

Deutscher Derivate Verband · Pariser Platz 3 · 10117 Berlin

Bundesministerium der Finanzen
Referat VII B 5
Herrn Udo Franke
Wilhelmstraße 97
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2. Dezember 2011

**Konsultation zu den am 20. Oktober 2011 veröffentlichten
Legislativvorschlägen der Europäischen Kommission im Zusammenhang
mit dem MiFID-Review**

**Geschäftszeichen: VII B 5 - WK 6210/07/0001
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Sehr geehrter Herr Franke,

wir danken Ihnen für die Zuleitung der Konsultation zur den Entwürfen der Überarbeitung der Richtlinie 2004/39/EG über Märkte für Finanzinstrumente („**MiFID II**“) und der Verordnung über Märkte für Finanzinstrumente und zur Änderung der Verordnung (EMIR) über OTC-Derivate, zentrale Gegenpartien und Transaktionsregister („**MiFIR**“) und die Gelegenheit zur Stellungnahme.

Wir stimmen grundsätzlich mit der Intention der EU-Kommission überein, künftig zusätzlich zur Richtlinie (MiFID II) das Mittel einer begleitenden Verordnung (MiFIR) zu nutzen. Wir haben jedoch schwerwiegende Bedenken mit Blick auf die geplanten **Regelungen zur Produktintervention** durch die ESMA und die nationalen Aufsichtsbehörden. Diese Regelungen sollten zur Schaffung von Rechtssicherheit in jedem Fall klarer gefasst werden.

Insbesondere sind wir der Ansicht, dass die Kriterien für ein **Verbot von Finanzinstrumenten** oder Handlungen im Zusammenhang mit Finanzdienstleistungen enger gefasst werden sollten. Wegen der möglichen weitreichenden Konsequenzen für die Emittenten von Finanzinstrumenten regen wir an, dass solche Maßnahmen lediglich im Falle eines Missstandes für den Anlegerschutz, der nicht auf andere Weise beseitigt werden kann, zulässig sein sollen. Im Hinblick auf Maßnahmen zum Schutze der Funktionsfähigkeit des Finanzmarkts sollten Interventionen lediglich dann erlaubt sein, wenn eine

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„ernsthafte Gefahr“ vorliegt und zu befürchten ist, dass die Gefahr nachhaltig und von gewisser Dauer ist. Die im Entwurf der MiFIR vorgesehenen Kriterien der „erheblichen Bedenken“ oder der einfachen „Gefahr“ sind aus unserer Sicht nicht ausreichend, um die Belange der Emittenten und übrigen Marktteilnehmer zu wahren. Im Übrigen sollten die Kriterien für eine Produktintervention der zuständigen nationalen Aufsichtsbehörden mit den Kriterien für eine Produktintervention der ESMA vereinheitlicht werden.

Die jeweilige Behörde sollte im Falle einer Produktintervention die davon betroffenen Produkte (i) so eng wie möglich auf bestimmte Einzelprodukte bzw., falls dies nicht möglich ist, auf bestimmte Produktmerkmale hin beschränken und (ii) so genau wie möglich bezeichnen bzw. beschreiben, um Unsicherheiten unter den Marktteilnehmern vorzubeugen.

Darüber hinaus regen wir an, dass eine Produktintervention zum Schutze der Anleger lediglich dann zulässig sein soll, wenn es sich um den Schutz privater Anleger handelt.

Die von uns vorgeschlagenen Änderungen sowie eine ausführliche Begründung dazu in englischer Sprache finden Sie in der Anlage zu diesem Schreiben.

Wir wären Ihnen dankbar, wenn Sie unsere Anmerkungen berücksichtigen würden, und stehen für Rückfragen gern zur Verfügung.

Mit freundlichen Grüßen



Dr. Hartmut Knüppel
Geschäftsführender Vorstand



Christian Vollmuth
Chefsyndikus

ANLAGE

I. Article 32 MiFIR – Product intervention by competent authorities

a. Article 32 paragraph 1 MiFIR together with Article 32 paragraph 4 MiFIR

“Article 32 – Product intervention by competent authorities

1. A competent authority may prohibit or restrict in or from that Member State:
(a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or
(b) a type of financial activity or practice.

[...]

4. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 1 are met. The notice shall contain a detailed description of the relevant financial instruments or financial activity or practice. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice.”

Reasons:

This provision in its current draft version is very broad and not very tangible. There is no clarity about how the terms "certain financial instruments" or "financial instruments with certain features" and "type of financial activity or practice" should be delineated. We appreciate the fact that, due to the many conceivable factual situations, the national competent authorities must have a broad leeway in order to make sure that action is possible in every conceivable situation which poses a threat. However, this involves great uncertainties for the participants in the market. A prohibition or restriction must be drafted in such a manner that it is possible to clearly determine which financial instruments are affected. Therefore, we suggest imposing on the national authorities the additional obligation to specify as exactly as possible the financial instruments and financial activities which are affected by a prohibition or a restriction in order to provide legal certainty both to the providers of financial services as well as to customers and other participants in the market. With respect to financial instruments, either the specific product (e.g. by its ISIN) or, where not possible, the determining features of the financial instrument must be clearly specified.

b. Article 32 paragraph 2 MiFIR

“Article 32

[...]

2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that:

(a) a financial instrument or activity or practice causes permanent and sustainable damage to ~~gives rise to a threat to significant investor protection concerns~~ for retail investors, which cannot be avoided in any other way, or poses a serious, sustainable and permanent threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system;

(b) existing regulatory requirements under Union legislation applicable to the financial instrument or activity or practice do not sufficiently address the risks referred to in paragraph (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements by way of a measure of the competent authority pursuant to Article 72 MiFID II;

(c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument or activity;

[...].“

Reasons:

(i) The criteria which must be fulfilled under Article 32 paragraph 2 lit. (a) through (c) in order to justify an intervention by the national authorities are stated very generally and, in our view, are not sufficiently strict. Especially with regard to the great range of potential consequences which such a measure can have for the issuer or other party offering a product, the criteria for intervention must represent a high hurdle.

(ii) A product intervention can involve great harm in the form of harm to the reputation. Of course, we welcome the possibility for national competent authorities to effectively combat excesses in the capital market. Shady offers and market participants must be sanctioned and hindered in order to protect the capital market and the investors and, thus, the entire industry. However, consideration must be given to the fact that a product intervention does not always have an impact only on the black sheep in the market but instead can also cause harm to honest participants. For example, this could be the case if a market participant is active in a permissible manner in a market which is improperly used by others. A prohibition of (or because of) certain activities

or products in such market could affect all participants in such market, even if they have acted permissibly and fairly. If the affected market is a relatively small market, it is quite possible that all participants active in that market are known and would suffer harm to their reputation as a result of the prohibition. Finally, product interventions under the proposed rules are most likely to be applied, where the affected participants in the market are by no means in conflict with applicable national law (because otherwise measures of the relevant national authorities for breach of national laws could and probably would have been taken).

(iii) Therefore, we especially have reservations about the criterion of "significant investor protection concerns". The criterion of investor protection was often used in the past to justify various tightening of regulations in the capital markets. A large portion of these measures was certainly justified. The investors must, of course, also be protected against dishonest suppliers and shady products, and there must be assurance that the investors are reasonably informed about the risks involved with the products. However, if this is assured, it should not be forgotten that the investor also has his own responsibility when purchasing a product.

(iv) The nature of the measures and their potential effects on market participants who are by no means in violation of applicable law with their behaviour (outside of the provisions in Article 32 paragraph 1 MiFIR in conjunction with Article 32 paragraph 4 MiFIR) are drastic; further the measures set forth in Article 32 MiFIR are to be considered as measures of a superior authority, as it is implied by its paragraph 2 (b) MiFIR; accordingly, an intervention should only be justified if either (a) a sustainable and permanent damage to investor protection for retail investors occurs, which cannot be avoided by any other means, or (b) there is a serious, sustainable and permanent threat to the orderly functioning or integrity of the financial markets.

(vi) The principle of proportionality of the measures under Article 32 MiFIR is clearly expressed in paragraph 2 lit. (b) and in lit. (c). According to paragraph 2 lit. (b), a product intervention is only permitted if existing regulatory requirements are not sufficient to avoid the damage or address the threat, respectively. In order to clarify this aspect, we propose inserting a reference to the newly regulated catalogue of measures for the national competent authorities set out in Article 72 MiFID II.

(vii) Further, there does not seem to be a reason why the national authorities should be allowed to intervene already on the basis of "significant concerns", whereas ESMA may according to Article 31 paragraph 2 (a) MiFIR only

intervene in case of a serious threat. We thus suggest harmonising the different criteria for intervention as set out above.

II. Article 31 MiFIR – ESMA powers to temporarily intervene

a. Article 31 paragraph 2 MiFIR

"Article 31

In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

[...]

2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:

(a) the proposed action is required to ~~addresses a threat to the~~ avoid permanent and sustainable damage to investor protection for retail investors, which cannot be avoided in any other way, or to address a serious, sustainable and permanent threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union;

(b) regulatory requirements under Union legislation that are applicable to the relevant financial instrument or activity do not address the threat;

(c) a competent authority or competent authorities have not taken action to address the threat or actions that have been taken do not adequately address the threat, and are generally not suitable to address the threat.

Reasons:

(i) The criteria which must be fulfilled under Article 31 paragraph 2 lit. (a) through (c) in order to justify intervention by ESMA are stated very generally and, in our view, are not strict enough. Especially with regard to the very broad range of potential consequences which such a measure can have for the issuer or supplier of a product, the criteria for an intervention should represent a high hurdle.

(ii) A product intervention can have a great harm in the form of harm to the reputation as the result of publishing the measure by ESMA pursuant to Article 31 paragraph 5 MiFIR. Of course, we welcome the possibility for the supervisory authorities to effectively combat excesses in the capital market. Shady offers and market participants must be sanctioned and hindered in order to protect the capital market and the investors and, thus, the entire industry. However, we wish to point out that a product intervention does not always affect only black sheep in the capital market and that instead also proper participants can be affected. For example, this could be the case if a market participant is permissibly active in a market which is used in an improper manner by others. A prohibition of (or because of) certain activities

or products in such market could affect all participants in such market, even if they are acting within the limits of what is permitted and fair. If the affected market is a relatively small market, it is quite possible that all participants who are active in this market are known and would suffer harm to their reputations as a result of the prohibition. Finally, product interventions under the proposed rules are most likely to be applied, where the affected participants in the market are by no means in conflict with applicable national law (because otherwise measures of the relevant national authorities for breach of national laws could and probably would have been taken).

(iii) Therefore, we consider the soft criteria of "a threat to investor protection or to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union" to be too low a hurdle for imposing such far reaching measures. The criteria should be specified and tightened as we have proposed above. In particular with respect to investor protection, it should be ensured that only in case of dramatic situations where damage cannot be avoided by any other means a product intervention should be allowed. With respect to the protection of the orderly functioning and integrity of the financial markets, the term "serious, sustainable and permanent threat" makes it clear that not every threat is sufficient for a product intervention and that instead an intervention by ESMA only occurs in special situations. At the same time, this term, in our view, still gives ESMA an adequate leeway for discretion in order to permit measures in all situations where it is necessary. The term "serious threat" is also used in Article 32 paragraph 2 lit. (a) MiFIR in the context of product intervention by national supervisory authorities. The change we are proposing would, thus, also establish consistency in the applicable provisions.

(v) Furthermore, it is our understanding that a measure of ESMA is only supposed to be taken in special situations which require actions that go beyond action by the individual national authorities. This is already clear under lit. (b) of Article 31 paragraph 2 MiFIR, according to which a measure of ESMA is only permitted if the existing European legal framework cannot prevent the threat. To the extent that this is the intent of the European legislative body, however, the third criterion in lit. (c) of the same paragraph does not fit, in our view. If general action falling under the jurisdiction of ESMA is required due to the nature of the damage or threat, the question about whether a national supervisory authority has become active or not is not decisive. In order to make sure that a damage or threat is actually involved which requires general action, however, it is important to determine whether the measures taken by the national competent authorities are capable of countering the damage or threat. In our view, lit. (c) of Article 31 paragraph 2 MiFIR should accordingly be modified as proposed.

b. Article 31 paragraph 1 MiFIR together with Article 31 paragraph 5 MiFIR

“Article 31 – ESMA powers to temporarily intervene

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

- (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or*
- (b) a type of financial activity or practice.*

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by ESMA.

[...]

5. ESMA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. . The notice shall contain a detailed description of the relevant financial instruments or financial activity or practice. A prohibition or restriction shall only apply to action taken after the measures take effect.”

Reasons:

This provision in its current draft version is very broad and not very tangible. There is no clarity about how the terms "certain financial instruments" or "financial instruments with certain features" and "type of financial activity or practice" should be delineated. We appreciate the fact that, due to the many conceivable factual situations, the national competent authorities must have a broad leeway in order to make sure that action is possible in every conceivable situation which poses a threat. However, this involves great uncertainties for the participants in the market. A prohibition or restriction must be drafted in such a manner that it is possible to clearly determine which financial instruments are affected. Therefore, we suggest imposing on the national authorities the additional obligation to specify as exactly as possible the financial instruments and financial activities which are affected by a prohibition or a restriction in order to provide legal certainty both to the providers of financial services as well as to customers and other participants in the market. With respect to financial instruments, either the specific product (e.g. by its ISIN) or, where not possible, the determining features of the financial instrument must be clearly specified.