

# **MiFID 2 and the CMU: Are we there yet?**

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# CMU and EBU: coopetition

- CMU as an alternative to EBU
  - Steps in when bank **deleveraging** may lead to credit crunch
  - May support more **innovative firms** (the case of the US)
- CMU as a supporting factor for EBU
  - Facilitating access to **equity capital** strengthens firm financial resilience
  - Reducing barriers to cross-border investments reduces the impact of **asymmetric shocks** in the EMU
    - All the more important when other **input factors** do not move across the borders (workers; state budget) (the case of the US, again)



# One project, many building blocks

- **My focus: MiFID II/MiFIR (MiFID 2)**
  - Crucial element at the centre of the regulatory stage
  
- **But the whole context matters, of course:**
  - Prospectuses
  - MAR
  - Transparency
  - Takeover bids
  - Venture capital
  - Company law (incl. start-ups)

# MiFID II and CMU: three perspectives

**1) Enhanced harmonization to foster integration**

**2) Retail investor protection**

**3) Market structure (trading industry)**

# CMU – material improvements

- Single Rule Book – law in books:
  - Towards a **complete** system leveraging on Art 290 and 291 TFEU
  - **Investment services: rules** provide legal certainty; **standards** provide flexibility
  - **Market structure**: integrating many competing TVs – share trading obligations; non-equity pre-trade info; governance of market data
- Good results in many areas:
  - **SME-GM**: a success story
  - Cases like **Sweden** show MiFID II (at least) does not prevent deep markets with retail participation and steady IPO flows



***But not there, yet***

# Investment services and retail investors

- A lot in the MiFID II:
    - Refined **suitability/appropriateness** tests
    - **Independent advice** and rules on **inducements**
    - Product governance and intervention
- } More to come with **RIS**
- But uncertainties remain:
    - **Sustainability preferences** hard to define and combine with other classifications (Taxonomy, SFDR)
    - **National interpretations** on key matters, such as:
      - Selling financial instruments and **best client's interest**
      - **PFOF** – persisting divergence on crucial issues such as inducements, Col and best execution (*ban on PFOF does not address these!*)

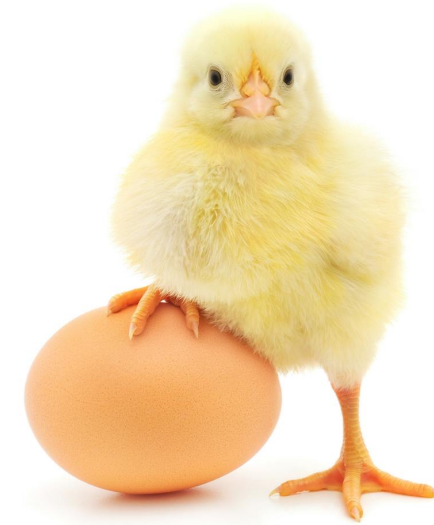


# Market structure

- 27 national stock exchanges for the 27 Member States
  - 15 exchange groups, but consolidation only for market operators
- Primary market:
  - **Fragmentation** reduces ability of each national market to become the gateway for:
    - Foreign issuers to tap local capitals
    - Foreign capitals to reach local issuers
- Secondary markets
  - **CTP** still missing (as opposed to US NMS): current attempts to reform

# A preliminary matter: What fosters what?

- “Capital Markets” or “Union”?
  - Should we **develop** local markets before unifying them?
  - Or does **integration** facilitate the development of capital markets?
- History of late joiners (such as Italy):
  - Financial market **integration facilitates development** of local capital markets
- Size of market participants (and the liquidity they can provide) as a crucial element to develop capital markets in the peripheral areas, as well
  - Critical mass facilitates **diversification**



# Where does the problem lie?



## *Harmonisation*

- Some differences among jurisdictions unlikely to disappear because of (i) national resistance or (ii) efficiency reasons
  - Limited room remaining for improvement
- 



## *Enforcement*

- Can help manage differences that harmonisation (i) cannot or (ii) should not address
- A lot of room remaining for improvement

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# Risk of conflicting interpretations (e.g. consumers)

## Inv. serv. provider in Country A

- NCA, and its interp. of COBs
- Applicable public law

## Free prov. consumer in Country B

- Court, and its interp. of COBs
- Applicable private law



Not to mention issues outside MiFID 2

- Contractual or tortious claim?
- Connecting factor(s) for tort?

# The invaluable role of ESMA

- Strengthening consistency within the CMU
  - Involvement through **RTS, ITS** (or technical advice)
  - Guidelines, recommendations, Q&A, peer review, information exchange, coordination groups
- Impact clearly visible in some key areas, such as:
  - New Guidelines on **suitability requirements**, to include sustainability preferences
  - **Q&A on MiFID 2** market structure and transparency
  - **Peer review** on supervision of cross-border activities of investment firms (with ensuing recommendations)

# Should we make ESMA a single supervisor?

- The European Banking Union (EBU) as a model? Not so fast:
  - Failed past attempts (e.g. EU AIF labels; certain prospectuses)
  - Towards multiple single authorities in the CMU?
    - Where conflict-of-law provisions allows selecting NCA
  - Would top-down centralisation of supervisory powers be efficient?
  - Broader role for private litigation in the CMU, compared to EBU?  
Divergence to remain in case law
- Fostering uniformity through negative integration (supervised freedom to choose home country) as an *alternative* or an *intermediate stage*
  - Determining applicable law and jurisdiction to facilitate concentration

# Takeaways

- Harmonization as a crucial element of market integration, but with its limits
- National interpretations hampering cross-border services (especially for retail investors)
- Market structure for trading services remains fragmented (CTP to help retail investors)
- The role of enforcement



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