BVI · Bockenheimer Anlage 15 · 60322 Frankfurt am Main

ESMA European Securities and Markets Authorities
103, rue de Grenelle
75007 Paris
FRANCE

Date
Frankfurt, 20 March 2015

Phone
069 15 40 90 235

Email
julia.backmann@bvi.de

BVI position paper on Joint Committee Consultation Paper on guidelines for cross-selling practices

BVI[1] gladly takes the opportunity to present its views on the ESAs' proposed guidelines for cross-selling practices. Cross-selling might occur in different sectors and relates to different services and products. Fair and comparable rules governing payment, investment and credit intermediation and the relationship with clients at the point of sale are requisite for the effective protection of EU customers. This aim should, however, neither tighten rules applicable under sectorial legislation nor hinder practicability of cross-selling. The proposed guidelines indicate that cross-selling might only occur if all disclosure requirements follow at least the highest sectorial legislative standard of the product and/or service involved and in some cases propose additional obligations. Since sectorial legislation lays down the rules for disclosure for service and/or products, the ESAs should not through guidelines add different requirements simply based on the fact that the service and / or product is sold as part of a package. **In particular the high standards on consumer protection and conduct of business rules as laid down in MiFID II should be considered as appropriate standards also for cross-selling.** For asset managers rules on disclosure are also included in the UCITCS and AIFMD framework as well as in the PRIIPs Regulation. Complying with this sectorial legislation should at least be sufficient for components sold as a package where the features are no different from the features of the components and where the price and the costs are the same. This should also be the case if the package is cheaper, because this is to the customers' advantage. The ESAs' proposals may otherwise impede customers' access to cross-sold components which may be for their advantage.

[1] BVI represents the interests of the German investment fund and asset management industry. Its 87 members manage assets in excess of EUR 2.5 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.

3. What is cross-selling?

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

Though we generally agree that cross-selling might come in different combinations of services and/or products, it is important to take into account the differences between the EU sectorial legislation. For instance, the definition of cross-selling is formally not in line with the definition of cross-selling within MiFID II. Cross-selling according to MiFID II involves at least one service. The sale of two products together is not considered as cross-selling under MiFID II. Consequently, there is no legal basis to apply in particular the additional obligations for disclosure and information for the sale of two products as a package by a MiFID firm. Depending on the final text, this might be different for the IMD II. Hence, the sale of two products together does currently not qualify as cross-selling under IMD II.

Further, some services as listed in the Annex I of MiFID II inherently require a combination of product and service. These cannot be considered to be cross-selling practices. In particular, portfolio management and placing of financial instruments combine the service with the sale of products. However, MiFID II qualifies these as one unified activity, which hence cannot qualify as cross-selling. It should be clarified in the cross-selling definition that neither portfolio management nor placing of financial instruments as services which inherently are combined with the sale of a product qualify as cross-selling according to the guidelines.

The same applies to investment advice in combination with reception and transmission of orders or execution of orders on behalf of clients as well as any of these services and/or dealing on own account combined with an investment product. These are services/products which by nature are connected and provided together and consequently do not cause any particular detriments or additional risks for investors. Therefore, the guidelines should clarify that these combinations should not qualify as cross-selling.

In addition, we understand that cross-selling only takes place if at least two parts of the package offered are not for free. Within the commission-based distribution model it is for example very common that the investment advice the distributor only charges the client for the reception and transmission of orders and the product but not for the investment advice. In such case, the requirements do not apply. We would appreciate a clarification in this respect.

We agree with the understanding that cross-selling must not be confused with packaged products. A packaged product requires that the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor (Art 3 para. 1 PRIIPs Regulation). In cases of cross-selling at least two services and/or products are purchased and not one product alone. A clear statement in this regard would be helpful, including e.g. a list of typical packaged products such as unit-linked insurances as named within the ESAs' discussion paper on Key Information Documents for Packaged Retail and Insurance-based Investment Products (PRIIPs), pp. 12.

We disagree with the general assumption that a bundled or tied purchase complicates further what are already complex products. There are products and services which have to be sold together. A common example is the case where the customer for the first time buys a financial instrument and thus has not yet a depositary account. In order to be able to buy a financial instrument, the customer needs to open the depositary account. This, however, does not mean that the bundled purchase complicates further

the customer's purchase decision.

4. Potential benefits and detriment associated with cross-selling practices

Potential consumer benefits

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

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

Potential consumer detriment

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

While we generally appreciate the outlined detriments, we think that the disclosure requirements as well as the provisions regarding organisation and conduct should remain appropriate and practicable. EU regulation such as the UCITS AIFMD and MiFID II framework and in future PRIIPs-Regulation set high standards regarding cost disclosure. The ESAs should make it clear that complying with these requirements should be regarded as sufficient cost disclosure unless the price for the bundle is higher than the price for each component.

Examples of detrimental cross-selling practices

Question 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.

- **Example 2:** We do not agree with this example as being detrimental cross-selling practices. It rather seems a common business decision. Cross-selling practices should not be measured against business decisions to become valid in future.
- **Example 5:** A firm might not have a complete picture on what product the client already has and which a customer cannot benefit from. This is in particular the case for online sales where there is no advice given. Further, clients might not be aware that there is a specific advantage for the second product and it is hence appropriate for the firm to offer such product. The example should therefore be revised in a way that a firm should not offer products of which it explicitly knows that the customer cannot benefit from them.
- **Example 1, 3, 4:** We have no specific comment regarding these examples.

Full disclosure of information (Guidelines 1 and 5)

Question 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.

We do not agree with the obligation in Guideline 1, number 14. MiFID II requires a clear breakdown and aggregation of relevant costs. In addition, there are rules regarding cost disclosure for products such as UCITS. Cross-selling should not require additional cost disclosure except for cases in which there are differences between the cost of the package and the sum of the costs for parts of the package. In

addition, the obligation to display prominently and communicate timely the key price and cost information should not be different from the MiFID II rules. It should be clarified that compliance with MiFID II rules regarding timing of disclosure and methodology meets the requirement of prominent display and timely communication of key price and cost information according to the guidelines.

Regarding the relevant non-price features and risks as addressed in Guideline 5, number 19 and the related illustrative example, it should be clarified that the requirements only apply if indeed features or risks change. This would also be in line with the mandate according to MiFID II which clearly states that the description will only be required where "the risks resulting from such an agreement or package offered to a retail client are likely to be different from the risks associated with the components taken separately" (Art. 24 para. 11 subpara. 2 MiFID II). If savings accounts are combined with e.g. investment products, in practice, there is often no change to the risk of the saving account, because the capital invested in the saving account is guaranteed. In such case, the other product does not influence the risk profile of the savings account and hence no communication regarding a different overall risk profile is required. We would appreciate a clarification in this regard.

Prominent and timely display of information (Guidelines 2, 3, 4 and 6)

Question 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.

Guideline 3 requires that equal prominence is assigned to the price and cost information on the component products. This bears a huge burden to firms. The services and products sold in a bundle might come from different sectors and hence have to comply with different disclosure obligations. The point of sale will only have available the disclosure according to the different sectorial legislation. These disclosure obligations which are sufficient according to the sectorial legislation may no longer be sufficient according to the proposed guidelines. The guidelines in particular propose that equal prominence is given to the price and cost information of the component products (see Guideline 3, number 17). As long as the disclosure obligations under each sectorial legislation are not identical, this rule is neither feasible nor in line with the legislation. None of the cross-selling rules within MiFID II, MCD, PAD and draft IMD II allow different disclosure requirements to those provided for in the respective directives and implementing acts. The rules only allow and require that the costs of each component shall be disclosed. Therefore, the information cannot be presented together but only subsequently for each product and / or service. In addition, the investor can only take into account one information at a time. It is neither practicable nor in line with the ESA's mandate and the respective disclosure requirements to request an additional or different type of disclosure in the case of cross-selling. In this regard, the guidelines should clarify the meaning of "equal" by clarifying that disclosure of each component according to the respective rules as well as disclosure of the package costs should be sufficient.

Further, we see potential conflicts between on the one hand the requirements of cost transparency as proposed by ESMA under MiFID II, the requirement for cost disclosure within PRIIPs Regulation and on the other hand the requirements of cost disclosure in other EU regulations. For instance, MiFID II Level 2 and PRIIPs Regulation will require disclosure of costs not only in percentage but also in monetary terms. If a MiFID service, however, is offered together with a product neither falling under MiFID II nor under PRIIPs Regulation, monetary terms might not be available. It should therefore be clear that no additional disclosure of price and cost information will be imposed (see Guideline 4 and related

illustrative example). Otherwise, the highest cost disclosure standard will proliferate to all other products and services although the rules applicable to such product and service do not require such disclosure. Such understanding would contradict the rules for such products and services and might even hinder the cross-selling which – as the ESAs pointed out – can have advantages for the customer.

Optionality of purchase (Guideline 7)

Question 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.

Guideline 7, Number 23 indicates that firms are required to sell the components separately. This is not the case. MiFID II for example states the requirement to disclose whether the components may be purchased separately. The guideline should be clarified in this respect.

Assessment of demand and needs or suitability/appropriateness (Guideline 8)

Question 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 the example 1) described in Guideline 8 since it does not differentiate clearly between the appropriateness and suitability test. It is correct that in 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. This should not be changed for cross-sold components. It has to be clear that in case the firm is obliged to assess the appropriateness, the assessment relates to the customers 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 in case a non-advised cross-selling takes place. This is not in line with the understanding of MiFID II regarding suitability and appropriateness and should therefore be revised.

The same applies to example 4 which includes the reference to the example in Guideline 5. Example 4 discusses that the package should be deemed suitable without any reference to the service provided. Suitability, however, is under MiFID II only required in case of investment advice or portfolio management. There is no reference to these services in the examples. This should be reviewed accordingly.

Training and remuneration (Guidelines 9 and 10)

Question 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.

Although we appreciate that the obligations in guidelines 9 and 10 follow obligations for firms which fall under MiFID II, we fear that the wording different from MiFID II may lead to other interpretations and potentially new obligations. Generally, the organisational rules regarding training of staff and remuneration would also apply to bundled packages without any inclusion in the guidelines. MiFID II provides for high standards also for staff remuneration and staff training. Hence, it should be made

clear that complying with MiFID II requirements suffices also with respect to bundled package.

Post-sale cancellation (Guideline 11)

Question 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 strongly object against the rule in guideline 11, number 29, to allow the customer to split the products grouped in a cross-selling offer. This goes far beyond the mandate for the cross-selling guidelines and the rules on cross-selling. These clearly indicate that the firm is allowed to offer the products only in bundled form. Hence, an obligation to subsequently split grouped products is not in line with the ESAs' mandate. In addition, the customer has to be informed in advance whether or not the components may be purchased separately. The customer therefore knows the circumstances when buying the package. A requirement to disclose whether or not the components may be split subsequently and at what price should be sufficient.

Annex 2: Cost-benefit analysis

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

The cross-selling Guidelines should not create additional disclosure requirements which contradict or go beyond the existing sectorial legislations. For MiFID firms compliance with the MiFID II standards for bundled products should suffice.

Sincerely,

Thomas Richter Dr. Julia Backmann