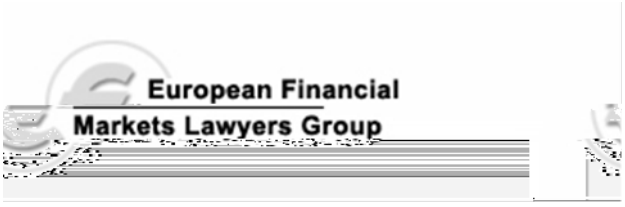

25 September 2023

European Commission

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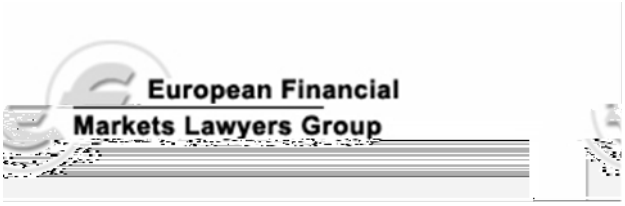

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Re: Retail investment strategy

Dear Mr Berrigan, dear Ms Ross, dear Ms Yon-Courtin, dear Mr Alonso Alonso, dear Mr Barrera López, dear Mr Moreno García-Cano

The European Financial Markets Lawyers Group (the "**EFMLG**") is a group of senior legal experts from the EU banking sector dedicated to making analysis and undertaking initiatives intended to foster the harmonization of laws and market practices and facilitate the integration of financial markets in Europe. The members of the Group are selected on the basis of their personal experience amongst lawyers of major credit institutions based in the EU active in the European financial markets. The Group is hosted by the European Central Bank.

The EFMLG supports the aims of the Retail Investment Strategy ("**RIS**") adopted by the European Commission ("**EC**") namely to encourage and increase retail participation in European capital markets at a fair price. However, although the goals of the initiative are remarkable, we have some concerns that:

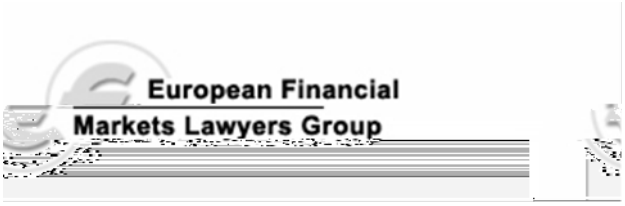
- **(i)** some of the measures will likely have **negative consequences in the European financial markets**;
- **(ii)** some aspects of the proposals go **against** the **free price formation process** and the need for **legal certainty**;
- **(iii)** the purposes of the RIS could be better **achieved with further supportive means**.

Concerns related to point (i) above are expected to be widely covered by market associations and other market participants in their answers. Consequently, and due to the nature of the EFMLG as a group of legal experts, **we will focus our comments on points (ii) and (iii).**

The comments will cover both (a) the Proposal for an Omnibus Directive as regards the Union retail investor protection rules[1] (hereinafter referred to as the "Omnibus Directive") and (b) the Proposal for a Regulation amending the PRIIPs Regulation[2] (hereinafter referred to as the "PRIIPs Regulation"), which comprise the RIS legislative package as proposed by the EC.

[1] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules, COM (2023) 279 final

[2] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1286/2014 as regards the modernisation of the key information document, COM (2023) 278 final



I.- Aspects of the RIS raising concerns

A. Omnibus Directive

1.- Pricing intervention measure.

1.a) Initial analysis

Whilst the objective of trying to give retail customers an adequate return for the money they invest ("**Value for Money**") is legitimate, very burdensome obligations are proposed to pursue it. These obligations in turn ultimately become an intervention in the prices of investment services and financial instruments falling under the definition of PRIIPs.

In particular, proposed Article 16-a.9 of Directive 2014/65/EU (**"MiFID 2"**) states that ESMA should create "*common benchmarks for financial instruments that present similar levels of performance, risk, strategy, objectives, or other characteristics*". The benchmarks will be created with data reported by manufacturers (costs and charges of the product) and distributors (cost and charges of the investment service). Investment firms will not be allowed to approve or distribute products whose cost and charges are above the relevant benchmarks unless they assess and prove that those costs and charges are justified and proportionate.

The EFMLG is especially concerned about this provision:

(i) Although the criteria to determine whether costs and charges are justified and proportionate would be adopted through delegated acts[3], investment firms approving or distributing instruments with costs and charges above the benchmarks will likely face a level of legal uncertainty as well as supervisory and litigation risk. This, in practice, will convert the benchmarks into caps on cost and charges for financial instruments and services. Moreover, no legal guidance is provided by the EC as to the content, timing and procedures of the "additional tests and further assessments" that, pursuant to the EC proposal, intermediaries would be required to perform where a financial instrument deviates from the relevant benchmarks.

(ii) Being that the case, only products below the cap will be distributed and reported to ESMA for the recalculation of the benchmarks. This will potentially result in the benchmarks being in continuous decline until they reach or are close to a fixed level.

(iii) In parallel, it is to be noted that: (a) manufacturers or distributors who might not be able to adjust their prices to the benchmarks[4] will likely be expelled from the market

In short, the need to accommodate costs to a certain benchmark will directly distort the process of free price formation that should prevail in any free market economy and, far from reducing the cost and charges of financial instruments and services it will **(i)** increase fixed costs due to the new reporting and monitoring obligations[6]; as well as **(ii)** potentially decrease the number of investment firms offering their products to clients, limiting competition and innovation, reducing the offer available to consumers while, most likely, increasing prices and costs.

To the best of our knowledge, the mechanism of costs regulation for PRIIPs suggested by the EC is unique in the landscape of major jurisdictions that feature highly developed financial markets and related regulatory framework.

1.b) Potential infringement of (i) the EU Charter of Fundamental Rights as regards to freedom to conduct a business and (ii) the antitrust law in relation to the freedom to set prices.

This public price intervention would violate the right of freedom to conduct business (Art. 16 of the EU Charter of Fundamental Rights), which comprises, according to the case law of the Court of Justice of the European Union ("**CJEU**"), the freedom to determine prices[7].

In this regard, the Charter itself (Art. 52(1)) provides that any limitation on the rights and freedoms set out therein may only be introduced where they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. However, this is always subject to the principle of proportionality.

While there is a clear general interest in ensuring strong and consistent investor protection throughout the Union, this cannot in any event be regarded as prevailing over the general interest of ensuring the stability of the financial system[8]. The latter would, however, certainly be affected by such price control measures. We have doubts about the necessary proportionality test being met in this case. Above all, our understanding is that the impact assessment published by the EC does not include any reason, assessment or conclusions about alternative measures which may have been analysed and disregarded that justify the proportionality of this pricing intervention. As mentioned in section II below, it is our view that those alternatives exist.

Finally, the competences of the European Supervisory Authorities, and particularly of ESMA, do not include the regulation of prices, nor the setting of price limits. This applies also to the creation of tools, such as benchmarks, that could be understood to serve such a purpose. In short, we consider that supervisory authorities should not be price regulators.

1.c) Conclusions:

(i) The need to accommodate prices to certain benchmarks will restrict the free price formation process, exposing some investment firms to higher supervisory and litigation risks and expelling some others from the market;

[6] If finally imposed, the obligation should consider the data already reported to NCA (i.e.: due to PRIIPs Regulation) or trade repositories (due to EMIR) to avoid duplication of tasks and costs.
[7] Judgment of 20 December 2017, Polkomtel, C-277/16, EU: C:2017:989, paragraph 50; Judgment of 15 April 2021, Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others, C-798/18 and C-799/18, EU:C:2021:280, paragraph 57.
[8] Judgment of 19 July 2016, Kotnik and Others, C 526/14, EU:C:2016:570, paragraph 91, and judgment of 8 November 2016, Dowling and Others, C 41/15, EU:C:2016:836, paragraph 54.

(ii) Price intervention measures are subject to the proportionality principle, i.e. they should be a tool of last resort in free market economies, when no other alternative can be used to reach a general interest objective. The impact assessment makes a minor reference to the proportionality of the measure, but there is no analysis behind it;

(iii) The need for investment firms to make a rigorous assessment about the fairness of the costs and charges of the financial instrument or service is a useful measure, but that analysis should be run by the firm itself not with a benchmark;

(iv) As explained in section II below, the EFMLG considers that increasing market competition within a harmonised legislative playing field should be the main driver to increase retail participation in the capital markets and to reduce costs of instruments and services.

2.- Low cost driven investment advice.

According to the proposed amendment in Article 24.1(a) of MiFID 2, when providing investment advice to retail clients, investment firms would be under the following obligations

(i) to make an assessment of an appropriate range of financial instruments;

(ii) to recommend the most cost-efficient financial instruments among financial instruments identified as suitable to the client and offering similar features;

(iii) to recommend, among the range of financial instruments identified as suitable to the client, a product or products without additional features that are not necessary for the achievement of the client's investment objectives and that give rise to extra costs;

2.a) Legal uncertainty

Terms such as "*an appropriate range of instruments*", "*most cost-efficient*[9]", "*additional features*" or "*extra cost*" are open-ended and, together with the complexity of the assessment, may lead to legal uncertainty and different interpretations by market actors and national supervisors. This would lead to an unlevelled playing field, create confusion for clients and potentially increase litigation if clients and courts consider that the understanding of the investment firm about, for instance, the existence of an extra cost was incorrect and led the investor to a wrong investment.

For example, the requirement to recommend, among the range of financial instruments identified as suitable to the client, a product or products "without additional features" that are: i) not necessary to the achievement of the client's investment objectives and ii) giving rise to extra cost, risks creating "vicious circles" from a legal standpoint. A pre-condition for a product to be deemed suitable is that this latter satisfies the client's investment objectives. Thus, envisaging that some features, which do constitute integral part of this product, might not be necessary to the achievement of the clients' investment objectives is at odds with the fact that this product

[9] It is not clear how to calculate the "cost efficiency" of a product; assuming that it cannot be determined only by the level of costs, and assuming also that it could be related to the potential performance of the product, what could be the "potential performance" to be considered? In relation to the different potential performances, for instance, the KID has 4 performance scenarios with very different results.

considered "as a whole" (i.e. in all its features) was deemed, at an earlier stage of this process "suitable" with a view to achieving the above-mentioned objectives[10].

2.b) Competitiveness

Due to the aforementioned uncertainty, the proposal may lead to the over-simplification of the suitability assessment to identify the cheapest suitable product[11]. This situation would be problematic, not only for excluding factors like the issuer credit worthiness, the track record of the manufacturer or the quality of the post trade service, but also for promoting economies of scale over innovation and customer experience. Investment advice mainly focused on low costs may lead to the exclusion from the market of those manufacturers with higher fixed costs or that promote quality of service or innovation over price[12]. As in the previous point, this may lead to a decrease in the offer and, subsequently, in medium term, to a potential increase in prices.

As already commented on the price intervention measures, we understand that increasing competition in the market should be the main driver to achieve lower prices for consumers. In this regard, imposing new obligations that may lead to legal uncertainty across Europe, together with the potential exclusion from the markets of some investment firms that may not compete in costs, rather than reducing product costs, may lead to an increase of market fragmentation, higher prices and a reduction in product innovation and ESG features.

3.- Ban on inducements.

After a long and intense debate over a potential total ban on inducements, the proposed text of Article 24a of MiFID 2:

(i) extends the current ban on inducements[13] to investment firms providing reception and transmission of orders and/or execution of orders to or on behalf of retail clients[14];

(ii) removes the quality enhancement test; and

(iii) introduces an obligation for the EC to reassess the framework in a three-year period.

3.a) Grounds for the ban.

The proposal to change the inducement model is the answer of the EC to *"shortcomings in the way products are manufactured and distributed, linked to conflicts of interest that may arise as a result of the payment of inducements between product manufacturers and distributors".* This and other similar statements are complemented along the text with references to the fact that changes in the framework are proposed to ensure that the advice given to retail investors is not biased by incentives and to avoid that such retail investors pay extra costs. These references seem based

[10] For instance, a structured note may have some features (i.e.: early termination windows) that may be seen as "additional features" not needed by the client but that form part of the unique product and, thus, are essential to provide the rest of rights, obligations, levels and costs of the instrument.
[11] Due to the interpretation of national supervisors or to the position of distributors trying to avoid mis-selling risks.
[12] We can foresee the impact that this type of measure may have in financial markets by imagining a similar obligation being implemented in other markets. We can think about an insurance broker being obliged to recommend the cheapest health or life insurance; a real estate broker obliged to recommend a house without extra costs… or an obligation like this in the TVs or mobile phone industry, automobile industry, etc. The difficulties, uncertainty and risks embedded in such comparisons are significant, similarly to the ones that investment firms will face with financial instruments.
[13] Currently applicable when the investment firm provides portfolio management or independent investment advice.
[14] Except for placement of securities which are not PRIIPs.

on the perception that measures for the prevention and management of conflicts of interest have not been sufficient to protect investors.

On the contrary, the measures adopted since the entry into force of MiFID II have significantly increased investor protection and the level and quality of investment services provided. The need to enhance the quality of the service provided to the client (through a close list of services, in some countries) and the complete disclosure about cost, charges and inducements provide the client with an added value and with full transparency to compare similar products including or excluding inducements. On the contrary, in certain countries, where the inducements scheme is already banned for all investment services, it has been observed as relevant report show that many retail clients have been excluded from access to investment.

In addition, contradictory reports on the benefits of the existing model of inducements and the one proposed by the EC, create questions on the rationale justifying the legislative action. In particular, certain shortcomings have been identified by the industry in the report commissioned by the EC, whereas the results of the report by a prestigious firm mandated by the most part of the financial industry lead to different conclusions. In any case, credibility and trust are essential to foster investor participation hence, when aiming towards increasing participation of retail clients in capital markets, these values should be fostered by both the public and the private sector on a common understanding.

Moreover, we would like to highlight the following points:

(i) The proposal is supposed to solve a potential conflict of interest between manufacturers and distributors and biased advice, however, such conflict has not been raised by clients before the courts or national competent authorities ("**NCA**"). If investment firms were to be providing biased advice, not acting in the best interest of their clients as the current MiFID 2 framework requires[15], NCAs would have imposed fines to investment firms and ESMA would have raised its voice asking for a change in the current legislation.

(ii) However, besides the lack of a fully recognised impact assessment by all parties or support from market supervisors, the proposal includes a prohibition to pay or receive inducements in those services (execution or reception and transmission of orders) where there is no advice and, consequently, there cannot be a biased advice.

One of the statements included in the Better Law Communication[16] reads as follows: "*Scientific evidence is another cornerstone of better regulation, vital to establishing an accurate description of the problem, a real understanding of causality and therefore intervention logic*" (the "**Better Law Communication**"). It is our understanding that the proposal to amend the inducement regime lacks all the requirements mentioned above: no scientific evidence establishing an accurate description of the problem has been provided nor is there a real understanding of causality. As a result, the intervention does not address the theoretical problem and may create unintended consequences. It is necessary to once again insist that, prior to any regulatory

[15] For an investment firm to pay or receive an inducement, it is required that this does not impair compliance with the investment firm's duty to act honestly, fairly and professionally in accordance with the best interest of its clients (Art. 24.4 MiFID 2)

[16] Page 3 of the July 2021 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions called "Better regulation: joining forces to make better laws"

modification of this magnitude, an adequate analysis that fully assesses both the initial situation and the effects and consequences of the modification of the incentive system shall be undertaken.

In this regard, we consider in any case essential to adopt a clear and harmonized definition of the concept of inducement, delimiting which payments are related to the provision of investment services to retail clients and which are legitimate payments from third parties for the provision of services to those third parties. This is necessary in order to ensure that the restrictions and prohibitions on inducements have an appropriate and uniform scope across Member States ("**MS**")[17]. We therefore request convergence in the interpretation of this concept by the different European Supervisory Authorities, as the lack of harmonization may harm competition in the European Union Market.

3.b) Review clause.

The proposed article 24a of MiFID 2 introduces a review clause by which, "*Three years after the date of entry into force of Directive (EU) and after having consulted ESMA and EIOPA, the Commission shall assess the effects of third-party payments on retail investors, in particular in view of potential conflicts of interest and as regards the availability of independent advice, and shall evaluate the impact of the relevant provisions of Directive (EU). If necessary to prevent consumer detriment, the Commission shall propose legislative amendments to the European Parliament and the Council*."

This timeframe is extremely short if we consider the time that the implementation at a national level will take, the need to obtain all relevant data and the time that should be invested to prepare accurate reports. In our view, a minimum of 5 years would be needed[18].

Also, the scope of the review clause seems to be too broad as it is encompassing all financial services despite the fact that most of the provisions concern only portfolio management and execution services. In this context, the analysis to be made should focus on those areas where the inducement regime has changed to foresee the impact that those changes had in terms of conflict of interest and product availability and costs for retail clients.

In addition, the above-mentioned review clause is problematic insofar as it i) does not rule out the possibility of further extending the ban (as explicitly indicated in the Explanatory Memorandum) and, in particular, of introducing a total ban on inducements (as explicitly envisaged in Recital 3) and ii) makes the introduction of a total ban conditional upon 1) the availability of independent advice and 2) the existence "per se" of conflicts of interests.

[17] As of today, there are clear misalignments in topics as important as the placement fees or the so-called platform fees.
[18] A longer deadline would be aligned with the content of Tool 44 of the Better Regulation Toolbox published by the European Commission in November 2021:

As a rule of thumb, an ex-post evaluation requires data on the application of the legislation over a period of at least three to four years. In setting the period on which an evaluation is to be provided, account must be taken also of the transposition, implementation and application deadlines, the moment when the key elements of the legislation will be applied in practice, as well as any time needed for the collection of data, for the evaluation and for the reporting.

Due consideration needs to be given to the time needed to carry out the evaluation, including the drafting of the report, where relevant, interservice consultations and the process for adoption of the report to the legislator, if the legislation provides for such a report. Ex-post evaluations should not be required more frequently than every 5 to 8 years after transposition, application, or implementation, as it is important that the requirements do not impose unnecessary burdens.

As for point 1), it is fair to say that the degree of availability of independent advice does not exclusively depend on the rules regarding inducements but also on a number of exogenous factors such as, for example, the unwillingness and/or the inability of most clients in many MS to pay a fee in exchange for receiving investment advice.

As for point 2), seemingly, the EC merely i) considers conflicts of interest "as a given" and ii) does not attach any relevance to "how" conflicts of interest are actually identified and managed, i.e. to the rules adopted by intermediaries to identify and manage these conflicts

4.- Other considerations.

4.1.- Suitability

The requirement for investment firms providing investment advice or portfolio management services to obtain information from clients related to the composition of "existing portfolios", as provided for in the proposed Article 25.2 of MiFID 2, raises two serious concerns.

1. The key concept of "existing portfolio" is not legally defined. Therefore, it is by no means clear whether it also encompasses portfolio(s) held at other/third intermediaries. This creates legal uncertainty and exposes investment firms to additional supervisory and litigation risks.

2. A scenario where the investments held by clients at other/third intermediaries are to be included within the perimeter of the "existing portfolio" for purposes of suitability assessment would be problematic at least for the following two reasons.

First, the profiling questionnaires and the methodologies adopted for purposes of suitability assessment are closely related with and instrumental to the peculiar model of service adopted by each intermediary. Therefore, the outcome of a suitability assessment performed by different intermediaries might not necessarily be the same, even when referred to the same investment.

Second, taking into account, for purposes of suitability recommendation, the composition of the investments held at third intermediaries is likely to raise significant operational challenges such as, sharing all data regarding clients' investments on a continuous and real-time basis.

4.2.- Timing

With regards to timing the EC proposal with respect to the Omnibus Directive raise serious concerns for two key reasons.

The first reason relates to the fact that the range of topics addressed by the proposed Omnibus Directive are very wide and the high impact of many of the innovative proposals contained therein i on the regulatory framework currently in force. Even assuming that MS successfully manage to meet the transposition deadline for the Omnibus Directive, the combined effect of this broad range of topics and high impact renders the six-months period for investment firms to implement national provisions too short.

The second reason relates to the multitude of level 2 and level 3 rules (EC delegated acts, ESMA and EIOPA regulatory and implementing technical standards (RTS and ITS) guidelines) that are due to follow and specify the level 1 amendments proposed by the EC. In this respect, the main concerns pertain to timing and substantive content.

In a nutshell: level 2 and level 3 rules play a crucial role in the overall architecture and in the concrete operationalisation of the EC proposal since they are mandated to address some of the most critical and innovative topics introduced by the EC. This implies that, in the absence of level 2 and level 3 rules, intermediaries will neither be in the position to concretely interpret and implement the relevant level 1 requirements they shall be subject to nor to perform a fully-fledged and conclusive assessment of the impact thereof. Therefore, ensuring synchrony of all the relevant deadlines (transposition of level 1 rules, submission/adoption of level 2 and 3 rules, implementation of the relevant rules) will prove crucial in order to ensure full and timely compliance by intermediaries with their legal obligations under the EC proposal.

Consequently, in order to avoid legal uncertainty for firms in the adaptation process and during the first months of the entry into force, we propose to link the entry into force of the Directive to amend MiFID 2 to the publication of these level 2 regulations in the Official Journal of the European Union (e.g. 18 months after the publication). This would also help avoid the problems and legal uncertainty seen in the past when level 1 enters into force, but level 2 is not published yet.

B. PRIIPs Regulation

With reference to the proposed amendments to the PRIIPs Regulation, in our view the new section titled '*How environmentally sustainable is this product?*' seems insufficient to provide retail investors with key information on ESG/sustainability characteristics of PRIIPs products. This is because:

(i) it is limited only to SFDR products, while other PRIIPS products aligned with the Taxonomy Regulation or KPI-linked products are excluded (e.g.: a structured PRIIP bond investing into "environmentally sustainable activities" aligned with the Taxonomy Regulation or a derivative linked to an ESG KPI following ISDA standards would not be subject to the requirement);

(ii) it is limited to Taxonomy aligned products, while both the SFDR and MiFID 2 also take into account relevant social sustainable investments and Principal Adverse Impacts considerations;

(iii) it does not fully reflect SFDR disclosure (e.g. differences between Article 8 and Article 9 products);

(iv) it seems to create, out of the blue, a sort of "*regulatory favor*" in respect of SFDR taxonomy aligned products and SFDR products considering GHG emissions, because only this information will be quickly available to retail investors via the Key Investment Document ("KID"); products having different ESG characteristics will disclose their ESG information in the "*What is this product?*" section, mixed with other product's information, and without a common standard and common layout;

(v) lack of transparency on other key ESG characteristics could negatively impact the efforts of EU Regulation to promote sustainable investments, and also increase the risk of greenwashing.

In our view it would be necessary to ensure same level playing field for all PRIIPs products having ESG/Sustainability characteristics aligned with applicable regulation (SFDR, MiFID 2, TR) and therefore:

(i) the KID ESG section should not be limited to SFDR products;

(ii) PRIIPs manufacturers should have more space for sustainability aspects of their products, not limited only to "environmentally sustainable";

(iii) ESG disclosure should be provided at the same KID point for every type of PRIIP.

II.- The aims of the RIS could be better achieved with further supportive means

The EFMLG clearly shares and supports the objectives of the RIS, (i.e. increasing the participation of retail clients in the capital markets at a fair price). However, as elaborated above, the EFMLG does not entirely share the approach to achieve these objectives based on price intervention measures, business model bans or the imposition of low-cost products.

As an alternative, the EFMLG would like to draw the attention of the EC to some measures that, in our opinion, would contribute decisively to achieving the same objectives in a way that is more aligned with the principles of the Union and the single European market.

(i) Financial education: the EFMLG welcomes the measures proposed by the EC to increase financial education of retail clients. Together with trust, financial education is the only way to increase retail clients' confidence in financial markets.

(ii) Less administrative burdens: the number of processes that a client must successfully go through to have access to certain products and the pages of documentation that such client should read, understand and consent to in order to be able to buy an instrument is overwhelming (e.g. ESMA's **Guidelines on certain aspects of the MiFID 2 suitability requirements,** in particular, in relation to the clients' sustainability preferences. The amount and granularity of the information that should be obtained from the client is also immense and should be gathered even if the firm knows from the outset that no product in its catalog meets the clients' sustainability preferences[19].

Another good example of administrative burdens within the commercial process is the reinsertion of the exemption introduced by "MiFID 2 Quick Fix" whereby Art. 29a MiFID 2 excluded professional clients and eligible counterparties from the cost and charges disclosure requirements of Art. 24 (4) (c) MiFID 2. The European co-legislators removed this requirement in 2021 arguing that "*professional clients and eligible counterparties do not need mandatory and standardised cost information, as they already obtain the necessary information when dealing with their service providers*". These conditions have not changed since 2021 and therefore there is no need to change the current regime.

Finally, we can find another example of extra paperwork for clients and firms in the proposed Article 25a (3), where the appropriateness test should now assess not only the knowledge

[19] Other examples can be found in other guidelines and Q&As or in additional guidelines published by NCAs for the same topics.

and experience of clients, but also their capacity to bear full or partial losses and risk tolerance. This would tighten the appropriateness test, requiring more paperwork, more time from clients and, in short, make it almost equivalent to the suitability test, which is only required for financial advice and portfolio management services. As a result, the boundaries of "suitability and appropriateness" dichotomy (that, so far, has represented a cornerstone of the whole legal MiFID 2 architecture) would be blurred without generating, in all likelihood, additional benefits and/or safeguards for clients who chose to operate only under the appropriateness regime to avoid receiving advice and to preserve full autonomy in their investment decisions. All this despite of the fact that the research behind the proposal concluded that the suitability and appropriateness tests were effective and efficient.

Instead of adding new requirements or obligations, the future amendment to MiFID 2 should focus on the reduction of current administrative and non-client protective restrictions included in level 1 and 2 as well as in the interpretation made by ESMA and NCA through level 3 text. Less but clearer documentation is needed[20]. We will never engage clients in financial markets if we continue having administrative burdens, unnecessary constraints or extensive paperwork during the commercial process.

(iii) The situation described above is worsened when administrative burdens or constraints differ from one MS to another. European authorities have tried to harmonize the interpretation of MiFID 2 and other investor protection rules but, as of today, the objective is far from being achieved.

A recent ESMA publication with the findings following a Common Supervisory Action across EU firms on the requirements on information on costs and charges ("**CSA**") is just an example, but it represents very well the message we want to transmit. According to ESMA, the CSA revealed certain shortcomings and/or areas where there is a lack of convergence in this field. It does not seem to be reasonable to introduce new obligations trying to cap costs and charges through European benchmarks, to lead clients to more cost-efficient instruments or to ban inducements when there is no common understanding across Europe about cost calculation and disclosure or what an inducement is.

Whilst ESMA's statement shows that common supervisory actions may reduce interpretation divergence, there is a lot to do in that field. In this regard, the potential benefits of level 3 guidance issued by ESMA get undermined by local Q&As and guidelines published by NCAs and by the interpretations shared during private bilateral requirements (consequently, only known and applied by a portion of the local market) which in many cases go beyond the helpful and practical adaptation of ESMA's position to the national context and specificities by introducing additional obligations and restrictions to ESMA's position.

Only by achieving a single interpretation and supervision of the European financial legislative framework will we achieve a real single European market, with European financial institutions providing services all across the Union, increasing competition and allowing customers to have a wide range of inst

proposal introduces new powers for MS to impose additional requirements in their relevant countries, thereby hindering the cross-border and homogeneous distribution of financial instruments across Europe.

In particular, the text introduces the possibility for MS to impose the use of risk warnings by investment firms in information materials related to particularly risky financial instruments where those instruments could pose a serious threat to investor protection. Again, the obligation itself seems to be reasonable, but the possibility that some local authorities trigger it whilst others do not go against the spirit of the European single market and also against one of its main purposes of encouraging cross-border investment. If the EC is seeking to increase participation of retail clients in capital markets and at a lower cost, solutions such as this, which discourage cross-border participation of service providers and thus a wider choice of products, do not seem the most appropriate. Such measures should always be imposed at a European level.

A similar situation occurs already, for instance, with the possibility of NCAs to:

(a) establish product intervention measures at a national level for certain products; or

(b) in relation to PRIIPs, to request the delivery of the KID before a PRIIP is marketed in their country. The process is burdensome, costly and time-consuming and there is no public database including which NCAs have executed this option. Given that few NCAs have developed this obligation, it seems that it is not such a useful tool for supervision and that the restrictions it creates are not proportionate.

In any case, if these gateways are what is needed in order to have a unified legislation framework for most of the obligations, we encourage the EC to develop or request each MS to develop a consolidated database including the countries which have triggered additional or different measures, for which products and under which specific legislation[21].

(v) Finally, no additional obligations should be imposed on those investment firms which are able to provide services on a cross-border basis. We are referring, in particular, to the cross-border reporting obligation suggested as new article 35a.

Although the EFMLG fully supports the introduction of new mechanisms that may increase cooperation among competent authorities, those mechanism should not impose additional obligations to investment firms. Alternatives to the reporting obligation in the form of internal mechanisms among national competent authorities could better achieve the final objective without extra burdens to the services providers.
Additionally, the EFMLG suggests the following to make the measure proportionate:

(a) the obligation should be triggered with a higher number of clients (i.e.: 150) and being only retail clients who are not engaging with the firm on a reverse solicitation basis. If the measure is intended to protect retail investors from regulatory arbitrage, it is only relevant to measure how many of these clients are affected. Therefore, only retail clients should be counted towards the threshold and only activity with retail clients should be reported, excluding professional clients and eligible counterparties.

[21] Something similar to what Article 24.12 of MiFID 2 currently covers but with a broader scope.

(b) Moreover, the threshold should not be computed in total terms for the European Union, but in relation to a particular MS. Under the current text, if a supplier were to provide services from one MS to 2 clients, each of them in another MS, the reporting obligation would be triggered.

III.- Conclusions:

As stated at the beginning, we are convinced that harmonisation of laws, market practices and supervisory criteria will increase the provision of cross-border investment services in the European Union and thereby bring us closer to the achievement of the objective sought by the EC through the RIS. Ultimately, this will foster the development of the Capital Markets Union. Before including any additional restriction or obligation in the legislative framework, we encourage the EC to work towards a real harmonisation of financial markets legislation.

To that end, the EFMLG stands ready to assist the EC or ESMA with such an exercise, whether by way of coordinating the exercise or by providing analysis of substantive issues to members of a working group.

The EFMLG remains at your disposal for any assistance or support you may need on this matter. Please keep the EFMLG informed on the above topics.

Yours faithfully,

Fernando Conlledo Lantero

Vice Chairman of the EFMLG