Comments

on the proposal for a Regulation on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341

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The associations above are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks and the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group. Collectively, they represent more than 1,700 banks.

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I. General comments

The BdB, BVR and DSGV associations support the start made by the European Commission on promoting sustainable investment products. Sustainable investments are of growing importance on the German market, which is why the German banks and savings banks are addressing the issue in depth. The legislative initiative of the European Commission offers the opportunity to eliminate some of the barriers for issuers and distributors and in this way to broaden the dissemination of sustainable products. For this reason, we appreciate the opportunity to comment on this draft.

Before commenting on the proposed regulations, we should like to deal with a few general aspects:

1. Priority definition of sustainability

For market participants, the greatest problem at present for the design and/or the distribution of sustainable investments lies in the fact that there are no clear criteria for what is to be understood by a sustainable investment. The lack of clarity represents not insignificant risks for manufacturers and distributors when they launch sustainable products or sell them to their customers. For instance, the accusation can always be made that the product in question is not sustainable. Regardless of whether “self-labelling” is to become possible, this lack of clarity can lead to liability risks for both the issuer that declares or has even advertised that the product is sustainable and the distributor which, based on the issuer’s description, has sold it as a sustainable product. This problem is exacerbated against the background that sustainability is an unspecified generic term which is interpreted in a wide variety of ways

In the view of the BdB, BVR and DSGV associations, it is therefore essential that it is first clearly defined what a sustainable investment is and to establish clear criteria for this purpose. This would already promote the development and distribution of sustainable products. Only as a second step additional regulations should be imposed for manufacturers and distribution outlets on dealing with sustainable products, based on the previously established criteria.

In our view, it will inevitably lead to friction in the legal requirements if these aspects are dealt with in parallel. This is shown not least by the legislative procedures in the recent past. For example, the product costs in the information on costs under Article 50 of the MiFID II Delegated Regulation are calculated differently from the product costs shown in the key information document under the PRIIPs Regulation, which means that different product costs are communicated to the customer for the same product (in the key information document including allocations; in the information on costs under MiFID II without allocations; both legislative acts were adopted in parallel and entered into force at the beginning of January 2018).[1]

To avoid such frictions, the European legislator should proceed gradually and first establish criteria for sustainable investments which can then form the basis for more far-reaching measures. One approach could be to follow existing principles.

2. Priority use of existing enabling provisions

In addition, we should like to suggest that the possibilities existing in the current law of the European Union are first used before new measures are adopted. For example, providers of PRIIPs under Article 8(3)(c)(ii) of Regulation (EU) 1286/2014 must indicate whether the PRIIP targets specific environmental or social objectives. The European Commission is empowered in Article 8(4) of Regulation (EU) 1286/2014 to specify, by delegated act, details of the procedures used to establish whether a PRIIP targets specific environmental or social objectives. Although the Joint Committee of European Supervisory Authorities already presented the Commission with Joint Technical Advice for this

[1] ESMA: Questions and Answers on MiFID II and MiFIR investor protection topics, Q 7, ESMA 35-43-349, status: 25 May 2018.

delegated act at the end of July 2017,[2] the Commission has so far not published a draft. In this respect, we should like to urge that the European Commission first avails itself of the possibilities arising from the existing legal acts before taking new initiatives.

New measures should only be decided when it transpires after implementation of the existing possibilities that further regulation is needed.

3. Meaningful addition to existing regulations

In the third recital of the draft, the Commission rightly refers to the fact that diverging specifications on sustainable investments are impedimental to the success of these products. This is to be prevented by the European initiative, which is inherently to be welcomed.

However, in our view, the Commission draws the wrong conclusions from this. In our opinion, detrimental fragmentation of the regulatory provisions on sustainable investments can be avoided only if the existing European regulations are supplemented on an ad hoc basis. At several points in the draft, the Commission rightly points out that various extensive regulations already exist here which the addressees of the present draft have to observe. In our view, it is not logical to create a new, overarching law containing additional provisions for certain regulatory areas covered by the existing regulations. This will lead to a regulatory hotchpotch which is difficult for practitioners to grasp and manage. This cannot be politically intended.

It would be far more effective to supplement the existing regulations (for example in the context of the forthcoming reviews of MiFID II and PRIIPs) by any further specifications in relation to sustainable financial investments and products which are considered necessary. For the addressees of the regulations, this would above all have the advantage that they can use the existing implementing measures (e.g. IT-stored product identifiers) for the implementation of the new specifications too.

4. Criticism of the existing flood of information

The new regulations will generate comprehensive transparency requirements. In this connection, it should be borne in mind that the implementation of the new information requirements under MiFID II and the PRIIPs Regulation, which entered into force at the beginning of the year, led to considerable resentment among customers. Customers complained to a hitherto unknown extent about the flood of information and found the accompanying delays in the advisory processes and the execution of orders to be an impediment and paternalistic.

Since today many customers already feel themselves to be overwhelmed by the mass of information, consideration should be given as a matter of urgency to whether it is necessary to introduce new information requirements. In so far as a requirement for additional information is perceived, it is imperative to take into account the considerations of the European legislator in relation to the PRIIPs Regulation, which state that additional information must above all be short and concise, as otherwise it will not be used, especially by small-scale investors.[3] In addition, the information should demonstrate a high level of standardisation to ensure the comparability of the different products. In this respect, guidelines should already be drawn up at Level I to serve as specifications for implementation at Level II.

5. Excessively high regulatory requirements thwart the promotion of sustainable investments

Moreover, nothing in the present draft indicates that the European Commission is actively taking up the suggestion of the High-Level Expert Group in favour of greater regulatory proportionality. The mobilisation of more financial resources for a

[2] Joint Technical Advice on the procedures to establish whether a PRIIP targets specific environmental or social objectives pursuant to Art. 8 (4) of Regulation (EU) no 1286/2014 (JC 2017 43) dated 28 July 2017.
[3] As stated explicitly in recital (15) of the PRIIPs regulation.

sustainable economy is a prime objective of the European Commission's plan. In contrast, we are concerned that the proposed comprehensive, far-reaching transparency requirements have the opposite effect and will lead to a decline in the offer and distribution of sustainable products. Furthermore, it is to be feared that compliance with the stringent regulatory requirements, especially the various transparency requirements, will lead to significantly higher costs for sustainable investments. Currently no provision has yet been made for any compensation through other directional policy incentives to offset the potential resultant loss of attractiveness of these sustainable investments.

This having been said, we have the following comments on the individual regulations:

II. Concerning the proposals in detail

1. Article 1: Subject matter

As already explained under section I, the subject of the present draft relates to areas which are already governed by comprehensive regulations deriving from special laws. In order to avoid friction between the various regulations, it should be reconsidered whether the additional requirements would not be better addressed in the context of the existing European regulations, which should be supplemented accordingly. This would also allow the development of tailor-made measures, building on the existing regulations and also taking into account the particularities of individual products.

Especially regulations from the more recent past have shown that a uniform approach for different product groups leads to problematic results. For instance, the European supervisory authorities modified certain text components of the key information documents provided for by law in relation to OTC derivatives in Q&A. This modification took place before the PRIIPs Regulation entered into force, since the application of the legal requirements would have led to misleading representations.[4]

Such frictions can be avoided by supplementing the existing regulations and refraining from implementation in a separate Regulation covering a very wide variety of providers and products.

In addition, we also explained under section I that many customers complain about the flood of information. In this respect, it should be examined carefully whether further information is in fact necessary.

2. Article 2: Definitions

The problem already addressed on several occasions of regulating the additional requirements in a separate Regulation arises too in the proposed definitions in Article 2. In nearly all the definitions, reference is made to definitions in other regulations. This has the consequence that, considered in isolation, the draft Regulation is difficult to understand. This too, in our view, is an argument in favour of making "tailor-made" supplements to existing regulations.

In addition, the definitions are in some cases intrinsically implausible and in our opinion represent selective discrimination against certain providers and products. For instance, the limitation of the definition of "financial market participant" (Article 2(a)) only to specific groups of providers of possible sustainable investments is questionable, if subsequently newly defined transparency requirements were then to be applicable only to these, but not to other potential providers of sustainable investments which would not fall under the current definition of "financial market participant". Also the limitation of the definition of "financial product" in Article 2(j) to the products named there is incomprehensible. This would lead in particular to the taxonomy of the current EU draft Framework for sustainable investments not being applicable to all other conceivable financial products which could be considered as sustainable investments, as, in Article 2(c) of this Framework, reference is made to the definition of "financial products" in the current draft Regulation.

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[4] Questions and answers (Q&A) on the PRIIPs KID (Commission Delegated Regulation (EU) 2017/653), JC 2017 49 20 November 2017, https://esas-joint-committee.europa.eu.

Furthermore, Article 2(o) does not contain a fixed definition of sustainable investments, on which extensive regulations are proposed in the Regulation. In this respect, we should like to urge once again that first a concrete, binding definition and criteria are established, which an investment must meet to be considered as a sustainable investment. In our view, it is not logical to adopt in parallel obligations relating to the not yet clearly defined investments. There would be a risk of friction arising from the parallel adoption of the legal acts, as occurred recently, for example, in the case of MiFID II and PRIIPs. In addition, it should be borne in mind that downstream supervision of sustainable investments, for example by depositaries within the meaning of the UCITS Directive and AIFMD, is only possible at all through concrete and binding definitions.

In particular, we consider the inclusion of the criteria of social objectives and good governance, listed in Article 2(o)(ii) and (iii), to be inappropriate, as the definitions in the present draft Regulation should be the same as those used in the current EU draft Framework for sustainable investments. However, the above-mentioned further criteria of the present draft Regulation are not contained in the Framework taxonomy.

In addition, sustainability risks play an important role in the draft Regulation. For instance, under Article 3 of the draft, financial market participants must publish a policy on sustainability risks. However, the concept is not defined in Article 2, which leads to considerable legal uncertainty. Also the perspective of the sustainability risks is not clear, and hence for whom the risks arise, for the provider, for the investment, for achieving the associated objective of the promotion, etc.

3. Article 3: Transparency of the sustainability risk policies

In the absence of a clearly understandable definition of sustainability risks, the requirements laid down in Article 3 as a whole are not comprehensible. Such a regulation would breach the requirement of certainty and therefore would not be practicable. The addition of a definition for sustainability risks is therefore essential.

Furthermore, the proposed provision in Article 3 is also only couched in very general terms and it is essential to clarify it. The provisions do not stipulate the content of the policy called for. Also the direction of the policy is not described. Both these aspects must be specified.

Still further questions than in the proposed paragraph 1 provisions arise from the paragraph 2 provisions. For instance, investment firms providing advice are to publish a policy on the sustainability risks in their investment advice on their homepage. We do not see which sustainability risks should emanate from providing investment advice services. It is clear that an investment product recommended to a customer in the advice carries certain risks. These can also include sustainability risks. These risks are dealt with under paragraph 1. However, the investment advice service in itself does not give rise to any sustainability risks. In this respect, it is essential to delete the provisions in paragraph 2.

Finally, the requirement in Article 3 concerning the publication of the information referred to there appears questionable in principle. The addressees mentioned there would already be obliged to publish an annual sustainability report, in which the topics designated in Article 3 should already be contained or can be included. Imposing an additional publication obligation on the undertakings concerned – possibly with repeated information – on their website represents a disproportionate burden for them.

4. Article 4: Transparency of the integration of sustainability risks

The proposed provisions in Article 4 too show, in our view, that it would be more logical to supplement the legal acts referred to in Article 4(3) – where necessary – instead of creating a separate Regulation which supplements the provisions listed there. The adoption of a supplementary Regulation would result in the legal provisions becoming even more complex, since in addition to the respective legal acts, provisions from the current Regulation would also have to be taken into consideration. For example, Article 69 of Directive 2009/65/EC in conjunction with Annex 1, Schedule A, and Article 23(1) of Directive 2011/61/EU provide a comprehensive list of the individual topics to be explained in these

documents. It is incomprehensible why the content of these documents now has to be put into concrete terms through new legal acts.

The provision in paragraph 2 will be difficult to implement in practice. As explained above concerning Article 3(2), the sustainability risks in the investment advice depend on the risks of the product on which the advice is given. However, this product-related information should not be imposed on the advisory bodies as contemplated in Article 4(2), but rather on the manufacturers of the sustainable investment products.

Concerning the pre-contractual information, we assume that this can be made available in standardised form.

5. Article 5: Transparency of sustainable investments in pre-contractual disclosures

Article 5 contains quite extensive additional disclosure requirements. In view of the complaints often expressed by customers concerning what is found to be an increasing inundation with information and the associated increase in the complexity and time taken for an advisory process or the acquisition of a financial product with reference to the information flood arisen, it should be examined whether pre-contractual disclosure is really necessary on all aspects. This seems to us to be very doubtful.

In so far as information is still considered necessary at this point, a framework should already be stipulated at Level I of how this should appear. These questions should not be dealt with at Level II; rather, a framework should already be established in sufficiently concrete terms in the Level I text.

Furthermore, it remains unclear which indexes can be designated as a reference benchmark.

6. Article 6: Transparency of sustainable investments on websites

As explained, we already consider the information requirements under Article 5 to be very extensive, without providing any corresponding benefit. In this respect, it should under no circumstances be supplemented by further information to be published on the homepage, as provided for in Article 6.

We consider it to be out of touch with reality that investors search for more far-reaching, product-related information on the homepage of the financial market participant. In this respect, the additional information requirements, which are imposed on the financial market participants and are to be put into more concrete form by Level II provisions, are totally disproportionate to the potential benefit for the investor.

Finally, it remains unclear why the publication requirements for sustainable investments exceed the publication requirements for conventional financial investments and products. Such over-regulation is disproportionate in every respect and substantially jeopardises the achievement of the objectives pursued through this legislative initiative.

7. Article 7: Transparency of sustainable investments in periodical reports

The description of the reporting requirements in paragraph 1(a) is unclear. Definitions are needed of “sustainability-related impact” and “sustainability indicators”.

The provisions of paragraph 2 again illustrate that it would be more logical to supplement the eight legal acts mentioned there rather than regulating additional obligations outside the individual legal acts.

The asset manager does not necessarily have the relevant information on the financial product. The reference in paragraph 3 to the management report does not help, since this does not necessarily have to contain non-financial performance indicators (such as environmental and employer conditions). The obligation to include non-financial statements only affects large undertakings which are public-interest entities, according to Article 19a of Directive

2013/34/EU. In addition, it is not comprehensible why this simplification applies only to financial market participants and not also to investment firms, which may equally be subject to the above-mentioned requirement.

8. Article 8: Review of disclosures

The provision on the review of disclosures should be based on the corresponding provisions on the review of disclosures in the respective legal acts cited in the Regulation and not exceed or contradict them. In particular, the requirement of explaining any changes should be deleted. Such explanations on considerations of the past offer no added value for the investment decision of the investor and would only unnecessarily inflate the information and at the same time generate disproportionately large expenditure.

9. Article 9: Marketing communications

We do not see the need for the enabling provision to adopt a delegated act under paragraph 2. The provision in Article 9 states that no marketing communications may be adopted that contradict the information under the Regulation. Any stricter provisions of the cited regulations are also to take precedence.

To meet this requirement, which is contained correspondingly in other legal acts, there is no need for any further specifications by a Level II act. In this respect, paragraph 2 should be deleted, especially as it gives the impression that additional requirements are to be drawn up in respect of marketing communications for sustainable investments.

10. Article 11: Evaluation

According to Article 11, the Regulation is to be reviewed 60 months after its entry into force. We suggest that the date of the review should be made dependent on the date of application of the Regulation.

11. Article 12: Entry into force and application

Article 12 contains a provision on the time of application, which is primarily based on the publication of the Level I Regulation. Only some measures, which are to be regulated by Level II, are to apply after the publication of the Level II act. According to very recent experiences with the postponement of MiFID II and the PRIIPs Regulation at short notice, the Regulation should apply one year after publication of the Level II acts.

Since it transpired in the case of both MiFID II and PRIIPs that the originally devised timetables for the adoption of the Level II acts may be delayed (whether for reasons of internal coordination as in MiFID II or the rejection of the Commission draft by Parliament as in PRIIPs), it is essential for the applicability of the entire Regulation to be linked to the publication of the Level II act. Otherwise, it is to be feared that postponement of the applicability will again occur at short notice. In this respect, particular consideration must be given to the fact that postponement at short notice causes massive extra costs for the undertakings concerned (extension and restructuring of the current implementation projects). After the experiences with MiFID II and PRIIPs, this should be avoided at all costs.