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Status: Question Rejected

Additional Information

Level 1 Regulation
Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries

Level 2 Regulation
Regulation 2017/565 - MiFID II Delegated Regulation

Topic
Investment advice on an independent basis

Additional Legal Reference
article 2(1), under points (c) and (k) of Directive 2014/65/EU (MiFID II)

Subject Matter
Scope of the exemptions provided for in article 2(1), (c) and (k) of Directive 2014/65/EU (MiFID II)

Question

We would like to submit to you the two following questions regarding the ambit of the exemptions provided for in article 2(1), under points (c) and (k) of Directive 2014/65/EU (MiFID II).

• As regards art. 2(1)(c) of MiFID II, the provision states that :

“The Directive shall not apply to (…) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service”.

Article 4 of the Commission Delegated Regulation 2017/565 then states further that :

“(…) an investment service shall be deemed to be provided in an incidental manner in the course of a professional activity where the following conditions are satisfied:
(a) a close and factual connection exists between the professional activity and the provision of the investment service to the same client, such that the investment service can be regarded as accessory to the main professional activity ; (…)”.

Moreover, Recital 34 of this Delegated Regulation states that “the exemption should only apply if the investment service has an intrinsic connection to the main area of the professional activity and is subordinated thereto”.

Given the foregoing, assuming that conditions (b) and (c) from article 4 of the Delegated Regulation are met, should article 2(1)(c) of MiFID be construed as meaning that, in order to benefit from the exemption thereunder, it suffices that the provision of an investment service is complementary to the provision another service otherwise regulated, and do not need to be necessary to the provision of that other service?

• As regards art. 2(1)(k) of MiFID II, the provision states :

“The Directive shall not apply to (…) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated”.

Assuming that the investment advice is not specifically remunerated, should this article be construed as meaning that, in order to benefit from the exemption thereunder, it is necessary but sufficient that the investment advice is made in the context of the provision of another service (not covered by the Directive), irrespective of whether the investment advice is ancillary, incidental, complementary or even, factually or otherwise, connected to the other service, and irrespective of whether the activity is regulated?