Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

28 October 2021 *

(Reference for a preliminary ruling – Directive 2014/65/EU – Markets in financial instruments – Delegated Regulation (EU) 2017/565 – Investment firms – Article 56 – Assessment of appropriateness and related record-keeping obligations – Article 72 – Retention of records – Methods of retention – Information concerning client categorisation – Information on costs and associated charges relating to investment services)

In Case C-95/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Administrative Court, Varna, Bulgaria), made by decision of 11 February 2020, received at the Court on 25 February 2020, in the proceedings

'Varchev Finans' EOOD

v

Komisia za finansov nadzor,

intervener:

Okrazhna prokuratura – Varna,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Ninth Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– 'Varchev Finans' EOOD, by M. Valchanova, advokat,

– Komisia za finansov nadzor, by B. Gercheva, L. Valchovska and M. Vasileva, acting as Agents,

* Language of the case: Bulgarian.

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the European Commission, initially by Y. Marinova, J. Rius and T. Scharf, and subsequently by Y. Marinova and T. Scharf, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56(2) and Article 72(2) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 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 (OJ 2017 L 87, p. 1), read in conjunction with Annex I to that delegated regulation.

2 The request has been made in proceedings between 'Varchev Finans' EOOD and Komisia za finansov nadzor (Financial Supervision Commission, Bulgaria; 'the KFN') concerning the fines imposed on that company for breach of its obligation to maintain registers on the categorisation of clients and information provided to clients on the costs and associated charges relating to investment services.

Legal context

EU law

Directive 2014/65/EU

3 Article 16 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349), entitled 'Organisational requirements', provides in paragraph 6 thereof:

'An investment firm shall arrange for records to be kept of all services, activities and transactions undertaken by it which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive, Regulation (EU) No 600/2014 [of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ 2014 L 173, p. 84)], Directive 2014/57/EU [of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ 2014 L 173, p. 179)] and Regulation (EU) No 596/2014 [of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1)], and in particular to ascertain that the investment firm has complied with all obligations including those with respect to clients or potential clients and to the integrity of the market.'

4 Article 25 of Directive 2014/65, entitled ‘Assessment of suitability and appropriateness and reporting to clients’, provides, in paragraphs 2, 3, 5 and 8 thereof:

‘2. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client’s or potential client’s knowledge and experience in the investment field relevant to the specific type of product or service, that person’s financial situation including his ability to bear losses, and his investment objectives including his risk tolerance so as to enable the investment firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him and, in particular, are in accordance with his risk tolerance and ability to bear losses.

Member States shall ensure that where an investment firm provides investment advice recommending a package of services or products bundled pursuant to Article 24(11), the overall bundled package is suitable.

3. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 2, ask the client or potential client to provide information regarding that person’s knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client. Where a bundle of services or products is envisaged pursuant to Article 24(11), the assessment shall consider whether the overall bundled package is appropriate.

Where the investment firm considers, on the basis of the information received under the first subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. That warning may be provided in a standardised format.

Where clients or potential clients do not provide the information referred to under the first subparagraph, or where they provide insufficient information regarding their knowledge and experience, the investment firm shall warn them that the investment firm is not in a position to determine whether the service or product envisaged is appropriate for them. That warning may be provided in a standardised format.

…

5. The investment firm shall establish a record that includes the document or documents agreed between the investment firm and the client that set out the rights and obligations of the parties, and the other terms on which the investment firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.

…

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to ensure that investment firms comply with the principles set out in paragraphs 2 to 6 of this Article when providing investment or ancillary services to their clients, including information to obtain when assessing the suitability or appropriateness of the services and financial instruments for their clients …’

Delegated Regulation 2017/565

5 Delegated Regulation 2017/565 was adopted on the basis of, inter alia, Article 25(8) of Directive 2014/65.

6 Recital 92 of that delegated regulation states:

'The records an investment firm is required to keep should be adapted to the type of business and the range of investment services and activities performed, provided that the record-keeping obligations set out in Directive [2014/65], Regulation [No 600/2014], Regulation [No 596/2014], Directive [2014/57] and this Regulation are fulfilled and that competent authorities are able to fulfil their supervisory tasks and perform enforcement actions in view of ensuring both investor protection and market integrity.'

7 Article 50 of Delegated Regulation 2017/565, entitled 'Information on costs and associated charges', provides in paragraph 2 thereof:

'For ex-ante and ex-post disclosure of information on costs and charges to clients, investment firms shall aggregate the following:

(a) all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and

(b) all costs and associated charges associated with the manufacturing and managing of the financial instruments.

…'

8 Article 56 of that delegated regulation, entitled 'Assessment of appropriateness and related record-keeping obligations', provides:

'1. Investment firms shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service as referred to in Article 25(3) of Directive [2014/65] is appropriate for a client.

An investment firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client.

2. Investment firms shall maintain records of the appropriateness assessments undertaken which shall include the following:

(a) the result of the appropriateness assessment;

(b) any warning given to the client where the investment service or product purchase was assessed as potentially inappropriate for the client, whether the client asked to proceed with the transaction despite the warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction;

(c) any warning given to the client where the client did not provide sufficient information to enable the firm to undertake an appropriateness assessment, whether the client asked to proceed with the transaction despite this warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction.'

9 Article 72 of that delegated regulation, entitled 'Retention of records', provides:

'1. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

(a) the competent authority is able to access them readily and to reconstitute each key stage of the processing of each transaction;

(b) it is possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;

(c) it is not possible for the records otherwise to be manipulated or altered;

(d) it allows IT or any other efficient exploitation when the analysis of the data cannot be easily carried out due to the volume and the nature of the data; and

(e) the firm's arrangements comply with the record keeping requirements irrespective of the technology used.

2. Investment firms shall keep at least the records identified in Annex I to this Regulation depending upon the nature of their activities.

The list of records identified in Annex I to this Regulation is without prejudice to any other record-keeping obligations arising from other legislation.

3. Investment firms shall also keep records of any policies and procedures they are required to maintain pursuant to Directive [2014/65], Regulation [No 600/2014], Directive [2014/57] and Regulation [No 596/2014] and their respective implementing measures in writing.

Competent authorities may require investment firms to keep additional records to the list identified in Annex I to this Regulation.'

10 Annex I to Delegated Regulation 2017/565, entitled 'Record-keeping', contains a minimum list of records to be kept by investment firms depending on the nature of their activities. According to that list, the information to be recorded includes, inter alia, under the heading of 'Client assessment', information relating to the 'Assessment of suitability and appropriateness' and, under the heading 'Communication with clients', 'Information about costs and associated charges'.

Bulgarian law

11 Article 71(2), point 4, of the Zakon za pazarite na finansovi instrumenti (Law on markets in financial instruments) (DV no 15 of 16 February 2018), in the version applicable to the dispute in the main proceedings, requires investment firms to provide their clients or potential clients with information on the various costs and charges payable by clients and on the amount thereof promptly, in an appropriate manner and with due regard for the need to provide true, clear and non-misleading information.

12 Under Article 290(9), point 16, first alternative, of that law, read in conjunction with Article 290(1), point 16, thereof, unless otherwise provided for, a fine of between 5 000 and 1 000 000 Bulgarian leva (BGN) (approximately EUR 2 500 to 510 000) is to be imposed on legal entities and sole traders for infringement of the applicable requirements of an EU Regulation, rising to between BGN 10 000 and BGN 2 000 000 (approximately EUR 5 000 to 1 020 000) in the event of a repeated offence.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Varchev Finans is an investment firm with a licence issued by the KFN authorising it to provide investment services and to engage in investment activities.

14 Pursuant to an order of the deputy president of the KFN of 20 August 2018, Varchev Finans was subjected to an audit, in the course of which it was ordered to grant access to all registers maintained by it in accordance with the regulatory requirements. It was established that Varchev Finans did not maintain a register recording information on the appropriateness assessments undertaken for its clients with respect to investment products and services, and that it did not maintain a register recording the information provided to clients on the costs and fees of investment services.

15 Consequently, by decision of 20 May 2019, Varchev Finans received two fines for infringement, first, of Article 56(2) of Delegated Regulation 2017/565, read in conjunction with Article 72(2) of and Annex I to that delegated regulation and, second, of Article 72(2) of that delegated regulation, read in conjunction with Annex I thereto.

16 Varchev Finans brought an action challenging that decision before the Rayonen sad Varna (District Court, Varna, Bulgaria), which dismissed that action and confirmed that, by failing to maintain registers, Varchev Finans had breached the requirements arising under Delegated Regulation 2017/565.

17 Varchev Finans brought an appeal in cassation before the Administrativen sad Varna (Administrative Court, Varna, Bulgaria), the referring court, against the judgment of the Rayonen sad Varna (District Court, Varna), claiming, inter alia, that Delegated Regulation 2017/565 had been misinterpreted and misapplied by the KFN. On the basis of the German, English and French versions of that delegated regulation, Varchev Finans argues, it is not obliged to maintain registers in the formal sense, but only to keep ‘records’, which latter – as established by the KFN – were available in the firm.

18 The KFN contends, on the other hand, that it is apparent from the Bulgarian version of the provisions of that delegated regulation that it is necessary for the appellant in the main proceedings to maintain registers in the formal sense.

19 The referring court takes the view, in the light of those arguments and after comparing the Bulgarian, German, English and French versions of the relevant terms in Article 56(2) and Article 72(2) of Delegated Regulation 2017/565, that a preliminary ruling is necessary in order to establish whether, under those provisions, it suffices that the investment firm lists the information referred to therein in each client's file or whether that information must be systematically recorded in separate registers.

20 In those circumstances, the Administrativen sad Varna (Administrative Court, Varna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 56(2) [of Delegated Regulation 2017/565], read in combination with Article 72(2) of and Annex I to [that delegated regulation], to be interpreted as meaning that:

– investment firms must maintain (and keep up to date) a separate single register (in the form of a database) recording the suitability and appropriateness assessments undertaken for each client with the content provided for in Article 25(2) and (3) of Directive [2014/65] and Article 50 of [Delegated Regulation 2017/565]?

– or does it suffice that the abovementioned data are in the possession of the investment firm and are attached to the record for each client in accordance with Article 25(5) of Directive [2014/65] and that that information is stored in a way accessible for future reference by the competent authority and in such a form and manner that the conditions of Article 72(1) of [that delegated regulation] are met?

2. Is Article 72(2) [of Delegated Regulation 2017/565], read in combination with Annex I [to that delegated regulation], to be interpreted as meaning that:

– investment firms must maintain (and keep up to date) for all clients a separate single register (in the form of a database) recording the information on costs and associated charges provided to each client with the content provided for in Article 45 of Delegated Regulation [2017/565]?

– or does it suffice that the abovementioned data are in the possession of the investment firm and are attached to the record for each client in accordance with Article 25(5) of Directive [2014/65] and that that information is stored in a way accessible for future reference by the competent authority and in such a form and manner that the conditions of Article 72(1) of [that delegated regulation] are met?'

Consideration of the questions referred

21 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 56(2) and Article 72(2) of Delegated Regulation 2017/565, read in conjunction with Annex I to that delegated regulation, must be interpreted as meaning that investment firms are required to record the suitability and appropriateness assessments undertaken for each client

with respect to investment products and services, as well as the information provided to each client on the costs and associated charges relating to the investment services, in separate single registers and, in particular, in the form of a database.

22 It should be noted, first, that although the Bulgarian version of those provisions, in so far as it uses the term '*registri*', must be understood, as pointed out by the KFN, as referring to an obligation to maintain registers in the formal sense, there are, as both the national court and all the parties to the main proceedings have pointed out, inconsistencies between the various language versions of those provisions.

23 Whereas certain language versions of Article 56(2) and Article 72(2) of Delegated Regulation 2017/565, and of Annex I thereto, refer, like the Bulgarian, to a 'register', such as the Spanish version ('*registros*'), the English version ('*records*'), the Italian version ('*registrazioni*'), and the Portuguese version ('*registos*'), other language versions refer rather to mere 'records', such as the German version ('*Aufzeichnungen*') and French version ('*enregistrements*') of those provisions. As such, it cannot be unequivocally inferred that those terms should be understood as referring to registers in the formal sense rather than to mere 'records'.

24 In that regard, it must therefore be recalled that, according to settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions. The provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union and, in the case of divergence between those versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment of 25 July 2018, *Teglgaard and Fløjstrupgård*, C-239/17, EU:C:2018:597, paragraphs 37 and 38 and the case-law cited).

25 To that effect, it should be noted that the record-keeping obligations which Delegated Regulation 2017/565 requires investment firms to comply with are not only listed selectively in certain provisions of that delegated regulation, such as in relation to the appropriateness assessments undertaken with respect to investment goods and services under Article 56(2) of that delegated regulation, but also in general terms in Section 8 of Chapter III of that delegated regulation on 'Record-keeping'.

26 That section includes Article 72 of Delegated Regulation 2017/565, which concerns the 'Retention of records'. On the one hand, Article 72(1) provides that records must be retained in a form and manner that meet the conditions set out in subparagraphs (a) to (e), in particular the condition that the competent authority must be able to have easy access to the records concerned.

27 On the other hand, Article 72(2) of that delegated regulation provides for the obligation to keep at least the records which feature on the list in Annex I to that regulation, including those at issue in the main proceedings, relating to the assessments as to the suitability and appropriateness of investment goods and services undertaken for each client and the information provided to each client on the costs and associated charges relating to the investment services.

28 As is apparent from recital 92 of that delegated regulation, those requirements relating to the retention of records are intended to ensure that competent authorities are able to fulfil their supervisory tasks and perform enforcement actions with a view to ensuring both investor protection and market integrity.

29 It thus follows from the general scheme and purpose of the provisions of Delegated Regulation 2017/565 on record-keeping requirements that that delegated regulation seeks to prescribe the information which investment firms are, at the very least, required to keep, but merely imposes certain requirements on the form and manner in which that information is stored, which include, inter alia, the requirement that the information should be easily accessible to the competent supervisory authorities.

30 It follows that, in so far as they refer, in their various language versions, to 'registers', those provisions cannot be interpreted in such a way as to require investment firms to store the information concerned in a specific form, such as the establishment of a separate single register in the form of a database.

31 Such an interpretation would deprive the definition of the requirements for retention of records in Article 72(1)(a) to (e) of Delegated Regulation 2017/565 of any substance.

32 In particular, it is apparent from Article 72(1)(e) of that delegated regulation that the investment firm's arrangements must comply with the record keeping requirements 'irrespective of the technology used'. It follows that that delegated regulation is predicated on a certain degree of 'technology-neutrality', in that it leaves it to investment firms to determine how the records are to be retained, provided that the method chosen meets all the requirements laid down in Article 72(1) of Delegated Regulation 2017/565.

33 Furthermore, it is not apparent from Directive 2014/65, on the basis of which the delegated regulation was adopted, that Articles 56(2) and 72(2) of Delegated Regulation 2017/565 and Annex I thereto should be interpreted as meaning that the wording used therein refers to registers in the formal sense rather than merely to 'records'.

34 Neither Article 16(6) of Directive 2014/65 – which requires the Member States to ensure that all investment firms keep a record of all services, activities and transactions undertaken by them which must be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions – nor Article 25(5) of that directive – under which the investment firm must establish a record that includes the document or documents agreed between the investment firm and the client that set out the rights and obligations of the parties, and the other terms on which the investment firm will provide services to the client – prescribes the technical form in which records must be kept by investment firms.

35 In the light of the foregoing, the answer to the questions referred is that Article 56(2) and Article 72(2) of Delegated Regulation 2017/565, read in conjunction with Annex I to that delegated regulation, must be interpreted as meaning that investment firms are not required to record the suitability and appropriateness assessments undertaken for each client with respect to investment products and services and the information provided to each client on the costs and charges relating to the investment services in separate single registers, in the form, inter alia, of a database, and the manner in which those records are kept may be freely chosen, provided, however, that it meets all of the requirements laid down in Article 72(1) of that delegated regulation.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 56(2) and Article 72(2) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 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, read in conjunction with Annex I to that delegated regulation, must be interpreted as meaning that investment firms are not required to record the suitability and appropriateness assessments undertaken for each client with respect to investment products and services and the information provided to each client on the costs and charges relating to the investment services in separate single registers, in the form, in particular, of a database, and the manner in which those records are kept may be freely chosen, provided, however, that it meets all of the requirements laid down in Article 72(1) of that delegated regulation.

[Signatures]