to standardised clauses or adherence contracts

¹⁰ FSUG response to the Public consultation on the review of the MiFID II/MiFIR regulatory framework, 18 May 2020, <https://drive.google.com/file/d/1eVJaoDKkYheM2YZIHOpXqr2iWJfbaCW/view>

¹¹ Including BEUC in: Upcoming Retail Investment Strategy: transparency alone is not an option to ensure retail investor protection against conflict of interests in the financial industry, 18 July 2022, https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-080_upcoming_retail_investment_strategy_transparency_alone_is_not_an_option.pdf

¹² BEUC response to the Call for Evidence, 31 May 2022, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13395-Retail-investment-new-package-of-measures-to-increase-consumer-participation-in-capital-markets/F3269640_en

¹³ *Disclosure, inducements, and suitability rules for retail investors study*, Centre for European Policy Studies (CEPS), Kantar and Milieu, <https://op.europa.eu/en/publication-detail/-/publication/5d189b3c-120a-11ed-8fa0-01aa75ed71a1/>



of competing products¹⁴. In many cases, excess complexity has no discernible benefit to the investor, and is an indication of an exploitative product and that should not be allowed¹⁵.

Redress (consultation chapter 10)

Even though the 2021 consultation includes an entire chapter on redress, there is no trace of the topic in the Call for Evidence. While initiatives have been taken in the past years, the result remains a patchwork for consumers, both at an individual level and through collective action.

On individual redress, so far no action has been taken on issues such as the governance and independence of alternative dispute resolution (ADR) bodies. All financial services providers should by default be obliged to adhere to ADR bodies and clearly inform consumers of the means to access the former. The EU law on ADR should be reviewed to ensure: (i) the response deadline for complaint-handling procedures at provider level should be limited to an overall maximum of 35 days; (ii) awareness campaigns should be initiated to inform consumers of the possibility of recourse through out-of court dispute settlements (ADR); (iii) the independence (from the financial industry) of ADR bodies (including the financial ombudsman) should be strengthened by imposing a minimum 5-year cooling off period for members and restricting financing from the financial industry; (iv) to reduce the fragmentation of ADR bodies, in particular in the banking industry; (v) the creation of regional ADR bodies, as is the case in Spain; and (vi) making ADR decisions (for cases under a certain threshold) binding for financial services providers.

On the collective side, the Collective Redress Directive adopted in 2020 does not cover direct investors in EU's capital markets (shareholders and bond investors) albeit the CMU having as an objective to attract more direct investors. The Representative Actions Directive, which covers Articles 23 to 29 of MiFID, does not always provide access to justice as MiFID has been implemented as supervisory law (and not civil law) in Germany and other Member States. As a consequence, consumers and their representative associations have no legal standing in court.

In the absence of a comprehensive redress framework, the EU should strengthen the best available complimentary instrument, which is the ability of a service user to change service provider. Following good practices in telecommunication and banking sectors, promoting the portability of securities accounts between different financial intermediaries, including by limiting switching costs, would help to **discipline firms. Without such regulation, investors are often "trapped" with existing providers.**

Product intervention powers (consultation chapter 11)

As the Commission notes, product intervention powers have been used in the past to avoid consumer detriment stemming from high-risk products such as binary options and contracts for difference. The **suddenly increased attention for financial "investment" services during the Covid pandemic** (e.g., the Gamestop case) and the volatility of financial markets due to the recent geopolitical instability demonstrate that the EU needs a robust product intervention regime, to ensure financial products are fit for purpose and not abusing **consumers' behavioural biases. There is no indication that the Commission plans to revise product intervention powers in context of the Retail Investment Package.**

Sustainable investing (consultation chapter 12)

The Commission consultation rightly addresses many dimensions of sustainable retail investment. An EU legislative initiative aimed at helping consumers invest more sustainably and address greenwashing of retail investments would support both the Capital Markets Union and the Sustainable Finance Action

¹⁴ FSUG Recommendations to the Commission 2019-2024), 7 November 2019, https://finance.ec.europa.eu/publications/fsug-opinions-2019_en

¹⁵ Finance Watch response to the Call for Evidence, 30 May 2022, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13395-Retail-investment-new-package-of-measures-to-increase-consumer-participation-in-capital-markets/F3267761_en



Plan, as well as general policies of the Union such as the Green Deal. As such, sustainable finance should be a key pillar of the Retail Investment Package, if not an initiative of its own. In a dedicated briefing on sustainable retail investment policy supported by FSUG members BETTER FINANCE and BEUC¹⁶, NGOs present ten complementary recommendations to incorporate sustainability aspects in EU retail investment policy. The Commission has included some suggestions in the Call for Evidence, including those related to distributors (sustainability preferences, education of investors – see above, inducements – see above,) and to product manufacturers (harmonisation of pre-contractual disclosures – see above).

However, in the field of distribution, the Package should also include measures to make sustainable products the default option, and to promote the uptake of sustainable investment choices through fintech. On the product side, the FSUG would support minimum standards for sustainability (through an omnibus to cover UCITS, PRIIPs, PEPP and ELTIF), measures to improve retail investor engagement (review SRD), a more thorough position on labels including the Ecolabel for finance project launched in 2018, as well as a strategy to move from measuring the theoretical sustainability of an investment to measuring the actual sustainability impact.

¹⁶ NGO recommendations for a sustainable EU retail investment policy, June 2021, <https://betterfinance.eu/publication/ngo-recommendations-for-a-sustainable-eu-retail-investment-policy/>