

CNMV ADVISORY COMMITTEE COMMENTS ON THE IOSCO REPORT ON RETAIL DISTRIBUTION AND DIGITALISATION

I. PURPOSE AND CONTENT OF THE CONSULTATION REPORT

The Spanish CNMV Advisory Committee welcomes the opportunity to make comments on the IOSCO report on Retail Distribution and Digitalisation (hereinafter “the consultation report”), dated on January 2022 (CR02/2022).

As mentioned by the consultation report, the rapid growth in digitalisation and use of social media is changing the way financial products are marketed and distributed. Therefore, online domestic and cross border offerings of financial services and products provide new opportunities for firms to reach potential clients and for investors to access to financial products. However, increased digitalisation and cross border offerings bring various new risks for investors, and challenges for securities supervisors.

In the consultation report, IOSCO aims to set out a toolkit of proposed policy and enforcement measures with guidance to help IOSCO members mitigate potential risks of retail investor harm posed by online and cross-border marketing and distribution, and digital offerings.

The proposed policy toolkit measures relate to:

- ✓ Firm level rules for online marketing and distribution;
- ✓ Firm level rules for online onboarding;
- ✓ Responsibility for online marketing;
- ✓ Capacity for surveillance and supervision of online marketing and distribution;
- ✓ Staff qualification and/or licensing requirements for online marketing;
- ✓ Ensuring compliance with third country regulations; and
- ✓ Clarity about legal entities using internet domains.

The proposed enforcement toolkit measures relate to:

- ✓ Proactive technology-based detection and investigatory techniques;
- ✓ Powers to promptly take action where websites are used to conduct illegal securities and derivatives activity and other powers effective in curbing online misconduct;
- ✓ Increasing efficient international cooperation and liaising with criminal authorities and other local and foreign partners;
- ✓ Promoting enhanced understanding by and collaboration with providers of electronic intermediary services with regard to digital illegal activities; and
- ✓ Additional efforts to address regulatory and supervisory arbitrage.

Please find below the Spanish CNMV Advisory Committee comments and opinions on each of the proposed measures.

II. COMMENTS ON THE PROPOSED POLICY TOOLKIT

Measure 1: Firm level rules for online marketing and distribution

IOSCO members should consider requiring that firms have proper internal rules, policies, processes and tools for their online marketing and distribution, and review them on a regular basis. This should include that any use by firms of targeting, behavioural techniques and gamification elements should be done in a way that ensures fair treatment of financial consumers and aims to avoid potential financial consumer harm.

The Spanish CNMV Advisory Committee supports the IOSCO's approach which consists of introducing effective internal rules for online marketing and distribution and believes that most regulated market participants already adhere to stringent regulatory and internal firm-based rules.

The Committee considers that regulators need to ensure a level playing field between financial and non-financial service providers. Where appropriate, they should seek to adjust the regulatory perimeter as needed to maintain consumer protection and market integrity, which may need to extend to entities not presently subject to regulation as market participants.

Regulation should be implemented in a business-friendly way and still allow for innovation.

Measure 2: Firm level rules for online onboarding

IOSCO members should consider requiring that firms apply appropriate filtering mechanisms, policies and procedures for financial consumer onboarding in line with the laws and regulations of the firms' jurisdiction, the financial consumers' jurisdiction, and the jurisdiction where the products or services are being marketed or distributed. During the onboarding process, the information provided should be clear, fair and non-misleading.

The Committee defends a principle-based approach, which defines appropriate standards for online onboarding that firms need to adhere to, taking into account differences in jurisdictional approaches. A potential approach to be adopted would be in line with the one proposed by the European Banking Authority on its draft Guidelines on the use of remote customer onboarding solutions.

Measure 3: Responsibility for online marketing

IOSCO members should require, subject to a jurisdiction's laws and regulations, that management assumes responsibility for the accuracy of the information provided to potential investors on behalf of the firm, including those provided via various social media channels, including influencers, and the timely disclosure of

necessary information regarding potential risks and conflicts of interest to avoid potential financial consumer harm.

The Committee supports this approach, but it also considers that it would be appropriate to apply a principle-based approach.

Measure 4: Capacity for surveillance and supervision of online marketing and distribution

IOSCO members should consider whether they have the necessary powers and have adequate supervisory capacity to oversee an increasing volume of online marketing and distribution activity. IOSCO members should also consider ways to develop appropriate monitoring programs for the surveillance of online marketing and distribution activities, including on social media.

Within the context of domestic legal frameworks, considerations for enhancing surveillance and supervisory capacity could include:

- the power to request access to content to detect illegal or misleading promotions;
- having regulatory channels in place to report consumer complaints for misleading and illegal promotions; and
- suitable evidence tracking processes in place to cope with the fast pace and changing nature of online information.

IOSCO members are encouraged to share experiences and good practices with each other regarding supervision and surveillance of online marketing and distribution.

The Committee shares IOSCO's view on the need to ensure that its members have the necessary powers and adequate supervisory capacity to monitor the increasing volume of online marketing and distribution activity. In this regard, however, it is of paramount importance to gather the involvement of other public authorities (such as the prudential supervisor or AML agencies), as well as private sector entities (financial industry, consumers associations, internet services providers,...). A fair cooperation among these agents is key to develop a holistic approach to online marketing and distribution.

Spanish experience on an upcoming Protocol for the fight against fraud in online financial marketing and distribution is a good example of how cooperation between public and private sector can yield good results for the integrity of financial markets.

Measure 5: Staff qualification and/or licensing requirements for online marketing

IOSCO members should consider requiring that firms assess the necessary qualifications for digital marketing staff. IOSCO members may also consider

requiring firms to have specific staff qualification and/or licensing requirements for online marketing staff, similar to licensing requirements for sales staff, if such regulatory requirements do not already exist or apply to online marketing staff.

Under the European legislation (MiFID II) marketing staff is already subject to a demanding training requirement (see ESMA Guidelines for the assessment of knowledge and competence and CNMV Technical Guideline 4/2017). Rules on staff's qualifications, knowledge and experience already cover the risks linked to marketing processes.

Therefore, the Committee sees no reason for specific licensing requirements for online marketing staff.

Measure 6: Ensuring compliance with third country regulations

Where firms may have clients from jurisdictions other than where they hold a license, the firm's home regulator should consider requiring their domestic firms to have adequate policies and procedures for onboarding these clients. For example, IOSCO members could require firms to undertake due diligence to determine whether they are required to hold a license in a prospective client's home country and/or whether other regulatory obligations apply, and to retain records of such due diligence.

The situation varies widely depending on regions and jurisdictions. Within the EU existing cross-border and compliance rules are considered to be enough by the Committee.

In relation with other jurisdictions, the proposal seems accurate in order to ensure compliance with third country regulations by the firms.

Measure 7: Clarity about legal entities using internet domains

IOSCO members should consider requiring firms, when they offer products through multiple internet domains, to adopt policies and procedures requiring clear, fair and not misleading disclosure about who the underlying legal entity is offering the product and under what license (and from which jurisdiction). This disclosure should also cover the scope and limitation of services. IOSCO members should also consider prohibiting firms from redirecting clients to a third country website to avoid the regulatory requirements in a jurisdiction.

Additionally, IOSCO members may wish to consider keeping an open register which could enable the public to check and confirm whether a website belongs to a firm authorised to provide services in the jurisdiction and under the law.

The Committee agrees on the proposal to ensure that firms adopt policies and procedures in case they use multiple internet domains that provide clear information about who the underlying legal entity is offering the product and under what license

(and from which jurisdiction). Anyway, the foreseen prohibition to redirect clients to a third country website should only apply in those cases in which the supervisor has the certainty to conclude that such redirection aims to avoid the regulatory requirements in a specific jurisdiction, which is not an easy task.

The Committee is also in favor of keeping an open register to enable the public to check and confirm whether a website belongs to a regulated firm.

III. COMMENTS ON THE PROPOSED ENFORCEMENT TOOLKIT

Measure 1 - Proactive technology-based detection and investigatory techniques

IOSCO members could consider whether to use proactive technology-based monitoring tools and approaches, where appropriate, to support the detection and investigation of potentially illegal digital conduct.

The Committee is fully supportive of enhanced regulatory abilities to monitor appropriate conduct. Strong automated surveillance systems that generate timely alerts and warnings can play an important role in protecting consumers from unlicensed conduct.

Measure 2 - Power to promptly take action where websites are used to conduct illegal securities and derivatives activity, and other powers effective in curbing online misconduct

IOSCO members could consider seeking additional powers to be more effective in promptly curbing illegal online conduct, including the power to shut down or block access to illegal websites, or seeking a legal order to do so, where appropriate.

In relation with websites conducting illegal securities and derivatives activity (for instance, firms giving investment advice without license), regulation must ensure the power, or the faculty to seek a legal order to do so, to shut down or block access to such illegal websites by the internet services providers (ISP).

Therefore, regulators and supervisors should strengthen their links with ISPs with the aim that such powers/faculties could be promptly and effectively exercised.

Measure 3 - Increasing efficient international cooperation and liaising with criminal authorities and other local and foreign partners

IOSCO members could consider ways to increase efficient cross-border cooperation and collaboration in investigations and enforcement actions and enhancing liaison with criminal authorities and other relevant local or foreign partners.

Measure 4 - Promoting enhanced understanding by and collaboration with providers of electronic intermediary services with regards to digital illegal activities

IOSCO members could consider initiatives, individually and collectively through IOSCO, to foster more meaningful understanding by and collaboration with

providers of electronic intermediary services in curbing digital illegal activities and anonymous website registration.

The Committee supports these proposals. Regulators should be better coordinated with existing intermediaries and platforms and should better understand the entire ecosystem of regulated and unregulated participants.

Measure 5 - Additional efforts to address regulatory and supervisory arbitrage

IOSCO members could consider additional efforts to address regulatory and supervisory arbitrage in the interest of facilitating international enforcement cooperation and enhancing investor protection on a global scale.

While the industry supports regulatory initiatives to avoid regulatory fragmentation, this should be done on a principle-based rather than “one-size-fits-all” way, accounting for specificities of different jurisdictions.

Industry and consumers should be involved in additional efforts to address regulatory and supervisory arbitrage.