

EFAMA'S KEY MESSAGES TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE REVIEW OF MIFID II/MIFIR

- 18 May 2020 -



GENERAL

- EFAMA has always been supportive of the overarching objectives of the MiFID II/MiFIR framework. For the most part, the framework is working as intended with provisions being appropriately calibrated. We see a need for revisions to the Level 1 texts only with regard to the issues raised around 'semi-professional' investors and opt-outs for professional investors for certain requirements.
- That being said, in almost all instances these revisions can be made by way of a more flexible interpretation of the Level 1 framework via targeted amendments to the Implementing Directive and Regulations as well as to ESMA's guidelines and Q&As.
- In general, ESMA's current approach in the form of continuously updated Q&As is burdensome for the wider financial industry. Each new clarification can lead to necessary changes to underlying systems and be time- and resource-intensive. We would therefore strongly suggest making thematic Q&A updates every year, with enough time for the industry to implement these changes.

INVESTOR PROTECTION

- More **flexibility** should be provided to professional investors and eligible counterparties. These types of investors should either be allowed to opt-out of many cost disclosure and investor protection requirements or should be out of scope, being allowed to opt-in.
- While we agree with the notion of '**semi-professional clients**' (and the intention to provide much-needed flexibility for these types of clients), we do not believe that the creation of new client category is the right way forward. The creation of a fourth client category would require a large number of changes to the entire MiFID II framework and lead to very high follow-up implementation costs for the financial industry. We are certain that the same objectives can be achieved by (1) calibrating the preconditions to allow these types of institutional clients to opt-up under certain conditions and (2) providing a more flexible regime for professional investors.
- **Delete the '10% depreciation alert'** as it encourages short-term behaviour, does not provide any added value for these types of clients and increases operational costs to comply with this requirement.

- **Retail AIFs** (i.e. following national retail schemes) should automatically be considered non-complex financial instruments that can be sold “execution-only”.
- We **disagree with an outright ban on inducements**. While access to independent investment advice is important, one must consider that non-independent advice is the prevalent form of distribution throughout Europe. Banning inducements would have substantial and far-reaching consequences in terms of overall access to investment advice for all European citizens. Experiences in other countries, which have chosen to ban inducements, have shown that certain demographics, in particular mass retail investors, are left with no possibility to access advice as distributors had put in place minimum investment amounts. As the cost of advice still has to be paid, it also does not necessarily decrease the total cost of ownership. Given that fee-based investment advice incurs certain fixed costs (e.g. per hour of the investment adviser’s time), this again favours rather large investments compared to smaller investment amounts.
- Where **issuer-sponsored research** is concerned, it should qualify as an **acceptable minor non-monetary benefit**, and therefore be kept out of the inducement regime. In addition, we consider that qualifying issuer-sponsored research as a minor non-monetary benefit, such as defined by Article 12, will support the development of issuer-sponsored research for the SMEs market. Lastly, in our view, the rules relating to issuer-sponsored research should **apply to pre-IPOs**.

CAPITAL MARKETS AND INFRASTRUCTURES

- **Another area of improvement relates to data quality and data costs**. Data costs are surging. MiFID II still fails to deliver a consolidated tape (CT) and the notion of “**Reasonable Commercial Basis**” in data costs has been largely overlooked. We therefore call on the Commission to **enforce the creation of a consolidated tape**. The enforcement of a consolidated tape **for all financial instruments** is a key component to bring transparency in markets, as post-trade data is the first level of pre-trade and price determination information and a CT constitutes a “unique centralised data source”. We consider that the Commission should **start with post-trade data**, which should be part of a CT offered at a proportionate cost and without mandatory consumption.
- We also call for both the Share Trading Obligation (STO) and the Derivatives Trading Obligations (DTO) to be completely removed. If not possible, at the very least the STO should be strictly imposed on EU securities and the DTO should be strictly relying on the application of the clearing obligation, as defined in EMIR Refit.
- We **need all sources of liquidity** to deliver the best results to our clients. Therefore, the **Systematic Internalisers’ regime must be protected**, to shield liquidity and financial market innovation.
- **FX spot must remain excluded from the list of financial instruments**. Any perceived regulatory gap should be assessed and managed through the Payment Service Directive or the Anti-Money Laundering Directive. In addition, and as ESMA rightly notes, the FX Global Code of Conduct (‘the Code’), developed by central banks and market participants from sixteen jurisdictions around the globe, has already achieved progress in promoting higher standards in the wholesale FX market.

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