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### 1. ESMA warning for people posting investment recommendations on social media to comply with Market Abuse Regulation requirements



On 6 February 2024, ESMA published a "Warning" for people [posting investment recommendations on social media](#).

Retail participation has increased over the last years, with people discussing investments on different fora.

With this warning, ESMA and National Competent Authorities are raising awareness of **requirements** established by the [Market Abuse Regulation](#) (MAR) which apply when posting such recommendations and on the **risks of market manipulation** in such publications.

In the document, ESMA warns that the **definition** in the Market Abuse Regulation (MAR) of "**investment recommendation**" is broad (any post, video, or any other type of public communications, including social media, in which a person gives advice or ideas, directly or indirectly, on buying or selling a financial instrument or on how to compose a portfolio of financial instruments) and that even messages using non-technical language or with an educational purpose can be considered investment recommendations.

ESMA refers to the applicable **rules** (MAR and its delegated Regulation) and that non-compliance can lead to sanctions, and even criminal prosecution, in some Member States.

The paper continues by giving an overview of the general and additional **requirements** that have to be complied with by different categories of people producing investment recommendations (non-professionals – which can include experts and non-experts - vs. professionals such as investment firms). Lastly, ESMA refers to the **risks of market abuse: market manipulation, insider dealing and unlawful disclosure of inside information.**

The paper also includes an **annex** with practical examples of direct and indirect recommendations by different categories of people (p 7 - 10).

As a reminder, the role and need for regulation of “finfluencers” is something we also find in recent European texts, such as the new Distance Marketing of Financial Services rules and the proposal for a Retail Investment Strategy.

## 2. ESMA and NCAs to coordinate supervisory activities on MiFID II pre-trade controls



On 11 January 2024, ESMA launched a Common Supervisory Action (CSA) with National Competent Authorities (NCAs), with the objective of assessing the implementation of pre-trade controls (PTCs) by EU investment firms using algorithmic trading techniques.

These controls are used by investment firms to carry out checks at order entry to limit and prevent sending erroneous orders for execution to trading venues. Following the May 2022 flash crash, ESMA and NCAs have focused their attention on the implementation of PTCs in the EU, gathering evidence through questionnaires submitted to a sample of EU investment firms. As a follow up, ESMA and NCAs have decided to launch a CSA with the goal of gathering further and more detailed insights on how firms are using PTCs across the EU. More information can be found [here](#).

## 3. The European Commission opens formal proceedings against X under the DSA



On 18 December 2023, the European Commission announced the opening of formal proceedings against X (formerly Twitter) to assess whether X may have breached the [Digital Services Act \(DSA\)](#). These are the first formal proceedings launched by the Commission to enforce the DSA.

X was designated, on 25 April 2023, as a “Very Large Online Platform” (VLOP) under the DSA. As such, it has to comply with a series of obligations such as diligently identifying, analysing and assessing, any systemic risks in the Union stemming from the design and functioning of its services, notifying individuals or entities of content moderation decisions, refraining from deceiving or manipulating its users through the design, operation or operation of its online interfaces, and providing a publicly available repository of advertisements on its platform.

The decision to open formal proceedings stems from preliminary investigations based, among others, on an analysis of the risk assessment report submitted by X in September, X’s transparency report submitted in November and X’s replies to a formal request for information.

According to the Commission’s press release, the formal proceedings will focus on:

- X’s compliance with DSA obligations regarding the countering of dissemination of illegal content in the EU.
- The effectiveness of the measures taken to combat information manipulation on the platform (including the effectiveness of X’s “community notes” system).
- The measures taken by X to increase transparency. More specifically, potential shortcomings in giving researchers access to X’s publicly available data.
- Suspected deceptive design of the user interface (notably regarding “checkmarks” linked to subscription products).

The Commission will now continue to gather evidence through further requests for information, interviews or inspections. It can also adopt interim measures and

non-compliance decisions. **The DSA does not impose any time limit on such investigations.** The deadline will depend on the complexity of the case as well as the extent to which X decides to cooperate with the Commission.

**If proven, the above-mentioned potential failures could amount to a violation of a number of Articles of the DSA.** Under Article 74 of the DSA, **the Commission may impose fines** for these infringements if they are proven (not exceeding 6% or 1% of the VLOP's worldwide annual turnover, depending on the breach). Under Article 76, **the Commission can also impose periodic penalty payments** on the VLOP in order to compel them to comply with their obligations.

## 4. The European Commission's infringement procedures regarding MiFID II and Mortgage Credit Directive



### 1/ MiFID II

The European Commission decided to open an infringement procedure by sending a "letter of formal notice" to Greece, Slovenia and Slovakia for the incomplete transposition into national law of amendments to the [Directive on markets in financial instruments](#) (MiFID II). The amendments replaced the **definition of "financial instrument"** in MiFID II. The transposition deadline was 23 March 2023.

The Commission is therefore sending a letter of formal notice (first step in the infringement procedure) to the 3 Member States, which now have 2 months to respond and address the shortcomings raised by the Commission. In the absence of a satisfactory response, the Commission may decide to issue a reasoned opinion (second step in the infringement procedure).

### 2/ Mortgage Credit Directive

The European Commission also decided to send a letter of formal notice to France for incorrect transposition of the Mortgage Credit Directive (MCD - [Directive 2014/17](#)). France notified a complete transposition of MCD, but it did not correctly transpose the aspects of the Directive relating to the **freedom to provide services** and the **freedom of establishment of credit intermediaries**

established and authorized in other Member States. The Directive requires that such credit intermediaries can offer their services on a cross-border basis or by establishing a **branch** in France within a specific time frame. They can do so based on their authorization in their home Member State and **irrespective of any registration** by the **French authorities**. The Directive also requires that their **supervision** is in principle carried out by the competent authorities of the **home Member State** and that supervision by French authorities needs to be limited in line with the Directive. Furthermore, the **remuneration** of the staff of creditors, credit intermediaries or appointed representatives providing advisory services must not be in any manner contingent on **sales targets**. The Commission considers that France has failed to correctly transpose these aspects of the MCD.

The Commission is therefore sending a letter of formal notice to France, which now has two months to respond and address the shortcomings raised by the Commission. In the absence of a satisfactory response, the Commission may decide to issue a reasoned opinion.

Links to the specific cases can be found on [this page](#).

## 5. The European Commission publishes the template for consumer profiling techniques under the DMA

**Article 15 of the [Digital Markets Act \(DMA\)](#) requires "gatekeepers" to submit to the Commission, within six months of their designation, an audited description of any techniques it applies for the profiling of customers.** "Gatekeepers", under Article 3 of the DMA, are undertakings that provide core platform services (inter alia social networks, intermediation, ads, search, video sharing, operating systems, etc.) which are important gateways for business users to reach end users and that have a significant impact on the internal market while enjoying an entrenched and durable position therein. **Gatekeepers, therefore, refer to large online platforms and marketplaces.** The **first six gatekeepers were designated by the Commission on 6 September 2023** and are the following: Alphabet (Google's parent company), Amazon, Apple, ByteDance (owner of TikTok), Meta (formerly Facebook) and Microsoft.

Following their designation as gatekeepers on 6 September, **these six companies will have to report under Article 15 by 7 March 2024**. In order to standardise reporting on this topic and to assist gatekeepers in the fulfilment of their obligations, **the Commission published, on 12 December 2023, a [template for the reporting on consumer profiling techniques](#) by gatekeepers**. The template contains 7 sections **requiring gatekeepers to provide information on themselves, on the profiling techniques they use and the audit process used**.

Regarding the profiling techniques used, the template requires gatekeepers to provide **detailed information on all profiling techniques used throughout any core platform services they offer**. For each technique used, the gatekeepers need to report a series of information, including:

- the specific purpose of each technique,
- a description of each category of personal data and data derived from user activity,
- a detailed description of the inferred customer data derived from the profiling technique,
- the retention duration of each type of data,
- whether consent was required for the processing of said data and, if so, a description of how it was acquired.

The following sections of the template must provide information on the auditors and the audit conclusions, including an assessment of “positive”, “positive with comments” or “negative” as well as detailed justifications for the said assessment.

**This new template is the latest in a [series of templates adopted by the Commission under the DMA](#) and directed at gatekeepers**. Other templates that have already been published by the Commission include templates on requests for a specification dialogue (under DMA Art 8(3)), suspension requests (under DMA Art 9), exemption requests (under DMA Art 10), compliance reports (under DMA Art 11) and information on transactions (under DMA Art 14).

**Upon receipt of the reports on customer profiling techniques, the Commission will transmit these to the European Data Protection Board (EDPB)**. The gatekeepers will also be required, under **Article 15(3) of the DMA, to make publicly available an overview of the audited description of consumer profiling techniques**. They will be entitled to take trade secrets into account when deciding what information to share publicly.

## 6. The European Commission appoints an EU SME Envoy



On 31 January 2024, MEP [Markus Pieper](#) (EPP DE) was appointed « EU small and medium-sized enterprises (SME) Envoy ». He will report directly to Commission President Ursula von der Leyen. Mr Pieper will take up office in the Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) and he will also report to the Commissioner for Internal Market (Thierry Breton) on all SME-related activities. As an MEP, he has been rapporteur on important SME-related matters, such as defining SMEs and improving regulations. Prior to being an MEP, Mr Pieper served as the Managing Director of a regional Chamber of Commerce in Germany.

As a reminder, the SME Envoy is an active interface with the SME business community, considering their specific interests and needs in EU programmes and policies. The main objective of this function is to establish a close, direct link between the Commission, SMEs and their representatives.

The Commission recognizes that SMEs are the backbone of the EU economy. The Commission is determined to take action in support of SMEs, recognising the role they play in achieving the transition towards a green, digital and resilient economy as well as the contribution they make to the EU’s long-term prosperity. It is against this background that the Commission adopted a [Communication on an SME relief package](#), which included the appointment of a dedicated EU SME Envoy, as also announced by Mrs. **von der Leyen** in her latest [State of the Union speech](#).

The EU SME Envoy will also chair the SME Envoy Network, thus maintaining close contact with the national SME Envoys, and work together with business associations to advocate for the special concerns and needs of SMEs within the Commission, in line with the Commission’s Better Regulation Agenda. This includes, in particular, working towards bureaucratic burden reduction for companies, and filtering upcoming SME-related EU legislation and signalling to the Commission those that merit close attention from an SME perspective, in a regular dialogue with the Regulatory Scrutiny Board.