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European Commission
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26 January 2016
ESAs 2016 07

The cross-selling of financial products – request to the European Commission to address legislative inconsistencies between the banking, insurance and investment sectors

Dear Commissioner,

We would like to bring to your attention that the recent work on Guidelines on cross-selling practices that has been carried out in the context of the Joint Committee (JC) of the European Supervisory Authorities (ESAs) has revealed some legal issues in the existing regulatory framework between the three financial sectors. It is the view of the three ESAs that these issues impede the ESAs from establishing the desirable degree of consumer protection, expose consumers to the risk of detriment, and prevent the JC from achieving its objective of ensuring a level-playing field across the three sectors. We are writing today to urge you to address these issues as soon as possible, possibly in the context of two recent publications the Commission has launched.

Article 24(11) of MiFID II contains a mandate that “ESMA shall, in cooperation with EBA and EIOPA, [...] develop by 3 January 2016, and update periodically, guidelines for the supervision and assessment of cross-selling practices”. In view of the explicit mandate requesting the ESAs to cooperate, and in view of the cross-sectoral implications of this work, the ESAs agreed, in spring 2014, to develop the Guidelines within the forum of the JC. The ESAs also agreed that it is of utmost importance that the scope of joint guidelines should not be limited to cross-selling practices under MiFID II, which only covers cross-selling practices involving at least an investment product.

Rather, it should be defined as broad as possible and also cover cross-selling between banking and insurance products, given that this particular constellation, such as the cross-selling between mortgages, loans or credit cards with payment protection insurance, has in the past caused significant detriment to consumers, has undermined market confidence; has led to unprecedented compensation and litigation payouts and fines; and has resulted in a loss of confidence in the integrity of the financial system. Furthermore, a consistent approach across the three financial sectors is deemed to be beneficial for consumers, who do not always distinguish between the three sectors when buying financial products; to financial institutions, who would be subject to the same requirements irrespective of the products that are cross-sold; and to supervisory authorities, who would have to supervise only one set of requirements irrespective of which constellation of cross-selling occurs.

As a legal basis to develop joint guidelines with this broad scope, the ESAs used their general consumer protection mandate in Article 9(2) of their respective founding regulations, in conjunction with the internal control and corporate governance provisions in sectoral legislation in the banking and insurance sectors such as the Capital Requirements Directive (CRDIV) and the Solvency II Directive, in addition to the Payment Services Directive (PSD), the Electronic Money Directive (EMD) and the Insurance Mediation Directive (IMD).

However, following the publication, on 22 December 2014, of our consultation paper with the draft Guidelines, two concerns of a legal nature were raised related to the underlying sectoral Union legislation.

The first of these relates to the diverse nature of the legal bases on which the joint draft guidelines had been based. This was deemed unhelpful, given that the guidelines were seeking to address issues arising from the cross-selling of financial products, and to do so in a consistent way across the sectors. In particular, the joint guidelines use an explicit consumer protection mandate under MiFID II for the investment sector and link these to provisions related to internal control and corporate governance in some of the Directives applicable to the banking and insurance sectors, as listed above. The comments indicated that these differences may impede the Guidelines from achieving their desired objective of protecting consumers and ensuring market confidence across the three sectors, and that it would be highly preferable for the Guidelines to be able to build on a coherent legal basis at Level-1 in all three sectors.

The second legal concern refers to issues arising from the fact that MiFID II confers a mandate on ESMA to develop, in cooperation with EBA and EIOPA, Guidelines on cross-selling practices which include at least an investment service, including in conjunction with insurance or banking products, but that the separate Directives that govern the banking and insurance products that are being cross sold also contain provisions on cross-selling, or to related concepts such as 'packaging' or 'bundling'. This is the case for the Mortgage Credit Directive (MCD), the Payment Accounts Directive (PAD), or the Insurance Mediation Directive (IMD). Concerns were raised that, between them, these four Directives differ in terms of formal wording, scope, level of granularity and date of application of cross-selling provisions.

As these two concerns arise from differences in the underlying provisions in Level 1 legislation, the ESAs are unable to address them. The ESAs have therefore decided not to issue final joint guidelines on cross-selling as had initially been consulted on. Instead, and in order for ESMA to fulfil its obligation under MIFID II to deliver its Guidelines on cross-selling by 3 January 2016, the JC agreed that ESMA should proceed by issuing ESMA-only Guidelines for the investment sector, on the sole basis of MiFID II. ESMA has subsequently published these, on 22 December 2015.¹

This outcome, which is the best the three ESAs could achieve, is not ideal because, firstly, the ESMA Guidelines can only apply to ESMA's regulatory scope and can therefore not address cross-selling between banking and insurance products, which, as explained above, has been a variant of cross selling that has required significant supervisory attention. This gap exposes consumers in the EU to an undesirable risk of detriment.

¹ See <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-mifid-ii-guidelines-cross-selling-practices>

Secondly, although MiFID II covers cross-selling between investment and banking products and between investment and insurance products, doubts could emerge on how the relevant sectoral legislation that govern the financial products covered under PAD, MCD, and IMD interact with that legislation. This re-iterates our preference for having aligned legislative provisions in different pieces of legislation falling in the regulatory remit of different ESAs (MiFID II – ESMA; IMD/IDD – EIOPA; PAD and MCD – EBA) in order to facilitate competent authorities and financial institutions to understand and consistently apply cross-selling guidelines.

Based on the above, we urgently ask you to assess the differences in the existing legislation and to consider any necessary steps in order to ensure that the ESAs can regulate cross-selling practices in a consistent way across the three sectors, to the benefit of consumers, financial institutions, and supervisory authorities.

A possible opportunity to do so would be in the context of any follow-up the Commission may decide to pursue when addressing the responses to its recently published *Green Paper on Retail Financial Services in the Banking and Insurance Sectors*ⁱ and/or to its *Call for Evidence on the regulatory framework in financial services*.ⁱⁱ

Yours sincerely,

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Chair of EIOPA and
the Joint Committee of the ESAs

Andrea Enria
Chair of EBA

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CC: Olivier Guersent, Director General, DG Financial Stability, Financial Services and Capital Markets Union, European Commission

ⁱ See http://ec.europa.eu/finance/consultations/2015/retail-financial-services/index_en.htm

ⁱⁱ See http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm