Frankfurt am Main,
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BVI's response to the EU Green Paper on retail financial services „Better products, more choice, and greater opportunities for consumers and businesses" (COM(2015) 630)

BVI[1] welcomes the opportunity to comment on the Commission's initial views in relation to the further development of the European market for retail financial services.

We understand that retail investment funds are not in the focus of the Green Paper, since the Single Market in this area is significantly more advanced compared with products from the insurance and banking sector. We are committed to identifying the remaining deficits in the course of the upcoming consultation on the use of EU passports and the cross-border distribution of investment funds as envisaged in the CMU Action Plan[2]. Our responses to the Green Paper at hand are thus targeted at issues of broader relevance or with indirect impact on the fund industry.

Question 2
What are the barriers which prevent firms from directly providing financial services cross-border and consumers from directly purchasing products cross-border?

Generally, we think there are regulatory as well as other barriers. The main regulatory barriers we see are:

- **Entry barriers at national level usually by way of goldplating:** National rules or practices may provide for certain additional requirements which favour local players (e.g. the necessity to appoint a paying agent in case of cross-border marketing under the UCITS Directive or to maintain local presence despite of the EU passport for cross-border management of UCITS or AIFs) or simply relate to fees to be charged in case of cross-border offerings.
- **Lack of harmonisation in certain areas:** As an example, many national markets provide for rules regarding retail AIFs. However, due to the lack of harmonisation regarding product rules, the cross-border marketing of such products is in most cases burdensome and sometimes even not at all feasible.
- **Legal uncertainties for cross-border issues:** These usually comprise questions regarding tax treatment which makes it difficult and expensive for firms to assess whether offering products cross-border has a business case. Furthermore, differences in e.g. civil and insolvency law provide for further complexity.
- **Requirements to provide national authorities with documents in the local language:** In Germany for instance, the marketing approval for retail AIFs requires provision of all documentation in German while UCITS notification involves only German translation of the KIID. In addition, not all local authorities make the information for cross-border marketing available in English. It is hence difficult to even preliminary assess the local requirements without obtaining local legal advice.

[1] BVI represents the interests of the German investment fund and asset management industry. Its 95 members manage assets of some EUR 2.6 trillion in UCITS, AIFs and assets outside investment funds. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the assets of 50 million private clients over 21 million households. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

[2] Cf. Communication from the Commission "Action Plan on Building a Capital Markets Union" from 30 September 2015 (COM(2015) 468 final), section 4.2 on page 2.

BVI
Bundesverband Investment und Asset Management e.V.

Contact
Phone +49 69 15 40 90 0
www.bvi.de

BVI Berlin
Unter den Linden 42
10117 Berlin

BVI Brussels
Rue du Trône 14–16
1000 Bruxelles

BVI Frankfurt
Bockenheimer Anlage 15
60322 Frankfurt am Main

Executive Board
Thomas Richter CEO
Rudolf Siebel MD

Furthermore, there are other barriers such as cultural differences and the lack of understanding of how the local market functions. We believe that some of the regulatory barriers could be more easily removed. For instance, enhanced work towards supervisory convergence could contribute to dismantling of some barriers resulting from national goldplating.

Question 3
Can any of these barriers be overcome in the future by digitalisation and innovation in the FinTech sector?

Yes, we think that the increased possibilities to offer products through digital means also influence cross-border distribution. The technological improvements provide advantages for both firms and investors, especially for the generation of investors which is accustomed to use digital means in their day-to-day life. Offering products through digital means is an easy way to convert cash savings into investments.

Digitalisation, however, does not solve all of the aforementioned problems (see Q2) regarding regulatory barriers to cross-border services. In addition, there are new questions to be dealt with. These include the economic trend toward lower cost distribution which might not always provide for the optimal investment decision. Furthermore, there are new risks for both costumers and firms attached when using digital means for financial services.

We believe that also national authorities could benefit from the digitalisation. In our view regulation could encourage Member States towards enhancing digitalisation, for example by allowing digital filings in order to reduce all the paperwork involved with the legal life of a product.

Question 4
What can be done to ensure that digitalisation of financial services does not result in increased financial exclusion, in particular of those digitally illiterate?

We do not think that digital services will serve as substitutes for non-digital services. While in some cases consumers are focused on digital services, other might use both non-digital and digital services and some consumers might use non-digital services only. Over time the proportion between those services will possibly shift, however, this will also be driven by the fact that the proportion of consumers accustomed to using digital means will grow. Digitalisation, we believe, is also an opportunity for service providers to approach new types of consumers. Furthermore, whether consumers will over time always have easy access to non-digital services not only depends on technological developments but also on the business case for service providers to maintain a network of branches. Hence, while we think that non-digital services will always be offered, we also believe that the range will decrease but not only due to digitalisation.

Nevertheless, digital and financial education could help to ensure that future generations of consumers will have the background for being able to choose from the different possibilities for obtaining financial services. Governments hence play a crucial role in preparing future consumers for possible choices.

Question 5
What should be our approach if the opportunities presented by the growth and spread of digital technologies give rise to new consumer protection risks?

We agree that there are digital technologies which give rise to new risks for consumers but also for firms. When dealing with this from a regulatory perspective, there are two important issues to be considered:

- **More regulatory fragmentation should be avoided**: We think it very important that the Commission uses the Green Paper initiative in order to evaluate all existing regulation which applies to the services provided. For instance, in the securities sector, MiFID II already provides for a high level of consumer protection. If securities are offered through digital means, those rules should apply. This includes all kinds of requirements aiming to avoid conflicts of interest.
- **Level playing field should be aimed at**: While we agree with the regulatory notion that digital technologies can provide an easier and in some cases also cheaper access to products, this should not be a cause for regulators to create an unlevel playing field. In other words: Digital services should be subject to the same standard of consumer protection as non-digital financial services. Otherwise, this could create another risk of mis-selling in terms of services or products, thus potentially impairing protection of European consumers.

Question 6
Do customers have access to safe, simple and understandable financial products throughout the European Union? If not, what could be done to allow this access?

We are convinced that UCITS represent an outstanding example of a functioning internal market for retail investments. Being thoroughly regulated and authorised on the basis of individual product rules by the competent NCA, UCITS can certainly be considered as safe, simple and understandable financial products for European consumers. This understanding is underscored by the marketing success of UCITS both at national and international level. According to the recent EFAMA statistics, the share of UCITS distributed cross-border amounts to 42 percent[3]. Nonetheless, there are still some impediments to the EU-wide distribution of UCITS which result mainly from national divergences in marketing standards and administrative procedures. We are committed to elaborate further on these remaining barriers to the EU Single Market in the course of a dedicated Commission's consultation on the use of the EU fund passports.

Except for UCITS, however, consumers generally remain unable to buy investment funds and other investment products offered in other Member States. In order to enhance investment choices, we recommend introducing a new category of alternative investment funds with limited leverage and allowing marketing of such funds under the AIFM passport at least to semi-professional investors across the EU.

Question 7
Is the quality of enforcement of EU retail financial services legislation across the EU a problem for consumer trust and market integration?

From the German perspective, we do not perceive any deficiencies in enforcing the EU rules for retail financial services. Overall, with the intensified cooperation of supervisory authorities under the auspices of the ESAs and the anticipated shift of work from setting regulatory standards to ensuring supervisory convergence, we would expect that the quality of enforcement across the EU should be further enhanced in the short to medium term.

[3] As of end 2014; source: EFAMA statistics.

Question 8
Is there other evidence to be considered or are there other developments that need to be taken into account in relation to cross-border competition and choice in retail financial services?

Evidence based on the experience with UCITS confirms that the flexibility given to Member States to gold-plate EU rules or supplement them with national standards can, in some cases, seriously hamper proper functioning of the EU single market. Specifically, we would like to refer to the marketing rules for UCITS which are not fully harmonised at EU level. Under Article 91(3) of the UCITS Directive, Member States may determine the modalities of UCITS marketing and dealing with redemption requests/other payments to investors. In this regard, some Member States require identification of a local financial institution as a paying agent who satisfies redemption requests and makes other payments to investors. This requirement which is not foreseen by the UCITS Directive significantly increases marketing costs of UCITS in the relevant jurisdictions.

As pointed out in our reply to the Call for Evidence on the EU regulatory framework for financial services, we advocate an extensive harmonisation of product-related marketing rules and further bundling of supervisory competences at the fund manager's home Member State authority. These measures have the potential of reducing costs and operational efforts, and thus should enhance the economic appeal of cross-border distribution. Similar issues pertain to the marketing of AIFs which is also generally submitted to the rules of the relevant host Member State[4].

Question 10
What more can be done to facilitate cross-border distribution of financial products through intermediaries?

Intermediation of financial instruments is subject to strict rules under MiFID, while the activities of insurance intermediaries or those involved in the offering of other retail investments such as building loan contracts in Germany follow different rules with often lower standards of investor protection. In our view, this lack of a level playing field and fragmentation of standards governing distribution activities still hinder the development of a truly integrated Single Market for retail investments.

As regards the potential impact of MiFID II on financial intermediation, we urge the Commission to pay attention to the MiFID II regime being interpreted and implemented in a feasible manner in order not to create additional burdens for cross-border distribution of financial instruments. One example in this regard is the ongoing discussion on the European concept of a target market which is desirable but due to its complexity and potential implication for the existing distribution channels needs to be properly discussed with market participants. Another example is the provision of investment advice to retail investors which might become cumbersome due to the enhanced requirements for suitability testing and the statement on suitability to be provided to clients. Based on the German experience with so-called "advice minutes" (Beratungsprotokoll) which is similar to a verbatim report, we fear that e.g. the suitability statement (depending on the implementation) could create a serious risk of banks withdrawing from the advice business in case of overly burdensome regulation.

Question 11
Is further action necessary to encourage comparability and / or facilitate switching to retail financial services from providers located either in the same or another Member State? If yes, what action and for which product segments?

[4] Cf. Annex IV h) of Directive 2011/61/EU (AIFM Directive).

We welcome the Commission's willingness to enhance consumers' choice and to facilitate switching between retail financial services or products. In this context, however, we would like to point out that the MiFID II framework is likely to considerably inhibit switching of financial investments by requiring investment firms to demonstrate that the benefits of switching are greater than the costs[5]. While we agree that an analysis of potential benefits and costs of switching investments should be considered a core element of investment advice or decision taken on behalf of a retail client, it is hardly possible to demonstrate with certainty that the cost-benefit-ratio will be positive. Performance of investment products other than those providing for a capital guarantee is generally exposed to fluctuations depending on the development of the underlying assets or reference values and cannot be predicted for the future. Since the envisaged tightening of rules will also entail higher liability risks for investment advisers and portfolio managers, we fear that the MiFID II framework will significantly curtail switching of investments including in cases in which higher benefits of a switch are likely, but cannot be actually demonstrated by the firm.

Question 17
Is further EU-level action needed to improve the transparency and comparability of financial products (particularly by means of digital solutions) to strengthen consumer trust?

After the recent financial crisis, many initiatives have been launched (notably under UCITS, MiFID, PRIIPs and IDD) in order to introduce appropriate transparency requirements under EU legislation enabling retail investors to compare between different types of retail investment products and to make informed investment decisions. We are still concerned, however, that some options currently taken by policymakers in developing the implementing measures to the above mentioned EU regulations could lead to an unlevel playing field between different types of substitutable retail investment products, hindering the objective of comparability that the European Commission is seeking to achieve. These concerns pertain in the first place to the PRIIPs framework under which no coherent measure of risks and costs for all packaged retail investment products has as yet been found.

Up to date, however, these initiatives pay little or no attention to the technological progress and the increased use of digital devices by consumers. In view of the emergence of new digital distribution channels, we believe that the legal requirements for providing information to investors should be put under closer scrutiny. For example, the UCITS Directive and the PRIIPs Regulation still consider provision of the investor information document in paper as the standard case while requiring additional safeguards for the use of a website as an information tool[6]. Provision of the key information with interactive features or in a more interactive way, e.g. by means of a mobile app, is generally considered not sufficient to meet the legal requirements, even in cases the investor agrees and even though it would be more engaging for the younger generation of investors used to deal with their personal matters on mobile devices.

Moreover, the UCITS Directive gives Member States significant leeway in determining how relevant information needs to be provided to investors. Under AIFMD, conditions for informing the existing investors are not at all specified and generally determined by the national product regimes. As a result, different standards and practices can be observed at national level. In Germany, for instance, fund providers are in many events required to inform investors by means of a durable medium. This applies in particular in cases of suspensions of redemptions of fund units or shares, terminations of fund

[5] Cf. Art. 49(11) of the draft Commission Delegated Regulation on Directive 2014/65/EU as regards organisational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive (text from December 2015).
[6] Cf. Article 38(2) of Regulation (EU) 583/2010 (UCITS KIID Regulation, Article 14(5) of the PRIIPs Regulation.

administration, amendments to the fund rules which (1) relate to fees and expenses, (2) are not compatible with the present investment principles or (3) otherwise affect substantial rights of the unit holders[7]. However, information via a durable medium is very expensive and onerous, since the fund manager is generally not able to identify investors in a retail fund and needs to rely on banks administering the securities accounts to comply with the information requirements.

Therefore, we would like to encourage the EU Commission to investigate how the increased use of digital communication tools could be utilised in order to ease the financial and administrative burden of providing information to investors. As a prerequisite, legal provisions governing investor information should be harmonised at least under the UCITS Directive which is generally used as a model for national regimes applicable to retail AIFs.

Question 18
Should any measures be taken to increase consumer awareness of FIN-NET and its effectiveness in the context of the Alternative Dispute Resolution Directive's implementation?

The availability and accessibility of adequate redress mechanisms, especially alternative dispute resolution mechanisms (ADR) are important aspects for consumers doing business across borders both online and offline.

In terms of ADR these aspects have already been addressed by the Directive 2013/11/EU on alternative dispute resolution for consumer disputes (Directive) and the Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (ODR). Major purpose is to provide consumers with access to simple, efficient, fast and low-cost means of resolving domestic as well as cross-border disputes which arise from sales or service contracts and to boost their confidence in the Single Market.

FIN-NET will most likely benefit from these measures as regards membership and cooperation between its members schemes. The Directive provides for full ADR coverage in the Union which will result in an increasing number of ADR schemes even in the financial sector and for cooperation between these schemes, e.g. by using the already existing and well-functioning FIN-NET platform. Therefore, we suggest as a first step to evaluate the effects of these reforms on FIN-NET and consumers' awareness after their implementation and gathering of first experiences at national level before envisaging or deciding on any additional regulatory measures.

However, the Commission should indeed take action for aligning the FIN-NET statues with the requirements of the Directive in order to secure and enhance consumers' confidence in doing financial business cross-border. We think that the new statutes should also encourage FIN-NET members to promote their membership in a more prominent manner, e.g. by using the FIN-NET logo on their own websites and by providing links to the FIN-NET website in order to help raising consumers' awareness of the FIN-NET. In this regard, we would like to point to the presentation of the FIN-NET membership by BVI's independent Ombudsman Scheme for Investment Funds[8]. In addition, the Commission might think of further steps promoting FIN-NET such as modernising the FIN-NET website, e.g. by adjusting it to the new ODR-platform which in turn could interact with FIN-NET, or providing consumer information about FIN-NET in case of cross-border (offline) financial disputes.

[7] Cf. §§ 298 para. 2 for UCITS, 299 para. 5 for AIFs marketed in Germany to retail investors.
[8] http://www.ombudsstelle-investmentfonds.de/start/

Question 19
Do consumers have adequate access to financial compensation in the case of misselling of retail financial products and insurance? If not, what could be done to ensure this is the case?

We would like to answer this question from three different points of view, as it may refer to three different situations:

a) A case of misselling and the consumer's compensation right have already been stated by a court judgment or some other authority's decision. Then it is of importance whether the consumer is able to enforce this judgment or decision cross-border.
b) The consumer believes that it has a compensation right due to misselling and wants to have it confirmed by a court or some other authority. In this case one should assess the consumer's possibilities to bring its case cross-border to court.
c) The consumer believes that it has a compensation right due to misselling but does not want to bring its case to court individually. Instead, it is looking for a simpler and cheaper cross-border mechanism to bring forth its claim.

Situations a) and b) have already been addressed by EU legislation, namely by regulations no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and no. 593/2008 on the law applicable to contractual obligations (Rome I). Both regulations contain special rules relating to certain kinds of retail financial services and products such as insurance contracts or units in trusts. Generally speaking, these regulations clarify where to bring forth certain kinds of claims, which national courts to address and which national law to apply. In our view, no further or more special regulation is needed. Considering the principle of subsidiarity, we are of the opinion that the regulations just mentioned already cover every procedural aspect that could be addressed by EU law.

As regards situation c), we think that the introduction of FIN-NET and other measures to enhance consumer awareness of (cross-border) alternative dispute resolution are already very helpful to investors wishing to settle disputes in a simple and cost effective way. We'd like to point out that "class actions" and similar mechanisms are not necessarily better suited to enforce consumer's rights. As regards applicability and cross-border access to such mechanisms, we think the regulations mentioned above already cover these aspects as well. Having once again in mind the principle of proportionality, every member state is solely responsible for setting up collective redress mechanisms that are in line with its general procedural system. Consequently, these mechanisms may vary across the EU just as civil law procedures do vary. However, cross-border information on existing mechanisms could be optimized on EU level.

Question 26
Does the increased use of personal financial and non-financial data by firms (including traditionally non-financial firms) require further action to facilitate provision of services or ensure consumer protection?

As regards protection of personal data of EU citizens, the European institutions have only recently agreed on new standards under the General Data Protection Regulation (GDPR). This new piece of EU law still awaits its formal adoption and shall take effect from 2018. In our view, the Commission should first assess the impact of GDPR in terms of strengthening data protection before envisaging further initiatives in this area.