German Banking Industry Committee

Die Deutsche
Kreditwirtschaft

Comments

of the German Banking Industry Committee on the European Commission’s proposal of 24 May 2023 for a Retail Investment Strategy – MiFID amendments

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Table of contents

I. Basic evaluation 4
1. Introduction 4
2. Objective of the retail investor strategy 4
3. Positions at a glance 4
3.1 Ban on inducements for non-advised services and inducements in connection with portfolio management 4
3.2 Investment advice 4
3.3 Appropriateness 5
3.4 Value for Money 5
3.5 Client information 6
3.6 Client classification 6
3.7 Delegation to levels 2 and 3 of the legislative process 6
3.8 Transposition period and review clause for inducements 6
II. Inducements 7
1. Inducements in connection with investment advice 7
2. Inducements in connection with portfolio management 7
3. Inducements in connection with non-advised services, principle 8
3.1. Ban on inducements 8
3.2. Summary 9
4. Exceptions to the ban on inducements in connection with non-advised services 10
4.1. Relation of the non-advised service to prior "non-independent" investment advice (Art. 24a para. 3 MiFID draft) 10
4.2. Inducements to issuers other than PRIIPs (Art. 24a para. 4 MiFID draft) 10
4.3. Minor non-monetary benefits (Art. 24a para. 5 MiFID draft) 10
5. Level 2 empowerment for the European Commission with regard to inducements 10
6. Review clause 10
III. Investment advice 12
1. Best interest test 12
1.1. Re lit. (a) Advice based on an appropriate range of financial instruments 13
1.2. Re lit. (b) Recommendation of the most cost-effective financial instrument 13
1.3. Re lit. (c) Recommendation of a financial instrument without additional features 14
1.4. Re the European Commission's empowerment of Level 2 regulrements 16
2. Unjustified preference for fee-based investment advice over commission-based investment advice 17
3. Expertise of investment advisors, among others 18
4. Further new requirements for investment advice and possibly other investment services 20
4.1. Mandatory portfolio assessment 20
4.2. Further new requirements regarding the collection of client information 22
4.3. Obligation to provide the client with a report on the client information provided by the client 23
4.4. New requirement with regard to the time of provision of the suitability report 24
4.5. Commission's empowerment in Art. 25 para. 8 MiFID draft much too far-reaching 25
IV. Appropriateness 26
1. Standardised warnings and standardised reporting on client information collected for the appropriateness test 26
2. Scope of client information to be obtained and considered for the appropriateness assessment 26
V. Product Governance 29
1. "Value for money" processes 29
1.1. Entry into price regulation should be rejected 29
1.2. Danger of the "race to the bottom" / Imminent distortions of competition 29
1.3 Enormous effort with no added value 31
1.4. In the alternative: Content-related requirements by the Level 1 legislator 32
2. Exceptions to the requirements of product governance 33
3. Requirements with regard to the sales strategy of the concept developer 33
4. Editorial note 33
VI. Client information 34
1. Basic evaluation 34
2. Marketing communications and marketing practices 34
2.1. Preliminary remark 34
2.2. New definitions 35
2.2.1 Definition of marketing communication 35
2.2.2 Definition of marketing practice 35
2.2.3 Definition of online interface 36
2.3. New requirements for marketing communications and marketing practices 36
2.3.1. Requirement to disclose the investment firms responsible for content and distribution 36
2.3.2 Indication of characteristics and main risks 36
2.3.3 Annual reports 38
2.3.4 Consistency with target market 38
2.3.5 Obligation for governance arrangements and policy 38

2.3.6 New powers for national competent authorities in the event of non-compliance 38
3. Electronic form for information 39
4. Other changes to the general MiFID requirements for client information 39
4.1. Prior to the provision of any service or the conclusion of any transaction (Art. 24 para. 4 sentence 1 MiFID draft) 39
4.2. Empowerment of the Member States with regard to the standardised format (Art. 24 para. 5 sentence 2 MiFID draft) 39
5. Risk warnings 40
5.1. Basic concerns 40
5.2. Notes in detail 41
5.2.1. Scope of application "information materials” 41
5.2.2 Scope of application “particularly risky financial instruments” 41
5.2.3 Format and content of the risk warning 42
5.2.4 Implementation deadline and consultation 42
VII. Information on costs, associated charges and third-party payments 43
1. Standardisation in the presentation of ex-ante cost information 43
1.1. Disproportionate measure without client benefit 43
1.2. Excursus: Comment on Art. 24b para. 4 subpara. 5 MiFID draft (terminology for annual reporting) 43
2. Expansion of cost information - increase in information overload 44
3. Presentation of the effects of third-party payments related to the net return in the ex-ante cost information 46
4. Disclosure of the calculation method 47
5. Calculation up to the maturity date/holding period 48
6. Requirements in case of professional clients and eligible counterparties 48
6.1. Introduction 48
6.2. Comment on Art. 24b para. 1 subparas. 6 and 7 MiFID draft 49
6.3. Comment Art. 30 para. 1 MiFID draft 49
7. Annual ex-post cost information 49
7.1. No multiplication of annual ex-post cost information 49
7.2. Significant expansion of content - danger of information overload 49
7.3. Abandonment of redundant quarterly reports, Art. 63 para. 1 Delegated Regulation (EU) 2017/565 50
7.4. Exception for online access to the reports 50
8. Implementation deadlines 50
9. Detailed notes 50
9.1. Comments on Art. 24b para. 1 subpara. 1 MiFID draft ("in the required format") 50
9.2. Comments on Art. 24b para. 1 subpara. 1 MiFID draft ("or transactions") 50
9.3. Comments on Art. 24b para. 1 subpara. 2 lit. (c) MiFID draft ("paid") 51
9.4. Comments on Art. 24b para. 2 subpara. 1 lit. (a) MiFID draft ("provision of any costs...") 51
VIII. Client classification 52
1. Annex II Section II.1. first indent MiFID draft 52
2. Annex II Section II.1. second indent MiFID draft 52
3. Annex II, Section II.1. third and fourth indent MiFID draft 52
4. Annex II Section II.1 new subparagraph 6 MiFID draft 52
IX. Time constraints 54

I. Basic evaluation

1. Introduction

On 24 May 2023, the European Commission presented a proposal for a retail investment strategy (Proposal for a Directive amending Directives (EU) 2009/65/EU, 2009/138/EU, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards Union rules on the protection of retail investors). In this comments, the German Banking Industry evaluates the proposals of the European Commission to amend the European Markets in Financial Instruments Directive (MiFID).

2. Objective of the retail investor strategy

In this comments, the German Banking Industry Committee supports the European Commission´s intention to use the retail investment strategy developed as part of the capital markets union, and thereby encourage retail investors to invest in EU capital markets. However, the European Commission has submitted a proposal which, for the most part, fails to achieve these objectives or even runs counter to them. The German Banking Industry Committee addresses this issue in this comments.

3. Positions at a glance

3.1 Ban on inducements for non-advised services and inducements in connection with portfolio management

The European Commission is proposing a ban on inducements for non-advised services. The German Banking Industry Committee considers this proposal inappropriate and disproportionate. It is not clear from the European Commission’s proposal what purpose a ban on inducements for non-advised services would serve. Certainly, the reason cannot be to prevent conflicts of interest, since it is the client who decides which product to purchase. In future, clients would experience higher costs for non-advised services and would find a significantly restricted range of products and services: Investment firms already provide a wide range of information and other forms of support to help the so called self-directed investors make their own decisions about choosing a suitable financial instrument as part of non-advised services. In the event of a ban on inducements, these services could no longer be financed by inducements received and would instead, be billed to the client or simply no longer offered. It is also important to remember that non-advised services are already strictly regulated and are subject to extensive requirements for investment firms, which entail additional costs and effort. Apart from the suitability test and suitability report, investment firms are obligated to meet almost the same requirements that they are for investment advice. Furthermore, the provision of payments in connection with portfolio management should continue to be permitted. A ban is not appropriate and, in particular, would make cooperation models, where portfolio managers work together with other investment firms that provide direct client services and in return receive remuneration for this from the portfolio manager, impossible.

See in detail: Section II (Inducements).

3.2 Investment advice

In future, a best-interest test is to apply to investment advice (Article 24 para. 1a MiFID draft) This includes three requirements that the German Banking Industry Committee is very much opposed to.

It is unclear what criteria are to be used for assessing whether there is an “appropriate range of financial instruments”. Regarding the assessment of cost-effectiveness, it is unclear how this relates to the already obligatory equivalence test (Article 54 para. 9 Delegated Regulation (EU) 2017/565). An additional requirement is not necessary. It also remains unclear which groups of products are to be compared with one another. The German Banking Industry Committee is concerned that the investment firms may end up having to compare the costs of “apples with oranges”. Focussing solely on costs without considering quality features would neither be in the interest of the clients nor in the interest of the investment firms. Focussing solely on particular cost factors ignores the fact that product features can be particularly beneficial under certain market conditions, but also come at a cost.

As a result, the European Commission’s proposals significantly disrupt the business models of investment firms. And it will be small and medium-sized investment firms, and those with a high degree of specialisation, that are affected the most. There is a substantial risk that they will no longer be able to continue to offer their advice services, particularly to retail investors, due to the increases in fixed costs that continue to rise sharply. This runs counter to the aim of the RIS to encourage retail investors to access the capital markets. The German Banking Industry Committee believes the new requirements are counterproductive. And should not, therefore, be introduced.

The European Commission’s proposal also favours fee-based advice in an one-sided manner over other types of investment advice, by lowering the requirements that govern it. This represents an unjustified intervention in the market.

The proposed requirements for the necessary expertise for investment advisors are not appropriate. The need for further training must continue to be evaluated on a case-by-case basis and in-house training must remain a possible option, also to keep costs low.

See in detail: Section III (Investment advice).

3.3 Appropriateness

The draft also includes considerably more extensive client assessments for non-advised services. Thus, investment firms should also assess the client's ability to bear losses and risk tolerance when performing an appropriateness test, in addition to assessing the client’s knowledge and experience. The German Banking Industry Committee is opposed to this new requirement. There is no recognisable need for these additional requirements in practice. Non-advised securities service would become fundamentally more complicated and time-consuming, which would be a considerable burden to self-directed investors, who already complain about the unnecessary complexity caused by the regulatory requirements. The proposal would eliminate the reasonable distinction between investment advice and non-advised service and would patronize clients who wish to make their own investment decisions.

See in detail: Section IV (Appropriateness).

3.4 Value for Money

In future, as part of the legal requirements for product governance, new processes relating to “value for money” are to be implemented which could generate enormous implementation costs. The proposals risk erring towards price regulation. This may lead to competition for the cheapest products within the benchmarks set by ESMA, irrespective of quality features that are important to clients but not necessarily relevant for the benchmark in question (“race to the bottom”).

The proposals for price regulation and a one-sided focus on costs were also heavily criticized in a study published on 27 June 2023 (Filippo Annunziata: “Retail Investment Strategy - How to boost retail investors' participation in financial markets”, p. 21) commissioned by the ECON Committee of the European Parliament. This criticism reinforces the German Banking Industry Committee´s concerns and opposition to the proposals. The German Banking Industry Committee sees a risk that the design of these benchmarks will lead to interventions in competition. This is due to certain business models not being adequately reflected in the benchmarks. Here too, the German Banking Industry Committee is concerned that apples will be compared with oranges in the benchmarks.

Furthermore, the proposals appear impractical considering the large number of products involved. The European Commission also seems to be aware of the risk of insufficient benchmarks, as it also refers to the possibility of initial quality defects (“...and refine their quality”) in recital 17 of its draft. For this reason, the German Banking Industry Committee is opposed to the European Commission’s proposal.

See in detail: Section V (Product Governance).

3.5 Client information

In the context of client information, including cost information and marketing communications, the European Commission is proposing numerous new obligations, requirements to provide additional information and even more bureaucracy for investment firms and their clients. Since a greater workload also makes the investment service more expensive, the principle of proportionality should be applied to the effort and client benefit involved. The current draft does not reflect this.

In addition, the draft may worsen the problem of “information overload”, which clients are already complaining about today.

See in detail: Section VI (Client information) and Section VII (Information on costs, associated charges and third-party payments).

3.6 Client classification

The German Banking Industry Committee welcomes the envisaged simplifications for the upgrading to professional client, but suggests some amendments to the proposal.

See in detail: Section VIII (Client classification).

3.7 Delegation to levels 2 and 3 of the legislative process

The European Commission's proposal to amend the MiFID rules remains vague in many places, implicitly or explicitly postponing key policy decisions to Level 2 regulations to be issued by the European Commission or to the European Supervisory Authority (Level 3).

In the view of the German Banking Industry Committee, the basic legislative act at stage 1 of the legislative process must already contain all the key political and substantive decisions. Some of the proposed regulations of the retail investment strategy have a significant impact on competition and the business models of investment firms and are therefore not merely detailed technical regulations. Fundamental political decisions should be reserved for the ordinary legislative procedure at Level 1 and thus not be removed from the co-determination of the Council and the European Parliament.

3.8 Transposition period and review clause for inducements

The proposed implementation period is too short for investment firms. It must be extended and begin only after the measures have been published at Level 2 of the European legislative process, since investment firms can only start implementing the new requirements at this stage. The European Commission’s draft provides for a review of the impact of inducements on retail investors within three years. The German Banking Industry Committee is opposed to the obligation to implement such a short-term review, especially since the European Commission appears to have already pre-empted the outcome of any such review. There is a risk that the extensive amendments are merely interim solutions.

See in detail: Section IX (Time constraints).

II. Inducements

With its proposal for the Retail Investment Strategy, the European Commission has revised the principles for accepting and retaining inducements in connection with the provision of investment services. The German Banking Industry Committee very much welcomes the fact that the European Commission has refrained from its original intention of proposing a full ban on inducements, which would have included the service of investment advice. Such a ban would have - as the European Commission itself writes in the Explanatory Memorandum of its proposal - unforeseeable consequences for markets and consumers. The German Banking Industry Committee agrees with this assessment.

In this context, however, it is particularly critical that the European Commission - while at the same time extending the obligations - proposes a ban on inducements relating to non-advised services, which are widespread in Germany.

1. Inducements in connection with investment advice

According to the requirements already in force today (Art. 24 para. 1 and para.8 MiFID), investment firms must act honestly, fairly and in the best interest of their clients when providing investment services. This requirement, which has been in force since MiFID I, is now to be further substantiated by the principle of acting in the best interest of the client ("best interest test") (Art. 24 para. 1a MiFID draft). The German Banking Industry Committee addresses this aspect in this statement in the section on investment advice (see III.1.).

2. Inducements in connection with portfolio management

According to the current requirements (Art. 24 para. 8 MiFID), the Member States must ensure that investment firms do not accept inducements from third parties in connection with portfolio management. According to the Explanatory Memorandum, this principle is to be maintained ("... the existing bans on inducements regarding independent advice and portfolio management, which are maintained, ..."). Contrary to this statement in the Explanatory Memorandum, the scope of application is surprisingly expanded in the text of the proposal. While the current requirement states "shall not accept or retain fees...", the proposal now states, "do not pay or receive any fee...".

Today, it is common practice for portfolio managers to pay out any inducements they receive to their clients. The German Banking Industry Committee assumes that this should continue to be permissible.

According to the current legal situation, the ban on inducements for portfolio managers applies exclusively with regard to the acceptance of inducements. A broader ban, which also covers the payment of inducements, is not appropriate and would in particular make cooperation models impossible in which portfolio managers cooperate with other investment firms which, for example, provide direct client care. Payments by the portfolio manager to these cooperation partners would then be inadmissible due to the broad wording, contrary to the Explanatory Memorandum to the proposal (see page 15 there), although such cooperation models do not cause any disadvantages for investors. Finally, it should be noted that the proposed ban would lead to an unjustified discrimination of portfolio management compared to investment advice. While manufacturers would be allowed to pay inducements to investment firms that advise clients, this would not be permitted for portfolio managers who cooperate with investment firms that provide direct client care, in particular advice. This seems in particular inappropriate against the background that a particularly high level of investor protection applies in the case of portfolio management due to ongoing suitability checks and more extensive reporting obligations by the portfolio manager. It is particularly problematic that the wording of the proposal, which among other things refers to the inadmissibility of the payment of fees, can be understood in such a way that the portfolio manager is also prohibited from receiving all paid services. Thus, the requirement could be understood in such a way that monetary benefits are inadmissible, e.g. for the purchase of research or IT services relating to portfolio management.

In the interest of retail investors, the German Banking Industry Committee therefore suggests retaining the current wording ("shall not accept or retain fees...").

Relevant legislation:
Art. 24a para. 1 MiFID draft

3. Inducements in connection with non-advised services, principle

According to the proposal (Art. 24a para. 2 MiFID draft), investment firms shall in future be prohibited in principle from accepting inducements from certain third parties where no advice is provided.

However, the wording chosen by the European Commission ("do not pay or receive any fee or commission") is unfavourable from the perspective of a retail investor. Agreements according to which inducements received in the non-advised service are paid out to the investor by the investment firm could be inadmissible according to this wording. In this respect, the German Banking Industry Committee refers to its comments above on portfolio management, where the same wording has been chosen in the Retail Investment Strategy; it proposes to use the wording "shall not accept or retain fees" known from MiFID II here as well.

According to the proposal of the European Commission, there are exceptions in the case of a relationship between the non-advised service and prior commission-based investment advice (Art. 24a para.3 MiFID draft), inducements in connection with placement activities ("underwriting and placement") with the exception of PRIIPs (Art. 24a para. 4 MiFID draft) and minor non-monetary benefits (Art. 24a para. 5 MiFID draft). See on these exceptions below under II.4.

3.1. Ban on inducements

The German Banking Industry Committee does not consider a ban on inducements for non-advised services to be appropriate and proportionate. The proposal and argumentation presented by the European Commission lack clarity on the purpose and necessity of introducing a ban on inducements for non-advised services. Regardless, potential conflicts of interests cannot justify it. Additionally, there are no other apparent instances of supposed abuse.

Inducements enable banks and savings banks to offer their clients a wide range of financial instruments from a wide variety of issuers and with a wide variety of underlying assets, payout profiles and other features. Clients' access to market research and various trading venues is also funded by inducements. At many investment firms, clients can also switch between the communication channels or even to the investment advice at any time ("multi-channel approach"). For this purpose, the investment firms provide a client-friendly infrastructure (e.g., branches, trained staff, telephone and video systems with voice recording options, online brokerage, numerous "tools" to support self-decision makers). And clients make use of that.

All these measures enable clients to choose the service that best suits them and the transaction at hand and to build their individual portfolio. Clients making their own investment decisions appreciate these additional value-added services and the wide range of financial instruments made available to them. The ban on inducements in this context, combined with the other additional requirements of the European Commission`s proposal, which also affect the non-advised services, could lead to higher costs for clients for non-advised services. In this context, inducements also provide a cost advantage for clients, making it easier for them to access the capital market through low threshold offers. This, in turn, promotes the securities and capital market culture overall. If a ban on inducements were to occur, clients would have access to fewer trading venues and a more limited range of products and services. This would go against the European Commission's objectives to facilitate retail investors' access to capital markets through their Retail Investment Strategy.

In non-advised services where clients choose their own financial instruments, a ban on inducements would not address the issue of conflicts of interest, as clients make investments decisions without interference by investments firms. However, Art. 44 Delegated Regulation (EU) 2017/565 fully addresses any potential conflicts of interest related to product marketing.

In addition, non-advised services are already heavily regulated and associated with extensive duties of investment firms, which entail costs and effort. With the exception of the suitability test and suitability report, investment firms have to fulfil almost the same investor-protecting obligations as in the case of investment advice. Furthermore, the investment firms provide the so-called self-decision-makers with a wide range of information and other support, which is intended to help the self-decision-makers choose the appropriate financial instrument. This includes, among others, the appropriateness test (i.e., testing the knowledge and experience of the client) and, if the product does not match, issuing a warning, the fulfilment of information and reporting obligations required by supervisory law (transaction-related information (e.g. ex-ante cost transparency, PRIIPs KID, settlement) as well as ongoing reporting obligations (e.g. quarterly reporting, loss threshold reporting, annual cost transparency)).

It should also be taken into account that non-advised services contribute to the financing of the infrastructure also used for other types of business, so that a discontinuation of inducements in the non-advised services can also have an impact on other types of services. For example, a wide range of (technical) support services (such as access to course and information portals, among others) is available to clients, irrespective of the investment service.

A ban on inducements for non-advised services is therefore disproportionate and leads to the fact that this can no longer be offered in a way that covers costs.

3.2. Summary

As previously mentioned, inducements currently allow for the implementation of quality-enhancing measures in the non-advised services. This enables a wide range of products to be offered and transacted through various communication channels at a cost-effective rate. As clients in this service make their own decisions independently from investment firms, there is no conflict of interest, and therefore no need for regulation.

Hence, it is neither appropriate nor proportionate to make such a significant intervention in the banks' business models.

The German Banking Industry Committee therefore proposes that inducements remain permitted in non-advised services.

Relevant legislation:
Art. 24a para. 2 MiFID draft

4. Exceptions to the ban on inducements in connection with non-advised services

4.1. Relation of the non-advised service to prior "non-independent" investment advice (Art. 24a para. 3 MiFID draft)

According to the present proposal (Art. 24a para. 3 MiFID draft), as an exception to the ban on inducements according to Art. 24a para. 2 MiFID draft, inducements paid to the investment firm shall be permissible "when providing investment advice on a non-independent basis relating to one or more transactions of that client covered by that advice".

The German Banking Industry Committee welcomes this exception - despite its fundamental criticism of the ban on inducements for non-advised services.

4.2. Inducements to issuers other than PRIIPs (Art. 24a para. 4 MiFID draft)

The German Banking Industry Committee welcomes this requirement, which confirms the current practice.

4.3. Minor non-monetary benefits (Art. 24a para. 5 MiFID draft)

Even in the past, minor non-monetary benefits were exempt from the requirements on accepting and retaining inducements. With the now proposed requirement, the term "minor" is further specified. However, there is no need for such concretisation. A concretisation based on a monetary amount also raises new problems and questions. The German Banking Industry Committee is therefore in favour of dispensing with the proposed concretisation.

Relevant legislation:
Art. 24a paras. 3 to 5 MiFID draft

5. Level 2 empowerment for the European Commission with regard to inducements

It is interesting to note that Art. 24 para. 13 MiFID draft contains a wide-ranging Level 2 empowerment. This means that not only the European Commission can outline the requirements specified in Art. 24, but they can also do so for Art. 24a, which pertains to inducements. However, the German Banking Industry Committee believes that referencing Art. 24a may be a mistake in the drafting process. If there was truly supposed to be a separate Level 2 empowerment for Art. 24a, it would have been included in that article.

For this reason, it is recommended that the Level 2 empowerment in Art. 24 para. 13 MiFID draft should only cover the requirements outlined in Art. 24 during subsequent legislative processes. In particular, the politically very controversial issue of inducements should be regulated directly by the democratically legitimised legislator at Level 1. Therefore, it is best to limit the empowerment to the provisions in Art. 24.

Relevant legislation:
Art. 24 para. 13 MiFID draft

6. Review clause

The European Commission's proposal (Art. 24a para. 8 MiFID draft) includes a provision to assess the impact of the inducement’s requirements on retail investors within three years of implementation. The German Banking Industry Committee opposes this requirement due to the significant effort required by investment firms to implement new procedures for securities transactions with retail investors. We believe that the proposal should not be seen as a temporary solution.

Relevant legislation:

Art. 24a para. 8 MiFID draft

III. Investment advice

1. Best interest test

A major change proposed by the European Commission in the area of investment advice is the so-called "best interest test". According to this, investment firms that provide investment advice to retail clients are obliged to

(a) provide the advice on the basis of an assessment of an appropriate range of financial instruments;
(b) recommend the most cost-effective financial instruments among those identified as suitable for the client and offering similar features;
(c) recommend, among the range of financial instruments identified as suitable to the client, one or more products without additional features that are not necessary to achieve the client's investment objectives and give rise to extra costs.

The European Commission's proposal does not take into account that there are already comprehensive provisions in place today with the aim of ensuring that clients' interests are protected, particularly in the area of investment advice. Clients are already comprehensively protected, inter alia, in the context of the suitability test, the disclosure of costs (Art. 50 Delegated Regulation (EU) 2017/565) as well as when recommending a switch of financial instruments by means of a cost-benefit analysis (Art. 54 para. 11 Delegated Regulation (EU) 2017/565; for further requirements already applicable today, see in detail below). The proposal will lead to far-reaching, disproportionate interventions in the business models of the investment firms (also detailed below). Small and medium-sized investment firms or those that have specialised will be particularly affected. There is a danger that they will no longer be able to maintain their advice services due to the further sharp increase in fixed costs, especially vis-à-vis retail clients. This counteracts the goal of the Retail Investment Strategy to promote access to the capital markets for retail investors. It is also unclear to what extent these additional requirements, which go beyond the already existing far-reaching requirements, will increase the confidence of retail investors in the functioning of the capital markets.

If widely understood, these requirements could lead to a ban on commission-based investment advice "through the back door" for certain types of financial instruments. However, the requirements must not lead to a de facto exclusion of advice in certain financial instruments.

In addition, the requirements remain vague, so that their impact on clients and investment firms can hardly be assessed at present (also detailed below). This also applies in particular to the interactions between the individual requirements of Art. 24 para. 1a MiFID draft (see lit. (a) to (c)). However, if requirements are made, they must already be sufficiently defined at Level 1. Legal changes that have particularly far-reaching effects on structures in investment advice, existed for decades and proven themselves should not be removed from the decision-making process of the democratically legitimised Level 1 legislator.

Relevant legislation:
Recital 6 RIS draft
Art. 24 para. 1a MiFID draft
Art. 24 para. 13 lit. (d) MiFID draft

1.1. Re lit. (a) Advice based on an appropriate range of financial instruments

Since MiFID II, investment firms are obliged to inform their clients how wide the range of types of financial instruments is in which they provide advice, including in particular whether this is limited to financial instruments issued or provided by entities with which they have close links. The clients should hereby be informed about a possible risk with regard to the independence of the advice (see explicitly Art. 24 para. 4 lit. (a) (ii) MiFID).

In contrast, the European Commission's proposal directly interferes with the market and thus with competition by stipulating that advice is only permissible on the basis of an "appropriate range of financial instruments". In this context, it is completely unclear at Level 1 what is meant by the term "appropriate range of financial instruments". Moreover, a concrete justification as to why the previous client information is not sufficient and therefore justifies such a far-reaching intervention in the business models of the investment firms and thus in competition is not recognisable. The proposal is therefore disproportionate.

Nor would it be appropriate to force investment firms to conduct an extensive market analysis and to have to include products in their advice services. In this context, it should be borne in mind that high-quality advice is only possible if the advising investment firm knows the product well. A large number and wide variety of information is required for the examination of the products in question. It is therefore associated with a high level of effort for the investment firms. Consequently, it is not possible for investment firms to extend the examination to further products without massive efforts that cause high costs.

The fact that there is no objective justification for this requirement is also shown by the following circumstance: this requirement is not to apply to fee-based investment advice. Rather, the existing requirements on the product range to ensure the independence of investment advice (Art. 24 para. 7 MiFID) are even reduced for these by granting them the possibility, under certain conditions, to limit their product range required according to Art. 24 para. 7 MiFID (Art. 24 para. 7a MiFID draft). According to Recital 8 RIS draft, this is intended to enable the development of independent investment advice at reasonable costs. The recital thus proves an objectively unjustified intervention in competition and confirms the above assessment that an obligation to offer an appropriate range of financial instruments can lead to unjustifiable costs for investment firms and even to the abandonment of investment advice.

For the above reasons, the German Banking Industry Committee is therefore strongly in favour of waiving Art. 24 para. 1a lit. (a) MiFID draft.

1.2. Re lit. (b) Recommendation of the most cost-effective financial instrument

Already today, within the scope of investment advice, investment firms must check whether there are suitable (= corresponding to the information provided by the client) financial instruments that are equivalent before making a recommendation on the basis of their range of advice. These are to be evaluated with a view to cost and complexity. This means that clients should be recommended the most cost-efficient equivalent financial instrument. If an investment firm wishes to recommend a more expensive equivalent financial instrument to the client, it must justify this. These requirements were stipulated with MiFID II at Level 2 (see Art. 54 para. 9 Delegated Regulation (EU) 2017/565) and further specified by ESMA within the framework of its guidelines on suitability (see there under paras. 91 et seq.).[1]

It remains unclear why the European Commission is now proposing a different wording ("similar features" instead of "equivalent") and whether this is connected with a different understanding. The different wording unnecessarily creates legal uncertainty. The German Banking Industry Committee sees the danger that in future equivalent products will no longer be the benchmark for the necessary cost comparison, but that "apples and

[1] ESMA Final Report - Guidelines on certain aspects of the MiFID II suitability requirement dated 23 September 2022, 3.4 Annex IV - Guidelines (English version) or ESMA Guidelines on certain aspects of the MIFID II suitability requirement dated 3 April 2023 (German version).

oranges" will have to be compared. In particular, it is important to ensure that comparing different financial instruments does not effectively result in a complete prohibition of recommending specific financial instruments or types of financial instruments to retail clients. However, the new requirement may effectively ban commission-based investment advice for specific (types of) financial instruments “through the back door”.

In addition, it must be ensured that the starting point for the assessment continues to be the range of financial instruments advised by the respective investment firm (see in this regard, in accordance with Art. 54 para. 9 Delegated Regulation (EU) 2017/565 "... of investment services and financial instruments selected for their [investment firms’] clients ..."). Otherwise, it would be indirectly interfered with the business model of the investment firms and thus competition, which would be unjustified. Rather, requirements that indirectly influence the range of financial instruments advised by investment firms would lead to "planned economy" regulations.

Here, too, it would not be appropriate to force investment firms to carry out a far-reaching market analysis and to have to include products in their advice services (for more details, see III.1.1. above).

For the above reasons, the German Banking Industry Committee is therefore strongly in favour of waiving Art. 24 para. 1 lit. (b) MiFID draft.

Insofar as the legislator wishes to provide for a rule on the priority consideration of the most cost-efficient product at Level 1, Art. 24 para. 1 lit. (b) MiFID draft should be replaced by the wording of the existing provision on the equivalence test in Art. 54 para. 9 Delegated Regulation (EU) 2017/565. At the same time, it should be ensured that the essential requirements are already stipulated by the democratically legitimised legislator at Level 1. Consequently, the above-mentioned clarifications should be made (e.g. through a recital) that there may only be a comparison of "equivalent" financial instruments and thus no comparison of "apples with oranges" and that the range of financial instruments advised by the respective investment firm is decisive for the assessment.

1.3. Re lit. (c) Recommendation of a financial instrument without additional features

According to the European Commission's proposal, investment firms should also be obliged in future to recommend at least one financial instrument that has no "additional features". According to the European Commission’s proposal, additional features are those that are not necessary to the achievement of the client's investment objectives and that give rise to extra costs.

As an example for products with additional features, the European Commission mentions "funds with an investment strategy which implies higher costs, a capital guarantee and structured products with hedging elements". If an investment firm also wants to recommend such products, it would have to justify this and disclose the additional costs (see Recital 6 RIS draft).

The scope of this requirement, which can have very far-reaching effects on the advice activities of the investment firms, remains completely open.

First of all, the relationship to the equivalence test already required today (in case of several financial instruments suitable for the respective client) including the necessity of a cost comparison of equivalent financial instruments is unclear. In the case of equivalent financial instruments, the most cost-efficient e equivalent financial instrument must be recommended to the client or - if the more expensive equivalent financial instrument is to be recommended to the client - reasons must be given as to why this financial instrument is nevertheless suitable for him (see in this respect accordingly paragraphs 91 to 95 of the ESMA guidelines on certain aspects of the MiFID II suitability requirements (cf. footnote 1). According to this, the planned requirement of Art. 24 para. 1a lit. (c) MiFID draft would not be necessary. On the contrary, it would considerably complicate the advice process, because according to the European Commission's proposal, clients might have to be recommended two products. Retail clients in particular are likely to feel overwhelmed by this. They want investment advice precisely because they do not have a sufficient overview of the structures and product features available on the market and do not want to have to choose between different products alone without receiving a clear recommendation.

It is also extremely problematic that the requirement is completely vague ("... products without additional features that are not necessary to the achievement of the client's investment objectives and that gives rise to extra costs ...", see also the examples in the recital above). Moreover, these vague provisions are to be specified by the European Commission only at Level 2 (see below under III.1.4.). Since the European Commission is at the same time recognisably pursuing the goal of making advice in products with additional features considerably more difficult or even impossible, the requirement could, if widely understood, lead to a ban on commission-based investment advice "through the back door" for certain types of financial instruments. However, the requirement must not lead to a de facto exclusion of advice in certain financial instruments. This would come very close to a product ban. However, a product ban is rightly tied to strict conditions, in particular its proportionality (Artt. 40 et seq. MiFIR).

In addition, the European Commission’s proposal, which focuses one-sidedly on the cost aspect, fails to recognise that there are many quality features that are very important for clients. Contrary to the impression given in Recital 6 RIS draft, these also include the aspects mentioned by the European Commission in this recital ("funds with an investment strategy …, a capital guarantee and structured products with hedging elements"). The pure focus on certain cost elements negates the fact that product features can prove particularly useful in certain market phases, but are also associated with costs. Products without further features either do not allow clients to participate more strongly in market rises or they lead to the client having to fully bear any market decline. The one-sided focus on costs could encourage the investment firm to no longer express its market view, which is highly valued by clients and is also a distinguishing and quality feature of the various investment firms. It is precisely this market view that is also a main reason why clients seek investment advice. Therefore, if one wanted to deny the benefits of such products, this would not be in the client's interest for the reasons mentioned above.

In this context, the German Banking Industry Committee would like to point out that the proposal to focus solely on the cost aspect is also viewed very critically in a study published on 27 June this year, which was commissioned by the ECON Committee of the European Parliament[2] . The following passage on page 21 of the study supports the above concerns:

> "Concerning the abovementioned proposals by the EC on inducements in the Omnibus Directive, there seems to be an intention to directly regulate mechanisms of price formation, with the view that "[s]ome retail investment products on the market still incorporate unjustifiably high costs and/or do not offer value to retail investors" ...
>
> However, such an approach may risk failing to address the actual problem faced by retail investors with respect to inducements, as we tried to illustrate above, as it places an excessive accent on costs. Instead of intervening directly in the market's pricing structure and recurring to notions such as "high costs" - which can be broad and variable, causing legal uncertainty and imprecisions - legislation should be focused on ensuring that retail investors properly understand the products and services that are being offered, allowing them to reasonably decide whether they should or should not take a certain investment decision. There is also the potential danger that the EC's approach leads to the market moving towards a common benchmark or standard, stifling financial innovation: benchmarking against a single parameter/test might lead to undue rigidities in the market.

[2] Filippo Annunziata: "Retail Investment Strategy - How to boost retail investors' participation in financial markets".

> Ultimately, looking at costs per se is not sufficient: costs are strictly related to the nature, characteristics and risk/return profiles of the investments and, without more clarity on the classification and mapping of products (an issue that the EC's proposal does not take properly into account, save - probably - for "high-risk products"), these proposals do not seem to properly address the real issue. More on that below."

The German Banking Industry Committee is therefore strongly in favour of waiving Art. 24 para. 1a lit. (c) MIFID draft.

1.4. Re the European Commission's empowerment of Level 2 reguirements

Due to the possible very far-reaching effects on investment advice, in particular also commission-based investment advice, the German Banking Industry Committee is in favour - if, contrary to its demand requirements on the "best interest test" are provided for - of waiving the empowerment of the European Commission to issue Level 2 requirements and thus of deleting Art. 24 para. 13 lit. (d) MiFID draft. In this case, the requirements should be finally stipulated by the democratically legitimised legislator at Level 1.

If, contrary to the opinion of the German Banking Industry Committee, the European Commission's empowerment in Art. 24 para. 13 lit. (d) MiFID draft is to be retained, the German Banking Industry Committee requests that the following points be taken into account:

- The German Banking Industry Committee is also very critical of the fact that the European Commission is empowered to issue Level 2 requirements with a view to the general requirement of Art. 24 para. 1 MiFID (see in Art. 24 para. 13 lit. (d) MiFID draft the explicit reference also to Art. 24 para. 1 MiFID). According to the wording of Art. 24 para.1 MiFID, this is a requirement from which no concrete requirements follow. The concrete requirements are found in the following paragraphs of Art. 24 MiFID draft, to which Art. 24 para. 1 MiFID draft explicitly refers. The possibility of specifying the general requirement in paragraph 1 at Level 2 contradicts the system that the concrete requirements resulting from the general requirement in paragraph 1 are directly regulated in MiFID (Level 1) (see the respective paragraphs following paragraph 1). Otherwise, the European Commission would de facto be given the competence to develop the general requirements at Level 2. This competence, however, belongs solely to the democratically legitimised Level 1 legislator. The German Banking Industry Committee is therefore strongly in favour of refraining from a reference in Art. 24 para. 13 lit. (d) MiFID draft to Art. 24 para. 1 MiFID.

- The same applies to the explicit mention of the case of receiving inducements in Art 24 para. 13 lit. (d) MiFID draft ("..., notably those receiving inducements, ..."). It must already be clear from Level 1 if only the case of receipt of inducements is to be affected; because only the democratically legitimised Level 1 legislator has the competence to provide for additional requirements for this case, if necessary. Consequently, the explicit mention of the case of receipt of inducments in Art. 24 para. 13 lit. (d) MiFID draft should be deleted.

- On the further petitions of the German Banking Industry Committee with regard to Art. 24 para. 13 lit. (d) MiFID draft, see also II.5.

If the current requirement on the equivalence test at Level 2 (Art. 54 para. 9 Delegated Regulation (EU) 2017/565) is to be adopted at Level 1, the essential requirements in this respect should already be defined at Level 1 by the democratically legitimised legislator (e.g. by means of a supplementary recital, on the proposal of the German Banking Industry Committee in this respect see already above under III.1.2.).

2. Unjustified preference for fee-based investment advice over commission-based investment advice

The European Commission’s proposal leads to an unjustified preference for fee-based investment advice over commission-based investment advice. The European Commission’s proposes the following different rules:

- Obligation to provide commission-based advice on the basis of an assessment of an appropriate range of financial instruments (Art. 24 para. 1a lit. (a) MiFID draft). These requirements do not apply equally to fee-based investment advice to retail clients. Rather, in the case of fee-based investment advice, the requirements regarding the necessary range of financial instruments, which already exist today with regard to independence (Art. 24 para. 7 MiFID), are even reduced under certain conditions (Art. 24 para. 7a MiFID draft; for more details see III.1.1. above).
- Furthermore, investment firms providing fee-based investment advice and meeting the conditions of Art. 24 para. 7a MiFID draft are not obliged to ask retail clients about their knowledge and experience of the financial instruments or investment services (Art. 25 para. 2 subpara. 2 MiFID draft).
- Moreover, these investment firms are not obliged to ask clients about the composition of the existing client portfolio (see also Art. 25 para. 2 subpara. 2 MiFID draft). Due to the lack of necessity to ask clients about the composition of the existing client portfolio, fee-based investment advice should therefore not be required to consider the aspect of portfolio diversification when making a recommendation (Art. 25 para. 2 subpara. 1 MiFID draft; see III.4.1. below for details of the new obligation to carry out a portfolio assessment applicable to commission-based investment advice).

The German Banking Industry Committee considers the possibility of a waiver of asking clients about their knowledge and experience in fee-based investment advice to be counterproductive and thus not in the client's interest, because this does not ensure that (i) clients understand the financial instruments recommended to them and can assess their risks (this is, after all, the purpose of asking clients about their knowledge and experience) and (ii) clients are recommended the financial instrument that is in their interest. Indeed, complexity - which is one of the conditions for the above mentioned exception - says nothing about the risk content or the client benefit of the product.

Furthermore, the suitability report to be provided to retail clients requires a comparison of the characteristics of the product with the information provided by the client. This applies regardless of the form of investment advice. Therefore, the European Commission’s proposal is contradictory on this point.

In addition, also under civil law aspects, a recommendation must always be object-oriented, which makes it imperative that a client is informed about the product characteristics and risks according to his knowledge and expertise. The inappropriate exception would lead to an objectively unjustified reduction of investor protection.

Finally, all of the above provisions lead to an objectively unjustified preference for fee-based investment advice over commission-based investment advice and thus unjustifiably interfere with competition to the detriment of commission-based investment advice.

The German Banking Industry Committee therefore considers a waiver of Art. 24 para. 7a and Art. 25 para. 2 subpara. 2 MiFID draft to be necessary (consequential amendment: if Art. 24 para. 7a MiFID draft is deleted, Art. 24 para. 4 lit. (a) (iv) MiFID draft should also be deleted).

Relevant legislation:
Recital 8 RIS draft
Art. 24 para. 4 subpara. 1 lit. (a) (iv) and para. 7a as well as Art. 25 para. 2 subpara. 2 MIFID draft

3. Expertise of investment advisors, among others

The European Commission's proposal provides for additional requirements related to the necessary expertise of investment advisors and staff providing information to clients on financial instruments, investment services or ancillary services. These additional requirements concern both the education and training of these staff. In detail, the following is provided for:

- Minimum standard for the required expertise of investment advisors (Art. 24d para. 2 subpara. 1 sentence 1 and Annex V MiFID draft).
- Regular updating of expertise through regular in-depth training for all above-mentioned employees (Art. 24d para. 1 subpara. 1 MiFID draft); for investment advisors at least 15 hours per year (Art. 24d para. 2 subpara. 1 sentence 1 MiFID draft).
- For investment advisors, proof of the required expertise by means of certification. This shall apply to the proof of the required expertise before taking up the activity as well as to the regular further training.
- Empowerment for the European Commission to adapt the minimum standard for the required expertise of investment advisors (Annex V MiFID draft) at Level 2 (Art. 24d para. 2 subpara. 2 MiFID draft).

There is no need for further harmonisation of the requirements for the necessary expertise. There are no known grievances in this area. Also in the so-called KANTAR study commissioned by the European Commission, the qualification of the advisors is considered to be completely sufficient.[3]

At the same time, there are differences in education and training in the European member states (as already stated by the European Commission[4]). For example, the globally recognised dual training in Germany, in which theory and practice are combined, is not standard in all member states. Consequently, a further standardisation of the requirements for the necessary expertise of investment advisors and thus a "one size fits all approach" is neither appropriate nor proportionate.

The level of respective previous education of an employee should determine the type and scope of training he need before starting his job as investment advisor. The required expertise of an investment advisor, for example, also depends decisively on the types of financial instruments in which he shall advise in the future. Consequently, the question of whether an employee has the required expertise and, if not, to what extent he requires additional training, depends on the individual case (previous education of the respective employee as well as the specific activity with which shall be entrusted). The training provided to each employee should also in the future be tailored to his specific job duties, taking into account his individual knowledge and experience, as it is today.

The proposed requirements on further training (generally regular, for investment advisors at least 15 hours per year) are also disproportionate. The scale here must continue to be the necessity. Further training is necessary

- in the event of new regulatory requirements or
- when the competence of an employee is expanded (e.g. investment advisor should advise on additional types of financial instruments in the future).

[3] "Disclosure, inducements, and suitability rules for retail investors study" (May 2022), Annex to the Final Report, p. 136 "The current level of qualifications of the advisors do not seem to be an issue. ...". In the following, corresponding feedback from the national supervisory authorities is also mentioned.

[4] "Public consultation on the review of the MiFID II/MiFIR regulatory framework" by the European Commission, 27 February 2022, introduction to Question 51 "..., due to the diversified national education and professional systems, ..."

The decisive factors may therefore be the above-mentioned reasons. The scope of the required further training also depends on whether the regulatory changes in the specific case are extensive or minor. The same applies with regard to the extent of the expansion of an employee's competence.

This is contradicted by the European Commission's proposal, which prescribes further training even if there have been no new regulatory requirements (= relevant for the respective employees) in the period in question, nor will the employees' competence change. The proposal also stipulates a minimum of at least 15 hours per year for investment advisors. Even if this blanket provision was taken from the IDD - it is still not appropriate: In individual cases it can be too low, but also too much. A targeted training measure to obtain the required expertise must always focus on the specific personal qualification needs of the respective investment advisor. If the need for qualification exceeds the above-mentioned minimum scope, the expectation of the European Commission's proposal is rightly that the training should not only last 15 hours, but longer, according to the respective need for qualification (see minimum scope). However, it is not appropriate that the European Commission's proposal does not provide for the possibility of reducing the scope of the qualification if the actual need for qualification is objectively below the minimum scope.

There is also no need for formal certification. This is especially true for further training. It would effectively mean that other suitable qualifications, such as in-house training, would no longer be possible. Instead, investment firms would be forced to use cost-intensive, external providers for this (as only these could issue a certificate). The costs that would be incurred by the investment firms would be considerable: costs for external training, additional costs for certification by the external provider; in the case of further training, the costs would also be incurred annually by German investment firms alone (which include credit institutions in particular) for currently more than 100,000 investment advisors (this does not take into account the insurance sector and advisors in the securities sector who are not subject to supervision by BaFin and are therefore not registered with it).

Another argument against externalising training is that it no longer ensures that the content of training is linked to internal processes and internal documentation. Especially against the background of the high density of requirements, the regulatory framework for the expertise of employees should be set in such a way that embedding in the business and the client base/target clients is the starting point. This is also supported by the regulatory requirements: It is not only a matter of teaching (theoretical) knowledge, but also of ensuring the proper implementation of new requirements etc. in practice ("appropriate experience"; on these two aspects, see the ESMA Guidelines for the assessment of knowledge and competence of 3 January 2017).

The necessity of certification of training measures also contradicts the goal of employees which possess permanently the necessary qualification. According to Art. 24d para. 1 sentence 1 MiFID draft, in the event of new financial instruments or services being offered, training should include specific training on these. Timely training on these innovations would not be possible via external service providers. The trainings would be coordinated between the investment firms and the external providers on an annual basis with regard to the 15-hour requirement. The introduction of new financial instruments during the year could not be taken into account in the training in the current year. The same would apply to training on new regulatory requirements.

It should also be noted that investment firms are obliged to employ qualified staff. In order to comply with this obligation alone, the training courses of the external providers would have to be checked internally for correctness and legality and revised if necessary. This is time-consuming and labour-intensive and thus causes further costs that might also have to be passed on to the clients.

In order to be able to offer employees practical and timely training in the event of new products or requirements, it should not be necessary to rely (solely) on external providers in this respect.

With regard to an alignment with the requirements of the IDD, it should be noted that the latter so far only provides for the possibility, but not the obligation, to require a certificate (Art. 10 para. 2 subpara. 3 IDD "may"). In Germany, the provable learning success control was only introduced for self-study further training measures in order to prevent circumvention of the further training obligation. In the case of classroom or in-house measures, this was not considered necessary and is thus not mandatory (§ 7 para. 1 VersVermV). Experiences in the securities and insurance sector show that internal training sufficiently qualifies employees (see above). This is also in the self-interest of the banks and savings banks, which want to avoid liability cases. A tightening of the requirements to ensure expertise is therefore not necessary.

The extent to which investment firms can continue to offer investment advice against this background, especially to retail clients, thus appears very questionable. Rather, it can be assumed that, against the backdrop of higher costs, investment firms will raise the threshold for offering investment advice, which would affect retail clients in particular. Thus, the new provisions on the required expertise would also counteract the goal of the Retail Investment Strategy to promote access of retail investors to the capital markets.

Finally, the German Banking Industry Committee also rejects an empowerment of the European Commission to adapt at Level 2 requirements made by the democratically legitimised legislator at Level 1 and thus without renewed participation of the democratically legitimised legislator (see III.4.5. below for a comparable case).

The proposed new requirements are not necessary, but cost-intensive and thus disproportionate. Moreover, they counteract the objective of the Retail Investment Strategy to promote access of retail investors to the capital markets. The German Banking Industry Committee is therefore strongly in favour of dispensing with these new requirements, also in the interest of retail clients.

Relevant legislation:
Recital 22 RIS draft
Art. 24d MiFID draft
Annex V RIS draft

4. Further new requirements for investment advice and possibly other investment services

4.1. Mandatory portfolio assessment

According to the European Commission's proposal, investment firms - if they provide commission-based investment advice or portfolio management - must also ask clients about the composition of their existing portfolio ("financial and non-financial assets", see Recital 34 RIS- draft) and take this into account in their recommendation. In addition, clients must be informed about how the recommended financial instruments take into account the diversification of the client's portfolio.

In our view, there is no need for such a requirement, since client protection is already comprehensively guaranteed by the existing requirements. In particular, the questioning about the client's existing investments is part of the process of obtaining information on the client's financial situation that will feed into a recommendation. These requirements can therefore be found in the ESMA guidelines on certain aspects of the MIFID II suitability requirements and have been established practice in the German market for years. The guidelines state: "Information about a client's financial situation includes information regarding his investments. This implies that firms are expected to possess information about the client's financial investments he holds with the firm on an instrument-by-instrument basis. Depending on the scope of the advice provided, firms should also encourage clients to disclose details on financial investments they hold with other firms, if possible also on an instrument-by-instrument basis." (ESMA guidelines, cf. footnote 1, para. 43).

Many clients do not want to provide detailed information on portfolios not managed by the investment firm in question. They want to make use of the expertise of different investment firms and may also pursue very different investment goals with their portfolios. Diversification is also not necessarily always desired; for example, there are clients who want to be advised exclusively on one asset class at a particular investment firm. Clients might, for example, want to be advised exclusively on shares in the US market. From a diversification point of view, one would have to advise the client against it and to inform him, also to invest in other regions and asset classes. This would not correspond to the client's investment objectives.

A more comprehensive questioning about the financial circumstances of retail clients would also be disproportionate in many cases. In practice, the aspect of diversification is already taken into account, especially in the case of an initial or individual financial investment, by recommending a broadly diversified investment (e.g. a broadly diversified fund) to the client.

Another case in practice where a portfolio assessment does not fit and would not create added value is investment advice to hedge specific transactions/contracts/investments by means of OTC derivatives. These are individual bilateral contracts that have a real economic background and, for example, hedge payment flows from projects or generally serve to control asset-liability management. These OTC derivatives are not held in a custody account and therefore cannot be compared using a classic asset class approach.

In addition, even large investment firms can only make a detailed assessment of the individual financial instrument for a limited product universe. With 2-2.5 million securities on the German market, a detailed analysis of each of these products is virtually impossible.

Irrespective of the willingness of clients to provide the required information, a mandatory requirement to take the client portfolio into account would make investment advice considerably more expensive. Because of the associated fixed costs, this would primarily affect retail clients with low incomes or assets. However, this would counteract the goal of the Capital Markets Union to promote investments by retail clients in the capital markets.

With regard to portfolio management, we would like to clarify that a portfolio assessment is limited to the assets that are the subject of the portfolio management mandate (= power of attorney) granted by the client. Any further obligation would lead to exceeding the power of attorney granted by the client, which is inadmissible.

In addition, the scope of the requirement at Level 1 remains open and is to be determined by the European Commission only at Level 2 (see the general empowerment to the European Commission in Art. 25 para 8 MiFID draft; in detail on this empowerment below under III.4.5.). The German Banking Industry Committee rejects this, in the present case, because different degrees are conceivable in a portfolio assessment - if reasonable and proportionate (see above). Consequently, the amount of the fixed costs for the investment firm and thus ultimately the costs for the clients depends on the concrete design and the scope of a portfolio assessment. For the impending negative consequences, especially for retail clients, see above.

The fact that there is no objective justification for this requirement is also shown by the following circumstance: this requirement should not apply to fee-based investment advice (see Art. 25 para. 2 subpara. 2 MiFID draft, also on the conditions for this exception). If, however, there is no need for a portfolio assessment for fee-based investment advice, then there is no objective reason to provide for it for commission-based investment advice (for more information on the unjustified preferential treatment of fee-based investment advice compared to commission-based investment advice, see III.2. above).

The German Banking Industry Committee is therefore strongly in favour of dispensing with an obligation to carry out a portfolio assessment. It would be conceivable to provide for portfolio assessment as a new ancillary service. If, contrary to our petition, the legislator wishes to retain a requirement for portfolio assessment, it should at least be made clear that cases to which this requirement does not apply or for which such a requirement would be disproportionate (see in detail above) are excluded. Equal treatment of fee-based investment advice and commission-based investment advice should be ensured in any case. (Consequential amendment: if the obligation to provide portfolio advice in Art. 25 para. 2 subpara. 1 MiFID draft is deleted, Art. 24 para. 4 lit. (a) (v) should also be deleted).

With regard to the further amendments to Art. 25 para. 2 subpara. 1 MiFID draft, the German Banking Industry Committee refers to the following explanations under III.4.2.

Relevant legislation:
Recital 34 RIS draft
Art. 24 para. 4 lit. (a) (v) and Art. 25 para. 2 subpara. 1 MiFID draft

4.2. Further new requirements regarding the collection of client information

According to the European Commission's proposal, the following new requirements regarding the collection of client information will result for investment advice and portfolio management - in addition to what has been said above under III.4.1.:

- For ability to bear losses: whether the client can bear full or partial losses.
- In addition to the investment objectives, the client must also be asked about his investment needs (see Art. 25 para. 2 subpara. 1 MiFID draft on both).

It is completely unclear what the European Commission's aim is with these two new requirements. Is an extension of the client’s questioning intended?

Investment firms should continue to have the option of focusing on the maximum risk with a view to the ability to bear losses. This is basically the total loss. Such an approach is taken to protect the clients, since neither the clients nor the investment firms can "foresee the future". Whether the risk of loss will materialise in whole or in part (however improbable it may be, e.g. in the case of bonds with a first-class credit rating) cannot be assessed by either party at the time of the advice. Consequently, both sides are "on the safe side" if they assume the maximum risk. For information: If, exceptionally, a higher risk than total loss is possible (in the case of financial instruments with margin calls), this higher risk is naturally taken as a basis for the ability to bear losses. In order to be able to continue to base the ability to bear losses on the maximum risk, the German Banking Industry Committee is in favour of waiving the planned amendment to the ability to bear losses in Art. 25 para 2 subpara. 1 MiFID draft.

It is unclear what is meant by "investment needs" in addition to "investment objectives". If a bridge is to be built here to the "wants and needs test" according to Art. 20 para. 1 IDD, there is no comparability. The client's wishes ("demands") and needs ("needs") are already ascertained before the actual advice on an insurance product. This serves the purpose of narrowing down the subjective wishes for a still undefined coverage with the objective needs and ultimately determining them in more detail. Only then does the actual advice of the insurance product take place. The query of wishes and needs according to Art. 20 IDD is therefore something completely different and cannot be transferred to the securities sector. Investment objectives already include the investment purpose, investment horizon (time horizon), preferences regarding risk taking, risk profile and sustainability preferences of the client (see Art. 54 para. 5 Delegated Regulation (EU) 2017/565). According to this, the clients are already to be questioned today (in addition to the questions on the financial circumstances including the ability to bear losses as well as the knowledge and experience). It is not apparent that further information from the clients could generally be required.

This would also lead to follow-up questions, because then the product governance requirements would also have to be adapted. However, since there has not been a uniform understanding of "needs" so far, it was decided in the course of defining the target market to combine "objectives and needs" into one target market characteristic. In addition, however, manufacturers and distributors have the option of specifying special "needs" in the target market (usually via free text fields) (e.g. sustainability in the past, now replaced by sustainability-related objectives). In this way, special client needs can already be adequately taken into account today. However, this can only be taken into account client-specifically and not standardised.

Another critical aspect is that the content of the requirement is again to be determined only at Level 2. This is also not linked to any specific conditions (see the empowerment to the European Commission to adopt Level 2 measures in Art. 25 para. 8 MiFID draft; details on this empowerment is provided below under III. 4.5.). The German Banking Industry Committee is therefore emphatically in favour of dispensing with the addition of "investment needs" in Art. 25 para. 2 subpara. 1 MiFID draft.

Relevant legislation:
Art. 25 para. 2 subpara. 1 MiFID draft

4.3. Obligation to provide the client with a report on the client information provided by the client

The German Banking Industry Committee is in favour of dispensing with the proposed obligation to provide the client with a report in a standardised format on the information provided by the client upon request, both in the case of investment advice and in the case of advice-free business with an appropriateness test. The German Banking Industry Committee does not see any need for such a requirement. Especially in the area of investment advice, the client already receives a suitability report which also contains detailed information on the client and explanations as to how the advice was tailored to the preferences, objectives and other characteristics of the retail client. To the extent that clients feel the need to obtain information on the details filed by the investment firms, they can ask their respective investment firm at any time. Furthermore, the new requirement leads to the fact that the additional effort involved would have to be financed by the client, which leads to the expectation of cost increases without this being offset by a client benefit.

The proposal is presumably based on the idea that the information provided by the client should be standardised and made transferable. Possibly, a specification in this respect should be made within the framework of the Open Finance Framework, which is what the German Banking Industry Committee concludes from paragraph 1, section Consistency with other Union policies, section 2 of the Explanatory Memorandum on the RIS draft as well as from passages in the European Commission's Impact Assessment on the RIS draft.

As an example, the German Banking Industry Committee refers to the presentation on page 7 of the European Commission's Impact Assessment:

> "This impact assessment also considers the interplay with other ongoing initiatives in the area of financial services. For example, the Open finance framework will aim to facilitate the access and re- use of customer data, with consent, across a range of financial services and enable data sharing and third party access for a wide range of financial sectors and products, in line with data protection and consumer protection rules. The Open finance initiative runs in parallel with the Retail investment strategy and coordination of the two will take place especially with regards to standardisation and/or portability of customer data." [Emphasis added by the German Banking Industry Committee].

Further notes can be found on pages 50, 211 and 220.

The German Banking Industry Committee strictly rejects both a standardisation and a transferability of client information for investment advice as well as for business without advice.

From the point of view of the German Banking Industry Committee, the appropriateness and suitability test are established processes that have proven themselves in practice. We are also not aware of any negative feedback or criticism from consumer advocates regarding the existing practice of obtaining client information. For this reason, the German Banking Industry Committee does not see any need for improvement.

A technical transferability of the client data, for which the German Banking Industry Committee does not see any need, would also require a Europe-wide standardisation of all questions and details of the client exploration. This would be extremely time-consuming and would probably even require a completely new survey of all existing clients.

Under no circumstances should adjustments be made in the MiFID in anticipation of expected requirements. It is to be feared that the requirements issued in two legislative procedures will not fit together and will cause problems in practice. This must be avoided at all costs by regulating the requirements that thematically fall under Open Finance uniformly in the requirements there.

Another critical aspect is that the content of the requirement is again to be determined only at Level 2 (see the empowerment to the European Commission to adopt Level 2 measures in Art. 25 para. 1 subpara. 6 MiFID draft). The essential elements of the new requirements must be determined by the democratically legitimised legislator at Level 1.

Relevant legislation:
Art. 25 para. 1 subparas. 3 to 6 MiFID draft

4.4. New requirement with regard to the time of provision of the suitability report

The new requirement of Art. 25 para. 6 subpara. 2 sentence 2 MiFID draft contains statements on the time of provision of the suitability report to retail clients.

Already today, there is a general requirement that the suitability report must be made available to retail clients before a transaction ("before the transaction is made"). With the new requirement, this requirement is to be concretised. However, the vague term "sufficiently in advance ..." is used. Furthermore, the new wording "except if otherwise instructed" is introduced. However, this also leaves open which requirements should apply to such an instruction.

In order to avoid supervisory risks as a result of this indeterminate requirements, investment firms would be forced to introduce a kind of "cool-off period". In concrete terms, this would mean that after investment advice clients could in principle only place their order after a certain cooling-off period. This in turn could lead to civil liability risks for investment firms, as clients could argue that they were only able to buy/sell the recommended financial instrument at a worse price as a result of this delay. The investment firms would therefore be exposed to the risk of corresponding claims for damages on the part of the clients.

In addition, this represents unequal treatment compared to the provision in Art. 25 para. 6 subpara. 3 MiFID, according to which in a distance selling situation (e.g. advice given by telephone) a subsequent provision of the suitability report (i.e. after conclusion of the transaction) is sufficient under certain conditions.

Indirectly, the new requirement will also lead to investment advice taking more time and thus investment advisors will ultimately be able to advise fewer clients. This also increases the costs of investment advice, which ultimately have to be borne by the client.

The German Banking Industry Committee is therefore in favour of abandoning the planned new requirement.

Relevant legislation:
Art. 25 para. 6 subpara. 2 MiFID draft

4.5. Commission's empowerment in Art. 25 para. 8 MiFID draft much too far-reaching

Already in the past, the empowerments to the European Commission to issue Level 2 requirements met with fundamental concerns due to their generality. In any case, the proposed addition to Art. 25 para. 8 MiFID draft, according to which the European Commission is empowered "to supplement this Directive", must be strictly rejected. This would grant the European Commission the power to issue new requirements beyond the stipulations of the European legislator at Level 1, i.e. to "take the place of the democratically legitimised Level 1 legislator". However, the stipulation of new requirements, which also include additions to Level 1, must remain reserved for the democratically legitimised Level 1 legislator. Consequently, the European Commission must remain bound by the requirements of Level 1, i.e. it may not go beyond Level 1 regarding the specifications it adopts at Level 2.

In addition, the German Banking Industry Committee again opposes the European Commission being empowered to specify the general clause in para. 1 at Level 2 (for more details on a corresponding empowerment in Art. 24 para. 13 lit. (d) MiFID draft see under III.1.4.).

The addition of "costs, risks, complexity, price" in Art. 25 para. 8 lit. (a) MiFID draft is too far-reaching. The point of lit. (a) is about which aspects are to be taken into account in each case with a view to specifications at Level 2. It is wrong to now have to consider the above-mentioned additional aspects for all requirements of Art. 25 MiFID (old or new (= MIFID draft)) when issuing Level 2 specifications, even if they are not relevant for these requirements. On the contrary, the German Banking Industry Committee sees the danger that at Level 2 more far-reaching requirements can be issued which have no basis in the requirements issued by the democratically legitimised Level 1 legislator. This addition should therefore be dispensed with.

Consequently, the German Banking Industry Committee is strongly in favour of dispensing with the additions made in Art. 25 para. 8 MiFID draft.

Relevant legislation:
Art. 25 para. 8 MiFID draft

IV. Appropriateness

1. Standardised warnings and standardised reporting on client information collected for the appropriateness test

The proposal is to be rejected with regard to standardised warnings to be developed by ESMA and the European Commission within the meaning of Art. 25 para. 1 subpara. 2 MiFIDdraft as well as a reporting on the client data collected for the purpose of appropriateness (Art. 25 para. 1 subpara. 3). Under the current regulatory requirements, clients already receive sufficient warnings if they do not provide any/insufficient information to an investment firm for the purpose of testing appropriateness or if a financial instrument is not appropriate for the client. A standardised format across Europe is also unlikely to meet the respective needs of clients and investment firms and is likely to lead to high IT implementation costs without corresponding benefits. It is also unclear how the standardised warnings were to be implemented across Europe (language differences). The German Banking Industry Committee is not aware of any abuses in current practice.

It also remains unclear what goal is to be achieved with standardised reporting on the information collected. Clients either already receive extensive information on the disclosures they have made or can request this from their investment firms. Since the collection of information is very individual to each investment firm and is tailored to the clientele, the type of financial instruments and the distribution channels, a standardised report would also mean a large implementation effort for all investment firms without increasing client protection.

Due to the already existing abundance of obligatory information, the proposal would lead to a further overtaxing or lack of understanding on the part of retail investors without bringing any recognisable benefit. The current overburdening of retail investors, which has already been scientifically proven in an impact study conducted by the Ruhr University in Bochum[5] , would be further exacerbated.

Relevant legislation:
Recital 35 RIS draft
Art. 25 para. 1 subparas. 2 and 3 MiFID draft

2. Scope of client information to be obtained and considered for the appropriateness assessment

The proposal to expand the scope of information about the client to be obtained and assessed for the appropriateness test to include the ability to bear full or partial losses and the risk tolerance is rejected by the German Banking Industry Committee.

The proposed extension of the client information required for the appropriateness test would not least require a significantly more in-depth and comprehensive recording of the personal circumstances of clients, which in the opinion of the German Banking Industry Committee is not in the interest of self-deciders.

As a result, even those clients who have sufficient knowledge/experience to assess the risks associated with the financial instruments would receive warnings because they are alleged to be inappropriate in terms of their risk nature according to the information previously provided by the client.

The extensions are not in the spirit of the client as a self-decider who has consciously decided against seeking advice and in favour of carrying out a transaction without advice. This client group has the primary interest that

[5] "MiFID II/MiFIR/PRIIPs Regulation Impact Study: Effectiveness and Efficiency of New Regulations in the Context of Investor and Consumer Protection A qualitative/empirical analysis ".

the transaction they want is carried out as quickly and unbureaucratically as possible. Self-deciders often want to take advantage of expected market movements at short notice. As a rule, they have informed themselves sufficiently about the product and the market situation before concluding the transaction. Any delay can lead to the price of a product changing to the investor's disadvantage.

The speed of order execution is therefore a decisive quality feature for self-deciders. On the other hand, the extensions would make the non-advised securities business fundamentally more complicated and time-consuming, which would be massively detrimental to the self-deciders, who already complain about the unnecessary effort caused by regulatory requirements. The proposal would amount to patronising clients who want to order independently and would blur the meaningful differentiation between investment advice and self-decision-making business, which has proven itself in practice.

The examination of the risk tolerance and the ability to bear losses have so far been core components of the suitability test in investment advice. If these examinations were also part of the appropriateness test, the advice-free business would become "investment advice light" through the back door. In the future, three of the six criteria of the suitability test would have to be checked when self-deciders place orders. This would unnecessarily raise the hurdles for investors to acquire financial instruments.

In addition, due to the expansion of the appropriateness test for financial instruments that have been offered without advice up to now, much more extensive data would now also have to be collected and checked and then matched with the client data. This applies in particular to the ability to bear losses, the further-reaching examination of which would require extensive additional information from clients on financial circumstances, which in turn would have to be technically stored and automatically processed. In addition to issues such as data protection, this can only be depicted in a very complex technical manner and the benefit for the client is questionable to the point of patronising.

The extensions would unnecessarily raise the hurdles for clients to acquire financial instruments without advice. The determination of an appropriate risk tolerance is one of the most complex processes of today's exploration in investment advice. This could also lead to a refusal of the client to provide information on this. Expected consequences could be the migration of clients to non-regulated or less regulated offers outside the EU, the use of execution-only business, the persistence of clients in offers of savings and deposit business or the turning away of retail investors from the capital market. This would be diametrically opposed to the goal of the retail investment strategy to improve access to the capital market for retail investors and investor protection.

Furthermore, the German Banking Industry Committee sees the danger that an isolated examination of the risk tolerance and the ability to bear losses in non-advisory services can lead to incorrect assessments and misjudgments to the detriment of the client. This is because the comprehensive view of the client, his individual financial situation and his situational needs, as collected in investment advice, is missing. Determining the risk tolerance without considering the holistic situation of the client and his interaction with the investment horizon and other investment goals of the client would miss the needs of the client.

The expansion would also increase the complexity of the IT systems and make the onboarding of new clients more complicated. For many investment firms, this would have negative consequences for their product or service offer. This is especially true if at the same time - as also proposed by the European Commission - inducements in non-advisory services should actually be prohibited. Thus, according to the European Commission's draft, on the one hand, inducements in non-advisory services are to be abolished and at the same time very expensive implementation measures are to be imposed on the providers.

In addition, the implementation of this proposal could lead to civil law implications in Germany. If the client gets the impression that there is a kind of "investment advice light", this may lead to the application of the case law on investor and object-specific advice, with not inconsiderable liability risks for the German banks and savings banks. This can lead to effects that run counter to the objectives of the Retail Investment Strategy. In this respect, there is a fear that certain products will no longer be accessible to retail investors who make their investment decision without advice. Banks and savings banks could, in order to avoid their liability risks, either not make certain products with a higher risk/reward profile available to clients at all due to the liability risk associated with the new requirement. Or this would only be possible at higher costs, which would be determined by the bank depending on the higher liability risks for the bank as a result of the new requirement.

The proposal should therefore not be implemented.

Relevant legislation:
Recital 35 RIS draft
Art. 25 para. 3 subpara. 1 MiFID draft

V. Product Governance

1. "Value for money“ processes

Within the framework of the legal requirements for product governance, the processes for product approval and ongoing product monitoring, among others, are to be considerably expanded in the future within the framework of a so-called "value for money" approach for many financial instruments, which would result in an enormous implementation effort due to the many new requirements. Furthermore, corresponding extensive reporting obligations are planned. The German Banking Industry Committee is very doubtful whether the effort of the investment firms to implement these new requirements is proportionate to the possible added value for the retail investor.

An essential element of this value for money concept is to be benchmarks, which are to be defined by ESMA through Level 2 or Level 3 measures. Manufacturers and distributors would then have to check their financial instruments and services (i.e. services such as order placement or investment advice, so-called distributor benchmarks) against the cost benchmarks created by ESMA. This approach does not appear to be expedient in terms of investor protection and disproportionate from various points of view. For example, the comprehensive MiFID II product governance regime already provides for product costs to be taken into account[6]. Through ex-ante cost information, clients are sufficiently informed about all costs to be able to compare different financial instruments. In investment advice, there is an obligation to take costs into account in the case of equivalent financial instruments as well as in the case of recommended switches by means of a cost-benefit analysis (see Art. 54 para. 11 Delegated Regulation 2017/565, Art. 25 para. 2 subpara. 4 MiFID draft). These regulations have proven themselves in practice. Violations of this obligation are not known and would have to be addressed by the national supervisory authorities vis-à-vis the investment firm concerned. In this respect, the proposed significant new requirements cannot be justified.

1.1. Entry into price regulation should be rejected

It must be taken into account that prices for goods and services are generally formed on the market. The proposals of the European Commission, on the other hand, bear the danger of entering into price regulation for financial instruments. It is to be feared that the benchmarks will act like price ceilings in practice. In a market economy, such price regulation should only take place in exceptional cases (e.g. in the case of market failure or monopolies). There is no reason for price regulation of financial instruments caused by legal requirements. A market failure with regard to cost efficiency is not recognisable. On the contrary, research by ESMA shows that, for example, the running costs for retail EU27 UCITS have fallen over the 5-year period between 2017 and 2021. The cost level for active and passive products has fallen continuously over the 10-year period in a comparison of the management styles active / passive (cf. ESMA, Report 2023, Costs and Performance, p. 5 and ESMA, Report 2023, Annex on Costs and Performance, p. 25, ASR-CP-S.63). Moreover, the distribution of securities has recently been "shaken up" by new providers such as "neo-brokers" with very low pricing models. Thus, there is no need for such a strong intervention in the market.

1.2. Danger of the "race to the bottom" / Imminent distortions of competition

The German Banking Industry Committee also sees the danger that the design of the benchmarks will lead to unjustified interventions in competition by not adequately reflecting certain business models and products in the benchmarks. It is to be feared that apples and oranges will be compared in the benchmarks. For example, products that contain more complex features are supposed to reduce risks or stabilise earnings. These products are generally more cost-intensive than products without risk management, although the additional costs are justified by a corresponding added value for investors. If products with and without risk management were

[6] Pursuant to Art 9 para. 12 DelRL (EU) 2017/ 593

assigned to the same product group, the products with risk management could possibly no longer be offered. This would run counter to the interests of investors.

The European Commission also seems to be aware of the danger of insufficient benchmarks, as it itself refers to the possibility of initial quality deficiencies in Recital 17 RIS draft:

> "In view of the extent of diversity of retail investment product offerings, the development of benchmarks by ESMA and EIOPA should be an evolutionary process, beginning with the investment products most commonly purchased by retail investors and progressively building on the experience gathered over time in order to broaden coverage and refine their quality". [Emphasis added by the German Banking Industry Committee].

The one-sided focus on costs can also lead to competition within the benchmarks to find the most cost-efficient products, leaving out quality features of the financial instrument that are irrelevant for the benchmark in question ("race to the bottom"). The one-sided focus on costs can thus lead to distortions of competition and prevent innovation in product development. In this respect, too, the German Banking Industry Committee considers the proposed benchmark approach to be misguided.

In this context, the German Banking Industry Committee would like to point out that the European Commission's proposal for price regulation and the creation of cost benchmarks is also viewed very critically in a study published on 27 June this year[7] which was commissioned by the ECON Committee of the European Parliament. The following passage on page 21 of the study supports the above-mentioned concerns of the German Banking Industry Committee:

> "Concerning the abovementioned proposals by the EC on inducements in the Omnibus Directive, there seems to be an intention to directly regulate mechanisms of price formation, with the view that "[s]ome retail investment products on the market still incorporate unjustifiably high costs and/or do not offer value to retail investors" ...
>
> However, such an approach may risk failing to address the actual problem faced by retail investors with respect to inducements, as we tried to illustrate above, as it places an excessive accent on costs. Instead of intervening directly in the market's pricing structure and recurring to notions such as "high costs" - which can be broad and variable, causing legal uncertainty and imprecisions - legislation should be focused on ensuring that retail investors properly understand the products and services that are being offered, allowing them to reasonably decide whether they should or should not take a certain investment decision. There is also the potential danger that the EC's approach leads to the market moving towards a common benchmark or standard, stifling financial innovation: benchmarking against a single parameter/test might lead to undue rigidities in the market.
>
> Ultimately, looking at costs per se is not sufficient: costs are strictly related to the nature, characteristics and risk/return profiles of the investments and, without more clarity on the classification and mapping of products (an issue that the EC's proposal does not take properly into account, save - probably - for "high-risk products"), these proposals do not seem to properly address the real issue. More on that below."

[7] Filippo Annunziata: "Retail Investment Strategy - How to boost retail investors' participation in financial markets".

1.3 Enormous effort with no added value

In addition, the proposed new requirements would increase the effort of the investment firms. The very extensive reporting obligations to the supervisory authorities, which are provided for in Art. 16-a para. 2 MiFID draft for manufacturers and Art. 16-a para. 6 MiFID draft for distributors, should also be emphasised. The requirements relate to the area of products offered in the investment advice services as well as in the non-advisory services.

In the German market alone, there is a seven-digit number of shares, bonds, certificates and funds plus a large number of exchange-traded options and futures. The estimate of a large German private bank is that at least 200,000 benchmarks would be needed for the German market alone. A less granular setting would not allow risk-appropriate valuations for investors. Moreover, these benchmarks would have to be updated regularly, for example daily, so that they reflect the daily market data necessary for investors. Especially in the case of leverage products, the risk changes with the market parameters and thus also the appropriate costs. A particular challenge would be the benchmark comparison during market distortions.

It is unclear what the reports of the manufacturers and distributors (Art. 16-a para. 6 MiFID draft) to the competent authority could look like. These would have to be highly complex. Reporting interfaces must be fully defined at least 24 months before the reporting obligation enters into force and must be available as a test version at least 12 months before entry into force. Not only ISIN and cost rate have to be delivered, but also the parameters relevant for classification. Without a final detailed technical concept, the investment firms cannot begin with the implementation. To illustrate the time required for implementation, it should be mentioned that a comparable project on the German market requires five years' lead time according to an expert estimate from among the member banks of the German Banking Industry Committee.

The comparison of the benchmarks with the individual products prior to the sale of a financial instrument, including individual case checks and documentation in the event of anomalies, would also be very time-consuming. Particularly for the non-advisory services, it is to be expected that individual distributors will significantly restrict the product range and thus ultimately competition would be impaired. Investors may face limited options as investment firms may only offer products from a few manufacturers. However, there is also a risk that investors may turn to unregulated or non-European markets.

Considering the significant quantity of products involved, the proposals appear quite challenging and not highly feasible in practice. A crucial requirement for conducting a cost comparison is to have a consistent and, most importantly, rational approach. Many years of experience with the PRIIPs Regulation have already shown that it is hardly possible to develop a cost methodology that does justice to all financial products and distribution channels. There are always distortions that falsely make certain products or distribution channels appear too expensive or too cheap.

Due to the large number of parties involved in the process and the enormous volume of data, the German Banking Industry Committee sees the danger of a complexity that is no longer practicable to handle and the resulting risks due to, for example, transmission and processing errors as well as time delays. For example, the handling of subsequent data corrections with regard to product approvals, recommendations and transactions that have already taken place would be open.

The German Banking Industry Committee has great doubts as to whether this amount of data could be managed in the creation of the benchmarks and whether it would lead to sufficiently precise results in the benchmarks. It is to be feared that an enormously high effort would be made on all sides, which would ultimately lead to no benefits for investors.

The creation and ongoing operation of these extensive processes would lead to considerable costs for setting up the corresponding systems as well as significant ongoing costs for the banks and savings banks. On the one hand, this is likely to lead to a further reduction in the product range. On the other hand, it is to be expected that the increased costs will be passed on to the investors and therefore counteract the objective of the Retail Investment Strategy to reduce costs for investors.

There would also have to be a harmonisation of the envisaged reporting obligations with those under the ESAP.

In addition, the German Banking Industry Committee points out that any "value formoney obligations", the introduction of which the German Banking Industry Committee rejects for the aforementioned reasons, should only be applicable to the investment firms once ESMA has already created and reported benchmarks that are comparable in form and content. An interim "value for money test" to be designed individually by the investment firms (before the benchmarks are developed) should be avoided at all costs, because this would not bring any client benefit and would even further complicate the product approval process.

Therefore, the German Banking Industry Committee rejects the European Commission's proposal, which means an entry into price regulation, as disproportionate. The German Banking Industry Committee does not consider this harsh intervention in the market to be necessary.

1.4. In the alternative: Content-related requirements by the Level 1 legislator

It is also very problematic that important cornerstones, in particular the creation of benchmarks, are to be "outsourced" to Level 2 without further specifications. The most concrete information on the content of the benchmarks can be found in Art. 16-a para. 9 sentence 1 MiFID draft, which states as follows:

> "...develop and make publicly available common benchmarks for financial instruments that present similar levels of performance, risk, strategy, objectives, or other characteristics, to help investment firms to perform the comparative assessment of the cost and performance of financial instruments, ...".

It is imperative that the essential elements of the new requirements be defined by the democratically legitimised legislator at Level 1. In the event that the proposed "value for money" approach should be pursued despite the concerns raised, it should be clarified at Level 1 that the benchmarks must also take into account relevant quality characteristics and must not be based solely on the cheapest offer (avoidance of the "race to the bottom").

Therefore, the Level 1 legislator should clarify in MiFID II that products with different quality characteristics (e.g. products with and without capital protection, products with different sustainability characteristics, products with active or passive fund management) may not be included in the same benchmark.

The same applies at the level of the services of the distributors (distributor benchmarks): Here, too, services with different quality characteristics (e.g. robo advice or advice by humans, comprehensive or very limited range of order or advisory channels, number of branches or advisors, etc.) should not be combined in a benchmark, as otherwise apples would be compared with oranges here, too.

Relevant legislation:
Recital 10 to 17 RIS draft
Art. 16-a MiFID draft

2. Exceptions to the requirements of product governance

With the MiFID quick fix, the legislator has, among other things, introduced a very positive exemption provision for bonds without another embedded derivative as a make-whole clause. From the point of view of the German Banking Industry Committee, the detailed MiFID review should now be used to extend the regulation to all simple bonds without an embedded derivative (so-called plain vanilla bonds such as fixed-interest or step-up bonds). The argument put forward by the legislator at the time that these are simple and easily understandable investment products for which no special precautions are required also applies to plain vanilla bonds without a make-whole clause. To determine these bonds, it makes sense to focus on all bonds that do not fall within the scope of the PRIIPs Regulation, thereby creating a synchronisation between MiFID II and the PRIIPs Regulation.

The German Banking Industry Committee also advocates that the scope of application of the product governance requirements should only be limited to investment products. The fact that the product governance requirements do not fit with regard to tailor made products such as OTC derivatives is very clearly shown by the proposed "value for money" requirements, as no benchmarks can be established for OTC contracts negotiated individually with the clients. It is imperative to provide for an exception here.

Relevant legislation:
Art. 1 No. (10) MiFID draft

3. Requirements with regard to the sales strategy of the concept developer

The amendments in Art. 24 para. 2 subpara. 1 lit. (b) MiFID draft are unnecessary in the view of the German Banking Industry Committee. According to the specifications, it would be necessary to consider what the marketing communication and marketing strategy should look like at a very early stage in the product conception. This is not necessary, as the general requirements on marketing documents, which are to be significantly expanded again according to the European Commission's draft, are sufficient.

The above-mentioned regulation should therefore be deleted from the specifications on the product governance process.

4. Editorial note

The designation of the article on exemptions from product governance requirements would also have to be changed to "Article 16b" if Art. 16a MiFID draft is retained.

Relevant legislation:
Recital 10 to 17 RIS draft
Art. 24 para. 2 subpara. 1 lit. (b) MiFID draft

VI. Client information

1. Basic evaluation

One of the goals of the Retail Investment Strategy is to simplify access to the capital market for retail investors and to promote investments by retail investors. The original central concern of the Retail Investment Strategy was to eliminate superfluous information and to reduce the "information overload", which has been massively lamented by clients and proven by studies.

For example, the "information overload" was identified by Prof. Dr Stephan Paul [8]

> "62.3% of the clients surveyed in the study stated that they were overwhelmed in view of the amount of information presented to them. 64.6% of the clients stated that they lose the overview more quickly in view of the flood of information and have to ask their advisor questions more often."

Similarly, a recent study commissioned by the ECON Committee of the European Parliament[9] , concludes on p. 30 that the current requirements lead to an information overload:

> "...excessive disclosure requirements and disclosure documents lead to choice and information overload for consumers ... Clients pay limited attention to the information disclosed, especially when they are complex. ... In most, if not all areas of financial legislation there is now an intricate web of disclosure rules, most of which need to be carefully reconsidered in terms of their effective utility, especially for retail investors. ... As summarised by the Report, an urgent need to decrease the quantity of disclosed information and to significantly enhance its quality and effectiveness has arisen. ..."

The Retail Investment Strategy was intended to simplify and streamline information[10] . However, the proposal blatantly fails to achieve these goals[11] . The European Commission proposes numerous new obligations, additional information and even more bureaucracy for investment firms and their clients. If the proposed requirements were to be enacted, the implementation effort for the investment firms would be very high, while at the same time the added value for the retail investors would at best be classified as low, if it existed at all. The securities business would become even more expensive for clients as a result of the requirements.

2. Marketing communications and marketing practices

2.1. Preliminary remark

With a comprehensive package of measures, the draft Retail Investment Strategy aims to facilitate access to relevant, comparable and easily understandable information on investment products to help retail investors make informed investment decisions. It also aims to address the risk of retail investors being unduly influenced by unrealistic marketing information via digital channels and misleading marketing practices. In particular, new safeguards are proposed for marketing communications via social media and other digital channels. Furthermore, the proposed provisions aim to counter the risk of unbalanced or misleading marketing communications that only emphasise the benefits. However, no new requirements are necessary in this respect, as Art. 24 para.

[8] Prof. Dr Stephan Paul (2019, Impact Study MiFID II/MiFIR and PRIIPs-Reg: Effectiveness and efficiency of the new regulations against the background of investor and consumer protection - A qualitative-empirical analysis).
[9] Filippo Annunziata: "Retail Investment Strategy How to boost retail investors' participation in financial markets".
[10] See the draft retail investor policy on p. 12 under "Detailed explanation of the specific provisions of the proposal": "Disclosure information: aiming to simplify and reduce the information presented to retail investors".
[11] The study of the ECON Committee mentioned in the text also comes to the conclusion that the Commission's proposals to modify the information obligations have not achieved the goal of simplifying the disclosure rules, p. 32: "...measures on this front are still modest and should definitely be much more ambitious. As discussed above, a coordinated review - and significant reduction - of disclosure obligations is, in this sense, highly encouraged. The lack of coordination as well as overlaps amongst EU legislative texts must also be addressed in a consistent way, to avoid information duplication and overburdening."

3 MiFID and Art. 44 Delegated Regulation (EU) 2017/565 currently already sufficiently and appropriately adress the risk of misleading marketing communications. For example, the information in marketing communications to retail and professional clients must already be accurate and must always give a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument.

2.2. New definitions

2.2.1 Definition of marketing communication

The definition of "marketing communication" in Art. 4 para. 1 No. (66) MiFID draft proposed in the Retail Investment Strategy is very broad. It is questionable what function the term ".... that entices investments ..." should have in addition to the already very comprehensive term "that directly or indirectly promotes" and whether this wording can be sufficiently specified at all. Another problem with this choice of wording is that no criterion is included as to whether the investment firm has deliberately designed its own actions to mislead the addressees. Above all, the inclusion of the term "indirectly promotes" imposes an obligation on the investment firm over which compliance it has no control, especially in the "social media" channel. For example, there is no differentiation with regard to the channel in which the marketing communication takes place. The wording focuses solely on whether others (who? anyone?) are in fact misled, which is not solely within the control of the investment firm and is also only recognisable in retrospect.

Also with regard to the wording in lit. (c) ("by any means"), it is questionable whether it can be sufficiently specified in view of the extensive, sanction-bound regulatory regime that is linked to it. The extensive canon of obligations could not be mastered with the almost boundless inclusion of materials. For example, with regard to the record-keeping obligations under Art.24c para. 7 MiFID draft, it would not be possible to determine with certainty which materials are to be included, and the records would generate a disproportionate flood of data.

For the above reasons, the wording should be urgently revised. In particular, it should be clarified that neutral information (service and product offer as well as neutral product information) is not covered by this. A good orientation for the revision of the definition is provided by the interpretation of the German competent authority, which has proven itself in the past. According to BT 3.1 MaComp[12]

> "A marketing communication is information intended to induce the addressees to acquire a financial instrument or commission an investment service (goal of sales promotion). Information that is merely used in an advisory situation does not necessarily have the goal of sales promotion. Neutral product information made available to meet obligations to provide advice appropriate to the investment and the client does not fall under the definition of marketing."

2.2.2 Definition of marketing practice

In addition to marketing communications, marketing practices are also regulated in the MiFID draft. The aforementioned concerns arise to an even greater extent in the definition of marketing practices in Art. 4 para. 1 No. (67) MiFID draft, which is so broad that de facto any conduct can be sanctioned without it being clear in advance which acts and omissions are covered. This risk arises in particular from the terms "indirectly" (lit. (a)), "accelerate or improve the reach and effectiveness of the marketing communications" (lit. (b)) and "promote in any way...". (lit. (c)). It is questionable whether this lack of boundaries is constitutional. The additional requirement, too, means not only a substantive but also a technical effort for investment firms, which is associated with currently unidentifiable costs.

[12] Circular 05/2018 (WA) – Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency – MaComp)

2.2.3 Definition of online interface

The term "online interface" is newly introduced in Art. 4 para. 1 No. (68) MiFID draft. Here, too, it should be noted that the term "online interface" is very broad. The extent to which the inclusion of these interfaces can serve the protection of the retail investor remains unclear at Level 1 and cannot be sufficiently assessed in the context of the legislative process due to a lack of knowledge of the concretising Level 2 provisions.

2.3. New requirements for marketing communications and marketing practices

The proposal for the retail investment strategy contains a number of new requirements for marketing communications and marketing practices to be regulated in a new Art. 24c MiFID draft. Considering the fact that the scope of application is almost infinite due to the definitions in Art. 4 para. 1 No. (66) to (68) MiFID draft and that the individual requirements do not contain any gradations regarding the scope of application, the requirements are very extensive and would hardly be stringently implementable in practice.

2.3.1. Requirement to disclose the investment firms responsible for content and distribution

The requirement in Art. 24c para. 1 MiFID draft that marketing communications disclose the investment firms responsible for their content and distribution leads to difficulties in particular in cases where the areas of responsibility diverge. Advertisements for financial instruments are in principle created by the product manufacturers/issuers, while the distributing investment firms are responsible for the distribution of the advertisements. The naming of both investment firms on the advertising can lead to a misleading understanding among retail investors. Moreover, this requirement cannot be implemented, especially in the case of internet advertising (reference to the manufacturer's website). The rule of Art. 44 of the Delegated Regulation (EU) 2017/565, which is already in force, should be retained, according to which only the investment firm producing the advertisement is to be indicated. If a third party creates advertising on behalf of the investment firm, this could be regulated to the effect that the ordering investment firm must be named. If - contrary to the recommendation of the German Banking Industry Committee - the drafted provision remains that both the investment firm responsible for the content and the investment firm responsible for the distribution are to be disclosed, this may only apply to marketing communications which are transferred unchanged by third parties and if the use by the third party has been initiated by the investment firm. The German Banking Industry Committee requests clarification to this effect.

2.3.2 Indication of characteristics and main risks

The fact that the requirements are very extensive and are likely to lead to considerable implementation difficulties in practice also applies in particular to the requirement in Art. 24c para. 2 subpara. 2 and 3 MiFID draft, according to which the essential characteristics of the financial instruments or the investment services and related ancillary services to which they refer shall be prominently and concisely presented in all marketing communications, including the key features of the financial instruments or services and the main risks associated with them. As there is no opening clause in this requirement and also any gradation according to the type or context of the marketing communications is missing, this requirement would have the consequence that all enumerated elements must always be included. In view of the very broad definition of ”marketing communication”, the compulsory contents lead to the fact that a lot of information has to be inflated and core messages that are interesting for the clients can get lost. Moreover, this would contradict the purpose of the proposal that the retail investor should overcome the inhibition threshold to invest in financial instruments by means of a short and comprehensible marketing communication.

This would run counter to the regulatory objective (reduction of the existing "*information overload*"). The purpose and benefit of the marketing communications for the client cannot be taken into account. Especially for professional clients and eligible counterparties (included in Art. 24c para. 2 subpara. 2 MiFID draft) this requirement is completely excessive, as these are client groups that have the relevant knowledge and are not in need of information in this respect. However, these requirements are also excessive for retail investors, especially in view of the fact that every product-specific advertisement for a PRIIP must contain a reference to the key information document in accordance with Art. 9 of the PRIIPs Regulation. In addition, Artt. 13 - 15 Delegated Regulation (EU 2019/979) contain further information requirements for advertising in relation to securities issues subject to prospectus requirements.

Depending on how the definition of marketing communication is interpreted, posters or other short documents or social media posts, for example, would always have to be provided with the comprehensive mandatory information. Banners on the internet, teasers and similar advertising formats would be almost impossible. Advertising formats would be almost impossible because there is simply no space for comprehensive product features.

However, in view of the many investor protection requirements already in place today, there is no danger of an ill-considered purchase, so that the planned extension of the information requirements is neither comprehensible nor necessary. The extent to which this would increase the attractiveness of investments in the capital market for retail investors is also not clear.

The protection of retail clients is already comprehensive and sufficiently developed. Within the scope of application of the PRIIPs Regulation, retail investors must be provided with a brief and easily understandable key information document on each financial instrument before the transaction is concluded. This clear information serves the purpose of concisely presenting to private investors at a glance the main opportunities and risks associated with the investment decision and enables the private investor to compare investment products and make an informed investment decision. In addition, there is currently, in principle, an obligation for marketing communications that the presentation of opportunities and risks must be balanced. This represents a proportional regulatory framework which, on the one hand, does justice to investor protection and, on the other hand, to the meaning and purpose of marketing as distinct from mandatory regulatory documentation. These existing requirements are also practicable and have proven their worth. There are no known cases of abuse that have arisen in compliance with these existing requirements. It would be unnecessary bureaucracy to have to additionally present the characteristics of the product in every type of advertising.

It should also be borne in mind that marketing by no means always refers to individual products. It is unclear how this requirement would be implemented, for example, in the case of advertising for product groups or image advertising.

It is also unclear which risks are to be classified as main risks and whether these would not always be the same for very many products anyway.

According to Art. 24c para. 8 lit. (a) MiFID draft, the essential characteristics of the financial instrument or service to be disclosed are only to be determined by a delegated act of the European Commission. This does not allow for a sufficient assessment of the proposed requirement within the framework of the legislative procedure; instead, the decisive questions are removed from the legislative process. In view of the extent of possible consequences, the constitutionality of such an approach would be questionable. It should remain with the proportionate requirements contained so far in Art. 44 Delegated Regulation (EU) 2017/565, which have proven to be practicable and have stood the test of time. According to this, the information has always to give a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument.

If, contrary to the recommendation of the German Banking Industry Committee to delete Art. 24c MiFID draft, this provision is retained in the draft, the requirements would at least have to be specified directly at Level 1 and not only at Level 2 for the reasons mentioned above.

2.3.3 Annual reports

Furthermore, according to Art. 24c para. 5 MiFID draft, Member States shall ensure, investment firms make annual reports to the firm’s management body on the use of marketing communications and strategies aimed at marketing practices, the compliance with relevant obligations on marketing communications and practices under this Directive and on any signalled irregularities and proposed solutions. The German Banking Industry Committee does not see any proportionality between the effort for the investment firm and the benefit for the private investors. Furthermore, the reports to the management bodies are overloaded if reports have to be made in such detail. A separate report is also not necessary, since anomalies in this area are in any case brought to the attention of the management body as part of the compliance report. The topic is therefore already sufficiently monitored by the existing structures. Abuses are not known. Therefore, there is no need for a new requirement.

2.3.4 Consistency with target market

According to Art. 24c para. 4 subpara. 1 sentence 2 and subpara. 2 MiFID draft, the distributor of a financial instrument shall ensure that a marketing communication of the manufacturer is used for the identified target market only and in line with the distribution strategy identified for the target market. More detailed specifications are to be laid down at Level 2 (Art. 24c para. 8 lit. (b) MiFID draft). However, a separate requirement to use advertising in line with the target market and the defined distribution strategy in the future is mere bureaucracy. From the requirement that advertising must be fair, clear and comprehensible, it already follows automatically that it must be written in such a way that it is generally comprehensible to all client categories in the target market. The German Banking Industry Committee therefore asks that the proposed requirement be deleted.

2.3.5 Obligation for governance arrangements and policy

Art. 9 para. 3 subpara. 1 and subpara. 2 lit. (d) MiFID draft provide for a new obligation to establish governance arrangements and a policy on marketing communications and practices. From the point of view of the German Banking Industry Committee, the cost-intensive preparation and maintenance for the investment firms does not bring any added value for the client.

2.3.6 New powers for national competent authorities in the event of non-compliance

Art. 5a MiFID draft and Art. 69 para. 2 lit. (ca) (ka) (v) MiFID draft provide for new competences for the competent national authorities in the event of non-compliance with the obligations. However, in the opinion of the German Banking Industry Committee, the existing powers, including the product intervention options, are sufficient.

Relevant legislation:
Recital 30 RIS draft
Recital 31 RIS draft
Recital 32 RIS draft
Art. 4 para. 1 No. (66), (67), (68) MiFID draft
Art. 9 para. 3 subpara. 2 lit. (d) MiFID draft
Art. 16 para. 3a MiFID draft
Art. 24c MiFID draft
Art. 5a MiFID draft and Art. 69 para. 2 lit. (ca), (ka) and (v) MiFID draft

3. Electronic form for information

Within 2 years after the entry into force of the Retail Investment Strategy, ESMA guidelines on the design of information in electronic form shall be developed in accordance with Art. 24 para. 5b sentence 1 subpara. 1.

The exact requirements are thus only to be specified downstream. As a result, the effects of the new requirements on clients and their financial investment firms cannot be fully assessed at present. At the same time, an important regulation for clients and investment firms is being removed from the decision-making process of the democratically legitimised legislator.

Furthermore, an appropriate implementation period for the investment firms is necessary after publication of the guidelines. From the point of view of the German Banking Industry Committee, a period of at least 24 months should be provided for this, which only begins to run after publication of the guidelines.

ESMA should also consult not only EIOPA but also market participants and conduct consumer testing before developing the standards. After all, the aim should be to develop a proposal that is geared to the needs of retail investors and is suitable for practical use.

Relevant legislation:
Art. 24 para. 5b MiFID draft

4. Other changes to the general MiFID requirements for client information

4.1. Prior to the provision of any service or the conclusion of any transaction (Art. 24 para. 4 sentence 1 MiFID draft)

Art. 24 para. 4 sentence 1 MiFID draft has been supplemented:

> "Appropriate information shall be provided in good time prior to the provision of any service or the conclusion of any transaction to clients or potential clients with regard to the investment firm and its services, the financial instruments and proposed investment strategies, execution venues and all costs and related charges. That information shall include the following ...".

However, the newly inserted wording is too broad and could give the impression that other banking transactions or other services are also covered beyond the investment services area, which cannot be the intention. In order to avoid uncertainties among legal practitioners, the common wording "investment services and ancillary services" in MiFID should be retained.

Relevant legislation:
Art. 24 para. 4 sentence 1 MiFID draft

4.2. Empowerment of the Member States with regard to the standardised format (Art. 24 para. 5 sentence 2 MiFID draft)

Art. 24 para. 5 sentence 2 MiFID draft contains the addition

> "Where this Directive does not require the use of a standardised format for the provision of that information, Member States may require that information to be provided in a standardised format."

However, such a requirement would lead to problems if advertising is to be used in several Member States and these have different format requirements. Currently, the passage reads:

> "Member States may allow the information to be provided in standardised format".

This is clearly preferable and it is not obvious why this should be changed.

Relevant legislation:
Art. 24 para. 5 sentence 2 MiFID draft

5. Risk warnings

5.1. Basic concerns

According to Art. 24 para. 5c MiFID draft and Art. 69 para. 2 lit. (w) MiFID draft, investment firms shall display appropriate warnings in information materials, including marketing communications, provided to retail clients or potential retail clients, to alert on the specific risks of potential losses carried by particularly risky financial instruments. ESMA shall thus develop guidelines on the concept of particularly risky financial instruments taking due account of the specificities of the different types of instruments. The powers of the supervisor shall also be expanded. The competent authority shall thus be empowered to to impose the use of risk warnings by investment firms in information materials, including marketing communications, related to particularly risky financial instruments where those instruments could pose a serious threat to investor protection. In case of concerns regarding the use, or absence of use or supervision of the use of such risk warnings in Member States, that may have a material impact on the investor protection, ESMA, after having consulted the competent authorities concerned, would be empowered to impose the use of risk warnings by investment firms.

Since there are no known abuses with regard to information materials on products, the extensive and invasive proposal is extremely surprising. The statements in Recital 36 RIS draft do not shed any light on which problem or malpractice is to be addressed by these new requirements. According to this recital, retail investors can be offered wide diversity of financial instruments, with each financial instrument entailing different levels of risks of potential losses. According to the European Commission, retail investors should therefore be able to easily identify particularly risky investment products. However, this is ensured by the already existing, very extensive information requirements, with which the investor is comprehensively informed about the existing risks of the products even in the context of non-advised services. Particularly worth mentioning are the key information documents for products that fall within the scope of the PRIIPs Regulation. This enables comparability and a simple overview. The key information document (PRIIPs KID) must also be made available in non-advised business. It is therefore not clear how misconceptions can arise for retail investors.

Furthermore, clients are currently already protected by Art. 25 para. 3 subpara. 2 MiFID according to which they receive a warning notice based on a mandatory appropriateness test if they do not have the necessary knowledge and experience to understand the risks associated with the financial instrument.

In particular, it remains completely unclear which products are to be regarded as particularly high-risk products. Likewise, it is not clear from the proposal which specific risks are meant in concrete terms. Since this is to be determined only at Level 2, the future scope of application of the requirement ultimately remains completely open. An assessment of the scope of the requirement and its effects is therefore only possible to a limited extent; the core of the requirement remains a "black box". The most important component, namely the question of which products the new requirement should apply to, remains excluded and is thus de facto withdrawn from the democratically legitimised will formation in the legislative process. At the same time, this lack of clarity could also have a counterproductive effect that new product types may not be offered in the market for retail investors due to an unclear regulatory classification, or it may be more difficult to classify risks in a legally secure manner.

A tightening of the information requirements, especially to this extent, would be disproportionate and would only lead to a high additional bureaucratic burden. Such over-regulation could ultimately even lead to less information being available to investors in the future than is the case today due to the associated burdens on investment firms, which would be diametrically opposed to the purposes of the Retail Investment Strategy. Moreover, a corresponding requirement does not exist for cryptocurrencies and savings deposits. This leads to a clear competitive disadvantage in the present case, which runs counter to the European Commission's goal of increasing the share of security holders.

In addition, it should be emphasised that the European Commission has already come to the conclusion within the framework of the draft law amending Regulation (EU) No. 1286/2014 that an additional benefit for clients is not recognisable through the tightening of information requirements. Consequently, it is planned that the warning in the PRIIPs KID is abolished for lack of effect.

The German Banking Industry Committee therefore recommends the deletion of Art. 24 para. 5c and Art. 69 para. 2 lit. (w) MiFID draft. Should a deletion not take place, particularly risky products can at best be those that lead to a margin call, which would have to be determined at Level 1.

5.2. Notes in detail

5.2.1. Scope of application "information materials"

Art. 24 para. 5c subpara. 1 MiFID draft introduces the term "information materials" as a point of reference for a new, special set of obligations, but does not define it in the draft for the retail investment strategy itself. It thus remains unclear what the legislator wants to include as "information materials" and to which materials the new obligations should apply. The addition of "including marketing communications", the definition of which according to Art. 4 para. 1 No. (66) MiFID draft is itself already very far-reaching,[13] makes the term seem almost boundless. This calls into question the appropriateness of the requirement in particular, as this would mean that a warning would have to be included in almost every document, without any possibility of weighing up the specific context.

Under no circumstances may legally required documents be covered, because this would otherwise lead to a multiplication of the always same risk notice. Otherwise this would mean that, for example, warnings would also have to be included in statutory cost information, insofar as these refer to and name the corresponding products. To include warnings in addition to the information already required would be absurd anyway and would only dilute the information.

Furthermore, it depends on the content of the information material. In this respect, Art. 44 para. 2 lit. (b) Delegated Regulation (EU) 2017/565 should be maintained, according to which relevant risks only have to be indicated if the information references potential benefits. This previous requirement is appropriate and has proven itself in practical application. There are no abuses in this respect. In the case of banner advertisements containing, for example, only the name and WKN of a product, a corresponding risk notice would be unnecessary.

5.2.2 Scope of application "particularly risky financial instruments"

According to Art. 24 para. 5c subpara. 2 MiFID draft within 18 months after the entry into force ESMA shall develop guidelines on the concept of particularly risky financial instruments taking due account of the specificities of the different types of instruments of the Retail Investment Strategy. Which products are to be considered as particularly risky products is thus currently completely unclear. As a result, the impact of the new requirements

[13] "... means any disclosure of information other than a disclosure required by Union or national law, or other than the financial education material referred to in Article 88b, or other than investment research that meet the conditions to be treated as such, that directly or indirectly promotes or entices investments in one or several financial instruments or categories of financial instruments or the use of investment or ancillary services provided by an investment firm that is made: ...", see also under VI.2.2.1.

on clients and their financial institutions cannot be fully assessed at present. At the same time, a decisive question is thus removed from the will-forming process of the democratically legitimised legislator.

The German Banking Industry Committee would like to point out that "particularly risky financial instruments" can in any case only be those products where losses in excess of the capital invested are possible. Should - contrary to the emphatic petition of the German Banking Industry Committee - the introduction of this provision be maintained, particularly risky products can at best be those that lead to a margin call, which would have to be determined at Level 1.

5.2.3 Format and content of the risk warning

The contents and format of the risk warnings also remain unclear in the draft, as this is also to be determined only at Level 2. According to Art. 24 para. 5c subpara. 3 MiFID draft, ESMA shall prepare draft regulatory technical standards for the European Commission on the details of the format and content of the risk warnings.

It is completely unclear whether the warning shall be limited to the statement that it is about a (currently undefined) "risky financial instrument" or whether the notice shall also extend to content-related additions from which it would be possible to identify what the risk would consist of. From the point of view of the German Banking Industry Committee, both aspects would be counterproductive for investor protection.

If the reference were to be limited to the fact that it is a "risky financial instrument", this would threaten to suggest that all those financial instruments that would not be categorised as "risky" are not exposed to the risk of a loss in value. However, as experience has shown, even simple deposit products, as well as debt securities that can be paid out at par, were and are exposed to the risk of the solvency of their debtor. This would dilute other risk warnings and reduce investor protection as a result.

If material explanations on the form of the risk would have to be made in the "information materials", there would be a risk that this would systematically lead to inconsistencies with other mandatory documents such as PRIIPs KIDs or prospectuses, which would be inadmissible pursuant to Art. 44 Delegated Regulation (EU) 2017/565. Furthermore, this leads to the expectation that redundancies will occur.

5.2.4 Implementation deadline and consultation

ESMA guidelines on the concept of particularly risky financial instruments shall be developed within 18 months after the RIS enters into force, according to Art. 24 para. 5c subpara. 2 MiFID draft. Furthermore, according to Art. 24 para. 5c subpara. 3 MiFID draft, ESMA shall develop draft regulatory technical standards on the details for the European Commission. The exact requirements are thus to be specified by the European Commission only downstream at Level 2 (Art. 24 para. 5c subpara. 4 MiFID draft). The investment firms need an appropriate implementation period of at least 24 months after publication of these guidelines and technical standards. The implementation period may only begin once the guidelines and technical standards have been published. Furthermore, the guidelines and technical standards should not be developed without consulting the market participants and especially the investment firms.

Relevant legislation:
Recital 36 RIS draft
Art. 24 para. 5c, Art. 69 para. 2 lit. (w) MiFID draft

VII. Information on costs, associated charges and third-party payments

1. Standardisation in the presentation of ex-ante cost information

With regard to the already existing and extensively regulated obligation to provide information on costs and third-party payments an additional standardisation in the presentation of ex-ante cost information is intended to be introduced by Art. 24b para. 2 MiFID draft.

1.1. Disproportionate measure without client benefit

Such standardisation does not appear to be expedient. An honest cost-benefit analysis is required in this respect. It is more than questionable whether standardisation is also associated with increased benefits for clients. Today, costs and benefits are already expressed both as a cash amount and as a percentage. Furthermore, both Annex II of Delegated Regulation (EU) 2017/565 and ESMA's Q&A contain a large number of specifications that already determine the structure and content of MiFID II cost information. In particular, third-party payments need to be disclosed separately. It is not comprehensible how further standardisation could create even better comprehensibility. The comparability sought by the European Commission is already ensured by the requirements of Art. 50 Delegated Regulation (EU) 2017/565 and Annex II (EU) 2017/565 as well as the specifications made by ESMA by means of its Q&A. A further increase in comparability is not possible against the background of the large number of different types of financial instruments, some of which differ fundamentally, and the different distribution channels. Rather, it is to be feared that additional requirements for the content and presentation of cost information will increase their complexity and impair comparability with other information materials that contain statements on costs, such as statutory sales documents of financial instruments.

It should be emphasised in this context that, based on client reactions to the member banks of the German Banking Industry Committee, they have no indications that the cost information currently used is not understood by investors or that additional information is requested or that better comparability of the information is desired. Undoubtedly, however, an adjustment of the requirements for ex-ante disclosure would lead to clients no longer receiving the familiar cost disclosure, but a different one, which may cause confusion among clients and reduce their trust in the relevant distributor. This is likely to apply in particular against the background that the current implementation can naturally take into account the individual distribution channels vis-à-vis the end client to be informed in the interest of the highest possible transparency in a more client-friendly way than any Europe-wide standardisation.

It is also undoubted that a revision of the currently used cost information sheets would produce an enormous implementation effort (especially very high IT costs). In view of this and the hardly expected benefit for the clients, format requirements and especially standardisation are not proportionate.

1.2. Excursus: Comment on Art. 24b para. 4 subpara. 5 MiFID draft (terminology for annual reporting)

According to Art. 24b para. 4 subpara. 5 sentence 2 MiFID draft, terminology and explanations from the standardisation requirements for ex-ante cost information shall also be applied to the annual ex-post reportings *("...shall be presented using the terminology and explanations as described under paragraph 2 of this Article*"). For ex-ante and ex-post cost information, however, practice has shown that as a rule different forms of presentation are necessary because the ex-ante cost information regularly refers to the use of a single service/product (most frequent case: a single securities order), whereas the annual ex-post information prepared retrospectively usually refers to a large number of services/products (most frequent case: for the client's entire securities account). This distinguishes the cost information from, for example, the PRIIPs KID, which is to be provided exclusively prior to acquisition, so that such difficulties cannot arise there.

It should therefore be clarified in Art. 24b para. 4 subpara. 5 sentence 2 MiFID draft that the terminology in the annual ex-post information may be supplemented to the extent necessary.

2. Expansion of cost information - increase in information overload

Under no circumstances should the European Commission's proposals in connection with new standardisation requirements pursuant to Art. 24b para. 2 MiFID draft lead to a further increase in the scope and complexity of cost information, which would result in client perception suffering. Contrary to the aim of the Retail Investment Strategy, the information overload would be further exacerbated.

A recent study commissioned by the ECON Committee of the European Parliament[14] also concludes on page 32 that the European Commission's proposals to modify the information requirements have not achieved the goal of simplifying the disclosure requirements:

> "Measures on this front are still modest and should definitively be much more ambitious. As discussed above, a coordinated review - and significant reduction - of disclosure obligations is, in this sense, highly encouraged. The lack of coordination as well as overlaps amongst EU legislative texts must also be addressed in a consistent way, to avoid information duplication and overburdening."

Clients are already criticising the considerable amount of mandatory information, which would be further increased by the proposed new requirements. In its final report to the European Commission, ESMA cited a study by BaFin on pages 6 and 7, according to which more than half of the consumers surveyed had not read the new ex-ante cost information at the time:[15]

> "The findings observed were that, though many investors were in favour of the new obligations, more than half of them admitted that they did not make use of the additional information."

The results of a client survey conducted as part of a scientific study by the Ruhr University Bochum in 2019 went in the same direction:[16] There, 77.3% of the clients stated that the more extensive information did not help them to better understand the content discussed. In fact, 62.3% of the clients surveyed felt overwhelmed by the amount of information presented.

This suggests that a reduction and concentration of information, but not an additional expansion, is sensible and necessary.

The European Commission, though, wants to further extend the information requirements currently considered too extensive by investors, whereby the details are still unclear. It is unclear, for example, with regard to Art. 24b para. 2 subpara. 1 lit. (b) MiFID draft, which requires Level 2 standardisations also with regard to *"related explanations"*, what is to be understood by this. If this means that explanations of the terminology used are to be included directly in the cost information sheets, this would make the cost information extremely bloated. In this case, it is to be feared in particular that the client's view of the costs shown as the actual subject of the information would be obscured if these were supplemented by comprehensive explanations or the clients would not read the "bloated" document in the first place (see the two studies mentioned above on this topic).

The wording "Explanations related to those costs, associated charges and third-party payments and their impact on the expected returns" in Art. 24b para. 2 subpara. 1 lit. (b) MiFID draft gives the impression that a large number of different items are to be listed and explained, whereby the exact requirements remain unclear.

[14] Filippo Annunziata: "Retail Investment Strategy How to boost retail investors' participation in financial markets".
[15] ESMA: Final Report On the European Commission mandate on certain aspects relating to retail investor protection (29 April 2022 | ESMA35-42-1227).
[16] Prof. Dr. Stephan Paul: Impact Study MiFID II/MiFIR and PRIIPs Regulation: Effectiveness and Efficiency of the New Regulations against the Background of Investor and Consumer Protection A Qualitative Empirical Analysis, p. 15.

As mentioned in the section before, already due to today's extensive requirements, a clearly understandable presentation of the costs must be made. The client can currently demand a more detailed breakdown of the costs upon request. To the knowledge of the German Banking Industry Committee, clients have so far only expressed such a request in very rare individual cases. This proves that the current information, especially its depth of presentation, is sufficient from the client's point of view. Therefore, the proven mechanism whereby the client can obtain further details on cost information upon request should be retained. In particular, it is not necessary to specify a more granular presentation of cost information via the diversions of standardisation requirements already related to the mandatory cost information sheet (problem of "information overload"). For clients, such a document would be more complex and difficult to understand than before, and the legislative goal would not only be missed, but also reversed. In a published study by the European Commission[17] it also became clear that clients are interested in the total costs and not in their breakdown (study p. 93):

> "As shown in the survey data and also acknowledged in stakeholder interviews, what consumers care about are the total product cost, not necessarily how this breaks down into different categories of costs. ..."

The current study commissioned by the ECON Committee of the European Parliament[18] also comes to this conclusion on p. 31:

> "Surveys demonstrate that investors are interested in the product's total cost, not necessarily how these are broken down into different cost categories".

This is also in line with the experience of the investment firms in daily practice.

Moreover, it is to be feared that such a standardisation would lead to a "levelling out" of business models and investment opportunities, which cannot be in the interest of clients and of European and national competition. Investment firms would have to adapt terminologies and, if necessary, cost models that have already been practiced on the market for a long time and are well known to their own clients. Such an intervention in contractual freedom and competition is not desirable. The fact that clients are already transferring their deposits between investment firms today also speaks for the fact that clients, even in view of different practices and cost models, are very well able to compare them and form an informed opinion. On the other hand, there are also a large number of clients who only have one securities account or one custodian and who therefore do not need or want any transferability and comparability of data. Standardisation is already not called for because the terms used are sufficiently clear and understandable for the client (cf. explanations above on the lack of corresponding complaints); rather, the change of the established terminology has the potential to cause confusion and lack of understanding on the part of the investor.

Above all, care should also be taken to ensure that no information is required that cannot be collected by the obligated parties or that cannot be presented. The implementation to date has already passed this practical challenge - which is significant against the background of the numerous different business models in the European Union.

[17] Disclosure, inducements, and suitability rules for retail investors study - Final report" published by the European Commission on 22 July 2022
[18] Filippo Annunziata: "Retail Investment Strategy How to boost retail investors' participation in financial markets".

3. Presentation of the effects of third-party payments related to the net return in the ex-ante cost information

Art. 24b para. 1 subpara. 4 MiFID draft contains the new requirement specifically for third-party payments: "shall disclose the cumulative impact of such third-party payments, including any recurring third-party payments, on the net return over the holding period".

The German Banking Industry Committee is strongly opposed to a requirement to perform the calculations on the impact of third-party payments in the cost information taking into account the (expected) net return.

According to Art. 50 para. 10 Delegated Regulation (EU) 2017/565, the impact of the total costs on the return must already be disclosed. Further requirements are neither necessary nor sensible. In this context, it should also be borne in mind that there is also no separate disclosure in the PRIIPs KIDs on the impact of the third-party payments on the return. In this respect, the proposed addition to the ex-ante cost information would create further information that clients will not find in the PRIIPs KIDs that they receive in parallel with the ex-ante cost information. This additional information thus runs counter to the intended harmonisation of the information according to MiFID II and PRIIPs Regulation, which also speaks against the introduction of the new information obligation.

As before, it should also continue to be permissible to work with "assumptions of zero return, stable pricing", i.e. that the presentation should be made as a zero return after costs (assuming a 0% gross return). The German Banking Industry Committee considers this to be the most sensible approach and this approach also corresponds to best practice in the German market. The proposal for a standardised presentation of ex-ante cost information published by the French competent authority AMF at the end of March 2023 also provides for operating with "assumptions of zero return, stable pricing", which the German Banking Industry Committee strongly supports.

The ex-ante cost information is usually prepared by the distributor. A disclosure requirement based on a net return would not be practical. Unlike, for example, the cost information in the PRIIPs KID to be prepared by the product manufacturer (which is based on the moderate scenario of the product simulated using historical data of the underlying), the costs of the distribution cannot be added up consistently without the distribution having to carry out a complex simulation each time ex-ante cost information is called up. The necessary infrastructure would still have to be created for such an extensive data transfer between manufacturers, data providers and distributors to take place smoothly. The sales department must be technically connected to this data and process the data with mathematically complex procedures in order to make the calculation result available to the client. For the client, this would have the disadvantage that the preparation of ex-ante cost information will take longer than before. However, lengthy processes are not in the interest of the investor, but are perceived as a nuisance and reduce the attractiveness of investments on the capital market.

Furthermore, the future performance of volatile financial instruments cannot be predicted. (cf. Recital 7 RIS draft "expected returns" - however, it can at best be a historically based probability distribution, which is based on past values and from which no reliable statement about the future can be derived). In this respect, the currently very precise cost information would be supplemented by an extremely uncertain additional indication, which - in comparison to the calculation based on a zero return - also has no added value for the investor, but may even lead to misunderstandings. It is to be feared that clients will primarily look at the projected return and lose sight of the valid cost information.

In this context, the immense problems with the performance scenarios in the PRIIPs KIDs should also be considered. Since the figures calculated there on the basis of the legal requirements have in part produced misleading scenarios, the European competent authorities have had to intervene and recommend that manufacturers add a warning notice to the KIDs:[19]

> "To add under the heading of "Performance scenarios" within the section "What are the risks and what could I get in return", an additional warning that:
>
> > Market developments in the future cannot be accurately predicted. The scenarios shown are only an indication of some of the possible outcomes based on recent returns. Actual returns could be lower.
>
> It is recommended to highlight this text, for example by using a bold format".

The immense problems in the PRIIPs KIDs, which have still not been solved (for example, the ESAs had recommended further adjustments to the legal requirements in their final report on the parallel PRIIPs review[20]), should under no circumstances be transferred to the MiFID cost information.

4. Disclosure of the calculation method

The following requirement has been added to Art. 24b para. 1 subpara. 5 MiFID draft:

> "Where the amount of any costs, associated charges or third-party payments cannot be ascertained prior to the provision of the relevant investment or ancillary service, the method of calculating the amount shall be clearly disclosed to the client in a manner that is comprehensible, accurate and understandable for an average retail client".

The requirement that the method of calculating the amount must be disclosed to the client where the amount cannot be ascertained prior to the provision of the relevant investment or ancillary service has so far only applied in relation to third-party payments (inducements), see Art. 24 para. 9 subpara. 2 MiFID. An extension of this requirement to all cost items within the cost information, as envisaged in the Retail Investment Strategy, should definitely be avoided, as this would inflate the cost information instead of streamlining it (further promoting information overload instead of relieving it).

For clients, such an extensive and complex presentation also becomes incomprehensible, so that clients de facto do not read the information.

The requirement also encounters massive implementation difficulties because the distributors are not familiar with the calculation methods for product costs. In the future, this data would have to be made available (centrally) by the product manufacturers in addition to the numerous cost data already supplied in a form that can be processed automatically by the distributors, which would be associated with a very cost-intensive organisational and IT effort.

The previous approach that reasonable estimations of the costs shall be made where actual costs are not available in advance (Art. 50 para. 8 Delegated Regulation (EU) 2017/565) has proven itself in practice. There are no known abuses or client disadvantages in this respect. Estimates are also more meaningful for the client than a calculation method. Ex-ante cost information can, by its very nature, only ever be a forecast for the future, so that specifying the calculation method would only create a false accuracy without any additional information value for the client. The actual values are communicated to the client in the annual ex-post cost information.

[19] ESAs: Final Report following joint consultation paper concerning amendments to the PRIIPs KID (JC 2019 6.2)
[20] ESAs: Call for advice on PRIIPs: ESA advice on the review of the PRIIPs Regulation (JC 2022 20) dated 29 April 2022, p. 73

5. Calculation up to the maturity date/holding period

The following new requirement was added in Art. 24b para. 1 subpara. 3 MiFID draft:

> "calculated up to the maturity date of the financial instrument or for financial instruments without a maturity date, the holding period recommended by the investment firm, or in the absence thereof, holding periods of 1, 3 and 5 years".

It should continue to be permissible for the costs incurred in the course of the holding period to be converted into p.a. figures. The German Banking Industry Committee urgently recommends a corresponding clarification in the legal text. This is already based on an appropriate assumption regarding the holding period, which either corresponds to the term of the product or the recommended holding period or (as in the case of shares, for example) another valid assumption. For the client, this has the advantage that, in the case of different holding periods of the products, he can place the p.a. figures next to each other and compare them very easily. If the new wording means that all costs within the total term must now be added up, this advantage for the client is lost. Instead of being simplified, the cost information will thus become more difficult for the client to compare. In addition, the costs only differ in the year of acquisition and sale, and in the years in between the costs are constant, so that a simulation of three different holding periods would hardly have any added value for the client.

Furthermore, the requirement that the costs for products without a maturity date or recommended holding period must be calculated for three different periods is particularly critical. This would affect shares, for example. To avoid unnecessary complexity that is confusing for the investor, only one holding period should be assumed. The cost representation in cash amounts and percentages otherwise becomes unnecessarily complex and confusing. It should remain with the current specification that in these cases a valid period (e.g. five years for shares) is sufficient.

6. Requirements in case of professional clients and eligible counterparties

6.1. Introduction

Very surprisingly, Art. 30 para. 1 MiFID draft contains a re-exception for eligible counterparties, which would reintroduce the cost transparency obligation in full, contrary to the legislative decision in the MiFID Quick Fix.

Moreover, with Art. 24b para. 1 subparas. 6 and 7 MiFID draft, some Level 2 provisions with regard to professional clients and eligible counterparties (Art. 50 para. 1 Delegated Regulation (EU) 2017/565), which are currently not applicable, would be integrated into MiFID (Level 1). The content of these provisions is the possibility to agree on facilitations for cost information with these clients.

With the so-called MiFID Quick Fix, however, the legislator had already severely restricted the applicability of the cost information requirements vis-à-vis professional clients (no cost information obligation in non-advised business, Art. 29a MiFID) and completely excluded them vis-à-vis eligible counterparties (Art. 30 para. 1 subpara. 1 MiFID). The newly inserted sub-paragraphs in Art. 24b para. 1 subparas. 6 and 7 MiFID draft would contradict this. Also, the re-exception contained in Art. 30 para. 1 MiFID draft to eligible counterparties would also contradict this. This cannot be politically intended, especially not in the context of an investment strategy for "retail clients".

The background for the MiFID Quick Fix facilitations was that professional clients and eligible counterparties generally do not need the mandatory cost information tailored to retail investors, but that such a requirement in the professional segment would regularly represent a bureaucratic obstacle to the fast and smooth execution of investment transactions on the capital market. In Recital 5 of the MiFID amending Directive (EU) 2021/338, the EU legislator has stated the following in excerpts:

> "... both provided confirmation that professional clients and eligible counterparties do not need standardised and mandatory cost information as they already receive the required information during the negotiation with their service provider. The information provided to professional clients and eligible counterparties is tailored to their needs and in many cases is far more accurate. Services provided to eligible counterparties and professional clients should therefore be exempt from the obligations to disclose costs and associated charges, except in the case of investment advice and portfolio management services, ..."

The German Banking Industry Committee cannot see any comprehensible reason for the insertions proposed with the draft for the Retail Investment Strategy with regard to professional clients and eligible counterparties. Such a change would rather contradict the objective of promoting investment in the capital market and would also counteract the will of the legislator in the recent revision of MiFID II by the MiFID Quick Fix.

6.2. Comment on Art. 24b para. 1 subparas. 6 and 7 MiFID draft

In order to exclude uncertainties and contradictions within MiFID, the new subparagraphs Art. 24b para. 1 subparas. 6 and 7 MiFID draft on professional clients and eligible counterparties should be urgently deleted for the reasons mentioned above.

6.3. Comment Art. 30 para. 1 MiFID draft

In Art. 30 para. 1 MiFID draft, the re-exception regarding the inapplicability of Art. 24b "with the exception of paragraph 1" must urgently be deleted for the reasons mentioned above.

In addition, a correction of the Level 2 provision Art. 50 para. 1 subpara. 2 and subpara. 3 Delegated Regulation (EU) 2017/565 is recommended, which has not yet been textually reworked in the wake of the MiFID Quick Fix.

7. Annual ex-post cost information

7.1. No multiplication of annual ex-post cost information

Art. 24b para. 4 MiFID draft introduces new requirements for annual ex-post cost information. The draft provides for different obligations for the investment firms depending on which service (safe custody service, distribution or both) they provide. In order not to increase the "information overload" for clients, it is essential to include a clarification that it is sufficient if the client receives the annual reporting with all required information from one of the obligated parties (e.g. the custodian). Under no circumstances should additional or multiple reporting be introduced.

7.2. Significant expansion of content - danger of information overload

In addition, the annual reporting is intended to be expanded to include aspects that have so far been covered neither in the annual reporting nor by other reporting obligations and are thus to be newly introduced according to the European Commission's proposal. These are the taxes and the net annual performance of each of the financial instruments included in this portfolio according to Art. 24b para. 4 subpara. 1 lit. (c) and (e) MiFID draft. With all additional information, there is again the problem that the already very extensive reports are further inflated by the additional information and there is the danger that the clients do not even read the reports that are too detailed (see already the references from the above-mentioned studies).

7.3. Abandonment of redundant quarterly reports, Art. 63 para. 1 Delegated Regulation (EU) 2017/565

Insofar as, contrary to the emphatic vote of the German Banking Industry Committee, the extension of the annual reports is retained, it should be made clear at Level 1 (e.g. in one of the recitals) that the largely redundant quarterly reports pursuant to Art. 63 para. 1 Delegated Regulation (EU) 2017/565, which also contain a list of the financial instruments held, the market value and other information, can be omitted due to the parallel extensions of the annual reports.

7.4. Exception for online access to the reports

Art. 24b para. 5 subpara. 1 MiFID draft provides for an exemption whereby annual reporting shall not be provided where the investment firm provides its retail clients with access to an online system, which qualifies as a durable medium, where up-to-date statements with the relevant disclosure per instrument as required under Art. 24b para. 4 MiFID draft can be easily accessed by the retail client and the firm has evidence that the client has accessed those statements at least once per year.

Such an exemption already exists today in the MiFID provisions on quarterly reportings (Art. 63 para. 2 subpara. 3 Delegated Regulation (EU) 2017/565) and has demonstrably not proven to be practical there. This is because visiting the online platform and calling up the documents is in the nature of things the sole responsibility of the client. It is therefore a "sham solution" that cannot be implemented by the investment firms and for this reason should not be taken up again with the Retail Investment Strategy.

8. Implementation deadlines

Sufficient implementation deadlines must be provided for any changes in transparency requirements on costs and inducements. In particular, the proposed deadlines for the standardisation of cost information are so short that they would not be feasible in practice. Art. 24b para. 2 subpara. 2 MiFID draft provides that ESMA shall have 18 months to develop a draft for the technical standards without at the same time providing for an implementation phase for the investment firms (adoption by the European Commission provided for in Art. 24b para. 2 subpara. 3 MiFID draft). After the publication of the standards by the European Commission, however, investment firms need an implementation period of at least 24 months in order to implement the standardisation requirements, which involve a high organisational and IT effort. The deadline for this may only begin after the publication of the standards.

9. Detailed notes

9.1. Comments on Art. 24b para. 1 subpara. 1 MiFID draft ("in the required format")

In Art. 24b para. 1 subpara. 1 MiFID draft, the words " in the required format" have been newly inserted. These words are superfluous and should be deleted as they would lead to uncertainty. It is unclear whether the words mean the electronic format (according to Art. 24 (5a) MiFID) or the new standardised presentation that is intended to be introduced by Art. 24b para. 2 MiFID draft and for which ESMA is still to develop the technical standards. Moreover, the words are dispensable, since it is regulated elsewhere in a bundled and unambiguous manner that the electronic form is considered the standard (cf. Art. 24 para. 5a MiFID, current version) and that a standardised presentation of costs is to be observed (cf. Art. 24 b para. 2 MiFID draft).

9.2. Comments on Art. 24b para. 1 subpara. 1 MiFID draft ("or transactions")

In Art. 24b para. 1 subpara. 1 MiFID draft the words "or transactions" have been newly inserted. So far, there is only a distinction between service costs and product costs (cf. Art. 24 para. 4 lit. (c) MiFID:

> "information relating to both investment and ancillary services, including the cost of advice, where relevant, the cost of the financial instrument recommended or marketed to the client and how the client may pay for it, also encompassing any third-party payments...")

These two categories are also sufficient and established in practice. Thus, all costs incurred are covered. It is unclear what meaning the additional wording "or transactions", which has now been added in the draft for the Retail Investment Strategy, is to have and which category, in addition to service and product costs, is to be newly covered by it. This ambiguity is likely to lead to uncertainty in practice. At the same time, there is no gap concerning transactions that could be closed by the addition. This is because all costs incurred in transactions are to be qualified either as service costs or as product costs. They are thus already fully covered by these two known categories and are thus reliably disclosed.

9.3. Comments on Art. 24b para. 1 subpara. 2 lit. (c) MiFID draft ("paid")

In Art. 24b para. 1 subpara. 2 lit. (c) the words:

> "any third-party payments paid or received by the firm in connection with the investment services provided to the client or potential client"

are newly inserted. With regard to the term "paid", it is unclear which case could be meant that could become relevant in the context of cost information. The insertion should therefore be reversed, as there is no need for regulation in this respect and the insertion would only lead to uncertainties in interpretation.

9.4. Comments on Art. 24b para. 2 subpara. 1 lit. (a) MiFID draft ("provision of any costs...")

Art. 24b para. 2 subpara. 1 lit. (a) MiFID draft reads: *"the relevant format for the provision of any costs, associated charges and third party payments..."*. This wording is unhappily shortened. What is meant is probably the provision of information (and not of the costs): "provision of information on any costs...". In order to avoid ambiguities in the application of the new regulations, this should be corrected.

Relevant legislation
Recital 7 RIS draft
Recital 27 RIS draft
Recital 28 RIS draft
Art. 24b MiFID draft

VIII. Client classification

The draft provides for facilitations for the upgrading to professional client (Annex II, Section II. 1 MiFID draft). The German Banking Industry Committee welcomes the initiative, as the current requirements (10 transactions of significant size per quarter; assets over EUR 500,000 and/or professional position in the financial sector, whereby at least two criteria must be met) are set very high.

According to the draft, at least two criteria must be fulfilled - as before - for a client to be upgraded to professional client.

1. Annex II Section II.1. first indent MiFID draft

The client has concluded an average of 10 transactions of significant size per quarter on the relevant market during the four preceding quarters (draft does not provide for any change in this respect).

The German Banking Industry Committee suggests modifying the requirements for this case group. For example, clients who have gained experience in a relevant market (e.g. shares, certificates or funds) over a period of five years and have conducted an average of at least 20 transactions in this market could be upgraded to professional clients for this market.

Rationale: Currently there is a problem of "volatility" (thresholds can change from year to year and have to be checked regularly by the investment firm). It is not understandable why a client who was classified as a professional client in one year due to meeting the thresholds should lose this status the next year. It often happens that clients complain when they lose the status of professional client again.

2. Annex II Section II.1. second indent MiFID draft

The German Banking Industry Committee welcomes in principle the proposed reduction of the threshold values for the required financial assets from currently over EUR 500,000 to only EUR 250,000 (average of the last three years). However, from a practical point of view, the German Banking Industry Committee considers the proposed period of time (average of the last three years) for the calculation of financial assets to be problematic for new clients. For clients who have not yet been clients for three full years, a reference date approach should be sufficient.

3. Annex II, Section II.1. third and fourth indent MiFID draft

The German Banking Industry Committee welcomes the new wording of the case group "experience in the financial sector" as well as the new introduction of the case group "proof of training".

4. Annex II Section II.1 new subparagraph 6 MiFID draft

The German Banking Industry Committee welcomes the facilitations for the upgrading of large companies provided for in the draft. Companies that meet two of the following three criteria should be able to be upgraded to professional client: Balance sheet total of EUR 10 million, turnover of EUR 20 million and/or own funds of EUR 1 million.

The German Banking Industry Committee understands the new provision in Annex II Section II.1 new subparagraph 6 MiFID draft to be an additional possibility for legal entities, but the previous criteria for the classification as a professional client upon application according to Annex II Section II. subpara. 5 MiFID can also be applied unchanged to legal persons. This should be clarified in the law.

In order to also give project companies (e.g. for solar/wind parks) the possibility of upgrading, the German Banking Industry Committee suggests including the investment volume (e.g. also 10 million) as an alternative to the balance sheet total of 10 million. This is because project companies always have an economic background with relatively high investment sums and a relatively long economic useful life. However, these are often freshly founded and therefore cannot fulfil the threshold values (e.g. because there is no balance sheet total yet). In this respect, this additional feature is required, especially since the corresponding transactions are usually carried out by a professional and experienced finance department.

Furthermore, according to the last sentence of the new subpara. 6, the investment firm shall assess that the legal representative of that legal entity or the person responsible for the investment transactions on behalf of that legal entity, understands the relevant transactions or services envisaged, is capable of making investment decisions in line with the legal entity's objectives, needs and financial capacity and is able to evaluate adequately the risks. In practice, companies will only grant power of attorney to persons who meet these criteria anyway. Beyond that, however, the German Banking Industry Committee does not see how the institution should be able to "assess" this and is therefore in favour of deleting this sentence.

In deviation from the current legal regulation of MiFID II, the German Banking Industry Committee also suggests replacing the term "large undertaking" with the term "legal entity". This would make it possible to classify certain cases from the application practice, e.g. larger associations under German law, appropriately under the appropriate conditions.

Relevant legislation:
Annex II, Section II. 1 MiFID draft

IX. Time constraints

The implementation period proposed by the European Commission is clearly too short for investment firms. It must be extended and may only begin once the measures have been published at Level 2 of the European legislative process. Because only then can the investment firms actually start with the concrete implementation of the regulatory requirements.

The European Commission's proposal also provides for it to review the effect of inducements on retail investors within three years. The German Banking Industry Committee rejects such a short-term review obligation, especially since the European Commission seems to be already fixed with regard to the outcome of the review. There is a danger that the extensive innovations are only an interim solution.

Relevant legislation:
Art. 6 RIS draft
Art. 24a para. 8 MiFID draft