

Comments

Legislative proposal for amending Regulation (EU) 2017/565 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

Register of Interest Representatives

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 1,700 banks.

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I. General comments

The German Banking Industry Committee (GBIC) welcomes the opportunity to comment on the European Commission's legislative proposal for amending Regulation (EU) 2017/565 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

We welcome the European Commission's intention, as part of the Action Plan on Financing Sustainable Growth, to mobilise more financial resources for a sustainable economy and to promote financial market stability.

The present draft for the adaptation of the MiFID II Delegated Regulation is part of a comprehensive legislative package of the European Commission. Both the draft MiFID amendment and the draft Regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341, on which the European Commission held a separate consultation, provide for mechanisms designed to lead to integration of sustainability aspects in investors' investment decisions. Indirectly, the aim is to create behavioural pressure on capital-seeking companies operating in the real economy through their financing conditions becoming dependent on the sustainability standards practised.

Notwithstanding this positive objective, we consider that anchoring sustainability considerations in the regulatory client information and in the advisory process is not expedient, at least for the time until the review of MiFID II. The experience from the implementation of the EU Directive on markets in financial instruments (MiFID II), which entered into force only on 3 January 2018, not only imposed considerable burdens on the financial sector, but also led to incomprehension and criticism on the part of investors concerning the significant lengthening of the advisory and order process and the clear increase in client information.

A further adaptation of the processes, especially from the point of view of consumers, would be hard to understand at the present juncture.

For effective promotion of the desired harmonisation in dealing with sustainability aspects, it is of decisive importance, in our opinion, first to devise a sustainability taxonomy and only at a second stage to follow up with regulatory measures on this basis. Banks and savings banks already take the opportunities outlined in the Action Plan on Financing Sustainable Growth. The European Commission should also bear this in mind and not allow itself to be put under unnecessary time pressure.

II. Lack of full harmonisation of the definition of sustainable investments

The German banking industry considers that integration of sustainability aspects in the distribution processes is impractical at present, on the grounds that so far no universally applicable criteria exist for the classification of investments as "sustainable".

According to Article 1(1) of the present draft, Article 2 of the MiFID II Delegated Regulation is to be extended in particular to include definitions of the concepts "environmentally sustainable investment", "social investment" and "good governance investment". The definitions as a whole are not very meaningful, in need of interpretation and consequently open up wide scope for interpretation. A taxonomy is planned only for the classification of environmental investments ("in particular environmentally sustainable investments as defined in Article 2 of (...)"). On the other hand, regarding the "social" and "governance" criteria, the draft has so far dispensed with a taxonomy. This planned differential treatment is not

appropriate and so not very expedient when establishing an EU-wide standard for the assessment of a service or product. A binding taxonomy also needs to be stipulated for the “social” and “governance” criteria.

III. Lack of concept for interaction between manufacturers and distributors

Only manufacturers can assess whether products fulfil the sustainability requirements and accordingly this assessment must be made within the sphere of the issuers, who must also bear the responsibility for fulfilling the criteria.

Distributors must be able to rely on appropriate labelling on the part of manufacturers. The distributor’s task is to discover which product can be recommended to the client taking into consideration all his or her specifications – including sustainability specifications (investment advice) or which product can be procured on the client’s behalf and consequently is suitable for him or her (portfolio management). No such concept can be inferred from the present draft. The effectiveness of the obligations should in any case be linked to the existence of the taxonomy.

IV. Concerning the planned extended suitability assessment

The proposals to integrate sustainability aspects are significant and at the present point in time are premature. In our view, a further review of the processes in the securities business, which underwent substantial adaptations only on 3 January 2018, should occur – provided that a taxonomy exists – as part of the planned MiFID II review. An extension of the technically-supported investment advice prior to the MiFID II review would trigger disproportionately high technical, administrative and economic efforts on the part of investment firms. In addition, the planned amendments in the present draft go too far.

Article 1(5) of the present draft lists the intended amendments relating to the assessment of suitability and the suitability reports (Article 54 MiFID II Delegated Regulation). According to Article 54(2) MiFID II Delegated Regulation, investment firms are required to obtain from clients or potential clients such information as is necessary (i) to understand the essential facts about the client and (ii) on this basis and giving due consideration to determine that the recommended transaction is suitable for the client. The criteria to be obtained and considered remain unchanged under MiFID II. Article 1(5)(a) of the present draft now provides for an extension of Article 54(2)(a) MiFID II Delegated Regulation, according to which investment firms in future also have to obtain and consider the respective client preferences, including in particular environmental, social and governance considerations (“...and any preferences, including environmental, social und governance considerations;”).

The word “any” should be deleted. Instead, the term “if any” should be added to the passage inserted in Article 1(5) (a) of the present draft (“... and ~~any~~ preferences, including environmental, social und governance considerations, **if any**;”).

Article 54(2) MiFID II Delegated Regulation requires investment firms to provide well-considered investment advice, free of errors of assessment, based on reliable information which takes into account the individual interests of the client. Unlimited obtaining and consideration of all client preferences including sustainability factors cannot be required of investment firms and is not in keeping with the aim of the suitability assessment, which must cover only the essential facts in relation to the client. ESG considerations should only be taken into account by the investment firm if the client expresses this investment preference explicitly and on his own initiative in the investment advice. Therefore, Article 1 (7) should be amended as follows: “ESG preferences” means a client's or potential client's preferences for environmentally sustainable investments, social investments or good governance investments based on the client's explicit request.

We are also opposed to the compulsory requirement for investment firms to include certain products (e.g. those which fulfil the ESG criteria) in their product portfolio. This view is also anchored in the draft Regulation itself if, on the one hand, Article 1(5)(b) of the draft is to supplement Article 54(5) of the MiFID II Delegated Regulation by the phrase “(...), his or her ESG preferences, **if any**, (...)”.

Article 54(5) MiFID II Delegated Regulation explains which information comes under the investment objectives of the client and thereby puts into concrete terms the provisions of Article 54(2)(a) of the MiFID II Delegated Regulation. On the other hand, Article 1(5)(d) of the draft [in the draft incorrectly Article 1(5)(b)] provides that the suitability report to be drawn up and provided to the client pursuant to Article 54(12) MiFID II Delegated Regulation only optionally has to contain information on the sustainability preferences of the client (“...including ESG preferences, **if any**,...”). The formulations should be consistent. Accordingly, in Article 54(9) MiFID II Delegated Regulation, the planned addition “including any environmental, social and governance considerations,” should be deleted and here too, after ESG preferences, the term “if any” should be added.

Furthermore, the suitability of a recommendation or investment decision in portfolio management should not compulsorily depend on fulfilment of ESG preferences. According to Article 54(10) MiFID II Delegated Regulation, no recommendations may be made or investment decisions taken if no suitable instrument is available. According to the draft, no products without the relevant ESG preferences may be recommended to an investor who has expressed ESG preferences. In this way, ESG criteria would always take precedence over other investment objectives or requirements of the investor. This would also apply if there were no products in the investment firm’s basket of products which corresponded to the desired ESG preferences.

In any case, ESG criteria should not be attributed greater importance than other investment objectives in the suitability assessment. It must be possible to make suitable recommendations or take investment decisions which do not fulfil the ESG preferences. This must then be pointed out to the investor.

V. Concerning the planned new information obligations

1. General comments on the planned information obligations

Comprehensive new information obligations impede the sale of sustainable investments and would be likely to lead to the range of sustainable investments in future being kept rather narrow instead of being promoted.

In addition, the ever increasing quantity of compulsory information, which is now to be boosted further to include sustainability information facets, will deter clients from taking corresponding investment decisions. With a view to the objectives pursued by the legislator, it is more a matter of striking a regulatory balance in such a way that ultimately only information which is decisive for the client is addressed. In this respect too, the existence of the taxonomy is crucial for targeted implementation of the normative specifications.

Concerning the new information obligations, provision should also be made that this information, under certain conditions, especially in the case of distance selling, exceptionally can also be provided subsequently, i.e. after the binding order has been placed by the client. Otherwise, the new requirements would hamper the sale precisely of sustainable investments and would render them less accessible than other investment opportunities for clients.

Furthermore, it should not be a requirement for the new information obligations to be tied to a durable medium. It should be a matter of allowing information to be made generally available to the client on the

website and not only under the conditions provided for in Article 3 of Delegated Regulation (EU) 2017/565. This would also increase the access opportunities of clients to sustainable investments.

2. Amendment of Article 47(3)(d) MiFID II Delegated Regulation

The word “any” should be deleted and the formulation “if any” added, “...based on the client’s investment objectives, including ~~any~~ ESG preferences, **if any**, ...”).

Article 47(3)(d) MiFID II Delegated Regulation, which is to be supplemented by Article 1(2) of the present draft, regulates which further information, apart from the information listed in Article 47(1) MiFID II Delegated Regulation, can be communicated where appropriate to the client or potential client in the case of portfolio management. Final and full consideration of any sustainability preferences of the client cannot currently be ensured by investment firms here either, for the reasons already presented, and therefore also cannot be required.

3. Amendment of Article 48(1) MiFID II Delegated Regulation

The word “any” should be deleted. The provision relates to the obligation to provide a general description of the nature and risks of financial instruments and therefore provides for general information on the characteristics of the financial instruments. The so-called “key information”, which ensures implementation on the German market, accordingly explains the various types of financial instruments only in general terms with regard to their features and risks. In this context, provision can therefore only be made for information on the sustainability aspect too to be made available to the client on a basis which is and remains general, for example which potential sustainability considerations may play a role for the instrument, how the client can obtain information on this, etc.
