

To
Commission Vice-President
Valdis Dombrovskis

25/09/2019

Subject: Possible violations of EU financial markets legislation by Germany

Dear Vice-President,

Since the financial crises, the EU produced a comprehensive body of financial markets regulation aiming at enhanced financial stability, transparency and consumer protection in financial markets. Even though the transposition into national law leaves Member States with certain room for manoeuvre, crucial key elements are not at national discretion and should have been transposed into national law by all governments after the respective transposition period. It seems, however, that the implementation of several Directives by Germany falls short of binding elements. Several of these shortcomings are at the expense of the protection of retail investors and consumers. I urge the Commission to analyse these cases and to take the necessary legal steps if so required. The cases referred to are in relation to the transposition of the Insurance Distribution Directive (2016/97/EU), the Mortgage Credit Directive (2014/17/EU), the Payment Accounts Directive (2014/92/EU) and issues related to supervisory failures, without raising claims to completeness.

Insurance Distribution Directive (2016/97/EU)

The Directive of the European Parliament and the Council of 20th of January 2016 concerning the distribution of insurances (IDD) was to be transposed into German law by 23rd of February 2018. The necessary legal adjustments were achieved with amendments to the Act implementing the Insurance Distribution Directive (Gesetz zur Umsetzung der Versicherungsvertriebsrichtlinie) of July 20, 2017 and changes of the Trade Regulation Act (Gewerbeordnung).¹

In the German transposition, ancillary intermediaries of residual debt insurances are exempted from the registration as insurance intermediaries (§34d Abs. 8 Nr. 3 GewO-E)² under the condition that the annual insurance premia per contract remains below 500€. This exception is not covered by the provisions of the IDD on ancillary insurance intermediaries exempted from registration (Article 1(3)) and therefore possibly violates

¹ https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetz-zur-umsetzung-der-eu-richtlinie-2016-97.pdf?__blob=publicationFile&v=14

² <https://dejure.org/gesetze/GewO/34d.html>

the IDD. Besides, for ancillary insurance intermediaries exempted from registration, the IDD foresees minimum standards for transparency and consumer protection (Article 1(4)a), for instance that the intermediary has to “act honestly, fairly and professionally in accordance with the best interests of their customers” (Article 17). None of the mentioned minimum standards for exempted ancillary insurance intermediaries did enter in the German transposition, possibly violating the IDD. Both deviations allow German ancillary insurance intermediaries to offer their customers unfavourable and intransparent package deals, for instance tying mortgage loans to residual debt insurances, for which they charge high commissions with devastating consequences for consumers.

Article 20 (IDD) establishes that even when no advice is given prior to the conclusion of an insurance contract, the insurance distributor has to provide the customer with all relevant information and take into account his demands and needs. Due to this, ad-hoc advisers who point out possible clients to insurance intermediaries or companies should not only be forbidden to give advice, but also be forbidden to identify the customer’s demands and needs. This is insufficiently specified in the German Insurance Contract Act (Versicherungsvertragsgesetz) (§61(1))³ and could possibly violate the IDD if not further clarified by Bafin.

Mortgage Credit Directive (2014/17/EU)

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property (Mortgage Credit Directive, MCD) was to be transposed into national law by 21st of March 2016. It was implemented in Germany with a legal act of 11th of March 2016 (Gesetz zur Umsetzung der Wohnimmobilienkreditrichtlinie und zur Änderung handelsrechtlicher Vorschriften)⁴. I believe that this implementation was insufficient and there continue to be gaps in consumer protection under the MCD.

While with fixed-interest mortgages, as usual in Germany, a certain compensation for early repayment is justified, early repayment penalties occur to be of up to 30% of the outstanding mortgage credit on a regular basis. This is the case despite of provisions limiting early repayment penalties in the Mortgage Credit Directive (MCD) (“the compensation shall not exceed the financial loss of the creditor”) granting the creditor “fair and objective compensation” (Article 25). As there are no specific provisions in German law on early repayment penalties in mortgage credit, the general provisions for consumer credit apply (Article 16 Consumer Credit Directive). In order to calculate early repayment compensations, banks shall “compare the initially agreed interest rate and the interest rate at which the creditor can lend out the amount repaid early on the market at the time of early repayment”. However, frequently applied case law allows credit institutes to either compare to a comparable mortgage credit or alternatively an investment in securities such as government bonds. Due to the low interest rate environment and the different type of investment, this enables credit institutes to calculate exorbitant forgone profits and consequently charge high penalties to consumers. This particularity of the German application of rules on early repayment violates the provisions of the MCD of fair and objective compensation and leads to considerable consumer detriment.

Additionally, bundling and tying of financial products remains a common practice often resulting in bad deals for consumers. The MCD allows only bundling of products while

³ <https://dejure.org/gesetze/VVG/61.html>

⁴ https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_Wohnimmobilienkreditrichtlinie.pdf;jsessionid=A95986D9D7B42F36C9A7AB03857CB14C.1_cid297?__blob=publicationFile&v=2

tying is generally prohibited (Article 12(1)). However, member states can allow tying when it is to the demonstrated advantage of consumers and the separate purchase of the products is possible (Article 12(3)). This specific provision was however not transposed into German law (German Civil Code 492a/b), leading to a situation where takers of mortgage loans are insufficiently protected from tying practices. The situation is, as mentioned above in the context of the IDD, equally problematic for other types of consumer credit which are regularly tied to products such as residual debt insurances with commissions of up to 70%. This situation reveals a dramatic lack of consumer protection in general and the insufficient transposition of the MCD in particular arguably violating EU legislation. This should be investigated and addressed by the Commission in order to prevent further consumer detriment in Germany.

Payment Accounts Directive (2014/92/EU)

With the payment accounts Directive (2014/92/EU), the EU gave all citizens the right to a basic bank account, a crucial enabler for an inclusive society.

The German transposition in the payment accounts law (Zahlungskontengesetz, Article 41), allows banks to offer basic payment accounts with considerable fees that effectively exclude persons on very low income from opening such an accounts. This practice counteracts the aim of the payment accounts Directive, namely to offer affordable accounts to everyone while explicitly excluding the admissibility of prohibitive conditions. As a result, the European promise of an affordable payments account for everyone continues unfulfilled in Germany.

Closet indexing and breaches of UCITs key disclosure rules

In a 2018 replication of a 2017 ESMA study into closet indexing, the investor organisation betterfinance found several potential closet index funds in Germany⁵. There is a large risk of closet indexing continuing in Germany to the detriment of investors. This is why supervisory action on the part of BaFin would be urgently required. While researching the issue of closet indexing, betterfinance found that a large share of the analysed funds, including several ones domiciled in Germany, are in breach of UCITs key disclose rules (KID), with neither EU nor national supervisors taking action. The breaches related to statements of past performances and the indicated indexes. This permanent violation of EU consumer protection legislation is intolerable.

I urge the Commission to thoroughly investigate these potential violations of financial services legislation and supervision in Germany that one-sidedly disadvantage consumers. It is high time to demand improvement from the German legislator and supervisor and, if no progress is made, open an infringement procedure.

Yours sincerely,

Sven Giegold



⁵ <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=2ahUKEwj1vKDSjenkAhWNJ1AKHUD4CFgQFjAEegQIABAC&url=https%3A%2F%2Fbetterfinance.eu%2Fwp-content%2Fuploads%2FPR-Benchmark-Disclosure-Compliance-Research-040618.pdf&usg=AOvVaw3nY0htwcaf0erv91qnRBs>