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Your ref., Your message of Our ref., person in charge Extension Date

 BSBV 64/Horvath 3141 23rd Dec 2021

**Call for evidence On the European Commission mandate on certain aspects relating to retail investor protection**

The Division Bank and Insurance of the Austrian Federal Economic Chamber, as legal representative of the entire Austrian banking and insurance industry, appreciates the possibility to comment on the above cited Call for Evidence. We would like to note the following comments and remarks.

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| **­Q1:** *Please insert here any general observations or comments that you would like to make on this call for evidence, including any relevant information on you/your organisation and why the topics covered by this call for evidence are relevant for you/your organisation.*  |

The European Commission’s (EC) work on the Retail Investment Strategy (RIS) provides an excellent opportunity to learn lessons from the successes and failures of previous EU legislative initiatives. This would enable retail investors to take full advantage of capital markets, which in turn can help to underpin Europe’s economic recovery from COVID-19 and the transition to a sustainable economy. The timeline set by the EC for EIOPA and ESMA to deliver their technical advices on aspects of retail investor protection is too short and raises limitations; the same for the EC deadline for the European Supervisory Authorities’ (ESAs) technical advice on the review of investor disclosures aspects under the Packaged Retail and Insurance-based Products (PRIIPs) Regulation. In particular, the tight timeframe restricts the possibility to explore the issues set out in the different EC calls for advice. It also places constraints on the ESAs’ ability to perform adequate testing of any new proposal on all the products in scope as well as the necessary, extensive testing with consumers. It is therefore **vital for Europe’s insurers to take every opportunity available to contribute to the debate, and hopefully facilitate discussions between the different competent authorities a common understanding of the specific features of the insurance business and insurance products.**

With IBIPs accounting for almost 90% of the current PRIIPs market (around five trillion euro of assets under management in 2019), it is paramount that the future framework also respects the specific features of IBIPs and enables consumers to take better informed decisions. IBIPs are unique due to their long-term nature. Furthermore, in contrast to direct investments, IBIPs offer distinctive features in terms of biometric risk covers, guarantees or other capital protection mechanisms, payment flexibility, switching/shifting options, estate benefits etc. Such elements can be designed and structured in various ways, to offer a diversified choice to consumers and better adapt to their needs. These characteristics are key to consumers’ protection and purchasing decisions and should, therefore, be recognised by EU rules and properly represented in the disclosures made to consumers. At the same time, the co-existence of different products, services and providers is in the interest of consumers, as it allows them to choose the best solutions based on their needs and preferences.

When considering changes, regulators should look at where improvements can be made to the consumer experience. For example, **the Retail Investment Strategy could examine how to better explain the characteristics of different products**.For instance, the PRIIPs Key Information Document (KID) should prominently display at the top of the document and/or in the first layer, the existence or lack of insurance covers, guarantees or other capital protection mechanisms, and allow adequate space to explain the insurance benefits.

Furthermore, **the regulatory framework must be digital-friendly for all products and services**. The relevant regulation should be amended to be digital by default, with information provided on paper when requested by the consumer. It is also important to ensure that new entrants to the market, such as BigTech, are subject to the same regulatory and supervisory framework (ie “same activities, same risks, same rules”) to ensure a level playing field and to maintain a consistently high level of consumer protection.

**Moreover, action is needed to increase financial literacy across Europe.** Financial literacy is an essential skill that enables citizens to take charge of their personal finances and here the EC should play a greater role.

Finally, **any review should not be rushed**. Extensive technical and consumer testing and an adequate timeline for the consultation of stakeholders should be pre-requisites set in the legislative texts for any review. **To ensure the best outcomes for consumers, it is also key to allow sufficient time for the implementation of any new rules. Manufacturers need at least 12 months from the publication in the Official Journal of the European Union of all the measures at Level 1 and 2 to implement any required changes, given the significant compliance and operational effort required from the industry.** As they are instrumental to a proper implementation, any Level 3 measures also need to be available a year before the framework implementation deadline. As in the pan-European Personal Pension Product (PEPP) Regulation, **a dynamic deadline in the legislative texts would be a practical solution to ensure this timeline is respected and to avoid legal uncertainties in case of delays in the legislative process that are outside manufacturers’ remit.**

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| **Q5:** *What do you consider to be the vital information that a retail investor should receive before buying a financial instrument? Please provide details.* |

It is important to take into account that there are various types of investment products. Pre-contractual information should therefore strike the right balance between comprehensibility and comparability**.**

In the PRIIPs KID there is no space to properly explain elements of the product other than plain investment, for IBIPs for example. If there are no insurance covers or guarantees, the information is simply omitted. This does not help consumers to understand the specificities of insurance products or to properly assess costs and benefits.

As to the PRIIPs KID intermediate time periods: displaying costs and performance after one year and half of the recommended holding period (RHP) is not appropriate for IBIPs and does not help consumers to understand the long-term nature of IBIPs. A correct understanding of the recommended holding period is key to reap the full benefit from the investment cycle. From a purely technical perspective, information on intermediate time periods (eg one year, half RHP) for products with a RHP of 30 years would not be comparable with the corresponding figures of a product with a RHP of 15 years, as their overall structure and duration is different. As opposed to direct investments, insurance products have a contractually agreed duration. Cancellations are possible, but the product is not actually designed to be terminated prematurely.

As to costs, the Reduction in Yield (RiY) is a robust and accurate indicator. In the 2019 joint consultation paper concerning amendments to the PRIIPs KID, the ESAs noted that RiY figures could be used to comply with requirements in MiFID or the Insurance Distribution Directive (IDD).

While the current version of the RTS had a truly comparable representation of costs of all PRIIPs, as there was consistency of representations of total costs (table 1) and composition of costs (table 2) based on the RiY, the changes on costs introduced by the revised RTS represent a step backwards, making it impossible for consumers to compare costs, while there is no objective justification for such a differentiated approach.

More in general, any disclosure format should be user- and digital-friendly.

The excessive quantity of information also represents an obstacle that discourages consumers and distracts them from vital information. **We appreciate the intention of ESMA to consider not only the requirements of MiFID II itself, but also parallel legislation which provides regulation on similar issues**. Regarding consumer information, the development of new requirements without a proper consideration of the existing legislation has led to significant information overload to the detriment of consumers. One prominent example which is of relevance is the Directive on Distance Marketing of Consumer Financial Services (DMFSD), which is currently being reviewed. Care should be taken to ensure that overlaps and duplications are eliminated and that less relevant information requirements are reconsidered in order to reduce the overall amount of information to be provided to the customer.

**The RIS (Retail Investment Strategy) should therefore focus on better, not more, information for consumers**.

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| **Q13:** *Which technical solutions for digital disclosures (e.g., solutions outlined in paragraph 27 or additional techniques) can work best for consumers in a digital - and in particular smartphone - age? Please provide details on solutions adopted and explain how these have proven an effective way to provide information that is clear and not misleading.* |

**Pre-contractual documents should be available in electronic format by default, but on ‘paper upon request’**, except where the contract between the retail investor and the distributor took place via digital means, where the alternative option could be ‘printable upon request’. This would avoid creating obstacles to pure digital players, while still allowing retail investors to print a paper copy of the precontractual disclosures if they feel the need.

To avoid information overload, disclosures should be clear, meaningful and avoid inconsistencies, overlaps and duplications. The disclosures format must also be engaging and flexible to adapt to consumer preferences.

**The regulatory framework should be flexible enough to be future proof, technology neutral**: for example, not based on an A4 document, avoiding long columns/table structures to facilitate navigation on a smartphone or tablet.

The use of layering and cross-referencing through hyperlinks should also be promoted. By using layering and different (digital) means, information is easier to understand. A layered approach also puts consumers in control of the type and amount of information they wish to access.

Moreover, the use of icons and simple and direct language where possible from a legal point of view are encouraged.

**Q15:** *Should the relevant MIFID II requirements on information to clients be adapted in light of the increased use of digital disclosures? If so, please explain how and why.*

The recent “MiFID II Quick Fix” as part of the Capital Markets Recovery Package will facilitate digital communication between investment firms and their clients (digital as default option). Experience with MIFID Quick Fix should be awaited. At present, for example, priority is given to the implementation of digital communication as default. We are of the opinion, that national law and experience with the Quick Fix should be awaited before further regulation in this area.

**Q37:** *What are, in your opinion, the risks and benefits connected to the use of social media as part of the investment process and are there specific changes that should be introduced in the regulatory framework to address this new trend?*

The existing requirements for entities regulated under the scope of MiFID or regulated by NCAs allow for a sufficient basis for enforcement of rules on online advertising to protect against possible mis-selling of retail investment products. Nevertheless, rules for other information sources, which are not fully regulated under financial market laws, might be considered.

For example, other entities, stepping in the financial market as startups (so no classical financial institutions, but offering financial instruments on a licensed basis) should be stricter monitored, as many of them are not in the full scope of existing regulatory requirements (e.g. Fintechs offering crypto assets or trading apps).

Further it is important to mention, that misleading information via social media is definitely not initiated by financial institutions; in most cases it is initiated by exactly such firms, which are not under the scope of regulatory requirements (see Gamestopp). So, strengthening the MiFID II and MAR rules would not lead to better information for clients. It would be important to get a regulation for those Fintechs and startups which are not under the scope of MiFID II and MAR.

In our view, this is a question of creating a level playing field for different participants on the same market.

**Q42:** *Do you consider that the current regulatory framework concerning warnings provides adequate protection for retail investors? If not, please explain and please describe which changes to the current regulatory framework you would deem necessary and why?*

From our point of view, the current regulatory framework regarding appropriateness and execution only requirements is adequately designed to protect retail investors.

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| ***Q43****: Do you believe that consumers would benefit from the development of an ‘open finance’ approach similarly to what is happening for open banking and the provision of consumer credit, mortgages, etc? Please explain by providing concrete examples and outline especially what you believe are the benefits for retail investors.*  |

Open finance, if designed right, has the potential to positively impact both consumers and the industry. However, the definition of any potential framework is crucial and will play a key role in determining its overall impact. Further elaboration of the exact scope and objectives of any open finance framework is therefore necessary. *According to Article 20 GDPR data portability requires (i) that the processing of data is based on consent and that (ii) the processing is carried out by automated means. We consider that any open finance framework should not amend/undermine these conditions.*

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| **Q44: What are, in your opinion, the main risks that might originate from the development of open finance? What do you see as the main risks for retail investors? Please explain and please describe how these risks could be mitigated as part of the development of an open finance framework.**  |

The European financial sector is a comprehensively regulated and supervised sector with a sound conduct of business and prudential framework in place. However, while new technological opportunities and new customer behaviour enable new service concepts, new service providers (eg BigTech) have also entered the market.

A key challenge for the future will be to ensure a level playing field and fair competition between market players and business models. One of the risks associated with BigTech companies gaining substantial market share in financial services relates to competition issues and potential abuses of market power. BigTech companies may make use of their market power when entering into partnerships or commercial agreements with certain financial service providers or provide them with favourable conditions to the detriment of their competitors. This could result in restricting access to certain services by other financial service providers, or imposing unfair terms and conditions, such as requiring payments to be made only via the BigTech company’s own platform.

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| **Q45: Which client investor data could be shared in the context of the development of an open finance framework for investments (e.g., product information; client’s balance information; client’s investment history/transaction data; client’s appropriateness/suitability profile)?**  |

The focus should be on context-relevant customer data. Any open finance framework must be based on the principle that the personal data supplied by or on behalf of customers is owned and controlled by those customers. **Data should not be accessed without the explicit consent of the customer and there should be possibility for the data subject to withdraw consent and have their data erased.**

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| **Q46: What are the main barriers and operational challenges for the development of open finance (e.g., unwillingness of firms to share data for commercial reasons; legal barriers; technical/IT complexity; high costs for intermediaries; other)? Please explain.**  |

The industry would also refer to Recommendation 24 of the Commission’s Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), which proposes that the impact of existing activities’ restrictions for financial institutions’ non-core business should be reviewed to determine whether these restrictions remain proportionate. According to the ROFIEG, in this review particular regard should be paid to cross-sectoral considerations, in order to ensure a level playing field between different types of players in the financial sector, including BigTech.

In addition, data sharing should be carefully considered in the context of competition law and intellectual property law, which may constitute obstacles by impeding the contractual parties’ ability to exchange data. Data which constitutes trade secrets or business sensitive information should not be subject to any data sharing requirements.

In any potential open finance framework, it will also be important to develop standards to facilitate data sharing. The starting point for any data sharing should be market-led, based on a common taxonomy that is developed in close coordination with industry.

Standardisation of application programming interfaces (APIs) would be a prerequisite for the opening of data in order to facilitate data sharing. It is also important that data is retrievable in a structured format and allows for automated data feed and analysis. Data should therefore be made available in open, easily readable file formats (JSON, XML, CSV, txt). Both the format and interface chosen should consider the type of data that is being processed. Wherever possible, open finance should seek to build on existing standards and practices to accelerate the implementation process and reduce costs for industry.

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| **Q47: Do you see the need to foster data portability and the development of a portable digital identity? Please outline the main elements that a digital identity framework should be focusing on.** |

Digital identities play an essential role in digitalisation, especially in the completion of onboarding and business processes. It is crucial that the use of digital identities is based not only on secure and trustworthy identification procedures, but also enables user-friendliness. Therefore, the establishment of an open, non-discriminatory, and interoperable ecosystem is considered important. This ecosystem should not only allow innovative processes based on new technologies such as self-sovereign identity (SSI), but also already existing and established ones in a co-existing and equal manner. For this, it is also crucial to place the requirements and values of a digital identity and the identification process in the context of the respective process. In addition to these requirements, it is also crucial that the ecosystem is accessible to the public from a technical point of view. High technical obstacles shall be avoided.

It should also be noted that, according to Article 20 GDPR, data portability requires (i) that the processing of data is based on consent and that (ii) the processing is carried out by automated means. It is important that any open finance framework does not amend/undermine these conditions.

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| ***Q48: Do you consider that regulatory intervention is necessary and useful to help the development of open finance? Please outline any specific amendments to MiFID II or any other relevant legislation.***  |

We suggest a modernization of the prohibition of non-insurance business (Art. 18 Solvency II). See Q46.

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| **Q49: What do you consider as the key conditions that would allow open finance to develop in a way that delivers the best outcomes for both financial market participants and customers? Please explain.** |

Firstly, it will be **important to safeguard consumers’ ownership of their data and to ensure that data sharing is consent-based**. Consumers, as data subjects, should have absolute confidence in the security of their data and the right to determine to which services and under what conditions their personal data will be used.

The European financial sector is a comprehensively regulated and supervised sector with a sound conduct of business and prudential framework in place. As new market entrants appear, it will also be important to respect the principle of “**same activities, same risks, same rules”** between the different market players. Maintaining a true level playing field will be key to ensuring:

* Consumers enjoy the same level of protection regardless of which company they are dealing with.
* A fair allocation of costs among the parties to ensure a balanced approach to the funding and development of any new infrastructure.

Yours sincerely,

Dr. Franz Rudorfer

Managing Director

Division Bank and Insurance