

# Necessary amendments and revisions to investor protection provisions in MiFID and PRIIPS

## Position paper prepared by the German Ministry of Finance

### General remarks

Within the last years the EU has taken significant steps towards the development of the Capital Markets Union and future-proof financial markets in the Union. Further steps are to be taken within the next years to review whether the existing provisions have achieved their objectives or whether they impose requirements that are too far-reaching and therefore should be reduced. However, any review or change of existing provisions should not lead to a reduction of the existing level of investor protection.

Taking this into account, the German Ministry of Finance consulted the public (investment firms, investors and other market participants), one year after the application of MiFID/MiFIR, on its experiences with the new rules including investor protection provisions. The findings did not reveal the need for a comprehensive review of MiFID II/MiFIR (e.g. MiFID III) but do show a great deal of discontent with several requirements under the new regime and a desire for an early refit covering certain requirements.

In general, respondents to the public consultation strongly criticised the breadth of the MiFID/MiFIR provisions, the implementation costs, the short timeframe for implementation (especially for the level 2 provisions), and the insufficient coordination with other legislation (e.g. the PRIIPS). In the future, more attention should be given to ensuring the proportionality of provisions, along with sufficient dynamic implementation periods of at least 18 months following the publication of the relevant level 2 provisions.

Based on the consultation's findings, the German Ministry of Finance proposes a two-step approach:

1. Near-term correction of minor, mainly technical deficiencies within the coming months and
2. Subsequent work by the European Commission on more fundamental and contentious issues, if necessary on the basis of further in-depth analysis and studies.

### **Ad. 1. Areas where amendments of investor protection provisions of MiFID and the PRIIPS Regulation are needed in the near term**

#### **MiFID**

**Wholesale clients:** Currently, all information requirements on costs and charges also apply to professional clients and eligible counterparties. Fulfilling these requirements is burdensome for investment firms, while wholesale clients usually have different sources of information and the expertise to assess costs and charges without being dependent on information about every transaction. Therefore, in order to avoid unnecessary burdens to investment firms as well as to professional clients and eligible counterparties, the client information requirements of MiFID and the respective level 2 provisions should be limited by giving these clients the possibility to opt out.

- **Distance communication:** Under MiFID, clients must be informed about the costs and related charges of a financial instrument in good time before the provision of investment services in a durable medium. This rule also applies to clients using a means of distance communication (e.g. telephone orders), where a timely provision of ex-ante information in many cases might possibly not be provided due to practical reasons. To ensure that these clients can use a means of distance communication effectively, and to ensure the timely conclusion of transactions, particularly in fast markets, investment firms should be allowed to provide ex-ante cost information after the client is bound by an agreement under the same conditions set out in Article 25 (6) MiFID regarding the provision of a suitability statement.
- **Recording of telephone conversations:** The implementation of the recording requirement (Art. 16 (7) MiFID) causes high costs for investment firms, raises data privacy concerns for customers, and has the potential to impair the confidentiality of communication between investment firm and client. The German Ministry of Finance is therefore in favour of deleting the provision. At a minimum, clients should be allowed to waive the telephone recording requirement, under the condition that they are provided with information regarding the risks of not being able to use a telephone recording as proof in cases of dispute with an advisor.
- **Product governance** requirements for simple financial instruments: Simple financial instruments (e.g. plain vanilla bonds, shares) used for corporate financing do not change their structure or payment profile during their life cycle. In general, a periodic review of such instruments does not lead to additional benefits for clients and should therefore not be required. Among other things, this would facilitate corporate financing.

## **PRIIPS Regulation**

- **Scope of application:** Due to the Commission's current interpretation regarding the scope of PRIIPS a significant volume of plain vanilla bonds with make-whole clauses traded on German trading venues is not available to non-professional clients. Bonds should not become packaged products simply by adding a make-whole clause. Therefore, it should be specified that PRIIPS does not apply to plain vanilla corporate bonds, including bonds with a make-whole clause (e.g. bonds with the amount repayable directly linked to an interest rate index). Additionally, in our view, the trading of these products does not lead to significant investor protection issues.

## **Ad 2. Areas where amendments of investor protection provisions of MiFID and PRIIPS are needed in the medium-term**

### **MiFID**

- **Introduction of semi-professional clients:** MiFID does not differentiate between inexperienced retail clients, who need all of the information and protection provided for in MiFID, and experienced retail clients, who are very active in financial markets and therefore might not have the same need for information. It should be examined how such a semi-professional client could be defined properly and how information requirements could be limited in such a way that they apply only to inexperienced retail clients. In any case, it should be assessed whether the information requirements that apply to experienced retail

clients can be limited to certain types of information (e.g. standardised ex-ante cost information).

- **Research:** Our information shows that reactions are divided with regard to the impact of MiFID's new rules on research fees. Some market participants stated that these rules have had positive effects on research costs (especially for research relating to large companies), while others claimed that these rules have had negative effects on SME research. For this reason, a thorough review should be conducted on the impact that these rules have had on the costs and availability of research relating to small and medium-sized businesses. Any amendments to the legislation should ensure that incentives for providing an adequate amount of research on SMEs are set.
- **Product governance:** Responses from market participants point out several application issues regarding the product governance requirements (e.g. extent of product governance obligations for initial public offerings (IPOs); lack of clarification at level 1 and level 2 regarding market makers and execution-only cases). Some market participants even expressed doubt that these requirements are needed at all. A thorough analysis should be conducted to identify the extent to which the product governance provisions are achieving investor protection objectives and whether these provisions can be simplified or revoked, since adequate protection could possibly be achieved through other provisions, in particular the suitability test. In any case, further clarification regarding the application of these provisions is needed.
- **Extra-territorial scope of MiFID:** The extent to which MiFID requirements apply if a MiFID investment firm does business outside the EU appears to be rather unclear (e.g. do MiFID product governance provisions or information requirements apply if a MiFID firm deals with non-EU clients abroad?). Further clarification on the scope of MiFID in such cases at level 1 should be considered.
- **Portfolio management (reporting of losses):** The additional reporting obligations in Article 62 Regulation (EU) 2017/565 regarding portfolio management may lead to the frequent, abrupt and unnecessary restructuring of portfolios, together with subsequent losses for clients. These potential effects should be thoroughly analysed, and amendments should be made to avoid unintended consequences.

## **PRIIPS**

- **Harmonisation of MiFID and PRIIPS information requirements:** The MiFID and PRIIPS provisions on the information that must be provided to clients, particularly as regards costs should be harmonised to avoid a misleading duplication of information. Under the current provisions, the cost information for the same product may differ depending on whether MiFID or the PRIIPS KID is applied, due to different calculation methods.
- **Review and adaptation of methodology for performance scenarios:** For some products, the current provisions lead to misleading presentations of performance scenarios. PRIIPS manufacturers are forced to add written comments that the presentation should be disregarded. This situation is contrary to the Regulation's objective of ensuring that retail clients are properly informed about packaged investment products and its potential future performance.