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## NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	<p>Retail Investment Strategy:</p> <p>Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1286/2014 as regards the modernisation of the key information document</p> <p>Proposal for a Directive amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules</p> <p>- Progress report</p>

## I. GENERAL REMARKS

1. On 24 May 2023 the Commission adopted the Retail Investment Strategy (RIS), which aims at enhancing retail investor participation as part of the initiatives towards a Capital Markets Union. The Retail Investment Strategy package amends the existing rules set out in the Markets in Financial Instruments Directive (MiFID II), the Insurance Distribution Directive (IDD), the Undertaking for Collective Investment in Transferable Securities (UCITS) Directive, the Alternative Investment Fund Managers Directive (AIFMD), and the taking-up and pursuit of the business of Insurance and Reinsurance Directive (Solvency II). The Retail Investment Strategy also includes an amending Regulation that revises the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation.

**2. The Retail Investment Strategy seeks to enhance retail investors' trust, bringing them closer to capital markets, and ensure consistency across the different legal instruments.**

The package includes a wide range of measures to: improve the way information is provided to retail investors, increase transparency and comparability of costs, ensure that all retail clients receive at least annually a clear view of the investment performance of their portfolio, address potential conflicts of interest in the distribution of investment and insurance-based investment products by introducing a partial ban on inducements and ensuring that financial advice is aligned with retail investors' best interests, protect retail investors from misleading marketing, preserve high standards of professional qualifications for financial advisors, encourage Member States to implement national measures that can support citizens' financial literacy, make the eligibility criteria to become a professional investor more proportionate; and enhance supervisory powers and cooperation to ensure proper, effective and consistent application of rules.

**3. The Spanish Presidency launched in early July 2023 the process of reviewing the Commission's legislative proposal.** Given the importance, length and complexity of this initiative, the Presidency set out an ambitious work plan for the Working Party. The goal was to make as much substantial progress as possible, while encouraging thorough discussions and facilitating knowledge-sharing between the national delegates. To this end, the Working Party has held five meetings that lasted for two consecutive days, except for the first and last one (7 July, 4-5 September, 4-5 October, 6-7 November and 1 December). In the fourth meeting, the Working Party invited the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) to give presentations and share their expertise and preliminary technical views in relation to the Value for Money provisions, including the development of benchmarks.

**4. The Working Party endorsed the proposal of the Presidency to follow a “topic by topic” approach rather than considering separately the legal instrument in which each amendment is contained.** This cross-cutting approach considering provisions related to insurance activities and investment activities seeks to ensure consistency between the different legal texts. To this end, experts from each Member State involved in the regulation or supervision of insurance activities and investment services have attended each meeting and have actively participated in all discussions. The participation of both investment services and insurance experts has been important for the discussions to take into consideration specificities of each sector.

**5. The Presidency believes that significant progress has been made during these months.** All legal provisions of the Retail Investment Strategy have been covered at the Working Party meetings. Moreover, several drafting suggestions to amend the proposal have been put forward by the Presidency with the insightful assistance of the Council’s legal service and the valuable participation of the Commission’s services and have been discussed amongst delegates. During the November meeting the Presidency presented a first set of drafting suggestions covering Packaged Retail and Insurance-based Investment Products (PRIIPs), marketing practices, disclosure information, client categorisation and financial literacy. The second set of drafting suggestions was presented at the December meeting and covered the ‘best interest of the client’ test, suitability and appropriateness assessments, professional requirements, supervisory enforcement and the transposition and application deadlines. Before the end of December, the Presidency plans to present a last non-paper aimed at reflecting and analysing Member States’ comments to the Presidency drafting suggestions presented at the November and December meetings.

6. **This progress report summarises the outcome of the progress achieved during the Spanish Presidency without precluding any future decision by the Council.** The report highlights the areas where an agreement seems easier to achieve and strives to illustrate the main positions and arguments in areas where there is divergence of opinions or simply further work is required. This report ultimately represents the Spanish Presidency's view of the state of play of the negotiations with a view to helping the incoming Belgian Presidency to keep this important dossier moving forward towards a Council position. All delegations have received the opportunity to comment on this report and the Presidency has done its best to take all comments into account.

## **II. PACKAGED RETAIL AND INSURANCE-BASED INVESTMENT PRODUCTS (PRIIPS) REGULATION**

### **Exclusions**

7. **Member States agreed with the Commission's proposal to extend the exclusion of national pension products, including immediate annuities without an accumulation phase, as well as to exclude some types of corporate bonds with make-whole clauses, from the scope of the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation.** Several delegations suggested to also exclude non-equity securities issued by non-financial entities.

## Multi-option products

- 8. Further discussions are needed about the requirements for products offering a range of options.** The Presidency presented at the November meeting several drafting suggestions on multi-option products (MOPs), but some issues need to be further debated due to the specificities of these products. For example, according to some Member States, the provision of simulation tools could be difficult to implement without imposing disproportionate costs and increasing technical difficulties on the industry. A few delegations also claimed that it was unclear whether the manufacturer or the distributor would be liable for the accuracy of the information provided by means of the interactive comparison tool. Finally, several delegations would rather incorporate the drafting proposal put forward by the European supervisory authorities in their 2022 advice on the review of this Regulation, to ensure that the costs of the insurance contract are included only in the specific information document under Article 10 of the Packaged Retail and Insurance-based Investment Products Delegated Regulation.

## Key information document

- 9. Member States expressed divergent views on the introduction of the “*Product at a Glance*” section.** While some delegations supported the introduction of this new section requesting the inclusion of more information, a few believed that the benefits for the retail investors might not outweigh the costs of using such additional space.

**10. On the performance scenarios and the information on costs, some Member States expressed their concern because the proposal did not take up some points of the European supervisory authorities' 2022 advice on the review of the Packaged Retail and Insurance-based Investment Products Regulation.** Among others, the proposal does not follow the European supervisory authorities' suggestion that would allow the inclusion of past performance for linear Packaged Retail and Insurance-based Investment Products and linear investment options (e.g. investment funds). The Commission proposal did not incorporate any amendments on this matter because it considered that the content of the scenarios and the presentation of the Key Information Document (KID) for these products have been recently amended and, thus, more time is required to evaluate the effects of such modifications. Some delegations also claimed that the European supervisory authorities should be able to take differences of products into account in Level 2 measures to improve intelligibility.

**11. Most delegations agreed with the inclusion of the section “*How environmentally sustainable is this product?*”.** However, there were different views on its content. For example, Germany presented a non-paper proposing the inclusion of an indicator comparable to the summary risk indicator but based on Environmental, Social and Governance (ESG) factors, using a colour-based scale. Moreover, some Member States inquired about the adequacy and informativeness of using the metric of the expected greenhouse gas (GHG) emissions intensity indicator. The Presidency suggested two alternatives in the non-paper presented at the November meeting: A) to replace the expected greenhouse gas emissions intensity indicator with the mention to the sustainability disclosures or B) to add the sustainability disclosures to that expected greenhouse gas emissions intensity indicator. While several delegations preferred option A, none of the alternative options has received substantial support. Finally, several Member States highlighted the need to also capture the social dimension and to make a reference to the existing sustainability disclosures.

- 12. A relevant number of Member States claimed that the new sections will make it difficult to comply with the 3-pages limit.** Consequently, several delegations proposed to increase the page limit to 4 pages, while others considered that the current limit should be kept.
- 13. Member States were overall not opposed to the removal of the comprehension alert proposed by the Commission.** While some delegations expressed their support to such removal, a few considered that the alert should be retained at least for some specific products.
- 14. Further discussions are needed on the provisions related to the updating of the Key Information Document.** Several Member States argued that updating certain information could generate confusion and a higher administrative burden for certain types of products. A few delegations suggested including a Level 1 provision to exempt the updating of the Key Information Document for certain products such as those which are no longer open to new subscriptions and no longer traded on the secondary market. Additionally, some Member States proposed to include additional guidance on the terms “still made available” and “no longer made available”.

**15. Member States generally supported introducing several clarifications to the provisions on the electronic format and accessibility of the Key Information Document.** Several issues may need to be further considered: i) the possibility to include more detailed guidance on the possibility of providing the Key Information Document by means of an interactive tool and the requirements for displaying the information of the Key Information Document in a personalised manner; ii) the adequate degree of emphasis on the cost characteristics of these products when using digital tools, especially further specification of cost personalisation; and iii) whether there should be an obligation to keep the Key Information Document accessible as long as the retail investor may need to consult it.

#### **Deadlines for the transposition and application of acts**

**16. Member States generally asked for an extended period of application of the provisions included in this Regulation.** After consulting the legal service of the Council, in the non-paper presented at the November meeting, the Presidency suggested postponing the application of those provisions that require delegated acts to the previous adoption of the corresponding delegated acts. In contrast, the Presidency proposed not to defer the provisions that do not require delegated acts. The Commission, following advice from the Commission's legal service, indicated that such a postponed application of certain provisions, linked to the adoption of delegated acts, would not be legally possible.



### III. OMNIBUS DIRECTIVE

#### Marketing practices

**17. Member States generally welcomed amendments proposed in the Presidency's non-paper presented at the November meeting regarding the provisions on marketing communications, although further discussions may still be necessary on certain aspects such as** i) the difference between the concepts “promoting” and “enticing” in the definition of marketing communication, ii) whether the definition of marketing practices is too broad and vague and should be further refined, iii) the difference between “target audience” and “target market”, iv) the possible burden placed on entities of the new requirements on annual reports and record keeping of marketing communications and practices, v) whether competent authorities of the host Member States have the possibility to verify that marketing communications comply with national law before they are launched; and finally, vi) whether competent authorities should be able to require prior notification of marketing communications.

## Disclosure information

**18. Member States generally did not oppose modifying the current regulatory disclosure framework.** However, several aspects might need further consideration. These include, among others, i) the concept of particularly risky products; ii) the role granted to the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority regarding the competence to impose risk warnings; iii) the way some pre-contractual information should be presented; and finally, iv) the cost calculation methodologies. A few Member States also noted that the disclosures under the Insurance Distribution Directive (IDD) should intend to establish a minimum harmonisation.

## Client categorisation

**19. Member States generally expressed support on the criteria for client categorisation.** Yet, further discussions are needed on the calculation of the wealth and trading frequency criteria and on whether some of the criteria proposed should be merged.

## Professional qualifications

**20. Member States generally agreed with ensuring higher professional standards for investment advisors by strengthening and aligning the requirements on the knowledge and competence of investment advisors set out in the Markets in Financial Instruments Directive (MiFID II) and the Insurance Distribution Directive (IDD).** Several delegations asked for the possibility for Member States to introduce further requirements and to have flexibility regarding the form of certificates. Amendments to this end were proposed by the Presidency at the December meeting.

## Promotion of financial literacy

- 21. Delegates generally shared the goal of ensuring that Member States promote financial education measures at national level so that retail investors are able to invest responsibly.** Several delegations made drafting suggestions that have been considered in the Presidency's proposed legal amendments presented at the November meeting.

## Supervisory enforcement

- 22. Member States generally supported the objectives of the Commission's proposal to strengthen supervisory cooperation in the context of the growth of digital channels and as regards the cross-border provision of services. While a few delegations expressed support for the Commission's proposal, some others requested some amendments/clarifications,** including as regards the roles of the European supervisory authorities in the setting-up of collaboration platforms, limiting the National competent authorities' information sharing requirements to the European supervisory authorities to cases where there is an added value (i.e. real concerns about retail investor protection) or the possibility for host National competent authorities to request a review of whether the conditions for authorisation are still met. A few Member States opposed the introduction of measures that, in their view, may constrain the provision of cross-border services.

**23. After thorough consideration of Member States' concerns, the Presidency proposed several amendments on the supervisory provisions at the December meeting.** First, the Presidency proposed to narrow down the scope of the requests to home National competent authorities to review if a firm meets the conditions for authorisation, so that the European Securities and Markets Authority would only be able to request a review in case of complaints highlighting material investor protection concerns. Also, the review would only affect specific requirements, and the reasons for the request should be explained. Additionally, with the aim of addressing a large group of comments regarding collaboration platforms, the Presidency suggested redrafting the proposal so that the European supervisory authorities could only launch such platforms upon the request of National competent authorities. Other changes aimed at extending the timeframes and clarifying concepts to improve the supervisory framework. Overall, the amendments put forward by the Presidency were welcomed.

**24. Member States showed openness to discuss the proposal, but expressed certain concerns and asked for clarifications,** including on the interlinkages with the suitability test as well as the value for money approach and on the concepts of appropriate range of financial products, cost-efficiency, and product without additional features. Based on this, the Presidency's non-paper presented at the December Working Party proposed several amendments. Amongst others, one amendment tried to clarify that the criterion of appropriate range of products can be met even if a firm offers products from only one manufacturer. This way tied agents will not be obliged to offer products originated by other third-party manufacturers. However, a few delegations pointed out that in the case of multi-option products the appropriate range of products needs to be checked at the underlying investment options level. The Presidency also proposed a clarification that the term cost efficiency needs to consider cost and performance. The amendments proposed in the Presidency's non-paper at the December Working Party were welcomed, although most Member States asked for further amendments in Level 1 and additional clarifications. Further discussions are therefore needed.

- 25. Some Member States expressed support for the new provisions, while some others expressed reservations regarding the simplified suitability assessment or asked for clarifications on some concepts, including *well-diversified, non-complex and cost-efficient* for the “simple advice” by independent advisors. Other delegations advocated for less burdensome requirements to avoid information overload.** For example, there were several concerns about the collection of information on ability to bear losses and the risk tolerance in the context of the appropriateness assessment.
- 26. The Presidency provided drafting suggestions in the fifth Working Party (1 December) which sought to address the concerns (in particular on proportionality and clarity of some concepts), by defining certain notions where relevant and proposing alternative solutions.** On suitability, to ensure proportionality, the Presidency suggested that portfolio diversification would not always need to be assessed in the same depth (e.g. asset-specific advice would be excluded from this assessment). The suggested amendments also included a definition of *cost-efficient* and *well-diversified*. *Non-complex* is already specified in the Markets in Financial Instruments Directive (MiFID II) and the Insurance Distribution Directive (IDD). Regarding appropriateness, the Presidency proposed to amend the reference to the capacity to bear losses and risk tolerance, following Member States’ comments noting that such analysis might be too complex for firms, in order to allow for greater flexibility. Further discussions are needed given that some delegations expressed support for those changes, but others would prefer to maintain the original proposal.

**27. Member States expressed diverging views on the partial ban on inducements, which range from the outright rejection of any ban to the support of a full ban.** While a large number of delegations expressed scepticism, most of them were in favour of further assessing how to better regulate inducements, noting that such a far-reaching policy intervention requires more in-depth analysis and evidence of the alleged widespread existence of conflicts of interest in the provision of insurance and investment services to retail clients. Moreover, some Member States warned about the possible exclusion of low-income retail investors from the provision of advice.

**28. Several delegations that do not support the partial ban raised concerns about different elements of the proposal.** They pointed at the potential negative implications affecting the supply side. These would include an increase in prices due to the reduction of the range and diversity of products offered, a disruptive impact on some existing business models such as the provision of some digital services, or a possible damage to the development of innovative business. Finally, several Member States were also wary of the potential asymmetric impact of the measure in domestic capital retail markets.

- 29. Other delegations who are more open to the introduction of the partial ban asked for some clarifications and technical amendments to the text.** Examples of proposed amendments include the exemption for investment firms providing advice to the same client relating to one or more transactions covered by that advice, the consistent use of “*pay or receive*” both for the ban on execution-only sales and for portfolio management services, and the non-application of the ban to minor non-monetary benefits.
- 30. Further discussions are needed to explore the way forward.** The inherent complexity of the subject matter, the manifold perspectives on the proposed partial ban and the far-reaching consequences of any policy choice, show that more technical analysis and constructive deliberations are needed before a proposal can be launched on a specific course of action that can be implemented successfully. On the other hand, the extension of the review clause to at least five years seemed to gather support from delegations.
- 31. Member States did not express objections to extending the ban on inducements for independent advisors to also cover independent insurance intermediaries,** provided that such ban on inducements does not prevent insurance intermediaries that are not employed by or contractually tied to an insurance undertaking but receive inducements from presenting themselves as not contractually tied to a specific insurance undertaking.



**32. The proposal on Value for Money raised many questions and concerns particularly due to the possible impact on competition and innovation, a possible overemphasis on costs, the potential risk that benchmarks might become a *de facto* price regulation tool and the heterogeneity of the European Union's markets.** Many delegations questioned how the proposed new provisions could work in practice but were open to further discussions.

**33. The Commission presented a non-paper on the application of Value for Money provisions prior to the discussion during the fourth Working Party (6 and 7 November).** The Commission explained the reasons behind the proposal, the importance of benchmarks as part of the process that product manufacturers and distributors must apply before bringing an investment product to market ("Value for Money assessment") and the tasks allocated in the Level 1 text to the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority. The Commission stressed that the focus of the proposed Value for Money approach would not only be on costs, but on the *value* that investment products would be expected to bring (which would take into consideration performance and, where relevant, other benefits). The Commission also underlined the importance of benchmarks developed by the European supervisory authorities as a basis for an objective comparison.

**34. The European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority were invited to the Working Party to provide their presentations and share their expertise and preliminary technical views in relation to the development of benchmarks.** They highlighted that there would be different clusters for different product types which can be modified to include more types or other characteristics and presented ideas on how the clusters could be formed and which indicators would need to be considered for the benchmark. Against the background of Member States' reservations regarding additional reporting requirements, the European supervisory authorities also explained that a lot of information would already be available, e.g. on the basis of the Packaged Retail and Insurance-based Investment Products' Key Information Document, on existing Solvency II quantitative reporting templates and on the new reporting framework under the Undertaking for Collective Investment in Transferable Securities (UCITS) Directive and the Alternative Investment Fund Managers Directive (AIFMD).

**35. Further debate and reflection are needed on the Value for Money provisions.** While some delegations expressed doubts regarding the approach, notably regarding the feasibility for the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority to develop relevant benchmarks or the possible negative impact on competition if the benchmarks are made publicly available, others expressed their support. Moreover, several Member States were open to consider the proposal, provided there are more clarifications in Level 1 (e.g. on the formation of clusters, on the acceptable level of deviation from the benchmark or on how to deal with deviations caused by domestic market movements) and the methodology is adjusted to consider market heterogeneity.

## **Deadlines for the transposition and application of acts**

**36. A majority of Member States advocated for longer transposition periods and considered the application deadline insufficient.** This was based on the potential impact on market participants and National competent authorities and on the length of national legislative processes. Several solutions were discussed, for instance, a general extension of deadlines as well as a dynamic approach taking into account Level 2 timelines. The Presidency proposed at the December meeting to extend the transposition period from 12 to 18 months and the entry into application of the Directive from 18 to 24 months. Some delegations asked for even further extended periods.

## **IV. CONCLUDING REMARKS**

**37. The Presidency invites the Permanent Representatives Committee (Coreper) to take note of this report and progress achieved, with a view to taking the work further.** The incoming Belgian Presidency is invited to build on the progress made and continue to work on the package.