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SPANISH BANKING ASSOCIATION COMMENTS ON COMMISSION DELEGATED REGULATION (EU) AMENDING REGULATION (EU) 2017/565 SUPPLEMENTING DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AS REGARDS ORGANISATIONAL REQUIREMENTS AND OPERATING CONDITIONS FOR INVESTMENT FIRMS AND DEFINED TERMS FOR THE PURPOSES OF THAT DIRECTIVE PROPOSAL

Spanish Banking Association shares the European Commission Action Plan on Financing Sustainable Growth objectives: improve the contribution of finance to sustainable and inclusive growth and strengthen financial stability by incorporating Environmental, Social and Governance (ESG) factors into investment decision-making.

However, we would like to make the following comments to the proposed amendment of Delegated Regulation 2017/565:

General comments:

The Action Plan on Financing Sustainable Growth, published on Marth 8th, included the amendment of delegated acts under Directive 2014/65/EU on markets in financial instruments (MiFID II) and Directive (EU) 2016/97 on insurance distribution (IDD) to ensure that sustainability preferences are considered in the suitability assessment.

MiFID II entered into force only a few months ago and it is still no transposed in some countries like Spain. IDD will enter into force next October. Financial entities have had to carry out (MiFID II) and are still involved (IDD) in the process of adapting new regulations, so it seems reasonable to develop an impact assessment of both regulations before undertaking modifications.

On the other hand, in the field we are dealing with, environmental, social and governance preferences, developments are still at initial stage. This imply a significant risk since the impact of the proposed modification based on an undetermined taxonomy and definitions cannot be evaluated.

Methodologies to evaluate products from the point of view of ESG are in development, there are still no globally shared valuation models. Special difficulty poses to incorporate the governance factor in relation to products. There must be a clear reference taxonomy for entities and clients officially approved, or at least recognized, prior to the incorporation of ESG considerations in the suitability procedures.

Therefore the effects of the future legislation are unclear. It should be recommendable that the

ESG principles shall be included in MIFID and IDD legislation when the taxonomy is completely defined and fully operative. It is crucial to know the scope of the new information obligation.

In this regard, it is also important not to create new legal concepts. Any legal concept already defined by MIFID or IDD legislation should be referred to such legislation and it should be avoided new definitions for the same concepts. Overlappings and inconsistencies should also be avoided.

Therefore, the EC's legislative proposal *on the establishment of a framework to facilitate sustainable investment* should also provide a clear definition for the ESG concept, and this legislative proposal -on the integration of ESG criteria in the suitability assessment- should be fully aligned with the aforementioned classification. As stated in a previous paragraph, inconsistencies and overlappings have to be avoided because they can mislead investors, markets and imply a (non-negligible) burden for the entities. Misleading definitions could imply legal risks which should be avoided in any case.

Secondly, it is very important that regulation assign clearly responsibilities of each player. The responsibility of the entities as investment advisor should be clarified. The liability should rest with the issuer of the financial products.

The definition of the ESG concept depends on the criteria and standards outside the scope of the capital markets and on the knowledge and experience of those who operate in them, and particularly of the entities that provide portfolio management and investment advice services.

Having said that, the obligations for these entities should include products with ESG "label" in their offer and in the portfolios of the interested clients, but in any case, should not include the verification of the ESG criteria in the underlying companies or products. These firms are not in a position to make such verifications and liability should rest in the issuer of the relevant instrument.

Specific comments to the proposed delegated regulation:

Article 1. Parr 1:

As already indicated, the existence of a clear taxonomy is fundamental. In this regard, the descriptions contained in the proposed sections (9) (10) and (11) of Article 2 of the Delegated Regulation: environmentally sustainable investment, social investment and investments with good governance are considered very broad and general.

As already mentioned, the criteria to meet these definitions verification should not in any case fall on financial entities providing investment services, as this is far from their knowledge and capabilities.

Article 1. Parr 2:

Although it seems to be included in the proposal, it should be clear that it is possible to evaluate only certain products, at least in an initial phase. It is important to clarify that only limited products could be evaluated and offered to customers with ESG preferences.

Article 1. Parr 3:

In relation to the proposed modification of article 48 (1), this modification goes beyond the objective of the proposal, the incorporation of ESG criteria in advice services and portfolio management.

ESG considerations may form part of investor's objectives and, therefore, in such cases it may make sense to consider them when providing investment advice. However, article 48 contains a general obligation for firms to provide clients with pre-trade information on the relevant financial instrument so that they understand the risks and functioning of such products. We believe that investment firms should not be required to include ESG considerations necessarily in the general pre-trade information that they provide their clients with. This information may be included in other more detailed information such as the final terms of a specific issue of a bond. In this respect, Recital 84 of MIFID 2 recognizes the possibility of providing information to clients at different stages ("*Nothing in this Directive should oblige investment firms to provide all required information about the investment firm, financial instruments, costs and associated charges, or concerning the safeguarding of client financial instruments or client funds immediately and at the same time, provided that they comply with the general obligation to provide the relevant information in good time before the time specified in this Directive. Provided that the information is communicated to the client in good time before the provision of the service, nothing in this Directive obliges firms to provide it either separately or by incorporating the information in a client agreement.*").

Besides that, this article 48 (1) regulates the "obligation to provide clients or potential clients, with sufficient advance to *the provision of investment services or ancillary services*, information on the financial instruments offered, to include in particular, any ASG consideration". The incorporation in this article of ESG considerations expands the new obligation to all investment and ancillary services under MiFID II, so we propose to eliminate this paragraph.

Article 2. Parr 2:

The proposed Regulation foresees a period of 18 months to adapt from its publication. This is a very short term for relevant technical changes, design and modification of the Suitability Test, review of the calculation algorithms of the tests, redefinition of the way of evaluating the products incorporating ESG factors, reclassifying products, modifying the counselling process (product selection, content of proposals, ...), specific training for employees, etc. These adaptations imply high costs which should be also taken into account.

In any case, the deadline should be defined in relation to the final definition and entry into force of the necessary taxonomy and not after the approval and publication of the proposed modification of Delegated Regulation 2017/565, since without this taxonomy entities cannot move forward