EU-regulation: MiFID II and delegated regulation 2017/565

Topic	Article (where relevant)	Proposal	Justification
General comments			
Horizontal alignment	MiFID II, SFDR, Prospectus Regulation, MiFID, UCITS, PRIIPS, Listing Act and MAR	Ensure overall alignment between the various sector specific requirements to ensure coordination and one disclosure regime (e.g. Prospectus Regulation, MiFID, UCITS, PRIIPS, Listing Act and MAR)	Current information disclosure requirements are scattered and would benefit from further harmonization. In particular, alignment of requirements for the delivery of information to clients which often cut across MiFID, IDD and PRIIPs requirements are important, e.g. advice resulting in a recommendation of both financial instruments and IBIPs. Another example is the need for extending the MiFID II electronic information regime to information and disclosures governed by IDD and PRIIPs.
OTC-derivatives used for hedging activities	Articles 24 and 25 MiFID II	Exclude OTC-derivatives used for hedging activities from investor protection rules in MiFID II – for all client categories.	When using a derivative for hedging activities the purpose is to eliminate risks. The purpose of many of the investor protection rules in MiFID II is however to protect the clients from

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	Article 10 delegated regulation 2017/565	There is an existing exemption for certain derivatives used as means of payment (article 10 of delegated regulation of MiFID II, 2017/565). A similar exemption should be introduced for OTC derivatives used for hedging purposes (option 1). Alternatively, targeted exemptions for such derivatives should be made from article 24 and 25 (option 2). (*See additional comments below*).	risks associated with *an investment*. Thus, the client's purpose with the OTC-transactions and the protection rules in MiFID II do not match. It should be noted that many of these clients are small companies that are classified as retail clients under MiFID II. Cost and charges reporting, the 10% depreciation reporting, product governance rules and sustainability preferences are a few examples where the rules are very cumbersome and offer little, if any, value, or benefit for the clients entering into OTC-transactions for hedging purposes. Concrete example: The requirement to disclose the cumulative effect of costs on return should only be targeted to financial instruments which have an investment purpose, i.e. instruments that are supposed to generate a return for the retail client and not hedging instruments or transactions for risk management purposes.

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Eligible counterparties and professional clients	Articles 23-25, 29a and article 30 MiFID II and delegated regulation 2017/565	Extend the existing exemptions from MiFID II investor protection rules for eligible counterparties and professional clients to include investment advice and portfolio management, with the possibility to *opt-in* (option 1). Alternatively, eligible counterparties and professional clients should easily be able to *opt-out* from this protection (option 2). (*See additional comments below*)	Amendments are needed to make the MiFID II framework simpler and more proportionate for eligible counterparties and professional clients, including when providing investment advice and portfolio management. These types of clients can look after their own interests and the existing requirements are administratively burdensome and costly for both investment firms and their clients.
Disclosure rules			
Disclosures – more proportionality	Artikel 24(3) and 24(4) MiFID II and articles 44-53 delegated regulation 2017/565.	Introduce more proportionality into the disclosure regime in MiFID II based on the complexity of the product or investment service/ancillary service as well as client categorization. Simplify the rules by removing requirements to use certain technical and legal concepts in the communication with clients. Review the amount of mandatory information to be provided.	The disclosure requirements in MiFID II need to be simplified. Less information should be required for non-complex services and products. Technical and legal terms are difficult for most retail clients to understand, and such requirements are therefore a driver of complexity. The amount of information creates information overload and, consequently, barriers of entry for retail clients.

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Disclosures - eligible counterparties and professional clients	Articles 16.7, 23, 24 och 25, 29a and 30 MiFID II, articles 34 and 44-53 delegated regulation 2017/565	Dispose of all ex-ante and ex-post disclosures to eligible counterparties and professional clients unless such counterparty requests the information (*opt-in*). Alternatively, eligible counterparties and professional clients should easily be able to *opt-out* from receiving the information (Option 2). Examples: - Cost & charges requirements, including for investment advice and portfolio management (arts 24 and 25) - Information on telephone recordings (art 16.7) - Information on conflicts of interest (art 23)	Professional clients and eligible counterparties have ample knowledge and experience to protect their interests bilaterally and opt-in requirements are therefore more proportionate considering costs and administrative burdens involved. For instance, the requirement to inform your client of the fact that a conversation over the telephone will be recorded applies not only in relation to retail clients but to eligible counterparties and professional clients as well. Both latter client types know very well that their conversations will be recorded. In the capital markets it has been a long-standing industry practice to record telephone conversations between market participants (since long before MIFID). Everybody knows that conversations are being recorded. It is red tape for the sake of red tape. Another example is conflicts of interest. All professional clients know that conflicts of interest exist. They also know that there is an obligation in MIFID to identify and handle conflicts of interest and inform your client if the conflict cannot be eradicated completely. Today all

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			professional market participants exchange standardized information on conflicts of interest. Nobody reads it and the information is of little interest to professional market participants. Except for conflicts of interest that have not been prevented by the investment firm the information is red tape for the sake of red tape. A third example is information on cost and charges. Investment firms are still obligated to inform professional clients and eligible counterparties) of cost and charges for investment advice, portfolio management (and possibly in case there are instruments with a derivative embedded - the level one and level two text seem to be conflicting). As pointed out above, eligible counterparties and professional clients have enough knowledge and experience to protect their interests bilaterally. In fact, since long before MIFID it has been market practice to require transaction cost analysis (TCA) between professional market participants whenever deemed necessary.

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			Finally, as a general rule when there is an obligation in MIFID to take certain steps and measures there is no need to inform eligible counterparties and professional clients that you as an investment firm have done exactly that. Another general rule must be that eligible counterparties and professional clients are knowledgeable enough to protect their own interests. Today there is lot of exchange of information to live up to formal requirements in MIFID that is of little interest to professional market participants. It is red tape for the sake of red tape.
Cost & charges			
Cost & Charges disclosures - OTC derivatives	Article 24 MIFID II	Dispose of cost and charges disclosure requirements in relation to OTC derivatives (regardless of client classification).	Recent years' experience regarding fair value for OTC derivatives is to say the least very discouraging. There has been no consensus on the market how to compute fair value. The result is that no useful comparison between market operators has been achieved. Another consequence is that there are numerous examples in the FX market - e.g. currency forwards or currency swaps - where one bank is offering a better price (currency rate)

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			to the client but reports a higher cost ex ante and ex post than other competitors in the market that offers worse prices but reports lower costs. The cost information to the client in relation to OTC derivatives is of no avail to the client since it is incomprehensible and misses its purpose. It is a theoretical computation of theoretical costs. For interest rate and currency exchange OTC derivatives what the client is interested in and what is of use to the client is what interest or currency rate (price) he or she gets – which is easy enough for a client to compare between the different market operators.
Cost & Charges – ex post report	Article 50 and annex II of delegated regulation 2017/565	The ex-post report should be in a more summarized format and simplified. The granularity of cost breakdown at instrument level is too detailed for clients' needs. There is no need to provide cost information both as an amount and a percentage (see below).	The ex-post cost & charges reports to clients are too complex and contribute to information overload which creates barriers of entry.

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		A review is needed as regards the language in the ex-post reports which is too technical/legal for retail clients.	
Cost & Charges disclosures - Implicit/indirect costs	Article 24 MIFID II Annex II to delegated regulation 2017/565	Simplify the calculation of implicit/indirect costs.	The calculation of implicit and indirect costs is much too complicated. It is not only incomprehensible to a client what the cost figure stands for but also there is no market consensus on how to make the calculations. The calculations vary from market participant to market participant. The result - apart from the fact that the client does not understand the cost figure - is an unlevel playing field between competing market participants. The PRIIPs approach has been to try and make it as theoretically and mathematically correct as possible. The result is, however, that the delegated regulation is all too complicated. Simplification is needed.
Costs & charges - illustration of the cumulative effect of costs on return	Article 50.10 delegated regulation 2017/565	Remove the requirement to illustrate the cumulative effect of costs on returns.	Firms must provide clients with an illustration of the cumulative impact of costs and charges on investment returns. Experience show that clients find this illustration complex, and it is also administratively burdensome for investment firms to produce. Since MiFID II permits various methods for the illustration, comparisons are

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			difficult for clients and the value of the information can be questioned.
Costs & charges - costs expressed as a percentage of invested amount	Article 50(2)(2) and 50(10) delegated regulation 2017/565	Remove the requirements to express costs as percentages.	The requirement to provide information on costs expressed both as an amount and a percentage of invested amount is not administratively burdensome whilst adding little value for clients. In particular, the requirement to express costs as a percentage is not appropriate for all products and services. Given that the report is consolidated, this approach may not always be clear to the client without a detailed and complex explanation of the calculations. Aggregated Ex-Post disclosure includes both explicit and implicit costs across various services and products. Some products lack an investment amount, making the requirements to express costs as a percentage unsuitable for them. There is also a concern that combining assets may distort the overall cost disclosure.
Periodic reporting			

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Reporting – online system	MiFID II Art. 25(6) and articles 60 and 62 delegated regulation 2017/565	The possibility to provide periodic portfolio management reporting and periodic holding statements through an "online system" should be simplified by removing "*which qualifies as a durable medium, where up-to-date statements of client's financial instruments or funds can be easily accessed by the client and the firm has evidence that the client has accessed this statement at least once during the relevant quarter*." Furthermore, the possibility to perform client reporting through an online system should be made general to all types of MiFID client reporting, e.g. also annual costs & charges reporting etc.	The current requirement of having to evidence that clients have accessed the reports is a hurdle preventing firms from making use of this type of digital reporting. Audit trail for clients' movements in digital channels is typically not kept for each dedicated page or space in the online environment and not connected to opening of documents or engaging with specific service features in the online environment. Furthermore, the evidence requirement as such presents a higher standard than what applies if a report is simply sent by traditional mail, where the firm has fulfilled its part when the letter has been submitted to the postal service and no further evidence is required on the client side. To make it easier for investment firms to provide information to clients online is also justified considering EU's Digitalization Agenda.
Reporting - 10% depreciation reports	Article 62 delegated regulation 2017/565	Remove the requirement for investment firms to inform clients if the value of any current instrument decreases with 10% or multiples thereof – for all client categories	Clients to not find the 10 % depreciation reports and generally think that they receive too much information. The reports are also unhelpful in extremely volatile markets, as the reports are provided in a high frequency and number.

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			Typically, clients who are interested in this type of information trade often and are therefore active and log in regularly, often several times a day, to check the development of their holdings. In MiFID Quick Fix, based on the above considerations, exemptions were made eligible counterparties and professional clients (opt-in), see recital 7 of amending directive 2021/338/EU. Considering that also retail clients have little value of the reports, the requirements of 10 % depreciation reports should be deleted – for all client categories.
Client categorization – opt up			
Client categorization – opt up	Annex II to MiFID II	A new criterion to be used within a context where a retail client wants to opt-up to be treated as a professional client for a specific investment type or specific transactions. The new criterion should be able to target all financial instruments, both investment products and hedging products. The concrete criterion could look like this: "*A MiFID firm should be able to treat a client as a professional client*	By aligning the MiFID regime with similar rules which can be found in the Prospectus Regulation concerning the criteria for when prospectuses do not have to be produced as well as local transpositions of AIFMD allowing MiFID non-professional clients to be treated as eligible investors for certain AIFs, one would achieve a better consistency between various regulations and at the same

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		for a specific investment type provided that: *The client commits to a transaction size of 100.000 EUR and declares in writing, in a document separate from the relevant investment/commitment agreement, that the client acknowledge and is aware of the risks with the investment/commitment."*	time uphold a relevant level of investor protection.
Client categorization – opt up	Annex II to MIFID II	Amend the transaction so that it becomes more relevant for professional client and different types of financial instruments.	According to the transaction criterion, the client has to carry out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters. However, the number of transactions is not a good indication of how a professional market participant acts. A professional portfolio or capital manager may execute a few trades every year - far from 10 transactions per quarter. Moreover, it should be noted that 10 transactions per quarter is not relevant for less liquid markets and financial instrument such as corporate bonds that do not trade very often.

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			We therefore propose that a mandate should be given to ESMA to develop more calibrated regime per asset class, taking the liquidity of different types of financial instruments into account.
Inducements			
Inducements – exclude client payments from scope	MiFID II Art. 24 and article 40 delegated regulation 2017/565	Clarify that the payment for an investment service from one client is not considered as an inducement in relation to another client to the investment firm. This should be the case for all investment services, including payments for underwriting and placing.	The application of MiFID II rules on inducements for payments from different clients for services provided by the investment firm is not workable in practice i.e. ban on inducements and the quality enhancement. One example is where an investment firm is providing an investment or ancillary service to two clients. For instance, one client is asking the investment firm to find a buyer for its financial instruments or a seller for financial instruments it is interested in buying. When executing this service, the investment firm provides investment services to both the seller and the buyer (and vice versa). The payment (commission) for executing the investment service is obviously in connection with the investment services provided (to both clients).

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			Another example is when an issuer requires help from an investment firm regarding multiple services such as advice, technical assistance and placing of an issuance of finance instrument. At the same time, the investment firm may provide advisory services or portfolio management to a client as regards the issuers securities. Unless exempt there is a risk that the receipt of payment from the issuer for the technical services will conflict with the inducement rules. At the same time, the application of the ban on inducement and QE-requirements could lead to very strange results for EU capital markets. Adequate investor protection is provided though the rules on conflict of interest, including disclosures.
Inducements – professional clients	Article 24 and 29a MiFID II and article 11-12 delegated directive 2017/593	Professional clients should be excluded from the inducement rules when interacting with each other.	Application of the inducement rules on the professional financial markets risk disrupting the efficient and longstanding function of the financial markets. Moreover, a professional client, market participant, has no interest in quality enhancement/inducement test. Such a client's only interest is for the service to be professionally provided

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			in line with industry standards and is fully capable of looking after its own interests.
Inducements – quality enhancement	Article 24 MiFID II and article 11 delegated directive 2017/593	Clarify the quality enhancement-rules.	The rules on quality enhancement (QE) are complex which create legal uncertainty to the detriment of producers and distributors, clients as well as supervisors. Since local markets and distribution networks differ, there have been challenges in achieving a harmonized approach in member states. Thus, if kept, the quality enhancement concept needs to be simplified, clarified and supervisory convergence improved.
Sustainability preferences			
Definition of sustainability preferences	Article 2.7 delegated regulation 2017/565	The definition of sustainable preferences should be simplified and linked to established minimum requirements and the new (simple) categorization of SFDR products. Taxonomy could be integrated into the sustainable investment category and be used to define environmentally sustainable investments in cases where data is available. Consequently, taxonomy as its own separate	The existing definition and requirements relating to sustainability preferences has a high level of detail, making it difficult to ensure that the customer understands the purpose and background of collecting sustainability preferences. The clients do not understand difficult concepts such as taxonomy and PAI. In a forthcoming review it is important to change the definition of

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		category when assessing sustainability preferences could be removed.	sustainability preferences and link it to the new (simple) SFDR categories. Integration of taxonomy into sustainable investment category would simplify the dialogue with clients and reduce the clients' state of confusion which is the result of the current terminology around sustainable investments, environmentally sustainable investments and taxonomy alignment.
Sustainability preferences – collection of client data	Article 54.2 och 54.5 MiFID II delegated regulation (2017/565) and ESMA guidelines on suitability (ESMA35-43-3172, see para 26 and 27))	More flexibility should be allowed regarding how investment firms should ask clients to determine their sustainability preferences. The existing "tree" in ESMAs guidelines on suitability (see para 26 and 27) on suitability is too complicated and should be reviewed.	Requiring or asking retail clients in general to determine and express minimum proportions and qualitative or quantitative elements demonstrating PAI is a very tough ask. Most retail clients find this very complicated and are not familiar with the technical terms and definitions that firms need to use in order to fulfil legal requirements. This makes it difficult for clients to communicate their sustainability preferences. In line with other principal requirements of communicating with clients in an easy-to-understand manner, there is a need for firms to model and explain sustainability in a more customer-friendly way.

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Sustainability preferences – OTC derivatives for hedging purposes	Article 2(7) delegated regulation 2017/565 and SFDR	Remove OTC derivatives used for hedging from the scope of MiFID sustainability preferences and SFDR.	Requirements on assessment of sustainability preferences not fit for purpose for all types of financial instruments. Relevant for SFDR- and other instruments used for investment purposes, but the definitions are difficult to apply to e.g. derivatives used for hedging purposes and creates a non-compliance risk in the case a client wants to receive investment advice on OTC derivatives while they have, for their investment purposes, sustainability preferences.
Product Governance			
Product Governance	Articles 16 and 24 MiFID II, articles 9 and 10 delegated directive 2017/593 and Final report to ESMA guidelines (ESMA35-43-3448)	The product governance rules should only target packaged investment products with a reference to PRIIPs (option 1). Alternatively, reduce the requirements for non-complex financial instruments, e.g. listed equities, and plain vanilla bonds (option 2).	The original proposal of product governance rules in MiFID II referred to “investment products” and “Investment products” were defined with a reference to PRIIPs. However, since the PRIIPs regulation was delayed, the scope of the product governance rules in MiFID II changed to include all financial instruments. Consequently, the Level II rules and ESMA Guidelines got a too broad scope to cover all products and all

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			services. This was unfortunate and one of the reasons why the rules have become complex and difficult to apply for some types of instruments. An alternative route which also fits the simplification agenda would be to reduce the requirements for non-complex products, such as listed equities and plain vanilla bonds. Despite the principle of proportionality, all steps in the product governance process are not motivated from an investor protection perspective. A concrete example would be the removal of the review obligation when advising corporate issuers, ref. ESMA's position in the final report to the Product Governance Guidelines regarding the review obligation and the use of proportionality (see footnote 22 on page 15). For regular shares, bonds, and other instruments, without any complex features, the product governance requirements are an unnecessary admin burden, without any clear benefit as the risk for such instruments is well understood and the target market is generally broad. The administration that is required

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			does not lead to improved client protection.
Product Governance – reports to management and compliance	Articles 9(6) and 9 (7) delegated directive 2017/593	Remove the obligation for the Compliance function to systematically include information about product governance arrangements in its reports to the management body. Additionally, remove the requirement for Compliance to explicitly monitor the development and the periodic review of product governance arrangements	The requirement to systematically include product governance information in compliance reports does not add any value as the product arrangements remain very consistent over time. Removing this obligation will allow the Compliance function to adopt a risk-based approach and allocate resources to areas with higher regulatory risk. This is in line with article 22 (2) of the delegated 2017/565. Investment firms vary significantly in their structure and product offerings, ranging from complex to more simple products depending on end-clients and available distribution channels. Detailed regulation of the Compliance function's focus does not add any additional value and steer them from adopting a risk-based approach. An investment firm's Compliance function must be able to decide where to put its resources from a risk-based approach.

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Knowledge and competence			
Knowledge and competence – professional clients and eligible counterparties	Article 25(1) MiFID II	Remove the detailed requirements on assessing the knowledge & competence of employees only providing information to professional clients or eligible counterparties.	There is no definition in MiFID II or the delegated directive what it means to "give information" to clients. In some member states this concept has been interpreted broadly by competent authorities. This, combined with national competent authorities requiring annual knowledge tests, has led to unproportionate requirements for employees who only deal with professional clients or eligible counterparties. These employees are already qualified for their job through education and other professional training.
Knowledge and competence – definition of requirements for Basic, Informed and Advanced Investor	Article 25(1) and 25(2) MiFID II and articles 55 and 56 delegated regulation 2017/565	Introduce a clear definition/taxonomy of what is meant by each knowledge requirement to ensure that all investment firms make the same assessment.	A clear definition/taxonomy will increase the level of harmonization and create a level playing field.
Knowledge and competence – IDD and MiFID II		Clarity is needed regarding what overlap can be credited between the EU-regulations. For example, supervision (MiFID) in relation to practical experience (IDD).	There is a need for more clarity and alignment between the rules in MiFID II and IDD regarding the knowledge and experience of advisors.

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Best execution			
Best execution - summary	Article 66.9 delegated regulation 2017/565	Remove the requirement that investment firms that execute orders for retail clients shall provide those clients with a summary of the relevant policy, focused on the total costs they incur.	There are very few clients interested in the information about best execution. Those who are interested can delve into the ordinary execution policy.
Algorithmic trading			
Algorithmic trading - annual assessment	RTS 6	Change the requirement for annual self-assessment to every two years	See ESMA review from 2021.