Council Working Party on Financial Services and the Banking Union (Financial Services)

Retail Investment Strategy

Monday, 8 April 2024

The eigth Council Working Party on the Retail Investment Strategy will be devoted to a presentation of the Presidency's drafting suggestions (i) on PRIIPS as well as on (ii) suitability and appropriateness. Three informational presentations will also be made regarding Value-for-Money (VfM): the Commission will recall the context underlying its VfM proposal; Denmark and Germany will share their national experiences about VfM.

The format of the meeting will be attachés + experts (1+2). Please note that interpretation will not be provided in the meeting.

1. **Presidency opening remarks and adoption of agenda (10:00 – 10:15)**

2. **Presentation and discussion of the Presidency drafting proposals on PRIIPS (10:15 – 12:30)**

Lunch break (12:30 – 14:00)

3. **Presentation and discussion of the Presidency drafting proposals on suitability and appropriateness (14:00 – 16:30)**

4. **Presentations by the Commission, Denmark and Germany about Value-for-Money (16:30 – 17:30)**

5. **AOB and concluding remarks (17:30 – 17:45)**

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Working Party on Financial Services and the Banking Union

Retail Investment Strategy

8 April 2024

Presidency note on drafting suggestions for PRIIPS

Executive Summary

In this note, the Belgian Presidency (Presidency) proposes further amendments to the Commission's proposals on the PRIIPs Regulation.

These proposals for amendments build on feedback received from the Member States (MS) during the CWP held on 8 March 2024 and on the subsequent written comments. They are intended to further enhance the initial proposals of the Commission.

The Presidency would like to have the views of the MS regarding those proposals for amendments.

Presidency drafting suggestions are highlighted in bold green, to contrast with bold blue for the previous drafting suggestions of the Spanish Presidency.

1 Introduction

This paper is based on Member States' (MS) comments. It proposes modifications to the Commission's proposal amending Regulation 286/2014 (PRIIPs Regulation). MS are invited to share their views on this note.

2 The term "immediate annuities without a redemption phase"

MS supported the clarification proposed by the Presidency during the Working Party held on 8 March 2024[1]. However, some believe it would be even clearer to present the exemption for immediate annuities without a redemption phase in a separate point. The Presidency proposes that Article 2(2) be amended accordingly.

Article 1

Amendments to Regulation (EU) 1286/2014

Regulation (EU) 1286/2014 is amended as follows:

(1) Article 2(2) is amended as follows:

(a) point (d) is replaced by the following:

'(d) securities as referred to in Article 1(2), points (b) to **(f)~~, and point (gf)~~** of Regulation (EU) 2017/1129 of the European Parliament and the Council*;';

(b) the following point (h) is added:

~~'(h) pension products, including immediate annuities without a redemption phase, which, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement and which entitle the investor to certain benefits;';~~

'(h) pension products, including immediate annuities without an accumulation phase;';

[1] WK 3318/2024 INIT

Q.1. Do MS support the proposed amendments to Article 2(2) of the PRIIPs Regulation? If not, please explain why.

3 Exclusion of non-equity securities issued by non-financial companies

A majority of MS were not in favour of explicitly excluding non-equity securities issued by non-financial companies in the scope of the PRIIPs Regulation. This in order to maintain a level playing field amongst the different manufacturers and avoid regulatory arbitrage. It is understood that the current legal uncertainty mainly stems from recital 6 of the PRIIPs Regulation, which states that the PRIIPs Regulation applies to products that are manufactured by the financial services industry. The Presidency proposes that any ambiguity be removed by adding a new recital in the Amending Regulation clarifying that the PRIIPS Regulation applies to all products that qualify as a PRIIP according to Chapter 1 of the PRIIPS Regulation, regardless of the sector to which the manufacturer belongs. The Presidency therefore proposes adding the following new recital 7a in the Amending Regulation.

Whereas:

[…]

(7a) Regulation (EU) No 1286/2014 applies to all products that qualify as a PRIIP according to Chapter 1 of the said Regulation. When assessing whether a product falls within the scope of Regulation No 1286/2014, the sector or industry to which the manufacturer belongs is irrelevant. This means that products manufactured by non-financial companies and which qualify as a PRIIP according to Chapter 1 of Regulation No 1286/2014 fall within the scope of the said Regulation.

Q.2. Do MS support the proposed new recital 7a Amending Regulation? If not, please explain why.

4 Performance scenarios

A majority of MS support revisiting performance scenarios at this stage.

In their Call for Advice, the ESAs recommend removing the word "scenarios" from point (iii) of Article 8 (3) (d) of the PRIIPs Regulation. Such an amendment would give more flexibility for the calculation methodology and presentation of performance prescribed in the RTS[2]. It would allow, amongst others, the possibility of replacing the performance scenarios[3] for UCITS, AIFs and unit-linked insurance-based investment products by past performance. This would improve the current regime, where past performance has to be disclosed in a separate document.

In view of the above and in light of the concerns relating to the difficulty of engaging in and finalizing in a timely manner technical discussions about what is the most appropriate methodology and presentation of performance information, the Presidency proposes amending Article 8(3)(d)(iii) of the PRIIPs Regulation and replacing the wording "*appropriate performance scenarios*" by "*appropriate information on performance*". In paragraph 5 of Article 8, a mandate is given to the ESAs to modify the RTS accordingly. In addition the Presidency proposes clarifying in the mandate that the ESA should pay particular attention to the need for simplicity, clarity and comparability when considering the different options for the calculation and presentation of performance information. They should also weight the advantages and disadvantages of the inclusion in the KID of either past performance, performance scenarios or both.

Q.3. Do MS support the replacement of the wording "*appropriate performance scenarios*" by "*appropriate information on performance*" in Article 8(3)(d)(iii) of the PRIIPs Regulation?

5 Multi-option products (MOPs)

MS see merit in having total costs, risks and performance included in the research and comparison tool but believe this should not lead to disproportionate implementation costs.

The inclusion of a reference to where pre-contractual information documentation about the underlying option can be found is also generally supported. A majority of MS is opposed to adding the costs relating to the contract/wrapper in the specific information document.

The Presidency is aware of the challenges involved in the development of a research and comparison tool. However, Article 14 of PRIIPs Delegated Regulation 2017/653

[2] Commission Delegated Regulation (EU) 2017/653

[3] As required in points 5 to 17 of Annex VI of Commission Delegated Regulation (EU) 2017/653

requires a specific information document containing, inter alia, the summary risk indicator and performance scenarios of each underlying investment option. It is therefore understood that the main issue relating to risk and performance concerns cases where an investor would combine different underlying investment options.

The Presidency proposes introducing the wording "*where technically possible*" and asking in the mandate given to the ESAs to specify when the inclusion of (i) total cost and (ii) risk and performance should be considered as "*technically possible*", thereby making an explicit reference to cases involving a combination of underlying investment options.

(4) in Article 6 paragraph 3 is replaced by the following:

"3. By way of derogation from paragraph 2, where a PRIIP offers the retail investor a range of options for investments, such that all information required in Article 8(3) with regard to each investment option cannot be provided within a single, concise stand-alone document, the key information document shall provide a generic description of the underlying investment options, and the costs of the PRIIP other than the costs for the investment option, provided that:

(a) PRIIPs manufacturers provide investors with tools adapted to retail investors that facilitate research and comparison among the different investment options **that they offer ~~including on costs~~ and, where technically possible, on (i) the total cost of the PRIIP relating to this investment option, including the costs relating to the insurance wrapper, referred to under point (c) and (ii) the risks and performance;**

(b) ~~**Retail investors have easy access to the pre-contractual information documentation relating to the investment products backing the underlying investment options;**~~ **the tools referred to in point (a) shall contain a reference to the pre-contractual information documentation relating to the investment products backing the underlying investment options.**

(c) PRIIPs manufacturers provide investors **with the total costs of the PRIIP relating to this investment option, including the costs relating to the insurance wrapper,** ~~**upon their request and**~~ in good time before retail investors are bound by any contract or offer to invest in a given investment option **and, upon their request, at any time** ~~**the complete costs of the PRIIP relating to this investment option**~~**. This**

condition shall be also deemed satisfied when the total costs of the PRIIP relating to this investment option, including the costs relating to the insurance wrapper , are provided to the investor via the tools referred to in point (a).”

(5) Article 8 is amended as follows:

(…)

(g) In paragraph 5, the following subparagraph is added after the second subparagraph:

‘When developing the draft regulatory technical standards, the ESAs shall assess the circumstances under which it is technically possible to include (i) the total costs of the PRIIP relating to the investment option, including the costs relating to the insurance wrapper; and (ii) the risk and performance information in the tool referred to in point (a) of Article 6(3), paying due regard to the implementation costs for companies. This assessment shall also cover cases of risk and performance information relating to the combination of different underlying investment options. Based on their conclusions, the ESAs shall specify in the draft regulatory technical standards when the inclusion of the total cost and of the risk and performance in the tool is considered as technically possible. Where the ESAs conclude that technical feasibility is limited, they may propose simplification of calculation or other technical parameters that would allow to display the level of total cost.’

Q.4. Do MS support the proposed drafting suggestions? If not, please explain why.

6 How sustainable is this product?

Most MS are supportive of including a cross-reference to SFDR disclosures, which would be further defined at level 2. Regarding the inclusion of a statement based on Articles 8 and 9 of the SFDR Regulation, MS were more circumspect.

MS referred to the upcoming SFDR review and its impact on current Articles 8 and 9. Others argued that Articles 8 and 9 should not be used as labels and that the inclusion of statements based on those articles could be misleading for investors. Most of the MS answered positively to the proposed derogation for MOPs. A few MS proposed adding an explanatory statement, indicating that the sustainability section was not relevant for

generic KID and that information about sustainability could be found in the specific information document. One MS indicated that the taxonomy alignment disclosures should be required only when the PRIIP has ESG characteristics.

In light of the above, the Presidency proposes removing the requirement to include a statement based on Article 8 or 9 of the SFDR. Article 8(3) aa) point (ii) of the PRIIPs Regulation would refer only to specific information disclosures made pursuant to Commission Delegated Regulation 2022/1288. The PRIIPs Delegated Regulation 2017/653 would specify which disclosures the sustainability section should contain.

(5) Article 8 is amended as follows:

(...)

(d) the following point (ga) is inserted:

'(ga) for PRIIPs on which financial market participants are to disclose pre-contractual information pursuant to Regulation (EU) 2019/2088 of the European Parliament and of the Council** and Commission Delegated Regulation 2022/1288***, under a section titled 'How ~~environmentally~~ sustainable is this product?', the following information:

(i) **when relevant**, the minimum proportion of the investment of the PRIIP that is associated with economic activities that qualify as environmentally sustainable in accordance with Articles 5 and 6 of Regulation (EU) 2020/852 of the European Parliament and of the Council****;

(ii) ~~**the expected greenhouse gas emissions intensity associated with the PRIIP pursuant to Delegated Regulation 2022/1288**~~ **a link to specific information disclosures made in accordance with Commission Delegated Regulation 2022/1288';**

By way of derogation from the first subparagraph, where a PRIIP offers the retail investor a range of options for investments, the key information document does not need to contain information about the sustainability of the PRIIP.

(5) Article 8 is amended as follows:

(…)

(h) In paragraph 5, the following subparagraph is added after the second subparagraph:

'When developing the draft regulatory technical standards, the ESAs shall specify to which specific information disclosures

defined in Commission Delegated Regulation 2022/1288 a link should be inserted in the section "How environmentally sustainable is this product?" in accordance with paragraph 3, point (ga).

Q.5. Do MS support the proposed drafting suggestions? If not, please explain why.

7 Voluntary interactive tools

The MS remarks can be summarized as follows:

a) **Inclusion of the possibility of simulating costs over a holding period that is different from the recommended holding period**: The views of the different MS were divided Those who opposed the inclusion of such a requirement argued that such calculation could be complex to implement..

b) **Specification of the parameters to be personalized**: The majority of the MS were in favour of specifying in the Level 1 text which parameters needed to be personalized.

c) **Clarification relating to the wording "all key information"**: The majority of the MS support the clarification.

d) **Generation of a "personalized KID" or of "personalized information"**: The views of the different MS were divided. Those who opposed the personalized KID argued that this could create liability issues and create confusion on how this personalized KID should be viewed as compared to the "standardized" KID, including taking into account that the KID should be a document enabling comparison across different products.

e) **Clarification of the liability if the interactive tool were developed by an advisor/seller**: Most MS were supportive of an amendment to Article 11 of the PRIIPs Regulation, but some MS warned against the risk that doing so may deter the advisor/seller from developing the interactive tool.

In light of the above, the Presidency proposes defining at Level 1 which parameters are eligible for personalization. In addition, a mandate is given to the ESAs to propose how such parameters could be personalized as well as whether such personalization should be mandatory or optional.

In view of the concerns expressed about the creation of a personalized KID via the interactive tool, the Presidency proposes clarifying that the interactive tool is meant to generate a personalized *presentation* of key information but does not constitute a personalized KID. For the avoidance of doubt and in view of the above point (a) and (b) should be removed.

(7) Article 14 is replaced by the following:

(…)

(2) ~~The electronic format of the key information document may be provided by means of an interactive tool that enables the retail investor to generate personalized key information based on the information in the key information document or the information underlying it.~~ **The manufacturer or the person advising on, or selling, a PRIIP may provide an interactive tool that enables the retail investor to generate personalized key information, based on the information in the key information document or the information underlying it.**

That optional tool shall respect the following conditions:

~~(a) the interactive tool, or its use, shall not alter the understanding of the key information document;~~

~~(b) all key information, shall be presented;~~

(**a**~~e~~) the key information document shall be easily accessible through a link next to the interactive tool, and the link shall be accompanied by the following message "It is recommended to download and store the key information document";

~~(~~**b**~~d) the interactive tool shall allow investors to simulate costs over a holding period that is different from the recommended holding period.~~ **The following information is eligible for personalization via the use of the interactive tool: the assumed invested amount; the holding period; the age of the policyholder.**

Where the key information ~~document~~ is provided in accordance with the first subparagraph, its format may be adapted compared to the presentation of the key information document referred to in Article 8.

(3) The ESAs shall develop draft regulatory technical standards specifying the modalities for personalising the information as referred to in paragraph 2, the first subparagraph, and the conditions for adapting the formatting of the information, as referred to in paragraph 2, the second subparagraph.

In addition to the modalities referred to in the first subparagraph, the regulatory technical standards shall include the conditions for personalising the key investor information in the following manners:

~~(a) the conditions for personalizing the information to allow investors to simulate costs over a holding period that is different from the recommended holding period;~~

(**a**~~b~~) the conditions for personalising the information to allow investors to compare different PRIIPs.

(**b**~~e~~) the conditions for personalising the information to make it accessible to persons with disabilities.

(7a) in Article 11, the following point (1a) is inserted:

' (1a) The person advising on, or selling, a specific PRIIP shall not incur civil liability solely on the basis of the information presented in an interactive tool in accordance with Article 14(2) and relating to that specific PRIIP, including any translation thereof, unless it is inconsistent with the information presented in the key information document drawn up by the manufacturer and relating to that specific PRIIP or with the requirements laid down in Article 14.

Q.6. Do MS support the proposed drafting suggestions for Article 14 and Article 11? If not, please explain why and propose alternatives that you consider more appropriate.

8 Update of the KID

In Article 1(6) of the Amending Regulation, the Commission proposes, when assessing whether the KID should be updated or not, to draw a distinction between PRIIPs that are still made available to retail investors and PRIIPs that are no longer made available. This proposal raised questions from the MS.

In general, there was an understanding that this provision would imply that the KID of products that are no longer made available would still need to be updated. MS wondered why such an update was necessary for PRIIPs that are no longer made available. MS challenged this requirement, claiming that the KID is a pre-contractual document. MS also mentioned that updating KIDs for products no longer made available could be technically challenging. In addition, there were some doubts about the interpretation that should be given to the wording "made available", with some MS urging a clarification of this concept in the Level 1 text.

In light of the above, the Presidency suggests not maintaining the proposed amendment to Article 10(2) and instead specifying that the requirement to review and revise the key information document shall cease to apply where the PRIIP is no longer open to new subscriptions and cannot be purchased on a secondary market.

Q.7. Do MS support the proposed way forward? If not, please explain why

9 Page limit

MS raised concerns relating to the current 3-page limit in view of the potential inclusion of two new sections, i.e. the "*Product at a glance*" dashboard and the "*How sustainable is this product?*" section. The Presidency notes that readability needs to be balanced

against the conciseness of the KID. A potential extension risks reducing the pressure to prioritise information in the KID to focus on those which are really essential to understanding the product. New elements could be accommodated within 3 pages with some degree of prioritisation at Level 2.

It should be noted that the European Parliament, in its position adopted in ECON Committee on 20 March, proposes a 4-page limit.

Q.8. Do MS support the current 3-page limit or prefer a new, 4-page limit?

10 Entry into force and application

In light of legal issues relating to a dynamic entry into application of this Regulation, the Presidency proposes an application date of 24 months after the date of entry into force of the Amending Regulation.

Q.9. Do MS support an application date of 24 months after the date of entry into force of the Amending Regulation? If not, please explain why and indicate what deadline MS believe would be more appropriate.

Working Party on Financial Services and the Banking Union

Retail Investment Strategy

8 April 2024

Presidency note on drafting suggestions for suitability and appropriateness

Executive Summary

In this note, the Belgian Presidency (Presidency) proposes further amendments to the Commission's proposals regarding (i) appropriateness and (ii) suitability (including the best interest of the client test).

The proposed amendments build on the work done by the Spanish Presidency as well as on the written comments received from Member States (MS). They are intended to further enhance the initial proposals of the Commission.

The Presidency would like to have the views of the MS regarding the proposals for amendments, with a view to closing the discussions on those parts of the text.

Presidency drafting suggestions are highlighted in bold green, to contrast with bold blue for the previous drafting suggestions of the Spanish Presidency.

Preliminary remarks

1. **The term "firms" in this note refers to "investment firms", "insurance undertakings" and "insurance intermediaries", unless explicitly stated otherwise.**

2. **The term "products" in this note refers to "financial instruments" (MiFID) and "insurance-based investment products" - "IBIPs" (IDD).**

3. **The term "clients" in this note refers to "retail clients" (MiFID) and "customers" (IDD).**

4. **The term "independent advice" in this note refers to "advice on an independent basis" (IDD) and "independent investment advice" (MiFID).**

5. **The term "non-independent advice" in this note refers to investment advice that does not qualify as independent advice.**

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1. Purpose of suitability and appropriateness assessment

The Commission's proposal introduces an obligation for firms distributing products to explain the purpose of the suitability and appropriateness assessment to clients in a clear and simple way, and to obtain from clients all relevant information which may be necessary and proportionate for the assessments. The proposal clarifies that clients need to be informed, via standardised warnings, about the consequences for the quality of the assessment if they do not provide accurate and complete information.

The Commission's proposal also points out that the suitability and appropriateness assessments need to be conducted in good time before the provision of the relevant investment service or before the customer is bound by an insurance contract or offer. A suitability assessment report needs to be provided to clients sufficiently in advance of the conclusion of the transaction to enable clients to seek and receive additional clarifications, where needed.

Based on the written comments of MS, the Presidency proposes that the following amendments be made to Article 25(1) of MiFID and to Article 30(1) of IDD:

– The Presidency proposes splitting the first paragraph of Article 25(1) of MiFID in two different paragraphs to clearly distinguish which test should be performed for which investment service (appropriateness versus suitability).

– With regard to the warning to be provided to clients, the Presidency suggests that point a) be limited to "*inaccurate information*" and that "*incomplete information*" be added to point b). If the information on necessary elements of the information to be collected is incomplete, the firm will not be able to evaluate properly whether the service or financial instrument envisaged is suitable or appropriate. One MS noted that 'redundant and contradictory information' can also negatively impact the quality of the assessment. Although this is true, the Presidency takes the view that this should not be explicitly mentioned in point a) since firms should alert clients if the latter provide contradictory information in order to be able to perform the assessment and they should not request from clients information that is not useful in the context of the suitability or appropriateness assessment. The Presidency also proposes aligning the wording between MiFID and IDD.

– One MS argued that retail clients should have the right to request the execution of their orders even when they choose not to provide information on their knowledge and experience. The Presidency proposes treating the situation where the investment firm is prevented from determining whether the service or financial instrument envisaged is appropriate to the client in the same way as the situation where the firm assesses the service or financial instrument as being inappropriate for the client (i.e. the firm can only proceed if the client requests that it do so). The Presidency proposes changing Article 25(3), subparagraph 4 of MiFID and Article 25(1) of

MiFID to reflect this. This is also in line with Article 56(2), point (c)[1] of Delegated Regulation (EU) 2017/565 for the appropriateness assessment.

– The Presidency suggests, furthermore, adding an obligation to maintain a record of the explanation or warning to the client, as is the case for other warnings.

– Finally, the Presidency suggests leaving it up to firms to determine the format in which they provide the report on the information collected for the purpose of the assessment at the request of the client, since most firms already have standardised processes in place and the added value for the client of a standardisation seems limited (since firms tend to use their own questionnaires and clients are not always willing to exchange their information between different firms). Where firms already provide this information in the suitability statement, it may be sufficient to comply with this obligation.

Article 25(1) of MiFID

Assessment of suitability and appropriateness and reporting to clients

The investment firm shall assess the ~~**suitability or**~~ appropriateness of the relevant financial instrument~~**s**~~(s) or investment service~~**s**~~ ~~**or transaction(s)**~~ to be recommended to, or **requested**~~**demanded**~~ by, ~~**his or her**~~**its** client or potential client in good time before~~**respectively i) the provision of the investment advice or portfolio management or ii)**~~ the execution or reception and transmission of the order.

The investment firm shall assess the suitability of the relevant financial instrument(s) or investment service to be recommended to, or requested by, its client or potential client in good time before the provision of the investment advice or portfolio management.

Each of these assessments shall be determined on the basis of information about the client or potential client as obtained by the investment firm, in accordance with the below requirements.

The investment firm shall ensure that the purpose of the suitability or appropriateness assessment is explained to the client or potential client before any information is requested from them. The clients and potential clients shall be warned of the following consequences:

(a) the provision of inaccurate~~ **or incomplete**~~ information ~~**shall**~~**may** impact negatively the quality of the assessment to be made by the investment firm;

[1] 2. Investment firms shall maintain records of the appropriateness assessments undertaken which shall include the following: (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 the warning, and, where applicable, whether the firm accepted the client's request to proceed with the transaction.

(b) the absence of **the necessary** information **(including the provision of incomplete information)** ~~shall~~ prevent**s** the firm ~~to~~**from** determin**ing** whether the service or financial instrument envisaged is suitable or appropriate for them and**, in the case of investment advice, from** ~~to~~ proceed**ing** with the recommendation ~~or the execution of the client's order~~.

Such explanation and warning shall be provided in a standardised format. **The investment firm shall keep a record of such explanations and warnings**.

The investment firm shall, upon request of the retail client, provide them with a report on the information collected for the purpose of the suitability or appropriateness assessment. ~~Such report shall be presented in a standardised format.~~

ESMA shall develop draft regulatory technical standards to determine the explanation and warning referred to in paragraph 1, second subparagraph~~, and the format and content of the report referred to in paragraph 1, third subparagraph~~.

ESMA shall submit the draft regulatory technical standards to the Commission by [OJ: insert date 18 months after the date of entry into force].

Power is **delegated**~~conferred~~ to the Commission to adopt those regulatory technical standards ~~referred to above in the fourth subparagraph of this paragraph~~ in accordance with Article~~s~~ 10 ~~to 14~~ of Regulation~~.~~ (EU) No 1095/2010.

Article 30(1) of IDD

Assessment of suitability and appropriateness and reporting to customers

Member States shall require that insurance intermediaries and insurance undertakings distributing insurance-based investment products assess the suitability or appropriateness of insurance-based investment products and, where applicable, underlying investment assets to be recommended to or demanded by customers in good time before the customers are bound by an insurance contract or offer. Each of these assessments shall be carried out on the basis of proportionate and necessary information about the customer as obtained by the insurance intermediary or insurance undertaking in accordance with the requirements set out in this Article.

Member States shall ensure that insurance intermediaries and insurance undertakings distributing insurance-based investment products explain to customers the purpose of the suitability or appropriateness assessment before any information is requested from them. Member States shall ensure that insurance intermediaries and insurance undertakings distributing insurance-based investment products warn customers, in a standardised format, of all of the following:

(a) that the provision of inaccurate ~~or incomplete~~ information may impact negatively the quality of the assessment to be made by the insurance intermediary or insurance undertaking**;**

(b) that the absence of **the necessary** information **(including the provision of incomplete information)** prevents the insurance intermediaries and insurance undertakings distributing insurance-based investment products from determining whether the service or financial instrument envisaged is suitable or appropriate for the customer and from providing advice.

Such explanation and warning shall be provided in a standardised format. Insurance intermediaries and insurance undertakings distributing insurance-based investment products shall keep a record of such explanations and warnings.

Member States shall ensure that insurance intermediaries and insurance undertakings distributing insurance-based investment products provide customers, upon their request, with a report on the information collected for **the purpose of** the suitability or appropriateness assessment. ~~**That report shall be presented in a standardised format, as developed by EIOPA.**~~

EIOPA shall develop draft regulatory technical standards to determine the explanation and warning referred to in the second subparagraph ~~**and the format and content of the report referred to in the third subparagraph**~~.

EIOPA shall submit those draft regulatory technical standards to the Commission by [OJ: insert date 18 months after the date of entry into force].

Power is delegated to the Commission to adopt those regulatory technical standards in accordance with Article 10 of Regulation (EU) No 1094/2010.

Q1: Do MS agree that the report on the information collected for the purpose of the suitability or appropriateness assessment should not be in a standardised format? If not, please explain.

Q2: Do MS agree with the drafting amendments proposed by the Presidency in Articles 25(1) of MiFID and 30(1) of IDD? If not, please explain.

2. Appropriateness assessment

The Commission's proposal expands, in Article 25(3) of MiFID and in Article 30(2) of IDD, the scope of the information that investment firms, insurance undertakings and insurance intermediaries need to obtain from clients when assessing appropriateness, by also adding questions about the capacity to bear full or partial losses and risk tolerance. In the event of a negative appropriateness assessment, the firm may only proceed with the transaction at the client's explicit request.

The Spanish Presidency proposed that Recital 35 of the Omnibus Directive and Articles 25(3) of MiFID and 30(2) of IDD be adapted to provide more flexibility, by allowing firms the possibility to test the capacity of their clients to bear losses and their

risk tolerance and by allowing firms to carry out the appropriateness assessment without this information if the client refuses to give this information. The Spanish Presidency noted in its Progress Report that further discussions were needed since there are diverging views between MS.

The Presidency takes the view that the inclusion of information on the capacity to bear losses and on risk tolerance in the appropriateness assessment could potentially lead to legal uncertainties for firms regarding the nature of the service offered to the client. Adding this type of information to the appropriateness assessment could give clients the impression that advice is being given, since the same type of information is collected in the context of the suitability assessment. Moreover, this would require that firms change their current questionnaires and start a repapering exercise towards their clients. Furthermore, it seems difficult to explain to clients that they can refuse to provide the information on their ability to bear losses and risk tolerance, but that the appropriateness assessment can take place anyway without this information (if so, why should the information be collected in the first place?).

In 2022, ESMA published its updated guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements[2]. Point 30 of the guidelines states: "*For the purpose of the appropriateness assessment, firms should only take into account the information on the client's knowledge and experience. Firms should avoid giving the perception to clients that information collected other than that which relates to a client's knowledge and experience, in particular with regard to the client's financial situation and investment objectives that may be collected for other purposes (e.g., in the context of product governance or in the context of advised services to the same client), is taken into account when conducting the appropriateness assessment.*"

The Presidency suggests that Articles 25(3) of MiFID and 30(2) of IDD be amended to delete the reference to the capacity to bear full or partial losses and to risk tolerance. Firms may however collect this information for other purposes than the appropriateness assessment as explained in the ESMA guidelines.

Finally, the Spanish Presidency suggested that Article 25(3) of MiFID be amended to refer exclusively to retail clients, given that professional clients are presumed to possess the necessary knowledge and experience to make their own investment decisions. Most MS welcomed this suggestion, whilst some MS believed the appropriateness assessment should also apply to professional clients. The current Article 56(1) of the MiFID Delegated Regulation (EU) 2017/565 already states: "*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.*" This means that, once clients are

[2] esma35-43-3006_gls_on_certain_aspects_of_the_mifid_ii_appropriateness_and_execution-only_requirements_en.pdf (europa.eu)

– based on the criteria for being treated as a professional client – categorised as professional clients for one or more product types, their sufficient level of knowledge and experience can be presumed for those product types and no additional appropriateness assessment is needed. Therefore, the Presidency proposes keeping the drafting suggestion of the Spanish Presidency and aligns the overall text in this way.

Recital 35

(35) ~~To ensure that appropriateness tests enable investment firms, insurance undertakings and insurance intermediaries to [more] effectively assess if a financial product or service is appropriate for their clients and customers, those firms, insurance undertakings and insurance intermediaries should [offer the possibility to their clients to make this assessment not only on the basis on] obtain from them information not only [obtained from them] about their knowledge and experience on such financial instruments or services, but for retail clients or customers also about their capacity to bear full or partial losses and their risk tolerance. [If the client or customer is not willing to provide information about their capacity to bear full or partial losses and their risk tolerance, the firm should base their assessment only on information about the client's or customers knowledge and experience]~~. In the case of a negative appropriateness assessment, an investment firm, insurance undertaking or insurance intermediary distributor should, in addition to ~~having the obligation~~ to provide a warning to the client or customer, only be allowed to proceed with the transaction where the client or customer concerned explicitly request so.

Article 25(3) of MiFID

Assessment of suitability and appropriateness and reporting to clients

Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 2, ask the **retail** client or potential **retail** client to provide information regarding their knowledge and experience in the investment field relevant to the specific type of product or service offered or ~~requesteddemanded, and for the retail client or potential retail client, the capacity to bear full or partial losses and risks tolerance~~ so as to enable the investment firm to assess whether the investment service(s) or financial instrument(s) envisaged is/**are** appropriate for the client. ~~The investment firm shall offer to a retail client or potential retail client the possibility, when considering whether the investment service(s) or financial instrument(s) are appropriate for the client, to also consider whether a product is appropriate for the client in view of information provided by that client regarding the client's capacity to bear full or partial losses and risk tolerance.~~

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 assesses**,** on the basis of the information received under the first subparagraph, that the product or service is not appropriate to the **retail** client or potential **retail** client, the investment firm shall warn the **retail** client or potential **retail** client. That warning shall be provided in a standardised format ~~**and shall be recorded**~~. **The investment firm shall keep a record of such warnings**.

The investment firm shall not proceed with a transaction subject to a warning indicating that the product o**r**~~f~~ service is not appropriate **or a warning indicating that the investment firm cannot assess the appropriateness of the product or service**, unless the **retail** client asks to proceed with it despite such warning. **The investment firm shall keep a record of** ~~**B**~~**b**oth **the request**~~**demand**~~ of the **retail** client and **the** acceptance of the firm ~~**shall be recorded**~~.

ESMA shall develop draft regulatory technical standards to determine the format and content of the warning referred to in subparagraph 3.

ESMA shall submit the draft regulatory technical standards to the Commission by [OJ: insert date 18 months after the date of entry into force].

Power is conferred **on**~~**to**~~ the Commission to adopt those regulatory technical standards in accordance with Article**s** 10 of Regulation (EU) No 1095/2010.

Article 30(2) of IDD

Assessment of suitability and appropriateness and reporting to customers

Without prejudice to Article 20(1), Member States shall ensure that, where no advice is given in relation to insurance-based investment products, the insurance intermediary or insurance undertaking shall ask the customer to provide information regarding that person's knowledge and experience in the investment field relevant to the specific type of insurance-based investment product or, where applicable, underlying investment assets, offered or demanded ~~**and the person's capacity to bear full or partial losses and risk tolerance**~~ so as to enable the insurance intermediary or the insurance undertaking to assess whether the insurance-based investment product or products envisaged are appropriate for the customer.

~~**The insurance intermediary or insurance undertaking shall offer to the customer the possibility, when considering whether the insurance-based investment product or products are appropriate for the customer, to also consider whether a product is appropriate for the customer in view of information provided by that customer regarding the customer's capacity to bear full or partial losses and risk tolerance.**~~

Where the insurance intermediary or insurance undertaking considers, on the basis of the information received under the first subparagraph, that the product is not appropriate for the customer, the insurance intermediary or insurance undertaking

shall warn the customer. That warning shall be provided in a standardised format ~~and shall be recorded~~. **The insurance intermediary and the insurance undertaking shall keep a record of such warnings**.

The insurance intermediary or insurance undertaking shall not proceed with the distribution of an insurance-based investment product subject to a warning indicating that the product or~~f~~ service is not appropriate **or a warning indicating that the insurance intermediary or insurance undertaking cannot assess the appropriateness of the product or service**, unless the customer asks to proceed with it despite such warning and the insurance undertaking accepts to conclude the contract at the demand of the customer. **The insurance intermediary and the insurance undertaking shall keep a record of ~~B~~b**oth the demand of the customer and the acceptance by the insurance undertaking ~~**shall be recorded**~~.

EIOPA shall develop draft regulatory technical standards to determine the format and content of the warning referred to in the second subparagraph.

EIOPA shall submit the draft regulatory technical standards to the Commission by [OJ: insert date 18 months after the date of entry into force].

Power is conferred on the Commission to adopt those regulatory technical standards in accordance with **Article** 10 of Regulation (EU) No 1094/2010.

Q3: Do MS support maintaining the current regime and keeping the appropriateness assessment clearly separated from the suitability assessment? If not, please explain.

3. Portfolio diversification

The Commission's proposal adds the need for portfolio diversification as one of the elements that distributors need to assess when considering the suitability of a specific product or service on the basis of information obtained from the client, including information on any existing portfolios.

The Spanish Presidency proposed that Recital 34 be clarified to include that:

- the assessment of the client's portfolio may refer only to the existing portfolios within the investment firm if the client is not willing to provide information on existing portfolios with other firms;
- the need for portfolio diversification should not be assessed in all cases, but only where it is proportionate to the scope of the service provided to clients.

MS generally welcomed the proposed amendments by the Spanish Presidency, but some MS requested further modifications to the wording.

Based on the written comments by MS, the Presidency proposes the following drafting suggestions:

– With regard to the need for portfolio diversification for the client, the Presidency proposes changing the wording in Recital 34 from "as far as necessary" to "where possible". This reflects the situation where firms have the possibility of not taking portfolio diversification into account where (i) the client is not willing to give information on its other existing portfolio(s) or (ii) the client requests advice on a specific financial instrument or asset class to cover a specific need (where diversification is difficult to obtain). This is also reflected in Article 25(2) of MiFID and Article 30(1) of IDD.

– The Presidency also suggests clarifying in Recital 34 that in the case of one-off advice with no view of the client's portfolio, portfolio diversification could be obtained by products that allow for a diversification of the risks for the client due to their underlying asset composition.

– The Presidency suggests, furthermore, making some technical drafting amendments in Article 25(2) of MiFID.

Recital 34

(34) To ensure that, in the context of advised services, due consideration is given to portfolio diversification, financial advisors should be ~~**systematically**~~ required to consider, ~~**as far as necessary**~~ **where possible,** the needs of such diversification for their clients or customers, as part of the suitability assessments, including on the basis of information provided by those clients or customers on their existing portfolio of financial and non-financial assets. **If the client or customer is not willing to provide information on an existing portfolio held with other investment firms or insurance undertakings, the advisor should base ~~their~~the assessment for portfolio diversification on the information that is available to the firm or insurance undertaking~~them~~. The level of consideration of the need for portfolio diversification may differ and may be more limited where, for instance, a client asks for specific advice on how to invest a given amount of money that represents a relatively small part of their overall portfolio or where~~n~~ the client requires advice on a specific asset class to meet a particular need of the client. In the case of one-off advice with no view of the client's portfolio, portfolio diversification could be obtained by products that allow for a diversification of the risks for the client due to their underlying asset composition.**

Article 25(2) of MiFID

Assessment of suitability and appropriateness and reporting to clients

Subject to the second subparagraph, when providing investment advice or portfolio management services, 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, **the~~that~~** client's financial situation, including, **~~as far as~~ where possible ~~and necessary~~,** the composition of any existing portfolios, its ability to bear full or partial losses, investment needs and objectives including sustainability preferences **as well as need for portfolio diversification**, if any, and risk tolerance, so as to enable the investment firm to recommend to the client or potential client**, or to undertake on the client's behalf,** the **~~investment services or~~transactions in** financial instruments that are suitable for that **client~~person~~**, and, in particular, are in accordance with its risk tolerance, ability to bear losses and, **where applicable, ~~potential~~** need for portfolio diversification.

[...]

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.

When providing either investment advice or portfolio management that involves the switching of financial instruments, investment firms shall obtain the necessary information on the client's investment and shall analyse the costs and benefits of the switching of financial instruments. When providing investment advice, investment firms shall inform the client whether or not the benefits of the switching of financial instruments are greater than the costs involved in such switching.

Article 30(1) of IDD

Assessment of suitability and appropriateness and reporting to customers

[...]

Without prejudice to Article 20(1), when providing advice on insurance-based investment products, the insurance intermediary or insurance undertaking shall obtain the **necessary** information regarding the customer's knowledge and experience in the investment field relevant to the specific type of insurance-based investment product or, where applicable, underlying investment assets, offered or demanded, **the ~~that~~** customer's financial situation, including, **~~as far as possible and necessary~~ where possible,** the composition of any existing portfolios, its ability to bear full or partial losses, investment needs and objectives, including **~~any~~** sustainability preferences **and need for portfolio diversification, if any**, and risk tolerance, so as to enable the insurance intermediary or the insurance undertaking to recommend to the customer the insurance-based investment products that are suitable for that **customer~~person~~** and that, in particular, are in accordance with its risk tolerance, ability to bear losses and**, ~~potential~~ where applicable**, need for portfolio diversification.

[...]

When providing advice that involves switching between underlying investment assets, insurance intermediaries and insurance undertakings shall obtain the necessary information on the customer's existing underlying investment assets and the recommended new investment assets and shall analyse the expected costs and benefits of the switch, so that they are reasonably able to demonstrate that the benefits of switching are expected to be greater than the costs.

Q4: Do MS agree with the drafting amendments proposed by the Presidency in Recital 34 of the Omnibus Directive? If not, please explain.

Q5: Do MS agree with the drafting amendments proposed by the Presidency in Articles 25(2) of MiFID and 30(1) of IDD? If not, please explain.

4. "Light" suitability regime for independent advisors (simple advice)

To encourage the provision of independent and less costly advice, the Commission's proposal introduced the possibility for independent advisors to provide advice limited to a range of diversified, non-complex and cost-efficient financial instruments. For these products, distributors would be able to perform a suitability assessment on the basis of more limited information about clients and customers. Given that the advice would be limited to well-diversified and non-complex products, an assessment of the knowledge and experience of clients, together with their portfolio diversification, would no longer be required.

The Spanish Presidency already proposed to make some amendments to Recital 8 with the aim of providing additional clarification of the elements "well-diversified" and "cost-efficient". The Spanish Presidency also suggested that these elements be further developed in Level 2 and proposed amending Article 24(13) of MiFID and Article 30(6) of IDD to empower the Commission to adopt delegated acts to specify the concepts of "well-diversified" and "cost-efficient".

MS generally welcomed the clarifications made by the Spanish Presidency, although considered that further clarification was needed. The Presidency takes the view that the different concepts are to be further explained in Level 2 as proposed.

Recital 8

(8) In order to enable the development of independent advice at a reasonable cost, independent advisors should be allowed to provide advice to retail investors on well-diversified, non-complex and cost-efficient products based on a more limited set of data collected for the suitability assessment. **Cost-efficient products are those that carry lower costs in relation to their performance. Well-diversified products**

are products that allow for the diversification of the risks for the client due to their underlying asset composition. The scope of such advice should be clearly disclosed to retail investors in good time before the provision of the advice. Given the diversified nature of the advised products, independent financial advisors should not be required to obtain and assess information from the clients relating to their knowledge and experience or existing portfolios.

Article 25(2) of MiFID

Assessment of suitability and appropriateness and reporting to clients

[...]

When providing independent investment advice to retail clients restricted to well-diversified, non-complex, and cost-efficient financial instruments, the ~~independent~~ **investment** firm shall be under no obligation to obtain information on the retail client or potential retail client's knowledge and experience about the considered financial instruments or investment services or on the retail client's existing portfolio composition.

[...]

Article 30(1) of IDD

Assessment of suitability and appropriateness and reporting to customers

[...]

When providing advice on an independent basis to retail customers restricted to well-diversified, non-complex, and cost-efficient insurance-based investment products, the insurance intermediary or insurance undertaking shall be under no obligation to obtain information on the customer's knowledge and experience about the considered insurance-based investment products or on the customer's portfolio composition.

[...]

Q6: Do MS agree to further explain the different concepts in Level 2? If not, please explain.

5. Best interest of the client test

5.1 Limitation of scope for safeguards of "best interest of the client test" to non-independent advice

As discussed during the Council Working Party of 18 March 2024 with regard to

inducements, the Presidency proposes to incorporate the elements of the 'best interest of the client test' into the suitability framework of Level 1 in order to improve the quality of advice. The Presidency proposes adding the elements of the 'best interest of the client test' as additional safeguards limited to situations of non-independent advice, for the following reasons:

- The Presidency refers to the aim of the 'best interest of the client test' as mentioned in the explanatory memorandum of the Commission's proposal: the safeguards of the best interest of the client test are aimed at managing conflicts of interest in advice, as a replacement for the quality enhancement test (MiFID) and the no detriment test (IDD), and thus at improving the quality of advice. This means that these safeguards should apply only to advice situations with a possibility of receiving or paying inducements. Taking into account the proposals by the Presidency during the Council Working Party of 18 March 2024, this means that the safeguards of the best interest of the client test should only be applied to non-independent advice, regardless of the application of the new inducements test.
- The Presidency believes that widening the scope of the best interest test to all advice situations could lead to possible inconsistencies, taking into account the current texts of MiFID and IDD and the drafting proposals of the Spanish Presidency, such as:
    - One of the safeguards of the 'best interest of the client test' is the need for an appropriate range of products (Article 24(1a)(a) of MiFID and Article 29b(1)(a) of IDD). However, Article 24(7) of MIFID and Article 30(5b)(a) already state that independent advisors must assess a sufficient range/sufficiently large number of products available on the market which are sufficiently diversified (...). This makes the requirement of the 'best interest of the client test' for independent advice inconsistent and even redundant.
    - The Spanish Presidency added a drafting suggestion in Recital 6 of the Omnibus Directive, stating that an appropriate range as a safeguard of the 'best interest of the client test' can be met by providing advice on the basis of products from one or more manufacturers. Offering products from only one manufacturer seems difficult to reconcile with the necessary independence when providing independent advice.
- Cost-efficiency for independent advice is already partially included in the requirements of Articles 24(7a) of MiFID, 25(2) of MiFID as well as 30(1) and (5c) of IDD. We refer to section 4 of this note. For the other types of advice on an independent basis, the Presidency takes the view that advisors will not be inclined to offer/select products that are not cost-efficient, because of the ban on inducements.
- The Presidency further takes the view that in the case of advice on an independent basis, advisors will not be inclined to offer/select products with additional features

that are not necessary to the achievement of the client's or customer's objectives and that give rise to extra costs, because of the ban on inducements.

In order to improve the quality of advice, these safeguards have to be applied during the advice process when selecting and recommending suitable products for the client. This means that firms can apply these safeguards during the suitability assessment or immediately after the suitability assessment, but certainly before the order confirmation by the client.

The Presidency proposes adding a new Article 24(7a) of MiFID and a new Article 30(5d) of IDD containing the safeguards of the initial 'best interest of the client test' for non-independent advice, in order to clearly differentiate this from the safeguards applicable only to advice on an independent basis/independent investment advice.

Q7: Do MS agree to applying the safeguards of the initial 'best interest of the client test' only to non-independent investment advice? If not, please explain.

5.2 Safeguards of the 'best interest of the client test'

Several MS provided comments on the Commission's proposal and on the drafting suggestions of the Spanish Presidency in its non-paper of 23 November 2023[3]. MS generally welcome the clarifications by the Spanish Presidency on "appropriate range", "cost-efficiency" and "additional features", but request additional clarifications. Some MS argue that the safeguards of the 'best interest of the client test' are too discretional. Some MS are concerned by the potential lack of consistency of these safeguards with other requirements (e.g. the requirement to analyse a diverse/sufficient/appropriate range of products when providing advice (on an independent basis). One MS stated that these safeguards must also be applied to portfolio management.

The Presidency takes the view that the application of these safeguards to portfolio management would not contribute to the aim of managing conflicts of interest. Portfolio management is already subject to an inducement ban. The incentive for portfolio managers to select products that are not cost-efficient and have unnecessary additional features seems to be very limited.

The safeguards of the 'best interest of the client test' for MiFID and IDD are further discussed below.

5.2.1 Assessment of an appropriate range of products (MiFID and IDD)

The Spanish Presidency suggested that the "appropriate range" could include products

[3] WK 15696/2023 INIT.

from one or more manufacturers. This means that firms, including tied insurance distributors, advising products from only one manufacturer ("closed architecture") could comply with this requirement. The Spanish Presidency added in Recital 6 of the Omnibus Directive the specification that the "appropriate range" shall include only suitable products for the investor.

Several MS expressed their support for the changes suggested by the Spanish Presidency but asked for further clarification on the concept of "appropriate range", preferably in the Level 1 text. One MS also suggested specifying that an "appropriate range" can be met by providing advice based on a single product if it offers an appropriate range of underlying investment assets, probably referring to multi-option products (MOPs). Some MS request some clarification regarding the consistency between this provision and Article 24(4)(a)(ii) of MiFID[4]. One MS also suggested clarifying the situation of tied agents in the Level 1 text of IDD[5]. Finally, some MS suggested deleting this safeguard because it serves no particular purpose, but creates ambiguity with regard to the suitability assessment and is too complicated and difficult in practice, causing disproportionately high costs.

The Presidency notes that the opinions of MS strongly differ on whether this safeguard should be kept and if so, what the definition and scope should be.

The Presidency therefore presents two options to the MS:

– Option A: a limited redrafting of the requirement based on the reactions of some MS;
– Option B: deletion of the requirement.

Option A

The Presidency proposes a redrafting of the requirement (see section 5.4 "Drafting Suggestions" of this note). This drafting suggestion contains the following elements suggested by MS:

[4] The Presidency takes the view that the assessment of an appropriate range of products does not lead to an inconsistency with Article 24(4)(a)(ii) of MiFID. This paragraph relates to the information to be provided prior to the provision of investment advice on the service and the offered range. The phrase "whether the advice is based on a broad or on a more restricted analysis of different types of financial instruments" can apply to both independent and non-independent advice. This does not seem to trigger any inconsistency with the requirement/safeguard of an appropriate range. However, the following sentence of said Article ("(...) whether the range is limited to financial instruments issued or provided by entities having close links with the investment firm or any other legal or economic relationships, such as contractual relationships, so close as to pose a risk of impairing the independent basis of the advice provided") only applies to independent investment advice. As proposed by the Presidency, the safeguards of the 'best interest of the client test' apply only to non-independent advice. Hence, the Presidency does not believe that this sentence causes ambiguity or inconsistency with the safeguards treated in this section.

[5] The Presidency suggests not adding a reference to tied agents in the Level 1 text of IDD. "Tied agents" are not defined in IDD, in contrast to MiFID (Article 4(1)(29) of MiFID).

– a reference in the Level 1 text to Article 25(2) of MiFID and Article 30(1) of IDD;

– a reference, in Recital 6 of the Omnibus Directive, new Article 24(7a) of MiFID and new Article 30(5d) of IDD, to the fact that the requirement can be met by providing advice on products of one or more manufacturers. Recital 6 of the Omnibus Directive and Article 30(5d) should also mention that an appropriate range can also be met by providing advice on a single product if it offers an appropriate range of underlying investment assets (multi-option products or "MOPs");

– the alignment, where possible, of "appropriate range" for non-independent advice with "sufficient range" for advice on an independent basis.

Option B

This option consists of a deletion of the requirement based on the following arguments:

– The range of (suitable) products is not determined after or during the suitability assessment, but during the product governance process for distributors, when they decide on the range of instruments they intend to recommend to clients, taking into account the identified target market and distribution strategy[6]. The range of products is determined before the advice process. This is the cornerstone of this process and of the suitability assessment. The requirement/safeguard of the "appropriate range" of products will have little to no effect if it is not implemented during the product governance process for distributors.

– The proposals of the Spanish Presidency and the MS, suggesting that an appropriate range of products can be met by one or more products (MOPs), from one or more manufacturers, could potentially undermine the requirement. It is not clear what the added value of the appropriate range requirement is, if an "appropriate range" can be one product (with a range of underlying investment options) from one manufacturer.

Q8: Which option (A or B) would MS prefer with regard to the appropriate range?

5.2.2 Recommendation of cost-efficient suitable products (MiFID and IDD)

The Spanish Presidency added a drafting suggestion in Recital 6 of the Omnibus Directive, stating that the assessment of cost-efficiency should focus not only on the costs, but also on the performance of the relevant products. Furthermore, the Spanish Presidency clarified in Recital 6 that firms must recommend the most cost-efficient

[6] Article 10 of the Commission Delegated Directive (EU) 2017/593, Article 10 of the Commission Delegated Regulation (EU) 2017/2358.

products amongst those that are suitable and share similar features (including guarantees or ESG characteristics), considering costs, charges and performance.

Several MS welcomed the drafting suggestions, but indicated that there is need for additional clarification, preferably in the Level 1 text. Some MS indicated that the requirement needs to be aligned with the current MiFID Level 2 texts (Article 54(9) of Delegated Regulation (EU) 2017/565). It is not clear whether the concept of cost-efficiency is identical to that of the value-for-money of a product and/or if it is identical to the term used in the drafting suggestion of the Spanish Presidency in Recital 8 of the Omnibus Directive (cf. section 4 of this Presidency note).

There seems to be no real consensus on how "cost-efficiency" should be understood. The Presidency takes the view that there should only be one notion of "cost-efficient" in the Omnibus Directive. This means that its meaning in Recitals 6 and 8 of the Omnibus Directive should be the same.

The Presidency suggests that the concept of "cost-efficiency" be distinguished from the concept of "value-for-money". The value-for-money assessment of a product is part of the product governance process for manufacturers and distributors. Firms assess the value for money for an identified target market, but this does not entail a preliminary suitability assessment. In this regard, the Presidency refers to the clarification made in the MiFID Level 3 by ESMA regarding the relationship between the product governance requirements and the suitability assessment[7].

Furthermore, the Presidency believes that the "cost-efficiency" of products in the context of advice refers to the assessment of the costs and associated charges of the features of the products identified as serving the client's objectives, and their impact on the expected return, in accordance with Article 24b(1) of MiFID and Article 29(1)(d) of IDD. This does not mean that "cost-efficiency" is the same as offering the cheapest product, but the costs of the product and its features will play an important role in this assessment. This assessment can be further elaborated by means of Level 2 provisions.

The Presidency added some more clarifications based on the drafting suggestions of the Spanish Presidency (see section 5.4 of this note). The Presidency proposes deleting "guarantees" as added by the Spanish Presidency in order to avoid any inconsistency with or ambiguity about the requirement to recommend at least one product without additional features.

Q9: Do MS agree that the concept of "cost-efficiency" in Recitals 6 and 8 of the Omnibus Directive should be aligned? If not, please explain.

Q10: Do MS agree with the drafting suggestions of the Presidency with regard to "cost-efficiency"? If not, please indicate which specific elements could lead to the

[7] ESMA *Guidelines on product governance requirements*, ESMA35-43-3448, par. 41.

assessment of "cost-efficiency"?

5.2.3 Recommendation of product(s) without additional features (MiFID and IDD)

Several MS indicated that the term "features" remains unclear and needs clarification in the Level 1 text. Furthermore, some MS suggested that the addition of "at least" in the MiFID and IDD text, as proposed by the Spanish Presidency, may lead to uncertainty and is not sufficient as a clarification.

The Spanish Presidency also added a sentence to Recital 6 of the Omnibus Directive, stating that when an insurance cover meets the demands and needs of the client, it should not be considered as an additional feature. The Presidency suggests deleting this sentence for the following reasons:

- The Presidency believes that additional features in this context are features embedded in the design of the investment component of the product. This interpretation enhances the envisaged level playing field between MiFID (features in the investment product only) and IDD (features in the investment product and possible additional insurance covers/supplementary insurances, see next point).
- The Presidency believes that an insurance cover cannot be an additional feature of supplementary insurance as envisaged in Article 2(3)(a)(iii), read together with Articles 73 and 74 of Solvency II.[8] If "additional insurance covers" (e.g. non-life covers) are embedded within the product as "features" without the possibility for the client to add or delete these covers, then these additional insurance covers can lead to an infraction to Solvency II because there is a pursuit of life and non-life insurance activity at the same time, embedded in the same product with no further choice for the client. An exception to this principle in this case are the "supplementary insurances". If the conclusion is that additional insurance covers are merely insurance covers proposed to the client in addition to the covers and investment module of the IBIP (hence: supplementary insurances), then this is not a question of an additional product feature, but more likely a question of bundling/tying.
- Insurance covers (including supplementary insurance) are treated in the requirement of point (d) in the Commission's proposal. The explanatory memorandum of the Commission explicitly states that this requirement comes in addition to the other requirements.

Possible examples of additional features are capital protection, capital guarantee or stop-loss mechanisms (including automatic switching of the underlying investment assets after a certain loss threshold). The Presidency suggests adding these examples

[8] Directive 2009/138/EC.

to Recital 6 of the Omnibus Directive.

Furthermore, Recital 6 of the Omnibus Directive states that if advisors choose also to recommend a product that carries additional features which carry extra costs for the client or customer, they should explicitly provide the reason for such a recommendation and disclose the extra costs involved. However, the current drafting of this requirement leaves no room for this approach. The Presidency suggests adding this to the Level 1 texts together with limited drafting suggestions in Recital 6.

Q11: Do MS agree with the examples of "additional features" as provided by the Presidency? If not, what examples of features do you suggest?

Q12: Do MS agree with the drafting suggestions of the Presidency? If not, please explain.

5.3 Delegation of powers in IDD

Several MS suggested deleting the paragraph containing the delegation of power to the Commission to supplement these requirements by adopting delegated acts[9]. The rationale behind this is that such delegation of power would limit the co-determination powers of the Council and the EU Parliament.

Q13: What are MS views on a deletion of the delegation of powers in IDD?

5.4 Drafting suggestions[10]

Alignment with option A of section 5.2.1.

Recital 6 of the Omnibus Directive

~~**The existing safeguards conditioning the payment or receipt of inducements, which under Directive (EU) 2014/65 require that the inducement is designed to enhance the quality of the service to the client, or under Directive (EU) 2016/97 should not have a detrimental effect on the quality of the service to the customer, have not been sufficiently effective in mitigating conflicts of interest. It is therefore appropriate to remove those criteria and introduce a new, common test, both in Directive (EU) 2014/65 and Directive (EU) 2016/97, that further clarifies how financial advisors should apply the principle of acting in the best interest of the client.**~~ **In order to improve the quality of advice, additional safeguards should be applied during the advice process when selecting and recommending suitable products for the client.** Financial advisors

[9] Article 30(5d)(2) of IDD in the Presidency's proposal.

[10] The drafting of Recital 6 Omnibus Directive may be subject to further adaption when incorporating the MS' views on the Presidency discussion paper on inducements as presented during the Council Working Party of 18 March 2024.

should base their advice on an appropriate range of **suitable** financial products. **The requirement to provide advice on the basis of an appropriate range of financial products can be met by providing advice on the basis of ~~financial~~products from one or more manufacturers. The appropriate range of products can also be met by tied insurance intermediaries through products from one manufacturer. The requirement can furthermore be met by providing advice on the basis of a single insurance-based investment product, if the product offers an appropriate range of underlying investment assets, such as multi-option products. From the range of suitable ~~financial~~ products, financial advisors should** recommend the most cost-efficient of similar products to their clients. **The assessment of cost-efficiency should take into account ~~the costs and charges associated with the identified financial products and their performance.~~ the costs and associated charges of the features of the products identified as serving the client's or customer's investment objectives and the impact of these costs and associated charges on the expected return, in accordance with Article 24b(1) of MiFID and Article 29(1)(d) of IDD. The most cost-efficient product should be assessed among those products identified as suitable for the client or customer and which share similar features, including ~~guarantees or~~ ESG characteristics.** Furthermore, financial advisors should also systematically recommend at least one product without features that may not be necessary for the achievement of the client's investment objective, so that retail investors are presented also with alternative and possibly cheaper options to consider. Such features may include, as an example, funds with an investment strategy which implies higher costs, a capital guarantee **or capital protection structure, stop-loss mechanisms (with or without automatic switching of underlying investment assets)** and structured products with hedging elements**, whe~~n~~re such characteristics are not necessary for the achievement of the client's or customer's investment objectives.** If advisors choose **~~to~~** also **to** recommend a product that carries additional features which carry extra costs **for ~~to~~** the client or customer, they should explicitly provide the reason for such a recommendation **in the suitability statement** and disclose the extra costs incurred. In the case of insurance-based investment products, **~~advisors'~~ insurance distributors** should also ensure that the insurance cover included in the product is consistent with the customer's insurance demands and needs. **~~Where such insurance cover is considered to meet the demands and needs of the client, it should not be considered as an additional feature.~~**

~~Art. 24(1a) of MiFID~~

~~1a. Member States shall ensure that, in order to act in the best interest of the client, when providing investment advice to retail clients, investment firms are under the obligation of the following:~~

~~a) to provide advice on the basis of an assessment of an appropriate range of financial instruments;~~

~~(b) to recommend the most cost-efficient financial instruments among financial instruments identified as suitable to the client pursuant to Article 25(2) and offering similar features;~~

~~(c) to recommend, among the range of financial instruments identified as suitable to the client pursuant to Article 25(2), a product or products without additional features that are not necessary to the achievement of the client's investment objectives and that give rise to extra costs.~~

Art. 24(7a) of MiFID

Member States shall ensure that investment firms, when providing investment advice to retail clients that does not qualify as investment advice provided on an independent basis according to Article 24(7) of this Directive, comply with the following requirements:

(a) to provide advice on the basis of an assessment of an appropriate range of financial instruments identified as suitable for the client pursuant to Article 25(2) of this Directive, from one or more manufacturers which must be sufficiently diversified with regard to their type, characteristics and underlying investment assets to ensure that the client's investment objectives can be met;

(b) to recommend the most cost-efficient financial instruments among financial instruments identified as suitable for the client pursuant to Article 25(2) and offering similar features. The assessment of cost-efficiency shall take into account the costs and associated charges of the features of these products which serve the client's investment objectives and the impact of these costs and associated charges on the expected return, in accordance with Article 24b(1);

(c) to recommend, among the range of financial instruments identified as suitable to the client pursuant to Article 25(2), one or more products without additional features that are not necessary in order to achieve the client's investment objectives and that give rise to extra costs. However, if investment firms recommend products with such additional features, then they must explicitly provide the reason for such a recommendation and disclose in the suitability statement the extra costs involved, in accordance with Article 25(6).

~~Art. 29b of IDD~~

~~Best interest of customers~~

~~1. Member States shall ensure that in order to act in the best interest of the customer in accordance with Article 17(1), when providing advice to customers on insurance-based investment products, insurance undertakings and insurance intermediaries are under the obligation:~~

~~(a) to provide such advice on the basis of an assessment of an appropriate range of insurance-based investment products and, where applicable, underlying investment assets;~~

~~(b) to recommend the most cost-efficient insurance-based investment product and, where applicable, underlying investment assets among the insurance-based investment products identified as suitable for the customer pursuant to Article 30(1) and offering similar features;~~

~~(c) to recommend, among the range of insurance-based investment products identified as suitable for the customer pursuant to Article 30(1), one or several insurance-based investment products and, where applicable, underlying investment assets, a product or products, without additional features that are not necessary to the achievement of the customer's objectives and that give rise to extra costs;~~

~~(d) to recommend an insurance-based investment products which insurance cover is consistent with the customer's insurance demands and needs.~~

~~2. The Commission shall be empowered to supplement this Directive by adopting delegated acts in accordance with Article 38 to further specify how insurance intermediaries and insurance undertakings are to comply with the principles set out in this Article.~~

~~Those delegated acts shall take into account the nature of the services offered or provided to the customer, the nature of the products being offered or considered, including different types of insurance-based investment products.~~

Art. 30(5d) of IDD

1. Member States shall ensure that insurance intermediaries or insurance undertakings distributing insurance-based investment products, when providing advice to customers that does not qualify as advice provided on an independent basis according to Article 30(5b) of this Directive, comply with the following requirements:

(a) to provide advice on the basis of an assessment of an appropriate range of insurance-based investment products identified as suitable for the customer

pursuant to Article 30(1) of this Directive, from one or more manufacturers which must be sufficiently diversified with regard to their type, characteristics and underlying investment assets to ensure that the customer's investment objectives can be met. This requirement can also be met by offering a single insurance-based investment product with an appropriate range of underlying investment assets, such as multi-option products;

(b) to recommend the most cost-efficient insurance-based investment products among insurance-based investment products identified as suitable for the customer pursuant to Article 30(1) and offering similar features. The assessment of cost-efficiency shall take into account the costs and associated charges of the features of these products serving the customer's investment objectives and the impact of these costs and associated charges on the expected return, in accordance with Article 29(1)(d);

(c) to recommend, among the range of insurance-based investment products identified as suitable for the customer pursuant to Article 30(1), one or more insurance-based investment products and, where applicable, underlying investment assets, without additional features that are not necessary in order to achieve the customer's objectives and that give rise to extra costs. However, if insurance intermediaries or insurance undertakings recommend products with such additional features, then they must explicitly provide the reason for such a recommendation and disclose in the suitability statement the extra costs involved in accordance with Article 30(5);

(d) to recommend insurance-based investment products which insurance cover is consistent with the customer's insurance demands and needs.

2. The Commission shall be empowered to supplement this Directive by adopting delegated acts in accordance with Article 38 to further specify how insurance intermediaries and insurance undertakings are to comply with the principles set out in this Article.

Those delegated acts shall take into account the nature of the services offered or provided to the customer and the nature of the products being offered or considered, including different types of insurance-based investment products.

Alignment with option B of section 5.2.1

Recital 6 of the Omnibus Directive

~~**The existing safeguards conditioning the payment or receipt of inducements, which under Directive (EU) 2014/65 require that the inducement is designed to enhance the quality of the service to the client, or under Directive (EU) 2016/97 should not have a detrimental effect on the quality of the service to the**~~

~~customer, have not been sufficiently effective in mitigating conflicts of interest. It is therefore appropriate to remove those criteria and introduce a new, common test, both in Directive (EU) 2014/65 and Directive (EU) 2016/97, that further clarifies how financial advisors should apply the principle of acting in the best interest of the client~~. ~~Financial advisors should base their advice on an appropriate range of suitable financial products. The requirement to provide advice on the basis of an appropriate range of financial products can be met by providing advice on the basis of financial products from one or more manufacturers. From the range of suitable products, financial advisors should recommend the most cost-efficient of similar products to their clients.~~ In order to improve the quality of advice, additional safeguards should be applied during the advice process when selecting and recommending suitable products for the client. From the range of suitable products, financial advisors should recommend the most cost-efficient products of similar products to their clients. The assessment of cost-efficiency should take into account ~~the costs and charges associated with the identified financial products and their performance.~~ the costs and associated charges of the product features of the identified products serving the client's or customer's investment objectives (including distribution costs) and the impact of these costs and associated charges on the expected return in accordance with Article 24b(1) of MiFID and Article 29(1)(d) of IDD. In this regard firms could consider rebate-free products as cost-efficient because of the absence of distribution costs. The most cost-efficient product should be assessed among those products identified as suitable for the client or customer and which share similar features, including ~~guarantees or~~ ESG characteristics. Furthermore, financial advisors should also systematically recommend at least one product without features that may not be necessary for the achievement of the client's investment objective, so that retail investors are presented also with alternative and possibly cheaper options to consider. Such features may include, as an example, funds with an investment strategy which implies higher costs, a capital guarantee or capital protection structure, stop-loss mechanisms (with or without automatic switching of underlying investment assets) and structured products with hedging elements, whe~~n~~re such characteristics are not necessary for the achievement of the client's or customer's investment objectives. If advisors choose ~~to~~ also to recommend a product that carries additional features which carry extra costs for ~~to~~ the client or customer, they should explicitly provide the reason for such a recommendation in the suitability statement and disclose the extra costs incurred. In the case of insurance-based investment products, ~~advisors'~~ insurance distributors should also ensure that the insurance cover included in the product is consistent with the customer's insurance demands and needs. ~~Where such insurance cover is considered to meet the demands and needs of the client, it should not be~~

~~considered as an additional feature.~~

~~Art. 24(1a) of MiFID~~

~~1a. Member States shall ensure that, in order to act in the best interest of the client, when providing investment advice to retail clients, investment firms are under the obligation of the following:~~

~~(a) to provide advice on the basis of an assessment of an appropriate range of financial instruments;~~

~~(b) to recommend the most cost-efficient financial instruments among financial instruments identified as suitable to the client pursuant to Article 25(2) and offering similar features;~~

~~c) to recommend, among the range of financial instruments identified as suitable to the client pursuant to Article 25(2), a product or products without additional features that are not necessary to the achievement of the client's investment objectives and that give rise to extra costs.~~

Art. 24(7a) of MiFID

Member States shall ensure that investment firms, when providing investment advice to retail clients that does not qualify as investment advice provided on an independent basis according to Article 24(7) of this Directive, comply with the following requirements:

(a) to recommend the most cost-efficient financial instruments among financial instruments identified as suitable for the client pursuant to Article 25(2) and offering similar features. The assessment of cost-efficiency shall take into account the costs and associated charges of the features of these products which serve the client's investment objectives and the impact of these costs and associated charges on the expected return, in accordance with Article 24b(1);

(b) to recommend, among the range of financial instruments identified as suitable to the client pursuant to Article 25(2), one or more products without additional features that are not necessary in order to achieve the client's investment objectives and that give rise to extra costs. However, if investment firms recommend products with such additional features, then they must explicitly provide the reason for such a recommendation and disclose in the suitability statement the extra costs involved, in accordance with Article 25(6).

~~Art. 29b of IDD~~
~~Best interest of customers~~

~~1. Member States shall ensure that in order to act in the best interest of the customer in accordance with Article 17(1), when providing advice to customers on insurance-based investment products, insurance undertakings and insurance intermediaries are under the obligation:~~

~~(a) to provide such advice on the basis of an assessment of an appropriate range of insurance-based investment products and, where applicable, underlying investment assets;~~

~~(b) to recommend the most cost-efficient insurance-based investment product and, where applicable, underlying investment assets among the insurance-based investment products identified as suitable for the customer pursuant to Article 30(1) and offering similar features;~~

~~(c) to recommend, among the range of insurance-based investment products identified as suitable for the customer pursuant to Article 30(1), one or several insurance-based investment products and, where applicable, underlying investment assets, a product or products, without additional features that are not necessary to the achievement of the customer's objectives and that give rise to extra costs;~~

~~(d) to recommend an insurance-based investment products which insurance cover is consistent with the customer's insurance demands and needs.~~

~~2. The Commission shall be empowered to supplement this Directive by adopting delegated acts in accordance with Article 38 to further specify how insurance intermediaries and insurance undertakings are to comply with the principles set out in this Article.~~

~~Those delegated acts shall take into account the nature of the services offered or provided to the customer, the nature of the products being offered or considered, including different types of insurance-based investment products.~~

Art. 30(5d) of IDD

1. Member States shall ensure that insurance intermediaries or insurance undertakings distributing insurance-based investment products, when providing advice to customers that does not qualify as advice provided on an independent basis according to Article 30(5b) of this Directive, comply with the following requirements:

(a) to recommend the most cost-efficient insurance-based investment products among insurance-based investment products identified as suitable for the customer pursuant to Article 30(1) and offering similar features. The assessment of cost-efficiency shall take into account the costs and associated charges of the features of these products serving the customer's investment

objectives and the impact of these costs and associated charges on the expected return, in accordance with Article 29(1)(d);

(b) to recommend, among the range of insurance-based investment products identified as suitable for the customer pursuant to Article 30(1), one or more insurance-based investment products and, where applicable, underlying investment assets, without additional features that are not necessary in order to achieve the customer's objectives and that give rise to extra costs. However, if insurance intermediaries or insurance undertakings recommend products with such additional features, then they must explicitly provide the reason for such a recommendation and disclose in the suitability statement the extra costs involved in accordance with Article 30(5);

(c) to recommend insurance-based investment products which insurance cover is consistent with the customer's insurance demands and needs.

2. The Commission shall be empowered to supplement this Directive by adopting delegated acts in accordance with Article 38 to further specify how insurance intermediaries and insurance undertakings are to comply with the principles set out in this Article.

Those delegated acts shall take into account the nature of the services offered or provided to the customer and the nature of the products being offered or considered, including different types of insurance-based investment products.