CNMV
COMISIÓN NACIONAL DEL MERCADO DE VALORES

Questions and answers on the implementation of the MiFID II Directive

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INDEX

This document is not regulatory. Its purpose is to transmit to the sector and, in particular, the entities providing investment services, interpretation criteria for the proper implementation of the requirements that according to Directive 2014/65/EU (MiFID II) should be applied from 3 January 2018.

1. INTRODUCTION

CNMV has been in contact with the main associations of the sector related to the provision of investment services in recent years in order to identify and collate MiFID II issues that may raise doubts or concerns about their interpretation prior to the entry into force of this Directive.

Given the imminent entry into force of MiFID II, CNMV is publishing a set of questions and answers on various issues that the sector has raised based on the information currently available.

This document sets out the interpretative criteria that are considered appropriate in relation to the issues raised, although these could be affected depending on the final text of the transposition into the Spanish legal system of the MiFID II regulations. It should also be borne in mind that issues relating to the interpretation of the MiFID II regulations continue to be discussed within ESMA in order to achieve adequate supervisory convergence.

For all these reasons, the criteria set out in this document shall be reviewed once more information is available, both with regard to transposition into the Spanish legal system and the interpretation at European level of the issues under discussion.

To the extent that other issues are considered necessary to clarify, they will be added to this question and answer document with an identification of the update date.

Main Abbreviations List

PRIIPs	Packaged Retail and Insurance-based Investment Products
KID	Key Investor Document
KIID	Key Investor Information Document
UCITS	Undertakings for the Collective Investment of Transferable Securities
AIFMD	Alternative Investment Funds Managers Directive
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU http://cnmv.es/portal/MiFIDII_MiFIR/MapaMiFID.aspx
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 http://cnmv.es/portal/MiFIDII_MiFIR/MapaMiFID.aspx
Delegated	Commission Delegated Regulation (EU) 2017/565 of 25 April 2016

Regulation/RD	supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive http://cnmv.es/Portal/MiFIDII_MiFIR/ESI-Actos-Delegados.aspx
Delegated Directive/DD	Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council 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 http://cnmv.es/Portal/MiFIDII_MiFIR/ESI-Actos-Delegados.aspx
ESMA Q&As	ESMA Questions and Answers On MiFID II and MiFID investor protection and intermediaries topics http://cnmv.es/Portal/MiFIDII_MiFIR/ESI-FAQ-ESMA.aspx
Delegated Regulation of PRIIPs	Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0653&from=EN
Q&A´s on the KID of PRIIPs	Preguntas y respuestas sobre el Documento de Datos Fundamentales para el Inversor en relación a productos PRIIPs, publicadas por el Joint Committe of the European Supervisory Authorities https://esas-joint-committee.europa.eu/Pages/Activities/Packaged-Retail-and-Insurance-Based-Investment-Products.aspx

2. PRODUCT GOVERNANCE REQUIREMENTS

2.1. Are the product governance requirements established in Article 9 of the Delegated Directive (hereafter, DD) for manufacturers applicable to Collective Investment Scheme Management Companies (CISMCs)?

CNMV considers that, in accordance with Recital 16 of the Delegated Directive, the product governance requirements established in Article 9 of the DD for manufacturers also apply to CISMCs to the extent that they market or provide an investment service in relation to the CISs they manage.

2.2. What information must a distributor provide to an entity as a manufacturer of financial instruments (hereinafter, FIs) not subject to MiFID?

In cases where the manufacturer is not subject to the requirements of MiFID manufacturers, Article 10(2)(3) of the DD states that distributors must take all reasonable steps to ensure that they obtain adequate and reliable information from manufacturers not subject to MiFID II in order to ensure that the products are distributed according to the characteristics, objectives and needs of the target market. Where the relevant information is not publicly available, the distributor shall take all reasonable steps to obtain such information from the manufacturer or its agent. Acceptable and publicly available information will be that which is clear and reliable and is prepared to meet regulatory requirements.

For its part, section 62 of the Product Governance Guidelines establishes that the information contained in the documents prepared in accordance with the requirements of the Brochures Directive, Transparency Directive, UCITS Directive and AIFMD or other equivalent legal documents of third countries. It also determines that if all relevant information were not publicly available, it would be reasonable to conclude an agreement with the manufacturer or its agent.

These obligations to obtain information from the manufacturer must be applied proportionally depending on the level of complexity of the product.

2.3. Should the distributor of an FI in any case provide information to the manufacturer on the sales of the FIs?

CNMV considers that, to the extent that the manufacturer is not obliged under MiFID II to process the information that may be received from the distributor (as an entity not subject to MiFID), the receipt of such information must be understood as a good practice. In this case, it is the distributor that has to review its product governance procedures to ensure that they remain robust and meet the objectives, so that appropriate action is taken if necessary.

2.4. Should the target market be defined at the level of the portfolio or at the level of each of its products?

The definition of the target market must be established for each product. However, when considering the product's compatibility with the client, the level of the portfolio can be taken into account in the case of portfolio management or portfolio-based advice

(see the ESMA Product Governance Guidelines).

2.5. In the case of customized products for eligible counterparties, e.g. portfolio management or advice for an eligible counterparty, are product governance obligations also applicable?

On the one hand, it should be noted that according to the answer 78 of the Commission Q&As document regarding Directive 2004/39/EC (MiFID I), the eligible counterparty category only applies in relation to the services identified in Article 24(1), i.e. reception and transmission of orders, dealing as agent and dealing on own account. It does not apply in a situation of investment advice or portfolio management.

On the other hand, the product governance obligations set forth in Art. 16.3 of MiFID II apply regardless of the nature of the client. The Product Governance Guidelines address the application of target market requirements for entities operating with eligible counterparties in paragraphs 75 et seq.

2.6. If portfolio management is delegated to a CISMC by an IF or a credit institution, do the product governance obligations apply to the CISMC to which it has been assigned?

Yes, they do apply, the treatment is identical if the delegated entity is a CISMC (which provides the portfolio management service) or an IF. In accordance with Article 31 of the Delegated Regulation (hereinafter, DR) on outsourcing of relevant operational functions, the IF or credit institution that delegates is fully responsible for ensuring compliance with the product governance obligations. Compliance with these obligations is also the responsibility of the entities to which the provision of the investment service is delegated and apply to portfolio management even when the client of the entity to which it is delegated is an eligible counterparty. In order to ensure compliance with these obligations by the delegated entity (CISMC in this case) responsibilities should be clearly assigned in a written agreement with the IF or credit institution.

3. INCENTIVES

3.1. Would the incentive rules apply in the case of a distribution model in which there is vertical integration?

CNMV considers that the new regulation of the perception (or prohibition) of incentives cannot be avoided through vertical integration practices, in which the explicit payment of incentives by the CISMC to the group marketer is simply abolished without the other conditions in the provision of services being modified. The economic fund would be the same, since the bank would provide the management company with a service (the distribution of its CISs) which, instead of being paid explicitly through the fee rebate, would be paid via dividend distribution or reserve accumulation in the subsidiary.

In particular, it is understood that there will be an incentive, to which the corresponding regulations would apply, when the distributor does not expressly receive a reversal from the CISMC, or receive an abnormally low reversal, through the marketing of CISs whose management fees are the same (or similar) to those that would exist with an express

remuneration policy, or when they exceed those normally applied in the market for similar CISs that do not generate rebates (clean classes), taking into account a reasonable margin differential between management companies.

3.2. Is a CISMC that distributes CISs from third parties subject to the rules on incentives?

Yes. CISMCs that market CISs or provide investment services must comply with the obligations related to incentives set out in Article 24, sections 7(b), 8 and 9 of MiFID II and Articles 11 and 12 of the Delegated Directive.

3.3. Are the incentive registration obligations additional to the content of the incentive register of the CNMV Resolution of 7 October 2009 or, conversely, can they already be understood as included in the current incentive register?

Yes. The registration obligations of Article 11(4) of the Delegated Directive (DD) deal with matters additional to those included in the CNMV Resolution of 7 October. The DD establishes that it is necessary to record how the payments granted or received by the entity or those that the entity tries to use, reinforce the quality of the services provided to the clients and the steps adopted so as not to damage the duty of the entity to act in a way that is honest, fair and professional in accordance with the best interests of the client. In section 20 of the CNMV Resolution of 2009 registration refers only to the communications issued to clients on incentives granted or received and client requests for information on incentives.

3.4. Should the remuneration that a tied agent would receive from an entity be considered as an incentive?

The remuneration received by agents of an entity for the provision of investment services or ancillary services to clients on behalf of the entity are not considered incentives but, in accordance with the criteria set out in the ESMA Guidelines on Remuneration Practices and Policies (published in June 2013), they are considered as an internal payment of the entity, and not as a payment to a third party.

3.5. How should the term "wide range of suitable instruments" be understood for the purpose of fulfilling the obligation contained in Article 11(2)(a) of the DD? Would this requirement be fulfilled if all the instruments were CISs, without the need for any type of financial instrument other than a CIS, when there is adequate diversification in terms of investment vocations, risk profiles, geographical and sectoral areas, etc.?

The concept of a wide range of instruments is a concept that has not been specified in Level 2 regulations or in the ESMA Q&As. In principle, CNMV considers that the requirements established in Art. 24.7.a of the Level 1 Directive and Art. 53 of the Delegated Regulation (DR) regarding the consideration of independent advice could be used as a reference. The Directive states that they must be sufficiently diversified by type of product and issuer or supplier and in the DR there are several conditions that could serve as a reference: (i) that they are adequately representative of the financial instruments available on the market and (ii) that for the selection of products all relevant aspects such as risks, costs and complexity have been considered, as well as the

characteristics of the entity's clients.

In addition, it should be considered that, in accordance with Art. 53 of the RD, it would be possible to meet this "wide range of suitable financial instruments" requirement by offering a single type of financial instrument provided that the investment service being provided to the client (in this case, non-independent advice or marketing) is circumscribed to that type of financial instruments, which is considered appropriate for the client and in which the client has expressed interest.

3.6. In the event that new classes of CIS shares are issued in order to comply with the prohibition of incentives, what entity (the CISMC or the distributor) should urge the exchange of the shares in question?

The CISMC must communicate to the distributors the issuance of new share classes and the distributor is responsible for urging the exchange of the shares in question.

3.7. **¿How should the prohibition of the perception of incentives in the discretionary management of portfolios be applied as from the entry into force of MiFID II in relation to third-party payments from positions arising from transactions carried out prior to 3 January 2018?**

CNMV considers that portfolio managers will not be able to continue receiving and retaining incentives from third parties for positions that arise from transactions made prior to 3 January 2018. In relation to this issue it should be noted that in MiFID II there is no transitional clause or grandfathering in this regard.

4. INDUCEMENTS IN RELATION TO RESEARCH

4.1. What should the periodicity of the budget be? Annual or could it be less than a year or multi-annual?

Article 13(1) of the DD states that the entity receiving the research service must annually report the costs to the clients. In this regard, it does not seem appropriate to prepare multi-annual budgets; rather they should be drawn up with a periodicity equal to or less than one year.

4.2. How can the agreement between the entity and the client on the budget and its method of payment be formalized?

Art. 13.5 of the DD states that the charge for research budgeted by the entity and the frequency of the charge in each year may be agreed with the clients, in the management agreement or in the general conditions of the contract. These documents could also include the method of payment.

4.3. What should the content of the written policy on the research incentives of an entity be?

Art. 13.8 of the DD states that the policy to be provided in writing to clients shall include all the elements necessary to assess the quality of the research purchased based on

robust quality criteria and its ability to contribute to better investment decision-making. It will also address the extent to which the research can benefit clients' portfolios and the approach to allocate costs fairly among client portfolios.

4.4. What criteria for allocating the cost of research between clients of the entity could be considered valid?

An allocation criterion included in the ESMA Q&A 1 and 10 on "Inducements (research)" is that it be a transparent method that is set out in writing in the research policy provided to the client. But the main requirement to take into account is that it must be a fair method for allocation among client portfolios. ESMA indicates that the research budget can be established for a group of client portfolios or accounts that have similar third-party research needs. The budgeted cost could be prorated among all client accounts benefiting from the research, based, for example, on the value of each client's portfolio. Other elements that could also be valued are the expected relevance of the research to certain investment strategies or the level of use by individuals or teams that manage or advise certain portfolios or accounts. Under no circumstances is it possible to use the intermediate volume, the number of transactions or the cost of intermediation as criteria.

In any case, institutions should not draw up an research budget for a group of client portfolios or accounts that do not share sufficient investment objectives or similar research needs. For example, when portfolios have material differences in the types of financial instruments or geographic regions or market sectors in which they can invest or are investing.

4.5. In what way and in what detail should the "ability to contribute to the adoption of a better investment decision" be justified in the management and assessment of the RPA [Research Payment Account]?

The justification must be made in writing and in sufficient detail so that the entity can justify to CNMV that the research received is useful for the adoption of investment decisions.

4.6. Would it be possible for an entity to have different criteria for allocating research expenditure according to the type of products? That is, if an entity is provided with research that is used for different products (managed portfolios, Pension Funds, EPSV (individual pension plans), CISs), would it be possible for the cost of the research of some of them to be borne by the client and the research of others by the entity?

We see no impediment provided that the requirements are met and, therefore, the different allocation criteria are duly informed and justified. Art. 13 of the DD states that the analyses provided by third parties will not be considered an incentive if they are received in exchange for: (i) payments with funds of the entity itself or (ii) payments of an RPA (Research Payment Account) controlled by the entity that meet the established operating conditions.

4.7. Does the inclusion of the research in the prospectus of a CIS as an expense borne by the Investment Fund require the right of separation to be granted to the unitholders

of said Fund?

In the case of a fund whose prospectus already envisages the existence of intermediation fees that incorporate the research service, the substitution of the above with the research expense (separate from the management fee) would not grant the right of separation when it does not involve an increase in expenses, provided that the management company can prove this and send a statement to CNMV to that effect.

If it is a question of funds whose prospectus does not envisage that brokerage fees incorporate the research service, the inclusion for the first time of the research expense would lead to the unitholders being granted the corresponding right of separation since it entails an increase in the expenses charged to the fund.

4.8. How can one determine when the research in relation to fixed income securities should be considered as an incentive?

ESMA Q&A 9 on "Inducements (research)" considers that for fixed income, currency and commodities (FICC) products, material produced in relation to these FICC markets could be considered as research or as a minor non-monetary benefit. For this type of product there is no established market practice with regard to the inclusion of research costs in explicit execution fees. ESMA also considers that there are many similarities between the macroeconomic reports and the FICC research. It would therefore be a question of assessing whether they meet the requirements as minor non-monetary benefits.

In accordance with recital 29 of the DD, minor non-monetary benefits are non-substantive material consisting of short-term market commentaries on the latest economic statistics or company results which contain only a brief summary of their own opinion on such information that is not substantive or includes a substantive research, such as simply repeating a vision based on an existing recommendation. In addition, reports on fixed income securities that are received free of charge when paid by a potential issuer or issuer to promote a new issue would also be considered minor non-monetary benefits as long as they are published and made available to the public.

In addition, Art. 12.3 of the DD contains a non-exhaustive list of minor non-monetary benefits. It includes: (i) information or documentation on a financial instrument that is generic or customized to reflect the circumstances of an individual client and (ii) material received free of charge from an issuer with a contractual relationship under which the issuer produces the research on an ongoing basis provided that the relationship is clearly revealed within the research and that the material is available at the same time to all entities wishing to receive it or to the general public.

ESMA Q&A 6 on "Inducements (research)" points out that the assessment of whether the material is substantive should be linked only to its content and not to the consideration given to it by the supplier of the research. Examples of minor non-monetary benefits include:

- brief market updates with limited comments or opinions and

- material that repeats or summarizes news, stories or public statements by issuers, such as quarterly results or other market announcements.

5. CONFLICTS OF INTEREST

5.1. Should the information provided to clients be changed regarding conflicts of interest, is it also necessary to inform the existing clients of the entity with whom an ongoing relationship is maintained?

Yes, to the extent that the change entails a material change in the information provided to the client in advance.

5.2. If communication were necessary to existing clients, could it be conducted through a communication on the entity's website?

Yes, as long as the conditions established in Art. 3 of the DR for the provision of information in a durable medium other than paper and through a website are met.

6. GENERAL INFORMATION REQUIREMENTS FOR CLIENTS

6.1. **For the purposes of delivering pre-contractual information to clients, how should the term "in good time" in recital 83 of MiFID II be understood?**

As set out in recital 83 of MiFID II, the information should be provided it so that the client has sufficient time to read and understand it before making an investment decision. A fixed minimum period of time is not established, so that entities can establish the delivery times that they consider appropriate in each case, taking into account, as established in the aforementioned recital, whether it is a complex product or not, or if the client is familiar with it or has no experience of it.

It should also be noted that an eventual urgency of contracting in the case of volatile markets or instruments with a contracting period nearing its end should not prevent clients from having sufficient time to analyse the information, understand the product and make a well-founded investment decision.

6.2. **What format should be used to provide pre-contractual information to clients?**

CNMV does not plan to develop standardized pre-contractual information documents in principle. Entities may use the format they deem appropriate to comply with MiFID II pre-contractual information obligations.

7. FAIR, CLEAR AND NON-MISLEADING INFORMATION

7.1. In relation to the profitability scenarios on which information containing future performance data should be based, what is the methodology to be applied for the calculation of these scenarios corresponding to different market conditions?

The Delegated Regulation of PRIIPS includes in its Annex IV the methodology for the calculation of scenarios for PRIIPs products.

This Regulation will apply to CISs from January 2020. Until that date, performance

scenarios for structured UCITS will be in accordance with the methodology established in the CNMV Communication of January 2015 on measures to strengthen transparency in the marketing of CISs.

For the rest of the FIs, no methodology is established in the standard, so a recognized methodology of common use should be used.

7.2. Should the new requirements established in Art. 44 of the Delegated Regulation to the information already submitted or to the advertising communications made before 3 January 2018? That is, will it be necessary to send back to the clients the information or advertising communications adjusted to the new requirements?

It will not be necessary to re-send the information or advertising communications adjusted to the new requirements. In any case, the information adjusted to the new requirements should be used to provide information or to issue advertising communications to retail or professional clients as of 3 January 2018. For these purposes, communications issued close to that date and that could take effect as of 3 January 2018 should comply with the provisions of the new regulations.

8. INFORMATION ABOUT THE ENTITY AND THE SERVICES

8.1. Does the information about the entity and its services apply to the marketing of FIs and, in particular, in cases of "execution-only" in which the entity is limited to attending a specific request by the client, and in which there is no contractual relationship with the client in general?

Yes, the information obligations apply to the marketing of FIs and, in particular, to cases of execution-only.

However, in the specific case of CISs, both in the case of marketing and when there is only "execution-only", the investors must be given free of charge before the subscription of shares, the KIID, as well as the last semi-annual report. These documents contain information similar to that provided in Article 47 of the DR (information for clients about IFs and their services). Therefore, the delivery of the KIID and the last semi-annual report would entail compliance with the information obligations established in that article.

8.2. Is the prohibition of setting the remuneration based on sales targets or otherwise that could provide an incentive for staff to recommend a particular financial instrument to a retail client if a different financial instrument can be offered that is better suited to the needs of the client applicable to the activity of advising and marketing the FIs of a CISMC? And, in that case, can it be included in the remuneration policies applicable to CISMCs?

Yes, it is applicable. Article 1(1) of the DR states that obligations relating to remuneration policies and practices are applicable to CISMCs when they provide investment services. It should be noted in this regard that the ESMA Guidelines on Remuneration Policies and Practices of June 2013 were already applicable to CISMCs when providing investment services.

The different remuneration rules have a different approach: UCITS Directive, AIFMD and CRD IV have a prudential approach and are aimed at staff who have influence over the entity's prudential risks while MiFID II targets staff that affect compliance of the rules of conduct. It could be the case that the UCITS and MiFID Compensation Guidelines apply to the same person when that person is managing a portfolio of a fund and is also carrying out marketing tasks for CISs. This case is envisaged in the ESMA Guidelines on sound remuneration policies under the UCITS Directive, dated October 2016, which establish the following:

When CISMC employees perform activities subject to different sectoral remuneration principles, they will be remunerated according to the following two options:

- applying the principles of sectoral remuneration pro rata according to objective criteria such as the time spent on each service or assets managed for each service or

applying the sectoral criteria that are considered most effective in order to discourage inappropriate risk-taking and better align individual interests with those of the investors of CISs.

8.3. Is the information to be provided to professional clients and eligible counterparts in accordance with Art. 47 of the Delegated Regulation is applicable only to new professional clients and eligible counterparties of entities from 3 January 2018 or also for those already existing at that date?

The obligation is applicable to new and existing clients who are offered an investment service from 3 January 2018. The information will be provided in a durable medium or through the web provided that the requirements established in Art. 3.2 of the DR are met.

9. INFORMATION ON FINANCIAL INSTRUMENTS

9.1. Will the obligation to provide information on financial instruments continue to be inapplicable in the case of the discretionary portfolio management service?

The criteria established in the CNMV Communication of February 2009 on the application of Circular 4/2008 on the contents of the quarterly, semi-annual and annual reports of collective investment schemes and the state of their position to which they refer will continue to apply. It is therefore not necessary to provide the prospectus or the periodic reports, since this information is intended to enable investors to make informed decisions on investment or divestment and in the case of discretionary portfolio management these decisions are taken by the manager.

9.2. How should the new client information obligations on financial instruments established in Art. 48 of the DR be applied? Can it be understood that it only applies to the new financial instruments on which advice is given or which are marketed from 3 January 2018?

As of 3 January 2018, entities that provide advice on or market financial instruments to clients (retailers, professionals or eligible counterparties) must provide them with all the

information set forth in Article 48 of the DR, in the case of new financial instruments as well as in the case of the financial instruments that they had already been marketing or recommending.

9.3. **In relation to the new information required by Article 48 of the Delegated Regulation, does "operation and results of the financial instrument in different market conditions, both positive and negative" refer to the development of scenarios? If this were the case, additional information would be needed on the types of scenarios to which it relates and on the methodology to be used for their development, in accordance with different market conditions.**

The required information can be assimilated to the development of scenarios. Although not specified, it may be understood that at least three favourable, moderate and unfavourable market scenarios should be considered. Regarding the methodology, we refer to response 7.1 given in the section on fair, clear and non-misleading information.

9.4. **What information should be provided to retail clients about the characteristics and risks of financial instruments? Would the KID on PRIIPS be sufficient? And for products that are not PRIIPS would the information contained in Order ECC/2316/2015 be sufficient?**

In general, entities must comply with the information obligations on financial instruments included in Article 24(4)(b) of MiFID II and Article 48 of the Delegated Regulation. The latter establishes that a description should be provided explaining the nature of the specific type of financial instrument in question, the operation and performance under different market conditions, including positive and negative, as well as the particular risks of the financial instrument in sufficient detail so that the client can make a well-founded investment decision. It should be noted that MiFID II set forth additional information obligations in relation to the marketed financial instrument, such as costs and charges information (in Article 24.4.c) or inducements (in Article 24.9).

In the case of PRIIPs products, the KID could cover the information obligations included in Article 24.4.b of MiFID II as long as it includes all the information previously mentioned in Article 48 of the Delegated Regulation.

In the case of non-PRIIP products, the information contained in Order ECC/2316/2015 is not sufficient since the risk indicator specified in the Order does not include all information obligations mentioned in the first paragraph.

10. INFORMATION ON THE SAFEGUARDING AND USE OF FINANCIAL INSTRUMENTS

10.1. **Will the person designated as responsible for safeguarding FIs be able to perform other functions within the entity?**

An entity may decide whether the designated person responsible for safeguarding assets may reconcile that task with other responsibilities, provided that it performs its functions effectively.

11. INFORMATION ON COSTS AND EXPENSES

11.1. Is the information provided by the UCITS KIID sufficient to comply with the ex-ante information obligations of the CIS marketer?

It is not sufficient. As indicated in Recital 81 of the DR, the transaction costs of CISs (as listed in Table 2 of Annex II to the DR) are not included in the UCITS cost information. In this case, the marketer must obtain the data relating to these CISMC costs to include them in the aggregated information on costs and expenses to be provided to the clients. Article 51 of the DR also refers to this issue, stating that the sellers of shares in CISs should also inform their clients about any costs associated with the product that is not included in the UCITS KID.

It should also be noted that the marketer must provide the client with information on the perceived incentives (which entail a cost for the client) and all the costs of the investment service provided to the client.

11.2. With regard to the transaction costs of CISs that in accordance with MiFID II should be provided, what methodology should be applied for their calculation?

ESMA Q&A 10 states that the methodology that would be expected to be used by entities is the methodology established in the Delegated Regulation of PRIIPs, in paragraphs 21-23 of Annex VI. It should be also taken into account the Q&A´s on the KID on PRIIPS issued by the Joint Committee of the European Supervisory Authorities on 4 July 2017, which clarifies some aspects of this methodology, should also be taken into account.

11.3. Is the information provided by the KID on PRIIPS sufficient to fulfil the ex-ante information obligations on costs and expenses?

For PRIIPs products, entities must inform the client of any costs or expenses related to the financial instrument not included in the KID, the costs and expenses of the service and on what part of the costs paid are reimbursed to the company which provides the investment service (incentives).

11.4. How would information on annual ex-post costs and expenses on CISs be obtained?

The data will be provided by the CISMCs to the distributor annually, and if a material change occurs, the information provided will be updated.

Distributors may use the information provided annually by the CISMCs to deliver personalized, annual ex-post information to their clients, calculating costs and expenses on a pro rata basis or on an average basis.

11.5. What are the obligations for ex-ante and ex-post information on costs and expenses of the discretionary management service?

Recital 75 of the DR states the following: "Taking into account the general obligation to act in the best interest of the clients and the importance of informing them in advance of all the costs and expenses that they will bear, the reference to the financial instruments recommended or marketed must include, in particular, investment firms

providing advice on investment or portfolio management services ...". A literal application of this recital is considered very rigorous within the framework of the discretionary portfolio management service as it would entail an obligation to inform the client of the costs of the financial instrument prior to its acquisition on behalf of the client.

We consider that a reasonable approach is that the client is informed ex ante of the costs of the portfolio management service and of the cost of the services associated with the portfolio management that are charged to the client. To the extent that these costs change, the client must be informed of them.

For ex-post information, we understand that it is relevant that the client is provided with information on the costs of the financial instrument included in Art. 50.9 of the DR. Art. 60.2.d, which specifically addresses ex-post reporting obligations in portfolio management, would also be applicable.

However, for the moment, ESMA has not stated its stance on this matter.

11.6. Confirmation that, in the case of marketing of a CIS by a CISMC, annual ex-post information should not be provided to the client, since it should be understood that there is no continuous relationship between the client and the CISMC.

In principle, it is considered that as long as the CISMC has to submit periodic information on the evolution of the CIS that it has marketed to the client, it seems reasonable to consider that there is a continuous relationship and, therefore, the CISMC that markets the CIS must provide aggregated information on ex-post costs on an annual basis. For these purposes, Art. 50.9 of the DR states that it may be provided in conjunction with other periodic information to clients.

However, for the moment, ESMA has not stated its stance on this matter.

12. INDEPENDENT ADVICE: INFORMATION AND DEFINITION

12.1. Can the information set out in Art. 24.4 of Directive 2014/65 and Art. 52 of the Delegated Regulation be provided to the client in a standard document?

Yes, to the extent that it is standardized information common to a particular type of advice model.

12.2. May the revisions and consequent updates of the consulting contracts existing before 3 January 2018 be understood as accepted by the clients by tacit consent, once a period of 15 days has elapsed after they are submitted to the client without the client having expressed his/her opposition to them.

Yes, although the 15 days will be counted from the reception of the information by the client.

12.3. In order for the advice to be considered as independent, how should the requirement to evaluate a sufficiently diversified range of financial instruments available on the market be understood?

The L1 Directive states that diversification refers to the type of instrument and the issuers or suppliers of products, although it is considered in the implementing regulations that it is possible to provide independent advice on a category or range of financial instruments. In short, the entity is required to analyse a universe of products broad enough to decide which ones it recommends to its clients. For these purposes, this requirement is not considered to have been fulfilled simply because the entity enables clients to purchase several of the financial instruments included in MiFID II.

The entity must define and implement a process to select the products to be evaluated in order to make a recommendation to the client. This selection process must include, according to Article 53 of the Delegated Regulation, inter alia, the following requirements:

(i) the number and variety of the financial instruments considered must be in proportion to the scope of the investment advisory service offered

(ii) the number and variety of the financial instruments considered must be representative of the financial instruments available on the market

12.4. **In order for the advice to be considered as independent, how should the requirement that the financial instruments analysed be limited to "tied" financial instruments be understood?**

The entities providing independent advice may not only consider financial instruments issued by the entity itself, an entity in their group or another entity in which there is a stake in the capital (of 20% or more of the voting rights) or a control relationship, or by other entities with legal or economic relationships, such as contractual relations (see question 12.5).

It is therefore possible to provide independent advice including a number of "tied" financial instruments provided that the following criteria are met:

(i) that the number of financial instruments issued by the entity or by related entities does not represent a relevant portion of the total amount of financial instruments considered

(ii) that the criteria for comparing different financial instruments include all relevant aspects such as risks, costs and complexity as well as the characteristics of the clients, and ensure that the selection of the instruments that can be recommended is not biased

12.5. **How should the requirement of "contractual legal or economic relationships" be understood with the issuer or distributor of the financial instruments?**

Contractual legal or economic relationships should be assessed on a case-by-case basis to determine whether such a relationship could jeopardize the independent nature of the advice. In such a case, the entity may not present itself to its clients as an independent advisory service provider.

13. PERIODIC INFORMATION ON THE PORTFOLIO MANAGEMENT SERVICE

13.1. Would it be possible to agree with the client that non-application or limited application of periodic information to eligible counterparties and professional clients is not possible, given that it is currently only mandatory for retail clients?

CNMV considers that it is not possible. Art. 60 of the Delegated Regulation has been extended to professional clients and eligible counterparties and the possibility of agreeing with these clients on a limited application has not been established, as has been established in other cases (Articles 49, 50 and 59). Therefore, it is not possible to apply it or to apply it to a limited extent.

13.2. Do Arts. 62.1 and 62.2 of the DR apply to CISMCs? (the entity shall inform the client when the overall value of the portfolio is depreciated by 10%, and thereafter by a multiple of 10%, no later than the end of the business day on which the threshold is exceeded or the following day if that occurs on a non-business day).

CNMV understands that it does apply. Article 1(1) of the DR contains an error due to a failure to update the references to the articles of an earlier version. In principle, the entire Section 4 applies to CISMCs. The European Commission is expected to correct this error.

13.3. There is currently a similar requirement in the case of discretionary portfolio management for retail clients, which requires that the client be notified immediately when there is a loss level equal to or greater than 25% of the managed assets (Rule 9 of Circular 7/2011).

Will the obligation to inform the client of the losses in the portfolio managed be maintained in the current terms of Rule 9 of Circular 7/2011?

No. Article 62(1) prevails over Rule 9(4) of Circular 7/2011, which had set a threshold of 25% given that the equivalent Article 42 of the MiFID I Directive 2006/73/EC did not specify any threshold and it was left to be agreed with the retail client. Therefore, the threshold of losses to be taken as a reference as of 3 January 2018 is that of 10% of the value of the portfolio. It should also be remembered that not only retail clients but also eligible professionals and counterparties should be informed.

14. RECORD KEEPING OBLIGATIONS

14.1. Should cost and expense information be included in a new register or could it be included in any of the existing registers in accordance with the Resolution of 7 October 2009?

The entity must keep a record of the information on costs and expenses. This information can be incorporated into an existing register or a new one can be created.

14.2. What should the content of the register named in Annex I of the Delegated Regulation "Obligation in respect of services rendered to clients" be?

The reference of this register to "Reporting to clients" in Annex I of the DR is to Articles 24(1) and 6 and Articles 25(1) and 6 of MiFID II and Articles 53 to 58 of the DR. This last reference is incorrect, Articles 59 to 63 corresponding to Section 4, Reporting to clients, of the DR that develop Article 24(6) of level 1 are correct.

14.3. Does the registration of orders apply to the orders derived from the discretionary portfolio management service?

The registration of client orders and trading decisions established in Article 74 of the DR does apply to orders derived from the discretionary portfolio management service. The specific mention in the standard of "every trading decision taken when providing the portfolio management service" has been deleted in order to also include the orders arising from the own account trading activity as proposed by ESMA in its technical advice to the EC.

14.4. Does the registration of transactions apply to the transactions derived from the discretionary portfolio management service?

Yes, it does apply. Article 75 of the DR, which establishes the registration of transactions and the processing of orders, is applicable both to orders received from clients and to trading decisions taken by the entities in relation to the provision of the discretionary portfolio management service. This is confirmed by ESMA in its technical advice to the EC.

15. RECORDING OF TELEPHONE CONVERSATIONS OR ELECTRONIC COMMUNICATIONS

15.1. Does the obligation to record telephone conversations or electronic communications apply to the transmission of orders made as part of the discretionary portfolio management service?

Article 16(7) stipulates that the register shall include recordings of telephone conversations or electronic communications relating, at least, to transactions carried out when trading on own account and the rendering of services related to the receipt, transmission and execution of orders of clients, even if such conversations or communications do not ultimately lead to the performance of such transactions or the provision of such services.

The general purpose of these recordings is therefore the follow-up of conversations with clients whose intention is the provision of a client service order; given that in portfolio management orders are not given by the client but the manager, who is the one who adopts the specific investment decisions, the recording obligation does not apply to this service.

What if the transaction is performed as a consequence of the receipt by the manager of an instruction from a managed client?

In this case telephone conversations or electronic communications should be recorded to record the instruction given by the client.

15.2. Confirmation that the obligation to record telephone and electronic conversations does not apply to the advisory service, even if as a result of the transaction an operation is carried out on a financial instrument that would already be in the framework of another investment service, i.e. the reception and transmission of orders.

The recording obligation in relation to advice has been addressed in ESMA Q&A 13 included in Section 3, Recording of telephone conversations and electronic communications. ESMA considers in this regard that if advice is provided when there is an intention to provide an order service to the client, the content of the advice has to be recorded.

15.3. Is the obligation to record telephone and electronic conversations only applicable when, through a given channel, the execution and transmission of the order is allowed in addition to the transmission and reception of the order?

No. As explained in ESMA Q&A 12 in Section 3, Recording of telephone conversations and electronic communications, ESMA considers that the content of Article 16(7) of MiFID II and the corresponding Article 76 of the Delegated Regulation do not support this interpretation. In fact, Article 16(7) of MiFID II makes clear that the conclusion of an operation is not a prerequisite to apply the recording obligation.

15.4. **When must minutes of face-to-face conversations with clients be drawn up? Can orders be used as minutes of relevant face-to-face conversations with the client?**

Article 76(9) of the DR establishes that entities must register in a durable medium the relevant information from the relevant face-to-face conversations with the clients in relation to the client order services established in Article 16(7) of MiFID II. One option to do this is through minutes as determined by Article 16(7) itself. In any case, at least the following information must be included: (a) the date and time of the meetings, (b) the location, (c) the identity of the attendees, (d) the "initiator" of the meetings and (e) the price, volume, type of order and when it will be transmitted or executed.

Considering the above, only the client's order would be sufficient if it contains all the required information.

An important aspect is to determine when the conversation and information are considered to be "relevant". For example, the information that makes it possible to determine who takes the initiative in the contracting of a certain product is relevant, as is the information that makes it possible to prove how long in advance the client was informed of the characteristics and risks of the product and any oral information that was provided to the client on the characteristics, risks and costs.

15.5. **What are the technical requirements for storing telephone conversations and electronic communications?**

Telephone conversations and electronic communications should be stored in a durable medium that makes it possible to reproduce or copy in a format that does not alter or erase the original record.

15.6. **What should the content of the order and transaction registration fields be?**

The order and transaction registration fields are listed in Sections 1 and 2, respectively, of Annex IV of the MiFID II Delegated Regulation. The detail or explanation of the content of the fields has not been developed, although it is pointed out that for fields that are also included in articles 25 and 26[1] of MiFIR, relating to transaction reporting, they must be maintained according to the same MiFIR standards.

15.7. **If the client requests the recordings of telephone conversations, can a transcription be delivered?**

The MiFID II rules states very clear that the client is entitled to be provided with the recordings (Article 76 (10) of the Delegated Regulation). Having said that, CNMV considers acceptable to provide the client only with the transcription of the recordings, provided that the client has been informed of the right to have the proper recordings and the client agrees on that. .

15.8. **¿What is the detail and the retention period of the records associated with the underwriting and placement service?**

These records have not been specifically included in the list of minimum records in Annex I of the MiFID II Delegated Regulation, nor have the fields or possible technical specifications been detailed. CNMV considers that the entities should store and keep the information required by the Delegated Regulation in the way it deems appropriate in one or more registers whenever the required information is included[2].

16. SUITABILITY AND APPROPRIATENESS ASSESSMENT

16.1. **Can the client suitability test be automatically updated by the entity in the event that it has sufficient information to determine the risk tolerance of said client and communicate the result to the client?**

In relation to the method of updating the suitability test, if the entity had sufficient information that pointed to a change in the characteristics of the client that should be taken into account for the suitability assessment, it would be reasonable to update the suitability test and report the result to the client. For example, the entity may have information about a change in the client's financial situation and it would be reasonable to update the test based on this information, informing the client. Communications may also be made when maintaining the characteristics that allow the client to be profiled. In contrast, it is not acceptable to make these communications to make certain changes not formally agreed with the client, such as establishing an increase in the risk tolerance of the client as a result of having performed certain operations or by providing a service with a level of risk superior to that derived from a suitability test given that the client may have a different risk profile or objective for different parts of his or her assets or

1 These articles have been developed respectively by the Delegated Regulation (EU) 2017/590 of the EC and the Delegated Regulation 2017/580 of the EC.

2 This information includes: (i) the content and date of instructions received from clients, (ii) assignment decisions made in a way that allows complete tracking to be carried out between the transactions of client accounts and instructions received from clients, and (iii) the final assignment to the clients.

mandates.

16.2. Can the registration obligations set forth in Art. 56.2 of the Delegated Regulation be considered included in CNMV Circular 3/2013?

The registration obligations provided in Article 56(2) of the DR are included in part in Circular 3/2013. The fifth rule of this Circular requires the maintenance of an updated record of evaluated clients and non-adequate products that will reflect for each client the products whose appropriateness has been evaluated with a negative result. The appropriateness assessment records are also included in the CNMV Resolution of 7 October 2009, according to which the information or documentation must be registered in order to evaluate the appropriateness and all the warnings sent or made by the company that provides investment services, which would include both warnings regarding the non-appropriateness of the product and warnings regarding the impossibility of evaluating appropriateness when faced with a lack of client information.

Article 56(2) of the DR requires that a record be kept of not only the assessment carried out and of the warnings regarding the non-appropriateness or lack of information but also: (i) if the client requested to proceed with the transaction despite the warning and, if applicable (ii) if the entity accepted the client's request to proceed with the transaction. In principle, it is considered that if the client gives an order and the entity processes it, these two facts are recorded in the register.

16.3. How should the obligation to globally assess the appropriateness or suitability of a product package be understood?

This obligation should be understood as a single product consisting of several components being offered. Therefore, when assessing appropriateness or suitability, the characteristics of the product as a whole should be considered in terms of performance, risk, costs, etc.

The suitability assessment should take into account the joint risk of the product or the recommended time horizon of the investment as a whole in order to conclude whether it is suitable to the client's risk profile or investment objectives.

An example of a combined sale would be a non-complex, low-risk fund together with a complex structured deposit or structured insurance product with a higher risk. It should be evaluated jointly if the package is advisable (or suitable). For these purposes, it should be taken into account that the structured deposit or structured insurance would add complexity and risk with respect to the non-complex investment fund.

16.4. For the purposes of the suitability assessment, what responsibility does the entity have vis-à-vis the information obtained from the client?

Entities have the right to rely on the information provided by their clients or potential clients unless they know, or should know, that the information is manifestly out of date, inaccurate or incomplete. Likewise, entities must take reasonable steps to promote that the information obtained about their clients or potential clients is reliable. In this respect, CNMV considers it important that entities have systems that allow them to verify that the information obtained in the suitability test is consistent with any other

information that they may have on the client.

17. NON-COMPLEX FINANCIAL INSTRUMENTS

17.1. Can it be understood that CISs other than UCITS (except structured UCITS which are in any case complex financial instruments) regulated in the LCIS and RCIS, insofar as they comply with the six criteria established in Art. 57 of the delegated regulation, will be a non-complex financial instrument that can be acquired through "execution only", without having to carry out the assessment of its appropriateness for the client?

No. According to ESMA Q&A 1 on Appropriateness/Complex Financial Instruments, shares of CISs that are not UCITS are explicitly excluded from the universe of non-complex products in accordance with Article 25(4) of MiFID II and cannot be reassessed according to the criteria of Article 57 of the MiFID II DR.

This treatment is consistent with the general criterion applicable to any other financial instrument; if the instrument is explicitly exempted from the list of non-complex products of Article 25(4) of MiFID II, the instrument will be considered complex and cannot be reassessed as not complex according to the criteria of Article 57 of the DR as reflected in Recital 80 of MiFID II. This is the case, for example, of stocks and bonds that incorporate a derivative, bonds that incorporate a structure that makes it difficult to understand the associated risks, or structured UCITS. Their treatment as a complex product responds to the objective of improving investor protection by requiring entities to conduct an appropriateness assessment before providing execution services in relation to these instruments.

17.2. Would funds with a fixed income return objective that invest only in a portfolio of term purchased bonds have the status of structured CISs?

No. Funds with a fixed income return objective do not qualify as structured CISs regulated in Art. 36 of EU Regulation 583/2010.

18. STRUCTURED DEPOSITS

18.1. **MIFID II equates the marketing of structured deposits with financial instruments in relation to, inter alia, the rules of conduct. Could structured deposits be included in the managed portfolios?**

Although structured deposits are not a financial instrument within the scope of MiFID II, Art. 1(4) set out the provisions that apply to investment firms and credit institutions when they provide advice on and sell these products to clients. These provisions include several that affect the portfolio management service. In addition, Article 1(2) of the MiFID II Delegated Regulation states that, "References to (...) financial instruments shall encompass structured deposits in relation to all the requirements referred to in (....)1(4) of Directive 2014/65/EU and their implementing provisions as set out under this Regulation".

Furthermore, it is reasonable to consider that the inclusion of structured deposits in clients' managed portfolios, within the framework of the provision of the discretionary portfolio management service, has the broader concept of providing advice on and selling these products to clients. Therefore, CNMV considers that structured deposits can be offered as an alternative in the discretionary portfolio management, if the product fits the profile and contract of the client, along with other products that are considered financial instruments.

19. CONTRACTS WITH CLIENTS

19.1. Is it necessary to formalize a basic contract with retail and professional clients for the mere reception and transmission of orders? Can CISs' subscription and redemption orders be considered valid for the purpose of complying with these requirements, especially in those cases in which there is no securities custody agreement linked to such transaction?

Article 58 of the MiFID II Delegated Regulation establishes that a basic agreement must be concluded that establishes the essential rights and obligations of the company and the client, and does not provide for any exception regarding the service of receipt and transmission of orders on CISs. To the extent that the subscription and redemption orders of CISs contain the information indicated, they may be considered valid to fulfil the obligation to have a basic contract for the reception and transmission of orders.

19.2. Can it be understood that the revisions and consequent updates of the contracts will be understood as accepted by the clients by tacit consent, once a period of 15 days has elapsed after they are submitted to the client without the client having expressed his/her opposition to them?

CNMV considers that it can, although the 15 days will be counted from the reception by the client.

19.3. **What types of clients affect the obligation to sign a contract in the provision of investment services?**

MiFID II requires that a basic contract be entered into with professional clients as well as with retail clients. This obligation will be applied in the provision of investment services and the auxiliary service of custody and administration, although in the advisory service it will only be obligatory to enter into a contract in those cases in which the entity is to perform a periodic assessment of the suitability of financial instruments or recommended services. It is not appropriate, as from the entry into force of MiFID II, for this obligation to apply only to new professional clients. Rather, all professional clients must have entered into a contract.

20. BEST EXECUTION

20.1. How must the execution obligations be applied to CISMCs in both their collective management and discretionary portfolio management activities?

As far as collective management is concerned, there have been no developments and it should be remembered that CIS regulations already contain specific rules on better execution.

Regarding discretionary portfolio management, as mentioned above, Article 1(1) of the DR contains an error due to a failure to update the references to the articles of an earlier version. In principle, Articles 64(4) and 65 of Section 5 on best execution (and Articles 66(2) to 66(9) by reference to Article 65) apply to CISMCs.

Furthermore, in general, those entities, when providing portfolio management services or receiving and transmitting orders, must identify in their execution policy, for each class of FI, the entities to which they are to transmit the orders for execution. The mention of the execution centres in Article 66 should be understood in this case as the entities to which orders are transmitted for execution. The execution policy for CISMCs provided by the portfolio management service must therefore, where appropriate, include information on the selected intermediaries and not necessarily on the execution centres.

20.2. Does the annual publication requirement of the five main investment firms to which client orders have been placed or transmitted, for each type of FI, for their execution in terms of volume, as well as information on the execution obtained, apply to CISMCs? If so, should this publication be made with the content contained in RTS 28[3]?

Yes. Article 65(6) states that such information to be published shall coincide with the information published in accordance with RTS 28.

21. KNOWLEDGE AND COMPETENCE

21.1. Must portfolio managers meet the knowledge and competence criteria of staff providing information or advising on investment?

In accordance with the scope of application of the CNMV Technical Guide, relevant personnel of the financial entities (including the agents) are those who provide information or advice to clients or potential clients, those staff who assist clients in relation to discretionary portfolio management contracts also being considered advisers.

21.2. Confirmation of the application of the measures for the assessment of the indicated knowledge and competence to the foreign entities that render investment services in Spain through branches or to related agents in Spain.

Given that the provision of services is carried out in Spain, the measures for the assessment of knowledge and competence will also apply to relevant personnel of foreign entities providing investment services in Spain, either through branches or tied agents.

[3] COMMISSION DELEGATED REGULATION (EU) 2017/576 of 8 June 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the annual publication by investment firms of information on the identity of execution venues and on the quality of execution