



2020/0152(COD)

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DRAFT REPORT

on the proposal for a directive of the European Parliament and of the Council amending Directive 2014/65/EU as regards information requirements, product governance and position limits to help the recovery from the COVID-19 pandemic
(COM(2020)0280 – C9-0210(2020) – 2020/0152(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Markus Ferber

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the **■** symbol or ~~strikeout~~. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a directive of the European Parliament and of the Council amending Directive 2014/65/EU as regards information requirements, product governance and position limits to help the recovery from the COVID-19 pandemic (COM(2020)0280 – C9-0210(2020) – 2020/0152(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2020)0280),
 - having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0210(2020)),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs (A9-0000/2020),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a directive

Article 1 – paragraph 1 – point 1 – point b

Directive 2014/65/EU

Article 2 – paragraph 4

Text proposed by the Commission

Amendment

(b) paragraph 4 is *deleted*;

(b) paragraph 4 is *replaced by the following*:

“4. ESMA shall develop draft regulatory technical standards to provide

guidance regarding the qualitative criteria used to assess whether the exemptions specified in paragraph 1 apply.”

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2021.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.”

Or. en

Amendment 2

Proposal for a directive

Article 1 – paragraph 1 – point 2 – point b

Directive 2014/65/EU

Article 4 – point 1 – point 50a

Text proposed by the Commission

Amendment

(b) the following point (50a) is inserted:

deleted

“(50a) ‘corporate bonds with make-whole clauses’ means corporate bonds with a clause that obliges the issuer in case of early repayment to return to the investor the principal amount of the bond and the net present value of the coupons the investor would have received in case the bond had not been called;”;

Or. en

Amendment 3

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive 2014/65/EU

Article 16 – paragraph 3 – subparagraph 7a

Text proposed by the Commission

Amendment

(3) in Article 16(3) the following subparagraph is added:

deleted

“The requirements laid down in the second to fifth subparagraphs of this paragraph shall not apply to corporate bonds with make-whole clauses.”;

Or. en

Amendment 4

Proposal for a directive

Article 1 – paragraph 1 – point 3 a (new)

Directive 2014/65/EU

Article 16 a (new)

Text proposed by the Commission

Amendment

(3a) the following Article is inserted:

“Article 16a

Exemptions from product governance requirements

Investment firms are exempt from the product governance requirements set out in Articles 16 and 24 of this Directive, provided that the object of the investment service is one of the following:

(i) shares admitted to trading on a regulated market or on an equivalent third-country market or on an MTF, where those are shares in companies, and excluding shares in non-UCITS collective investment undertakings and shares that embed a derivative;

(ii) bonds or other forms of securitised debt admitted to trading on a regulated market or on an equivalent third country market or on an MTF, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved; or

(iii) shares or units in UCITS, excluding structured UCITS as referred to in the second subparagraph of Article 36(1) of Regulation (EU) No 583/2010.”;

Or. en

Amendment 5

Proposal for a directive

Article 1 – paragraph 1 – point 3 b (new)

Directive 2014/65/EU

Article 16 b (new)

Text proposed by the Commission

Amendment

(3b) the following Article is inserted:

“Article 16b

Research

1. By way of derogation from Article 13(1) to (8) of Commission Delegated Directive (EU) 2017/593, an investment firm providing portfolio management or other investment or ancillary services may choose not to comply with the requirements set down in those paragraphs regarding the provision of research by third parties to such investment firms in either of the following cases:

(a) the research is provided exclusively in relation to issuers which did not exceed a market capitalisation of EUR 10 billion during the period of 36 months preceding the provision of the research;

(b) the research is provided exclusively in relation to fixed income instruments.

2. By way of derogation from Article 13(9) of Commission Delegated Directive (EU) 2017/593, an investment firm that uses the option referred to in paragraph 10 of that Delegated Directive shall be authorised to pay for the provision of

execution services and the provision of research jointly, provided that all of the following conditions are met:

(a) before the execution or research services have been provided, an agreement has been entered into between the investment firm and the research provider, identifying which part of the joint payment is attributable to research;

(b) the investment firm informs its client about the joint payment;

(c) in the case of research as referred to in point (a) of Article 13(10) of Commission Delegated Directive (EU) 2017/593, the execution services for which the joint payment is made are provided exclusively in relation to issuers which did not exceed a market capitalisation of EUR 10 billion during the period of 36 months preceding the provision of the research.

Or. en

Amendment 6

Proposal for a directive

Article 1 – paragraph 1 – point 4 – point a

Directive 2014/65/EU

Article 24 – paragraph 2 – subparagraph 2a

Text proposed by the Commission

Amendment

(a) In paragraph 2, the following subparagraph is added:

deleted

“This paragraph shall not apply to corporate bonds with make-whole clauses.”;

Or. en

Amendment 7

Proposal for a directive

Article 1 – paragraph 1 – point 4 – point b

Directive 2014/65/EU

Article 24 – paragraph 4 – subparagraph 2a – introductory part

Text proposed by the Commission

“Where the agreement to buy or sell a financial instrument is concluded using means of distance communication, the investment firm may provide the information on costs and charges *in an electronic format* without undue delay after the conclusion of the transaction, provided that all of the following conditions are met:”

Amendment

“Where the agreement to buy or sell a financial instrument is concluded using means of distance communication, the investment firm may provide the information on costs and charges without undue delay after the conclusion of the transaction, provided that all of the following conditions are met:”

Or. en

Amendment 8

Proposal for a directive

Article 1 – paragraph 1 – point 5 a (new)

Directive 2014/65/EU

Article 25 – paragraph 6 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

(5a) in Article 25(6), the following subparagraph is added:

“This paragraph does not apply to obligations related to loss reporting thresholds as laid down in Article 25a of this Directive.”

Or. en

Amendment 9

Proposal for a directive

Article 1 – paragraph 1 – point 5 b (new)

Directive 2014/65/EU

Article 25 – paragraph 8 – introductory part

Present text

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to ensure that investment firms comply with the principles set out in paragraphs 2 to 6 of this Article when providing investment or ancillary services to their clients, including information to obtain when assessing the suitability or appropriateness of the services and financial instruments for their clients, criteria to assess non-complex financial instruments for the purposes of point (a)(vi) of paragraph 4 of this Article, the content and the format of records and agreements for the provision of services to clients and of periodic reports to clients on the services provided. Those delegated acts shall take into account:

Amendment

(5b) in Article 25(8), the introductory part is amended as follows:

“8. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to ensure that investment firms comply with the principles set out in paragraphs 2 to 6 of this Article when providing investment or ancillary services to their clients, including information to obtain when assessing the suitability or appropriateness of the services and financial instruments for their clients, criteria to assess non-complex financial instruments for the purposes of point (a)(vi) of paragraph 4 of this Article, the content and the format of records and agreements for the provision of services to clients and of periodic reports to clients on the services provided, **but excluding obligations related to loss reporting thresholds laid down in Article 25a**. Those delegated acts shall take into account.”

Or. en

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0065-20200326>)

Amendment 10

Proposal for a directive

Article 1 – paragraph 1 – point 5 c (new)

Directive 2014/65/EU

Article 25 a (new)

Text proposed by the Commission

Amendment

(5c) the following Article 25a is inserted:

“Article 25a

Loss reporting thresholds

1. *Investment firms providing the service of portfolio management shall inform the client where the overall value of the portfolio, as evaluated at the*

beginning of each reporting period, depreciates by 20 % and thereafter at multiples of 10 %, no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.

2. Investment firms that hold a retail client account that includes positions in leveraged financial instruments or contingent liability transactions shall inform the client, where the initial value of each instrument depreciates by 10 % and thereafter at multiples of 10 %. Reporting under this paragraph should be on an instrument-by-instrument basis, unless otherwise agreed with the client, and shall take place no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.”

Or. en

Amendment 11

Proposal for a directive

Article 1 – paragraph 1 – point 6 a (new)

Directive 2014/65/EU

Article 27 – paragraph 10 – subparagraph 3 a (new)

Text proposed by the Commission

Amendment

(6a) in Article 27(10), the following subparagraph is added:

“The regulatory standards referred to in this paragraph shall however not apply until ... [date of entry into force of this amending Directive + two years].”;

Or. en

Amendment 12

Proposal for a directive

Article 1 – paragraph 1 – point 7

Directive 2014/65/EU

Article 29a – paragraph 1

Text proposed by the Commission

(1) The requirements laid down in point (c) of Article 24(4), shall not apply to services provided to professional clients ***except for investment advice and portfolio management.***

Amendment

(1) The requirements laid down in point (c) of Article 24(4) shall not apply to services provided to professional clients.

Or. en

Amendment 13

Proposal for a directive

Article 1 – paragraph 1 – point 11 a (new)

Directive 2014/65/EU

Annex II – II.1. Identification criteria – subparagraph 5 – indent 1

Present text

— the client has carried out transactions, in significant size, on the relevant market at an average frequency of **10** per **quarter** over the previous four **quarters**,

Amendment

(11a) in Annex II, point II.1, fifth subparagraph, the first indent is amended as follows:

“— the client has carried out transactions, in significant size, on the relevant market at an average frequency of **15** per **year** over the previous four **years**, ”

Or. en

(<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0065-20200326>)

EXPLANATORY STATEMENT

Disclosure of costs and charges:

In its draft proposal, the COM exempts investment firms from providing the disclosure of costs and charges to professional clients and eligible counterparties for certain MiFID services other than investment advice and portfolio management.

Investment advice and portfolio management should also be excluded from cost and charges disclosure for professional clients, (with an opt-in clause) as those clients should be generally familiar with the cost structure of these services.

Technical note: the provision of investment advice and portfolio management is not applicable regarding eligible counterparties.

Changes reflected in AM 12.

Best-Execution Reports:

The COM proposal only suspends the application of RTS 27 (MiFID 27(3); reporting requirements for venues about best execution), but not RTS 28 (MiFID 27 (10); information requirements for investment firms to clients about best execution).

Given that the reporting obligation is most tricky for investment firms (and not for venues) the links between the two RTS and the questionable usefulness of the best execution reports for retail clients, suspending the application of both RTS 27 and 28 seems warranted.

Changes reflected in AM 11.

Product governance:

The Commission proposal exempts bonds with make whole-clauses from the product governance provisions.

The exemption from product governance requirements should be extended to other simple products such as other “plain vanilla bonds”, UCITS, and shares traded on regulated markets.

The respective COM proposal is deleted with AMs 2, 3, 6. A new article with the desired text is introduced with AM 4.

Ex-Post information about costs and charges:

The COM proposal introduces the possibility to receive information on costs and charges via electronic format after the transaction if the client consents.

Delete the limitation that the information must always be transmitted in “electronic format” to accommodate the needs of older/ less tech-savvy clients. This would also align well with the general newly introduced rule of electronic information with opt-out clauses (i.e. the new paragraph 5a introduced by the COM).

Changes reflected in AM 7.

Professional Investors:

The Commission has dropped the idea of introducing a new category of a semi-professional investor.

To compensate for that, one should modify the criterion of transaction numbers to 15 per year.

Changes reflected in AM 13.

Loss Reporting Threshold:

Currently, investment firms doing portfolio management are required to inform the client if the value of their portfolio drops by more than 10% (and every multiple of that).

Such a warning might encourage the client to restructure his portfolio and to panic-sell instruments at a loss, which might not be in his best long-term interest, particularly if it concerns a temporary correction.

Therefore, this threshold is increased to 20%, for non-leveraged products.

The respective provision has so far been in Delegated Regulation 2017/565 Article 62. Given the importance of this provision, it should be moved to the Level 1 text, i.e. MiFID II.

AM 8 clarifies that MiFID 25(6) shall no longer be the Level 1 anchor for a respective Level 2 text. AM 9 deletes the related empowerment from MiFID so that delegated regulation 2017/565 Article 62 will no longer be in force. With AM 10, the respective text is copied from the delegated regulation into MiFID, with the necessary change.

Research:

In its proposal to change Delegated Directive (EU) 2017/593 (consultation closed on 5 September 2020), the COM has proposed introducing a different treatment of SME Research.

This provision should be moved into the Level 1 text to make sure that this is an exemption mandated by the legislator and not the start to unravel the unbundling regime.

This would also give the legislator a better say in determining the type of financial instrument covered by an exception, as well as the conditions under which the exemption applies.

The thresholds should be significantly higher than suggested by the Commission in the amended delegated regulation. In order to capture both small and mid-caps and allow for the establishment of an ecosystem for such kind of research, the market cap threshold should be at EUR 10 billion (with a moving average over the past 36 months to avoid sudden cut-offs).

Changes reflected in AM 5.

Ancillary Activity Exemption:

The COM has proposed deleting quantitative criteria and making the ancillary test a qualitative test only, which might give NCAs a lot of leeway in determining who falls under the exemption.

To get a more harmonised European outcome, an ESMA RTS should be introduced which limits NCA flexibility to a certain degree by giving guidance in terms of qualitative criteria.
Changes reflected in AM 1.