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Position of the European Financial Congress[1] in relation to the European Securities and Markets Authority's consultation paper on integrating sustainability risks and factors in MiFID II[2]

Methodology for preparing the answers

The answers were prepared in the following stages:

Stage 1

A group of experts from the Polish financial sector were invited to participate in the survey. They received selected extracts of the ESMA's consultation paper and the consultation questions. The experts were guaranteed anonymity.

Stage 2

Responses were obtained from experts representing:

- commercial banks,
- investment funds,
- regulatory bodies,
- consulting firms,
- the academia.

Stage 3

The survey project coordinators from the European Financial Congress prepared a draft synthesis of opinions submitted by the experts. The draft synthesis was sent to the experts participating in the survey with the request to mark the passages that should be modified in the final position and to propose modifications and additions as well as marking the passages they did not agree with.

Stage 4

On the basis of the responses received, the final version of the European Financial Congress' answers was prepared.

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[1] European Financial Congress (EFC – www.efcongress.com). The purpose of the EFC is to promote debate on how to ensure the financial security and sustainable development of the European Union and Poland.

[2] https://www.esma.europa.eu/press-news/consultations/consultation-integrating-sustainability-risks-and-factors-in-mifid-ii

Answers of the European Financial Congress to the consultation questions

Q1: Do you agree with the suggested approach and the changes to the Article 21 of the MiFID II Delegated Regulation on 'general organisational requirements'?

Broadly, the answer is yes. The change is to take into account another risk factor, which should be indicated explicitly. The change should be very general, convey the intention and emphasise the idea of ESG. It should point to the voluntary nature of application of the provisions. Then, in order for implemented solution to be effective, investment firms must have information on how issuers meet ESG goals. It would also be appropriate for ESMA to indicate in the Guidance or in Q&A ESMA's approach to understanding when and how ESG factors are important in the provision of investment services. Incorporating a new risk – sustainability risk – in Article 21 without providing a precise definition of the same might lead to a situation when too vague concept is introduced, uncorrelated with the nature of Article 21, which refers to internal procedures of investment firms. This potential deficiency should be addressed in a precise and unambiguous manner. For this reason, this general approach is now appropriate.

Q2: Do you agree with the suggested approach and the changes to the Article 23 of the MiFID II Delegated Regulation on 'risk management'?

We do not agree with the presented approach. As indicated in paragraph 9, the classification system for such issues has not been finalised yet, and if including them in the activities of investment firms will entail significant financial outlays to identify them and manage this risk in the future. The proposed wording does not create a direct link between the level of incorporation of these factors and their relevance for the activities of a particular investment firm. This might also weaken/distract attention from the analysis of fundamental risks.

Furthermore, risk control is usually positioned on one of more aspects of functioning of investment firms. Accordingly, risk management should be limited to unequivocal and measurable aspects related to the functioning of markets. On the other hand, the aspects related to ESG are universal and general in nature. That said, such a significant disruption of the idea of risk control systems, in the context of the very stringent approach to the implementation of Directives by our home regulator, might lead to the underlying intentions being over interpreted, and the rules of functioning of investment firms being overly regulated.

Q3: Do you agree with the suggested approach and the new recital on 'conflicts of interest'? What would be specific examples of conflicts of interests that might arise in relation to sustainability considerations?

The need to add a new recital on sustainability seems questionable. We do not think that ESG considerations generate other sources of conflicts of interest than those already specified in

Article 33 of Delegated Regulation 2017/565. The topic of conflicts of interest might be reflected in Article 24 of MIFID II. The topics of outsourcing risk management and the possible risk of circumvention of law by financial market entities may be examples of methods of potential conflicts of interest.

Q4: Do you think that on the topic of 'organisational requirements' other amendments should be made to the MiFID II Delegated Regulation in order to incorporate sustainability risks and factors? If yes, which ones?

As an additional topic, we would like to suggest inclusion – perhaps in the recital – of an explanation of the differences between the currently specified risk factors and sustainability risk, due to its completely different character of the latter. Additional amendments to the directive itself are not necessary.

Q5: Which existing market standards or "labels" are you intending to take into accountor already taking into account for the consideration of ESG factors? Do you see anyissues when relying on current market standards or "labels"?

The product governance standards existing in the market today are sufficiently flexible: they ensure that ESG considerations and product parameters related to ESG are or are not reflected, as appropriate (e.g. depending on the specific offer in the particular market, Clients' education level or expectations). A rational solution would be to leave the possibility of applying own standards and labels by Member States (they might introduce their own systems or use systems already existing in the market). The methodologies and approaches to ESG assessment currently used by different rating firms unfortunately do not ensure comparability; their results are low-correlated, which may lead to market transparency being impaired rather than improved.

Q6: Do you agree with the suggested approach and the proposed amendments to the MiFID II Delegated Directive Articles on 'product governance'?

Yes, we agree. The key thing/approach is to ensure that the proposed changes give some leeway in applying ESG criteria, rather than impose an obligation. This is due to the different level of development of the offer of investment products in various EU markets, as well as different needs and expectations of Clients, including within various market segments (e.g. between the mass market and the private banking market).

Q7: Do you agree with the proposed changes to the ESMA Guidelines on MiFID II product governance requirements and the addition of an additional case study?

Yes, the changes to the ESMA Guidelines would be purposeful. Given the imprecise description of the entire ESG product sector, a case study might be helpful. The entire system should be based on these Guidelines and on the best practices confirmed by certificates.

Q8: Do you think extra guidance is needed on the elements listed in paragraph 15 above?

Yes, such guidance would be welcome. ESG factors might be taken into account as a common indicator, and individual ESG factors should be analysed separately.

Q9: Please specify any approach you see to identify environmental, social and governance criteria separately from each other or as a single indicator. Please explain how the criteria would interact with each other and how the target market assessment and matching would be performed in such cases.

The three types of criteria describe product characteristics which are quite different from each other and largely unrelated. For this reason, an assessment of each criterion should be provided separately. However, if only one indicator is adopted, the total score should not be higher than the lowest partial score.

Q10: What current market standards or "labels" are you intending to take into account or already taking into account for the consideration of ESG factors? Do you see any issues when relying on current market standards or "labels"?

At present, we do not see any agreed common standards in this area. The ESG ratings existing in the market do not ensure consistency or unambiguity. We are awaiting the EC's taxonomy version in this regard.

Q11: Do you agree with the suggested approach and the amendments to paragraph 28 of the suitability guidelines? If not, do you have any suggestions for developing a more detailed approach with regard to (a) the collection of information from clients and (b) the assessment of ESG preferences with the assessment of suitability?

Basically, these changes in paragraph 28 are hardly anything more than high-level provisions, but the less detailed the approach is, the better. There is no need to change this proposed approach.

Q12: Please specify any approach you see to assess environmental, social and governance criteria separately from each other or as single preferences. Please explain how the criteria would interact with each other and how the suitability assessment would be performed in such cases.

As we have emphasised before, any provisions introduced should stress the underlying idea and promote voluntary application.

These three assessments should be presented separately. They are only qualitative in nature; they are difficult to compare and difficult to harmonise. These criteria may have a positive and/or negative influence on each other, but striving for a single assessment is pointless.

Q13: Do you agree with the suggested approach and the amendments to paragraph 70 of the suitability guidelines?

We believe that including ESG factors in the definition of target markets is only relevant in cases where this will be important for a given target market and ultimately for clients.

General comments:

We express our concern about the proposed 'package' of legislative changes. While addressing significant legal changes (the intention of which we accept in principle), on a generalized level we doubt their effectiveness, efficiency and purposefulness, especially at the current stage of development of the Polish market and the advancement of non-harmonised methods of ESG assessment used in the market. We wish to emphasise that the level of regulation is currently very high and the introduction of more regulation unfortunately leads to reducing the competitiveness of the European market in relation to other markets.

In particular, knowing the current EU regulatory practices, and having experience of how they work in practice, we believe that the proposed high-level provisions will be supplemented by delegated regulations, technical standards and guidance, the form of which is currently unknown, but which, in our opinion, should be given the same consideration as the proposals already on the table. In addition, we have concerns about implementation of the high-to-measure sustainability risk into law as a risk akin to measurable risks, such as market risk or liquidity risk. All the proposed changes introduce exactly the same legislative and organisational solutions (in terms of design of the proposed provisions in relation to managing, monitoring, reporting and division of tasks).