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Re: Response to ESMA's Consultation Paper on "Draft guidelines on MiFID II product governance requirements" published on 5 October 2016

Firstly, we would like to express our appreciation and support on ESMA's work on product governance requirements under MiFID II and the largely transparent way that the work has been conducted. In the document, we want to highlight an issue where we feel it would be useful to receive ESMA's feedback.

Our response refers to the question Q8 "Do you have any further comment or input on the draft guidelines?".

The purpose of this document is to raise the attention of the Authority on an issue - not already included amongst the topics focused in the Consultation Paper - related to the following scheme, widely adopted by large international groups:

- a) the group's manufacturer (hereinafter, the "Manufacturer") is based in a EU Member State (e.g.: Luxembourg);
- b) the financial products created, developed, issued and/or designed by the Manufacturer (the "Products") are promoted in other EU Member States (e.g.:

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Italy) by its local affiliates ⁽¹⁾, belonging to the same group (the “Promoter” ⁽²⁾);

- c) the Manufacturer and the Promoter have in place a service agreement regulating promotional activities (such as seeking the actual distributors, organizing events and training sessions, preparing promotional materials, etc.) of the Products;
- d) pursuant to the scope envisaged in the agreement, the Promoter carries on its promotional activities towards a large number of eligible counterparties (*i.e.*: credit institutions and/or investment firms) based in Italy, which, in turn, distribute the Products to retail “target” clients (*i.e.*: the end-clients in the distribution chain) (the “Distributors”).

Given that the Consultation Paper does not specifically address the peculiarities deriving from such distribution chain ⁽³⁾, and in order to set aside uncertainties on the product governance obligations between the different parties involved in the chain described above, it would be helpful if ESMA could provide specific guidance on the Promoter’s role, taking into account the following considerations:

- 1) In our view, the Promoter may not, directly and completely, fall within the scope of the provisions on product governance regime applicable to manufacturers and/or distributors. Therefore, its role is “hybrid”, since it merely works in the distribution chain as a link between the Manufacturer, on one side, and the Distributors, on the other.
- 2) If ESMA agrees with the assumption *sub* 1), we believe that the only possible role, if any, played by the Promoter in the distribution chain should be that of “intermediary investment firm”, outlined in the draft of Commission Delegated Directive (EU) dated 7 April 2016 (the “MiFID II Delegated Directive”), and in particular in article 10(10).

⁽¹⁾ *E.g.*: by an Italian investment firm – *Società di Intermediazione Mobiliare (SIM)* – in Italy and/or by a branch in another EU Member State.

⁽²⁾ In our opinion, a comparable case would be if the affiliate was appointed as the local global distributor, with faculty to nominate sub-distributors, which would have the direct relationship with the end-client.

⁽³⁾ Paragraphs 66-69 seem to address a different matter, since, in such scenario, the “intermediary” buys the product with the intention of selling the same to the clients.

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- 3) If such interpretation is correct, the Promoter, in line with what prescribed under article 10(10) of the MiFID II Delegated Directive, shall:
 - (a) *«ensure that relevant product information is passed from the manufacturer to the final distributor in the chain;*
 - (b) *if the manufacturer requires information on product sales in order to comply with their own product governance obligations, enable them to obtain it; and*
 - (c) *apply the product governance obligations for the manufacturer, as relevant, in relation to the service they provide».*
- 4) In such scenario, while the obligations contained *sub (a) and (b)* are sufficiently clear, we seek further guidance on which of the *“product governance obligations for the manufacturer” sub (c)* should apply to the Promoter.
- 5) In this regard, the aside *“as relevant”* seems to be aimed at avoiding duplication of the burdens imposed both on the Manufacturer/Promoter. Consequently, reference to *“product governance obligations for the manufacturer”* made by article 10(10)(c) of MiFID II Delegated Directive has to (and must) be considered limited to the obligations relating to the target market (i.e.: article 9(9) and 9(11)).
- 6) We are of the opinion that such limitation of obligation is reasonable, since the Promoter has a better knowledge of the specific local market than the Manufacturer, given that the same directly liaises with the final Distributors.
- 7) Conversely, the obligations relating to the governance of the Products (i.e.: article 9(1) to 9(8), 9(10) and 9(12) to 9(15)) shall remain exclusively applicable to the Manufacturer ⁽⁴⁾, which has the technical competence required by law.

We are grateful for the opportunity to provide our contribution.

Kind regards.

Edoardo Guffanti

Matteo Catenacci



⁽⁴⁾ Therefore, the Manufacturer and the Promoter should duly regulate the mutual responsibilities in the service agreement.