

VALDIS DOMBROVSKIS

Vice-President of the European Commission

Mr. Sven Giegold
Member of the European Parliament
Office ASP 08 H 359 60
Rue Wiertz B-1047
Brussels

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Brussels,
Ares S(2019)7070015

Dear Mr. Giegold,

dear Sven!

I thank you for your letter alerting us for possible violations of EU financial legislation by Germany. My services will take full account of the information you provided us with in the assessments of the transposition of the relevant legislation by Germany.

Notwithstanding, I would like to provide you with some preliminary comments on the different issues you have raised:

Insurance Distribution Directive (2016/97/EU)

Under Article 10(1) IDD, ancillary insurance intermediaries must be registered with a competent authority in their home Member State. An exception to this principle is only possible where the conditions for the exemption of ancillary insurance intermediaries set out in Article 1(3) IDD are met. Furthermore, even in the case of insurance distribution by exempted ancillary insurance intermediaries, Member States must ensure that the relevant insurance undertakings fulfil the requirements set out in Article 1(4) IDD. These include “appropriate and proportionate arrangements” to comply with the basic duty to “act honestly, fairly and professionally in accordance with the best interests of their customers”. Finally, according to Article 20(1) IDD, it is the task of the insurance distributor, to specify the demands and needs of the customer.

DG FISMA is currently evaluating the conformity of national legal provisions notified by the German government as transposition of the IDD. In this context, DG FISMA will carefully evaluate the provisions mentioned in your letter (§ 34d paragraph 8 of the Gewerbeordnung on ancillary insurance intermediaries and § 61 paragraph 1 Versicherungsvertragsgesetz on the demands and needs test) and discuss possible shortcomings with the German authorities.

Mortgage Credit Directive (2014/17/EU)

According to the information at our disposal, Germany transposed article 25 of the Mortgage Credit Directive (MCD) by providing that consumers may, at any time, early fulfil all or part of their obligations under a consumer loan agreement (Section 500 paragraph 2 sentence 1 BGB). However, if the mortgage contract is qualified as a loan agreement (Grundpfandrecht) under Section 489 BGB with a fixed interest rate, termination is possible after ten years with a six-month notice. The contract can be terminated earlier if: a) this is agreed in the contract; b) in case the borrower pays back the whole loan and in addition an early payment compensation; or c) the fixed interest rate was agreed for a shorter time than ten years (Section 489 para. 1 No 1 BGB). In case of fixed interest rate of more than 10 years, early termination is only possible if the borrower has a corresponding justified interest (Section 500 paragraph 2 sentence 2 BGB).

It is not clear to us if the practices you refer to with regard to the payment of a high compensation for the early repayment of mortgage credit agreements arise from an incorrect transposition of the Directive or from an accepted practice by the national competent authorities. It is also not clear whether the compensation consumers have to pay in those cases exceeds the financial losses of creditors, contrary to what is provided in article 25(3) of the MCD. In any event, DG FISMA will be investigating this situation with the German authorities in the context of the conformity assessment on the transposition of the Directive.

Tying practices are, as a rule, forbidden under the MCD (article 12(1)). However, the Directive allows Members States to exceptionally accept those practices on condition that the creditor can demonstrate to its competent authority that the tied products or categories of product offered, on terms and conditions similar to each other, which are not made available separately, result in a clear benefit to the consumers taking due account of the availability and the prices of the relevant products offered on the market. Germany has transposed this provision with Section 492b (3) BGB which provides that a package deal (tying practice) is permitted if the supervisory authority responsible for the creditor has approved the other financial products or services, as well as their integration with the approved mortgage credit agreement. DG FISMA will be investigating with the German authorities the correctness of the transposition of this provision of the Directive and the enforcement of the said rules by the National Competent Authority.

Payment Accounts Directive (2014/92/EU)

We are aware of the rather high costs of the services included in the payment accounts with basic features in Germany, with regard to national income levels and the average fees charged by the credit institutions (article 18(1) and (3) of the Directive). DG FISMA will be investigating with the German authorities the reasons for this in the context of the conformity assessment of the transposition of the Directive.

Closet indexing and breaches of UCITs and key disclosure rules

The findings of Better Finance in relation to potential cases of closet indexing and breaches of UCITS key disclosure rules have retained our attention. We have directly spoken to Better Finance and encouraged ESMA to analyse the cases of potential closet index funds and to ensure that information provided by asset managers is fair, clear and not misleading.

ESMA conducted research on a sample of 2,600 funds to determine whether it could find any indication of closet indexing at an EU-wide level. Subsequently, several rounds of discussions involving all National Competent Authorities have taken place at ESMA level. Moreover, National Competent Authorities have analysed the situation on their national markets. The German BaFin has undertaken an investigation between April and December 2016 and concluded that information deficiencies exist. BaFin has issued in April 2017 new transparency standards for sales prospectuses.

On European level, ESMA has issued a Q&A in March 2019, which in particular underlines the following elements:

- Article 7(1)(d) requires that a UCITS either has an index tracking objective, or alternatively allows for discretionary choices, and in both cases this must be disclosed in the objectives and investment policy section of the KIID.
- In the case of index-tracking UCITS, using the terms 'passive' or 'passively managed' in addition to 'index-tracking' is recommended practice in order to assist investor understanding.
- A UCITS management company should consider providing additional wording to ensure the meaning of the term 'passive' or 'passively managed' is clear.
- An index-tracking (passive) UCITS must disclose the index it is tracking and show performance against that index in the past performance section of the KIID.

I welcome that ESMA and NCAs have taken action in order to strengthen uniform high standards of disclosures to investors. ESMA is continuing monitoring funds' compliance. We will keep on engaging with ESMA and closely monitoring this issue.

Yours sincerely,



Valdis DOMBROVSKIS