EFAMA's comments on the Joint Committee Consultation Paper on guidelines for cross-selling practices [JC/CP/2014/05]

EFAMA[1] strongly supports the notion of a level playing field rather than the current "vertical silo" approach to EU legislation on distribution and investor protection.

Nonetheless, we question whether it is the right point in time to supply guidelines on these cross-sectorial issues in order to create a single rulebook. We are fully aware that MiFID II requires the ESAs to provide such Guidelines by 03 January 2016, but this initiative comes at a time when the final Level 2 rules for MiFID II (and, in particular, the delegated acts) have not yet been published and certain important features on investor protection that are a key part of the cross-selling provisions are not yet finalised. Moreover, this timing issue is further aggravated by major overhauls of other directly relevant Level-1 legislation (i.e. IMD II), which are still under negotiation. Furthermore, cross-selling is defined differently under different parts of EU legislation. We therefore believe that the basis for the ESAs' mandate to "establish […] consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law"[2] is not yet met and should therefore be delayed until a time when the required Union law has been implemented into Member States' law.

As regards the substance of the proposed Guidelines, EFAMA is concerned that they will add further disclosure requirements rather than making use of the existing EU frameworks. For asset managers the UCITS Directive, MiFID II and the PRIIP KID Regulation set high standards regarding disclosure. We therefore believe that the ESAs should make it clear that complying with these requirements should be regarded as sufficient to comply with the Guidelines for cross-selling practices.

1. Do you agree with the general description of what constitutes the practice of cross-selling?

While we tend to agree that the notion of cross-selling can involve a combination of products and/or services, we would nonetheless draw attention to the fact that the proposed definition and meaning of cross-selling is different to MiFID II's Level-1 (the final IMD II definitions are still to be decided by the

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 62 corporate members almost EUR 17 trillion in assets under management of which EUR 11.3 trillion managed by 55,600 investment funds at end December 2014. Just over 36,100 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit www.efama.org

[2] ESAs' Regulations on "Guidelines and recommendations" see Regulation (EU) No 1093/2010, Article 16(1); Regulation (EU) No 1095/2010, Article 16(1) and Regulation (EU) No 1094/2010, Article 16(1)

rue Montoyer 47, B-1000 Bruxelles
☎ +32 2 513 39 69 • Fax +32 2 513 26 43 • e-mail : info@efama.org • www.efama.org • VAT Nr BE 0446.651.445

co-legislators and might be different). Within MiFID II certain services are by nature inherently tied to the provision of a financial product. In particular, portfolio management, investment advice and placing of a client's order are intrinsically connected to the eventual purchase or sale of financial instruments and are therefore not deemed as cross-selling. It is important that the guidelines take into account this relationship in MiFID II in order not to incorrectly define these instances as cross-selling.

2. Do you agree with the identified potential benefits of cross-selling practices?

Yes, we generally agree with the identified potential benefits of cross-selling practices.

3. Do you agree with the identified potential detriment associated with cross-selling practices?

Yes, we generally agree with the identified detriment associated with cross-selling practices.

4. Please comment on each of the five examples in paragraph 13, clearly indicating the number of the example to which your comment(s) relate.

We agree with the examples 1, 3 and 4 and have no particular comments.

With regards to Example 2, we question whether "teaser rates"[3] are always of negative value for customers. We believe that the intention of the example should rather focus on the customer being made aware that these rates are currently lower (than the current components put together) and to disclose when and by how much an increase is going to take place.

With regards to Example 5, one has to take into consideration that an investment firm will not always have a complete picture of a customer's overall portfolio, which is the essential assumption that has been taken by the ESAs. This is, in particular, the case for online sales where there is no advice provided to customers. Furthermore, clients might not be aware that there is a specific advantage for the second product and it is therefore appropriate for the firm to offer such product to its clients. The example should therefore be rephrased to speak about a firm not offering products from which it explicitly knows that the customer cannot benefit.

5. Please comment on the proposed guidelines 1 and 5 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

Guideline 1 (para. 14) should not create an additional layer of disclosure, but should rather reinforce that this Guideline can be fulfilled by providing the existing cost disclosures as stipulated in the relevant legislations (e.g. MiFID II, PRIIP KID, UCITS KIID).

[3] Para. 13, Example 2: "cross-selling offer by advertising/promoting the fact that, as of the day of sale, the overall amount of costs and charges payable by the customer is below the cumulated price of each component as sold separately, where in reality this amount of costs and charges are already scheduled to be raised to a higher amount overtime due, for instance, to the accumulation of running costs/fees."

6. Please comment on the proposed guidelines 2, 3, 4 and 6 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

We agree with the proposed Guidelines 2 and 4.

With regards to Guidelines 3 & 6 and in line with our above comments, we ask for further clarification how, in practice, a firm can use "a simplified or jargon-free language" without creating additional disclosure requirements. While we certainly agree with providing customers with easy-to-understand information, we need to take into account that disclosure information differs from one piece of sectorial legislation to another. Will providing the sectorial specific disclosure requirements (e.g. UCITS KIID) still be in line with the ESAs' cross-selling Guidelines or would this require an additional layer of disclosure information that is not yet present in the Level-1 legislation? Since the Guidelines cannot alter the Level-1 text, we believe that disclosure of each component according to the respective rules, as well as disclosure of the package costs, should be sufficient and that this should be clarified in the final Guidelines.

7. Please comment on the proposed guideline 7 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

In line with the Guidelines' para. 4 stating that it is not intended to prevent the offering of "indivisible packages", we suggest to amend para. 23 to clarify that bundled packages do not have to be offered unbundled, but that a customer rather makes a conscious decision to accept the bundled package:

> *23. Competent authorities supervising firms which distribute a bundled package**, of which the component products can be purchased separately,** should ensure that firms design their ~~internet~~ **internal** default options in a way which enables customers to actively select a purchase and therefore to make a conscious decision to buy the component product or the bundled package.*

8. Please comment on the proposed guideline 8 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

We disagree with Guideline 8 (as set out in para. 25) as this conflicts with the MiFID II requirements, as it does not differentiate between the appropriateness and suitability tests but regards them as one single test.

It is correct that in the case of MiFID services other than advice and portfolio management, the appropriateness of a bundled package has to be assessed. Unlike the suitability test, the appropriateness does not include an assessment of the customers' financial situation and investment objectives, which means that the firm is obliged only to assess the appropriateness, which relates to the customer's experience and knowledge. The requirement to assess or evaluate a potential benefit of the "cross-sold" components for the client would in fact trigger a suitability test when a non-advised cross-selling takes place.

We therefore consider that these Guidelines are in conflict with the Level-1 text and we suggest a revision of Guideline 8 (and its relevant examples, such as Example 2) that clearly distinguishes between the requirements to test suitability and/or appropriateness.

9. Please comment on the proposed guidelines 9 and 10 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

We generally agree with Guidelines 9 and 10, but would highlight that their wordings are not aligned with the relevant provisions under MiFID II. We would therefore ask for either an alignment with the MiFID II text or further clarification in the Guidelines that fulfilling the MiFID II obligations is sufficient to fulfil the Guidelines' requirements.

10. Please comment on the proposed guideline 11 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

We are concerned that para. 29 of Guideline 11 requires the splitting of previous bundled packages at a later stage, which was neither discussed nor envisioned in the Level-1 text of MiFID II and therefore goes beyond the ESAs' mandate. It should clearly be sufficient to inform the customer in advance whether or not the components may be purchased separately. This allows the customer to be aware of the particular conditions when buying the package without retroactively allowing him to withdraw from parts of this transaction at a later stage.

11. Please provide any specific evidence or data that would further inform the analysis of the likely cost and benefit impacts of the guidelines.

As stated previously, we are of the strong opinion that these cross-selling Guidelines should not create additional disclosure requirements that cannot be satisfied within the existing sectorial legislations. With regards to investment firms, it should therefore suffice to follow the MiFID II standards for bundled products in order to comply with these Guidelines.

***

Brussels, 20 March 2015

[15-4046]