POSITION PAPER

ESBG response to Have-your-Say consultation on the Retail Investment Strategy package

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Preamble

ESBG supports the European Commission's view that boosting the Capital Markets Union, by strengthening the participation of retail investors in the capital markets, is an essential way to channel private finance into the economy and support the green and digital transitions.

Regarding the proposed Retail Investment Strategy package, ESBG very much welcomes the Commission's decision to refrain from its original intention of proposing a complete ban on inducements since its introduction would have had that "potential disruptive impact" as recognised by the Commission itself.

However, due to the huge number of additional tests, processes, obligations, requirements, organizational and IT implementations, the proposal departs from the goal of reducing information overload and making financial services more approachable by retail investors.

In addition, ESBG outlines the need, especially in the current economical context, to preserve a capital markets regulatory framework able to include and attract all kinds of retail investors: our view is that the legislative proposal does not fully consider this important goal of inclusion.

It would also be deeply regrettable if the Retail Investment Strategy were to become an obstacle to one of its stated objectives: stimulating productive investment by European citizens to finance the green and digital transitions. This would be particularly detrimental at a time when it is vital to increase the financing capacity of the European economy.

In the following three sections, ESBG provides its view regarding more controversial issues, suggesting – where feasible - possible legislative improvements.

SECTION I
CHANGES ON DIRECTIVE 2014/65/EU (MIFID) MADE BY OMNIBUS AMENDING DIRECTIVE PROPOSAL

Value for Money - Benchmarks' development

The Omnibus Directive proposal suggests supplementing the existing product governance requirements under MiFID, AIFMD, UCITS and IDD, by the development of a Value for Money (VfM) test by introducing benchmarks by ESMA and EIOPA both at the level of manufacturers and distributors. Manufactures and distributors have to assess whether their products or services (such as investment advice) are more expensive than the benchmarks, which would indicate that the product/service does not provide VfM. The Commission has proposed that ESMA and EIOPA develop those benchmarks without providing any further criteria or methodology to this end in the legal text.

This approach is too interventionist and for ESBG will result in indirect price fixing, as admitted in the explanatory memorandum itself where it said[1] that this activity will turn out to "regulate pricing process". The one-sided focus on costs is also seen very critical in a recent study on the Retail Investment Strategy commissioned by the ECON Committee of the European Parliament[2].

> *"Concerning the abovementioned proposals by the EC on inducements in the Omnibus Directive, there seems to be an intention to directly regulate mechanisms of price formation, with the view that "[s]ome retail investment products on the market still incorporate unjustifiably high costs and/or do not offer value to retail investors" …*
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> *However, such an approach may risk failing to address the actual problem faced by retail investors with respect to inducements, as we tried to illustrate above, as it places an excessive accent on costs. Instead of intervening directly in the market's pricing structure and recurring to notions such as "high costs" - which can be broad and variable, causing legal uncertainty and imprecisions – legislation should be focused on ensuring that retail investors properly understand the products and services that are being offered, allowing them to reasonably decide whether they should or should not take a certain investment decision. There is also the potential danger that the EC's approach leads to the market moving towards a common benchmark or standard, stifling financial innovation: benchmarking against a single parameter/test might lead to undue rigidities in the market.*
>
> *Ultimately, looking at costs per se is not sufficient: costs are strictly related to the nature, characteristics and risk/return profiles of the investments and, without more clarity on the classification and mapping of products (an issue that the EC's proposal does not take properly into account, save – probably – for "high-risk products"), these proposals do not seem to properly address the real issue. More on that below. "*

[1] See page 17 of the explanatory memorandum of the Omnibus Directive proposal.

[2] Filippo Annunziata, Retail Investment Strategy – How to boost retail investors' participation in financial markets", p. 21.

Indeed, benchmarks will act like price ceilings in practice with the results of distorting competition and preventing innovation in financial product development.

The imposition of specific cost-based product benchmarks constitutes a restriction on the pricing freedom of economic operator.

Indeed, depending on the configuration of the benchmarks and the criteria used to calculate them, the results of the comparison may not correspond to reality or to concrete needs of retail clients and would ultimately lead to a reduction in the choice of products, instead of just stressing outliers. It is against the fundamental objective of the investment process, which is to provide solutions tailored to the needs of individual clients.

Furthermore, any limitations preventing the offering of products that deviate from the relevant benchmarks would limit the supply of products to the market and so would undermine the comparability of those benchmarks.

In addition, important key aspects for the establishing of the benchmarks are expected to be specified through Level 2 measures without any specifications at Level 1.

As result, substantial regulatory requirements with huge impact for financial market participants and clients will only be known after the adoption of the text and will be defined through a procedure with lower political scrutiny and participation than for the Omnibus Directive.

On another note, we are concerned about the proposed implementation deadlines. The Directive proposal envisages numerous implementing rules to specify the functioning of VfM through the adoption of delegated acts by the European Commission and regulatory technical standards by ESMA and EIOPA. Given the complexity of the proposal, the deadlines for the preparation of the Level 2 measures are very tight.

Considering the above, ESBG stresses also that the VfM approach raises many additional concerns for which further scrutiny is needed in the legislative process such as: (i) the cost rates of financial instruments and (ii) the historical performance, since benchmarks reflect past performance and their use in decision making can lead to past performance bias and misleading or unrealistic expectations.

The EU legislator to strengthen price competition in the EU, has already planned a tool, ESAP to ease the comparison among products. The increased transparency will create cost pressure on manufacturers and distributors in a market-conforming procedure (i.e. without price regulation). This mechanism will lead to falling prices. There is no need to undermine the diversity and creativity of manufactured products to achieve this!

In addition, the democratically legitimized Level 1 legislator must regulate the framework for the creation of the benchmarks / comparison groups itself through concrete specifications. Delegation of these central issues to the Commission should be avoided. At Level 1, it should be made clear that the benchmarks / comparison groups must also take into account relevant quality features (such as capital guarantee, an active fund management, ESG features or investment advice in person instead of robo advice) and must not be based solely on the most favourable offer.

Besides, if eventually implemented benchmarks (in MiFID, IDD, and UCITS) should be granular in all cases and not "where is feasible to do so" as stated in the Omnibus Directive proposal.

In their configuration, benchmarks should always take into account at least certain objective elements, such as: nature, cost structures, investment policy, similar levels of return, risk, strategy and objectives.

For example, one element that may distort the comparability of products is the inclusion of "rotation costs". Certain products may have very high portfolio turnover as part of their investment strategy while other products with less rotating portfolios have considerably lower costs. However, such rotation is necessary to allow the diversification of the portfolio.

An additional example to illustrate the importance of granularity is the case of funds that take ESG criteria into consideration. Given the regulatory complexity and additional costs associated with the creation and management of this type of funds (selection of underlying assets, disclosures, etc.), the costs of these products may be higher than funds that do not take ESG criteria into account.

On the other hand, in addition to considering objective elements, the granularity of the benchmark methodology should include the possibility of considering qualitative criteria, such as: the provision of personalised services, the branch network, the provision of high-quality online services, the delivery of investment reports and the possibility to have meetings with specialised advisors, among others.

With regards to the additional testing and further assessments to establish whether costs and charges are nevertheless justified and proportionate, we also consider that qualitative criteria should be also taken into account when justifying why certain products might have higher costs for the manufacturer or distributor. Certain products could provide a particular added value to clients that would be difficult to quantify in purely numerical terms only.

For comparability to be objective, consistency of the product results over time should be included in the benchmarks configuration. Due to several factors (including markets' volatility), there might be time periods with a very positive return on investments, combined with time periods with a lower or even negative profitability. Thus, the comparison of both insurance-based investment products and financial instruments should be established within reasonable timeframes in order to capture the evolution of the actual investment and not short periods that could distort the real return on investment.

On another note, the provisions covering potential product deviations from the relevant benchmarks should only focus on identifying products with extreme deviations from market trends. Additionally, the margin of minimum deviations from the benchmark should consider market fluctuations.

In sum, benchmarks could start a "race to the bottom" towards less expensive but standardised products, with hardly any differentiation between them. On the one hand, with less availability of products in the markets, customers would have less choice. On the other hand, the products would be less personalised and therefore, less adapted to the needs of clients.

For all the above reasons, ESBG opposes the Value for Money approach envisaged in the legislative proposal.

Risk warnings – New Article 16a

The new article 16a as per the Omnibus Directive proposal introduces a new paragraph 5c on article 24 according to which information material and marketing documents for retail clients on particularly risky products should in future contain a risk warning.

ESMA is empowered to draw up guidelines for identifying particularly risky products as per new paragraph 2, letter w) of article 69.

This requirement is superfluous. Retail investors are already comprehensively informed about the existing risks of the products, also in the non-advised business.

Particularly worth mentioning here are the key information documents. This enables comparability and a simple overview and should be the place for awareness. Apart from shares and plain vanilla bonds, almost all common financial instruments fall within the scope of the PRIIPs Regulation.

The key information document must also be made available in execution-only business.

For non-advised transactions, clients are also protected by amendments made by the proposal in article 25 of MiFID according to which clients receive a warning based on a mandatory appropriateness test if they do not have the necessary knowledge and experience to understand the risks associated with the financial instrument.

It remains unclear in which materials the planned risk warnings are required. The term ″information materials″ (new paragraph 5c, of article 24) is itself not defined. The addition of ″including marketing communications″, the definition of which according to new paragraph 1, number 66 of article 4 is itself already very far-reaching, makes the term almost boundless. It is also unclear which products are to be regarded as particularly high-risk and which specific risks are meant. Since this is only to be defined at Level 2, the future scope of application of this provision remains completely open.

Moreover, there is no corresponding requirement for **cryptocurrencies and savings deposits**. This leads to a clear competitive disadvantage, which runs counter the goal of increasing the share of securities' holders.

Finally, it should be emphasised that the Commission has already conclude in the context of the Regulation proposal amending Regulation (EU) No. 1286/2014 (PRIIPs) that no additional benefit for clients is apparent from the tightening of information requirements.

Consequently, the warning in the PRIIPs-KID is to be avoided again for lack of effect.

We recommend the deletion of new paragraph 5c in article 24 and deletion of new letter w) in article 69, paragraph 2 of MiFID proposal. If they are not deleted, from our point of view, particularly risky products may be those that lead to a margin call.

Ban on inducements for non-advised transactions – New Article 24a

The Omnibus Directive proposal largely bans firms from accepting payments from certain third parties in connection with the non-advised transaction, except in some circumstances (i.e., relationship between the advice-free transaction and prior ″non-independent″ investment advice;

underwriting and placement activities with the exception of PRIIPs; minor non-monetary inducements).

ESBG does not consider such approach appropriate even more since the entry of MiFID II measures have significantly increased the investor protection and the level of quality of investment services provided.

Such a ban seems based on the perception that measures for the prevention and management of conflicts of interest have not been sufficient to protect investors.

The current framework on inducements addresses potential conflicts of interest for independent and non-independent advice. The proposed ban in the advice-fee business cannot be justified with potential conflicts of interest. Other alleged grievances are also not apparent.

Inducements is just a payment model, mutualising the costs between investors, and providing economies of scales on the whole distribution chain. With this model, banks, specifically savings banks, are able to offer their clients a wide range of financial instruments from an extensive variety of issuers and with a broad variety of underlying assets, payout profiles and other features.

For this purpose, banks provide a customer-friendly infrastructure (e.g., branches, trained staff, telephone and video systems with voice recording options, online brokerage, tools to support self-decision makers). Clients take advantage of this, so that a great deal of the non-advisory orders are placed stationary via an advisor (in the branch or by telephone). Clients can also switch between the channels or even to the advisory service at any time ("multi-channel approach").

All these measures enable clients to choose the service that best suits them and the transaction at hand and to put together an individual portfolio. Self-deciders appreciate these additional value-added services and the wide range of financial instruments made available to them.

The prohibition of inducements in this context, combined with the other high requirements of the proposed retail investor strategy, would:

- Reduce the competitiveness landscape by promoting institutions not having local presence and benefiting from economies of scales only on the manufacturing side, currently not European companies. Ultimately, this will not help the EU economy to find new financial investments.

- Lead clients to bear higher costs or order fees in the non-advised business in the future.
- Cause a more limited range of offers and endanger the multi-channel approach, as well as the holistic portfolio advice approach.
- Jeopardise the development of digital media and open architecture models, where distributors act as a channel to access products from multiple providers on a non-advised basis.

Indeed, inducements enable a cost advantage for small retail clients, who can gain easier access to the capital market via low threshold offers, so that the securities and capital market culture is promoted overall.

Even if the requirements for execution-only business are met in some cases today, many banks carry out an appropriateness test on a voluntary basis. However, if this becomes too cost-intensive for the institutions, they could do without it in the future. This would also lead to a lower level of investor protection and thus contradict the goals of the retail investor strategy.

Currently non-advisory business is heavily regulated and associated with extensive obligations for banks, which entail costs and effort.

Apart from the suitability test and declaration, the institutions fulfil almost the same investor-protecting obligations as in the case of investment advice. In addition, the institutions provide the so-called self-decision-makers with a wide range of information and other support, which is intended to help the self-decision-makers choose the appropriate financial instrument (i.e. appropriateness test; warning if product is not suitable; fulfilment of information and reporting obligation; etc.).

ESBG proposes that inducements remain permitted in non-advisory business.

Inducements in connection with portfolio management – New article 24a

Under the current MiFID (article 24, paragraph 8), investment firms may not accept and retain inducements from third parties in connection with portfolio management. According to the explanatory memorandum of the Omnibus Directive proposal, this principle is to be maintained, however, contrary to this statement, the scope of application is surprisingly expanded to the payment of inducements and other fees: While the current MiFID states "shall not accept or retain fees…", the proposal differently states, "do not pay or receive any fee or commission…".

The payment of inducements and fees in asset management should continue to be permissible otherwise asset management would be unjustifiably placed at a disadvantage compared to investment advice, which is not appropriate. There are no conflicts of interest for the asset manager.

This is because in asset management the ongoing suitability test leads to an even higher level of investor protection than in advisory services.

Furthermore, a prohibition on the payment of inducements would inter alia exclude cooperation models in which asset managers cooperate with other institutions which, for example, provide direct client care. Payments by the asset manager to these cooperation partners would then be inadmissible due to the broad wording.

It is particularly problematic that the wording of the proposal, which among other things refers to the inadmissibility of the payment of fees, can be understood in such a way that the asset manager is also prohibited from receiving all paid services. Thus, the proposal could be understood in such a way that monetary payments are inadmissible, e.g., for the purchase of research or IT services relating to asset management.

We are therefore in favour of retaining the current provision: "shall not accept or retain fees…".

Exceptions to the prohibition on inducements in connection with non-advisory business - New article 24a, paragraph 3

According to new article 24a, paragraph 3 an exception to the prohibition of accepting and retaining inducements is permissible in connection with the advice-free transaction if the advice-free transaction is related to a previous "non-independent investment advice".

We welcome this exception, despite our fundamental rejection of the prohibition of inducement in non-advisory business.

Best interest test – New article 24, paragraph 1a

A major change proposed by the European Commission in the area of investment advice is the so-called "best interest test". According to this, investment firms that provide investment advice to retail investors are obliged to:

(a) Provide the advice based on an assessment of an appropriate range of financial instruments.

(b) Recommend the most cost-effective financial instruments among those identified as suitable for the client and having similar features.

(c) Recommend, from the range of financial instruments identified as suitable for the client, one or more products without additional features that are not necessary to achieve the client's investment objectives and incur additional costs.

In general, ESBG considers that the concept of the most cost-efficient investment product is not the one that should be at the forefront of clients' investments. The preferences and needs of investors do not per se necessarily have to be aligned with the most cost-efficient products. Furthermore, the proposed approach places a disproportionate focus on costs and may lead retail clients to prioritise the "cheapest" product over others that could potentially offer them better value.

We note that such an outcome would, in fact, be contrary to the best interests of the clients.

Moreover, the proposal does not consider that already under the current provision in article 54, paragraph 9 Delegated Regulation (EU) 2017/765, within the scope of investment advice, it must be checked before a recommendation is made whether there are suitable financial instruments that are equivalent. These are to be evaluated with regard to costs and complexity.

If an investment firm wishes to recommend a more expensive equivalent financial instrument to the client, it must justify this. These requirements were standardised at level 2 and further specified by ESMA within the framework of its guidelines on suitability.

It remains unclear why it is now proposing a different wording ("similar features" instead of "equivalent") and whether this is associated with a different understanding. The different wording unnecessarily creates legal uncertainty. We see the danger that in future equivalent products will no longer be the benchmark for the required cost comparison, but that "apples and oranges" are to be compared.

In addition, it must be ensured that the starting point for the examination continues to be the respective advisory offer of the investment firm. Otherwise, the business policy of the investment firms and thus competition would be indirectly interfered with. There would be no objective justification for this.

Against the background of the existing provisions on the equivalence test, which are very similar to the best interest test proposed, we see no need for new provisions which would create a high degree of legal uncertainty.

The fact that there is no objective justification for this requirement is also shown by the following circumstance: this requirement is not to apply to independent investment advice. Rather, even the existing requirements on the product range to ensure the independence of investment advice (article24(7) MiFID) are reduced by granting them the possibility, under certain conditions, to limit their product range required under article 24(1a) MiFID.

Review Clause – New Article 24a, paragraph 8

New article 24a, paragraph 8 provides for a review clause according to which three years after entry into force of the directive, the Commission, after having consulted with ESMA and EIOPA, shall assess the effects of third-party payments on retail investors, in view of the potential conflicts of interest and as regards the availability of the independent advice.

This is the result of the 'staged approach' undertaken by the Commission, after having recognized that an immediate full ban on inducements would have had 'significant and sudden impacts on existing distribution system, with consequences that are hard to predict".

As part of the staged approach, the legislative package proposes to address alleged "conflicts of interests via a number of different measures", such as the partial ban on non-advised transactions, the stricter best interest test, improving the overall disclosure to customers specifically on costs and inducements.

Since the great number of new requirements imposed, ESBG reject such an approach and a short-term review in view of the effort involved in the implementation for credit institutions and the introduction of new procedures in the financial activity for retail investors.

Level 2 authorisation of the commission for inducements – Article 24, paragraph 13

Paragraph 13 of article 24 of the MiFID as per the Omnibus Directive proposal contains a very broad power, according to which the Commission can specify not only the requirements in article 24, but also, among others, the requirements in article 24a on inducements and 24b on cost information via Level 2 measures. In our view, the reference to article 24a and 24b is probably a drafting error. The following reasons in particular speak in favour of this:

- If separate Level 2 authorisations had actually been intended for article 24a and 24b, these would have had to be located there.
- This view is supported by the fact that the Commission has provided for an authorisation to issue a Regulatory Technical Standard in article 24b, paragraph 2. This special authorisation would not have been necessary if the authorisation in article 24, paragraph 13 had also covered in article 24b.

For this reason, the Level 2 authorisation in the amended article 24, paragraph 13 should be limited to the provisions in article 24 in the further legislative process. There is no need for a further addition on cost transparency in article 24b.

Information on cost, associated charges, and third-party payments – New article 24b

a) *Further ex-ante information requirements will foster information overload*

Under no circumstances should the Commission's proposals in connection with new standardization requirements pursuant to article 24b, paragraph 2 lead to a further increase in the scope and complexity of cost information, which would have a negative impact on client perception. In contrast to the objective of the retail investor strategy, the information overload would be further exacerbated.

A recent study commissioned by the European Parliament's ECON Committee also concludes[3] that the Commission's proposals to modify information requirements have not achieved the goal of simplifying disclosure rules:

> *"…measures on this front are still modest and should definitively be much more ambitious. As dis-cussed above, a coordinated review - and significant reduction - of disclosure obligations is, in this sense, highly encouraged. The lack of coordination as well as overlaps amongst EU legislative texts must also be addressed in a consistent way, to avoid information duplication and overburdening."*

The calculations on the impact of the inducements on the (expected) net return. In this regard it must be pointed out that future performance of volatile financial instruments cannot be predicted and therefore would be very complex to comply with such an obligation with the results that the currently precise cost information would be supplemented by an extremely uncertain indication.

To this context, the immense problems with the performance scenarios in the PRIIPs KIDs (which have not been solved yet) should under no circumstances be transferred to the ex-ante cost information.

[3] Filippo Annunziata, Retail Investment Strategy – How to boost retail investors' participation in financial markets", p. 32.

On the other hand, the implementation of these measures would entail very significant costs for the banks' operating systems due to the proposed granularity of details to be provided. For example, in relation to the calculation of the "cumulative effect on return of the investments", it is essential to have more clarity on how the expected return would be calculated and what would be the criteria established for such a calculation.

The Commission`s proposal amends article 30, paragraph 1 of MiFID, so that cost transparency obligation is fully reintroduced for eligible counterparties and thus even more strictly regulated than for professional clients (according to article 30, paragraph 1 indeed article 24b, paragraph 1 of MiFID is fully applicable for eligible counterparties. However, article 29a of the proposal excludes the cost transparency obligation for professional clients in non-advisory business).

With new article 24b, paragraph 1 some of the current Level 2 regulations (article 50, paragraph 1, MiFID 2-Delegated Regulation), which are currently obsolete, are also to be integrated into MiFID (Level 1) with regard to professional clients and eligible counterparties. The content of these regulations is the possibility to agree on facilitations for cost information with these clients.

With the so-called MiFID quick fix, however, the legislator had already severely restricted the applicability of the cost transparency regulations vis-à-vis professional clients (no cost transparency obligation in non-advisory business, article 29a MiFID) and completely excluded it vis-à-vis eligible counterparties (article 30, paragraph 1, subparagraph 1 MiFID). The newly inserted subparagraphs in article 24b, paragraph 1, subparagraphs 6 and 7 would contradict this. Also, the re-exception contained in article 30, paragraph 1 of the proposal so that article 24b, paragraph 1 should remain applicable to eligible counterparties would also contradict this. This cannot be politically desirable.

The background for the MiFID Quick Fix facilitations was that these client groups do not need the mandatory cost information tailored to retail investors, but such a requirement in the professional segment would represent a bureaucratic obstacle to the fast and smooth execution of investment transactions on the capital market. In recital 5 of the MiFID amending Directive (EU) 2021/338, the EU legislator has stated the following in excerpts:

" .... both provided confirmation that professional clients and eligible counterparties do not need standardised and mandatory cost information as they already receive the required information during the negotiation with their service provider. The information provided to professional clients and eligible counterparties is tailored to their needs and in many cases is far

more accurate. Services provided to eligible counterparties and professional clients should therefore be exempt from the obligations to disclose costs and associated charges, except in the case of investment advice and portfolio management services, ..."

We cannot see a comprehensible reason for the tightening proposed with regard to professional clients and eligible counterparties. Such a change would rather contradict the goal of promoting investments on the capital market and, moreover, counteract the will of the legislator in the recent revision of MiFID II in the context of the MiFID quick fix.

To avoid uncertainties and contradictions within MiFID, the new paragraph 1, in article 24b on professional clients and eligible counterparties should be deleted. In article 30, paragraph 1, of the proposal it is essential to delete the re-exception regarding the inapplicability of article 24b "with the exception of paragraph 1".

b) Calculation until due date/holding period - New Article 24b, paragraph 1, subparagraph 3

New article 24b, paragraph 1of MiFID as per the Omnibus Directive proposal adds the following new requirement: "calculated up to the maturity date of the financial instrument or for financial instruments without a maturity date, the holding period recommended by the investment firm, or in the absence thereof, holding periods of 1, 3 and 5 years".

It should continue to be permissible for the percentage costs incurred over the holding period to be converted into p.a. figures.

We urgently recommend a corresponding clarification in the legal text.

The addition should only be provided for as an alternative. This is already based on an appropriate assumption regarding the holding period, which either corresponds to the term of the product or the recommended holding period or (as in the case of shares, for example) another valid assumption. For the client, this has the advantage that, in the case of different holding periods of the products, he can place the p.a. figures next to each other and compare them very easily. If the new wording means that all costs within the total term must now be added up, this advantage for the client is lost. Instead of being simplified, the cost information becomes more difficult for the client to understand.

The percentage disclosure of annual costs would also be in line with the system used in PRIIPs KIDs, where the percentage costs are also disclosed annually, see the following example from Annex VI of Delegated Regulation (EU) 2021/2268.

Furthermore, the requirement that the costs for products without a term or recommended holding period must be calculated for three different periods is particularly critical. This would apply to shares, for example. The presentation of costs in euros and percentages thus becomes unnecessarily complex and confusing. Here, it should remain the current requirement that in these cases a valid period (e.g., 5 years for shares) is sufficient.

Ex-post costs' information - New article 24b, paragraph 4

New article 24b, paragraph 4, of MiFID as per the Omnibus Directive proposal introduces new requirements for annual ex-post costs' information, depending on which service (custody, distribution, or both) they provide.

In addition, the annual reporting is expanded to include also the taxes incurred and the return achieved. With both additional information, there is again the problem that the already very extensive reports will be further inflated and there is the danger that clients will not even read the reports that are too detailed (see already the references from the above-mentioned studies).

Furthermore, especially in the case of the return, the effect of the costs is very different: There are costs included in the price that have no effect on the return achieved (this would possibly have been higher without the cost item) and "additional" costs that actually reduce the return (e.g., stock exchange fees). Here, it would have to be examined separately for each cost item how it actually works. This is very complex, and it is to be feared that clients will not understand the (factually correct) differentiation.

To avoid the "information overload" for clients, ESBG asks to clarify that it is sufficient that the client receives the annual report with all required information from one of the obligated parties only (e.g., the custodian).
If, contrary to ESBG view, the extension of the annual reports is retained, it should be made clear, for instance in a recital, that the largely redundant quarterly reports pursuant to article 63, paragraph 1, of MiFID, can be dispensed due to the parallel extensions of the annual reports.

Appropriateness test – Article 25, paragraph 3

New article 25, paragraph 3 of the MiFID as per the Omnibus Directive proposal provides for the extension of the appropriateness test.

While currently only the knowledge and experience of the client must be checked, according to the proposal, the loss-bearing capacity and the risk tolerance of the client should also be checked in the future.

The extensions are not in the spirit of the client as a self-decider who has consciously decided against seeking advice and in favour of carrying out a transaction without advice. This client group has the primary interest that the transaction they want is carried out as quickly and unbureaucratically as possible. Self-deciders often want to take advantage of expected market movements at short notice. As a rule, they have informed themselves sufficiently about the product and the market situation before concluding the transaction. Any delay can cause the price of a product to change to the investor's disadvantage.

The speed of order execution is therefore a decisive quality feature for self-deciders. On the other hand, the extensions would make the non-advised securities business fundamentally more complicated and time-consuming, which would be massively to the detriment of the self-deciders, who already complain about the unnecessary effort caused by regulatory requirements. The proposal would amount to patronising clients who want to order independently and would blur the meaningful differentiation between investment advice and self-decision-making business, which has proven itself in practice.

The examination of risk propensity and loss-bearing capacity have so far been core components of the suitability test in investment advice. If these tests were also part of the appropriateness test, the advice-free business would become "investment advice light" through the back door. In the future, three of the six criteria of the suitability test would have to be checked when self-deciders place orders. This would unnecessarily raise the hurdles for investors to acquire financial instruments.

The significantly expanded programme of duties in the advisory-free business is also in contradiction to the proposal to largely prohibit the inducements in the advisory-free business.

Standardized warnings – Article 25

Article 25, paragraph 1 of MiFID as per the Omnibus Directive proposal requires ESMA to standardise warnings to warn clients when products and services are not appropriate for them.

Already within the framework of the current regulatory requirements, clients receive sufficient warnings if they do not provide any/insufficient information to an investment firm to check appropriateness or if a financial instrument is not appropriate for the client.

A standardised format across Europe is also unlikely to meet the respective needs of clients or investment firms and is likely to lead to high IT implementation costs without corresponding benefits. It is also unclear how the standardised warning is to be implemented throughout Europe (language differences). We are not aware of any grievances with the current practice.

It also remains unclear what goal is to be achieved with standardised reporting on the information collected. Clients either already receive extensive information on the details they have provided or can request this from their banks and savings banks. Since the collection of the information is very institution-specific, tailored to the clientele, the type of financial instruments as well as the sales channels, a standardised report would also mean a large implementation effort for all institutions without increasing customer protection.

Due to the already existing abundance of obligatory information, the proposal would lead to further excessive demands or further lack of understanding on the part of retail clients without bringing any recognisable benefit.

Consideration of the portfolio in individual investment advice – Article 25, paragraph 2

According to article 25, paragraph 2 of MiFID as per the Omnibus Directive proposal investment firms - if they provide commission-based investment advice or financial portfolio management - must also ask clients about the composition of their existing portfolio ("financial and non-financial assets") and take this into account in their recommendation. In addition, clients must be informed about how the recommended financial instruments take into account the diversification of the client's portfolio.

It is not apparent why there should be any deviation from the existing regulations. Customer protection is already comprehensively guaranteed by the existing regulations. In particular, the enquiry of existing investments of the client is part of the collection of information on the financial situation of the client, which is included in a recommendation. These requirements can therefore be found in the ESMA guidelines on some aspects of the MIFID II requirements on suitability and have been established practice in Member States for years. The guidelines state: "Information on the financial circumstances of the client includes information on his investments. In this context, it is to be assumed that the firms are informed about the individual investments of the client held with them. Depending on the scope of the advice provided, firms should also encourage clients to disclose information about investments they hold with other firms, including, where possible, a breakdown by individual instruments". (ESMA Guidelines, latest version of 3 April 2023, para. 43). Accordingly, there is no need for new provisions on this regard.

Diversification is also not necessarily always desired; for example, there are clients who want to be advised exclusively on one asset class by one particular institution.

Clients might, for example, want to be advised exclusively on shares in the US market. From a diversification point of view, one would have to advise the client against investing in other regions and asset classes.

This would not correspond to the client's investment objectives.

Irrespective of the willingness of clients to provide the required information, a mandatory requirement to take the client portfolio into account would make investment advice or financial portfolio management considerably more expensive.

Because of the fixed costs involved, this would affect small investors with low incomes or assets. However, this would counteract the goal of the Capital Markets Union to promote investments by small investors in the capital markets.

ESBG is therefore strongly in favour of dispensing with an obligation to carry out a portfolio valuation.

Marketing communications and marketing practices – New article 24c

A comprehensive package of measures is intended to facilitate access to relevant, comparable, and easily understandable information on investment products. In particular, new safeguards are proposed for marketing communications via social media and other digital channels.

The following regulatory proposals are particularly noteworthy.

a) New definitions

In particular, the following are newly introduced: Definition of "marketing communication.

The proposed definition of "marketing communication" in article 4, paragraph 1, n. 66 is too broad. It is questionable what function the case group "that entices investments" should have in addition to the already very comprehensive case group "that directly or indirectly promotes" and whether this can be sufficiently specified at all. This also imposes an obligation on the investment firm over which it has no control in purely practical terms - especially in the "social media" channel.

For the above reasons, the wording should be revised. In particular, it should be made clear that neutral information (service and product offers as well as neutral product information) is not covered by this.

A good orientation is provided by the interpretation practice of the German supervisory authority (BaFin), which has proven itself in the past. The definition of "marketing communication" of the BaFin is:

"information which is intended to induce the addressees to acquire a financial instrument or to commission an investment service (sales-promoting objective). The mere use of information in the context of an advisory situation does not necessarily give it a primarily sales-promoting objective. Neutral product information which is made available in the context of the fulfilment of obligations to provide investment- and investor-friendly advice does not fall under the concept of advertising. Pure image advertising is not covered by the regulations."

b) New requirements for marketing communications and marketing practices

The Directive proposal also contains a number of new requirements for marketing communications and marketing practices, which are to be regulated in a new article 24c of MiFID. Because the scope of application is almost infinite due to the proposed definitions in article 4, paragraph 1, point 66 to 68 and the individual requirements do not contain any gradations with regard to the scope of application, the requirements are very extensive and would hardly be stringently implementable in practice.

c) Disclosure of features and principal risks

According to article 24c, paragraph 2 of MiFID as per the Omnibus Directive proposal the main features of the financial instruments or investment services and the related ancillary services to which they relate should be clearly and concisely set out in all marketing communications. This would have the de facto consequence that all elements must always be named. In view of the very broad definition of the marketing communication, the compulsory contents lead to a great deal of information having to be inflated and core messages that are interesting for the customer may be lost.

This would run counter to the regulatory objective (reduction of the existing "information overload"). Especially for professional clients and eligible counterparties, who are in any case included in the proposed article 24c, paragraph 2, this requirement is completely excessive.

But it is also an excessive requirement for retail investors, especially because every product-specific advertisement for a PRIIP must contain a reference to the key information document in accordance with article 9 of the PRIIPs Regulation.

In addition, articles 13 - 15 of Commission Delegated Regulation (EU) 2019/979 [4]contain further information requirements for advertising in relation to securities issues subject to prospectus requirements.

Depending on how the definition of marketing communications is interpreted, posters or other short documents or social media posts, for example, would always have to be provided with the comprehensive mandatory information. Banners on the internet, teasers and similar. Advertising formats would be almost impossible because there is simply no space for comprehensive product features.

The protection of retail investors is already comprehensive and sufficiently developed. Within the scope of investment advice to retail investors, the client must be provided with a brief and easily understandable basic information sheet on each financial instrument to which the advice relates before the transaction is concluded, especially in the case of PRIIP products (key information document). In addition, there already exists a basic obligation for marketing communications that the presentation of opportunities and risks must be balanced.

Facilitations for the upgrading of retail clients to professional clients – Annex I

ESBG very much welcomes the Annex I of the Omnibus Directive which amends section II.1 of Annex II of MiFID to provides facilitations for the upgrading of retail clients to professional clients, by reducing the thresholds for the required financial assets from currently over EUR 500,000 to only EUR 250,000 (average of the last three years). However, in this respect would like to suggest some further improvements as follows.

We suggest a further reduction to EUR 100,000. In our opinion, the main argument for being a professional client must be knowledge and experience, not the client's assets.

[4] Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301.

In addition, clients who have gained experience in a certain asset class (e.g., shares, certificates, or funds) within five years and have conducted at least 20 individual transactions in this asset class can be upgraded to professional client for this asset class. It is not comprehensible why a client who was classified as a professional one year should lose this status again the next year: knowledge and experience are not lost. Clients complain when they lose the status of professional again.

For legal persons, ESBG suggests including the investment volume (e.g., also 10 million) as an alternative to the balance sheet total of 10 million. Project companies always have an economic background with relatively high investment sums and a relatively long economic useful life.

However, these are often freshly founded and therefore cannot fulfil the threshold values (e.g., because there is no balance sheet total yet). In this respect, this additional feature is warranted, especially since the corresponding transactions are usually carried out by a professional and experienced finance department.

Furthermore, according to new subparagraph 6, Section II.1, Annex II of MiFID, the legal entity shall assess whether its legal representative is, inter alia, able to make investment decisions in accordance with the objectives, needs and financial capabilities of the legal entity and to adequately assess the risks. In practice, companies will in any case only grant power of attorney to those persons who meet these criteria. Beyond that, however, we do not see how the institution should be able to "assess" this and are therefore in favour of deleting this sentence.

Article 6 - Transposition

Article 6 of the Omnibus Directive proposal states that it will enter into force 20 days after the publication in the Official Journal of the European Union.

Member States are requested to implement the European requirements into national law 12 months after their publication in the EU Official Journal.

Institutions only have 18 months after the publication of the new requirements in the EU Official Journal before they must apply them.

Given that the proposed developments will imply significant implementation changes at the level of systems, marketing, policies, contracts, and costs, we believe that the deadlines for transposition of the Directive, implementation of the Regulation and preparation of Delegated Acts should be substantially longer than currently envisaged.

It is particularly problematic that the Level II requirements are to be enacted parallel to the national implementation of the Level I requirements, which will have a considerable impact on the concrete implementation.

ESBG therefore asks that the transition period for the institutions should only begin once the final Level 2 requirements have been published in the EU Official Journal. Alternatively, the deadline for transposition of the Omnibus Directive as well as the deadlines to draft all delegated acts should be extended substantially.

Section 2

Changes on Directive EU 2016/97 (IDD) Made by Omnibus Amending Directive Proposal

New article 29b - Best interest of consumers

Regarding the obligation set out in new article 29b of the IDD as per the Omnibus Directive proposal to provide advice based on an assessment of an appropriate range of insurance-based investment products (IBIPs) and, where appropriate, underlying investment assets, we understand that this obligation should be interpreted as a requirement to offer different products *strictu sensu* but not products from different insurers. Additionally, for the comparison to be homogeneous, we believe it should be between appropriate products that meet the clients' needs.

As per the classification of product complexity, some IBIPs are considered as "complex" simply because they include derivatives on the underlying assets. We believe that the delegated acts that the Commission proposes to develop in article 30, paragraph 6 of the proposed review of IDD are a good opportunity to clearly define the evaluation criteria of complex and non-complex IBIPs considering the actual risks assumed by the client as well as the specificities of managed portfolios.

We believe that a solution similar to the classification of complex UCITS would be a good starting point.

In relation to the requirements of the "best interest of customers" concept in IDD, insurance undertakings and insurance intermediaries are under the obligation to provide advice based on an assessment of an appropriate range of insurance-based investment products and, where applicable, underlying investment assets.

While the MiFID proposal includes a reference to the "appropriate range of financial instruments", in IDD there is a reference to "the underlying investment assets" in article 29b. Moreover, the Commission is empowered to adopt delegated acts to further specify how insurance intermediaries and insurance undertakings are to comply with the principles set out in article 29b.

In this regard, it would be necessary to clarify whether the reference to "the underlying investment assets" already includes or could include the concept of "financial instruments", as the lack of clarity in this regard could create legal uncertainty for financial market participants. We also believe it is appropriate to clarify whether the concept of "underlying assets" would include unit linked products of other portfolios or if it would be necessary to include different products.

SECTION 3
CHANGES ON AMENDING REGULATION (EU) NO 1286/2014 AS REGARDS THE MODERNISATION OF THE KEY INFORMATION DOCUMENT

ESBG welcomes the proposal to amend the PRIIPs regulation aiming at eliminating some of the existing weaknesses in the regulatory requirements so that the PRIIPs KIDs form a better basis for the investment decisions of retail investors than is currently the case.
The Regulation proposal is positive on some issues, such as:

- The priority of electronic provision of PRIIPs KIDs (this creates a synchronisation with MiFID II)
- The exemption for bonds with make-whole clauses, which will make those products again available for retail investors again and will create a parallel with the exemption on product governance under MiFID II.
- Deleting the current provision in article 8, paragraph 3, letter b) of PRIIPs Regulation regarding the warning notice
- The use of layering as optional and not mandatory under Article 14, paragraph 4.

Nevertheless, we suggest further improvements to strengthen confidence in the capital markets and thus promote investments by retail investors in particular, based also in the outcome of the ESAs report for PRIIPs review.

Exclusions of the scope of application – Article 2, paragraph 2, letter h)
The amendment proposal of article 2, paragraph 2, letter h) should include a reference to "immediate annuities". Certain retail insurance products that rely on relevant biometric coverages (i.e., with coverages over the 600 € threshold) that clearly differ from pure investment products without such an insurance component should also be excluded from the scope of the application of the PRIIPS Regulation.

Introduction of a "product at a glance" dashboard – Article 8, paragraph 3, letter aa)
Regarding the introduction in article 8, paragraph 3, letter aa) of an introductory overview section at the beginning of the PRIIPs KID, we wonder whether a summary presentation of the most important information in the PRIIPs KIDs, which should not be longer than three pages, is actually useful. While an introductory summary is certainly useful for long documents, the added value of an introductory overview in the short information sheets is not apparent to us. In this way, a lot of redundant information is created on a few pages.
In this context, it should also be considered that many manufacturers already have problems complying with the 3-page limit. This will hardly be possible due to the proposed additions (this concerns not only the

dashboard but also the new information on sustainability). In this respect, either the additions should be dispensed with, current content in the PRIIPs KIDs should be omitted or the 3-page limitation should be abandoned.

Harmonisation of the definition of sustainability according to MiFID and PRIIPs Regulation – Article 8, paragraph 3

We welcome the fact that the Commission proposes in article 8, paragraph 3 of PRIIPs to address the important issue of sustainability in the PRIIPs-KIDs.

However, it is problematic that the proposed presentation fundamentally deviates from the sustainability-related aspects that advisors must ask clients about in investment advice according to article 2, MiFID 2 – Delegated Regulation (EU) 2017/565. Thus, in future, PRIIPs KIDs are to contain two pieces of information on sustainability, while the client can choose between three (completely different) sustainable product types in the advice. The clients will thus not find the sustainability-related contents of the advisory meeting in the basic information sheet they receive in the advisory.

To avoid contradictory information on sustainability, the presentation in the PRIIPs KIDs should be aligned with the existing MiFID requirements in article 2 n. 7 MiFID 2 Regulation (EU) 2017/565. In addition, that itself should be reviewed. Sustainability disclosures should be mandatory or at least possible for all PRIIPs and not only for funds and insurance investment products as proposed.

Finally, it should be clarified that detailed information on sustainability is only required for sustainable products and not for non-sustainable products. Here, a brief indication that the product does not pursue sustainable goals should be sufficient.

Personalisation – Article 14, paragraphs 2 and 3

The possibility of personalising PRIIPs KIDs in article 14, paragraph 2 of PRIIPs Regulation is of a very general nature. According to paragraph 3, the concrete design is to be determined by Level 2 measures. In this respect, it is not possible to evaluate the proposed innovation, which may lead to the PRIIPs KID looking completely different in the future than it currently does.

Against this background, it is very positive that personalisation in article 14, paragraph 2 is designed as an optional possibility. In view of the above-mentioned uncertainties regarding the still open design, the optional design should be retained in any case.

Facilitation of the provision of KIDs for savings plans – Article 13, paragraph 4

In the case of savings plans, customers must currently be provided with an up-to-date PRIIPs KID every time there is a significant change. In their final report for the PRIIPs review, the ESAs proposed a simplification of the information obligation, according to which the customers would be provided with a one-time link via which they can call up the respective current PRIIPs KID. ESBG support the view of taking up this facilitation in order to reduce the information overload.

Restriction of the scope of application to investment products
The PRIIPs Regulation currently also covers hedging products such as OTC derivatives. The regulations tailored to investment products do not apply to these products (e.g., investors must be informed about the risk of loss of the investment amount - with OTC derivatives there is no investment amount).
For this reason, the ESAs have already had to amend the statutory requirements on the content of PRIIPs KIDs for OTC derivatives through Q&A to avoid misleading information or at least reduce it.
To avoid PRIIPs KIDs with misleading content being created due to inappropriate regulatory requirements, the scope of the PRIIPs Regulation should be limited to investment products to which requirements are tailored.

Limitation of the information obligation to retail clients
Currently, professional clients also receive a PRIIPs KID when purchasing funds, which is only provided for private clients according to the PRIIPs Regulation. The background is that the UCITS Directive (2009/65/EC) still contains an information obligation towards professional clients, which can be fulfilled by providing the PRIIPs KIDs (which happens regularly in practice).
The information requirements should be limited to private clients and the legal coexistence of PRIIPs-KID, which are no longer used in practice, should be ended (reduction of unnecessary bureaucracy). This requires a deletion of articles from 78 to 82a of the UCITS Directive.

More flexibility in the differentiation of the various product groups
In their Final Report, the ESAs had recommended creating more flexibility at Level 1 for the content of the key information documents at Level 2 in order to better take into account the specificities of certain product groups and to be able to describe them accurately if the rigid legal requirements would lead to misleading statements in the PRIIPs KIDs for certain product groups.
Such regulation should be supplemented accordingly.

More flexibility in the presentation of performance scenarios
Finally, the ESAs had recommended that the Level 2 regulation should also be given more flexibility in the presentation of the performance scenarios in the PRIIPs KIDs to develop suitable performance scenarios for all product groups here. Here, too, the Level 2 regulation should be given more flexibility and carefully take into account the clients' real needs.

No statements on the harmonisation of product costs according to MiFID II and PRIIPs Regulation

The fact that the cost information under MiFID and the key information documents do not contain any statements on the harmonisation of the product costs is quite surprising.

The fact that different product costs are shown in the cost information (under MiFID without inducements and under PRIIPs Regulation with inducements) is one of the most pressing problems in the area of investor protection.

It is even more astonishing that neither the Omnibus Directive proposal nor the Amending Regulation proposal contain a statement on this topic.

A clear request to the Level 2 to harmonise product costs under MiFID and PRIIPs Regulation should be included in order to avoid contradictory client information.

Transposition period

Moreover, the implementation period is far too short: the new requirements are to be applicable only 18 months after their publication in the EU Official Journal.

At the same time, the ESAs are to submit a proposal for the amended Level 2 requirements within twelve months. Subsequently, the Commission will prepare an official draft law. Based on this timetable, it is already clear that the amended Level 2 requirements, on which the manufacturers are absolutely dependent for the preparation of the new PRIIP KIDs, will not be available in time.

The implementation period for the institutions may therefore only begin after the important detailed specifications for the creation of the new PRIIPs KIDs at Level 2 have been determined.

About ESBG (European Savings and Retail Banking Group)

ESBG is an association that represents the locally focused European banking sector, helping savings and retail banks in 17 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 885 banks, which together employ 656,000 people driven to innovate at 48,900 outlets. ESBG members have total assets of €5.3 trillion, provide €1 trillion billion in corporate loans, including SMEs, and serve 163 million Europeans seeking retail banking services. ESBG members commit to further unleash the promise of sustainable, responsible 21st century banking. Learn more at www.wsbi-esbg.org.

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