RIS / MIFID 2
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Position commune de l'AMAFI, la FBF, l'AFG et l'AFPDB

En suite de la réunion du Conseil en date du 22-23 avril, et alors qu'un premier projet de compromis est attendu aux alentours du 8 mai. les associations professionnelles (AFBDB/AFG/FBF/AMAFI) ont adressé, le 3 mai 2024, à la Direction Générale du Trésor un courriel récapitulant leur position commune sur la révision de MIFID 2 dans le cadre de la RIS.

La présente note reprend le contenu de ce courriel.

"As a preliminary remark, we would like to encourage the co-legislators to keep in mind the CMU overarching objective to foster the competitiveness and attractiveness of EU capital markets. In that perspective, the focus should be on essential areas where there is a need for improvement, and one should avoid complexifying a regulatory framework that is already fairly exhaustive and readily enforceable. In that respect, we strongly believe that multiplying the number of tests at the different stages of the client's journey is overly burdensome and would lead to red taping. Furthermore, in a context where there is a need to channel savings to finance the economy, and while one of the objectives of RIS is to empower individuals to invest directly in financial markets, one should be careful not to create additional hurdles which would further deter them from doing so, by complexifying an investment process that is already too complex.

However, we see merit in reinforcing the product governance requirements with a robust Value for Money (VfM) framework, with the objective of eliminating overly costly products.
Our detailed comments are set out below.

1. Inducements

1.1 Partial ban for non-advised services

We continue to be strongly opposed to any ban, even partial, on inducements. Consequently, we welcome the proposed withdrawal of such a ban, for the following reasons:

- non-advised services are per essence not subject any conflict of interest, real or perceived,
- a partial ban could pave the way for further extensions in future reviews of the text,
- any type of ban would be an extreme and disproportionate measure for which positive outcomes have failed to be observed in the jurisdictions in which it has been used in the last decade,
- with a robust VFM framework, it would become unnecessary and unjustified.

Along the same lines, we do not support the new option offered to Member States (MS) in Article 24a(9) MiFID to prohibit or to restrict the payment or acceptance of third-party payments by investment firms. We believe that such discretion at MS level will (i) water down the drive associated to the Capital Markets Union and nurture markets fragmentation, (ii) weaken the principles of harmonized regulation across the EU and (iii) create an unlevel playing field for firms active in those countries – three principles at the core of the EU legislating values in general but also at the core of the Letta report and the conclusions of the EU Council of 17-18 April.

1.2 Inducement principles

Despite the improvement brought by the latest CWP discussion papers, we are still concerned about the second principle, i.e. the notion of "proportionality, where we see a risk of an extensive definition by a later Level 2 text. We believe that cross referring to the Value for Money process would be a more effective and simpler solution.

1.3 Inducement and best interest tests

We deplore the introduction and multiplication of rules and tests serving the same purpose of avoiding any conflict of interest, real or perceived, on the basis that the existing applicable MIFID 2 texts (suitability and appropriateness tests, client best interests) already provide far-reaching client protection.

To us, the best interest test would further complicate an already cumbersome client investment process to the point of deterring clients from investing directly in financial markets.

If however the cumulative tests had to stay, we recommend that they be alleviated, meaningful for each product and service type and proportionate so that they do not lead to a de facto ban.

In that context, we acknowledge the improvements brought in the latest CWP discussion papers on the inducement test, notably the removal of the criterion on the absence of commissions "*paid in advance*" and the rewording of the "*predominantly quantitative criteria*".
However, we are still concerned about the mechanism for reclaiming inducement fees in case the product lapses or is surrendered at an early stage. This should be reworded so as to (i) exclude cases where such situations are expressly provided for in the product's documentation (i.e. where such occurrences are not left at the manufacturer's discretion) and (ii) only apply to situations where there has been an infringement of MiFID requirements that harmed client's interests.

1.4 Scope of ban for portfolio management

We support the proposed reintroduction of the terms "*accept and retain*" in place of "*pay or receive*" and the rewording of the review clause (extension to 5 years and precisions added on the basis of the assessment).

1.5 Transparency

We deplore the following requirements that are, to us, overly burdensome considering other disclosure requirements:

- the new proposed requirement to disclose "*the cumulative impact of such third-party payments […] on the net return […] on a cumulative basis since the acquisition of the financial instruments in the portfolio by the retail client*".
- The requirement that "*a firm that provides reception and transmission of orders or execution of orders to or on behalf of retail clients in relation to financial instruments through digital means without advice, makes a filtering tool available to retail clients that allows them to easily identify financial instruments for which the investment firm does not pay or receive inducements*".

2. Appropriateness and suitability test

We agree with the latest CWP discussion papers' proposals not to add any criteria to the appropriateness test and to temper the obligation to verify diversification in advice.

3. VFM / Benchmarks

With regards to the latest CWP discussion paper on VFM, we view positively:

- the fact that VFM is based on internal policies developed by each investment firm;
- the explicit recognition that the peer group or peers average costs approaches may not be relevant for all financial instruments, which to us accommodates the specificities of structured products, for which the appropriate approach is benchmarking against "next best alternative"(e.g zero coupon + asset class risk premium as relevant); in that regard, it is worth stressing that the French industry is currently working on a proposed approach of VFM for structured products, based on forward looking scenarii;
- that such VFM is based both on quantitative and qualitative elements.

However, we are still concerned about the risk of price regulation, which is not totally eliminated with the proposed development, by ESMA (except where financial instruments are distributed in only one member state in which case such member state's NCA will develop the benchmark), with the use of benchmarks used as supervisory tools. Apart from the fact that such VFM is likely to be extremely complex and costly, it runs the risk of not being fit for purpose.

If however policy makers were willing to bring this measure forward, the text should provide at a minimum for those benchmarks not to be publicly available or for the industry to be involved in drawing up these benchmarks.

4. Product governance, other topics

We support an exclusion of simple shares and bonds from the scope of product governance rules. Such rules are ill suited for these products that are not issued to meet investment expectations but to meet financing needs.

5. Disclosures

We still see a number of difficulties with the latest CWP discussion paper's proposals on disclosures:

- Article 24b(1) first subparagraph

The addition of the requirement to provide clients with cost information "prior to the conclusion of any transaction" on top of the requirement to provide such information prior to the provision of an investment service will significantly increase the amount of information provided to clients.

- Article 24b(1) third subparagraph

The proposed requirement to calculate and disclose costs for holding periods of 1, 3 and 5 years for products without a recommended holding period or maturity date is to us overshooting as clear and simple disclosure is essential to capture the attention of retail clients.

- Article 24b(1) fourth subparagraph

Given that third party payments will have to be itemized separately in the costs and charges information provided to clients, we consider that it is not proportionate to require the disclosure of their cumulative effect on returns.

- Annual statement: Article 24b(4)

We believe that the information required by (b) and (d) (dividends & interest and market value) should not be disclosed in the annual statement on costs and charges as they do not relate to costs and charges and would make this statement difficult to read for a retail client.

In addition, the inclusion of detailed instrument by instrument information on performance under (e) would require considerable IT developments generating significant costs, which will necessarily have an impact on the cost of the services provided to clients."