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MIF 2 – MESURES D'APPLICATION PAIEMENT DE LA RECHERCHE

Un débat de fond est nécessaire au regard de l'enjeu macro-économique

Dans son avis technique rendu fin décembre à la Commission européenne, l'Autorité européenne des marchés financiers a fait le choix de traiter la recherche reçue par les entités effectuant de la gestion de portefeuille sous le régime défini aux articles 24-7, 8 et 9 de la directive 2014/65/UE du 15 mai 2014 (MiFID 2), qui encadrent strictement la possibilité de recevoir de fournisseurs des avantages monétaires et non monétaires (*inducements*).

L'avis technique de l'AEMF

Pour assurer la conformité à la directive de niveau 1, la proposition formulée par l'AEMF (*v. aussi Annexe, p. 19*) est qu'hors le cas où la recherche serait payée directement par l'entité concernée sur son compte d'exploitation, celle-ci ne pourrait être reçue que si trois conditions sont simultanément remplies :

- Ce paiement est effectué sur la base d'un budget annuel établi *ex-ante* avec l'accord du client (y compris en termes de fréquence des débits réalisés sur le compte du client), le montant de ce budget ne pouvant être revu à la hausse qu'avec l'accord écrit du client ;
- Des procédures internes permettent de vérifier la qualité de la recherche et sa capacité à contribuer à de meilleures décisions d'investissement au profit du client ;
- L'information du client est assurée, *ex-ante*, sur le montant budgété et sur le coût prévisionnel qui devrait lui être affecté et, *ex-post*, sur la charge annuelle que cela représente pour lui, étant par ailleurs prévu que le client a toujours la possibilité de demander certaines informations spécifiques (fournisseurs de recherche ayant reçu des paiements, biens et services fournis en contrepartie, montants totaux payés sur une période définie, y compris en les comparant au budget établi pour cette même période).

Par ailleurs, l'avis prévoit également :

- D'une part, que les fournisseurs de services d'exécution doivent distinguer les coûts de ces services de ceux liés à d'autres biens et services dont la fourniture ne doit aucunement dépendre des paiements attachés aux flux d'exécution, des Orientations de l'AEMF pouvant être utiles pour préciser ce point ;
- D'autre part, que la Commission européenne devrait envisager de préciser les conditions dans lesquelles les fournisseurs de services d'exécution et de recherche peuvent simultanément mener des activités de placement et de prise ferme, afin de contrôler et de gérer les possibles conflits d'intérêt auxquels ils font face.

Ce dispositif est présenté par l'AEMF comme un assouplissement de ses propositions initiales en réponse aux différents arguments exprimés à leur rencontre, lors de la phase de consultation clôturée le 1^{er} août 2014, par l'ensemble des parties prenantes, y compris le *Securities and Markets Stakeholder Group* institué auprès de l'Autorité européenne¹.

En aucun cas toutefois, cet avis ne répond aux critiques émises. Au contraire, ignorant la dimension macro-économique que joue la recherche dans la capacité des entreprises à accéder aux meilleures conditions aux marchés pour financer leur développement, l'AEMF propose d'introduire des lourdeurs administratives d'autant plus intolérables pour les entités ayant une activité de gestion de portefeuille que leur taille est réduite. Et cela alors même que les entités de taille réduite sont celles qui, fréquemment, sont le plus orientées sur les valeurs PME et ETI. Et alors même également que la capacité des PME et ETI à accéder à des financements de marché est reconnue comme vitale face au mur de la croissance auquel est aujourd'hui confrontée l'Europe.

S'il n'est pas question de prétendre qu'en matière de paiement de la recherche aucun sujet ne serait à examiner, il ne peut en revanche être

approprié de le traiter de manière connexe au travers seulement de la gestion de portefeuille, sans prise en compte de sa dimension macro-économique. L'enjeu est aussi, et avant tout pour la gestion collective

¹ V. Advice to ESMA - Investors Protection Aspects of the Consultation Paper on MiFID II and MiFIR, 8 August 2014, § 78 à 90 qui conclut: " Therefore the SMSG as part of its advice urges ESMA to reconsider their stance by deleting the paragraph relating to investment research".

menée sous forme de gestion alternative ou non, les compagnies d'assurance, les caisses de retraite et fonds de pension, ainsi que pour les mutuelles, ces investisseurs institutionnels utilisant bien plus massivement que la gestion individuelle la recherche externe pour éclairer leurs décisions d'investissement. Et c'est d'ailleurs bien en considération de cet enjeu que l'AEMF préconise d'étendre son approche à la gestion collective. Seul un débat approfondi permettant de peser toutes les conséquences des choix effectués, mené au niveau politique et non technique, peut conduire à modifier le cadre propre de chacune de ces catégories d'acteurs dans le meilleur intérêt des utilisateurs finaux des marchés que sont les entreprises et les épargnants.

CONTEXTE DE LA RECHERCHE

La recherche, dont les conditions de paiement seraient profondément bouleversées par l'avis de l'AEMF, s'inscrit dans un contexte particulier qu'il est nécessaire d'avoir présent à l'esprit pour être en mesure d'évaluer en connaissance de cause la portée des enjeux en cause.

UNE PRESTATION INTELLECTUELLE A HAUTE VALEUR AJOUTEE

La recherche, dénommée aussi analyse financière, est une prestation intellectuelle à haute valeur ajoutée par laquelle un analyste, à partir d'informations publiques, cherche à comprendre les fondamentaux d'un émetteur. Il s'agit pour lui d'en dégager une analyse raisonnée en termes de perspectives d'évolution du cours de bourse de cet émetteur ou, plus généralement, de valorisation de ses actions et autres titres de capital, et donc de l'intérêt qu'ils présentent au regard d'entreprises comparables pour y investir ou au contraire désinvestir.

Dans ce cadre, l'analyste ne se contente pas de consacrer quelques jours ou semaines par an afin de produire une analyse sur un émetteur avant de passer à un autre : il doit au contraire, en permanence, comprendre et anticiper les facteurs économiques, financiers et stratégiques des valeurs qu'il suit pour, en cas de modification de l'environnement, être en mesure d'informer ses clients en conséquence. C'est ainsi qu'il leur permettra de saisir les opportunités qui se présentent avant que le reste du marché ne les perçoivent également, et donc de maximiser le rendement dégagé à leur bénéfice ou à celui de leurs mandants.

C'est ainsi que la crédibilité d'un analyste ou d'une équipe d'analystes ne se construit pas sur le résultat ponctuel que constitue la production d'une « bonne » analyse mais sur la reconnaissance de la qualité de son suivi d'une valeur ou d'un secteur dans la durée et de sa capacité à permettre à ses clients de saisir les opportunités décelées.

Contenu de la prestation de recherche

De manière générale, pour être reconnu, le travail de l'analyste implique :

- L'analyse détaillée des comptes (bilan, compte de résultat, cash flow) sur une période de 5 à 10 ans, couplée à une analyse prévisionnelle sur deux exercices au moins ;
- Des discussions régulières avec les émetteurs pour avoir une compréhension exacte des informations publiques les concernant ;
- La publication de commentaires plus ou moins détaillés à l'occasion de tous les événements (société ou sectoriel), de *previews* avant résultats et de *postviews* après résultats ;
- Le contact régulier avec un certain nombre de clients investisseurs ciblés.

La prestation de recherche repose bien sûr sur une bonne connaissance de l'émetteur, mais aussi de son secteur d'activité, ce qui explique d'ailleurs que l'un des enjeux de cette fonction soit de recruter des personnes ayant une connaissance opérationnelle du secteur sur lequel elles interviennent.

La qualité de la prestation s'appuie sur des rencontres périodiques avec le management ainsi que sur l'actualisation permanente des données à disposition, qu'elles concernent l'émetteur lui-même où son secteur.

C'est pour cela qu'il peut être estimé que pour réaliser une prestation en mesure de retenir l'attention des investisseurs institutionnels, un analyste ne peut raisonnablement pas envisager de suivre plus de 10 à 15 valeurs.

TROIS TYPES DE FOURNISSEURS DE RECHERCHE

Les fournisseurs de recherche se distinguent aujourd'hui en trois catégories :

- La recherche *sell-side* pour laquelle la prestation d'analyse financière est rendue par une entreprise qui exerce simultanément des activités d'intermédiation financière ;
- La recherche dite indépendante pour laquelle le fournisseur d'analyse financière n'exerce par ailleurs aucune activité d'intermédiation financière ;
- La recherche *buy-side*, caractérisée par le fait que la prestation d'analyse financière est réalisée en interne par une entreprise (société de gestion le plus souvent) pour répondre à ses propres besoins, et guider ainsi ses choix d'investissement.

Prédominance de la recherche *sell-side*

Trois facteurs expliquent la prédominance de la recherche *sell-side* sur la recherche dite indépendante d'une part, sur la recherche *buy-side* d'autre part :

- Son couplage avec les activités d'intermédiation financière lui confère d'abord une plus grande proximité avec le marché, et ainsi la capacité à mieux appréhender les besoins et attentes des investisseurs.
- Mais ce couplage induit aussi l'existence d'une force de distribution des valeurs suivies. Au sein des équipes des établissements fournisseurs de recherche *sell-side*, les vendeurs ont ainsi pour rôle, par rapport à la connaissance qu'ils ont de leurs clients et de leur stratégie, de leur proposer pro-activement, sur la base notamment de la recherche produite en interne, des idées d'investissement et de désinvestissement
- Par ailleurs, la recherche *sell-side*, en tant que recherche externe, et au même titre que la recherche dite indépendante, est souvent plus complémentaire qu'alternative à la recherche *buy-side*, qui de toutes les façons, n'est accessible qu'aux gestions d'une certaine taille compte tenu des coûts attachés à cette activité. La recherche *buy-side* se sert en effet fréquemment de la recherche externe pour détecter des opportunités qu'elle n'aurait sans doute pas identifiées sinon, mais aussi pour confronter son propre raisonnement à d'autres, et l'enrichir ainsi.

La recherche *sell-side* est aujourd'hui, de loin, la plus utilisée par les investisseurs, et notamment les sociétés de gestion.

Une rémunération de la recherche *sell-side* historiquement liée aux flux d'exécution

La recherche *sell-side* s'est développée au milieu des années 80 quand la rémunération des services d'exécution était strictement encadrée par les Etats ou par les bourses sur lesquelles se traitaient quasi exclusivement les titres. La fourniture d'une prestation de recherche associée à des services d'exécution a été ainsi un moyen pour les acteurs concernés de se différencier les uns des autres.

La disparition progressive dans le courant des années 90 de l'encadrement de la rémunération des services d'exécution a conduit à accentuer les besoins de différenciation de l'offre de services tant sur la partie exécution que sur la partie recherche.

Jusqu'au milieu des années 2000, les problématiques de qualité d'exécution sont toutefois restées limitées : les titres n'étant traités en pratique que sur une seule plateforme d'exécution, l'enjeu premier était de modérer l'impact de marché subi par le client sur cette plateforme. C'est assez naturellement donc que prestation d'exécution et prestation de recherche sont restées rémunérées ensemble.

Ce cadre a été profondément renouvelé en 2007 avec la mise en œuvre de la directive MIF qui a mis en concurrence les plateformes d'exécution tout en mettant en place des règles de meilleure exécution. Pour autant, la recherche *sell-side* et la recherche dite indépendante continuent d'être rémunérées essentiellement au travers de la rémunération versée sur les flux d'exécution.

La coexistence de ces trois formes d'analyse ainsi que la multiplicité des fournisseurs de recherche externe (*sell-side* et dite indépendante) expliquent la très grande diversité d'opinions accessibles aux investisseurs, même s'il est vrai que le consensus de marché reconnaît sur certaines valeurs et certains secteurs, une pertinence particulière à un ou quelques analystes, dont l'opinion acquiert de ce fait un poids plus marqué par rapport à leurs confrères. Cette diversité est une caractéristique importante du marché actions, surtout comparée aux marchés de dette où quelques agences de notation jouent un rôle de premier plan dans la prise de décision des investisseurs.

UNE REMUNERATION VERSEE EN FONCTION DE LA VALEUR AJOUTEE CREEE

La recherche est un service marchand qui en tant que tel, doit être rémunéré. S'agissant d'une prestation intellectuelle dont l'objet est de créer de la valeur ajoutée au profit des investisseurs, en les aidant à prendre la bonne décision d'investissement au bon moment, et donc à améliorer le rendement de leur portefeuille, l'enjeu est que la rémunération prenne en compte cette création de valeur.

A défaut, la pratique montre que les investisseurs ont un moindre accès à la recherche *sell-side* ou à la recherche dite indépendante, les moyens et l'offre de service étant alors réalloués vers les clients assurant les meilleures rémunérations.

Broker review et CCP

La Broker review se place dans le cadre plus large du dispositif de Commissions de courtage partagées – CCP qui permet à toute société de gestion de demander à l'intermédiaire qui a exécuté ses ordres de reverser à un tiers la partie de la rémunération reçue correspondant à la rémunération des services d'aides à la décision d'investissement et d'exécution que ce tiers lui a fourni.

La capacité à réallouer vers un tiers une partie de la rémunération versée lors de l'exécution des ordres est en effet liée à l'existence d'un processus de revue qui, en amont, permet de déterminer précisément les différents services couverts par cette rémunération et leurs parts respectives dans cette rémunération. C'est la transparence obtenue grâce au processus de revue qui autorise la société de gestion et l'intermédiaire de marché à convenir des conditions dans lesquelles ce dernier reversera à des tiers une partie de la commission reçue.

C'est pour favoriser ce processus de compréhension partagée de la valeur créée par la recherche fournie que, depuis quelques années, ont commencé à se mettre en place de façon formalisée des processus de revue. Ces processus, plus souvent connus sous leur dénomination anglo-saxonne de *Broker review*, ne concernent toutefois que les sociétés de gestion les plus importantes compte tenu des contraintes organisationnelles qu'ils comportent. Ils permettent à chaque société de gestion et intermédiaire de marché de s'accorder sur la rémunération ou la pondération attachée à chaque catégorie de services fournis : services d'exécution d'une part, services d'aide à la décision d'investissement (dont recherche) d'autre part. C'est en fonction de cette évaluation, que sera mutuellement jaugé l'intérêt économique de la relation nouée : la société de gestion peut estimer ainsi que le coût du service est

trop élevé par rapport à son intérêt, tandis que l'intermédiaire peut prendre la décision de cesser de fournir certains services, considérant qu'ils ne sont pas suffisamment rémunérés.

Concrètement, le processus de revue suppose tout d'abord que la société de gestion apprécie en interne, le plus souvent au travers de mécanismes de vote qui peuvent être relativement complexes, la valeur fournie par chaque service. Ensuite, s'engagera avec l'intermédiaire de marché une discussion commerciale dont l'objet sera de confronter, service par service, la valeur estimée par la société de gestion avec celle attribuée par l'intermédiaire de marché. Au final, dans la durée de la relation et non rigoureusement opération par opération, seront alors déterminés la nature des services rendus et le niveau de leur rémunération.

LA RECHERCHE SELL-SIDE, FACTEUR IMPORTANT DE LA CAPACITE DES EMETTEURS A LEVER DES FINANCEMENTS DE MARCHE

Mais l'enjeu de la recherche ne se limite pas aux rapports entre fournisseurs de services d'exécution et de recherche d'une part, investisseurs d'autre part. Il concerne aussi très directement les émetteurs qui font appel au marché pour financer leur développement.

La recherche constitue en effet un enjeu important pour les émetteurs. Le travail mené par les analystes est en effet fondamental pour leur permettre de capter largement l'attention des investisseurs, susciter des flux et donc de la liquidité sur le marché secondaire de leurs titres, et ainsi être en situation de lever au meilleur coût lorsqu'ils le souhaiteront, de nouveaux

The Real Effects of Financial Shocks: Evidence from Exogenous Changes in Analyst Coverage

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Abstract

We study the causal effects of analyst coverage on corporate investment and financing policies. We hypothesize that a decrease in analyst coverage increases information asymmetry and thus increases the cost of capital; as a result, firms decrease their investment and financing. We use broker closures and broker mergers to identify changes in analyst coverage that are exogenous to corporate policies. Using a difference-in-differences approach, we find that firms that lose an analyst decrease their investment and financing by 1.9% and 2.0% of total assets, respectively, compared to similar firms that do not lose an analyst. These results are significantly stronger for firms that are smaller, have less analyst coverage, have a bigger increase in information asymmetry, and are more financially constrained.

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financements. La recherche académique (*voir ci-dessus*) confirme d'ailleurs qu'une réduction de la recherche produite entraîne, par augmentation des asymétries d'informations, et donc par réduction de l'appétence des investisseurs craignant que ces asymétries ne jouent en leur défaveur, une baisse mesurable de leurs investissements et de leurs financements, cette baisse étant d'autant plus accentuée que la taille de l'entreprise est faible.

Ces travaux scientifiques ne font d'ailleurs que confirmer ce que révèle depuis longtemps l'expérience pratique. En France, cela fait maintenant plusieurs années que, pour favoriser leur financement par le marché, des réflexions sont menées et des actions entreprises en vue de stimuler la recherche produite sur les émetteurs de valeurs moyennes. Le constat à ce stade est toutefois celui d'un échec : la viabilité économique d'une véritable activité de recherche sur valeurs moyennes (c'est-à-dire produisant de la valeur pour les investisseurs qui l'utilisent) est difficile à atteindre, voire impossible, si elle n'est pas couplée à une offre de services plus large à destination des émetteurs, et incluant le plus souvent l'animation de leur marché pour favoriser la liquidité ainsi que l'assistance en matière de communication financière. Pour beaucoup d'établissements produisant de la recherche *sell-side* sur ces valeurs, il s'agit en outre de s'inscrire dans une relation de longue durée où l'entreprise, au fur et à mesure qu'elle croîtra et lèvera de nouveaux financements sur les marchés, fera appel à eux pour réaliser ou diriger ces levées de fonds.

UN AVIS AEMF QUI MET GRAVEMENT EN PERIL LA RECHERCHE

Prenant acte des critiques unanimement émises à l'encontre de sa proposition initiale prévoyant de considérer la recherche comme un avantage non monétaire, mais tout en rappelant son désaccord avec les commentaires reçus, l'AEMF éprouve néanmoins le besoin de modifier cette proposition : « *However, in order to address concerns expressed by respondents, ESMA has clarified in which circumstances the receipt of research does not qualify as an inducement in accordance with Article 24(7)(a) and (8) of MiFID II and is therefore permissible.* »

UN DISPOSITIF COMPLEXE ...

Il est ainsi introduit, en alternative au paiement direct de la recherche sur les ressources propres de la société de gestion, le principe d'un compte de recherche établi au niveau de chaque client permettant d'acquérir de la recherche externe. Les modalités de fonctionnement en seraient les suivantes :

- ✚ Sur la base d'un budget annuel validé par un accord du client, la société de gestion débitera le compte de recherche du client, selon une périodicité également indiquée, d'un montant fixe qui ne pourra être aucunement lié au volume ou à la valeur des transactions réalisées pour son compte.
- ✚ Le montant payé annuellement par chaque client pour l'acquisition de recherche ne pourra dépasser le budget préétabli qu'avec l'accord écrit du client. La non utilisation de l'intégralité du budget de recherche en excédent de prélèvements déjà effectués devra conduire à des remboursements.
- ✚ Le budget devra être établi de manière raisonnable par rapport aux besoins anticipés du client en matière de recherche dans le cadre de procédures internes qui assurent la primauté des intérêts du client, notamment en termes de pistes d'audit permettant de contrôler la qualité de la recherche acquise et la non utilisation du budget pour acquérir de la recherche produite en interne (recherche *buy-side*).
- ✚ La société de gestion sera pleinement responsable de la gestion du compte de recherche. Elle pourra toutefois en déléguer l'administration à un tiers si cela facilite l'acquisition de recherche externe.

- ✚ La société de gestion devra périodiquement contrôler la qualité de la recherche acquise, particulièrement au regard de sa capacité à contribuer à de meilleures décisions d'investissement. Elle devra être en mesure de matérialiser ces éléments dans une politique écrite remise au client.
- ✚ La société de gestion devra informer le client du coût total de la recherche qui lui a été facturée. Sur demande, elle devra également lui fournir la liste des fournisseurs de recherche, des montants payés à chacun, des biens et services acquis, la comparaison entre le montant payé et le budget initial.

... INGERABLE EN PRATIQUE POUR DE NOMBREUSES SOCIÉTÉS DE GESTION ...

La description du dispositif proposé par l'AEMF au regard des conditions dans lesquelles la recherche externe est aujourd'hui utilisée met en évidence toute l'inadéquation de ce dispositif. A titre principal, les obstacles concernent :

- ✚ La définition d'un budget ex-ante alors que tout l'enjeu de l'accès à une recherche de qualité est la reconnaissance de la valeur ajoutée créée au profit de la société de gestion, qui par définition ne peut se déterminer qu'ex-post.
- ✚ La définition d'un budget par client alors que la recherche sert à un ensemble de clients (qui peuvent se compter en centaines, voire en milliers), et que la valeur ajoutée créée n'est pas nécessairement de même niveau pour chaque client.
- ✚ La possibilité d'augmenter le budget de recherche seulement avec l'accord écrit du client alors que l'on connaît les difficultés pratiques à recueillir un tel accord exprès. Surtout que cela suppose de répartir l'augmentation globale considérée nécessaire entre tous les clients concernés pour réunir l'accord de chacun d'entre eux.
- ✚ L'obligation qu'il n'y ait aucun lien entre paiement de la recherche *sell-side* et ordres exécutés alors que l'un des objectifs de l'acquisition de la recherche est d'aider à prendre des décisions d'investissement qui, si elles peuvent conduire à l'inaction (confirmation que la composition du portefeuille n'a pas besoin d'être modifiée), sont souvent matérialisées sous forme de flux d'exécution.
- ✚ L'obligation de démontrer la qualité de la recherche acquise et sa capacité à contribuer à de meilleures décisions d'investissement de la part de la société de gestion, mais sans fournir aucun critère sur lequel asseoir une telle démonstration.

Si l'on ajoute à cette liste la lourdeur issue des obligations d'information, le risque est que beaucoup de sociétés de gestion ne veuillent pas mettre en place des dispositifs de cette nature. Le risque est d'ailleurs d'autant plus avéré que l'expérience des mécanismes de CCP et de *brokers review* a mis en évidence que ces mécanismes n'étaient accessibles qu'aux sociétés de gestion d'une taille suffisante, en mesure de gérer la charge administrative qui en résulte ...

Dans un contexte où le taux de rendement des portefeuilles gérés est peu élevé, il est par ailleurs peu vraisemblable que les sociétés de gestion fassent le choix d'acquérir de la recherche externe sur leurs propres ressources. Cela supposerait en effet une augmentation des frais de gestion prélevés qui apparaîtrait sans doute insupportable aux clients, surtout au regard de leurs concurrents européens. Et cela même si corrélativement était enregistrée une baisse des frais d'exécution, ceux-ci n'incluant désormais plus le paiement de la recherche externe.

Il est alors plus probable que les plus gros acteurs de la gestion collective resteront seuls en mesure de supporter les coûts associés à l'utilisation de la recherche externe. Or, au regard de la masse des capitaux qu'ils gèrent, ces acteurs ne se révèlent pas comme ceux qui, proportionnellement, investissent le plus dans les tissus économiques locaux que composent les PME et les ETI. Ce financement relève d'abord de nombreuses sociétés de gestion, de faible taille, ayant des stratégies de niche.

... AVEC DES REPERCUSSIONS INEVITABLES SUR LA DIVERSITE DE LA RECHERCHE DISPONIBLE

Moins de sociétés de gestion acquérant de la recherche externe conduit nécessairement à la déstabilisation du modèle économique sur lequel est assis l'activité de recherche. La logique est alors une contraction de l'activité de recherche produite en Europe. Contraction en termes de diversité d'opinions disponibles, mais aussi contraction en termes de périmètre de valeurs suivies, la recherche se concentrant sur les grandes valeurs, celles qui représentent dans l'ensemble des portefeuilles gérés le poids économique le plus important, au détriment de la recherche produite sur les PME et ETI.

Cette contraction / concentration joue au profit des grands centres financiers mondiaux et des grands acteurs qui y sont implantés mais au détriment des écosystèmes de proximité qui ont un rôle central dans l'accès des PME et ETI aux financements de marché, et qui pour des raisons économiques se désengagent peu à peu de la recherche produite sur ces valeurs.

DES ENJEUX MACRO-ECONOMIQUES A PESER SOIGNEUSEMENT AVANT TOUTE DECISION

Dire que la recherche joue un rôle important dans l'appétence des investisseurs à fournir des financements de marché aux entreprises qui veulent se développer est révélateur de l'enjeu attaché à l'avis que vient de délivrer l'AEMF. Conséquence des nouvelles réglementations prudentielles bancaires, l'Europe bascule vers un modèle de financement de son économie où le marché doit désormais fournir les ressources que le crédit n'est plus en mesure de dégager. L'Europe est par ailleurs confrontée au défi de la croissance, la conviction commune étant que la capacité des PME et ETI à investir, et donc à disposer au meilleur coût des financements nécessaires à cet effet, est vitale pour relever ce défi avec succès.

On ne peut donc qu'être extrêmement critique envers une démarche de l'Autorité européenne, qui sans considérer un seul instant cet enjeu macro-économique, et ses effets particulièrement néfastes en termes de capacité des PME et ETI à jouer leur rôle dans le retour de la croissance, s'apprête à déstabiliser brutalement le modèle économique de la recherche. Cette question nécessite donc un débat politique de fond entre les co-législateurs européens, d'autant plus nécessaire que :

- ✚ ***Pour la cohérence de la démarche, les mêmes principes devraient être appliqués à la gestion collective, ce qui passe par un choix politique (processus de co-décision) qui ne saurait être préempté par des mesures de niveau 2 visant un univers beaucoup plus étroit.***

L'AEMF estime que sa proposition, malgré le bouleversement qu'elle induit, est cohérente avec l'approche traditionnelle menée par les régulateurs européens et la Commission : « *The qualification of this method of paying for research as an inducement is in line with a long standing classification in the regulatory arena, for instance, CESR and the Commission clearly mentioned research in the context of inducements.* »

L'argument se renverse toutefois. Comment est-il possible qu'une question aussi porteuse d'enjeux, et clairement identifiée par le superviseur européen et la Commission, n'ait pas été spécifiquement évoquée lors des discussions qui ont conduit le Conseil et le Parlement européens à adopter les dispositions relatives aux avantages monétaires et non monétaires ? Surtout alors que ces dispositions ont fait l'objet d'une attention particulièrement forte.

La question mérite d'autant plus d'être posée que l'enjeu principal du dispositif n'est pas tant sur la gestion de portefeuille, ici seule en cause, que sur la gestion collective, bien plus consommatrice de recherche ... Or, en la matière, assurer la cohérence du dispositif souhaité par

l'AEMF, conduit nécessairement à préempter le débat politique nécessaire pour décider la modification des textes régissant la gestion collective ...

L'AEMF ne s'en cache d'ailleurs pas : « *ESMA notes these proposals are made for the purpose of MiFID II and are therefore mainly aimed at investment firms managing individual portfolios of clients (portfolio management). Similar investment management services are provided in relation to collective investment schemes that fall under the UCITS directive and AIFMD. These activities are however not in the scope of MiFID II. ESMA therefore advises the Commission to consider the possibility of aligning the relevant provisions that fall under UCITS and AIFMD with the MiFID II implementing provisions on this topic.* »

✚ **Une problématique propre à un Etat membre ne saurait imposer une unification des règles mettant en péril des écosystèmes locaux vitaux pour le financement des PME et ETI.**

La proposition de l'AEMF est directement articulée sur une problématique propre au Royaume-Uni et sur une solution préconisée par la *Financial Conduct Authority* pour résoudre des dysfonctionnements constatés au niveau national. Sauf à présupposer que les autres autorités nationales n'auraient pas mené leurs missions avec la diligence attendue, il n'est pas en revanche établi qu'elles auraient détecté des problématiques similaires dans leur champ de compétence.

Si l'harmonisation de la supervision financière en Europe constitue un objectif important pour permettre la réalisation d'un marché unique encore plus intégré, cet objectif est nécessairement de second rang. La priorité est d'abord d'assurer le bon fonctionnement des marchés au profit des émetteurs et des investisseurs, ce qui dans un certain nombre de situations, et particulièrement en ce qui concerne le financement des PME et ETI, passe durablement par des écosystèmes locaux qu'une harmonisation non réfléchie risque de détruire sans pour autant y substituer une alternative viable.

✚ **Des choix assumés s'imposent afin d'arbitrer dans l'intérêt général entre protection des investisseurs et capacité des émetteurs à lever de façon fluide des financements de marché.**

La proposition de l'AEMF est guidée par la conviction qu'elle serait de nature à améliorer notablement la protection des investisseurs, mais sans aucunement tenir compte du fait que l'accès à la recherche participe aussi de la capacité du gérant à fournir une meilleure prestation au client. En outre, parce qu'ils sont en même temps des citoyens européens, les investisseurs ont aussi collectivement besoin d'entreprises qui investissent pour se développer et créer des emplois et de la valeur : pour cela, il est absolument nécessaire que ces entreprises aient la capacité d'accéder de façon fluide à des financements de marché.

C'est d'ailleurs en conscience d'une telle nécessité qu'alors que l'Europe réfléchit à un cadre ad hoc pour le *crowdfunding*, de nombreux Etats membres ont d'ores et déjà mis en place des règles spécifiques encadrant cette activité. Ainsi, compte tenu de son rôle dans le financement des PME et TPE, il a été choisi de favoriser son développement en réduisant les contraintes qui pèsent sur elle, et particulièrement en termes de protection des investisseurs.

Il est d'autant plus nécessaire de soigneusement peser l'arbitrage à réaliser que l'AEMF n'indique aucunement en quoi le dispositif qu'elle propose, par rapport au corps de règles déjà existant, présenterait des bénéfices supérieurs aux inconvénients qu'il recèle. Notamment :

- ✓ La primauté des intérêts du client s'impose en tout état de cause ;
- ✓ Les règles de meilleure exécution veillent à ce que l'exécution des ordres ne soit pas guidée par d'autres impératifs que celle d'obtenir les conditions les plus favorables pour le client ;
- ✓ Les conflits d'intérêts doivent être prévenus et, si cela s'avère impossible, gérés dans le meilleur intérêt du client.

✚ ***Dans une industrie mondialisée, l'intérêt de l'investisseur peut le conduire à privilégier une offre externe à l'Union européenne.***

Dans un contexte de mondialisation de l'industrie de la gestion d'actifs, l'approche préconisée par l'AEMF nécessite par ailleurs d'être appréciée aussi au regard de la compétitivité de la gestion européenne et de la valeur escomptée pour l'investisseur.

Il ne peut être ignoré ainsi que le débat sur le mode de rémunération de la recherche est absent des préoccupations des régulateurs américains. Cela signifie que la gestion américaine pourra continuer à rémunérer la recherche par le biais des commissions d'exécution, s'exposant ainsi à des coûts inférieurs à ceux prévalant pour leurs concurrents européens et proposant une offre de gestion plus diverse car non contrainte par des coûts fixes difficilement absorbables par les acteurs moyens.

L'intérêt économique des investisseurs européens pourrait ainsi les conduire à privilégier des offres étrangères présentant des coûts moindres et un plus grand choix d'investissements, malheureusement non orientés dans leur majorité vers les économies nationales européennes.

Quant aux acteurs européens ayant des activités aux Etats-Unis, leur structure de coûts résultant des contraintes imposées en Europe constituerait un désavantage compétitif important.

✚ ***Des effets potentiellement systémiques à analyser.***

Moins de recherche, c'est comme on l'a déjà souligné moins de diversité d'opinions. Et comme l'a rappelé la crise financière au travers du rôle acquis par un très petit nombre d'agences de notation, cette situation peut avoir des effets systémiques majeurs.

Par ailleurs, une diminution du recours à la recherche par les sociétés de gestion conduit nécessairement à une inflexion des modes de gestion. Dans un environnement où la gestion indicielle a déjà un poids préoccupant au regard du comportement mimétique d'un nombre toujours plus important d'acteurs, cet aspect doit nécessairement être considéré.

Les préoccupations traduites par l'AEMF dans son avis sont légitimes. Elles doivent certainement être prises en compte. En revanche, et contrairement à l'approche menée, il ne peut être question des les examiner seulement sous l'angle de la protection des investisseurs et de la prévention de dysfonctionnements qui n'ont pas été détectés dans plusieurs Etats membres. Il est essentiel de les analyser également au regard de leur implications macro-économiques dans le cadre d'un débat large et approfondi, mené transversalement compte tenu des différents textes en jeu, qui relève du seul niveau politique.

Il est donc essentiel que sur cette question du paiement de la recherche, la Commission européenne ne suive pas l'avis de l'AEMF pour laisser le sujet en l'état tant qu'elle n'aura pas engagé le débat préalable qui est nécessaire. D'autant plus d'ailleurs que comme l'a indiqué en juillet 2014 son Président, Jean-Claude Juncker, en présentant son programme au Parlement européen et en lançant son initiative d'Union des marchés de capitaux : « *To improve the financing of our economy, we should further develop and integrate capital markets. This would cut the cost of raising capital, notably for SMEs, and help reduce our very high dependence on bank funding. This would also increase the attractiveness of Europe as a place to invest.* »

MiFID II IMPLEMENTING MEASURES PAYING FOR RESEARCH

The macroeconomic issues raised mean an in-depth debate is needed

In the Technical Advice that it delivered to the European Commission at the end of December, the European Securities and Markets Authority (ESMA) opted to make investment research received by portfolio managers subject to the requirements of Article 24(7), (8) and (9) of Directive 2014/65/EU of 15

ESMA's technical advice

To achieve compliance with the Level 1 Directive, ESMA proposes (*see also Annex, p. 19*) that unless investment research is paid for directly by the firm out of an operating account, it may be received only if three conditions are concurrently met:

- Payment is made on the basis of an annual budget whose amount and the frequency with which charges may be deducted from the client's account are set ahead of time with the client's agreement. The budget may be increased only with the client's written agreement;
- Internal procedures are in place to check the quality of research and the ability of research to contribute to better investment decisions for the client;
- Clients should be informed ex-ante about the budgeted amount for research and the amount of the expected research charge and ex-post about the annual cost incurred. The client always has the right to request specific information on research providers that received payments, goods and services provided in return, total amounts paid over a given period and how these compare against the budget for that period.

ESMA's advice also covers the following:

- Providers of execution services are asked to identify charges for these services separately from the charges for other goods and services, whose supply must not be dependent on levels of payment for execution services. Future ESMA guidelines may also be useful in this area;
- The European Commission should also consider clarifying the conditions under which firms that provide execution and research services may also carry out underwriting and placing activities, to control and manage any potential conflicts of interest that may arise.

May 2014 (MiFID II), which establish strict conditions for the receipt of monetary and non-monetary benefits, also known as inducements, from suppliers.

ESMA presented its advice as offering more flexibility to address the arguments voiced against the initial proposals by many stakeholders, including ESMA's own Securities and Markets Stakeholder Group (SMSG)², during the consultation that ran to 1 August 2014.

But the advice does not address any of the criticism. On the contrary, ESMA ignores the macroeconomic role that research plays in enabling firms to access markets under optimal terms to finance their growth and proposes adding more red tape that will be particularly hard on smaller portfolio managers, even though they are often the ones that focus on small and medium sized enterprises (SMEs) and mid-tier companies, and even though the ability of these firms to access market financing is recognised as essential if Europe is to meet the growth challenges it faces.

This is not to say that there are no questions to address. But it is inappropriate to tackle the issue of paying for research solely in relation to portfolio management, without taking account of the macroeconomic dimension. In fact the challenge is primarily one for alternative and non-

alternative collective investment, insurers, pension funds and mutual insurers, since these institutional investors make much heavier use than portfolio managers of third party research to guide their

² See Advice to ESMA - Investor Protection Aspects of the Consultation Paper on MiFID II and MiFIR, 8 August 2014, § 78 to 90, which concludes: "Therefore the SMSG as part of its advice urges ESMA to reconsider their stance by deleting the paragraph relating to investment research".

investment decisions. ESMA knows this, which is why it recommends extending its approach to collective investment. To amend the specific framework for each category of participants in the best interest of end market users, namely companies and individual investors, we need to have an in-depth debate at the political – not technical – level that weighs all the consequences of the choices made.

RESEARCH ENVIRONMENT

Research, whose payment arrangements would be turned upside down by ESMA's advice, exists in a particular environment that must be kept in mind to properly gauge the scope of the issues being discussed.

AN INTELLECTUAL SERVICE WITH HIGH-VALUE ADDED

Investment research, also known as financial analysis, is an intellectual service with high value added. An analyst providing this service uses publicly available information to try to understand an issuer's fundamentals. He or she wants to make a reasoned analysis of the issuer's potential future share price performance or the value put on its shares and other equity securities more generally, and, in so doing, assess the case for investing or disinvesting in the issuer when viewed against comparable firms.

Analysts do not merely spend a few days or weeks a year analysing an issuer before moving on to the next one. Rather, they are continually seeking to understand and anticipate the economic, financial and strategic factors affecting the stocks that they cover so that if conditions change, they can tell their clients, who can then seize opportunities before the rest of the market notices them too and maximise their own returns or those of their investors.

In other words, the credibility of an individual analyst or research team is not built on one "good" analysis but on recognition of high-quality coverage of a stock or sector over time and a proven ability to help clients tap into opportunities.

What goes into a research service?

To be recognised, the work of an analyst generally comprises:

- Detailed analysis of financial statements, including the balance sheet, P&L account and cash flow, over a five- to ten-year period, together with a forward-looking assessment covering at least the next two financial years;
- Regular dialogue with issuers to gain a precise understanding of the publicly available information about them;
- Publication of comments when company- or sector-specific events arise, earnings previews and postviews;
- Regular contact with a number of targeted client investors.

Research is naturally based on a thorough familiarity with the issuer, but also with the sector, which is why one of the challenges for this field is to hire people with operational knowledge of the sector in which they work.

The quality of service depends on meeting regularly with management and constantly refreshing issuer and sector data.

Accordingly, to provide a service that is capable of attracting institutional investors, an analyst cannot reasonably be expected to cover more than 10 to 15 stocks.

THREE TYPES OF RESEARCH PROVIDERS

Research providers can be divided into three categories:

- Sell-side research, which is provided by a firm that also supplies financial intermediation services;
- Independent research, where the supplier does not provide financial intermediation services as well;
- Buy-side research, which is conducted within a firm, typically a management company, to meet its own needs and guide investment decisions.

Sell-side research is far and away the type most commonly used by investors, particularly management companies.

Sell-side research predominates

There are three explanations for the predominance of sell-side research over independent and buy-side research:

- The fact that it is combined with financial intermediation services enables closer connection to the market and hence a better ability to understand investor needs and expectations.
- It also comes with marketing for the securities that are followed. Within firms providing sell-side research, sales teams are responsible for using information about clients and their strategy to go to those clients with investment and disinvestment proposals backed up by internal research.
- Moreover, sell-side research, as third party research, is often used to complement rather than replace buy-side research, which in any case can only be conducted by larger management firms given the associated costs. Independent research is used in the same manner. Buy-side research often uses third party analyses to spot opportunities that it would have missed otherwise and to compare and enhance in-house assessments.

The coexistence of these three types of research and the presence of many sell-side and independent research firms mean that investors have access to a wide range of opinions, although the market consensus may acknowledge that a particular analyst or group of analysts has special insight into certain stocks or sectors, giving their opinion more weight than that of their peers. This diversity is an important feature of the equity market, especially compared with debt markets, where a handful of rating agencies play a frontline role in investor decision-making.

Payment for sell-side research has traditionally been tied to execution services

Sell-side research expanded in the mid-1980s when payment for execution services was strictly regulated by governments or by stock exchanges trading almost exclusively securities. The provision of a research service associated with execution services was a way for firms to set themselves apart from each other.

The gradual lifting of the rules on payment for execution services in the 1990s increased the need to differentiate execution and research service offerings alike.

Execution quality issues remained limited until the mid-2000s. Since in practice securities were traded on a single execution venue, the main challenge was to mitigate the market impact borne by the client on the venue. Accordingly, execution and research services continued fairly naturally to be bundled together.

The situation changed dramatically in 2007 with the implementation of MiFID, which introduced competition between execution venues while setting best execution rules. Even so, sell-side and independent research continue to be paid for essentially through the remuneration of execution services.

PAYMENT BASED ON VALUE ADDED GENERATED

Research is a market service and as such must be paid for. Since it is an intellectual service whose purpose is to create added value for investors by helping them to make timely investment decisions that enhance portfolio returns, the challenge is to ensure that payment reflects the value created.

Otherwise, experience shows that investors will have less access to sell-side or independent research, with service resources and proposals being reallocated to clients offering the best payment.

To promote a shared understanding of the value created by research, formal review processes have begun to be set up in recent years. However, these processes, often called broker reviews, involve only the largest management companies, given the associated organisational requirements. They give individual management companies and market intermediaries an opportunity to agree on the payment or weighting assigned to each category of services provided, i.e. execution and investment decision support (including research). The review provides the foundation for a mutual assessment of the economic benefits of the relationship. Based on this process, the management company may feel that the cost of

Broker reviews and CSAs

Broker reviews form part of the broader framework of commission sharing agreements (CSAs), which allow a management company to ask an intermediary that executed its orders to pay part of the remuneration received to a third party in return for investment support and execution services rendered by that third party.

The ability to allocate a portion of the order execution payment to a third party is linked to a review process that makes it possible to determine ahead of time exactly which services are covered by the payment and what proportion they represent. The transparency procured by the review allows the management company and market intermediary to agree the terms under which the latter may pay third parties a portion of the commission received.

the service outweighs the benefits, while the intermediary may decide to discontinue some services if it feels they are not adequately remunerated.

In practice, the review process assumes that the management company conducts an initial internal assessment of the value provided by each service, often based on relatively complex voting arrangements. After this, the company will enter into a commercial discussion with the market intermediary to compare the value estimated by the management company for each service against the value assigned by the market intermediary. Ultimately, the nature of and payment for services rendered are determined over the course of the relationship rather than transaction by transaction.

SELL-SIDE RESEARCH IS AN IMPORTANT FACTOR IN THE ABILITY OF ISSUERS TO RAISE MARKET FINANCING

The questions raised by research are not limited to relations between investors and execution and research providers. They also directly affect issuers that go to the markets to obtain financing to fund their growth.

Research is a major question for issuers. The work done by analysts plays a critical role in enabling them to garner broad investor attention, generate trading and thus liquidity on the secondary market, and be in a position to raise new financing at the best possible cost when they want. Academic research (see opposite) shows that reduced analyst coverage increases information asymmetries and decreases investor appetite owing to fears that these asymmetries will be unfavourable, leading to a measurable decline in their investment and financing. The decline is stronger among smaller firms.

These findings merely bear out what practical experience has long shown. Discussions and initiatives have been underway in France for some years now aimed at stimulating analyst coverage of mid caps. Thus far, these efforts have come to naught. It is hard, if not impossible, to make a bona fide mid cap research business economically viable (i.e. producing value for user investors) unless it is bundled with a broader suite of issuer services, typically including market making to promote liquidity and financial PR support. Many institutions producing sell-side research on these stocks must foster a long-term relationship with the company, which, as it grows and raises new market financing, calls on them to carry out or manage these offerings.

The Real Effects of Financial Shocks: Evidence from Exogenous Changes in Analyst Coverage

FRANÇOIS DERRIEN and AMBRUS KECSKÉS

Abstract

We study the causal effects of analyst coverage on corporate investment and financing policies. We hypothesize that a decrease in analyst coverage increases information asymmetry and thus increases the cost of capital; as a result, firms decrease their investment and financing. We use broker closures and broker mergers to identify changes in analyst coverage that are exogenous to corporate policies. Using a difference-in-differences approach, we find that firms that lose an analyst decrease their investment and financing by 1.9% and 2.0% of total assets, respectively, compared to similar firms that do not lose an analyst. These results are significantly stronger for firms that are smaller, have less analyst coverage, have a bigger increase in information asymmetry, and are more financially constrained.

*The Journal of Finance, August 2013, Vol. 68, Issue 4
<http://ssrn.com/abstract=1725539>*

ESMA'S ADVICE POSES A GRAVE THREAT TO RESEARCH

Responding to the universal criticism levelled at its initial proposal, which was to treat research as a non-monetary benefit, while at the same time noting its disagreement with the feedback, ESMA felt the need to amend its proposal, saying: "However, in order to address concerns expressed by respondents, ESMA has clarified in which circumstances the receipt of research does not qualify as an inducement in accordance with Article 24(7)(a) and (8) of MiFID II and is therefore permissible".

COMPLEX ARRANGEMENTS...

ESMA has therefore added the concept of a research payment account for each client that may be used to purchase third party research, as an alternative to direct payment by the management company out of its own resources. This would work as follows:

- + Based on an annual budget agreed to by the client, the management company will charge a fixed amount to the account that may not be linked to the volume and/or value of transactions executed on behalf of the client, according to a frequency that must also be agreed.
- + The amount paid annually by each client to buy research may not exceed the budget without the client's written agreement. If there is a surplus in the research budget after deductions, a process must be in place to rebate these funds.
- + The budget must be based on a reasonable assessment of the client's research needs using internal procedures that ensure that the client's interests come first, notably in terms of audit trails to check the quality of acquired research and to make sure that the budget is not used to fund buy-side research.
- + The management company is fully responsible for operating the research payment account although it may delegate administration to a third party if this facilitates the purchase of third party research.
- + The management company should regularly assess the quality of the research purchased, particularly with regard to its ability to contribute to better investment decisions. The company must be able to demonstrate these elements in a written policy provided to clients.
- + The management company should disclose to the client the total cost incurred for research. Upon request, it should also be able to provide a list of research providers, the amount paid to each of them, the goods and services received, and how the total amount spent compares with the initial budget.

... THAT ARE UNMANAGEABLE IN PRACTICE FOR MANY MANAGEMENT COMPANIES ...

The arrangements proposed by ESMA are totally inadequate when considered against the way in which third party research is used today. The main problems include the following:

- + The requirement to set an ex-ante budget, when the whole question of access to high-quality research revolves around recognition of the value added created for the management company, which by definition can only be determined ex-post.
- + The requirement to set a budget for each client, when research is used by many clients, potentially numbering in the hundreds or even thousands, and the same value added is not necessarily created for every client.

- ✚ The ability to increase the research budget only with the client's written agreement, when the practical difficulties in obtaining such agreement are well known. This is particularly problematic because it would mean that an overall increase deemed necessary would have to be spread across all affected clients in order for each of them to agree.
- ✚ The obligation to separate payment for sell-side research and executed orders, when one of the objectives of purchasing research is to support investment decisions. While these decisions may result in inaction (confirmation that the portfolio composition does not need to change), they often translate into execution flows.
- ✚ The obligation to demonstrate the quality of research obtained and its ability to contribute to better investment decisions by the management company, when no criteria are provided on which to base this demonstration.

If we add to this list the burden created by disclosure obligations, there is a risk that many management companies will not want to set up arrangements of this kind. The risk is even clearer because experience with CSAs and broker reviews shows that these are available only to management companies that are large enough to manage the administrative burden.

At a time when managed portfolios are generating low rates of return, it seems unlikely that management companies will choose to buy third party research with their own resources. That would mean increasing management expenses charged, which would surely be unacceptable to clients, especially in comparison with their European competitors. This would be true even with a corresponding reduction in execution fees, which would no longer include payment for third party research.

More than likely, only the largest collective investment firms would be able to bear the costs associated with using third party research. But an examination of the capital that they manage reveals that these firms are not the ones that invest the most proportionately in the local economic fabric made up of SMEs and mid-tier companies. This financing comes primarily from many small-sized management companies pursuing niche strategies.

... WITH INEVITABLE REPERCUSSIONS FOR THE DIVERSITY OF AVAILABLE RESEARCH

If fewer management companies are buying third party research, this will necessarily disrupt the research business model, leading to a contraction in research produced in Europe, not just in terms of the diversity of available opinions but also in terms of the spectrum of stocks followed, as coverage concentrates on large stocks with the greatest weight in managed portfolios, at the expense of SME and mid-tier research.

This contraction / concentration will favour major financial centres and large players based in them, to the detriment of local ecosystems that play a central role in giving SMEs and mid-tier companies access to market financing, and which for economic reasons are withdrawing gradually from the research produced on these stocks.

THE MACROECONOMIC ISSUES NEED TO BE CAREFULLY CONSIDERED BEFORE ANY DECISIONS ARE TAKEN

The fact that research plays an important role in the willingness of investors to provide market financing to companies that want to grow illustrates the stakes riding on ESMA's recently delivered advice. Because of new prudential and banking regulations, Europe is shifting towards an economic financing model where the market has to supply the resources that credit can no longer furnish. At the same time, Europe is facing a growth challenge in the shared belief that the capacity of SMEs and mid-tier companies to invest, and hence to obtain the necessary financing at the best possible cost, is vital to meeting this challenge successfully.

Accordingly we can only find fault with the approach taken by ESMA, which is poised to severely disrupt the research business model without thinking through the macroeconomic issues and the devastating impact on the ability of SMEs and mid-tier companies to play their role in stimulating growth. This question needs an in-depth political discussion by European co-legislators, particularly since:

- ✚ ***For the approach to be consistent, the same principles have to be applied to collective investment. This requires a political decision (co-decision process) that must not be pre-empted by Level 2 measures aimed at a narrower universe.***

ESMA believes that its proposal, despite causing upheaval, is consistent with the long-standing approach taken by European regulators and the Commission: "The qualification of this method of paying for research as an inducement is in line with a long standing classification in the regulatory arena, for instance, CESR and the Commission clearly mentioned research in the context of inducements".

Yet this argument can be turned around. How is it that such an important question – one that has been clearly identified by the European supervisor and Commission – was not specifically raised during the discussions that led the European Council and Parliament to adopt provisions on inducements? And all the more so since these provisions were the subject of close attention.

The question is especially important because the main challenges are not for portfolio management, which is solely concerned here, but rather for collective investment, which is a much heavier user of research. Ensuring the consistency of the arrangements called for by ESMA will necessarily entail holding the political debate required to amend the legislation governing collective investment.

To be fair, ESMA acknowledges this: "ESMA notes these proposals are made for the purpose of MiFID II and are therefore mainly aimed at investment firms managing individual portfolios of clients (portfolio management). Similar investment management services are provided in relation to collective investment schemes that fall under the UCITS directive and AIFMD. These activities are however not in the scope of MiFID II. ESMA therefore advises the Commission to consider the possibility of aligning the relevant provisions that fall under UCITS and AIFMD with the MiFID II implementing provisions on this topic".

- ✚ ***Problems specific to one Member State cannot drive rule harmonisation that threatens the local ecosystems vital to SME and mid-tier financing.***

ESMA's proposal is directly designed to address a problem that is specific to the UK and is based on a solution recommended by the Financial Conduct Authority to solve domestic problems. Unless we assume that other national authorities failed to discharge their responsibilities with the requisite care and attention, there is no evidence that they noted similar problems within their own purviews.

While the harmonisation of financial supervision in Europe is an important objective in the drive to build a more integrated single market, it necessarily takes second place. The priority is to provide issuers and investors with orderly markets, which in some situations, and particularly in the case of SME and mid-tier financing, rely on local ecosystems that ill-conceived harmonisation could destroy without creating a viable alternative.

✚ ***Clear choices are needed to steer a course in the general interest between investor protection and the ability of issuers to smoothly access market financing.***

ESMA's proposal is guided by the belief that it will improve investor protection, but utterly fails to take account of the fact that access to research forms part of the ability of investment managers to serve clients better. Moreover, because they are also European citizens, investors collectively need companies that invest to grow and create jobs and value. For this, it is vital that these companies should be able to smoothly access market financing.

It is with this in mind that Member States have already set up specific rules for crowdfunding, even as Europe considers a special framework for the activity. Given crowdfunding's role in financing smaller companies and micro-businesses, the decision was made to promote the activity while easing some of the restrictions, particularly in terms of investor protection.

It is all the more important to carefully weigh the choices ahead because ESMA does not give any indication as to how its proposed arrangements improve on the existing corpus of rules in terms of the tradeoff between benefits and drawbacks. In particular:

- ✓ Client interests come first in all cases;
- ✓ Best execution rules ensure that order execution is not guided by considerations other than the need to obtain the best possible conditions for the client;
- ✓ Conflicts of interest must be prevented and, where this is impossible, managed in the client's best interest.

✚ ***In a global industry, investors may find that it is in their interest to prefer offers from outside the European Union.***

Given the global nature of the asset management industry, ESMA's proposed approach also needs to be considered from the angle of the competitiveness of European asset managers and expected value for investors.

It should not be forgotten that the procedures for paying for research are not on the radar screen for US regulators. Accordingly, US asset managers will be able to continue paying for research through execution fees, thus incurring lower costs than their European competitors while offering a more varied range of products and services because they are unconstrained by fixed costs that are hard for mid-sized firms to absorb.

European investors might therefore find that it is in their business interest to prefer cheaper non-EU offerings that give a wider range of investment choices, but that are unfortunately not for the most part focused on domestic European economies.

Meanwhile, European firms with US operations would find themselves at a big competitive disadvantage because of their cost structure resulting from restrictions imposed in Europe.

✚ ***Potentially systemic effects that need to be analysed.***

Less research, as already pointed out, means less diversity of opinion. And as the financial crisis illustrated through the role taken on by a handful of rating agencies, this situation can have major systemic effects.

Furthermore, reduced use of research by management companies will necessarily affect management approaches. At a time when index-based management already occupies a

worryingly large role given the herd behaviour of a growing number of firms, this aspect must be given consideration.

The concerns reflected in ESMA's advice are genuine and should certainly be addressed. In contrast with the approach taken, however, they cannot be examined solely from the perspective of investor protection and with a view to preventing issues that have not been detected in more than one Member State. They must be considered in terms of their macroeconomic implications within a broad, in-depth and cross-cutting debate to reflect the various pieces of legislation involved, which is something that can be done only at the political level.

It is therefore essential that the European Commission should not follow ESMA's advice on paying for research and leave things as they stand until it has had the requisite prior debate. Particularly since, as Commission President, Jean-Claude Juncker said in July 2014 when he presented his programme to the European Parliament and launched his Capital Markets Union initiative: "To improve the financing of our economy, we should further develop and integrate capital markets. This would cut the cost of raising capital, notably for SMEs, and help reduce our very high dependence on bank funding. This would also increase the attractiveness of Europe as a place to invest".



ANNEX

Final Report

ESMA's Technical Advice to the Commission on MiFID II and MiFIR

2.15. The legitimacy of inducements to be paid to/by a third person

Background/Mandate

Extract from the Commission's request for advice (mandate)

ESMA is invited to provide technical advice on:

- *the conditions under which investment firms providing investment advice on an independent basis and portfolio management fulfil the requirement to not accept and retain any monetary or non-monetary third party fees commissions or benefits as well as on the definition and conditions for acceptable minor non-monetary benefits;*
- *the conditions under which payments and non-monetary benefits, paid to or provided by investment firms providing all other investment or ancillary services, are not deemed to meet the requirement of enhancing the quality of the relevant service to the client;*
- *disclosure and organisational arrangements to be complied with by investment firms in order to meet the requirements set out in Article 24(7), (8) and (9).*

1. MiFID I contains requirements for third party payments in the context of Article 26(b) of the MiFID Implementing Directive, regulating inducements. The essential requirements for the legitimacy of inducements to be paid by/to a third person (other than payments by or on behalf of the client) are:

- i. disclosure of the existence, the nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained the method of calculating that amount prior to providing investment or ancillary services;
- ii. the third party payment must be designed to enhance the quality of the relevant service to the client; and
- iii. the third party payment must not impair compliance with the firm's duty to act in the best interest of the client.

2. CESR published recommendations on the topic of inducements in 2007³ and 2010⁴.

3. MiFID II aims to strengthen the current MiFID requirements for third party payments and benefits. To this end MiFID II distinguishes between the rules that apply to the investment services of portfolio management and investment advice on an independent basis and to all investment services.

4. Recitals 74 and 75 of MiFID II state that:

“(74) In order to strengthen the protection of investors and increase clarity to clients as to the service they receive, it is also appropriate to further restrict the possibility for firms providing the service of investment advice on an independent basis and the service of portfolio management to accept and retain fees, commissions or any monetary and non-monetary benefits from third parties, and particularly from issuers or product providers. This implies that all fees, commissions and any monetary benefits paid or provided by a third party must be returned in

³ CESR/07-228b 'Recommendations on Inducements under MiFID' May 2007.

⁴ CESR/10-295: 'Inducements: Reports on good and poor practices' April 2010.

full to the client as soon as possible after receipt of those payments by the firm and the firm should not be allowed to offset any third-party payments from the fees due by the client to the firm. The client should be accurately and, where relevant, periodically, informed about all fees, commissions and benefits the firm has received in connection with the investment service provided to the client and transferred to him. Firms providing independent advice or portfolio management should also set up a policy, as part of their organisational requirements, to ensure that third party payments received are allocated and transferred to the clients. Only minor non-monetary benefits should be allowed provided that they are clearly disclosed to the client, that they are capable of enhancing the quality of the service provided and that they do not, or could not be judged to, impair the ability of investment firms to act in the best interest of their clients.

(75) When providing the service of investment advice on an independent basis and the service of portfolio management, fees, commissions or non-monetary benefits paid or provided by a person on behalf of the client are allowed only as far as the person is aware that such payments have been made on that person's behalf and that the amount and frequency of any payment is agreed between the client and the investment firm and not determined by a third party. Cases which would satisfy this requirement include where a client pays a firm's invoice directly or it is paid by an independent third party who has no connection with the investment firm regarding the investment service provided to the client and is acting only on the instructions of the client and cases where the client negotiates a fee for a service provided by an investment firm and pays that fee. This would generally be the case for accountants or lawyers acting under a clear payment instruction from the client or where the person is acting as a mere conduit for the payment”.

5. Article 24(7)(b) and 24(8) of MiFID II state that when an investment firm provides investment advice on an independent basis or portfolio management, it shall not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients. Minor non-monetary benefits that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client should be clearly disclosed and are excluded from this provision.

6. Article 24(9) of MiFID II states that investment firms are not regarded as fulfilling their obligations under Article 23 or Article 24(1) where they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit in connection with the provision of an investment service or ancillary service, to or by any party except the client or a person on behalf of the client, other than where the payment or benefit:

- i. is designed to enhance the quality of the relevant service to the client; and
- ii. does not impair compliance with the firm's duty to act honestly, fairly and professionally in accordance with the best interest of its clients.

7. Article 24(9) of MiFID II also states that:

“The existence, nature and amount of the payment or benefit referred to in the first subparagraph, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service. Where applicable, the investment firm shall also inform the client on mechanisms for transferring to the client the fee, commission, monetary or non-monetary benefit received in relation to the provision of the investment or ancillary service.

The payment or benefit which enables or is necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which by its nature cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients is not subject to the requirements”.

Analysis following feedback from stakeholders

Minor non-monetary benefits

(...)

The treatment of research

12. Concerning the treatment of research (when received as a benefit, for instance by a portfolio manager from a broker with whom they execute orders on behalf of clients), the large majority of respondents did not agree with the ESMA proposal. Many argued that research cannot be qualified as an inducement for a number of reasons:

- i. the provision of research is a service and it is also classified as autonomous MiFID ancillary service;
- ii. reception of research by portfolio managers is in the interest of clients since it helps portfolio managers to carry out their fiduciary obligations to clients by making their investment decisions more effective and allocating efficiently investors' money;
- iii. only research (or other services) provided for free or at an undervalue could qualify as a benefit (and so an inducement) but this is not normally the case for research
- iv. inducements under MiFID essentially target problems arising from the distribution of financial instruments and research is never mentioned in MiFID II as an inducement.

13. In line with this reasoning, some added that, by classifying research as an inducement, ESMA advice would not be in line with MiFID II. They also argued that research should rather be dealt with in the context of conflict of interest requirements which would provide a sufficient basis to tackle the issues raised by the reception of research out of dealing commissions. Few respondents also mentioned best execution requirements.

14. Other respondents mentioned that any intervention in this area would be unbalanced since it would be limited to the MiFID context without tackling similar issues arising in the context of the management of UCITS and AIFs.

15. The SMSG shared the concerns expressed by other respondents that labelling investment research as an inducement may lead to severe unintended consequences, especially on research on SMEs which MiFID II rightfully aims at the same time to support. Consequently, the SMSG advises ESMA to delete the part of the ESMA advice relating to investment research.

16. Several respondents argued that the ESMA proposal could lead to a number of unintended consequences: massive increase of costs for active managers in the EU and competitive disadvantage of smaller asset managers and raising barriers to entry for new asset managers; reduction in the quality and diversity of investment research with negative impact on small and specialised research providers and on the coverage of SMEs; international unlevel playing field among EEA and non-EEA players (especially in US and Asia-Pacific), the latter being allowed to continue receiving research; uncertain consequences in terms of VAT application.

17. Some respondents also disputed the distinction (paragraphs 13 and 14 of the ESMA CP) between publicly available and tailor made/bespoke research. Some argued that tailor made/bespoke research is the one enhancing the quality of the service provided and is needed to serve clients' interest. Others argued that the distinction could favour low-value research and that, consequently, if research is an inducement, no research should qualify as (permitted) minor non-monetary benefit. A few suggested the need clarify the ESMA proposed advice between these paragraphs of the CP and the advice part (paragraph 5) where reference to personalised information is included.

18. In this respect, ESMA notes that tailor made/bespoke research is the one which may have high value and may unduly influence the behaviour of the recipient. The circumstance that it may be used in the interest of clients and may improve the quality of the service provided to them does not reduce its potential, when provided by brokers to portfolio managers, to possibly affect compliance with portfolio managers' obligations to act in the best interest

of their clients when selecting and using the services of the brokers to whom orders on behalf of clients are directed.

19. Notwithstanding the criticism, many respondents recognised that the reception of research by portfolio managers from a broker may raise concerns of compliance with the overarching requirements to ensure fair treatment of clients. However, these respondents suggested that there are arrangements already in place that may effectively tackle these concerns.

20. One of the frequently mentioned mechanisms is the use of commission sharing agreements (CSA) between portfolio managers and brokers which was proposed as an effective way forward. CSA would ensure that cost of research and cost of execution are unbundled, with the executing broker retaining a set proportion of dealing commissions in a separate account and directing payments to providers of investment research on the basis of indications received from asset managers. Ex-ante contracts between managers and research providers could be in place to cover the provision of research services. The use of CSA would foster competition on the quality of research and on its pricing. Furthermore, CSA could be associated with additional measures and controls such as use of research budget not influenced by trading volumes, separate internal governance process for research spend, separation of trading and investment functions; some of the suggested measures could be included in Level 3 measures (e.g. guidelines). Some stakeholders also emphasized that CSA would be consistent with ESMA's view, expressed in the CP (paragraph 15), that portfolio managers and independent advisors could separately acquire third party research to fulfil their needs.

21. Specific features could additionally identify quality research which would be admissible (including research being original and not merely repeating or repackaging previous information or stating what is commonplace or self-evident and comprehending an analysis/elaboration of data aimed at reaching significant conclusions). Meaningful and complete disclosure should complement the proposed measures above.

22. Again in terms of way forward, few respondents mentioned that, in order to qualify as "*mi-nor*" non-monetary benefits, research could be assessed against quantitative criteria (pro-portion of total costs or of assets under management).

23. ESMA disagrees with the comments made by respondents on the legal qualification of research, in the circumstances indicated above, as an inducement. The definition of inducements is broad (monetary and non-monetary benefits) and is not limited to distribution issues. The current dominant model in the market to pay for research makes use of indirect payment structures by simply bundling payments for research into transaction costs of the broker. The qualification of this method of paying for research as an inducement is in line with a long standing classification in the regulatory arena, for instance, CESR and the Commission clearly mentioned research in the context of inducements. While MiFID II does not include any elements to change the definition of inducements, it changes the conditions under which inducements are allowed by prohibiting portfolio managers and firms providing independent advice to accept and retain inducements other than minor non-monetary benefits. The classification of research as an ancillary service is not relevant in this context because the issue to be addressed is which payment structures for research may fulfil the conditions to be admissible in accordance with MiFID II.

24. However, in order to address concerns expressed by respondents, ESMA has clarified in which circumstances the receipt of research does not qualify as an inducement in accordance with Article 24(7)(a) and (8) of MiFID II and is therefore permissible. In doing so, ESMA has elaborated on the suggestions to allow for commission sharing agreements. ESMA also notes that, in several regulatory areas, the UCITS and AIFM regulatory framework have been built on the basis of MiFID requirements. For this reason, while this advice is clearly adopted in the context of MiFID II, the Commission will be able to assess any extension of the proposed regulatory approach from MiFID II to the UCITS and AIFMD context. ESMA considers that such an extension would be appropriate, in order to ensure a level playing field between different categories of asset managers.

25. ESMA advises the Commission to clarify the conditions under which the receipt of research does not qualify as an inducement under Article 24(7)(a) and (8) of MiFID II and is therefore permissible to be received by investment firms, including portfolio managers and firms providing independent investment advice, in relation to the services

they provide to their clients. ESMA considers that the commission sharing arrangements (CSA's) have elements that address the conflict of interests between brokers and portfolio managers in respect of research. However, the conditions under which such arrangements are currently operated often do not entirely address the conflicts of interests at stake. The current use of CSA's by industry still enables amounts charged for research by the investment firm to be determined by the volume of transactions of the investment firm with the executing broker, although some investment firms apply budgets to control the total amounts accrued in CSAs. Also, CSAs do not guarantee a fair allocation of research costs to the client's portfolio.

26. ESMA has therefore formulated additional requirements which are aimed at further limiting these conflicts of interest. The key purpose of this proposal is to make clear how the receipt of third party research by portfolio managers and independent investment advisors interacts with the prohibition to accept and retain inducements, except for minor non-monetary benefits. ESMA proposes that the MiFID II Implementing measures should permit investment firms to accept third party research only where they pay for it directly or from a ring-fenced research account that is funded by a specific charge to their clients (subject to certain conditions, as detailed below). The proposal makes clear that there should be no payment for third party research linked to the payments made for execution of orders. This will address the potential inducements and conflict of interest issues that currently exist for portfolio managers when they receive third party research linked to execution arrangements with the broker. The proposed approach will also create more transparency over spending on re-search to improve outcomes for consumers.

27. If the portfolio manager (or independent investment advisor) chooses to pay directly for research out of its own resources either by absorbing the costs of research themselves or by increasing their headline fee (annual management charge or advice fee), then they may do so subject to requirements on general disclosure and managing conflicts of interest. In-vestment firms that spend small amounts on research may prefer this method of paying for it in order to limit their administrative burden.

28. However, the proposal also allows flexibility for the portfolio manager (or independent in-vestment advisor) to use a research payment account to buy research, which can be funded by a specific charge to the client's portfolio. In order for an investment firm to make use of this optional process to fund research, a number of more detailed requirements on the governance of this account and spending are prescribed below. These requirements are aimed at ensuring that investment firms remain accountable to their clients.

29. Finally, ESMA also suggests high-level provisions to indicate that brokers⁵ will need to price and supply execution and research services separately to enable portfolio managers (and independent investment advisors) to meet the new restricted approach to inducements. Brokers will also need to consider any potential conflicts where they offer a number of different services under MiFID.

30. ESMA notes these proposals are made for the purpose of MiFID II and are therefore mainly aimed at investment firms managing individual portfolios of clients (portfolio management). Similar investment management services are provided in relation to collective investment schemes that fall under the UCITS directive and AIFMD. These activities are however not in the scope of MiFID II. ESMA therefore advises the Commission to consider the possibility of aligning the relevant provisions that fall under UCITS and AIFMD with the MiFID II implementing provisions on this topic. ESMA notes that the proposed regime sets out the conditions under which third party research does not qualify as an inducement. Therefore the arrangements can also be used by investment firms providing other investment services than portfolio management and independent advice to adequately manage conflicts of interests arising out of inducements. For the sake of simplicity, reference to investment firms in the technical advice normally indicates those firms providing the service of portfolio management to clients (which, in most cases, is the situation in which the issue of the treatment of research arises).

31. ESMA considers that a useful additional requirement could be placed on those investment firms who offer execution of orders and research services to price and supply these services separately. This would ensure

⁵ The term "broker" indicates investment firms providing the service of execution of orders on behalf of clients.

transparency in the market, allowing investment firms to better demonstrate their compliance with the inducements requirements and wider conflicts of interest provisions, and allow competent authorities to more easily detect any poor practices.

Inducements - Quality enhancement

(...)

Disclosure requirements

(...)

Technical advice

Accept and not retain third party payments

(...)

Minor non-monetary benefits

(...)

Investment research

7. The provision of research by third parties (such as firms executing orders or independent research providers) to investment firms providing portfolio management (or other investment or ancillary services) to clients should not be regarded as an inducement if it is received in return for:

i. direct payments by the investment firm out of its own resources (which they may choose to reflect in an increase to the firm's portfolio management or advice fees), or

ii. payments from a separate research payment account controlled by the investment firm, provided the following conditions relating to the operation of this account are met:

a) The research payment account shall only be funded by a specific research charge to the client. The specific research charge shall: only be based on a research budget set by the investment firm for the purpose of establishing the need for third party research in respect of investment services rendered to its clients; and not be linked to the volume and/or value of transactions executed on behalf of the clients.

The total amount of research charges received in the research payment account may not exceed the research budget.

The investment firm must agree with each client the research charge as budgeted by the firm and the frequency with which the specific research charge will be deducted from the resources of the client over the year. The investment firm may only increase the research budget with the client's written agreement. If there is a surplus in the research payment account at the end of a period, the firm should have a process to rebate those funds to the client or to offset it against the research budget and charge calculated for the following period.

b) As part of establishing a research payment account and agreeing a reasonable charge with their client, the investment firm must set and regularly assess a re-search budget as an internal administrative measure. The research budget is managed solely by the investment firm and is based on a reasonable assessment of the need for third party research. The allocation of the research budget to purchase third party research should be subject to appropriate controls and senior management oversight to ensure it is managed and used in the best interests of the firm's clients. Such controls include a clear audit trail of payments made to research providers and how the amounts paid were determined with reference to the quality criteria referred to in paragraph 7(ii)(d). Investment firms may not use the research budget and

research payment account to fund internal research.

c) The investment firm is responsible for operating the research payment account. The investment firm may delegate the administration of the research payment account to a third party, provided that the arrangement facilitates the purchase of third party research and payments to research providers in the name of the investment firm without any undue delay in accordance with the investment firm's instruction.

d) The investment firm should regularly assess the quality of the research purchased based on robust quality criteria and its ability to contribute to better investment decisions. Investment firms should be able to demonstrate these elements in a written policy and provide it to their clients. It should also address the extent to which re-search purchased through the research payment account may benefit clients' port-folios (including, where relevant, by taking into account investment strategies applicable to various types of portfolios) and the approach the firm will take to allocate such costs as fairly as practicable to the various clients' portfolios.

e) Where an investment firm makes use of the research payment account, it should provide the following disclosure to its clients:

- Ex-ante – In line with Article 24(4)(c) of MiFID II, clients should be informed about the budgeted amount for research and the amount of the expected re-search charge for each of them. This information is further elaborated in the ESMA technical advice on information on costs and charges.
- Ex post – In line with Article 24(4)c of MiFID II clients should receive annual information on the total costs that each of them has incurred for third party re-search. The investment firm should also be required, upon request by their clients or by competent authorities, to provide a summary of the providers who were paid from this account, the total amount they were paid over a defined period, the goods and services received by the investment firm, and how the total amount spent from the account compares to the budget set by the firm for that period – noting any rebate or carry-over if residual funds remain in the account.

8. Firms providing execution services should identify separate charge for these services that only reflect the cost of executing the transaction (buying or selling a financial instrument). Any other goods or services rendered should be subject to a separately identifiable charge; the supply of these goods or services should not be influenced by (or be conditional on) levels of payment for execution services. Future ESMA guidelines may also be useful in this area.

9. The European Commission should also consider clarifying that an investment firm that provides execution and research services, and also carries out underwriting and placing activities, should ensure adequate controls are in place to manage any potential conflicts of interest between these activities and between their different clients receiving those services.

Article 24(9) of MiFID II - Quality enhancement

(...)

Permitted inducements: disclosure requirements

(...)