

# Regulatory activity in the EU

EFMLG meeting

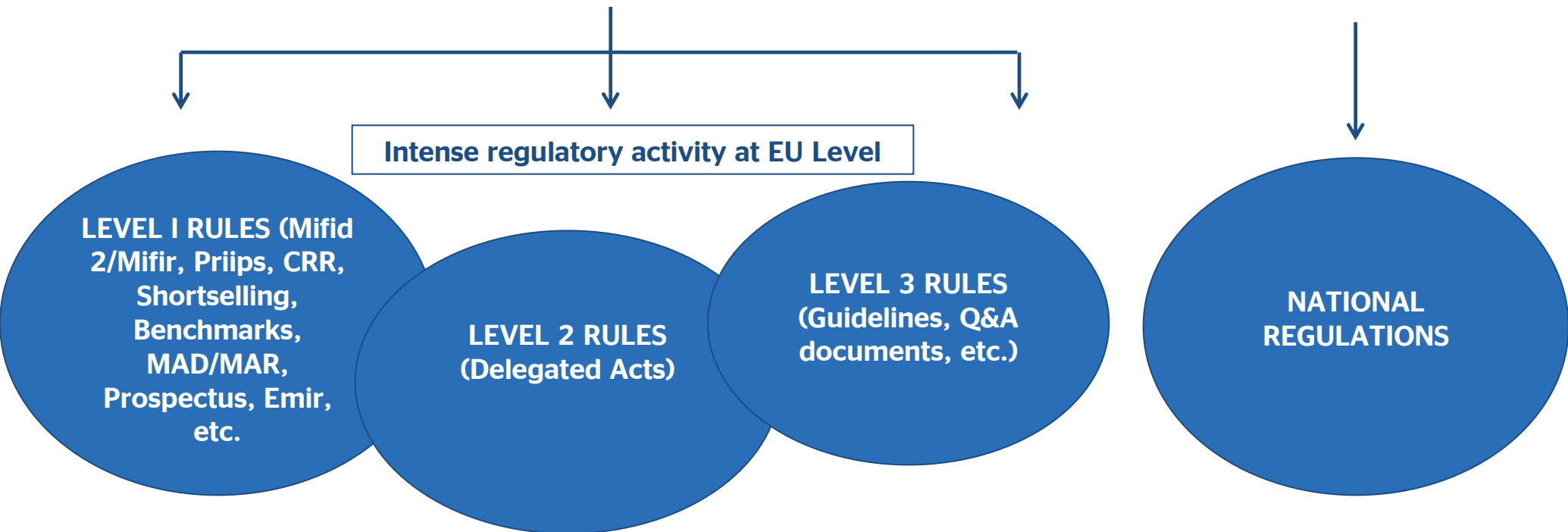
9<sup>th</sup> June 2016

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# 1. Background

The financial crisis led to an increase of regulation and supervision of the financial sector to achieve a threefold purpose:

- (i) reduce systematic risk;
- (ii) enhance transparency; and
- (iii) protect integrity of markets and investors.



**More robust and transparent financial markets**  
 ....HOWEVER..... some unintended consequences

## 2. Some concerns regarding European regulation

1

**Lack of coordination and interactions of individual rules: different definitions for the same concepts, overlaps and inconsistencies among different regulations.**

2

**Obligations/requirements developed in Level 2 rules and Q&As/guidelines.**

**(A) Timing: great detail, but tight deadlines** → **difficulties in implementation**

**(B) Content:**

- Level 2: goes beyond Level 1
- Level 3: “binding rules” in practice, but not subject to stakeholders consultation.

3

**National regulations: uncoordinated local rules among Member States.**

# 3. Some examples: (1) Lack of coordination among regulations

## (i) Definitions:

- Market maker/market making activities. - Various pieces of legislation include non-homogeneous definitions of market making such as MIFID 2 vs. Short Selling Regulation.
- Liquid instruments/markets. - The definition of liquidity/liquid markets is relevant for the purposes of transparency requirements under MIFIR. The final RTS on PRIIPs determine when a PRIIP is illiquid for the purpose of including certain warnings in the KID. The concept of liquidity differs among both regulations.

## (ii) Overlaps, duplications and inconsistencies:

- PRIIP vs. MIFID 2. - Both contain pre-contractual disclosure requirements for retail clients (essentially, risks and costs). Not exactly the same scope but broad range of products will be subject to both rules.
- Overlap of EMIR, MiFID 2, MiFIR and SFT Regulation regarding reporting requirements. - existence of different reporting regimes/obligations implemented by a number of EU legislative acts towards different regulatory bodies.
- PRIIPs vs. Prospectus Directive. - Scope partially overlapping. Delineation between purposes of both regulations not clear. Different approaches taken for the disclosure of risks under both regulations.

### 3. Some examples: (2)Level 2 rules and Q&A/guidelines

#### (I) Timing:

- Timing & tight deadlines (delay in adoption of Level 2 rules)
  - PRIIPS to be implemented in January 2017, but no RTS approved yet.
  - Expected delay of MIFIDS 2/MIFIR not formally approved yet.



Difficulties for entities to implement detailed rules in short periods.

#### (II) Content:

Some **Level 2 rules** go beyond Level 1:

##### (a) MIFID 2:

- Recordkeeping.- Level 1 includes the reception of client orders at meetings and production of written minutes to document such meetings as a prerogative, while Level 2 rules apparently impose the obligation to document every relevant meeting with clients.
- Product governance.- Level 1 is clear on that the issuer of a product defines the target market and the distributor takes it into consideration. Level 2 rules however goes beyond that implying an additional target market definition made by the distributor.

##### (b) EMIR:

- Clearing thresholds.- Level 2 specified that the clearing thresholds that determined the obligation to clear transactions through CCPs should be calculated in terms of gross notional value while Level 1 specified that these calculations should consider net positions.

### 3. Some examples: (2) Level 2 rules and Q&A /Guidelines

#### Examples of concerns arising from Level 3:

- Go beyond their initial purpose (to clarify certain aspects of the regulation) and seem to impose new requirements. E.g. draft Q&A on MIFID 2 that develops substantially the target market provisions.
- Not subject to public consultation (Q&A).
- Q&A documents & Guidelines of European Authorities discussed before Level 2 rules are adopted. E.g., for PRIIPS and MIFID 2 the industry is aware of Q&A/Guidelines already being prepared.

In our opinion,

- If Q&A/Guidelines make clarifications or developments identified as necessary **before Level 2 rules are adopted**, then they should be included in Level 2;
- **After Level 2 rules are adopted**, necessary clarifications may be included in Level 3, however Level 3 should have a limited scope: clarification/interpretation of certain concepts/provisions, BUT should not create new figures or impose new requirements

### 3. Some examples: (3) Uncoordinated local rules

- National regulations on pre-trade information.- Member States have established their own disclosure regimes that would now be also addressed by the PRIIPs Regulation. Different Member States have created risk indicators based on different characteristics and categories.
- In Spain, the client must provide handwritten notes when the result of the appropriateness assessment is negative or when, due to the lack information, such assessment has not been made confirming that he/she is aware of such circumstance.
- Article 55 BRRD: different approaches/solutions across Member States.
- Definition of financial instruments: FX forwards concluded for commercial purposes. Different approaches among Member States MIFID 2 tries to address this question, **BUT** the current draft of MiFID 2 Delegated Regulation still raises doubts.

## 4. Conclusions

1

**Lack of coordination, inconsistencies and overlaps create legal uncertainty (Capital Markets Union).**

2

**Regulatory dispersion hampers ability to comply and requires continuous adaptation.**

**In particular, Level 3 rules prevent stakeholders participation and create market fragmentation.**

3

**Uncoordinated local rules jeopardize the level playing field across the EU and impose barriers for foreign entities to provide financial services across the Union.**

4

**New actions required? Letter to authorities?**





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