

# Consultation Paper

ADVICE TO THE EUROPEAN COMMISSION  
REGARDING CERTAIN ASPECTS RELATING TO  
RETAIL INVESTOR PROTECTION

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EIOPA REGULAR USE

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**eiopa**

European Insurance and  
Occupational Pensions Authority

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## RESPONDING TO THIS PAPER

1. EIOPA welcomes comments on the Consultation Paper regarding its Advice on certain aspects relating to retail investor protection.

Comments are most helpful if they:

- respond to the question stated, where applicable;
- contain a clear rationale; and
- describe any alternatives EIOPA should consider.

2. Please send your comments to EIOPA by 25 February 2022, responding to the questions in the survey provided at the following link<sup>1</sup>:

<https://ec.europa.eu/eusurvey/runner/CPRetailInvestorProtection>

3. Contributions not provided using the survey or submitted after the deadline will not be processed and therefore considered as they were not submitted.

### **Publication of responses**

4. Your responses will be published on the EIOPA website unless: you request to treat them confidential, or they are unlawful, or they would infringe the rights of any third party. Please, indicate clearly and prominently in your submission any part you do not wish to be publicly disclosed. EIOPA may also publish a summary of the survey input received on its website.
5. Please note that EIOPA is subject to Regulation (EC) No 1049/2001 regarding public access to documents and EIOPA's rules on public access to documents<sup>2</sup>.

### Declaration by the contributor

6. By sending your contribution to EIOPA you consent to publication of all information in your contribution in whole/in part – as indicated in your responses, including to the publication of your name/the name of your organisation, and you thereby declare that nothing within your response is unlawful or would infringe the rights of any third party in a manner that would prevent the publication.

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<sup>1</sup> EUSurvey supports the following browsers: Microsoft Edge (last 2 versions), Mozilla Firefox and Google Chrome (latest versions). Using other browsers might cause compatibility issues

<sup>2</sup> [Public Access to Documents](#)

### **Data Protection**

7. Please note that personal contact details (such as name of individuals, email addresses and phone numbers) will not be published. EIOPA, as a European Authority, will process any personal data in line with Regulation (EU) 2018/1725. More information on how personal data are treated can be found in the privacy statement at the end of this material. [www.eiopa.europa.eu/privacy-statement\\_en](http://www.eiopa.europa.eu/privacy-statement_en)

## INTRODUCTION

8. A report was published by the High Level Forum on the Capital Markets Union on 10 June 2020, which set out 17 interconnected recommendations aimed at removing the biggest barriers in the EU's capital markets. As a follow-up to this report, on 24 September 2020, the European Commission adopted a new Capital Markets Union (CMU) Action Plan. As indicated in the new CMU Action Plan, the Commission intends to publish a strategy for retail investments in Europe in 2022 with the aim to ensure that retail investors can take full advantage of capital markets and that rules are coherent across legal instruments.
9. The main objectives of the Commission's retail investment strategy are to ensure that an individual investor benefits from: (i) adequate protection, (ii) bias-free advice and fair treatment, (iii) open markets with a variety of competitive and cost-efficient financial services and products, and (iv) transparent, comparable and understandable product information. Furthermore, in the Commission's view, EU legislation should be forward-looking and should reflect ongoing developments in digitalisation and sustainability, as well as the increasing need for retirement savings.
10. With a view to developing its retail investment strategy, the Commission ran a public consultation from 11 May to 3 August 2021 and has launched an extensive study, focusing on the different disclosure regimes, the extent to which advice given to prospective investors is useful and impartial and the impact of inducements paid to intermediaries.
11. To bolster these ongoing initiatives, the Commission sent EIOPA a Call for Advice on certain aspects relating to retail investor protection on 27 July 2021. The Call for Advice covers the following six areas:
  - Addressing and enhancing investor engagement with disclosures;
  - Drawing out the benefits of digital disclosures;
  - Assessing the risks and opportunities presented by new digital tools and channels;
  - Tackling damaging conflicts of interest in the sales process;
  - Promoting an affordable and efficient sales process; and
  - Assessing the impact of complexity in the retail investment product market
12. The Commission has requested EIOPA to deliver its report to the Commission services by 30 April 2022 so that the Commission can factor this into its on-going work on its Retail Investment Strategy.

13. EIOPA welcomes the opportunity to provide advice to the Commission on this issue and has taken into account the results of the Commission’s public consultation in developing this Consultation Paper. However, at the time of preparing this Consultation Paper, the final report of the Commission’s study had not yet been published and therefore, EIOPA was not able to take the results of this study into consideration in developing this Consultation Paper.
14. A separate Call for Advice has been sent to ESMA on MiFID II and to the Joint Committee on PRIIPs. There are some contingent issues in both of these Calls for Advice which are relevant to the content of this Call for Advice, hence EIOPA has sought at all stages to ensure close co-ordination with ESMA and the Joint Committee on both pieces of work.
15. The compressed timeline for developing its advice has meant that EIOPA has not had the time to carry out the level of evidence-gathering from external stakeholders or impact assessment it would have liked to carry out if it had had more time to develop its advice. For this reason, EIOPA initiated an informal fact-finding exercise on the Call for Advice with its EIOPA’s Insurance and Reinsurance Stakeholder Group during the course of August and September 2021 and also took into consideration the results of a public survey on the application of the Insurance Distribution Directive (IDD)<sup>3</sup> which ran until 1 February 2021 (which have formed the basis for EIOPA’s recently published report on the application of the IDD<sup>4</sup>).
16. In addition, the compressed timeline is the reason for the unusually short public consultation period of 4 weeks for stakeholders to provide responses. EIOPA recognises that such a short period to carry out a public consultation is not preferable from a policy-making perspective, but is caused by the limited time available to develop such advice.
17. **In the case of each section of EIOPA’s draft advice in this Consultation Paper, a detailed summary of relevant EU legal provisions and an overview of national implementation, including, in some cases, some specific national examples, can also be found in Annex II to this Consultation Paper. Examples of recent national reform experience in the field of regulating inducements can be found in Annex VI. A full analysis of the structure of distribution channels selling IBIPs across the EU, can be found in Annex V.**

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<sup>3</sup> Survey on the application of the Insurance Distribution Directive (IDD): [https://www.eiopa.europa.eu/document-library/survey/survey-application-of-insurance-distribution-directive-idd\\_en](https://www.eiopa.europa.eu/document-library/survey/survey-application-of-insurance-distribution-directive-idd_en)

<sup>4</sup> [https://www.eiopa.europa.eu/media/news/eiopa-publishes-report-application-of-insurance-distribution-directive\\_en](https://www.eiopa.europa.eu/media/news/eiopa-publishes-report-application-of-insurance-distribution-directive_en)

### Setting the scene

18. Given that the focus of the Commission’s work is on the retail investment market, this advice has focussed only on the distribution of insurance-based investment products (or IBIPs). An IBIP is defined in Article 2(1)(17) of the IDD as:
- “An insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations”.*
19. The notion of an IBIP is not defined according to a set of product criteria and derives from the PRIIPs Regulation<sup>5</sup>. More details on the types of products covered under the notion of IBIPs can be found in Annex I to this Consultation Paper.
20. The rules governing the distribution of IBIPs are captured both under a general Chapter V of the IDD covering information and conduct of business rules and a Chapter VI capturing additional requirements in relation to IBIPs. The IDD is aimed at minimum harmonisation and does not preclude Member States from maintaining or introducing more stringent provisions in order to protect customers. In that respect, the IDD includes a number of different national options for Member States to exercise.
21. It is important to stress from the outset that, as shown by EIOPA’s evaluation of the European insurance intermediation market in 2018 and its recently published report on the application of the IDD<sup>6</sup>, the insurance distribution market is characterised by “a very wide diversity of local distribution channels and different definitions adopted at the national level. Registration practices and reporting frameworks also vary amongst Member States, contributing to the diversity in terms of size of European intermediaries markets”. This characteristic of a heterogeneous insurance distribution market is an important element to be taken into consideration when determining how to best regulate the distribution of IBIPs at a European level.
22. In recent years, EIOPA has highlighted in its supervisory convergence work and reports on consumer trends (as highlighted by national competent authorities), concerns over the distribution of IBIPs

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<sup>5</sup> N.B. It is worth noting that the exemption in Article 2(2)(e) of the PRIIPs Regulation (“pension products which, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement and which entitle the investor to certain benefits”) currently provides for an element of national discretion with regard to the definition of an IBIP. Consequently, the scope of IBIPs can vary amongst Member States, leading to the potential for a differentiated application of conduct of business rules to IBIPs, including product oversight and governance requirements. The ESAs are also considering the issue of scope of PRIIPs in the context of the work on the [COM’s Call for Advice on the PRIIPs Regulation](#), which will be of relevance for any revisions to the text of the IDD concerning IBIPs.

<sup>6</sup> [https://www.eiopa.europa.eu/media/news/eiopa-publishes-report-application-of-insurance-distribution-directive\\_en](https://www.eiopa.europa.eu/media/news/eiopa-publishes-report-application-of-insurance-distribution-directive_en)

and in more recent times, unit-linked life insurance<sup>7</sup>. These concerns relate to a lack of transparency, lack of consumer understanding of products, product complexity, conflicts of interests, lack of adequate returns and an increase in the sale of unit-linked policies to vulnerable consumer groups<sup>8</sup>.

23. EIOPA has sought to put at the forefront the following high-level goals/objectives as a basis in developing this draft advice:

- Seeking to increase retail participation in capital markets by enhancing choice for consumers and make investing in IBIPs and wealth accumulation more attractive for consumers at a time of significant ongoing digital transformation;
- At the same time, creating a safe environment for consumers that enables them to make the right choices, and ensure products are suited for the proposed target market, for both advised and non-advised sales;
- Promoting further the principle that IBIPs should offer “value for money”<sup>9</sup> as put forward in EIOPA’s supervisory statement on assessing value for money in the unit-linked market<sup>10</sup>;
- Aiming for a regulatory framework that will enable a risk-based approach to conduct supervision in order to take into account the specificities and benefits of digitalisation, while maintaining the same level of protection for consumers.

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<sup>7</sup> In particular, it is worth noting the Opinion which EIOPA issued in March 2021 on the planned prohibition of some unit-linked life insurance products by the Polish Financial Supervision Authority and calls for coordinated action across Europe: [https://www.eiopa.europa.eu/media/news/eiopa-partially-supports-planned-prohibition-of-some-unit-linked-life-insurance-products\\_en](https://www.eiopa.europa.eu/media/news/eiopa-partially-supports-planned-prohibition-of-some-unit-linked-life-insurance-products_en)

<sup>8</sup> See, for example, page 24 “Possible enhanced risks in the unit-linked market” in EIOPA’s annual consumer trends report for 2020: [https://www.eiopa.europa.eu/document-library/consumer-trends-report/consumer-trends-report-2020\\_en](https://www.eiopa.europa.eu/document-library/consumer-trends-report/consumer-trends-report-2020_en). Quote: “Overall lack of transparency, lack of consumer understanding, product complexity, and mis-selling remain the main problems in the unit-linked market”.

<sup>9</sup> In line with its supervisory statement, EIOPA considers that unit-linked products offer value for money when “costs and charges are proportionate to the benefits (i.e. investment performance, guarantees, coverage and services) to the identified target market as well as reasonable, taking into account the expenses born by the providers”.

<sup>10</sup> “Supervisory Statement on the assessment of value for money of unit-linked insurance products under product oversight and governance”: [https://www.eiopa.europa.eu/content/eiopa-sets-out-framework-delivering-better-value-money-consumer-centric-way\\_en](https://www.eiopa.europa.eu/content/eiopa-sets-out-framework-delivering-better-value-money-consumer-centric-way_en)



# 1. ADDRESSING AND ENHANCING INVESTOR ENGAGEMENT WITH DISCLOSURES AND DRAWING OUT THE BENEFITS OF DIGITAL DISCLOSURES

## 1.1. BACKGROUND/MANDATE

### **Extract from the European Commission’s Call for advice**

*Identification of any significant overlaps, gaps, redundancies and inconsistencies across investor protection-related legislation that might have a detrimental effect on retail investors (i.e. which might confuse or hamper decision-making or comparability), in addition to those already identified and addressed by the recent PRIIPs level 2 work, how the different legal frameworks fit together and options as to how to remedy any identified shortcomings. We would especially appreciate to receive a supervisor’s perspective on these issues, and in particular, how and whether the current rules help retail investors to take well-informed investment decisions. In addition, it would be helpful to understand what might be considered the vital information that a retail investor should receive.*

*We would also invite EIOPA to reflect on how the rules work from a retail investor perspective – including on whether they have fully attained the objective of ensuring that consumers can make informed choices and adequately reflect behavioural insights, avoid information overload and overly complex information, and the specific challenges for different types of products (e.g. multi-option products).*

*Conversely, are there areas where investors may not receive adequate and accurate, streamlined and clear information and in an appropriately standardised form, before investing, and are there any potential blind spots?*

*An assessment of how regulatory disclosures and communications can work best for consumers in a digital, and in particular a smartphone age, and proposed options as to how existing rules might be adapted, such as allowing layered information.*

### **1.1.1. Analysis of overlaps, gaps, redundancies and inconsistencies across investor protection-related legislation**

24. This section indicates the main findings from an analysis of the investor-protection legislation that were identified by EIOPA as particularly relevant for IBIPs - this includes the IDD, Solvency II<sup>11</sup>, the PRIIPs Regulation<sup>12</sup>, the Distance Marketing of Consumer Financial Services Directive (DMFSD)<sup>13</sup>, and the Directive on electronic commerce<sup>14</sup>. A more detailed analysis and full comparison is included in Annex V.
25. In certain cases, a specific recommendation to remedy certain shortcomings has been provided. In other cases, given the broader scope of the requirements beyond the insurance and pensions sectors, EIOPA has focused on identifying the issue.
26. During the analysis, EIOPA has taken into account that there are different types of information provided at different stages of the offer and sales process. While overlaps should be avoided, it can be relevant to provide similar information at different stages of the process, for example within both general product information and a personalised offer to the customer.

#### **a) Duplications in regulatory disclosures applicable to the sale of IBIPs**

27. The tables below show a summary of the duplications – highlighted in colours – of provisions on disclosures, mostly pre-contractual requirements, in the legislative acts which apply to IBIPs. Overall, potential duplications have been identified between a number of Solvency II, PRIIPs and IDD requirements, as well as between some requirements of the DMFSD and those in IDD, PRIIPs or Solvency II.
28. The main areas of duplication in relation to the pre-contractual phase relate to administrative aspects such as the identity and contact details of the insurance undertaking, information on the IBIP term, product benefits and information on complaints-handling procedures<sup>15</sup> - for the latter, there is a full overlap between four pieces of legislation. It is also particularly relevant to note that information on distribution costs cuts across three pieces of legislation (IDD, PRIIPs and the DMFSD).

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<sup>11</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

<sup>12</sup> REGULATION (EU) No 1286/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

<sup>13</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

<sup>14</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

<sup>15</sup> Bearing in mind at the same time that the complaints-handling procedure may be different in practice between a complaint concerning the insurance product itself and a complaint concerning the insurance distribution service provided.

29. Potential duplications between PRIIPs and Solvency II requirements also relate to information on underlying assets; description of risks and contract terms such as the duration of the contract and description of the surrender/cooling-off periods; the means of calculation and distribution of bonuses; the indication of surrender and paid-up values and the extent to which they are guaranteed; the definition of the units to which the benefits are linked for unit-linked policies; the information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate. PRIIPs requirements tend to be more specific than Solvency II requirements. More detailed tables which include a list of duplicative information requirements can be found in Annex VI to this Consultation Paper.
30. The only relevant pre-contractual requirements under Article 185 of Solvency II which are not duplicated in any way in the PRIIPs KID are:
- The name of the Member State in which the head office and, where appropriate, the branch concluding the contract is situated (Article 185(2)(b)),
  - The general information on the tax arrangements applicable to the type of policy. Instead, the PRIIPs Regulation requires the disclosure of a statement that the tax legislation of the retail investor's home Member State may have an impact on the actual pay-out. This requirement could be transferred from the Solvency II Directive to the IDD.
  - The law applicable to the contract where the parties do not have a free choice or, where the parties are free to choose the law applicable, the law the life insurance undertaking proposes to choose. This information could be transferred to the IDD.
31. Another requirement under Article 185 of the Solvency II Directive that is not duplicated in the PRIIPs KID, but is not considered relevant to be kept or transferred to IDD is a concrete reference to the report on the solvency and financial condition (SFCR) as laid down in Article 51, allowing the policyholder easy access to this information (Article 185(2)(d)).
32. Tables 1 and 2 below list the duplicative disclosure requirements of the regulatory framework applicable to IBIPs and summarise the proposals made to address the duplication. Key for the colour-coding used in Table 1 and 2 below:
- Green refers to disclosures that should be kept
  - Amber refers to disclosures that should be modified or transferred
  - Red refers to disclosures that should be disappplied

Table 1. Overview of identical information requirements					Proposal to address duplication
	IDD	SII	PRIIPs	DMFSD	
<i>PRE-CONTRACTUAL</i>					
Insurance undertaking: identity and contact details	Green	Red	Green	Red	Disapply SII & DMFSD
Insurance intermediary: identity and contact details	Green	White	White	Red	Disapply DMFSD
Address of the branch office	White	Yellow	White	Red	Transfer from SII to IDD
Information on the supervisory authority	White	White	Green	Red	Disapply DMFSD
Register of insurance intermediaries	Green	White	White	Red	Disapply DMFSD
Information on complaints-handling procedures	Green	Red	Green	Red	Disapply SII & DMFSD
IBIP term	White	Red	Green	Red	Disapply SII & DMFSD, consider to transfer from SII to IDD personalised information
Product benefits/features <sup>16</sup>	White	Red	Green	Red	Disapply SII & DMFSD, consider to transfer from SII to IDD personalised information

<sup>16</sup> Including means of calculation and distribution of bonuses, the indication of surrender and paid-up values and the extent to which they are guaranteed, for unit-linked policies, the definition of the units to which the benefits are linked, information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate,

Table 2. Overview of partially identical information requirements					Proposal to address duplication
<i>PRE-CONTRACTUAL</i>					
Underlying assets					Disapply SII
Tax system					Transfer from SII to IDD
Means of payment					Disapply SII & DMFSD
Risks					Disapply from IDD as PRIIPs is more detailed
Compensation system / protection system					Disapply DMFSD
Contract termination including cooling-off					Transfer cooling-off to the IDD
Applicable law					Disapply, not relevant
Distribution costs					Further specify disclosure distribution costs in the IDD and/or the KID <sup>17</sup>
<i>PERIODIC</i>					
Updating of information					

33. The impact of the duplications varies depending on the relevance and type of information, as well as the level of consistency across the requirements. The practical burden of duplication and potential for increased confusion/hampering of decision-making for consumers is considered *high* with regards to:

- Information on risks which is important, however the lack of consistency between PRIIPs and Solvency II disclosures with regards to how risks are presented might make it too difficult for consumers to understand the final risk level of the product.
- Information on distribution costs, as it is duplicated but not disclosed in the same way under IDD and PRIIPs, and it is not disclosed separately under PRIIPs, also without a break down to specify

<sup>17</sup> This specification can be more appropriate at Level 2 or Level 3 rather than Level 1. However, for IDD, a new empowerment would be needed in order to specify this further at Level 2.

inducements. Hence the practical burden of duplication and potential for increased confusion/hampering of decision-making for consumers, is considered high

- Information on the supervisory authority
- Underlying assets
- Means of payment
- Contract termination, including cooling-off.

34. Annex VII lists the information requirements for which the practical burden of duplication and potential for increased confusion/hampering of decision-making for consumers is considered at a *medium and low level*.

#### **Proposals for possible reform**

35. The PRIIPs Regulation and Solvency II include a number of duplicative or very similar information requirements. Most of the Solvency II requirements are duplicated under the PRIIPs Regulation. One of the main challenges in addressing the duplication of disclosures between Solvency II and PRIIPs is the question of whether, despite duplication, that duplication could still be justified as the nature and purpose of each document might be different. In particular, one might question whether there is an element of specificity or personalization under the provisions in Solvency II Directive (information to be provided to the policy holder) that would justify delivery of information separately and in addition, to the more generalized information in the PRIIPs KID (information targeted at the type of retail investor to whom the product is intended to be marketed).
36. Should it be beneficial to disclose to the consumer, one generic and one personalised pre-contractual document, a solution to address the duplication of disclosures could be to distinguish more the purpose of these documents and details of the information disclosed i.e. the PRIIPs KID including more generalised information, while personalised disclosures currently under Solvency II being transferred to IDD, as Solvency II is primarily not a conduct of business directive.
37. For example, when the term of the product in the KID is expressed in number of years, under Solvency II, the information disclosed could be instead the specific date of the information on the term of the product calculated based on the planned starting date.
38. However, most of provisions under Article 185 of the Solvency II Directive are of a generic, not personalised nature and are duplicated in the PRIIPs KID, in particular the following elements of Article 185(3), Solvency II:
- insurance undertaking identity and contact details,
  - the definition of each benefit and each option,

- the terms of the IBIP,
- for unit-linked policies, the definition of the units to which the benefits are linked;
- information on underlying assets,
- information on risks,
- the means of terminating the contract, including the arrangements for application of the cooling-off period,
- information on complaints-handling procedures,
- the means of payment of premiums and duration of payments,
- the means of calculation and distribution of bonuses.

39. To address this issue, Solvency II disclosures could be shortened by disapplying the provisions that do not concern personalised information for IBIPs, are both duplicated in the PRIIPs KID or are not relevant for the identification of the document (e.g. duplicative information on the identity of the insurance undertaking might be justified). The remaining personalised disclosures under Solvency II could be transferred to the IDD. In that case, the following personalised elements from Solvency II could be transferred to IDD for a short personalised document:

- The term of the contract (art. 185.3.b) Solvency II Directive)
- Information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate (art. 185.3.g) Solvency II Directive)
- An indication of surrender and paid-up values and the extent to which they are guaranteed (art. 185.3.f) Solvency II Directive)

40. **In order to ensure a more robust solution to the existing duplications of disclosure requirements, Solvency II pre-contractual disclosures could be completely disappplied for IBIPs.** In other words, it could be considered to limit the scope of Solvency II pre-contractual disclosures under Article 185 to “pure protection” life insurance products<sup>18</sup> as the scope of the Solvency II disclosures includes also pure protection life insurance products and since they are not IBIPs, consumers of such products do not receive other standardised EU level disclosures. Hence, for these products, the generalised information required under Solvency II provisions could be kept and possibly moved into the IDD. However, it is worth noting that Solvency II disclosures have been implemented in some Member States with more specific provisions with different levels of granularity.

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<sup>18</sup> This refers to “life insurance contracts where the benefits under the contract are payable only on death or in respect of incapacity due to injury, sickness or infirmity” and are exempted from the scope of an “insurance-based investment product” under Article 2(2)(b) of the PRIIPs Regulation and Article 2(1)(17(b) of the IDD

41. In addition, there are also a number of duplications with the IDD and the DMFSD, as well as the E-Commerce Directive for those IBIPs that are sold online. **The disapplication of DMFSD provisions for IBIPs sold online could bring some important benefits as both the duplicative IDD disclosures and the PRIIPs/Solvency II disclosures should be delivered when a product is sold online**<sup>19</sup>, hence the DMFSD duplicative provisions may not bring significant added value in an online environment. Consequently, the only sales context where the DMFSD provisions could be still relevant is for IBIPs sold over the phone. However, it would bring particular benefits to have all disclosures in one framework and disapply the DMFSD for IBIPs.

**b) Potential Gaps in current regulatory disclosures applicable to the sale of IBIPs, including reflections on areas where investors may not receive adequate pre-contractual information**

42. Most regulatory disclosures under EU legislation are focused on the pre-contractual stage. There are more limited disclosures provided periodically and the current regulatory framework excludes some types of information from being provided to consumers - for example, on past performance of IBIPs. The Solvency II Directive requires the annual disclosure of information on the state of bonuses<sup>20</sup> and the IDD provides for adequate reports on the advised or non-advised service to be provided on a durable medium in the form of periodic communications to customers<sup>21</sup>.
43. In addition, the PRIIPs KID Regulation provides that the PRIIP manufacturer should “review the information contained in the key information document regularly and revise the document where the review indicates that changes need to be made” and “the revised version should be made available promptly”<sup>22</sup>. This provides, therefore, an option for the customer to access a revised KID on the product manufacturer’s website, albeit the information is not personalised to the customer.
44. At national level, Member States might have gone further by adding more periodic disclosure requirements, recognising that the periodic disclosures under Solvency II are over 30 years old and may not be fit for purpose any more. Despite these efforts at national level, setting up a standard periodic disclosure in EU legislation would help to fill an existing gap and would help to improve the comparability of IBIPs and ensure an optimal standard of periodic disclosures across Europe.

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<sup>19</sup> Article 4(1) of the DMCFSD provides that “Where there are provisions in the Community legislation governing financial services which contain prior information requirements additional to those listed in Article 3(1), these requirements shall continue to apply”.

<sup>20</sup> Article 185(5)(d) [N.B. There is a lack of clarity over whether this wording refers to “returns” and whether it applies to unit-linked products or only profit participation products].

<sup>21</sup> Article 30(5), IDD provides that these periodic communications should “take into account the type and the complexity of insurance-based investment products involved and the nature of the service provided to the customer and shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the customer”.

<sup>22</sup> Article 10(1), PRIIPs Regulation. The conditions for reviewing and revising the PRIIPs KID have been further specified in a delegated regulation.



45. **EIOPA proposes to require the disclosure of an “annual statement” similar to the Pension Benefit Statement for IORPs and PEPPs. This could include information, to be elaborated further at Level 2, on:**
- **Paid premiums<sup>23</sup>,**
  - **Associated costs and charges paid<sup>24</sup>,**
  - **Past performance,**
  - **Current value of the savings,**
  - **Adjusted individualised projections<sup>25</sup> (in particular for long-term IBIPs),**
  - **Information on what happens if the policyholder dies (or another insured event occurs) and what happens if the policyholder terminates the contract at that point in time; and**
  - **In the case of unit-linked protection policies, for which the policy terms and conditions allow for periodic premium reviews, the projected premiums required to maintain existing protection benefits until the ages of 55, 65, 75 and 85.**
46. This could be done most effectively by creating a new periodic disclosure requirement in the IDD and disapplying Solvency II periodic disclosures.
47. In fact, pre-contractually in the PRIIPs KID, the consumer receives information which includes projections of the value of the investment at the recommended holding period. However, during the lifetime of the product, these projections might no longer be valid, as the volatility and returns of the investments made by the product might have differed from the data used in the projections. Disclosure of projections of the expected outcome at the recommended holding period is, in particular, important for long-term IBIPs, because it can be seen as most essential information for savers. In fact it is difficult for consumers to understand how the past volatility of a product’s return translate into the future and final investment value, while that projection is vital information which might nudge the consumer to take action when needed to ensure an appropriate level of future savings – for example to switch products, make other investments or reduce spending.

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<sup>23</sup> It is important to mention in this context that one NCA has identified in its supervisory work that, in the case of some whole of life policies, which are reviewed only every 5 years, there have been very sizeable premium increases during this period and the NCA has therefore been considering making a change to its national legislation to require more regular post contractual information issued to consumers.

<sup>24</sup> For example, in line with the requirement in Article 5 of Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, to provide to the customer annually and free of charge, a “Statement of fees”

<sup>25</sup> This is linked to the nature of the information provided on potential future performance in the PRIIPs KID that is currently based on the requirement to include “appropriate performance scenarios”. If scenarios or projections are included in the KID, personalised projections (e.g. for multi-option products, reflecting the investment options chosen) are relevant as the performance scenarios in the KID are not individualized and the projection might change significantly over time, depending for example on the past performance of the product. Such adjusted projections also allow the performance so far to be taken into account.

48. Hence, it could make sense to disclose to the consumer an adjusted projection of the investment, based on the current value of the investment. If the return has been lower than it had been assumed in the projections, the projection could be corrected using as data the current real value of the “savings pot” and the past performance of the investment in the calculation.
49. Consequently, the issues to address are the wording on past performance to be used and where this information should be disclosed (the periodic information could be disapplied from Solvency II for IBIPs and disclosed in a new document), as well as the need to create a more complete periodic disclosure for consumers by disapplying the Solvency II periodic disclosures (Article 185(5), Solvency II) for IBIPs and creating instead a new “annual statement”.

#### **1.1.2. Reflection on how the current rules work from a retail investor perspective**

50. Taking into account one of the main objectives of the Commission’s Retail Investment Strategy (namely, transparent, comparable and understandable product information), the analysis in this section also takes into account the different investor protection-related legislation that can apply to IBIPs, including those that are not specific to the insurance sector.

##### **Introduction**

51. Consumer disclosures aim to promote informed and effective decision-making by providing consumers with information that is easy to read, understandable and comparable. They are intended to engage consumers, to encourage them to inform themselves about relevant product features. This is with the broader aim of reducing information asymmetries between consumers and financial service providers which should, in turn, promote more competitive and efficient markets, i.e. on the basis of more informed consumers. In addition, in the case of IBIPs, they can help investors to participate more effectively in capital markets and manage their wealth/savings for retirement.
52. At the same time, insights from behavioural research have highlighted how challenging it is to use consumer disclosure as a regulatory tool to protect consumers and to promote sensible decision-making, given that consumers’ decisions are not determined simply by reasoned deliberation, but are influenced by biases and other factors, such as inertia. There is also, ultimately, a limit to the amount of choices that consumers can make. Also, they sometimes rely on heuristics to make complex choices, which entails the risk of suboptimal decision-making. Research suggests that consumers often do not read pre-contractual disclosure documents and when they do, do not

understand them or make decisions based on other factors, such as recommendations from friends or online influencers<sup>26</sup>.

### **Analysis of the current situation**

53. Existing regulation has led to specific areas of improvements, but EIOPA’s view is that overall current disclosures are not meeting their intended aims. Although some of the disclosures referred to below are out of the scope of this call for advice, experiences with these existing EU disclosure documents is considered indicative of some of the broader challenges regarding regulatory disclosures.
54. To start with some of the positive developments, the IPID for non-life insurance products has been widely complimented in terms of bringing more digestible information, and using visual aids such as icons. The PRIIPs KID has brought some more transparency, in particular on cost metrics, and ensured better information flows between different market participants. The IORP Pension Benefit Statement model provides clear information to members on their pension pot to help them make more informed decisions about their retirement savings.
55. Despite these improvements, consumer disclosures remain too complex and are not being appropriately used by providers, which together means they are usually not read by consumers. In addition, there is also evidence that certain types of disclosure can “backfire” and actually lead to worse outcomes for consumers.<sup>27</sup>
56. One way of capturing the current problems is how market and supervisory transparency objectives are all too often being mixed with consumer transparency objectives, in a way that leads to a single disclosure document being designed for very different target audiences. This is the case for the PRIIPs KID and has also been illustrated most recently with the Sustainable Finance Disclosure Regulation (SFDR) requiring the same product disclosures for very different target audiences with regards to the UCITS prospectuses and the PEPP KID. This has resulted (or is likely to result for the SFDR) in consumer disclosures that are too long and detailed - even, in the case of the PRIIPs KID, when the starting point was precisely to avoid this outcome.
57. A clear focus on findings from behavioural research is lacking in the drafting of EU legislation and consumer testing comes too late in the process. Once a long list of disclosure requirements – themselves mixing consumer and market transparency outcomes - are already set down in Level 1

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<sup>26</sup> See, for example, AFM Report “ Principles for the use of consumer behaviour insights,” 30 March 2021, <https://www.afm.nl/nl-nieuws/2021/mrt/principes-consumentengedraginzichten#:~:text=De%20AFM%20publiceert%20gelijktijdig%20met,moment%20het%20meest%20relevant%20vndt>

<sup>27</sup> “Disclosure: Why it shouldn’t be the default. A joint report from the Australian Securities and Investments Commission (ASIC) and the Dutch Authority for the Financial Markets (AFM)”, October 2019, p. 42. See also, Cass R. Sunstein “Too Much Information: Understanding What You Don’t Want to Know”, The MIT Press 2020, p 83-84.

legislation, it is then very difficult to provide genuinely consumer-friendly solutions within this framework, even when using consumer testing.

58. The scope and aims of disclosures have often not been appropriately calibrated, with standardisation and comparability coming at the price of ensuring that consumers receive meaningful information.
59. Crucially, digitalisation trends are not adequately captured. Although the current regulation is supposed to be technology-neutral, it was mainly designed without considering ‘digital’ distribution, and certainly before the ‘app’ revolution.
60. In terms of the design of disclosures by companies, despite existing obligations for disclosures to be fair, clear and not misleading, the use of jargon or unnecessarily<sup>28</sup> complex terminology is still prevalent and information is not necessarily presented in clear or engaging way to consumers.
61. Lastly, information is not being effectively communicated to consumers and information is often provided in a tick-the-box approach by firms to mitigate liability. Disclosures are also often being provided too late in the sales process to enable consumers to sufficiently compare products. They are also sometimes difficult to find online.

#### **Analysis and considerations regarding how to improve disclosures**

62. While some of the examples and recommendations in this section concern disclosures for which a template is prescribed in EU legislation, these examples and recommendations are also considered to be applicable in relation to the other types of information that need to be disclosed regarding IBIPs, separate from the PRIIPs KID (e.g. disclosures under IDD and currently Solvency II). For this other information, the structure and presentation of the information is currently determined by the manufacturer or distributor. In general, EIOPA would not recommend the introduction of new prescriptive templates, but additional requirements can be relevant setting out the elements to be taken into account by, and expectations for, manufacturer and distributors regarding these disclosures.
63. In terms of potential changes to the current approach, **EIOPA is of the view that consumer disclosures need to be presented in a radically simpler and more user-friendly format to work better**, without however depriving the consumer of all useful information, especially relating to the main life insurance cover and all applicable supplementary covers. A more user-friendly format could entail making sure the most important information stands out, allowing the use of layering, the use of icons, an easy-to read presentation and thinking if and what type of very short-form

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<sup>28</sup> In the sense of what is beyond that which might be formally required by national legislation.

summaries, such as dashboards, labels or QR codes, can assist consumers. Where relevant, default options should be as fitting as possible for clients' needs. Layering has particular benefits:

- It allows disclosure to cater to different types of consumers with heterogeneous information preferences;
- It can help, in particular, to focus the attention of consumers on the most important information, allowing them to be informed about additional information at a second level.
- It can also help to explain technical terms (e.g. use of glossaries) or facilitate engagement by the consumer with interactive tools (e.g. QR codes).

64. Comprehensive product information and disclosures should be available upon request.

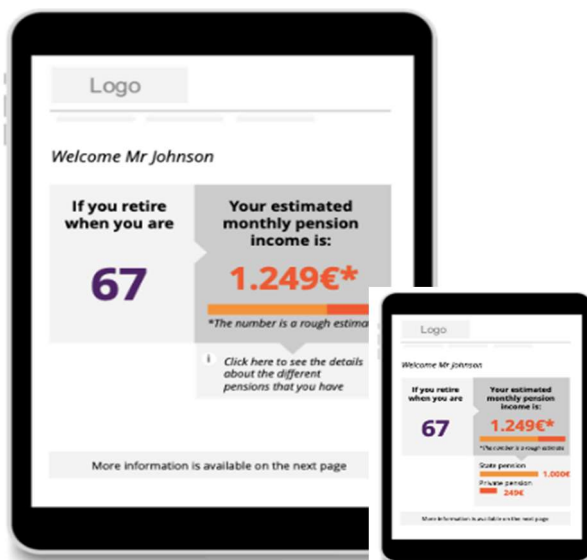
65. EIOPA looked at possible examples of approaches which have led to good results in consumer testing and have been well received by external stakeholders in the area of layering in an on-line disclosure. In this respect, the landing page designed and consumer tested by EIOPA within its technical advice<sup>29</sup> to the European Commission on a Pension Tracking System<sup>30</sup> can provide a useful visual illustration (see below). EIOPA recommended to the Commission to include in the landing page only the most critical information that would be appropriate for a consumer to know in a Layer 1 in a user-friendly format.

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<sup>29</sup> [https://www.eiopa.europa.eu/document-library/advice/technical-advice-development-of-pension-tracking-systems\\_en](https://www.eiopa.europa.eu/document-library/advice/technical-advice-development-of-pension-tracking-systems_en)

<sup>30</sup> Pension Tracking Systems are on-line tools that provide citizens with an overview of their future retirement income, based on their entitlements from all pension sources to which they contribute.

Figure 1 - The Landing Page of a Pension Tracking System



66. The most essential information in the landing page consists of two elements - the information on the retirement age and the estimated income at retirement, which is understood by all users, regardless of their financial literacy. A second layer should include information on projections, total savings and saving per provider, costs, ESG disclosures etc.
67. In a paper or PDF document, an approach which has led to good results in consumer testing and has been well received by external stakeholders, is considered to be the PEPP KID, for which the layout was consumer tested. The document includes, at the beginning, a “dashboard” which highlights or summarises, at the top, the essential information presented in the document.

Figure 2 - Layer 1 "dashboard" in the PEPP KID



68. In the context of presenting simpler disclosures as well as in response to the Commission’s request, EIOPA has analysed “what might be considered **the vital information that a retail investor should receive**”. In that respect, EIOPA understands the notion of “vital information” being a different concept to the “key information” which might be included in a Key Information Document<sup>31</sup>. The approach taken is that the most vital information is the information that it is most critical for all consumers to read and pay most attention to. Hence, when applying a layering approach to the disclosures, the most vital information would be the information that should be included in Layer 1. This layer includes the information that a consumer “must know”. In addition, these elements should be presented in a visually engaging way. The remaining information should be disclosed in further layers - Layer 2 with information that the consumer “should know” and Layer 3 with information that is “nice to know”. The exclusion of specific information from the list of most vital information does not imply that such information should not be disclosed at all to the consumer.

69. EIOPA believes that in order to define the list of “most vital” information, a consumer testing exercise should be carried out. The most vital information might not be standardised among all types of IBIPs. For example, information on projections is considered vital for products with a long

<sup>31</sup> Recital 15 of the PRIIPs KID Regulation states: “Retail investors should be provided with the information necessary for them to make an informed investment decision and compare different PRIIPs, but unless the information is short and concise there is a risk that they will not use it. The key information document should therefore only contain key information, in particular as regards the nature and features of the product, including whether it is possible to lose capital, the costs and risk profile of the product, as well as relevant performance information, and certain other specific information which may be necessary for understanding the features of individual types of product”.

recommended holding period, while it can be less critical for products with a shorter recommended holding period e.g. 5 years, and/or products which carry less risk for the policyholder.

70. With the caveat, EIOPA believes that in general the most vital information for an IBIP consists of the following different elements:

Product information

71. EIOPA believes that the most vital pre-contractual product information for IBIPs is composed of the following elements:

- Name of the product, the identity and contact details of the PRIIP manufacturer
- Main features and objectives of the product
- Insurance benefits
- Summary risk indicator and, where applicable, information on guarantee
- The term of the IBIP
- Total costs

72. For products with a sustainable investment, the most vital information should also include information on the sustainable objective of the product or the Ecolabel, when applicable.

73. The following elements have been identified as information for which it is important that the information is readily available and in a summary form, but it is not necessary to be in the first layer, and which would therefore be appropriate to include in Layer 2 and 3 of the pre-contractual disclosures:

- further information on the features of the product, including the means for achieving its objectives, in particular whether the objectives are achieved by means of direct or indirect exposure to the underlying investment assets, including a description of the underlying instruments or reference values, including a specification of the markets the PRIIP invests in, including, where applicable, specific environmental or social objectives targeted by the product, as well as how the return is determined
  - a description of the type of retail investor to whom the PRIIP is intended to be marketed, in particular in terms of the ability to bear investment loss and the investment horizon;
  - narrative explanation of that risk indicator and the possible maximum loss of invested capital,
  - Information on potential performance / return (Projections / performance scenarios) information on cooling off period or cancellation period for the PRIIP;
  - information on recommended and required minimum holding period and conditions to cash in before recommended holding period
  - information regarding the competent authority of the PRIIP manufacturer and the date of the document,
  - what happens if the manufacturer is not able to pay out,



- further information on costs (e.g. breakdown between different cost elements) and appropriate guidance on, and warnings of, the risks associated with the IBIP or in respect of particular investment strategies proposed,
  - information on complaints-handling procedures
  - information on applicable taxation
  - in case of products that promote environmental or social characteristics or have a sustainable investment objective, further information on how the characteristics or objective will were met.
74. The most vital periodic information to be disclosed in a Layer 1 of an “annual statement” to consumers having purchased an IBIP are projections/performance scenarios, information on past performance and the current value of the savings.
75. The following elements can be disclosed in a Layer 2 or 3 of an annual statement: paid premiums, associated costs and charges paid, information on what happens if the consumer dies (or other insured events occur) and what happens if the consumer terminates the contract at that point in time, and in case of products that promote environmental or social characteristics or have a sustainable investment objective, further information on how the characteristics or objective were met.

#### Intermediary information

76. EIOPA identifies the following elements as representing the “most vital” information that should be communicated<sup>32</sup> by the intermediary to the customer prior to the conclusion of the contract:
- the identity and address of the intermediary and whether they are a registered insurance intermediary;
  - information on whether the intermediary is representing the customer or is acting for and on behalf of the insurance undertaking;
  - Information on whether the intermediary has a holding in a given insurance undertaking or whether an insurance undertaking has a holding in in the insurance intermediary; and
  - the nature, and (subject to the outcome of the Commission’s legislative proposals) the amount, of the remuneration received in relation to the contract e.g. amount of the commission/fee received from the product manufacturer<sup>33</sup>.
77. **Any disclosure documents should be designed, starting from behavioural principles:** Consumer testing is critical in this respect and from a regulatory perspective this needs to be done also as part of the process of drafting the Level 1 rules (as well as delegated acts) so that the choices at that level also reflect behavioural insights. This might also involve requirements relating to companies embedding these principles into their processes for designing disclosures. Firms should keep up to

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<sup>32</sup> Subject, where appropriate, to the information conditions set down in Article 23, IDD.

<sup>33</sup> Information on product costs & charges would be provided via the product manufacturer’s product disclosures, which the intermediary might pass onto the customer

date with consumer research more generally and use these insights, as well as from their own consumer testing, to develop disclosure documents. To ensure the effectiveness of disclosures, it is important that firms set clear and measurable objectives for disclosures, so that it is possible to test whether they have actually been realised and adjustments can be made if needed.

78. There should be a more explicit link between the disclosure approach and the target market and product type (including complexity level). Manufacturers should be required to take into account the characteristics of the target market when preparing disclosures, the terminology or language used should reflect the knowledge and experience of the intended retail investor.
79. In terms of achieving disclosures that are clearer and more useful for consumers, it has been argued that, as an alternative to establishing rules regarding the structure of disclosures, companies should be required to carry out checks or reviews of their own disclosures (so-called “confusion audits”) to assess the level of confusion caused by their disclosures<sup>34</sup>. This could entail firms demonstrating through periodic independent third-party expert testing of representative samples of the firm’s actual customers that a good proportion of its customers know, at the time the customers can make use of this knowledge, the key pertinent costs, benefits, and risks of the products and services the firm has sold them. However, the costs and benefits of such an approach for firms would need to be carefully considered, as well as the role of supervisors in assessing the involvement of third party auditors.
80. It is relevant to consider how to facilitate a more streamlined or integrated delivery of mandatory information, i.e. to try to avoid that regulatory disclosures are simply an additional document provided only at the end of the process and outside of the “consumer journey”. This could involve both further specifying the obligations regarding the provision of information in good time, as well as by addressing potential obstacles in the current regulatory approach or design that might discourage companies from leveraging the disclosures as a way to communicate with their consumers, or presenting the information in a prominent way (e.g. on their website).
81. It is also important to consider the rules regarding various forms of marketing and advertisements/advertising given that these communications can be crucial in determining consumer behaviour and influencing investment decisions. Retail investors who are subject to misleading advertisements and marketing material are more likely to be mis-sold an unsuitable/inappropriate financial product and service, even where correct information is provided through regulatory disclosures.

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<sup>34</sup> Is time up for mandated disclosure?, Lauren Willis, Professor of Law at Loyola Law School: <https://www.fca.org.uk/insight/can-performance-based-regulation-succeed-where-mandated-disclosure-has-failed>. “...We should use “customer confusion caps” rather than mandated disclosures and allow firms to meet those caps in whatever way they see fit.”.

82. The IDD already establishes important principles regarding marketing communications<sup>35</sup>, including that they should not be misleading and should be clearly identifiable as such. However, EIOPA considers that some further requirements on this topics could be relevant and further supplemented in Level 2 measures or Level 3 guidance on specific examples of marketing not meeting the necessary standards. This could address, *inter alia*:
- Types of cases where marketing communications would not meet the standard of fair, clear and not misleading, such as the omission of material information;
  - The internal procedures necessary to ensure that internal control functions and senior management of product manufacturers are sufficiently engaged in the process of approval and ensuring compliance of marketing communications with the regulatory requirements.
83. EIOPA would like to receive more information from external stakeholders on whether they currently see specific issues with misleading advertisements and marketing material in relation to the sale of IBIPs.

**1.1.3. Assessment of how regulatory disclosures and communications can work best for consumers in a digital, and in particular a smartphone age**

84. New technologies are transforming financial services products and services offers and how information is provided to consumers. Therefore, making disclosures more fit for purpose in digital context is a fundamental part of improving disclosures in general. If done correctly, digital or online information offers many opportunities for presenting information more attractively and simply than in paper form. The advantages are for example the flexible structure and application of interactive elements, such as menu features in an app, infographics, videos, contents sidebar and images. Visual information, such as infographics and images, can clarify written text, make the layout of a document more clearly visible and provide insight into complex terms and processes. One study of visualisation of key information<sup>36</sup> shows that investment funds are obliged to publish shows that infographics can help potentially vulnerable investors to take better investment decisions, while not causing any harm for more experienced investors. It is important to avoid ambiguity, complexity or an emphasis on the wrong elements when including visual information.
85. In assessing how regulatory disclosures can work best for consumers in a digital age, EIOPA considers it crucial to take into account behavioural research so as to promote consumer comprehension and engagement with insurance products. By way of examples:

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<sup>35</sup> It is worth noting that, although the current regulatory framework, addresses “marketing communications”, there are new digital distribution models, manufacturers and intermediaries, which increasingly rely on new forms of marketing, customer targeting and algorithms that are not covered by the term “marketing communications”.

<sup>36</sup> Ruben Cox, Peter de Goeij, “Infographics and financial decisions,” [P20200624 Netspar-Design-Paper-148-WEB.pdf](#)

- In line with the approach taken in the PEPP Level 2 legislation, ensuring the location of pre-contractual information in an area of the website or a mobile application can be easily found and accessed and it is provided in a stage of the purchase process where the prospective or current customer is allowed enough time to consider the document before being bound by a contract or an offer.
  - For mobile phones, the importance to avoid long columns and consider how to manage the possibility of numerous different layers (e.g. summaries of the steps reached). Here it is especially important the most relevant information is featured most prominently.
86. There is also a link to the digital aspects, such as taking advantage of the potential benefits of open insurance<sup>37</sup>, which could facilitate growth of more practical tools like comparison websites. In addition, disclosures can also help to overcome the challenges related to lack of clarity on rights and obligations of the respective parties in the event of claims and complaints in more fragmented value chains.
87. In order to ensure an appropriate consumer protection when disclosures are accessed on-line, insurance undertakings and intermediaries should retain a copy of all versions of the digital disclosures provided to customers and use technology, where possible, to maintain records of when each version was available in order to allow clients and potential clients to be able to prove which version of the disclosure they relied on. Instructions should be provided to consumers on how to access the disclosures in a clear and easy to understand manner.
88. In line with the three ESAs' advice to the Commission on digital finance<sup>38</sup>, EIOPA sees benefits from applying the following guiding principles in presenting, formatting and providing digital disclosures for IBIPs (bearing in mind at the same time, where relevant, the product specificities of IBIPs):

*Presentation and format*

- The use of short and direct sentences, key words, boldface, bullet points, comparative tables or other such features so as to highlight relevant information and improve clarity and also to make a distinction from information which constitutes marketing material.
- The provision of information in clear and understandable language, and technical jargon should be avoided, whenever possible. Where such use cannot be avoided, a glossary for reference should be available in a visible place (e.g. through mouse roll-over or pop-up).

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<sup>37</sup> In EIOPA's Discussion Paper on "OPEN INSURANCE: ACCESSING AND SHARING INSURANCE-RELATED DATA", open insurance is defined in a broad sense, covering accessing and sharing insurance-related personal and non-personal data usually via APIs

<sup>38</sup> Final advice due for publication at the beginning of February 2022

- Where possible, the use of at least the official language(s) of the country where the firm is marketing the service, unless the consumer agrees to use another language.
- Drawing attention to relevant information and display disclosures prominently on the app, website etc. giving also further consideration to the format imposed by legislation.
- Presentation of information in a readable font size, which can easily adapt to work on any kind of device. Ideally, this would also enable the option for consumers to increase the default font size. In addition, most relevant information for consumers should not be displayed in a smaller font size than the rest of the disclosure, in particular charges and withdrawal conditions, if applicable.
- Design of disclosure material such that they are noticeable, paying particular careful attention to the size, colour, icons or graphics used to disclose relevant information, as they may affect its prominence in relation to other content displayed in the screen (for instance, information in a colour that blends in with the background is likely to be missed). Where colours are used in the design of mandatory disclosures, such as standardized pre-contractual information, they should not diminish the comprehensibility of the information provided if these are printed or photocopied in black and white. If audio or video is used, speed of speaking and volume of sound shall be adjusted to make the information noticeable and understandable.

#### *Provision of information*

- The need to take into account, in relation to information to be disclosed to the consumer through standardized pre-contractual information documents on a durable medium, the practicality of the relevant standardized form, and whether it is downloadable in its entirety as a stand-alone document<sup>39</sup>.
- Ensuring where the length of the information is such that cannot be shown within the display area in its entirety, leading to the implementation of a scrolling mechanism<sup>40</sup> to view different

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<sup>39</sup> More details are provided in the Joint ESAs Advice on digital finance due to be published at the beginning of February 2022: “For example, when access to relevant information is provided through a hyperlink, providers should be required to ensure that hyperlinks are:

- r. not used in a way that misleads consumers away from the relevant information, for example, by fragmenting the information provided into separate pieces in different locations;
- s. noticeable and presented consistently, for example regarding style, prominence, positioning, etc., to ensure that consumers can navigate easily through the additional information available;
- t. labelled appropriately to convey the importance, nature, and relevance of the information they refer the consumer to. For example, when a hyperlink leads to a mandatory pre-contractual information document, the name of the document should be reflected in (name of) the hyperlink. This should prevent hyperlinks from having different names than the documents they refer to;
- u. referring consumers directly to the relevant information on the click-through page; and
- v. periodically tested by the providers for proper functioning, keeping in mind that a medium can be qualified as a “durable medium” if the transmitted information are not submitted to an “any unilateral modification of its content”

<sup>40</sup> With regard to scrolling through information, providers should use different techniques to encourage consumers to scroll including, but not limited to,

- using text or visual cues;

parts of the document, that consumers cannot conclude the contract before scrolling down the entire information to the very end.

**Proposed options as to how existing rules might be adapted, such as allowing layered information**

89. New business models, increased fragmentation and the use of platforms for insurance distribution could require new approaches to disclosures. EIOPA’s view is that consumer disclosures should be simpler, visual and accessible by digital means as well as taking into account behavioural research to promote consumer comprehension and engagement with insurance products. This would involve, for example, a careful consideration of different policy instruments that suit the objective. If disclosure is chosen, behavioural insights should be used to prioritise specific techniques to reduce information asymmetry for consumers such as “dashboards” and information layering, which is already explicitly recognised, for example, in the PEPP Regulation.
90. In terms of digitalisation, there is a need to go further than layering in leveraging technology to the full. Any regulatory solutions should not stifle freedom to innovate and hamstring the ability to keep pace with technological developments.
91. Digitalisation opens the possibility for new opportunities offering tools for more consumer-centricity, more tailored and personalised products and providing more engaging forms of media and interactive tools to engage with consumers. This could make the information more appealing, adaptable to personal needs, and easier to understand for consumers. Additionally, this offers the advantage of having more timely, convenient and reliable interaction in a cost efficient fashion. Disclosure requirements should allow for a digitally engaging presentation of information.
92. At the same time, future regulatory and supervisory tools will need to take into account the challenges arising from digitalisation and much quicker decisions. For example, research shows that the level of comprehension on a computer screen is lower than on paper<sup>41</sup>. It can also be easier to take advantage of consumer biases online.
93. One way of achieving this is more targeted standardisation. While it is clear that certain underlying metrics, e.g. on costs and performance, must be calculated on comparable bases, this needs to be

- 
- adjusting navigation for scrolling, for example by keeping abreast of empirical research about where consumers do and do not look on a screen while at the same time recognizing and adjusting to any technological limitations on the consumer's device; and
  - using jump-to-section options to enhance long-scrolling.

<sup>41</sup> [“Effects of VDT and paper presentation on consumption and production of information: Psychological and physiological factors” \(2005\), Wästlund, Reinikka, Norlander, Archer: “The results show that performance in the VDT presentation condition where inferior to that of the Paper presentation condition for both consumption and production of information.”](#)  
[“Reading linear texts on paper versus computer screen: Effects on reading comprehension”, December 2013, International Journal of Educational Research 58:61-68: Mangen, Walgermo, Brønneick: “Conclusion: Main findings show that students who read texts in print scored significantly better on the reading comprehension test than students who read the texts digitally. Implications of these findings for policy making and test development are discussed”.](#)

combined with greater flexibility in order to develop communications that are working for each target market.

94. Moreover, there should be a shift from disclosure to wider transparency and effective communication. The current ‘paper by default’ requirements for IDD disclosures (both pre-contractually and periodically) should be addressed to reflect the growing digital transformation, which has been accelerated by the COVID-19 pandemic. It should be noted, however, in the context of this advice which covers IBIPs that a number of the provisions in the IDD already provide for disclosures in a “durable medium”.<sup>42</sup>
95. One option would be for the IDD to invert the current approach to have a “digital by default” approach. Furthermore, as EIOPA and the other ESAs have indicated in their joint advice on digital finance, the definition of ‘durable medium’ should be adapted to fit better technological evolutions: Despite the fact that definitions of ‘durable medium’ exist in several directives, including the IDD<sup>43</sup>, the definitions may not keep up with the speed of innovation in the technology that is available to store information. The definition should be technology-neutral and future-proof.
96. Notwithstanding this, considering that some segments of the population (e.g. often this is the case of elderly people or consumers with low levels of financial literacy) or consumers engaging in traditional face-to-face contact with a distributor may still prefer to receive the information on paper, it would be important that the IDD keeps the option for consumers to ask for information both pre-contractually or periodically, on paper or in a printable format if they wish.
97. Finally, whilst it is important to recognise that some insurance undertakings or insurance intermediaries might have a digital-only business model (e.g. whole distribution only via mobile apps or website without any physical branch or infrastructure), the consumer should nevertheless still be promptly and clearly informed at the outset about his right to ask for information on paper or in a printable format. The possibility for insurance distributors to completely remove paper from their internal processes and interaction with their customers could also be dependent on other aspects such as practical requirements for digital documents and signatures.

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<sup>42</sup> As regards IDD, given that the insurance undertaking or insurance intermediary always has to be able to provide a paper copy on request and free of charge (Article 23(3)), it is essentially a “paper by default” requirement (with some notable exceptions – the disclosure of the nature or sources of a conflict of interest regarding the distribution of an insurance-based investment product must be done in a durable medium and include sufficient detail (Article 28(3)) and the same is the case for periodic reporting and suitability statement for IBIPs (Article 30)). N.B. The paper by default approach applies to disclosures required under Article 29, IDD e.g. as regards disclosure of costs and associated charges.

<sup>43</sup> Article 2(1)(18), IDD

## 1.2. PROPOSED ADVICE TO THE EUROPEAN COMMISSION

- Duplications between Solvency II and PRIIPs KID disclosure requirements could be addressed by disapplying Solvency II pre-contractual disclosures. The disapplication of DMFSD provisions for IBIPs sold online could bring some potential benefits as both the duplicative IDD disclosures and the PRIIPs/Solvency II disclosures should be delivered when a product is sold online.
- To address the current legislative gap at an EU level, on periodic disclosures with regard to IBIPs, EIOPA proposes to require the disclosure of an “annual statement” in the IDD, similar to the Pension Benefit Statement for IORPs and PEPPs which could include information on paid premiums, past performance, current value of the savings, as well as adjusted individualised projections.
- In terms of how the current disclosure rules work from a retail investor perspective, EIOPA sees the need for a shift towards truly consumer-focused disclosures, built upon an enhanced supervisory framework, that fits the digital age:
  - First, the starting point when designing consumer disclosures should be behavioural research and enabling sufficient time and resources for consumer testing, rather than any other supervisory or transparency objectives, and behavioural research should be implemented in the phase of developing Level 1 legislation and not just at Level 2. The Commission should make a clear distinction between the goals of disclosure documents from a market transparency perspective versus how it works for retail investors. For the perspective of retail investors, it is important to note that disclosure documents are just one of multiple tools regulators and supervisors can use to ensure a high level of protection which allows retail investors to make better use of capital markets. Firms should be expected to apply behavioural science insights to make disclosure documents more effective at enabling consumers to make sensible financial decisions. This includes firms setting a clear and measurable objective, understanding consumer behaviour and the way they use disclosure, and continuously measure whether objectives have been met and make adjustments if needed.
  - Secondly, consumer information needs to be radically simpler to achieve the objective of allowing consumers to make sensible decisions. It should be understandable, but crucially shorter (extracting the really key information and featuring this prominently) and visual (e.g. use of icons) in order to be engaging, also to a non-financially literate audience. At a minimum, disclosure documents should be correct and clear, not misleading, recognisable as such, be provided early enough for consumers to make a comparison, and be easy to find and accessible. Disclosure documents should avoid jargon as much as possible and



assume little prior knowledge. Work in this area can build on the layering approach explicitly recognised in the PEPP Regulation and in some national pension communications. EIOPA has identified the most vital information to be included in Layer 1 and the information to be included in subsequent layers.

- Finally, future disclosures need to be designed as a comprehensive solution from the perspective of the consumer, replacing existing documents and not simply being added on top of the existing disclosure documents or other information requirements stemming from a range of legislative contexts. Digital disclosures offer great opportunities for presenting information in a more engaging and simpler manner than in paper form. The advantages are, for example, the flexible structure, which allows layering, and application of interactive elements, such as infographics, videos and images. The use of such tools should aim at promoting good consumer outcomes and not seek to take advantage of behavioural biases.
- In order to ensure an appropriate consumer protection when disclosures are accessed online, in addition to the provision of information on a “durable medium”, insurance undertakings and intermediaries should retain an electronic copy of all versions of the digital disclosures provided to customers and instructions should be provided to consumers on how to access the disclosures in a clear and easy to understand manner.

### 1.3. QUESTIONS FOR THE PUBLIC CONSULTATION

Q1. What do you consider currently to be the most burdensome duplicative requirements between the different legislative frameworks? Do you consider there to be any duplicative disclosures which EIOPA have identified above between different legislative regimes to be not particularly burdensome for insurance undertakings or insurance intermediaries to comply?

Q2. EIOPA can see some specific benefits in disapplying a number of disclosure requirements in the Solvency II Directive and the DMFSD and rationalising any remaining requirements in the IDD. Do you agree with this approach?

Q.3 Notwithstanding the proposed approach set out in Q2, do you consider that there is an element of personalization under the provisions in Solvency II Directive that would justify delivery of personalized information separately and in addition to the generalized information in the PRIIPs KID?

Q4. Do you agree that to address the current gap on periodic disclosures, it makes sense to require the disclosure of an “annual statement” which could include information on paid premiums, past performance, current value of the savings, as well as adjusted projections?

Q5. Do you agree with the proposed list of “most vital” product and intermediary information? If not, what elements do you identify as being “most vital”, that is essential information that is most critical for consumers to read?

Q6. Do you currently see specific issues with misleading advertisements and marketing material in relation to the sale of IBIPs, which would merit specific regulatory treatment and if so, which aspects?

## 2. ASSESSING THE RISKS AND OPPORTUNITIES PRESENTED BY NEW DIGITAL TOOLS AND CHANNELS

### 2.1. BACKGROUND/MANDATE

#### **Extract from the European Commission’s Call for advice**

*An assessment of both risks and opportunities with respect to retail investing, stemming from both the increasing availability of digital tools and the increasing levels of direct investor participation via online platforms.*

*This assessment would, in addition, explore whether and how far value chains should be ‘opened’ up by the sharing of specific investor data amongst insurance and non-insurance firms, and how far new markets for services, such as advice via platforms, might be expected to develop, bearing in mind, on the one hand, the need to protect investor rights, but also to bring down cost and allow for innovation in products and services.*

#### Introduction – Growth of digital tools and channels

98. Consistent with wider digitalisation trends across the EU economy, financial institutions are increasingly relying on innovative technologies to provide financial products in the digital environment through an improved access point alongside with new and improved services to their customers. As part of this trend, digital platforms are increasingly being used to market and distribute financial products and services, sometimes bundling different financial and non-financial services and products from a range of service providers.
99. There are different drivers, which are fostering the rapid uptake of digital platforms in the financial services sector such as consumer behaviour, which is shifting towards an increasing search for convenience. Consumers are increasingly demanding access to financial services and products at all times and from different digital devices through a single access point. This behavioural shift towards frequenting online financial services has been accelerated by the Covid-19 pandemic and is expected to become structural essentially breaking the historic trend of services being provided and accessed locally via physical premises. Additionally, consumers are increasingly seeking personalized products and experiences and, with this, a broader range of tailored financial products and services.
100. Digital platforms or services can help financial institutions in meeting this demand by boosting convenience, allowing consumers to access financial products and services through almost any digital device and without time-restrictions, and better addressing the specific needs and

expectations of consumers. Furthermore it can use layering and more customized information and disclosure features. Another enabling factor has been the growing adoption of relatively new technologies, such as APIs (Application Programming Interfaces) or artificial intelligence, which make physical interactions less relevant and facilitate the development of enhanced front and back-office processes, including through the use of advanced data analytics.

101. Nevertheless, the use of digital platforms for the provision, marketing or distribution of insurance products can also present or exacerbate risks such as:

- The risk of insufficient disclosure to consumers e.g. as regards product/service terms and conditions; the name of the contracting party; the applicable complaint-handling mechanisms and redress schemes;
- A lack of comprehension/information asymmetry for consumers in understanding the business model under which a digital platform operates and there is a lack of clarity about the nature of the services provided by these players, including regarding the pricing structure, the use of customer data<sup>44</sup>. These challenges could be exacerbated when services are provided cross-border.
- Consumers may also face challenges in delineating the functions and responsibilities of different parties within the digital platform ecosystem, such as distributors, and their respective rights and obligations vis-à-vis those parties.
- Risks of detriment arising from the access to and use of customer data:
  - a. inadequate or insufficient awareness among consumers of the value of their data for providers
  - b. ineffective mechanisms to support informed consent to the use of personal data taking into account GDPR requirements;
  - c. risks of mis-use and unlawful data access. The wider sharing of data with different parties raises the risks of a data breach, misuse and fraud, including obtaining unauthorized knowledge about facets of consumers' lives, including sensitive data concerning the customer's health, location, or financial status.

#### Digital tools and channels used to distribute IBIPs

1. Notwithstanding the increasing trend in the growth of digital platforms, based on analysis carried out amongst Member authorities, **EIOPA has thus far seen more limited evidence of the existence of digital distribution channels/platforms for IBIPs in the respective national markets.** (In particular, to date, the growth of online platforms has been much more prevalent in the market for non-life insurance products). However, there are some specific examples in some Member States

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<sup>44</sup> For example, the platform provider or third party leveraging the platform to distribute financial products and services may unilaterally terminate the arrangement with the effect of denying customer access.

where market growth has been identified which are referred to in more detail in Annex IV. These relate to increasing digital sales, different types of robo-advice and other digital solutions and an increasing amount of companies themselves labelled as offering execution-only solutions.

2. Taking into account the need to future-proof legislation, an important element going forward will be the role that “choice environments” play in the financial decision-making of the consumer. Especially in digital and online contexts, the “choice environment” or “choice architecture” can strongly nudge consumers toward certain behaviours or products that may be sub-optimal. It may be necessary to consider requiring firms to design the choice architecture in such a way that they contribute to sensible decision making by consumers and to suitable products being sold to the right target market.
3. A possible way to achieve this would be to allow digital techniques and tools to be used by firms only that place the best interests of the customer at the forefront and avoid potential harm. This would involve requiring firms to have, for example, proper policies and procedures as well as tools for online marketing and distribution in place, and to review these on a regular basis. The requirement should therefore include that targeting, behavioural nudges and gamification techniques can only be used by the firm when they are in the best interests of the customer or potential customer.
4. Another aspect that will be relevant going forward will be the need for firms to have proper internal rules, policies, processes and tools for their online marketing and distribution, and review them on a regular basis. This could ensure that any use by firms of targeting, behavioural techniques and gamification elements is done in a way that ensures fair treatment of financial consumers and aims to avoid potential financial consumer harm.

#### Opening up the insurance value chain

102. Open finance is a development, which is currently facilitating both innovation and increasing fragmentation. The discussion around open finance has been underway for some time, focusing mainly on the banking sector and PSD2 (open banking). Recent EU policy initiatives such as the European Commission Data Strategy and Digital Finance Strategy (DFS) clearly recognise the importance of data-driven innovation and data flows within the European Union internal market. The DFS announced that the Commission will present a legislative proposal for a new open finance framework by mid-2022, building on and in full alignment with broader data access initiatives.

103. EIOPA carried out a public consultation via a Discussion Paper on “Open Insurance: Accessing and sharing insurance-related data”<sup>45</sup>. In that paper, EIOPA indicated that if more information is exchanged between insurance undertakings and consumers, more information is available, including on the demands and needs of consumers, and consequently consumers arguably mainly benefit through new and more transparent products and services, including advice services.
104. There is also potential for open insurance: to enable consumer to better compare offerings and switch providers; to increase sector efficiencies and facilitate supervision through more effective and responsive oversight capabilities. The new opportunities brought up by open architectures and open finance promote both innovation and competition, which can be facilitated for instance by third-party data sharing, use of big data and advanced analytics. Automatic open insurance data processing could also reduce costs, including marketing and administrative costs.
105. Open insurance could, for example, include:
- (i) Insurance Policy Information Services where insurers could be required to provide other insurers/intermediaries or third-party providers seamless access (via standard APIs) to their users’ underwritten insurance policies e.g. information such as insured object, coverages, claims history, data on suitability assessment, know your customer (KYC) data etc.
  - (ii) Better switching services that encourage consumers to compare the market and shop around.
  - (iii) The integration of data, technology and new services could result in insurance products and services more tailored to the demands and needs of consumers.
106. Furthermore, the paper indicated that some cross-sectorial open finance solutions could be developed, either by strategic co-operation between banks and insurers and/or leveraging on PSD2 data, e.g. account information is analysed for suitability assessment when providing life insurance products (e.g. to understand key life events such as buying a new car or house or birth of child, overall financial situation and availability of other insurance and pension products).
107. At the same time, certain risks may exist with further developing “open insurance” business models, such as:
- The wider sharing of data with more parties raises the risks of a data breach, misuse and fraud, including obtaining unauthorized knowledge about facets of consumers’ lives, including sensitive data concerning the customer’s health, location, or financial status. This may be particularly relevant in the case of the sale of life insurance. Data quality and how it would be measured and enforced might be another possible challenge in this regard.

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<sup>45</sup> In its Discussion Paper, EIOPA states that “open insurance could be defined as accessing and sharing consumers’ insurance services-related data (e.g. their insurance policies data such as insured object, coverages, claims history, and Internet of Things data etc.) between insurers, intermediaries or third parties to build applications and services” and that

- More openness in relation to the data gathered, processed and exchanged for insurance purposes could also increase ICT/cyber risks and API security risk, including opening leeway for malpractices, such as phishing or malware/ransomware (this is also linked to data breaches).
- Financial exclusion could be seen as another major concern. The more information insurance undertakings have and share about the individual, the higher the probability that some parameters or combination of parameters can be used as a disqualifier or proxy for a traditional parameter. Consequently it might be difficult to protect clients who do not get insurance or have to pay unreasonably high insurance premiums due to their ‘unfit’ risk profile
- More granular consumer data combined with AI may also increase the ability of undertakings to identify opportunities to charge differential amounts to groups of consumers that are similar in terms of risk and cost to serve.
- Finally, the costs of developing open insurance might be shifted on to end-consumers which consequently has effect on product pricing and/or quality – impacting value for money for consumers. In addition, open insurance can be expected to correlate with higher intermediation in the value chain (more actors), which can also correlate with greater complexity – depending on market efficiency and business model evolution, in the absence of appropriate regulatory and supervisory measures, this could drive costs up.

## 2.2. PROPOSED ADVICE TO THE EUROPEAN COMMISSION

- Digital tools and platforms have the potential to enhance the customer journey by better addressing the specific needs and expectations of consumers and providing e easy access to financial products and services through most digital devices and without time-restrictions. Such digital tools can provide benefits such as use of layering and more customized information and disclosure features. At present, the market for digital tools and platforms selling IBIPs is limited to specific national markets, but EIOPA sees scope for a market for digital platforms selling IBIP to develop further in the future in EU Member States, but only under the appropriate regulatory framework & conditions. There could be potential for online platforms to develop further in distributing IBIPs - for example, as regards multi-option products where there are numerous underlying investment options.
- Nevertheless, it should be considered that certain risks to consumers will need to be borne in mind, should such a market further develop, such as the risks of insufficient consumer disclosures, information asymmetry and misuse of client data. In addition, the nature of IBIPs (long-term individualized products; biometric risk coverage; factoring in the consumer’s needs) could make it more difficult to compare products which cannot be easily standardised. In order to make the legal framework future-proof, the Commission should address the impact the “choice architecture” or “choice environment” has on consumer decision making and ensure that firms use behavioural finance insights in the best interests of the customer”.
- The Commission will need to be aware, in the context of further legislating in this area of digital tools and channels, of national specificities in this context; for example:
  - Whether a Member State has chosen the option of mandatory advice for all IBIPs provided in the IDD; and
  - The complexity of specific IBIPs distributed in some national markets.
- Without prejudice to GDPR requirements, it is recommended to the Commission to further explore costs and benefits of providing all public disclosure information (including information included in standardised key information documents) in a dedicated space and in machine-readable form so that third parties such as FinTech companies can develop tools for better comparison of financial services and products, and innovation in the area of robo-advice.



## 2.3. QUESTIONS FOR THE PUBLIC CONSULTATION

Q7. Do you agree on the current level of development of the market for online platforms distributing IBIPs? If not, please could you provide examples of where you see evidence of online platforms selling IBIPs at present and how you see this impacting the customer journey and if possible, any quantitative data you can provide on this distribution channel.

Q8. Do you see the potential for the growth of open architecture models for the sale of IBIPs in the future and if so, in relation to which types of products?

Q9. Do you share EIOPA's assessment of the types of risks that could arise in the context of the growth of more diverse distribution channels for IBIPs? Are there any risks which you see arising, but which EIOPA has not identified in this paper?

## 3. TACKLING DAMAGING CONFLICTS OF INTEREST IN THE SALES PROCESS

### 3.1. BACKGROUND/MANDATE

**Extract from the European Commission’s Call for advice**

*an analysis of the considerations and ramifications that the Commission should be mindful of as regards the impact of the payment/receipt of inducements on retail distribution under IDD, including the role of product manufacturers in selecting appropriate distribution channels and remuneration models.*

*This analysis should consider the impact of differences that exist between the IDD and MIFID II. In particular, the Commission seeks EIOPA’s analysis as regards the structure of distribution models in different Member States, also taking into account any recent reform experience in the Member States.*

*Without the need for making a recommendation for a specific solution, it should provide advice on the practical and technical implications that the Commission should consider in its assessment of whether to maintain existing rules on inducements or whether to address them through alternative regulatory levers, further restrictions or an outright ban.*

### 3.1.1. Remuneration of insurance distributors and the notion of an “inducement”

108. There are two primary mechanisms<sup>46</sup> by which insurance distributors are remunerated for the activity of “insurance distribution”:
- A fee system under which the customer directly pays for the services provided<sup>47</sup> or a fee could be paid directly by the insurance undertaking to the insurance intermediary<sup>48</sup>, up front irrespective of whether a contract is concluded;
  - A commission system under which the insurance intermediary is paid a percentage of the premium paid by the customer for coverage based upon the insurance intermediary's agreement with the insurance undertaking<sup>49</sup>. The commission system, therefore, typically satisfies a need for services in the future, hence the reason why it is often paid in connection with the sale and ongoing servicing of an IBIP. When advice is provided, the commission remunerates the advisor for the service of conducting the suitability assessment and providing on-going advice (typically known as “trail commission”).
109. It is worth noting that commission-based distribution remains the prevailing practice in most EU Member States<sup>50</sup> and this is an important contextual element to be taken into consideration. Notwithstanding this, nine Member States (CZ, FI, HR, IE, IT, NL, RO, SE and SK) have prohibited or further restricted the offer or acceptance of fees, commissions or non-monetary benefits from third parties in relation to the provision of insurance advice on IBIPs<sup>51</sup>.
110. The term “inducement” is broader than just monetary benefits and also covers non-monetary benefits such as provision of hospitality services, which are paid or received in connection with the distribution of an insurance product, to or by any party except the customer or a person acting on behalf of that customer.
111. Article 2(2) of the Delegated Regulation (EU) 2359/17 (Level 2 of the IDD) provides the definition of “inducement” as *“any fee, commission, or any non-monetary benefit provided by or to such an intermediary or undertaking in connection with the distribution of an insurance-based investment*

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<sup>46</sup> “Remuneration” is broadly defined in Article 2(1)(1), IDD as *“any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given in respect of insurance distribution activities”*. Although commissions and fees are the two primary mechanisms, they are not necessarily binary and some remuneration models can be a combination of both forms.

<sup>47</sup> Article 19(1)(e)(i), IDD. N.B. The notion of “inducement” (see below) excludes fees paid directly by the customer.

<sup>48</sup> Article 19(1)(e) (iii), IDD: “on the basis of any other type of remuneration, including an economic benefit of any kind offered or given in connection with the insurance contract”.

<sup>49</sup> Article 19(1)(e)(ii), IDD

<sup>50</sup> AT, BE, BG, CZ, DE, EE, ES, FI, FR, IE, IT, LT, LV, MT, PL, PT, RO, SE, SI, SK

<sup>51</sup> Article 29(3) of the IDD

*product, to or by any party except the customer involved in the transaction in question or a person acting on behalf of that customer*".

112. The term "inducement" is typically assimilated to the notion of a "third party payment" and this term is also used in Article 29(1), IDD. In that respect, with regard to a fee, an inducement would only capture fees which are not paid by the customer i.e. paid directly by the insurer to the insurance intermediary.
113. The IDD also lays down a basic principle of insurance distributors not "remunerating employees or assessing their performance in a way that conflicts with their duty to act in the best interests of their customers"<sup>52</sup>. Particular emphasis is placed on insurance distributors "not making any arrangement by way of remuneration, sales targets or otherwise that could provide an incentive to itself or its employees to recommend a particular insurance product to a customer when the insurance distributor could offer a different insurance product which would better meet the customer's needs".
114. **N.B. A detailed summary of relevant legal provisions applicable to the acceptance/retention of inducements is contained in Annex III to this Consultation Paper.**

Potential detrimental outcomes to consumers arising from the payment/receipt of inducements

115. It is important to note that specific detrimental outcomes can arise for consumers from the payment/receipt of inducements:
- The payment/receipt of an "inducement" can create a conflict of interest that misaligns the interests of the insurance distributor with their customer. Inducements have the potential to reduce the integrity/quality of the advice offered to the customer - in simple terms, if the only way an insurance distributor can be paid is to sell a particular product because of the level of monetary benefit paid to or received by the distributor, then there is a risk that the distributor will be swayed towards the sale of the product that generates a higher monetary benefit for him ("product bias")<sup>53</sup>.
  - Equally, the payment/receipt of an inducement can impact on the cost-efficiency of an IBIP and whether it generates value for money. Due to their embedded nature and complexity, some types of inducements can make it difficult for consumers to assess and manage the impact of

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<sup>52</sup> Article 17(3), IDD

<sup>53</sup> At the same time, it can be argued that there is a difference in the influencing effect of an inducement depending on whether the inducement is paid as a fee, meaning it is irrespective of whether a contract is concluded, or as an acquisition commission that is only paid in the case of the conclusion of a contract. In the case of a fee, in this context to be understood as a fixed remuneration and without any variables and sales targets paid by the insurance undertaking to an insurance intermediary, the inducement basically has the character of a compensation of an effort by the insurance intermediary and there would not be a 'specific incentive' to sell a specific product. In contrast, in the case of an acquisition commission, the potential for the creation of a conflict of interest is higher as described above.

costs on their investment returns; and may cause consumers to pay costs that may not reflect the level of advice and service they may actually receive; the cost of the advice and service provided may exceed its benefit to the customer.

116. Some Member States have experienced mis-selling with regard to the distribution of IBIPs to which high commissions paid to distributors significantly contributed and have taken significant regulatory measures as a result. Some examples of these recent reform national measures (for example, in NL, IE and SE) are listed in the Annex VI to this Consultation Paper.
117. In addition, as evidenced by EIOPA's annual consumer trends reports and conduct oversight work to date such as its previous thematic review on monetary incentives between asset managers and insurers, conflicts of interest and high levels of inducements are increasingly a driver of poor market conduct and if left unmitigated, have the potential to seriously undermine the workings of the market and result in consumer detriment. EIOPA's own supervisory work in cooperation platforms during the course of 2020/2021 has identified potential mis-selling arising from products which relied on distribution models with high levels of commission paid or received. These products typically offer significantly lower value for money because of a number of features such high costs, poor performance and are directed to the wrong target markets.

Potential benefits arising from a properly designed inducement scheme

118. Conversely, under certain circumstances, if an inducement scheme is properly designed, it may be able to bring some benefits such as:
- Financing and pooling the costs resulting from legal obligations in terms of information and advice given by insurance intermediaries to each customer;
  - Making it possible for there to be a significant minimum amount of product information and advice requirements applicable to any sale of IBIPs;
  - Encouraging consumer participation in financial markets;
  - Improving access and affordability of advice as there is no payment of commission until a contract is concluded (as opposed to the need for a consumer to pay a direct and/or upfront fee or invest a large amount of initial capital (both of which might, in some cases, be substantial), to procure the services of the insurance intermediary, if an inducement ban were in place); and
  - Ensuring adequate supply/choice of products on the market to prevent consumers from becoming under-insured/under-pensioned.

### 3.1.2. **Considerations and ramifications as regards the impact of the payment/receipt of inducements on retail distribution under IDD and analysis of impact of differences between IDD and MiFID II**

#### Analysis of the impact of any differences that exist between the IDD and MiFID II

119. EIOPA has sought to consider the impact of any differences both from a regulatory perspective in terms of analysing semantic differences in the texts, but also in terms of the impact of supervisory experience from NCAs in applying the different provisions such as the quality enhancement test and the “no detrimental impact” test. EIOPA has also consulted ESMA in developing its analysis and taken into consideration ESMA’s technical advice delivered to the Commission on Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II<sup>54</sup>.
120. As a starting point, it is important to recognise that the IDD and MiFID II have different starting points in terms of the level of harmonisation. The IDD is aimed at minimum harmonisation and sets down a number of national options which may be used by Member States<sup>55</sup>. This in itself can lead to the risk of inconsistencies in terms of consumer protection outcomes and lack of supervisory convergence as significantly different national regimes emerge. Conversely, as MiFID II starts from a premise of maximum harmonisation<sup>56</sup>, the scope for national divergences/differences (over and above some flexibility in implementing a Directive (as opposed to a Regulation) into national legislation) are more limited as MiFID II only allow for stricter measures (for example, in relation to inducements) to be imposed in exceptional cases<sup>57</sup>.
121. **Although the IDD has sought to harmonise how insurance is distributed to consumers, the EU insurance distribution market remains fragmented with, as mentioned above, a wide variety of national distribution channels (in particular, categories of insurance intermediaries), registration requirements and reporting frameworks across the EU. This heterogeneity can present challenges in ensuring that any harmonised approaches apply evenly across all national markets and consumers are treated in a consistent manner across different markets.**

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<sup>54</sup> [Final Report - ESMA's Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II -31 March 2020 | ESMA35-43-2126](#)

<sup>55</sup> There are in total 17 different national options contained in the IDD. Nine national options relate to conduct of business obligations which are relevant to the distribution of IBIPs. More details can be found on pages 25-26 of EIOPA’s report on national general good rules: [https://www.eiopa.europa.eu/media/news/eiopa-examines-national-general-good-rules\\_en](https://www.eiopa.europa.eu/media/news/eiopa-examines-national-general-good-rules_en)

<sup>56</sup> Recital 7: “**Since the main objective and subject-matter of this Directive is to harmonise national provisions** concerning the areas referred to, it should be based on Article 53(1) of the Treaty on the Functioning of the European Union (TFEU)”. Recital 70: “More investors have become active in the financial markets and are offered a more complex wide-ranging set of services and instruments and, in view of those developments, it is **necessary to provide for a degree of harmonisation to offer investors a high level of protection across the Union**”.

<sup>57</sup> Article 24(12), MiFID II: “*Member States may, in exceptional cases, impose additional requirements on investment firms in respect of the matters covered by this Article. Such requirements must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State*”.

122. The following are some examples of differences identified by EIOPA purely between the Level 1 texts of IDD and MiFID II as regards the regulatory treatment of inducements. More distinctions may exist at the level of Level 2 legislation<sup>58</sup> or Level 3 measures such as Q&As or Guidelines issued by EIOPA or ESMA. (A more detailed illustration of differences is included in Annex VI to this paper):
- Article 23(1), MiFID II explicitly refers, as an example of a conflict of interest to “*those caused by the receipt of inducements from third parties or by the investment firm’s own remuneration and other incentive structures*” whereas this text is not replicated in Article 28(1), IDD. In practice, while it would be beneficial for the IDD Level 1 text to explicitly refer to inducements as an example of type of conflict of interest that needs to be managed by insurance distributors, the fact that there is no explicit reference in the IDD should not be seen as a barrier to inducements being considered as causing conflicts of interest that are damaging to the best interests of customers.
  - As referred to above, the IDD does not explicitly mandate disclosure of the amount of the inducement paid or received to the customer (only the “nature of the remuneration”) in the same way as equivalent text in Article 24(9), MiFID II<sup>59</sup>. Under MiFID II, the investment firm is required to disclose to the client the amount of the inducement paid or retained (however, receiving and retaining the inducements is banned if it is provided in relation to the provision of independent investment advice and portfolio management).
123. MiFID II, as a general presumption, prohibits all inducements, considering investment firms receiving inducements as ‘*not fulfilling their obligations*’ to act honestly, fairly, and professionally in accordance with the best interests of the client<sup>60</sup>. MiFID II provides an exception to this principal ban on inducements, namely the fact that the payment or benefit has to be “designed to enhance the quality of the relevant service to the client” and “does not impair compliance with the firm’s duty to act honestly, fairly, and professionally in accordance with the best interests of its clients”. In the case of independent investment advice and portfolio management, this exception is not available so there is a ban on receiving and retaining inducements (other than minor non-monetary

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<sup>58</sup> Particularly noteworthy in this respect are Article 11 of Commission Delegated Directive (EU) 2017/593 with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits. This sets out a series of binding cumulative conditions which need to be fulfilled for a fee, commission or non-monetary benefit shall be considered to be designed to enhance the quality of the relevant service to the client.

In addition, ESMA has provided further guidance in Q&A 12.8 on “how the quality enhancement condition should be applied that the inducement is justified by the provision of an additional or higher-level service to the relevant client, proportional to the level of inducements received”: [esma35-43-349\\_mifid\\_ii\\_qas\\_on\\_investor\\_protection\\_topics.pdf \(europa.eu\)](#).

<sup>59</sup> Article 24(9), MiFID II: “*The existence, nature and amount of the payment or benefit referred to in the first subparagraph, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service. Where applicable, the investment firm shall also inform the client on mechanisms for transferring to the client the fee, commission, monetary or non-monetary benefit received in relation to the provision of the investment or ancillary service*”.

<sup>60</sup> Article 24(9), MiFID II

benefits). N.B. This prohibition applies only to firms providing independent investment advice and portfolio management, and only to the recipient firm (rather than the party providing the benefit).

124. The IDD starts from a different premise, namely that insurance intermediaries or insurance undertakings receiving inducements are regarded as 'fulfilling their obligations', provided these inducements do not have a “detrimental impact” on the quality of the service and do not impair compliance with the duty to act honestly, fairly, and professionally in accordance with the best interests of the customer<sup>61</sup>.
125. There are different views over the practical impact of the different wording. In particular, the “quality enhancement” criterion might imply more positive action<sup>62</sup> to be taken by the investment firm to comply with the criterion and the “no detrimental impact” test may appear more comparable with the MiFID II requirement “not to impair compliance with the duty to act in the best interests of the client”. However, some NCAs have indicated similar challenges with assessing in the case of the payment/receipt of a monetary benefit (as opposed to a non-monetary benefit), whether the quality of service to the customer has been enhanced as compared to whether there has been no detrimental impact on the quality of the service provided to the customer. In addition, some NCAs have indicated the fact that there is little evidence to date of material differences in terms of supervisory outcomes between applying the “quality enhancement” criterion and the “no detrimental impact” criterion.
126. It is worth noting that MiFID II has introduced a mandatory notion of “independent investment advice”. As mentioned earlier, under the IDD, the equivalent concept of “independent advice” is contained in a Member State option<sup>63</sup> and a narrower concept of “fair and personal analysis”<sup>64</sup> exists with regard to the sale of all insurance products.

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<sup>61</sup> Article 29(2), IDD

<sup>62</sup> As illustrated in Article 11 of the MiFID II delegated directive and ESMA Q&A 9.12:

[https://www.esma.europa.eu/sites/default/files/library/esma35-43-349\\_mifid\\_ii\\_qas\\_on\\_investor\\_protection\\_topics.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf)

<sup>63</sup> Article 29(3), IDD: “Member States may require that, where an insurance intermediary informs the client that advice is given independently, the intermediary shall assess a sufficiently large number of insurance products available on the market which are sufficiently diversified with regard to their type and product providers to ensure that the client’s objectives can be suitably met and shall not be limited to insurance products issued or provided by entities having close links with the intermediary”.

<sup>64</sup> Article 20(3), IDD: “Where an insurance intermediary informs the customer that it gives its advice on the basis of a fair and personal analysis, it shall give that advice on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make a personal recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer’s needs”.



*Record-keeping requirements*

127. Under the IDD, insurance intermediaries and insurance undertakings are required to keep a record of the situations in which a conflict of interest entailing a risk of damage to the interests of a customer has arisen. Under MiFID II<sup>65</sup>, the investment firms are required to hold evidence that any fees, commissions or non-monetary benefits paid or received by the firm are designed to enhance the quality of the relevant service to the client:
- (a) by keeping an internal list of all fees, commissions and non-monetary benefits received by the investment firm from a third party in relation to the provision of investment or ancillary services; and
  - (b) by recording how the fees, commissions and non-monetary benefits paid or received by the investment firm, or that it intends to use, enhance the quality of the services provided to the relevant clients and the steps taken in order not to impair the firm's duty to act honestly, fairly and professionally in accordance with the best interests of the client.

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<sup>65</sup> Article 11(4), MiFID II Delegated Directive

**3.1.3. Practical and technical implications that the Commission should consider in its assessment of different policy solutions**

128. It is important to take into account, as a starting point, the current market for insurance distribution in the EU. In particular, the fact, as evidenced in previous reports by EIOPA, there is a significant heterogeneity in insurance distribution channels and the types of insurance-based investment products sold. As mentioned already above, the commission-based model remains currently the prevailing practice in most Member States with only nine Member States having exercised the option to prohibit or further restrict the offer or acceptance of fees, commissions or non-monetary benefits from third parties in relation to the provision of insurance advice on IBIPs (Article 29(3)).
129. The current rules in the IDD have brought about important changes in the way that conflicts of interest and inducements are assessed by insurance undertakings and insurance intermediaries such as more transparency pre-contractually around the status of the insurance intermediary and their contract relationships and processes for identifying and managing conflicts of interest. In addition, Commission Delegated Regulation (EU) 2021/1257<sup>66</sup> brings about a further important change as of 2 August 2022 by requiring insurance intermediaries and insurance undertakings distributing insurance-based investment products, when identifying the types of conflicts of interest the existence of which may damage the interests of a customer or potential customer, to include those types of conflicts of interest that stem from the integration of a customer's sustainability preferences.
130. The IDD also introduced new principles such as the requirement for distributors to act honestly, fairly and professionally in the best interests of customers<sup>67</sup> and for the insurance intermediary, to disclose the nature of the remuneration received in relation to the insurance contract and whether, in relation to the insurance contract, they work on the basis of a fee or a commission<sup>68</sup>. In addition, information needs to be disclosed on all costs and related charges of the IBIP, information relating to the distribution of IBIPs, including the cost of advice, where relevant the cost of the IBIP recommended or marketed to the customer and how the customer pay for it, also encompassing any third party payments<sup>69</sup>.
131. Based on this context, EIOPA has set out below a series of different options and assessed the different pros and cons of those options, but it should be emphasised that EIOPA has not been able

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<sup>66</sup> COMMISSION DELEGATED REGULATION (EU) 2021/1257 of 21 April 2021 amending Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 as regards the integration of sustainability factors, risks and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors and into the rules on conduct of business and investment advice for insurance-based investment products

<sup>67</sup> Article 17(1), IDD

<sup>68</sup> Article 19(1)(d) and (e), IDD

<sup>69</sup> Article 29(1)(c), IDD

to carry out a formal impact assessment of each of these options due to lack of time. These options could include, for example, the following:

1. *Refining existing rules in the IDD on inducements*

As mentioned above, the current rules in the IDD have brought about important changes in the way that conflicts of interest and inducements are assessed by insurance undertakings and insurance intermediaries. Some NCAs have noted, however, that the existing criteria in the Level 2 legislation are currently too vague to be effectively supervised. One option would be to seek to further enhance the existing Level 2 criteria to make them more impactful and provide a clearer hook to supervise them (see below for more detail).

Potential benefits: Further refinements at Level 2 may be quicker and easier to implement for NCAs who have the requirements already on their statute books at national level and would not require a wide-ranging reform at EU level of the retail investment market, which could take up to 5 years to properly bed in.

Potential disadvantages: The downside is that changes to Level 2 cannot bring about fundamental changes and provide full clarity on certain aspects in the same way as a Level 1 change can – an example being the need to introduce a clear provision at Level 1 requiring disclosure of the amount of the inducement paid or received.

2. *Further enhancing disclosure of inducements to consumers and making the concept of an “inducement” easier to understand for consumers*

This option could include explicitly mandating disclosure of the amount of inducements to customers on an *ex ante* and on-going basis, or quoting premiums net of commission. It could alternatively involve amending the IDD to further emphasise that the existing provisions concerning disclosures of third party payments in Article 29(1)(c), IDD cover disclosure of the amount of an inducement. In such disclosures, consumers should be made aware that an inducement increases the risk of a conflict of interest arising for the distributor. It could also be done, for example, by requiring information on costs included in the PRIIPs KID to be formally broken down to refer to the amount of inducements paid/received.

Potential benefits: One of the benefits would be that this could allow consumers to realise the impact inducements may have on the service they receive and why the distributor may have certain incentives to act in a certain manner. An explicit requirement to disclose the amount of inducements would also provide for a stronger hook for NCAs to supervise the payment/receipt of inducements and to promote a consistent level of protection for consumers.

Of equal importance would not be only enhanced disclosure of the amount of the inducement, but that consumers understand the nature and impact of an “inducement”. An enhanced disclosure regime could also involve (as proposed in ESMA’s advice to the Commission in March 2020) introducing the obligation to include, in all inducements disclosures, an explanation, in sufficiently clear and simple wording, of the terms used to refer to inducements (for instance, third-party payments)<sup>70</sup>.

Potential disadvantages: The potential downside of such an enhanced disclosure regime is the risk that this information is not absorbed by consumers and does not significantly change their behaviour/decision-making as a result<sup>71</sup> as they may not fully understand how an inducement could influence the financial advice process or the types of IBIPs that are recommended to them. In addition, the levels of commissions on the same product might differ depending on the distribution channel, while the PRIIPs KID for a product is the same, irrespective of the distribution channel.

3. *Further bolstering rules on inducements at the product design phase (include enhanced responsibilities for senior management) and enhanced conduct supervision/enforcement by NCAs.*

This option would involve making rules regarding product design, the selection of distribution channels and choice of remuneration models more stringent so that there is less risk of mis-selling to the target market through biased advice. Mis-selling may also be the result of poor product design, including poor selection of underlying funds (in the case of unit-linked products, especially when monetary incentives are received from asset managers) and a lack of monitoring activities performed by product manufacturers for those underlying funds – in particular, in terms of relationships with smaller intermediaries and/or for business models which are based on generating commissions.

Potential benefits: Enhancing existing rules on product design (including the management of conflicts of interest and the selection of distribution channels and remuneration appropriate to the target market and the types of products distributed to that target market) would take the focus exclusively off the point of sale only, whilst also strengthening rules to prevent mis-selling. EIOPA could leverage existing work developed on target market identification, distribution strategies and remuneration practices to address undue costs being charged to policyholders.

Potential disadvantages: This would potentially require changes to the Product Oversight and Governance (POG) rules under the IDD, particularly at Level 2. Equivalent changes might also be

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<sup>70</sup> [ESMA’s Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II \(31 March 2020\)](#). ESMA recommended the following language in their final advice: “Third-party payments are payments received by [name of the firm or firms (if more than one)] for selling this product to you and is part of the costs that you incur for the service provided by [name of the firm], even though you do not pay such costs directly to [name of the firm].”

<sup>71</sup> The limits of disclosures to consumer reflect, in particular, the experience in the Netherlands with their regulatory framework and the introduction of an inducement ban (see Annex IV)

required under MiFID II and the Commission would need to broaden the scope of its Retail Investment Strategy beyond just the point of sale. However, for the reasons outlined above and in Section 5 on “Product Complexity”, EIOPA can see specific benefits in looking at the whole product lifecycle.

4. *Introducing a mandatory concept of “independent advice” into the IDD and introducing a ban on the payment/receipt of inducements for independent advice in line with MiFID II.*

This option would effectively involve aligning the IDD with the equivalent provisions in MiFID II relating to “independent investment advice” and the ban on the payment/receipt of inducements (excluding minor non-monetary benefits) for independent investment advice in Article 24(7)(b), MiFID II.

Potential benefits: This could help to ensure that the advice provided to the customer is based on a broad analysis of the financial products that are available on the market as this analysis affects whether and how the customer’s investment objectives are met. It could enable consumers to decide which type of advice they prefer, and how they want to pay for it. When they decide to receive advice on an independent basis, they would pay their adviser for it directly through a fee, and could be confident that their adviser has considered and assessed a wide range of products from across a range of product suppliers (not just ones with links to the firm providing the customer with advice). A ban on inducements for independent advice could also remove contrary incentives for advisors and/or intermediaries to sell and/or advise products that are not primarily in the customer’s best interests.

Potential disadvantages: There is the potential risk that the “independent advice” label is not fully understood by consumers and leads to confusion. There would be a need to ensure that “non-independent advisors” are clearly labelled as such in all communications to customers. Some countries that have introduced this concept, have had to follow up by providing further guidance on what “independence” means. There is equally the potential risk of unlevel playing field with non-independent advice through agents who can continue to receive commissions from insurers and employees of insurers who are providing direct sales to customers.

In addition, in some Member States, the border lines between brokers and agents may be blurred. The notion of “independent adviser” could be practically difficult to apply as it may also not fit in all markets with the current market structures and prevalence of commission-based distribution models. For example, the concept of “independent advice” may not really exist in some markets (e.g. where the majority of insurance intermediaries are multi-tied agents) and it may be difficult to identify pure independent advisors carrying out a whole of market product search.

In addition, some brokers may be remunerated according to mixed remuneration models, including both commission and fees. Finally, there is the risk that the commercial advantage for an insurance

intermediary of being able to disclose to a customer that he/she is “independent” may not be considered sufficient to compensate for the impact of not being able to distribute IBIPs via a commission-based model.

5. *Ban/restrict the payment/receipt of all inducements across the EU in relation to the provision of insurance advice*

This option would imply a complete prohibition on the payment/receipt of any inducements in relation to the provision of insurance advice on IBIPs (something which is currently a national option under Article 29(3), IDD), with a system whereby a fee is paid directly by the customer to obtain regulated a distribution service, such as advice on IBIPs.

Potential advantages: Where advice is provided, it can help to improve the quality of advice and raise professional standards by addressing the inherent concerns over product bias/product-driven sales with a focus on more consumer-oriented advice and promote a level playing field across the EU. A ban could remove incentives for intermediaries to sell or advise on products that are not primarily in the customer’s best interest, thereby aligning more closely the interests of the distributor with that of the customer, instead of the provider.

A ban can also encourage the distribution of more cost-effective investment products to consumers by recommending more cost-efficient alternatives to customers. It addresses conflict of interest through the payment of trail commission where no on-going advice is provided (see below re ban specifically in relation to execution-only sales).

Potential disadvantages: The impact for 27 different markets is unpredictable and might have an uneven impact across markets due to the heterogeneity of the different national markets and prevailing national commission-based distribution models. It should be emphasised that, although some examples of national reform experience with bans or specific restrictions on the payment/receipt of inducements are included in the Annexes to this paper, EIOPA has not been able to carry out a formal impact assessment of introducing such a change due to lack of time, in particular to assess the potential market impact, for example, in relation to the existing types of insurance intermediaries on the European market.

Nevertheless, given that the commission-based model is widespread in the EU, there is the potential risk of a material impact on business models and market structure arising from this policy option. There might, for example, be a risk of insolvencies and/or greater consolidation/concentration of market power in larger providers. As referred to in Annex V, however, there is currently a large number of natural persons (estimated at 79% of the market) operating as insurance intermediaries in the European Union. There is also a potential for regulatory arbitrage if competing products such as personal pensions are not caught by a ban.

Another risk often cited relates to the risk of creating an “advice gap”/the potential for financial exclusion for less affluent/low volume consumers and/or under-supply of certain products, as consumers may not be willing to pay large up-front fees or revert to robo-advice/execution-only sales as a result. Ideally, a ban would need to be complemented by a strategy to make advice more accessible and affordable to ensure that any potential advice gap is sufficiently bridged. A total ban may also not address the “closed architecture” distribution models where retail distributors do not receive commissions or other inducements, but sell mostly or solely in-house products from the same group of companies e.g. in the case of bancassurance sales, hence these are not understood as “third party payments” in the strict sense.

6. *Intermediate options to a full ban on the payment/receipt of inducements*

Some intermediate options to an outright ban on inducements or a ban in relation to the payment/receipt of inducements for independent advice (examples set out below) have also been adopted in some countries. The potential risk arising from intermediate solutions is that they may have the potential to create competitive distortions/an unlevel playing field between types of products/insurance distributors in the market:

*Ban/restrict the payment/receipt of enhanced or additional inducements contingent on sales targets/volumes*

This addresses specifically damaging practices focussed on the payment of variable remuneration such as commissions (rather than fixed fees) such as “volume override arrangements” whereby extra commission is paid out by a product provider when a distributor surpasses a target threshold of sales for a given product. This would be a logical step as a corollary to existing provisions of the IDD which already refer to this issue<sup>72</sup> and the fact that the incentive to make such a financial gain provides strong evidence of a conflict of interest and inducement which has a detrimental impact on the quality of the service to the customer. However, it could also be argued that this would only address specific excessive or disproportionate market practices and it could be argued that Article 17(3), IDD already addresses this point to some extent<sup>73</sup>.

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<sup>72</sup> For example, there is a specific reference in Article 8(2)(f) of Commission Delegated Regulation (EU) 2017/2359 as a criterion for evidence of a detrimental impact of an inducement on the quality of the service to the customer: “the existence of any form of variable or contingent threshold or any other kind of value accelerator which is unlocked by attaining a target based on volume or value of sales”. In addition, there are indirect references such as:

- “The likelihood of making a financial gain to the potential detriment of the customer” (Article 3(2)(a) of Commission Delegated Regulation (EU) 2017/2359 as a type of detrimental conflict of interest).
- “whether the inducement or inducement scheme is solely or predominantly based on quantitative commercial criteria...” and “the value of the inducement paid or received in relation to the value of the product and the services provided” (Articles 8(2)(b) and (c) of Commission Delegated Regulation (EU) 2017/2359).

<sup>73</sup> “In particular, an insurance distributor should not make any arrangement by way of remuneration, sales targets or otherwise that could provide an incentive to itself or its employees to recommend a particular insurance product to a customer when the insurance distributor could offer a different insurance product which would better meet the customer’s needs” (Article 17(3), IDD).

*Ban/restrict the payment/receipt of certain non-monetary benefits such as hospitality gifts*

Minor non-monetary benefits such as hospitality gifts, in particular, are designed to influence an insurance intermediary to place business with a particular provider rather than to provide any direct benefits to consumers. An example of an NCA (the Central Bank of Ireland), which has taken action to specifically address this issue is included in Annex VI. It is worth noting that the IDD Delegated Regulation refers to the establishment of a “gifts and benefits policy” as a means to manage conflicts of interest and prevent them from damaging the interests of customers<sup>74</sup>.

*Ban/restrict the payment/receipt of inducements in the case of “execution-only sales”*

A number of NCAs have also highlighted that their concern with payment/receipt of inducements, centres more around non-advised sales of IBIPs such as execution-only services<sup>75</sup> where they fail to see the justification, in terms of value for money/cost-efficiency for the customer, for the payment/receipt of inducements if no advice is provided to the customer, particularly in the case of long-term IBIPs with a long recommended holding period where trail commission may be charged but no advice is provided over a long period of time.

Conversely, it should be noted that under the IDD, even in the case of an execution-only sale, certain services still need to be provided by the insurance intermediary prior to the conclusion of the contract. For example, pre-contractual information needs to be provided to the customer even if no advice is provided and an information-gathering exercise needs to be carried out in order to perform a “demands and needs” assessment for the customer<sup>76</sup>. In some Member States, the scope and amount of information to be gathered under the “demands and needs” test in the pre-contractual phase may be broad and still require time & resources to be invested by the insurance intermediary. Finally, if the main justification for a ban on the payment/receipt on inducements in relation to execution-only services, is a value for money consideration, a cap on the level of inducement could also potentially address this issue.

*Ban/restrict the payment of inducements in the case of the sale of high risk or highly complex products*

As regards a ban on inducements paid/received in relation to high risk or highly complex products<sup>77</sup>, this could mitigate the potential for a material advice gap<sup>78</sup>. In fact, consumers seeking less complex

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<sup>74</sup> Article 5(1)(f) of Commission Delegated Regulation (EU) 2017/2359: “A gifts and benefits policy which determines clearly under which conditions gifts and benefits can be accepted or granted and which steps are to be taken when accepting and granting gifts and benefits”.

<sup>75</sup> Article 30(3), IDD. Bearing in mind that, currently, only 13 Member States permit execution-only sales of IBIPs under the IDD.

<sup>76</sup> In accordance with Article 20(1), IDD

<sup>77</sup> N.B. This was the approach taken initially in NL as of 1 January 2013 with a complete ban on commissions on complex financial products, mortgage credits, loss-of-income insurances, funeral insurances and service provision.

<sup>78</sup> It is worth noting that an “advice gap” has not been the experience in the NL after implementing such a ban. The experience in NL is set out in more detail in Annex IV.



products – i.e. targeted towards broad target market – would still be able to access commission-based advice. It could also address potential conflicts of interest risks for the sale of those products for which more “independent advice” might be required – i.e., those products for which manufacturers are likely to pay higher commissions.

It would also ensure that those consumers seeking to buy high risk or highly complex products are aware they are receiving bias-free advice. However, depending on how broadly the scope of products deemed highly complex is defined, introducing such a ban could also result in a risk that such complex products, which may offer higher value to certain target markets, may be driven out of the market with distributors mostly preferring a commission-based model.

As an alternative to banning inducements in relation to the distribution of highly complex products, alternative preventive measures could be considered to tackle the issue of increasing distribution of overly complex products (e.g. the moratorium on overly complex structured products in Belgium)<sup>79</sup>.

*Introduce a cap on the payment/receipt of inducements*

As regards introducing a cap, this would prevent the marketing of products with very high distribution costs – above the cap, but without the same level of market impact as a ban. A cap could be beneficial for some markets where, on average, commissions are very high, compared to other markets. Moreover, a cap on inducements is, to some extent, synonymous with the proportionality concept reflected already in the criterion set out in Article 8(2)(e) of the Delegated Regulation, according to which “the value of the inducement paid or received in relation to the value of the product and the services provided” should be considered when determining whether an inducement has a negative effect.

However, the introduction of a cap can also lead to “herd behaviour” - this is where firms follow the actions of others in setting inducements to the maximum level of the cap. In addition, if the cap is set too low, it could act as a deterrent to the distribution of IBIPs as higher value products/features may no longer be distributed because the costs cannot be absorbed.

In addition to the above policy options, some further measures could be envisaged such as *enhancing existing Level 2 criteria relating to the payment/receipt of inducements*:

132. EIOPA’s advice on inducements, as part of its package of technical advice on the implementation of the IDD in February 2017<sup>80</sup>, specified a set of criteria to be considered when assessing whether an

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<sup>79</sup> A moratorium was imposed on the distribution of particularly complex structured products in June 2011 by FSMA. (See Annex for more details).

<sup>80</sup> [https://www.eiopa.europa.eu/document-library/eiopa%E2%80%99s-technical-advice-possible-delegated-acts-concerning-insurance-distribution\\_en](https://www.eiopa.europa.eu/document-library/eiopa%E2%80%99s-technical-advice-possible-delegated-acts-concerning-insurance-distribution_en)

inducement or inducement scheme “increased the risk” of exposure to a detrimental impact on the quality of the relevant service to the customer, but this was not carried over into the text of the Delegated Regulation<sup>81</sup>. The effect of the current criteria (i.e. whether they increase or decrease risk) is left to the discretion of the distributor and the criteria are drafted in a principle-based manner whereby it would require clarification of supervisory expectations if they are to be effectively implemented with legal certainty in a common way across European markets.

133. In particular, it could be beneficial to bring some element of benchmarking to the question of tolerable differences in commission rates between two products that may be sold instead of each other and the question of the maximum proportion that an incentive may represent in relation to the value of the product, as well as other criteria set out in Article 8 of the IDD Delegated Regulation. Alternatively, an explicit requirement for the value of the inducement to be proportionate when considered against the value of the product and the service provided in relation to the product could be introduced in line with EIOPA’s original technical advice on the implementation of the IDD<sup>82</sup>.
134. In addition, deferral of payment of commission or commission rebating/claw back could be explicitly mandated; for example, in the case of evidence of mis-selling or where the customer exits the contract early. Models such as this exist already in a number of jurisdictions and the ability to claw back commission is a criterion to be taken into account under current IDD rules to assess whether inducements have a detrimental impact on the quality of service provided. However, this relies on consumers to understand that they have been mis-sold a product and /or consumers to actively surrender which may not often be the case due to high surrender penalties.
135. Furthermore, in line with the follow-up to EIOPA's thematic review on monetary incentives received by insurers from asset managers of funds marketed as units of account in life insurance contracts, it may be appropriate to include provisions to prevent the negative effects of this practice on the quality and marketing of insurance products. Several types of measures could be envisaged: transparency obligations or obligations to pay back these incentives to policyholders.
136. Finally, in order to improve the ability of supervisors to address conflicts of interest, a strengthening of the rules on *record-keeping* could be considered, by requiring distributors to keep and regularly update a record of the situations in which a conflict of interest entailing a risk of damage to the interests of a customer has arisen or may arise, as currently required under Commission Delegated Regulation (EU) 2017/2359.

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<sup>81</sup> See, in particular, pages 44-49 of the Technical Advice

<sup>82</sup> The Technical Advice referred to a criterion of “c) the value of the inducement is disproportionate when considered against the value of the product and the services provided in relation to the product”. This would also be in line with EIOPA’s recent supervisory statement on value for money in the unit-linked market, where value for money is defined as “costs and charges being proportionate to the benefits (i.e. investment performance, guarantees, coverage and services) to the identified target market, as well as reasonable, taking into account the expenses born by the providers”.

### 3.2. PROPOSED ADVICE TO THE EUROPEAN COMMISSION

- EIOPA would like to emphasise, from the outset, to the Commission the heterogeneous nature of the insurance distribution market in Europe and that this heterogeneity can present challenges in ensuring that any harmonised approaches apply evenly across all national markets and consumers are treated in a consistent manner across different markets. EIOPA also notes that the commission-based distribution model remains the prevalent distribution model in the majority of national markets, notwithstanding the fact that specific Member States have taken more stringent measures at national level to address concerns around the payment/receipt of inducements in their markets.
- EIOPA has analysed the impact of differences in the regulation of the payment/receipt of inducements between MiFID II and the IDD. There are some important differences particularly at the level of disclosure of inducements and stronger language restricting the payment/receipt of inducements in MiFID II as compared to IDD, where there could be benefits in aligning legislation. Nevertheless, NCAs also note the practicalities of applying different provisions in national supervision such as the quality enhancement criterion (where further guidance is provided in Level 2 and Level 3) and the fact that there is little evidence of material differences in terms of supervisory outcomes between applying the “quality enhancement” criterion and the “no detrimental impact” criterion, which need to be borne in mind by the Commission in the further development of its retail investment strategy.
- EIOPA sees, from its own oversight work, the need for more to be done to tackle damaging conflicts of interest arising throughout the product lifecycle of an insurance-based investment product, to address the risk of inducements leading to product bias and materially impacting the cost-efficiency and “value for money” of IBIPs. EIOPA has set out the pros and cons of a number of different policy options to more strictly regulating the payment/receipt of inducements. There is no one single all-encompassing solution in this area as EIOPA has identified pros and cons with all different options, including maintaining and refining existing requirements under the IDD, and varying market impacts. A combination of different options could also bring specific benefits. In particular, a number NCAs see some benefits in enhancing further existing disclosure requirements for inducements and strengthening requirements to mitigate the risk of detrimental consumer outcomes arising from inducements throughout the product lifecycle. A specific empowerment at Level 2 to develop this further and/or the scope for accompanying Level 3 measures to promote supervisory convergence could be particularly beneficial in this respect.

- Finally, EIOPA can see benefits in formalising the concept of “independent advice” in the IDD, but the notion of an “independent adviser” could be particularly practically challenging to apply as it may not fit in all national markets with the current market structures and prevalence of commission-based distribution models.

### 3.3. QUESTIONS FOR THE PUBLIC CONSULTATION

Q10. Do you agree with EIOPA’s analysis of differences between IDD and MiFID II? Are there any other differences not mentioned which you consider to be relevant?

Q11. Do you have any views on EIOPA’s analysis of the structure of different distribution models for the sale of IBIPs in the EU?

Q12. Has EIOPA captured, in your view, all relevant policy options? Do you agree with the different pros and cons listed for these options and the potential impacts indicated for these options? Are you in favour of any particular options or combination of options? Are there any other policy options and pros and cons to be considered in your view?

## 4. PROMOTING AN AFFORDABLE AND EFFICIENT SALES PROCESS

### 4.1. BACKGROUND/MANDATE

#### **Extract from the European Commission’s Call for advice**

*an analysis, based on available data, of the practical functioning of the current rules on the assessment of the “demands and needs” and “suitability” tests in the IDD, including possible dysfunctionalities that might result in overly burdensome and time-consuming procedures and recognising the necessary linkages between the needs of the identified target market for the product and the preferences of the individual customer.*

*The Commission would also invite EIOPA to consider ways of simplifying and streamlining these assessments, in particular in the context of digitalisation.*

#### **4.1.1. Practical functioning and possible dysfunctionalities of the current rules**

137. In order to assess the practical functioning and possible dysfunctionalities of the current rules applicable to the process for selling IBIPs, it is important to specify from the outset that there are some important differences in the different rules applicable:
138. While the assessment of suitability and appropriateness is only required for IBIPs, the demands-and-needs test applies to all insurance contracts. The completion of the demands-and-needs test applies without prejudice to the assessment of suitability and appropriateness and execution-only sales. This is particularly worth noting in the case of non-advised sales as the demands and needs test can provide an additional layer of protection for consumers.
139. The demands-and needs-test has to be conducted in any event prior to the conclusion of the contract and is different from the suitability assessment which can also be provided at any time during the customer relationship i.e. after the contract has been concluded. The assessment of demands and needs is required whether or not advice is being provided and the specifying of the demands and needs would not amount to an assessment of suitability and appropriateness. Depending on the national implementation, where advice is being provided, the demands-and-

needs test and assessment of appropriateness and suitability could be seen as a continuum, rather than as a break.<sup>83</sup>

140. In addition, Commission Delegated Regulation (EU) 2021/1257<sup>84</sup> will bring about important changes as of 2 August 2022 in the way the sustainability preferences of the individual customer are taken into account in the suitability assessment by the insurance distributor. “Recommendations to customers or potential customers should reflect both the financial objectives and any sustainability preferences expressed by those customers”<sup>85</sup>. The main objective of including sustainability factors in the advisory process is to ensure that it does “not lead to mis-selling practices or to the misrepresentation of insurance-based investment products as fulfilling sustainability preferences where they do not”<sup>86</sup>. Separate to the work on this Call for Advice, EIOPA is currently looking into the possibility of issuing guidance to promote a consistent application of these requirements by NCAs.

*Experience of national competent authorities with regard to the different assessments*

141. EIOPA has carried out analysis amongst NCAs of the current application of the “demands and needs test” both in an offline and an online context. In particular, this has shown that there is an absence of guidance at EU level regarding the demands and need test in general and room for improvement on some local markets. For example, some NCAs do not accept a general solution that fits every customer (e.g. a general phrase/statement of the customer expressing their needs as regards a type of insurance product will not suffice).
142. As mentioned in EIOPA’s IDD application report, findings from NCAs have shown that the demands-and-needs test in online sales processes has shown some deficiencies. In some cases, at the end of the online sales process, consumers are nudged into ticking a box confirming that the contract concluded is in line with their demands and needs, shifting the responsibility for conducting the demands-and-needs test from the insurance distributor to the customer.
143. There is also a lack of clarity over the scope of the “demands and needs” test to be carried out – an extensive scope to the demands and needs test will depend on the complexity of the customer’s demands and needs and the complexity of the products which will be consistent with those demands and needs ultimately. The IDD states that “the details referred to in [the demands and needs test] shall be modulated according to the complexity of the insurance product being proposed

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<sup>83</sup> See also IDD Q&A 1638 on the relation between the demands-and-needs test and the suitability assessment: [https://www.eiopa.europa.eu/qa-regulation/questions-and-answers-database/1638\\_en](https://www.eiopa.europa.eu/qa-regulation/questions-and-answers-database/1638_en)

<sup>84</sup> COMMISSION DELEGATED REGULATION (EU) 2021/1257 of 21 April 2021 amending Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 as regards the integration of sustainability factors, risks and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors and into the rules on conduct of business and investment advice for insurance-based investment products

<sup>85</sup> Recital 11 of Commission Delegated Regulation (EU) 2021/1257

<sup>86</sup> Recital 11 of Commission Delegated Regulation (EU) 2021/1257

and the type of customer”<sup>87</sup>. This may be particularly relevant in the case of the sale of a more complex product such as an IBIP.

144. What is clear from the outcome of this analysis amongst NCAs was that only a general statement on the demands and needs is not sufficient to fulfil the demands and needs test, whereas an explicit statement of the customer is needed and insurance distributors need to have sufficient knowledge of the customer’s demands and needs to provide advice. The demands and needs test therefore needs to be established and documented always, regardless of the sales channel and on the product level.
145. In terms of experience of specific NCAs with the suitability assessment and the demands and needs test, some examples in relation to Hungary and Belgium are cited in EIOPA’s IDD application report<sup>88</sup>. Based on the above-mentioned NCAs’ experience, there is room for EIOPA to provide additional clarifications through Level 2 measures or Level 3 guidance as to what information is required to be provided to the customer under the demands-and-needs-test and suitability assessment in order to avoid an unnecessarily formalistic/tick-box approach to these processes. This would, in turn, facilitate supervisory convergence and effective supervision of insurance distributors and provide clarity for insurance distributors that need to apply these provisions in practice.

#### **4.1.2. Possible ways to simplify and streamline assessments, in particular in the context of digitalisation**

146. EIOPA is also invited by the Commission in their Call for advice to “*consider ways of simplifying and streamlining [the aforementioned different assessments], in particular in the context of digitalisation*”. EIOPA has looked at the potential for simplifying and streamlining the assessments with a particular focus on providing affordable and unbiased advice to consumers on IBIPs without lowering the level of consumer protection.
147. In particular, EIOPA has considered whether it would be possible to have a well-designed, low-cost method of meeting customers who have straightforward needs and want to invest smaller amounts of money without a potentially time-consuming and costly initial fact-finding exercise, taking into account specific national initiatives already taken in this area<sup>89</sup>. The main objective of rationalising the advice process would be to improve the sales process for IBIPs, including on-line, to enable consumers engage more in capital markets and invest or save more for retirement. An additional benefit would be to cut advice costs, while it is noted that streamlining of advice in this context

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<sup>87</sup> Article 20(2), IDD

<sup>88</sup> More details on these examples in Hungary and Belgium can be found on pages 32-33 of the IDD application report: [https://www.eiopa.europa.eu/media/news/eiopa-publishes-report-application-of-insurance-distribution-directive\\_en](https://www.eiopa.europa.eu/media/news/eiopa-publishes-report-application-of-insurance-distribution-directive_en)

<sup>89</sup> In particular, the UK’s Financial Advice Market Review (FAMR) and subsequent FCA guidance on streamlined advice.

would not mean reducing the advice process to a simple exercise of a customer ticking box, indicating that they had understood the advice provided to them.

148. A more streamlined advice process<sup>90</sup> could involve proportionally simplifying the advice process through the distributor carrying out *“a filtering/triage, at the start of the advice process, to filter out those customers whose needs, characteristics and objectives would not be compatible with the particular products on offer through a “streamlined advice” process and/or for whom a “streamlined advice” service would not be appropriate”*<sup>91</sup>.
149. Different mechanisms for filtering, such as a series of questions, decision trees or drop down lists, could be used, according to what best suits the potential customers and type of process. Where an insurance undertaking or an insurance intermediary obtains information from the customer during the filtering stage, that information could, where appropriate, also be used during the suitability assessment, rather than asking for the same information again. That information would need to be sufficiently detailed for the purposes of assessing suitability.
150. Streamlined advice services might also be combined in the form of automated services together with traditional models (semi-automated advice, ‘robo advice’ services or more traditional face-to-face or telephone-based models) and also taking into account the potential for more personalised customer services via Artificial Intelligence (AI) and open insurance/tracking systems to develop in the future. The use of a multichannel system could help to simplify the suitability assessment, but it will most likely mean that no specific phase in the sales process is removed, but replaced with another one.
151. Although the general overarching objective of trying to make the advice process for IBIPs more accessible and affordable is generally welcomed, there are also specific challenges/risks in introducing a concept of “streamlined advice”, as compared to a full advice service, given that:
- Streamlining of the advice process could create the impression of a lowering of standards and the potential for circumvention of the different assessments that need to be carried out, and also that professional training standards might not need to be fulfilled. It is necessary to ensure a strong set of minimum standards for the provision of regulated advice on IBIPs (which are often complex long-term products with features such as biometric risk coverage which may be difficult for consumers to understand);

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<sup>90</sup> Streamlined advice in this context, could be understood as set out on page 69 of the [FAMR \(Financial Advice Market Review\) Report](#) as “advisory services that provide a personal recommendation that is limited to one or more of a customer’s specific needs. The service does not involve analysis of the customer’s circumstances that are not directly relevant to those needs”.

<sup>91</sup> See para. 2.17 of FCA Finalised Guidance, FG17/8: Streamlined advice and related consolidated guidance. <https://www.fca.org.uk/publication/finalised-guidance/fg-17-08.pdf>



- Streamlining of advice could encroach on existing national regimes of mandatory advice where the focus might be on making the full advice process more efficient to prevent a tick-box approach, rather than streamlining advice.
  - Introducing a streamlined advice regime might not be appropriate at a time when digital selling methods (such as the use of artificial intelligence and algorithms) are amplifying some risks for consumers in terms of the effectiveness of the pre-contractual information and demands and needs process.
  - Streamlining the sales process may not automatically translate into lower costs as there may no direct impact in lowering the level of commissions charged.
152. Finally, the IDD already includes, to some extent, an element of “streamlining” in the advice process since the assessment of demands and needs and the provision of a personalised recommendation are two separate steps in the pre-contractual phase<sup>92</sup>. However, this is not considered enough in itself to facilitate more efficient and affordable advice on IBIPs. Finally, the possibility for the customer to not receive mandatory advice<sup>93</sup> on the sale of an IBIP, currently exists in the majority of Member States.
153. In addition, the quality (including potentially lower cost of the sales process) may also be achieved through enhanced professional standards in the sector. It also remains to be seen if the same regulatory requirements applied to both streamlined and full advice (without a degree of tolerance/mitigation of liability that distinguishes the simplified advice service from the full advice service), whether there would be sufficient incentive for market participants to provide a streamlined advice service.
154. Notwithstanding these aforementioned challenges in developing a specific concept of “streamlined advice”, it is clear that, with the level of technological innovation occurring in the market such as the use of Artificial Intelligence (AI) to provide more customised advice and portfolio management based on the profile of the customer, there is scope for new tools/channels for the provision of advice (such as more automated services as referred to above) to develop further in the future and thereby make the provision of advice more affordable and accessible. Where such new tools/channels reach the market, it will be particularly important for firms to identify and manage attendant risks and for supervisors to be aware of these risks when engaging with firms.

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<sup>92</sup> Article 20(1), IDD

<sup>93</sup> AT, BG, EE, EL, HU, LU, RO and SK have made the provision of advice mandatory for the sale of any insurance product, or for certain types of insurance products; and CZ, EL, HU, IT, LU, PL, RO and SK have made the provision of advice mandatory for the sales of any IBIPs, or for certain types of them.

155. Linked to the aforementioned possibility for EIOPA to clarify further at Level 3, the inter-relationship between the “demands and needs” test and the suitability assessment, EIOPA also sees currently a lack of existing guidance on the provision of advice and the application of the suitability assessment more generally. In that respect, EIOPA sees scope for further supervisory convergence work to be carried out to ensure that the same rules for the advice process are applied properly and proportionally across national markets with a view to ensuring that the focus is on good consumer outcomes, rather than the advice process becoming tick-box/compliance exercise. In the long run, this will help to ensure a smoother functioning and supervision of sales processes and support the over-arching objective of making the advice process more accessible and affordable for consumers and empowering consumers to engage in capital markets and invest/save for retirement.
156. EIOPA has also considered whether to introduce measures on **strengthened target market identification to simplify demands and needs processes online** and to facilitate the sales process, for example, by:
- Mandating consumer research or testing of products,
  - Defining some minimum criteria which should be taken into account for the target market and/or more systems and controls which should result in a more granular target market identification and thereby more highly personalised and streamlined products and services.
157. The benefit of these approaches would be that insurance distributors could benefit from smoother demands and needs assessments before a suitability assessment is then carried out either as a separate stage or a continuum.

#### **4.1.3 Consideration of alternative demand-side initiatives to make advice on IBIPs more accessible and affordable**

158. In the absence of a more streamlined suitability assessment, EIOPA has looked at what further could be done on the “demand-side” to make advice on IBIPs more affordable and reach a wider group of consumers, given the existing wide notion of regulated advice. In particular, there could be consumers who do not know how to engage properly in managing their financial wellbeing, yet do not wish to seek professional financial advice.
159. EIOPA looked at the potential for providing more meaningful, personalised support for consumers without straying into the realm of regulated advice. This could involve developing a formal regulatory framework for “financial guidance”<sup>94</sup> (including qualifications, accreditations, training, professional liability)<sup>95</sup> as an alternative to a regulated advice service as a tool to help consumers

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<sup>94</sup> In terms of “financial guidance”, this would be understood as a process of determining an individual's financial goals, purposes in life and life's priorities, and after considering his resources, risk profile and current lifestyle, to detail a balanced and realistic plan to meet those goals. Financial guidance is disconnected, either directly or indirectly, at any time, from any sale of financial products or any form of personalised recommendation.

<sup>95</sup> Another term also used in this context is “financial coaching” which aims at helping consumers to better manage their finances.

addressing its present and future financial needs, which could be provided separately, in a non-advised sale or as a pre-cursor to a formal sales process and conclusion of a contract. The key challenge is that there needs to be a very clear boundary between financial guidance and regulated advice for such a regime to succeed.

160. The development of a financial guidance framework is an approach which has been previously supported by the Commission’s Financial Services User Group (FSUG)<sup>96</sup> and was the basis of a Commission/FSUG study on access to comprehensive financial guidance for consumers<sup>97</sup>.
161. In some Member States, as an alternative means of reaching consumers, specific bodies have been set up. For example, a network of consumer advice centres has been set up in Germany to facilitate access to financial guidance<sup>98</sup> and some relevant non-EU examples exist such as the UK’s Money and Pensions Service, including its “Money Helper” website. Finally, in Norway, the State-backed “Finansportalen” website has been developed to give consumers the power and ability to make good choices in the market for financial services. The portal consists of digital tools that help consumers to compare, *inter alia*, insurance products.
162. In addition, although it is a topic not addressed specifically in the Commission’s Call for Advice, more can clearly be done to enhance the level of financial education of consumers seeking to purchase IBIPs and to raise awareness about potential scams and significant cases of mis-selling. In this respect, the Commission’s initiatives under the Capital Markets Union Action Plan such as the development of a Joint Financial Competence Framework will be helpful complementary initiatives, as well as replicating, in the IDD with respect to the distribution of IBIPs, the requirement under the Mortgage Credit Directive<sup>99</sup> for Member States to support the education of consumers. This kind of action could lead to increasing the financial awareness and literacy of consumers to the benefit more broadly of the internal market and the CMU in particular.

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<sup>96</sup> The FSUG considers that the main benefits of financial guidance to be the following:

- “Enabling consumers, in particular people who cannot afford wealth management services, to make good decisions as they could rely on independent and qualified persons focused on their personal needs;
- Facilitating wider dissemination of simple financial products and better suited products to consumer needs (too complex categories of products are not intended to be recommended by financial guidance providers);
- Cleaning up the intermediation market: competition in the distribution of financial products does not benefit the consumer, but only intermediaries. If the financial guidance is developed enough and consumers are satisfied with the service they receive, the intermediaries who provide no value to consumers should disappear from the market”.

<sup>97</sup> Study on access to comprehensive financial guidance for consumers, Project number: 2016.2438 - A report by the OEE in partnership with: The Personal Finance Research Centre; The Institute for Financial Services e.V.; The National Institute for Family Finance Information; RMIT University; Aarhus University

<sup>98</sup> These are regional consumer advice centres set up by the German consumer association (VBB) which provide financial guidance to consumers

<sup>99</sup> Article 6 of Directive 2014/17/EU: (1) Member States shall promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements. Clear and general information on the credit granting process is necessary in order to guide consumers, especially those who take out a mortgage credit for the first time. Information regarding the guidance that consumer organisations and national authorities may provide to consumers, is also necessary. (2) The Commission shall publish an assessment of the financial education available to consumers in the Member States and identify examples of best practices which could be further developed in order to increase the financial awareness of consumers.

163. In conclusion, EIOPA sees some potential for developing efforts on the demand-side to enhancing the efficiency and affordability of the sales process, but would be keen to gather more views from external stakeholders on this issue before taking a conclusive position on this point.

## 4.2. PROPOSED ADVICE TO THE EUROPEAN COMMISSION

- In order to promote an affordable and efficient sales process for the purchase of IBIPs, EIOPA sees the need to provide more clarity on the scope of the different assessments used in both the advised and non-advised sales contexts. This could be achieved by possible amendments to Level 1, but more specifically through an empowerment for EIOPA to develop Level 2 measures, or for EIOPA to issue Level 3 guidance on this issue.
- Simplifying and streamlining the advice process, particularly taking into account the ongoing digital transformation in the sale of financial products, carries particular challenges/risks which may be difficult to mitigate. EIOPA therefore suggests that further supervisory convergence work is done to ensure that the same rules for the advice process are applied properly and proportionally across national markets with a view to ensuring that the focus is on good consumer outcomes, rather than the advice process becoming a tick-box/compliance exercise. In the long run, this will help to ensure a smoother functioning and supervision of sales processes and support the over-arching objective of making the advice process more accessible and affordable for consumers and empowering consumers to engage in capital markets and invest/save for retirement.
- Other demand-side initiatives could also be considered to make advice more affordable, such as the potential for access to personalised financial guidance and enhanced opportunities for financial education of consumers. The boundaries between guidance and regulated advice would need to be clear for this to work.

## 4.3. QUESTIONS FOR THE PUBLIC CONSULTATION

Q13. Where do you see the most significant overlaps lie between the demands and need test and suitability assessment and what can be done to address these overlaps?

Q14. Do you see scope for streamlining the suitability assessment and in what way, could digitalisation be harnessed to make advice on IBIPs more affordable?

Q15. Do you see any specific risks for consumers in streamlining the advice process further?

Q16. What is your view on possible demand-side solutions to facilitate the provision of affordable advice on the sale of IBIPs and support wealth management, such as financial guidance and what benefits could this bring?

## 5. ASSESSING THE IMPACT OF COMPLEXITY IN THE RETAIL INVESTMENT PRODUCT MARKET

### 5.1 BACKGROUND / MANDATE

**Extract from the European Commission’s Call for advice**

*Analysis of potential measures to facilitate the access of retail investors to simpler, cost-efficient, insurance-based investment products*

164. This section of the mandate seeks advice as to possible measures that could be introduced to facilitate access to simpler and cost-efficient IBIPs. Supervisory experience has shown that some IBIPs features and associated costs can be particularly challenging for retail investors and their advisors to properly assess. Examples of features which are challenging to assess include:
- Complex product features, such as variable premium allocations between funds and/or between unit-linked and with profit components or bonuses which may not be straightforward to understand;
  - Expected returns that depend on a number of factors which are not easily foreseeable for the retail target market. For example, the guarantee may only materialize depending on the attainment of a certain level of performance;
  - Expected returns and risks that are presented in an overly complex way;
  - Complex cost structures presented in a disaggregated way, where several layers of calculations and fee structures need to be combined because the basic elements (and basis) of cost calculations are insufficiently disclosed;
  - Insufficient comparability between products, such that is challenging to assess which offer is the most appropriate and which offer gives the highest value for money for a given risk profile.
165. In interpreting this Call for Advice, EIOPA has also taken into account that IBIPs are products embedded<sup>100</sup> with multiple components. In addition, the selection between components and their combinations that may be undertaken by distributors is ‘pre-packaged’ by the insurance manufacturer, so that more sophisticated investors buying IBIPs may often have limited possibilities to ‘customise’ their own products, even though some products may have been engineered to allow for a high degree of personalisation. Thus resulting in the fact that the higher complexity generated

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<sup>100</sup> See also Recital 56 of the IDD: “To deliver consistent investor protection and avoid the risk of regulatory arbitrage, it is important that insurance-based investment products are subject, in addition to the conduct of business standards defined for all insurance products, to specific standards aimed at addressing the **investment element embedded in those products**”.

by having multiple options which advisors and retail investors need to compare often does not necessarily imply more personalisation as options are pre-packaged by manufacturers.

166. In general, the structure of IBIPs is *per se* more complex than some other retail investments. In addition, there are specific issues for certain IBIPs, these include:
- The long term nature of some IBIPs – particularly relevant for personal pensions products which qualify as IBIPs in certain Members States – with long recommended holding periods<sup>101</sup>, resulting in the fact that some retail consumers may buy an IBIP once in their entire lifetime;
  - Depending on the type of IBIP, there may be limited possibility for customer intervention during the contract period, also taking into account national restrictions e.g. regarding delegation.
167. These can make it difficult to simply apply complexity-related criteria originating from the securities markets to IBIPs.
168. In light of the above, in interpreting this call for advice and in providing views on possible measures, it is important to highlight that EIOPA sees the highest level of conduct risk materialising in relation to those IBIPs which:
- Because of their structure make it difficult for consumers to understand or potentially may mislead the consumer as to the risks, the costs and the expected returns: for instance, by including features which, although aiming at offering safety whilst seeking higher returns, have clear limits (e.g. partial contingent guarantees) and which may make it difficult for retail consumers to understand the risks they may be exposed to.
  - Because of their features carry higher costs and/or have opaque cost structures which may not be sufficiently clear for the customer limiting the possibility to make a cost-benefit analysis.
169. The advice, rather than solely focusing on promoting the access of retail investors to simpler and cost-efficient products, provides options, highlighting the advantages and disadvantages of possible measures which could be taken to facilitate the access of retail investors to simpler and cost-efficient IBIPs, including the option consisting in ensuring proportional regulatory and supervisory measures given different levels of complexity (and riskiness which can emerge thereof) which distinct IBIPs carry.
170. This is because, while simplicity can mitigate some conduct risks, product simplicity is not equivalent to a low exposure to market risks, even though it should aim at ensuring products are better

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<sup>101</sup> Particularly relevant for personal pensions which qualify as IBIPs in certain Member States.

targeted and more easily understood by consumers. In this respect it is critical to note the different dimensions of simplicity and complexity – that is, simplicity and complexity in underlying engineering versus simplicity and complexity in the product offering (e.g. complex options), versus the risk of loss (e.g. value at risk for some defined scenarios).

171. To better grasp policy options in relation to simplicity, complexity and cost-efficiency, it may be useful to disentangle these different dimensions. Providing concrete examples could assist in distinguishing these aspects as presented in Table 1.

**Table 1 – Examples of different dimensions which can contribute to product complexity**

Example	Level of market / counterparty risk of the product	Level of complexity of the underlying features and operating of the product	Level of complexity in the understanding of the product from the perspective of an average customer	Type of product
1	High	High	High	This product, possibly a multi-option product, offering investment options that are structured funds or complex debt securities and with only/without any very small financial guarantee, is a risky and complex IBIP that should therefore be aimed at a more literate and less risk-adverse target market which can bear substantial losses
2	Medium	High	Medium/low	This product, possibly a policy with profit participation with a guarantee, can be aimed at more conservative and less financially literate policyholders because, despite the complexity behind the structure/operating of the product, its features, in terms of risks, costs, rewards, are relatively simple to understand if properly explained
3	High	Medium/Low	Low – albeit requiring a clear understanding of the risks	This product, possibly an equity unit-linked product with a simpler structure, it may be aimed at customers with an aggressive risk profile which, even though they may not need to understand complex financial engineering, they should be able to understand market related risks and their



Example	Level of market / counterparty risk of the product	Level of complexity of the underlying features and operating of the product	Level of complexity in the understanding of the product from the perspective of an average customer	Type of product
				ability to bear losses; hence requiring basic understanding of ability to bear losses. In fact, this product is not complex in itself but risky

172. When the risk mitigation features of a product have a high degree of complexity from the perspective of a retail consumer’s understanding and/or they result in excessive and opaque costs, this can result in retail consumers overestimating the financial safety or in a misalignment in the risk profile being sought by the retail consumer and the product they buy.

173. Measures to facilitate access to simpler and more cost efficient products should not, however, be intended to favour the promotion of products exposing consumers to greater financial risks for the sole reason that they may have a less complex structure.

## 5.2 CURRENT REGULATORY FRAMEWORK – THE NOTION OF COMPLEXITY ACCORDING TO THE DIFFERENT LEGAL ACTS

174. The current regulatory framework includes criteria to identify complex products as follows:

- The PRIIPs Regulation requires the Key Information Document (KID) to include where applicable, a comprehension alert which shall read: “You are about to purchase a product that is not simple”<sup>102</sup>
- The IDD contains rules on when a product may be sold on an execution-only basis (i.e. without an appropriateness test) (Article 30(3)) based on the product being non-complex.

<sup>102</sup> Article 8(3)(b) of REGULATION (EU) No 1286/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on key information documents for packaged retail and insurance-based investment products.

- Further guidance as to what is considered “not simple” is referred to in a recital to the PRIIPs Regulation<sup>103</sup> and in the PRIIPs Delegated Regulation and EIOPA Guidelines<sup>104</sup>:
  - Complexity is identified with contracts which provide investment exposure to financial instruments other than those deemed non-complex under Directive 2014/65/EU (MIFID II) and incorporate a structure<sup>105</sup> that further sets down the conditions for which it makes it difficult for the customer to understand the risks.
  - The Delegated Regulation for IBIPs (Art. 16) identifies criteria on non-complex IBIPs which are based on the level of financial risk, (it includes a contractually guaranteed minimum maturity value), on the predictability of the product’s behaviour (it does not incorporate a clause, condition or trigger that allows the insurance undertaking to materially alter the nature, risk, or pay-out profile on the IBIP), and on the product structure (it provides options to surrender at the value that is available to the customer, without charges disproportionate to the cost to the insurance undertaking, it does not incorporate a structure which make it difficult for the customer to understand the risks involved).
- The PRIIPs KID Delegated Regulation<sup>106</sup> requires a comprehension alert to be included in the KID, this is basically where the IBIP does not meet requirements on non-complexity laid down in the requirements relating to execution-only sales in the IDD<sup>107</sup>.

175. Separately:

- According to the IDD Product Oversight and Governance (POG) Delegated Regulation, the target market identification needs to be granular and take into account “the risk profile, complexity and nature of the insurance product”<sup>108</sup>. In addition, when assessing whether an insurance product is compatible with a target market, manufacturers shall take into account “the level of

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<sup>103</sup> Recital 18: “As some of the investment products within the scope of this Regulation are not simple and may be difficult for retail investors to understand, the key information document should, where applicable, include a comprehension alert to the retail investor. **A product should be regarded as not being simple and as being difficult to understand in particular if it invests in underlying assets in which retail investors do not commonly invest, if it uses a number of different mechanisms to calculate the final return of the investment, creating a greater risk of misunderstanding on the part of the retail investor or if the investment’s pay-off takes advantage of retail investor’s behavioural biases, such as a teaser rate followed by a much higher floating conditional rate, or an iterative formula**”.

<sup>104</sup> Guidelines under the IDD on Insurance-based investment products that incorporate a structure which makes it difficult for the customer to understand the risks involved: <https://www.eiopa.europa.eu/document-library/guidelines/guidelines-under-insurance-distribution-directive-insurance-based>

<sup>105</sup> Article 1, second sub-section, point (a) of Commission Delegated Regulation 2017/653.

<sup>106</sup> Article. 1(2)(a) of Commission Delegated Regulation 2017/653.

<sup>107</sup> Article. 30(3)(a)(i) and (ii) of IDD. The comprehension alert and the execution-only criteria are, therefore, inextricably interlinked. **It is important to note that execution-only sales per se are not allowed under IDD unless a Member State provides for a derogation. To date, only 13 Member States allow execution-only sales. The impact of criteria is therefore limited across the EU**

<sup>108</sup> Article 5(1) of Commission Delegated Regulation (EU) 2017/2358

information available to the customers belonging to that target market and their financial literacy”<sup>109</sup>, which makes necessary a link between the notion of complexity for the purpose of the execution-only regime and the notion of complexity for the purpose of the comprehension alert in the KID.

176. However, the existence of the three different sets of criteria presented above, coupled with other references made to complexity in the POG regime, make it difficult to identify complex products as they are not separate concepts in these different areas:

- In some instances the existing criteria differentiate between complexity and financial riskiness while in other instances they do not;
- They differentiate only between simple and complex products without allowing for a degree of complexity as otherwise required in the POG Delegated Regulation – more nuanced differentiation could allow for more targeted alerts rather than an approach of either with or without an alert;
- They do not differentiate between complexity related to product operation and complexity related to understanding the product from the target market’s point of view.

177. Therefore, EIOPA sees the need to have clearer objectives when considering product complexity at the regulatory level, and greater coherence in the measures introduced for achieving those objectives taking into account the need to assess complexity in the different phases of a product lifecycle. EIOPA is of the view there is a need to explore practical criteria at the level of implementation that are easier to use, so as to also take a more holistic perspective for the retail investment market. Key aspects to be explored include:

- Granularity in assigning complexity;
- The distinction between complexity related to product engineering and complexity related to understanding the product from the average customer's point of view;
- The distinction between financial/investment risk and complexity;
- Simplicity and coherence, to the extent these requirements are applicable to IBIPs, as far as possible across the practical implementation of the different legal acts.

178. Moreover, despite the regulatory requirements, issues persist in the market because:

- Some of these provisions may have not led to the desired outcome because the way in which they been designed or implemented. For example, a number of products examined by EIOPA as

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<sup>109</sup> Article 5(3) of Commission Delegated Regulation (EU) 2017/2358

part of its regular oversight work, albeit being sold with the ‘comprehension alert’ *ex Article 8(3)(b)* of the PRIIPs Regulation, are not adequately and sufficiently targeted;

- The execution only criteria do not directly address complexity in terms of product design as they are more focused on the way in which the distribution activity is carried out and the direct interface with the customer (rather than the product design process, for example);
- The comprehension alert is not designed to test the comprehension/financial literacy of the customer and it is used so often in such a wide range of products (rather than on a selective basis) that its effectiveness is very limited. This undermines the original goal of identifying those products which may be particularly difficult to understand.

179. In light of the above, while consideration should be given to promoting more coherence and addressing the issues highlighted above, EIOPA views that more might be achieved at this stage by focusing on questions of practical implementation, for instance by ensuring, through supervisory approaches, more proportionality to product complexity, as highlighted below.

### 5.3 AN EVOLVING MARKET ENVIRONMENT

180. Due to the prolonged low-yield environment, there is an increasing shift from products with guarantees – i.e. traditional insurance with profit participation – to products with limited / no guarantees that pursue higher return expectations. Insurance undertakings have therefore developed riskier product offerings and sometimes more sophisticated and complex products in order to manage policyholders' exposure to risks, whilst making products more attractive for consumers by seeking a higher return.<sup>110</sup>

181. In fact, the general decreasing trend in life insurance Gross Written Premium (GWP) observed in 2020, further enhanced the shift from products with guarantees towards unit-linked products.

- Data reported via the Solvency II Quantitative Reporting Templates shows that the drop in insurance with-profit participation (-10%) emerged as the major driver behind the decrease in life insurance GWP. Index-linked and unit-linked insurance (+2% in EIOPA's sample) grew in most Member States – above 15% in five of them.
- Qualitative information shared by NCAs and stakeholders with EIOPA for the purpose of the consumer trends work, highlights that hybrid products with lower guarantees and higher return

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<sup>110</sup> EIOPA 2021 Consumer Trends Report: [https://www.eiopa.europa.eu/document-library/consumer-trends-report/consumer-trends-report-2021\\_en](https://www.eiopa.europa.eu/document-library/consumer-trends-report/consumer-trends-report-2021_en)

opportunities play an increasingly important role, thereby indicating that pure profit participation products are slowly disappearing.

The analysis of 2021 **quarterly data** reinforces the trends observed for 2020:

- Index-linked and unit-linked GWP is 45.9% higher than pre-COVID 19 levels.
- Insurance with profit participation GWP is 14.5% lower than pre-COVID 19 levels.

182. Traditional profit participation products tended to offer higher returns alongside stable guarantees, which were generally easy for consumers to understand. However, given the current low-yield market situation and the expectation of rising inflation, they might be perceived as offering limited chance of returns by consumers in the future. Traditional with profit participation products are also less common in new contracts, with insurers shifting away given the difficulty of offering competitive returns.
183. The hybrid product category, which is slowly replacing profit participation products, is very heterogeneous both from the point of view of the underlying financial risk-return profile (closely related to the portion of the premium invested respectively in with profit participation and unit-linked components), and in terms of number and type of funds on which it is possible to allocate the unit-linked component.
184. IBIPs, in general, also include a range of protection components – not offered as separate riders and with premiums not being calculated separately – which are not limited to basic coverage in the event of death, but can include coverage of disability, critical illness, etc.
185. All this contributes to making a number of IBIPs complex to assess either for advisors or retail investors. Moreover, further difficulties can arise in assessing the adequacy of the protection cover with respect to one's needs, taking into account that these protections may have limitations, peculiarities and exclusions that could reduce the benefit for some types of policyholders.
186. In EIOPA's experience, based on observations of the market through successive Consumer Trends Reports, the Costs and Past Performance Reports, and a number of targeted oversight and general market monitoring activities, the considerable increase in complexity is resulting in an increased risk of mis-selling. More complex IBIPs, in particular unit-linked and hybrid products, have been repeatedly identified as a major area of concern in EIOPA Consumer Trends Reports.
187. The main features and issues that have been reported in relation to complexity include:
- The way performance of complex products is calculated is difficult to understand; for example, in many instances performance depends on two or more funds with different characteristics, making it difficult for a consumer to understand the different risks.

- Some products contain complex contractual phrasing/uncommon features making the surrender value/death benefit difficult to understand because the payment is often subjected to specific conditions, which, however, are not clearly explained and/or which are uncommon and difficult for consumers to understand.
- For some products there is limited clarity on the investment objectives and risks and there are explicit and implicit charges at the fund level making it difficult to understand the overall costs involved.
- Some products include a very high number of additional insurance protection options and/or many underlying investments options increasing the degree of complexity.
- Some products have complex features such as loyalty bonuses, maturity bonuses, bonuses which kick in when certain events occur and/or certain conditions are met, leading to cumbersome and non-linear structures such that the policyholder may not adequately understand the product.
- In many instances, the limited exposure to market trends offered by some products is subjected to certain conditions which may not materialize and this could be misunderstood by retail consumers leading to a mis-match between actual returns and expected returns.

188. Many of the issues highlighted:

- Lead to products requiring more customer information and more sophisticated suitability assessments (and monitoring) increasing overall distribution costs;
- Can increase the risk of mis-selling making it more difficult for consumers and distributors to make accurate choices. In fact, the more complex the products, the more accurately the target market needs to be defined. Moreover, more complex products carry more conduct risks which can in turn lead to higher mis-selling;
- Can increase the amount of information which needs to be given to consumers leading to risks resulting in information overload/choice overload;
- Have the potential to limit comparability amongst products making it difficult for consumers to understand which product best suits their need and objectives;
- Can increase the risk of mis-matches between consumers' expectations and actual returns because they limit awareness of the expected performance and the risks and benefits of the product.

189. The higher complexity has also been accompanied by higher costs and while high costs can bring added value when associated with some specific features, e.g. for highly specific risk profiles that might be sought by some niche investors – there are also higher conduct risks – i.e., the costs can significantly impact returns leading to a mis-match between actual and expected returns.

190. For many of the products analysed by EIOPA as part of its market monitoring work, costs are generally high leading them not to break even except where unrealistically high returns are

assumed. Certain products that have been the subject of cooperation platform work and/or EIOPA's higher scrutiny have very high costs:

- Some of the products analysed by EIOPA have costs that account for more than 50% of total premium paid requiring a minimum yearly average return of 4 to 5% to break-even over a period of 20 years. This means that such products, based on a holding period of 20 years, are burdened with a RIY of 4 to 5%.
- Similarly, products with high upfront/distribution (i.e. above 8%) depending on the holding period only break even with yearly average returns above 4 to 5% and not for all policyholders – i.e. elderly policyholders may not be able to reach break-even.

191. The Costs and Past Performance Report 2021<sup>111</sup> has shown that:

- By looking at the cost breakdown, according to the classification of costs in the KID:
- “Other ongoing costs”<sup>112</sup> are higher for unit-linked products, being the most prominent cost component.
- Entry costs are higher for profit participation products.
- By looking at costs classified by their cause/nature, based on information for 117 unit-linked products and for 36 profit participation products for which this breakdown was available:
- In RIY terms, the most prominent cost element are administrative costs for both unit-linked (1.0%) and profit participation products (0.7%).
- Distribution costs are also high, representing the second most prominent cost element for both product categories and accounting for, in RIY terms, 0.8% of total unit-linked costs and for 0.5% profit participation costs.
- Biometric risk costs are lower and on average equal between unit-linked and profit participation products.
- Finally, ‘other costs’, which mainly correspond to investment management costs, are similar for both product categories.
- There is a significant gap in between products and Members States in relation to costs indicating that, for some markets/some products, there are clear cost-efficiency problems:
- Unit-linked products range from below 1% in some markets in RIY at recommended holding period terms to almost above 3.5% in other markets in average terms, with some products having over 9% RIY;
- Profit participation products range from below 0.5% in some markets in RIY at recommended holding period to almost 3% in other markets in average terms, with some products having over 4% RIY.

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<sup>111</sup> [https://www.eiopa.europa.eu/document-library/costs-and-past-performance-report/cost-and-past-performance-report-2021\\_en](https://www.eiopa.europa.eu/document-library/costs-and-past-performance-report/cost-and-past-performance-report-2021_en)

<sup>112</sup> This category covers on-going costs that are not classified as transaction costs. This can include investment, administrative and distribution costs that are charged on an on-going (annual) basis on the product.

192. Overall, EIOPA also observes that measures introduced to protect consumers may have not led to the desired outcome for IBIPs. For example, as explained in Section 5.2, although the comprehension alert was originally designed to highlight those products that are particularly difficult to understand by retail investors, EIOPA currently observes in the case of IBIPs, that the comprehension alert is not being used selectively, but it is rather being used as a general alert for most IBIPs<sup>113</sup>. Thus, the comprehension alert's original objective to identify those products that are difficult to understand is undermined since it is applied to a wide range of product (rather than on a selective basis) that its effective impact is very limited.

## 5.4 POSSIBLE SOLUTIONS FOR A MORE COHERENT APPROACH

193. EIOPA has identified that there is a real consumer risk related to the high level of complexity and high costs, especially given the long term nature of some IBIPs, particularly relevant for personal pensions which qualify as IBIPs in certain Member States.

194. EIOPA is of the view that existing regulatory requirements, while aiming at addressing the issues highlighted, have not attained the desired outcomes because the way in which they have been designed or implemented. This is not only leading to consumer detriment but it is also hindering the Capital Markets Union. In fact, simpler and cheaper products require economies of scale, addressing issues around complexity and cost-efficiency for IBIPs are also a precondition to channel retail investments into the capital markets.

195. As result EIOPA considers that there is a need to re-think how to assess complexity throughout the product lifecycle to ensure coherence but also to ensure that specific aspects, relating to ensuring complexity is addressed sufficiently in the different stages of a product lifecycle, are sufficiently addressed.

196. To this extent, EIOPA envisages further Level 1 or Level 2 intervention in the future, as highlighted in Section 5.2. However, EIOPA also considers a number of measures by focusing on the practical implementation of existing requirements and by ensuring more proportionality in supervisory approaches to mitigate and address the risks identified.

197. EIOPA has considered three different options presented below, followed by an assessment of their respective advantages and disadvantages. These are:

- **Option 1:** Regulatory *status quo* - maintaining the current supervisory framework based on targeted and market-wide supervisory interventions;

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<sup>113</sup> This has come out of the findings from a large number of stakeholders in the ESAs' recent Call for Evidence on the PRIIPs Regulation: [https://www.eiopa.europa.eu/media/news/esas-invite-stakeholders-input-priips-review\\_en](https://www.eiopa.europa.eu/media/news/esas-invite-stakeholders-input-priips-review_en)



- **Option 2:** Introduce further Level 3 Guidance on a number of aspects, including following possible Level 1 changes presented in Section 3. The Level 3 Guidance would aim at introducing further proportionality in supervisory approaches aimed at: (i) mitigating risks relating to product complexity and (ii) promoting cost efficiency;
- **Option 3:** The same approach as for Option 2, but accompanied by additional measures to promote more proportionality and facilitate simplicity, including following possible Level 1 changes presented in Section 1, in Section 3, and in Section 4.

#### 5.4.1 Option 1 – Regulatory status quo

198. As already highlighted in its value for money supervisory statement<sup>114</sup> and in its Opinion on the proposed product intervention measure of the Komisja Nadzoru Finansowego (KNF) of Poland<sup>115</sup>, EIOPA is of the view that if adequately implemented in a consistent manner across the EU, the current regulatory framework could assist in promoting simpler and cost efficient products.
199. In particular, considering the current IDD framework is relatively new, EIOPA explored continuing identifying measures to promote simplicity and cost efficiency via supervisory interventions which could range from targeted supervisory interventions, when issues emerge in relation to specific products and/or insurance undertakings, to broader market wide measures to address more structural issues.
200. EIOPA has already taken a number of actions to this extent, which include specific oversight interventions carried out jointly with NCAs and the market-wide work on value for money. NCAs have also intervened; however in carrying out this work a number of issues also emerged:
- As highlighted in the Opinion on the proposed product intervention measure of the KNF of Poland *“Product manufacturers pursue various methods to product testing resulting in different levels of consumer protection across the market. Clarifications, guidance and detailed specifications would be needed to ensure that insurance product manufacturers apply the principles in a consistent manner across the market, so as to achieve consistently high levels of consumer protection”*.<sup>116</sup>
  - Some NCAs are of the view that further guidance is needed to more successfully supervise existing requirements in order to challenge insurance product manufacturers.

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<sup>114</sup> [EIOPA sets out a framework for delivering better value for money in a consumer-centric way | Eiopa \(europa.eu\)](#)

<sup>115</sup> [Opinion of the European Insurance and Occupational Pensions Authority on the proposed product intervention measure of Komisja Nadzoru Finansowego of Poland | Eiopa \(europa.eu\)](#)

<sup>116</sup> [Opinion of the European Insurance and Occupational Pensions Authority on the proposed product intervention measure of Komisja Nadzoru Finansowego of Poland - EN \(1\).pdf](#)

## 5.4.2 Option 2 and Option 3

201. EIOPA has looked at the potential for addressing and/or mitigating risks stemming out of product complexity looking at measures which would provide further guidance, including via the issuance of formal guidelines, to insurance product manufacturers on how they should place their products on a complexity scale for product manufacturing purposes.
202. Considering the fact that the POG Delegated Regulation refers to product complexity, EIOPA considers it may be necessary to develop further Level 3 Guidance – without developing additional criteria given the already complex legal framework – on how manufacturers can put their products on a complexity scale. This guidance would be followed by further Level 3 Guidance, including through formal guidelines, as outlined below with sections 5.4.2.1 and 5.4.2.3 being relevant for both Option 2 and 3 and section 5.4.2.2 being relevant solely for Option 3.

### 5.4.2.1 Mitigating risks relating to complexity

203. In relation to mitigating risks relating to complexity, EIOPA has considered developing further Level 3 Guidance whereby:
- For products identified as more complex, more guidance under existing product oversight and governance requirements would be provided for manufacturers on how risks relating to product complexity could be mitigated via the different POG phases.
  - For products identified as more complex, more guidance defining requirements for insurance product manufacturers to carry out an enhanced target market assessment, which could include aspects, such as:
    - Carrying out behavioural and market research to ensure that the more complex product features are reflective of a target market need;
    - Taking into account specific criteria (which could be defined in Level 3 guidance) as part of the target market assessment.
  - For products identified as more complex, more guidance defining product monitoring requirements and the type of remedial actions to be taken including the need for the manufacturer to provide financial redress, in case consumers detriment materialises under Article 7.3 of the POG Delegated Regulation, when mis-selling materializes because of mis-targeting marketing in relation to complexity.
204. In addition to the above Level 3 measures, for products identified as highly complex and highly risky, EIOPA has also considered the introduction of restrictions or a ban on inducements for which the approach and the pros and cons and highlighted in Section 3 should be borne in mind.

#### 5.4.2.2 Promoting simplicity

205. EIOPA has explored which potential measures could be introduced to incentivize the development of products which could be considered simpler.
206. In particular, EIOPA has considered whether it would be possible to ensure more proportionality, by also introducing further Level 3 Guidance, for products showing a lower degree of complexity. The main objective of making such requirements more proportional would be to incentivize providers and distributors in developing less complex products as well as limiting the burden on consumers to ensure the envisaged outcomes are achieved. This with the view of facilitating access, whilst not lowering requirements, for less complex IBIPs. An additional benefit would be to cut sales related costs, which would also address cost-efficiency related aspects.
207. Proportionality in supervisory approaches would in particular relate to:
- The distribution strategy/monitoring carried out by manufacturers and the advice process. This could be further specified in Level 3 Guidance and via the development of a common supervisory position whereby supervisory scrutiny on distribution related requirements would be proportional to the level of complexity of the product.
  - Under this guidance, manufacturers, in their distribution strategy, could provide information to distributors on whether, based on the complexity of the product, detailed advice might need to be provided to customers to facilitate both customers' and the distributor's overall comprehension of the product, and supervisory authorities would be able to determine the adequateness in a proportional manner in their supervisory process. It is important to note, however, that more proportional advice should not result in a lower level of consumer protection. Rather, this should result in the adaptation of questionnaires and material used to identify if a product is suitable for a consumer with aim of achieving good outcomes, namely that consumers are more engaged and advice is provided in a more effective manner.
  - Information requirements on documents which manufacturers and distributors would be required to give consumers – if a layered approach to disclosure is adopted in the future legislative framework and relevant Level 1 changes are made as presented in Section 1. In particular, it would be envisaged that for simpler products targeted at retail investors with less experience more targeted information would be provided. Prior to issuing the guidance, consumer testing would need to be carried out to determine the different types of information which would need to be given to consumers in the sale process in light of the complexity of a product/target market needs.

### 5.4.2.3 Promoting cost-efficiency

208. EIOPA has explored which potential measures could be introduced to incentivize the development of cost-efficient products. While introducing the above aspects for Option 3 should lead to more cost-efficiency and lower costs, EIOPA has also explored additional measures which could be introduced to promote more cost-efficiency.
209. EIOPA has considered whether it would be possible to introduce caps on product costs in return for labelling the product as simpler, which would be a similar approach to that taken for the Basic PEPP. However, there is a significant risk that this type of label / the proposition of simpler products will not be taken up by the market because the commercial opportunities it could provide are not sufficient to compensate for the constraint created on the level of costs.
210. Absolute caps on product costs could also be considered according to different products features and notably their risk classes. Indeed, it could prevent the most excessive pricing abuses without harming product diversity and innovation too much if the caps are properly calibrated and the different categories of products to which they apply adequately defined.
211. Nevertheless, there are also significant risks and challenges which may not lead to the desired outcome. This include the fact that:
- The IBIP market is diverse and it could be difficult to properly define limits for all IBIPs;
  - Introducing caps could lead to the risk that very specific products/features would no longer be distributed at least for a period of time because their costs are currently too high, creating a risk of supply gap for this very specific markets.
212. In addition, costs caps could involve the risk of herd behaviour (all manufacturers putting their costs at the maximum) and could be counterproductive in this respect.
213. Given the issue above, EIOPA has explored whether there may be other solutions aimed at addressing cost-efficiency. In particular, EIOPA sees it may be useful to develop further Level 3 Guidance on how insurance product manufacturers should assess their costs in the product testing phase. This would include the need to create a linkage between the definition of costs and the service provided in relation to such costs, at least for the product manufacturer and distributor (i.e., the disclosure of costs could continue to follow the current PRIIPs categorization).
214. The objective of creating this linkage would be that supervisors could then more closely compare costs and assess whether costs are due and proportional as stated in EIOPA’s supervisory statement

on value for money.<sup>117</sup> In particular, EIOPA sees the importance of, for at least products showing a medium to high degree of complexity, requiring the manufacturer to clearly identify and ‘single out’:

- **Distribution costs**, which cover costs arising from marketing and selling products, including the costs and fees related to providing advice and generally upfront costs charged to consumers.
- **Administrative costs** which cover those costs arising from an undertaking’s activities when managing policies, collecting premiums, providing information and paying out surrenders, including fixed costs which should be estimated in relation to the product/service offered.

215. The objective would be to allow supervisors to monitor whether the proportionality between the services offered, costs incurred and the costs charged to the consumers has been met. In fact, introducing this approach alongside layered disclosures and more proportional supervision of advice-related requirements could enable cost containment.

216. Moreover, for more complex products – i.e., those products with the highest degree of complexity – further Level 3 guidance on the granularity of information required in relation to cost disclosures could be developed. In particular, this would explore:

- Guidance to manufacturers on how to explain the details of all costs to distributors as part of the documents to be provided in line with Article 8 of the POG Delegated Regulation; and
- Guidance to distributors on how to explain in details to retail consumers all product related costs.

#### 5.4.3 Advantages and disadvantages of the three different Options

217. All three Options presented above have been carefully and duly considered by EIOPA. They all present some advantages and disadvantages which are explored in Table 2.

**Table 2 – Advantages and disadvantages of Options for measures to facilitate the sale of simpler and more cost efficient products**

Option	Advantages	Disadvantages
<b>Option 1 (Regulatory status quo and maintaining the current supervisory framework based on targeted and</b>	Allow the current framework to further mature and the market to further work in implementing existing measures whilst avoiding that more proportionality in implementing existing measures could lead to	As highlighted in the Opinion to the KNF, supervisory interventions could be lengthy and they may not be implemented in a convergent manner across Member States as also

<sup>117</sup> [Supervisory statement on assessment of value for money of unit-linked insurance products under product oversight and governance | Eioipa \(europa.eu\)](#)

Option	Advantages	Disadvantages
<b>market-wide supervisory interventions)</b>	an increase in the sale of riskier products. This would allow for more flexibility given the diversity in national markets.	highlighted by EIOPA cross-border cooperation work. Some of the requirements which have been envisaged in the IDD to prevent mis-selling and promote the sale of products aligned with customers’ needs may continue being implemented following a compliance-based approach – i.e., same approach for all products – rendering the envisaged objectives redundant. Given the lack of further guidance in relation to the notion of complexity/financial literacy of the target market envisaged in the POG Delegated Regulation, supervisory challenges could emerge when manufactures are challenged on the way in which they identified complex vs. non-complex products.
<b>Option 2 (Introduce further Level 3 guidance on a number of aspects to introduce further proportionality in supervisory approaches)</b>	A more convergent supervisory approach and actions to address the risks relating to complexity and high costs without raising concerns in relation to proportionality in the sales process.	This approach does not fully address the request of the European Commission to assess the possibility to promote the marketing and sale of “simpler, cost-efficient, insurance-based investment products.
<b>Option 3 (Same approach as for Option 2, but accompanied by additional measures to promote more proportionality and facilitate simplicity)</b>	By promoting a more proportional approach towards the supervision of POG and sales related requirements, it would allow a more consistent outcomes-focused approach which may better lead to the objective envisaged in the IDD. In particular, it would ensure that for simpler products while advice and information are sufficiently and adequately given, this process is not followed for compliance purposes. Rather it would ensure these requirements are implemented sufficiently and in a proportional manner limiting the burden on manufacturers, distributors and consumers.	Concerns exist that while the proposed approach might facilitate marketing and sale of simpler and more cost-efficient products, if not applied uniformly – considering the different approach to proportionality – it could lead to a weakening of the level of consumer protection currently granted by the IDD to all the IBIPs and this could also lead to serious consumer detriment by facilitating the commercialisation of riskier simpler products. Some NCAs are also of the view that despite the fact that manufacturers are required to identify which products are complex and which are not, the mere introduction of Level 3 Guidance could raise challenges in some markets as it would require supervisory judgement, leading to the possibility of creating a supervisory arbitrage. Indeed, according to this approach, this would also result in a challenging assessment for the

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Option	Advantages	Disadvantages
		Supervisors of the correct application of the above-mentioned Level 3 Guidance for each kind of product, with high costs in terms of time and resources.

## 5.5 PROPOSED ADVICE TO THE EUROPEAN COMMISSION

- EIOPA is of the view that identifying measures to promote simpler and cost-efficient IBIPs is difficult because there are currently different regulatory frameworks applicable to product complexity. A product can be complex when its target market is defined or implemented, when the disclosure documents are prepared and / or when it is sold. Hence, while nuances could be envisaged more coherence amongst these different frameworks is necessary – such a coherence should carefully reflect key aspects that need to be taken into account when determining where a product falls in the complexity scale in the different stages of a product lifecycle.
- Given the current framework was developed taking into account criteria originating from the securities market, there are clear indications as some of the mitigating measures envisaged may have not led to the desired outcome (e.g., excessive use of the comprehension alert in many IBIPs).
- EIOPA would like to have a clearer notion of the objectives when considering product complexity and cost-efficiency. This would entail the need to explore, in Level 1, the idea of a new set of criteria that is easier to apply/implement.
- Despite the above, EIOPA is also of the view that under the current regulatory framework further measures could be adopted to promote a more convergent approach in order to mitigate complexity and promote simplicity and cost efficiency.
- To this extent, the following different Options have been identified:
  - Option 1: Maintaining the current supervisory framework based on taking targeted supervisory measures and market-wide interventions without, however, issue further Level 3 Guidance in the form of more binding convergence tools such as Guidelines.
  - Option 2: Introduce further Level 3 guidance on a number of aspects to ensure further proportionality in supervisory approaches, including where relevant in the form of more binding convergence tools such as Guidelines. This would cover aspects relating to:
    - Manufacturers' obligation to put products on a complexity scale in line with POG requirements;
    - For more complex products, manufacturers' obligation to develop adequate risks mitigation strategies to limit conduct risks under POG requirements;
    - For more complex products, manufacturers' obligation to carry out an enhanced target market assessment;



- For more complex products, manufacturers' obligation to perform enhanced monitoring requirements and the type of remedial actions to be taken;
  - For more complex products, how to clearly identify costs to assess the extent to which costs are due and how to improve cost disclosures.
- In addition to the above Option 3 also proposes to develop further Level 3 Guidance for simpler and low-risk products to have a more proportional approach towards the supervision of requirements related to the distribution strategy. The more proportional approach could result in a common supervisory position whereby supervisory scrutiny on distribution related requirements would be proportional to the level of complexity and taking into account the riskiness of the product, whilst not lowering the level of consumer protection. Under this guidance manufacturers in their distribution strategy based on the complexity of products could identify different levels of details for the suitability assessment to be carried out.
- For Option 3 same approach as for Option 2, but accompanied by additional measures to promote more proportionality and facilitate simplicity. In addition, if Level 1 changes are made opting for a layered approach towards disclosure, further Level 3 Guidance could be provided for simpler and low-risk products to follow more proportional information requirements.

Finally, in addition to the above and also in light of the advice provided in Section 3, consideration could be given to limitations or a ban on inducements to highly complex or highly risky products or consider alternative intervention measures such as a moratorium regarding the marketing of such products.

## 5.6 QUESTIONS FOR THE PUBLIC CONSULTATION

Q17. Do you agree with EIOPA's interpretation of complexity and cost efficiency in light of the changing market environment?

Q18. Do you agree with EIOPA's assessment of the types of products and/or products features which could be considered simpler?

Q19. How would you, as an external stakeholder, define simpler and cost-efficient products? Could you please provide concrete examples of products that you consider simpler and cost-efficient?

Q20. Do you consider, as an external stakeholder, that other measures could be more effective in ensuring cost efficiency? Examples of such measures could include amending the wording of the POG Delegated Regulation and state more clearly that, in the product testing, manufacturers should also assess whether costs may be too high and hence not to fit for any target market

Q21. Do you agree with the advantages and disadvantages of the different options proposed? Are there additional aspects which should be highlighted?

## LIST OF CONSULTATION QUESTIONS

Q1. What do you consider currently to be the most burdensome duplicative requirements between the different legislative frameworks? Do you consider there to be any duplicative disclosures which EIOPA have identified above between different legislative regimes to be not particularly burdensome for insurance undertakings or insurance intermediaries to comply?

Q2. EIOPA can see some specific benefits in disapplying a number of disclosure requirements in the Solvency II Directive and the DMFSD and rationalising any remaining requirements in the IDD. Do you agree with this approach?

Q3 Notwithstanding this proposed approach in Q2, do you consider that there is an element of personalization under the provisions in Solvency II Directive that would justify delivery of personalized information separately and in addition to the generalized information in the PRIIPs KID?

Q4. Do you agree that to address the current gap on periodic disclosures, it makes sense to require the disclosure of an “annual statement” which could include information on paid premiums, past performance, current value of the savings, as well as adjusted projections?

Q5. Do you agree with the proposed list of “most vital” product and intermediary information? If not, what elements do you identify as being “most vital”, that is essential information that is most critical for consumers to read?

Q6. Do you currently see specific issues with misleading advertisements and marketing material in relation to the sale of IBIPs, which would merit specific regulatory treatment and if so, which aspects?

Q7. Do you agree on the current level of development of the market for online platforms distributing IBIPs? If not, please could you provide examples of where you see evidence of online platforms selling IBIPs at present and how you see this impacting the customer journey and if possible, any quantitative data you can provide on this distribution channel.

Q8. Do you see the potential for the growth of open architecture models for the sale of IBIPs in the future and if so, in relation to which types of products?

Q9. Do you share EIOPA’s assessment of the types of risks that could arise in the context of the growth of more diverse distribution channels for IBIPs? Are there any risks which you see arising, but which EIOPA has not identified in this paper?

Q10. Do you agree with EIOPA’s analysis of differences between IDD and MiFID II? Are there any other differences not mentioned which you consider to be relevant?

Q11. Do you have any views on EIOPA's analysis of the structure of different distribution models for the sale of IBIPs in the EU?

Q12. Has EIOPA captured, in your view, all relevant policy options? Do you agree with the different pros and cons listed for these options and the potential impacts indicated for these options? Are you in favour of any particular options or combination of options? Are there any other policy options and pros and cons to be considered in your view?

Q13. Where do you see the most significant overlaps lie between the demands and need test and suitability assessment and what can be done to address these overlaps?

Q14. Do you see scope for streamlining the suitability assessment and in what way, could digitalisation be harnessed to make advice on IBIPs more affordable?

Q15. Do you see any specific risks for consumers in streamlining the advice process further?

Q16. What is your view on possible demand-side solutions to facilitate the provision of affordable advice on the sale of IBIPs and support wealth management, such as financial guidance and what benefits could this bring?

Q17. Do you agree with EIOPA's interpretation of complexity and cost efficiency in light of the changing market environment?

Q18. Do you agree with EIOPA's assessment of the types of products and/or products features which could be considered simpler?

Q19. How would you, as an external stakeholder, define simpler and cost-efficient products? Could you please provide concrete examples of products that you consider simpler and cost-efficient?

Q20. Do you consider, as an external stakeholders, that other measures could be more effective in ensuring cost efficiency? Examples of such measures could include amending the wording of the POG Delegated Regulation and state more clearly that in the product testing manufacturers should also assess whether costs may be too high and hence not to fit for any target market

Q21. Do you agree with the advantages and disadvantages of the different options proposed? Are there additional aspects which should be highlighted?

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