

## FNG's position on fiduciary duty/Investors duties:

FNG appreciates EU's initiative of clarifying fiduciary/investors duties and its measure to, as a first step, collect stakeholder views on how to reach this target. Concerning further steps on behalf of EU, we favour to build upon existing activities in the member countries.

### Fiduciary/investors duty is leverage for sustainable finance:

An asset managers' decision about investing the assets of beneficiaries highly depends on the clients decision and the definition of fiduciary duty: based on a risk management perspective, the intermediate has to make sure to optimize a long-term investment strategy for the sake of the beneficiaries. For this reason, asset managers have to comply with the principles of care, loyalty and prudence.

EU legislation as basis for the asset managers creates similar conditions for FNG's members in Germany and Austria. For fund managers, UCITS directive 2009/65/EC defines the following:

*Article 14 1. Each Member State shall draw up **rules of conduct** which management companies authorised in that Member State shall observe at all times. Such rules shall implement at least the principles set out in this paragraph. Those principles shall ensure that a management company:*

*(a) acts honestly and fairly in conducting its business activities **in the best interests of the UCITS it manages and the integrity of the market;***

Germany, Austria and Switzerland have incorporated these principles in different ways in guidelines and legislation. Regarding asset management in Germany as an example, this is the case via the so called Wohlverhaltensrichtlinien (WVR), which are voluntary guidelines of the asset management association BVI.

With growing data on the correlation of ESG aspects and risk management it has become evident in recent years that ESG-aspects have to be integrated in fiduciary duty. For this reason the WVR were updated by BVI, with the new guidelines started in 2017. Now, complying with WVR means that an asset manager also does have to define how ESG factors are integrated in investment processes in order to optimize risk management. The asset managers themselves decide about measures how to assure compliance with the new WVR and report on a "comply or explain" basis their accordance with the WVR. FNG appreciates this freedom in the question of „how“ and expects the new guideline to leverage the target of sustainable finance. To assure the process of implementation, we see the necessity to establish standards for standards for implementation that can answer the question how far ESG-integration into fiduciary duties are already implemented by asset managers.

Beyond voluntary guidelines as mentioned here, legal changes are the second level of measures to set free a leverage effect. They should be taken into account only in case the application on a voluntary basis fails.

For the reason described, FNG's new methodology to describe the market for Responsible Investment and SRI also incorporates this logic: beyond dedicated SRI products, asset managers should show how they operationalize the process of being a responsible investor. This methodology will be applied starting with the market study to be published by FNG in June 2018.

### The role of institutional investors

When extending the perspective to investor's duties - which is a step very important and overdue - the picture is more complex: e.g. insurance and pension funds also have to be taken into account. There is a range of different mandatory and voluntary settings that will have to be worked on in order to clarify duties on ESG.

In general, from an FNG point of view, every legislative change that strengthens ESG-aspects as a systematic part of institutional investors' own risk management and disclosure processes is favoured. Especially with regard to the risks of climate change there is a growing interest in the market to have a clear framework like it is given in France via Article 173-VI of its energy and ecological transition law, which applies to both asset managers and institutional investors.

#### Art. 173 contains 4 key principles:

- Obligation to report on ESG factors extended to institutional investors
- Focus placed on the environment, and, more specifically, climate change issues
- ESG-Climate approach into investment strategy in 2 ways : the impacts "on" and "of" investment
- "Comply or explain" principle : provides investors with broad flexibility in choosing the way to fulfil the law's objectives

Additionally, public institutional investors increasingly show activities to show how their investment strategy complies with public sustainability strategies. From an FNG point of view, this path should be intensified. A level playing field for all institutional investments should be the aim of any regulation.

### Legal changes

IORP-Directive 2016/4321/EC for pension funds currently being in the process of translation in national law is to be taken into account. Unfortunately it only enables IORP's to integrate ESG, but still leaves way to clarify a mandatory character of ESG-integration:

#### Article 19 - Investment rules

1) Member States shall require IORPs registered or authorised in their territories to invest in accordance with the **‘prudent person’ rule** and in particular in accordance with the following rules:

(a) **the assets shall be invested in the best long-term interests of members and beneficiaries as a whole.** In the case of a potential conflict of interest, an IORP, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;

(b) **within the prudent person rule, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on environmental, social, and governance factors;**

FNG would definitely appreciate further clarification in a future revision of this EU guideline.

Regarding national law and again taking Germany as an example, the following legal basis is relevant:

1. Versicherungsaufsichtsgesetz (clarification of fiduciary duty already necessary due to IORP II-translation in national law)
2. Kapitalanlagegesetzbuch (KAGB): not the legislative basis itself has to be changed, but there is need for adaptation of the so called „Leitlinien für Fondsverwalter“

Legal changes may be considered if necessary, although from an FNG perspective it will in most cases be sufficient to clarify the use of existing terms in regulation.

Additionally, BaFin as supervisory body in Germany will play an important role in supervising the application e.g. of KAGB-guidelines. In case of non-compliance legal changes could be necessary in a second step.

#### Conclusion:

- FNG is clearly in favour of EU clarifying that ESG must be accepted as an integral part of fiduciary duty/investor’s duties
- FNG is not in favour of measures by EU that determine how to implement ESG aspects in the asset managers or institutional investors risk management processes
- German process on systematic integration of ESG in fiduciary duty on a comply or explain basis in asset management has already started – ESG-risk-consideration at asset managers level should be watched by finance supervision
- Legal changes are a second level of leverage – first step would be to adapt legal guidelines – when extending to investor’s duties, various legal regulation is to be worked on
- Further Institutional investors’ ESG disclosure obligations – like the French Article 173 - would help to optimize asset managers possibilities to integrate ESG as part of fiduciary duty and investor’s risk management

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