

Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 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 (Text with EEA relevance)

## CHAPTER III

### OPERATING CONDITIONS FOR INVESTMENT FIRMS

#### SECTION I

#### *Information to clients and potential clients*

#### *Article 44*

#### **Fair, clear and not misleading information requirements(Article 24(3) of Directive 2014/65/EU)**

1 Investment firms shall ensure that all information they address to, or disseminate in such a way that it is likely to be received by, retail or professional clients or potential retail or professional clients, including marketing communications, satisfies the conditions laid down in paragraphs 2 to 8.

2 Investment firm shall ensure that the information referred to in paragraph 1 complies with the following conditions:

- a the information includes the name of the investment firm,
- b the information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument,
- c the information uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout ensuring such indication is prominent,
- d the information is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received,
- e the information does not disguise, diminish or obscure important items, statements or warnings,
- f the information is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each client, unless the client has accepted to receive information in more than one language,
- g the information is up-to-date and relevant to the means of communication used.

3 Where the information compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services, investment firms shall ensure that the following conditions are satisfied:

- a the comparison is meaningful and presented in a fair and balanced way;
- b the sources of the information used for the comparison are specified;
- c the key facts and assumptions used to make the comparison are included.

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4 Where the information contains an indication of past performance of a financial instrument, a financial index or an investment service, investment firms shall ensure that the following conditions are satisfied:

- a that indication is not the most prominent feature of the communication;
- b the information must include appropriate performance information which covers the preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided where less than five years, or such longer period as the firm may decide, and in every case that performance information is based on complete 12-month periods;
- c the reference period and the source of information is clearly stated;
- d the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
- e where the indication relies on figures denominated in a currency other than that of the Member State in which the retail client or potential retail client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- f where the indication is based on gross performance, the effect of commissions, fees or other charges are disclosed.

5 Where the information includes or refers to simulated past performance, investment firms shall ensure that the information relates to a financial instrument or a financial index, and the following conditions are satisfied:

- a the simulated past performance is based on the actual past performance of one or more financial instruments or financial indices which are the same as, or substantially the same as, or underlie, the financial instrument concerned;
- b in respect of the actual past performance referred to in point (a), the conditions set out in points (a) to (c), (e) and (f) of paragraph 4 are satisfied;
- c the information contains a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.

6 Where the information contains information on future performance, investment firms shall ensure that the following conditions are satisfied:

- a the information is not based on or refer to simulated past performance;
- b the information is based on reasonable assumptions supported by objective data;
- c where the information is based on gross performance, the effect of commissions, fees or other charges is disclosed;
- d the information is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specific types of instruments included in the analysis;
- e the information contains a prominent warning that such forecasts are not a reliable indicator of future performance.

7 Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.

8 The information shall not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the investment firm.

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#### *Article 45*

##### **Information concerning client categorisation(Article 24(4) of Directive 2014/65/EU)**

- 1 Investment firms shall notify new clients, and existing clients that the investment firm has newly categorised as required by Directive 2014/65/EU, of their categorisation as a retail client, a professional client or an eligible counterparty in accordance with that Directive.
- 2 Investment firms shall inform clients in a durable medium about any right that client has to request a different categorisation and about any limitations to the level of client protection that a different categorisation would entail.
- 3 Investment firms may, either on their own initiative or at the request of the client concerned treat a client in the following manner:
  - a as a professional or retail client where that client might otherwise be classified as an eligible counterparty pursuant to Article 30(2) of Directive 2014/65/EU;
  - b a retail client where that client that is considered a professional client pursuant to Section I of Annex II to Directive 2014/65/EU.

#### *Article 46*

##### **General requirements for information to clients(Article 24(4) of Directive 2014/65/EU)**

- 1 Investment firms shall, in good time before a client or potential client is bound by any agreement for the provision of investment services or ancillary services or before the provision of those services, whichever is the earlier to provide that client or potential client with the following information:
  - a the terms of any such agreement;
  - b the information required by Article 47 relating to that agreement or to those investment or ancillary services.
- 2 Investment firms shall, in good time before the provision of investment services or ancillary services to clients or potential clients, to provide the information required under Articles 47 to 50.
- 3 The information referred to in paragraphs 1 and 2 shall be provided in a durable medium or by means of a website (where it does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.
- 4 Investment firms shall notify a client in good time about any material change to the information provided under Articles 47 to 50 which is relevant to a service that the firm is providing to that client. That notification shall be given in a durable medium if the information to which it relates is given in a durable medium.
- 5 Investment firms shall ensure that information contained in a marketing communication is consistent with any information the firm provides to clients in the course of carrying on investment and ancillary services.
- 6 Marketing communications containing an offer or invitation of the following nature and specifying the manner of response or including a form by which any response may be made, shall include such of the information referred to in Articles 47 to 50 as is relevant to that offer or invitation:

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- a an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service with any person who responds to the communication;
- b an invitation to any person who responds to the communication to make an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service.

However, the first subparagraph shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the potential client must refer to another document or documents, which, alone or in combination, contain that information.

#### *Article 47*

### **Information about the investment firm and its services for clients and potential clients(Article 24(4) of Directive 2014/65/EU)**

1 Investment firms shall provide clients or potential clients with the following general information, where relevant:

- a the name and address of the investment firm, and the contact details necessary to enable clients to communicate effectively with the firm;
- b the languages in which the client may communicate with the investment firm, and receive documents and other information from the firm;
- c the methods of communication to be used between the investment firm and the client including, where relevant, those for the sending and reception of orders;
- d a statement of the fact that the investment firm is authorised and the name and contact address of the competent authority that has authorised it;
- e where the investment firm is acting through a tied agent, a statement of this fact specifying the Member State in which that agent is registered;
- f the nature, frequency and timing of the reports on the performance of the service to be provided by the investment firm to the client in accordance with Article 25(6) of Directive 2014/65/EU;
- g where the investment firm holds client financial instruments or client funds, a summary description of the steps which it takes to ensure their protection, including summary details of any relevant investor compensation or deposit guarantee scheme which applies to the firm by virtue of its activities in a Member State;
- h a description, which may be provided in summary form, of the conflicts of interest policy maintained by the firm in accordance with Article 34;
- i at the request of the client, further details of that conflicts of interest policy in a durable medium or by means of a website (where that does not constitute a durable medium) provided that the conditions set out Article 3(2) are satisfied.

The information listed in points (a) to (i) shall be provided in good time before the provision of investment services or ancillary services to clients or potential clients.

2 When providing the service of portfolio management, investment firms shall establish an appropriate method of evaluation and comparison such as a meaningful benchmark, based on the investment objectives of the client and the types of financial instruments included in the client portfolio, so as to enable the client for whom the service is provided to assess the firm's performance.

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3 Where investment firms propose to provide portfolio management services to a client or potential client, they shall provide the client, in addition to the information required under paragraph 1, with such of the following information as is applicable:

- a information on the method and frequency of valuation of the financial instruments in the client portfolio;
- b details of any delegation of the discretionary management of all or part of the financial instruments or funds in the client portfolio;
- c a specification of any benchmark against which the performance of the client portfolio will be compared;
- d the types of financial instrument that may be included in the client portfolio and types of transaction that may be carried out in such instruments, including any limits;
- e the management objectives, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion.

The information listed in points (a) to (e) shall be provided in good time before the provision of investment services or ancillary services to clients or potential clients.

#### *Article 48*

#### **Information about financial instruments(Article 24(4) of Directive 2014/65/EU)**

1 Investment firms shall provide clients or potential clients in good time before the provision of investment services or ancillary services to clients or potential clients with a general description of the nature and risks of financial instruments, taking into account, in particular, the client's categorisation as either a retail client, professional client or eligible counterparty. That description shall explain the nature of the specific type of instrument concerned, the functioning and performance of the financial instrument in different market conditions, including both positive and negative conditions, as well as the risks particular to that specific type of instrument in sufficient detail to enable the client to take investment decisions on an informed basis.

2 The description of risks referred to in paragraph 1 shall include, where relevant to the specific type of instrument concerned and the status and level of knowledge of the client, the following elements:

- a the risks associated with that type of financial instrument including an explanation of leverage and its effects and the risk of losing the entire investment including the risks associated with insolvency of the issuer or related events, such as bail in;
- b the volatility of the price of such instruments and any limitations on the available market for such instruments;
- c information on impediments or restrictions for disinvestment, for example as may be the case for illiquid financial instruments or financial instruments with a fixed investment term, including an illustration of the possible exit methods and consequences of any exit, possible constraints and the estimated time frame for the sale of the financial instrument before recovering the initial costs of the transaction in that type of financial instruments;
- d the fact that an investor might assume, as a result of transactions in such instruments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the instruments;
- e any margin requirements or similar obligations, applicable to instruments of that type.

3 Where an investment firm provides a retail client or potential retail client with information about a financial instrument that is the subject of a current offer to the public and a prospectus has been published in connection with that offer in accordance with Directive 2003/71/EC, that firm shall in good time before the provision of investment services or ancillary

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services to clients or potential clients inform the client or potential client where that prospectus is made available to the public.

4 Where a financial instrument is composed of two or more different financial instruments or services, the investment firm shall provide an adequate description of the legal nature of the financial instrument, the components of that instrument and the way in which the interaction between the components affects the risks of the investment.

5 In the case of financial instruments that incorporate a guarantee or capital protection, the investment firm shall provide a client or a potential client with information about the scope and nature of such guarantee or capital protection. When the guarantee is provided by a third party, information about the guarantee shall include sufficient detail about the guarantor and the guarantee to enable the client or potential client to make a fair assessment of the guarantee.

#### *Article 49*

### **Information concerning safeguarding of client financial instruments or client funds(Article 24(4) of Directive 2014/65/EU)**

1 Investment firms holding financial instruments or funds belonging to clients shall provide those clients or potential clients with the information specified in paragraphs 2 to 7 where relevant.

2 The investment firm shall inform the client or potential client where the financial instruments or funds of that client may be held by a third party on behalf of the investment firm and of the responsibility of the investment firm under the applicable national law for any acts or omissions of the third party and the consequences for the client of the insolvency of the third party.

3 Where financial instruments of the client or potential client may, if permitted by national law, be held in an omnibus account by a third party, the investment firm shall inform the client of this fact and shall provide a prominent warning of the resulting risks.

4 The investment firm shall inform the client or potential client where it is not possible under national law for client financial instruments held with a third party to be separately identifiable from the proprietary financial instruments of that third party or of the investment firm and shall provide a prominent warning of the resulting risks.

5 The investment firm shall inform the client or potential client where accounts that contain financial instruments or funds belonging to that client or potential client are or will be subject to the law of a jurisdiction other than that of a Member State and shall indicate that the rights of the client or potential client relating to those financial instruments or funds may differ accordingly.

6 An investment firm shall inform the client about the existence and the terms of any security interest or lien which the firm has or may have over the client's financial instruments or funds, or any right of set-off it holds in relation to those instruments or funds. Where applicable, it shall also inform the client of the fact that a depository may have a security interest or lien over, or right of set-off in relation to those instruments or funds.

7 An investment firm, before entering into securities financing transactions in relation to financial instruments held by it on behalf of a client, or before otherwise using such financial instruments for its own account or the account of another client shall in good time before the use of those instruments provide the client, in a durable medium, with clear, full and accurate

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information on the obligations and responsibilities of the investment firm with respect to the use of those financial instruments, including the terms for their restitution, and on the risks involved.

### Article 50

#### **Information on costs and associated charges(Article 24(4) of Directive 2014/65/EU)**

1 For the purposes of providing information to clients on all costs and charges pursuant to Article 24(4) of Directive 2014/65/EU, investment firms shall comply with the detailed requirements in paragraphs 2 to 10.

Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to professional clients shall have the right to agree to a limited application of the detailed requirements set out in this Article with these clients. Investment firms shall not be allowed to agree such limitations when the services of investment advice or portfolio management are provided or when, irrespective of the investment service provided, the financial instruments concerned embed a derivative.

Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to eligible counterparties shall have the right to agree to a limited application of the detailed requirements set out in this Article, except when, irrespective of the investment service provided, the financial instruments concerned embed a derivative and the eligible counterparty intends to offer them to its clients.

2 For ex-ante and ex-post disclosure of information on costs and charges to clients, investment firms shall aggregate the following:

- a all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and
- b all costs and associated charges associated with the manufacturing and managing of the financial instruments.

Costs referred to in points (a) and (b) are listed in Annex II to this Regulation. For the purposes of point (a), third party payments received by investment firms in connection with the investment service provided to a client shall be itemised separately and the aggregated costs and charges shall be totalled and expressed both as a cash amount and as a percentage.

3 Where any part of the total costs and charges is to be paid in or represents an amount of foreign currency, investment firms shall provide an indication of the currency involved and the applicable currency conversion rates and costs. Investment firms shall also inform about the arrangements for payment or other performance.

4 In relation to the disclosure of product costs and charges that are not included in the UCITS KIID, the investment firms shall calculate and disclose these costs, for example, by liaising with UCITS management companies to obtain the relevant information.

5 The obligation to provide in good time a full ex-ante disclosure of information about the aggregated costs and charges related to the financial instrument and to the investment or ancillary service provided shall apply to investment firms in the following situations:

- a where the investment firm recommends or markets financial instruments to clients; or

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- b where the investment firm providing any investment services is required to provide clients with a UCITS KIID or PRIIPs KID in relation to the relevant financial instruments, in accordance with relevant Union legislation.

6 Investment firms that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation shall inform their clients about all costs and charges relating to the investment and/or ancillary service provided.

7 Where more than one investment firm provides investment or ancillary services to the client, each investment firm shall provide information about the costs of the investment or ancillary services it provides. An investment firm that recommends or markets to its clients the services provided by another firm, shall aggregate the cost and charges of its services together with the cost and charges of the services provided by the other firm. An investment firm shall take into account the costs and charges associated to the provision of other investment or ancillary services by other firms where it has directed the client to these other firms.

8 Where calculating costs and charges on an ex-ante basis, investment firms shall use actually incurred costs as a proxy for the expected costs and charges. Where actual costs are not available, the investment firm shall make reasonable estimations of these costs. Investment firms shall review ex-ante assumptions based on the ex-post experience and shall make adjustment to these assumptions, where necessary.

9 Investment firms shall provide annual ex-post information about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s) where they have recommended or marketed the financial instrument(s) or where they have provided the client with the KID/KIID in relation to the financial instrument(s) and they have or have had an ongoing relationship with the client during the year. Such information shall be based on costs incurred and shall be provided on a personalised basis.

Investment firms may choose to provide such aggregated information on costs and charges of the investment services and the financial instruments together with any existing periodic reporting to clients.

10 Investment firms shall provide their clients with an illustration showing the cumulative effect of costs on return when providing investment services. Such an illustration shall be provided both on an ex-ante and ex-post basis. Investment firms shall ensure that the illustration meets the following requirements:

- a the illustration shows the effect of the overall costs and charges on the return of the investment;
- b the illustration shows any anticipated spikes or fluctuations in the costs; and
- c the illustration is accompanied by a description of the illustration.

#### *Article 51*

#### **Information provided in accordance with Directive 2009/65/EU and Regulation (EU) No 1286/2014(Article 24(4) of Directive 2014/65/EU)**

Investment firms distributing units in collective investment undertakings or PRIIPs shall additionally inform their clients about any other costs and associated charges related to the product which may have not been included in the UCITS KID or PRIIPs KID and about the costs and charges relating to their provision of investment services in relation to that financial instrument.



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## SECTION 2

### **Investment advice**

#### Article 52

#### **Information about investment advice(Article 24(4) of Directive 2014/65/EU)**

1 Investment firms shall explain in a clear and concise way whether and why investment advice qualifies as independent or non-independent and the type and nature of the restrictions that apply, including, when providing investment advice on an independent basis, the prohibition to receive and retain inducements.

Where advice is offered or provided to the same client on both an independent and non-independent basis, investment firms shall explain the scope of both services to allow investors to understand the differences between them and not present itself as an independent investment adviser for the overall activity. Firms shall not give undue prominence to their independent investment advice services over non-independent investment services in their communications with clients.

2 Investment firms providing investment advice, on an independent or non-independent basis, shall explain to the client the range of financial instruments that may be recommended, including the firm's relationship with the issuers or providers of the instruments.

3 Investment firms shall provide a description of the types of financial instruments considered, the range of financial instruments and providers analysed per each type of instrument according to the scope of the service, and, when providing independent advice, how the service provided satisfies the conditions for the provision of investment advice on an independent basis and the factors taken into consideration in the selection process used by the investment firm to recommend financial instruments, such as risks, costs and complexity of the financial instruments.

4 When the range of financial instruments assessed by the investment firm providing investment advice on an independent basis includes the investment firm's own financial instruments or those issued or provided by entities having close links or any other close legal or economic relationship with the investment firm as well as other issuers or providers which are not linked or related, the investment firm shall distinguish, for each type of financial instrument, the range of the financial instruments issued or provided by entities not having any links with the investment firm.

5 Investments firms providing a periodic assessment of the suitability of the recommendations provided pursuant to Article 54(12) shall disclose all of the following:

- a the frequency and extent of the periodic suitability assessment and where relevant, the conditions that trigger that assessment;
- b the extent to which the information previously collected will be subject to reassessment; and
- c the way in which an updated recommendation will be communicated to the client.

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### Article 53

#### **Investment advice on an independent basis (Article 24(4) and 24(7) of Directive 2014/65/EU)**

1 Investment firms providing investment advice on an independent basis shall define and implement a selection process to assess and compare a sufficient range of financial instruments available on the market in accordance with Article 24(7)(a) of Directive 2014/65/EU. The selection process shall include the following elements:

- a the number and variety of financial instruments considered is proportionate to the scope of investment advice services offered by the independent investment adviser;
- b the number and variety of financial instruments considered is adequately representative of financial instruments available on the market;
- c the quantity of financial instruments issued by the investment firm itself or by entities closely linked to the investment firm itself is proportionate to the total amount of financial instruments considered; and
- d the criteria for selecting the various financial instruments shall include all relevant aspects such as risks, costs and complexity as well as the characteristics of the investment firm's clients, and shall ensure that the selection of the instruments that may be recommended is not biased.

Where such a comparison is not possible due to the business model or the specific scope of the service provided, the investment firm providing investment advice shall not present itself as independent.

2 An investment firm that provides investment advice on an independent basis and that focuses on certain categories or a specified range of financial instruments shall comply with the following requirements:

- a the firm shall market itself in a way that is intended only to attract clients with a preference for those categories or range of financial instruments;
- b the firm shall require clients to indicate that they are only interested in investing in the specified category or range of financial instruments; and
- c prior to the provision of the service, the firm shall ensure that its service is appropriate for each new client on the basis that its business model matches the client's needs and objectives, and the range of financial instruments that are suitable for the client. Where this is not the case the firm shall not provide such a service to the client.

3 An investment firm offering investment advice on both an independent basis and on a non-independent basis shall comply with the following obligations:

- a in good time before the provision of its services, the investment firm has informed its clients, in a durable medium, whether the advice will be independent or non-independent in accordance with Article 24(4)(a) of Directive 2014/65/EU and the relevant implementing measures;
- b the investment firm has presented itself as independent for the services for which it provides investment advice on an independent basis;
- c the investment firms has adequate organisational requirements and controls in place to ensure that both types of advice services and advisers are clearly separated from each other and that clients are not likely to be confused about the type of advice that they are receiving and are given the type of advice that is appropriate for them. The investment firm shall not allow a natural person to provide both independent and non-independent advice.

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## SECTION 3

### ***Assessment of suitability and appropriateness***

#### *Article 54*

#### **Assessment of suitability and suitability reports(Article 25(2) of Directive 2014/65/EU)**

1 Investment firms shall not create any ambiguity or confusion about their responsibilities in the process when assessing the suitability of investment services or financial instruments in accordance with Article 25(2) of Directive 2014/65/EU. When undertaking the suitability assessment, the firm shall inform clients or potential clients, clearly and simply, that the reason for assessing suitability is to enable the firm to act in the client's best interest.

Where investment advice or portfolio management services are provided in whole or in part through an automated or semi-automated system, the responsibility to undertake the suitability assessment shall lie with the investment firm providing the service and shall not be reduced by the use of an electronic system in making the personal recommendation or decision to trade.

2 Investment firms shall determine the extent of the information to be collected from clients in light of all the features of the investment advice or portfolio management services to be provided to those clients. Investment firms shall obtain from clients or potential clients such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for determining, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:

- a it meets the investment objectives of the client in question, including client's risk tolerance;
- b it is such that the client is able financially to bear any related investment risks consistent with his investment objectives;
- c it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

3 Where an investment firm provides an investment service to a professional client it shall be entitled to assume that in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge for the purposes of point (c) of paragraph 2.

Where that investment service consists in the provision of investment advice to a professional client covered by Section 1 of Annex II to Directive 2014/65/EU, the investment firm shall be entitled to assume for the purposes of point (b) of paragraph 2 that the client is able financially to bear any related investment risks consistent with the investment objectives of that client.

4 The information regarding the financial situation of the client or potential client shall include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

5 The information regarding the investment objectives of the client or potential client shall include, where relevant, information on the length of time for which the client wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

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6 Where a client is a legal person or a group of two or more natural persons or where one or more natural persons are represented by another natural person, the investment firm shall establish and implement policy as to who should be subject to the suitability assessment and how this assessment will be done in practice, including from whom information about knowledge and experience, financial situation and investment objectives should be collected. The investment firm shall record this policy.

Where a natural person is represented by another natural person or where a legal person having requested treatment as professional client in accordance with Section 2 of Annex II to Directive 2014/65/EU is to be considered for the suitability assessment, the financial situation and investment objectives shall be those of the legal person or, in relation to the natural person, the underlying client rather than of the representative. The knowledge and experience shall be that of the representative of the natural person or the person authorised to carry out transactions on behalf of the underlying client.

7 Investment firms shall take reasonable steps to ensure that the information collected about their clients or potential clients is reliable. This shall include, but shall not be limited to, the following:

- a ensuring clients are aware of the importance of providing accurate and up-to-date information;
- b ensuring all tools, such as risk assessment profiling tools or tools to assess a client's knowledge and experience, employed in the suitability assessment process are fit-for-purpose and are appropriately designed for use with their clients, with any limitations identified and actively mitigated through the suitability assessment process;
- c ensuring questions used in the process are likely to be understood by clients, capture an accurate reflection of the client's objectives and needs, and the information necessary to undertake the suitability assessment; and
- d taking steps, as appropriate, to ensure the consistency of client information, such as by considering whether there are obvious inaccuracies in the information provided by clients.

Investment firms having an on-going relationship with the client, such as by providing an ongoing advice or portfolio management service, shall have, and be able to demonstrate, appropriate policies and procedures to maintain adequate and up-to-date information about clients to the extent necessary to fulfil the requirements under paragraph 2.

8 Where, when providing the investment service of investment advice or portfolio management, an investment firm does not obtain the information required under Article 25(2) of Directive 2014/65/EU, the firm shall not recommend investment services or financial instruments to the client or potential client.

9 Investment firms shall have, and be able to demonstrate, adequate policies and procedures in place to ensure that they understand the nature, features, including costs and risks of investment services and financial instruments selected for their clients and that they assess, while taking into account cost and complexity, whether equivalent investment services or financial instruments can meet their client's profile.

10 When providing the investment service of investment advice or portfolio management, an investment firm shall not recommend or decide to trade where none of the services or instruments are suitable for the client.

11 When providing investment advice or portfolio management services that involve switching investments, either by selling an instrument and buying another or by exercising

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a right to make a change in regard to an existing instrument, investment firms shall collect the necessary information on the client's existing investments and the recommended new investments and shall undertake an analysis of the costs and benefits of the switch, such that they are reasonably able to demonstrate that the benefits of switching are greater than the costs.

12 When providing investment advice, investment firms shall provide a report to the retail client that includes an outline of the advice given and how the recommendation provided is suitable for the retail client, including how it meets the client's objectives and personal circumstances with reference to the investment term required, client's knowledge and experience and client's attitude to risk and capacity for loss.

Investment firms shall draw clients' attention to and shall include in the suitability report information on whether the recommended services or instruments are likely to require the retail client to seek a periodic review of their arrangements.

Where an investment firm provides a service that involves periodic suitability assessments and reports, the subsequent reports after the initial service is established may only cover changes in the services or instruments involved and/or the circumstances of the client and may not need to repeat all the details of the first report.

13 Investment firms providing a periodic suitability assessment shall review, in order to enhance the service, the suitability of the recommendations given at least annually. The frequency of this assessment shall be increased depending on the risk profile of the client and the type of financial instruments recommended.

#### *Article 55*

#### **Provisions common to the assessment of suitability or appropriateness(Article 25(2) and 25(3) of Directive 2014/65/EU)**

1 Investment firms shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:

- a the types of service, transaction and financial instrument with which the client is familiar;
- b the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;
- c the level of education, and profession or relevant former profession of the client or potential client.

2 An investment firm shall not discourage a client or potential client from providing information required for the purposes of Article 25(2) and (3) of Directive 2014/65/EU.

3 An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

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*Status: Point in time view as at 31/01/2020.*

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## Article 56

### **Assessment of appropriateness and related record-keeping obligations(Article 25(3) and 25(5) of Directive 2014/65/EU)**

1 Investment firms, shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service as referred to in Article 25(3) of Directive 2014/65/EU is appropriate for a client.

An investment firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client.

2 Investment firms shall maintain records of the appropriateness assessments undertaken which shall include the following:

- a the result of the appropriateness assessment;
- b any warning given to the client where the investment service or product purchase was assessed as potentially inappropriate for the client, whether the client asked to proceed with the transaction despite the warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction;
- c any warning given to the client where the client did not provide sufficient information to enable the firm to undertake an appropriateness assessment, whether the client asked to proceed with the transaction despite this warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction.

## Article 57

### **Provision of services in non-complex instruments(Article 25(4) of Directive 2014/65/EU)**

A financial instrument which is not explicitly specified in Article 25(4)(a) of Directive 2014/65/EU shall be considered as non-complex for the purposes of Article 25(4)(a)(vi) of Directive 2014/65/EU if it satisfies the following criteria:

- (a) it does not fall within Article 4(1)(44)(c) of, or points (4) to (11) of Section C of Annex I to Directive 2014/65/EU;
- (b) there are frequent opportunities to dispose of, redeem, or otherwise realise that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;
- (c) it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument;
- (d) it does not incorporate a clause, condition or trigger that could fundamentally alter the nature or risk of the investment or pay out profile, such as investments that incorporate a right to convert the instrument into a different investment;
- (e) it does not include any explicit or implicit exit charges that have the effect of making the investment illiquid even though there are technically frequent opportunities to dispose of, redeem or otherwise realise it;

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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- (f) adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

#### *Article 58*

### **Retail and Professional Client agreements(Article 24(1) and 25(5) of Directive 2014/65/EU)**

Investment firms providing any investment service or the ancillary service referred to in Section B(1) of Annex I to Directive 2014/65/EU to a client after the date of application of this Regulation shall enter into a written basic agreement with the client, in paper or another durable medium, with the client setting out the essential rights and obligations of the firm and the client. Investment firms providing investment advice shall comply with this obligation only where a periodic assessment of the suitability of the financial instruments or services recommended is performed.

The written agreement shall set out the essential rights and obligations of the parties, and shall include the following:

- (a) a description of the services, and where relevant the nature and extent of the investment advice, to be provided;
- (b) in case of portfolio management services, the types of financial instruments that may be purchased and sold and the types of transactions that may be undertaken on behalf of the client, as well as any instruments or transactions prohibited; and
- (c) a description of the main features of any services referred to in Section B(1) of Annex I to Directive 2014/65/EU to be provided, including where applicable the role of the firm with respect to corporate actions relating to client instruments and the terms on which securities financing transactions involving client securities will generate a return for the client.

#### *SECTION 4*

### ***Reporting to clients***

#### *Article 59*

### **Reporting obligations in respect of execution of orders other than for portfolio management(Article 25(6) of Directive 2014/65/EU)**

1 Investment firms having carried out an order on behalf of a client, other than for portfolio management, shall, in respect of that order:

- a promptly provide the client, in a durable medium, with the essential information concerning the execution of that order;
- b send a notice to the client in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or, where the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

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*Status: Point in time view as at 31/01/2020.*

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Point (b) shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the client by another person.

Points (a) and (b) shall not apply where orders executed on behalf of clients relate to bonds funding mortgage loan agreements with the said clients, in which case the report on the transaction shall be made at the same time as the terms of the mortgage loan are communicated, but no later than one month after the execution of the order.

2 In addition to the requirements under paragraph 1, investment firms shall supply the client, on request, with information about the status of his order.

3 In the case of client orders relating to units or shares in a collective investment undertaking which are executed periodically, investment firms shall either take the action specified in point (b) of paragraph 1 or provide the client, at least once every six months, with the information listed in paragraph 4 in respect of those transactions.

4 The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable and, where relevant, in accordance with the regulatory technical standards on reporting obligations adopted in accordance with Article 26 of Regulation (EU) No 600/2014:

- a the reporting firm identification;
- b the name or other designation of the client;
- c the trading day;
- d the trading time;
- e the type of the order;
- f the venue identification;
- g the instrument identification;
- h the buy/sell indicator;
- i the nature of the order if other than buy/sell;
- j the quantity;
- k the unit price;
- l the total consideration;
- m a total sum of the commissions and expenses charged and, where the client so requests, an itemised breakdown including, where relevant, the amount of any mark-up or mark-down imposed where the transaction was executed by an investment firm when dealing on own account, and the investment firm owes a duty of best execution to the client;
- n the rate of exchange obtained where the transaction involves a conversion of currency;
- o the client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the client;
- p where the client's counterparty was the investment firm itself or any person in the investment firm's group or another client of the investment firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading.

For the purposes of point (k), where the order is executed in tranches, the investment firm may supply the client with information about the price of each tranche or the average price. Where the average price is provided, the investment firm shall supply the client with information about the price of each tranche upon request.

5 The investment firm may provide the client with the information referred to in paragraph 4 using standard codes if it also provides an explanation of the codes used.



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## Article 60

### **Reporting obligations in respect of portfolio management (Article 25(6) of Directive 2014/65/EU)**

1 Investments firms which provide the service of portfolio management to clients shall provide each such client with a periodic statement in a durable medium of the portfolio management activities carried out on behalf of that client unless such a statement is provided by another person.

2 The periodic statement required under paragraph 1 shall provide a fair and balanced review of the activities undertaken and of the performance of the portfolio during the reporting period and shall include, where relevant, the following information:

- a the name of the investment firm;
- b the name or other designation of the client's account;
- c a statement of the contents and the valuation of the portfolio, including details of each financial instrument held, its market value, or fair value if market value is unavailable and the cash balance at the beginning and at the end of the reporting period, and the performance of the portfolio during the reporting period;
- d the total amount of fees and charges incurred during the reporting period, itemising at least total management fees and total costs associated with execution, and including, where relevant, a statement that a more detailed breakdown will be provided on request;
- e a comparison of performance during the period covered by the statement with the investment performance benchmark (if any) agreed between the investment firm and the client;
- f the total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio;
- g information about other corporate actions giving rights in relation to financial instruments held in the portfolio;
- h for each transaction executed during the period, the information referred to in Article 59(4)(c) to (l) where relevant, unless the client elects to receive information about executed transactions on a transaction-by-transaction basis, in which case paragraph 4 of this Article shall apply.

3 The periodic statement referred to in paragraph 1 shall be provided once every three months, except in the following cases:

- a where the investment firm provides its clients with access to an online system, which qualifies as a durable medium, where up-to-date valuations of the client's portfolio can be accessed and where the client can easily access the information required by Article 63(2) and the firm has evidence that the client has accessed a valuation of their portfolio at least once during the relevant quarter;
- b in cases where paragraph 4 applies, the periodic statement must be provided at least once every 12 months;
- c where the agreement between an investment firm and a client for a portfolio management service authorises a leveraged portfolio, the periodic statement must be provided at least once a month.

The exception provided for in point (b) shall not apply in the case of transactions in financial instruments covered by Article 4(1)(44)(c) of, or any of points 4 to 11 of Section C in Annex I to Directive 2014/65/EU.

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*Status: Point in time view as at 31/01/2020.*

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4 Investment firms, in cases where the client elects to receive information about executed transactions on a transaction-by-transaction basis, shall provide promptly to the client, on the execution of a transaction by the portfolio manager, the essential information concerning that transaction in a durable medium.

The investment firm shall send the client a notice confirming the transaction and containing the information referred to in Article 59(4) no later than the first business day following that execution or, where the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

The second subparagraph shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the client by another person.

#### *Article 61*

#### **Reporting obligations in respect of eligible counterparties(Article 24(4) and Article 25(6) of Directive 2014/65/EU)**

The requirements applicable to reports for retail and professional clients under Articles 49 and 59 shall apply unless investment firms enter into agreements with eligible counterparties to determine content and timing of reporting.

#### *Article 62*

#### **Additional reporting obligations for portfolio management or contingent liability transactions(Article 25(6) of Directive 2014/65/EU)**

1 Investment firms providing the service of portfolio management shall inform the client where the overall value of the portfolio, as evaluated at the beginning of each reporting period, depreciates by 10 % and thereafter at multiples of 10 %, no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.

2 Investment firms that hold a retail client account that includes positions in leveraged financial instruments or contingent liability transactions shall inform the client, where the initial value of each instrument depreciates by 10 % and thereafter at multiples of 10 %. Reporting under this paragraph should be on an instrument-by-instrument basis, unless otherwise agreed with the client, and shall take place no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.

#### *Article 63*

#### **Statements of client financial instruments or client funds(Article 25(6) of Directive 2014/65/EU)**

1 Investment firms that hold client financial instruments or client funds shall send at least on a quarterly basis, to each client for whom they hold financial instruments or funds, a statement in a durable medium of those financial instruments or funds unless such a statement

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*Status: Point in time view as at 31/01/2020.*

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has been provided in any other periodic statement. Upon client request, firms shall provide such statement more frequently at a commercial cost.

The first subparagraph shall not apply to a credit institution authorised under Directive 2000/12/EC of the European Parliament and of the Council<sup>(1)</sup> in respect of deposits within the meaning of that Directive held by that institution.

2 The statement of client assets referred to in paragraph 1 shall include the following information:

- a details of all the financial instruments or funds held by the investment firm for the client at the end of the period covered by the statement;
- b the extent to which any client financial instruments or client funds have been the subject of securities financing transactions;
- c the extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions, and the basis on which that benefit has accrued;
- d a clear indication of the assets or funds which are subject to the rules of Directive 2014/65/EU and its implementing measures and those that are not, such as those that are subject to Title Transfer Collateral Agreement;
- e a clear indication of which assets are affected by some peculiarities in their ownership status, for instance due to a security interest;
- f the market or estimated value, when the market value is not available, of the financial instruments included in the statement with a clear indication of the fact that the absence of a market price is likely to be indicative of a lack of liquidity. The evaluation of the estimated value shall be performed by the firm on a best effort basis.

In cases where the portfolio of a client includes the proceeds of one or more unsettled transactions, the information referred to in point (a) may be based either on the trade date or the settlement date, provided that the same basis is applied consistently to all such information in the statement.

The periodic statement of client assets referred to in paragraph 1 shall not be provided where the investment firm provides its clients with access to an online system, which qualifies as a durable medium, where up-to-date statements of client's financial instruments or funds can be easily accessed by the client and the firm has evidence that the client has accessed this statement at least once during the relevant quarter.

3 Investment firms which hold financial instruments or funds and which carry out the service of portfolio management for a client may include the statement of client assets referred to in paragraph 1 in the periodic statement it provides to that client pursuant to Article 60(1).

## SECTION 5

### **Best execution**

#### *Article 64*

#### **Best execution criteria(Articles 27(1) and 24(1) of Directive 2014/65/EU)**

1 When executing client orders, investment firms shall take into account the following criteria for determining the relative importance of the factors referred to in Article 27(1) of Directive 2014/65/EU:

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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- a the characteristics of the client including the categorisation of the client as retail or professional;
- b the characteristics of the client order, including where the order involves a securities financing transaction (SFT);
- c the characteristics of financial instruments that are the subject of that order;
- d the characteristics of the execution venues to which that order can be directed.

For the purposes of this Article and Articles 65 and 66, ‘execution venue’ includes a regulated market, an MTF, an OTF, a systematic internaliser, or a market maker or other liquidity provider or an entity that performs a similar function in a third country to the functions performed by any of the foregoing.

2 An investment firm satisfies its obligation under Article 27(1) of Directive 2014/65/EU to take all sufficient steps to obtain the best possible result for a client to the extent that it executes an order or a specific aspect of an order following specific instructions from the client relating to the order or the specific aspect of the order.

3 Investment firms shall not structure or charge their commissions in such a way as to discriminate unfairly between execution venues.

4 When executing orders or taking decision to deal in OTC products including bespoke products, the investment firm shall check the fairness of the price proposed to the client, by gathering market data used in the estimation of the price of such product and, where possible, by comparing with similar or comparable products.

#### *Article 65*

#### **Duty of investment firms carrying out portfolio management and reception and transmission of orders to act in the best interests of the client (Article 24(1) and 24(4) of Directive 2014/65/EU)**

1 Investment firms, when providing portfolio management, shall comply with the obligation under Article 24(1) of Directive 2014/65/EU to act in accordance with the best interests of their clients when placing orders with other entities for execution that result from decisions by the investment firm to deal in financial instruments on behalf of its client.

2 Investment firms, when providing the service of reception and transmission of orders, shall comply with the obligation under Article 24(1) of Directive 2014/65/EU to act in accordance with the best interests of their clients when transmitting client orders to other entities for execution.

3 In order to comply with paragraphs 1 or 2, investment firms shall comply with paragraphs 4 to 7 of this Article and Article 64(4).

4 Investment firms shall take all sufficient steps to obtain the best possible result for their clients taking into account the factors referred to in Article 27(1) of Directive 2014/65/EU. The relative importance of these factors shall be determined by reference to the criteria set out in Article 64(1) and, for retail clients, to the requirement under Article 27(1) of Directive 2014/65/EU.

An investment firm satisfies its obligations under paragraph 1 or 2, and is not required to take the steps mentioned in this paragraph, to the extent that it follows specific instructions from its client when placing an order with, or transmitting an order to, another entity for execution.

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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5 Investment firms shall establish and implement a policy that enables them to comply with the obligation in paragraph 4. The policy shall identify, in respect of each class of instruments, the entities with which the orders are placed or to which the investment firm transmits orders for execution. The entities identified shall have execution arrangements that enable the investment firm to comply with its obligations under this Article when it places or transmits orders to that entity for execution.

6 Investment firms shall provide information to their clients on the policy established in accordance with paragraph 5 and paragraphs 2 to 9 of Article 66. Investment firms shall provide clients with appropriate information about the firm and its services and the entities chosen for execution. In particular, when the investment firm selects other firms to provide order execution services, it shall summarise and make public, on an annual basis, for each class of financial instruments, the top five investment firms in terms of trading volumes where it transmitted or placed client orders for execution in the preceding year and information on the quality of execution obtained. The information shall be consistent with the information published in accordance with the technical standards developed under Article 27(10)(b) of Directive 2014/65/EU.

Upon reasonable request from a client, investment firms shall provide its clients or potential clients with information about entities where the orders are transmitted or placed for execution.

7 Investment firms shall monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 5 and, in particular, shall monitor the execution quality of the entities identified in that policy and, where appropriate, correct any deficiencies.

Investment firms shall review the policy and arrangements at least annually. Such a review shall also be carried out whenever a material change occurs that affects the firm's ability to continue to obtain the best possible result for their clients.

Investment firms shall assess whether a material change has occurred and shall consider making changes to the execution venues or entities on which they place significant reliance in meeting the overarching best execution requirement.

A material change shall be a significant event that could impact parameters of best execution such as cost, price, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order.

8 This Article shall not apply where the investment firm that provides the service of portfolio management or reception and transmission of orders also executes the orders received or the decisions to deal on behalf of its client's portfolio. In those cases Article 27 of Directive 2014/65/EU shall apply.

#### *Article 66*

#### **Execution policy(Article 27(5) and (7) of Directive 2014/65/EU)**

1 Investment firms shall review, at least on an annual basis execution policy established pursuant to Article 27(4) of Directive 2014/65/EU, as well as their order execution arrangements.

Such a review shall also be carried out whenever a material change as defined in Article 65(7) occurs that affects the firm's ability to continue to obtain the best possible result for the execution of its client orders on a consistent basis using the venues included in its execution policy. An investment firm shall assess whether a material change

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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has occurred and shall consider making changes to the relative importance of the best execution factors in meeting the overarching best execution requirement.

2 The information on the execution policy shall be customised depending on the class of financial instrument and type of the service provided and shall include information set out in paragraphs 3 to 9.

3 Investment firms shall provide clients with the following details on their execution policy in good time prior to the provision of the service:

- a an account of the relative importance the investment firm assigns, in accordance with the criteria specified in Article 59(1), to the factors referred to in Article 27(1) of Directive 2014/65/EU, or the process by which the firm determines the relative importance of those factors.
- b a list of the execution venues on which the firm places significant reliance in meeting its obligation to take all reasonable steps to obtain on a consistent basis the best possible result for the execution of client orders and specifying which execution venues are used for each class of financial instruments, for retail client orders, professional client orders and SFTs;
- c a list of factors used to select an execution venue, including qualitative factors such as clearing schemes, circuit breakers, scheduled actions, or any other relevant consideration, and the relative importance of each factor; The information about the factors used to select an execution venue for execution shall be consistent with the controls used by the firm to demonstrate to clients that best execution has been achieved in a consistent basis when reviewing the adequacy of its policy and arrangements;
- d how the execution factors of price costs, speed, likelihood of execution and any other relevant factors are considered as part of all sufficient steps to obtain the best possible result for the client;
- e where applicable, information that the firm executes orders outside a trading venue, the consequences, for example counterparty risk arising from execution outside a trading venue, and upon client request, additional information about the consequences of this means of execution;
- f a clear and prominent warning that any specific instructions from a client may prevent the firm from taking the steps that it has designed and implemented in its execution policy to obtain the best possible result for the execution of those orders in respect of the elements covered by those instructions;
- g a summary of the selection process for execution venues, execution strategies employed, the procedures and process used to analyse the quality of execution obtained and how the firms monitor and verify that the best possible results were obtained for clients.

That information shall be provided in a durable medium, or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

4 Where investment firms apply different fees depending on the execution venue, the firm shall explain these differences in sufficient detail in order to allow the client to understand the advantages and the disadvantages of the choice of a single execution venue.

5 Where investment firms invite clients to choose an execution venue, fair, clear and not misleading information shall be provided to prevent the client from choosing one execution venue rather than another on the sole basis of the price policy applied by the firm.

6 Investment firms shall only receive third-party payments that comply with Article 24(9) of Directive 2014/65/EU and shall inform clients about the inducements that the firm

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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may receive from the execution venues. The information shall specify the fees charged by the investment firm to all counterparties involved in the transaction, and where the fees vary depending on the client, the information shall indicate the maximum fees or range of the fees that may be payable.

7 Where an investment firm charges more than one participant in a transaction, in compliance with Article 24(9) of Directive 2014/65/EU and its implementing measures, the firm shall inform its clients of the value of any monetary or non-monetary benefits received by the firm.

8 Where a client makes reasonable and proportionate requests for information about its policies or arrangements and how they are reviewed to an investment firm, that investment firm shall answer clearly and within a reasonable time.

9 Where an investment firm executes orders for retail clients, it shall provide those clients with a summary of the relevant policy, focused on the total costs they incur. The summary shall also provide a link to the most recent execution quality data published in accordance with Article 27(3) of Directive 2014/65/EU for each execution venue listed by the investment firm in its execution policy.

## SECTION 6

### **Client order handling**

#### *Article 67*

#### **General principles(Articles 28(1) and 24(1) of Directive 2014/65/EU)**

- 1 Investment firms shall satisfy the following conditions when carrying out client orders:
  - a ensure that orders executed on behalf of clients are promptly and accurately recorded and allocated;
  - b carry out otherwise comparable client orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise;
  - c inform a retail client about any material difficulty relevant to the proper carrying out of orders promptly upon becoming aware of the difficulty.

2 Where an investment firm is responsible for overseeing or arranging the settlement of an executed order, it shall take all reasonable steps to ensure that any client financial instruments or client funds received in settlement of that executed order are promptly and correctly delivered to the account of the appropriate client.

3 An investment firm shall not misuse information relating to pending client orders, and shall take all reasonable steps to prevent the misuse of such information by any of its relevant persons.

#### *Article 68*

#### **Aggregation and allocation of orders(Articles 28(1) and 24(1) of Directive 2014/65/EU)**

- 1 Investment firms shall not carry out a client order or a transaction for own account in aggregation with another client order unless the following conditions are met:

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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- a it is unlikely that the aggregation of orders and transactions will work overall to the disadvantage of any client whose order is to be aggregated;
  - b it is disclosed to each client whose order is to be aggregated that the effect of aggregation may work to its disadvantage in relation to a particular order;
  - c an order allocation policy is established and effectively implemented, providing for the fair allocation of aggregated orders and transactions, including how the volume and price of orders determines allocations and the treatment of partial executions.
- 2 Where an investment firm aggregates an order with one or more other client orders and the aggregated order is partially executed, it shall allocate the related trades in accordance with its order allocation policy.

#### *Article 69*

##### **Aggregation and allocation of transactions for own account(Articles 28(1) and 24(1) of Directive 2014/65/EU)**

- 1 Investment firms which have aggregated transactions for own account with one or more client orders shall not allocate the related trades in a way that is detrimental to a client.
- 2 Where an investment firm aggregates a client order with a transaction for own account and the aggregated order is partially executed, it shall allocate the related trades to the client in priority to the firm.

Where an investment firm is able to demonstrate on reasonable grounds that without the combination it would not have been able to carry out the order on such advantageous terms, or at all, it may allocate the transaction for own account proportionally, in accordance with its order allocation policy referred to in Article 68(1)(c).

- 3 As part of the order allocation policy referred to in Article 68(1)(c), investment firms shall put in place procedures designed to prevent the reallocation, in a way that is detrimental to the client, of transactions for own account which are executed in combination with client orders.

#### *Article 70*

##### **Prompt fair and expeditious execution of client orders and publication of unexecuted client limit orders for shares traded on a trading venue(Article 28 of Directive 2014/65/EU)**

- 1 A client limit order in respect of shares admitted to trading on a regulated market or traded on a trading venue which have not been immediately executed under prevailing market conditions as referred to in Article 28(2) of Directive 2014/65/EU shall be considered available to the public when the investment firm has submitted the order for execution to a regulated market or a MTF or the order has been published by a data reporting services provider located in one Member State and can be easily executed as soon as market conditions allow.
- 2 Regulated markets and MTFs shall be prioritised according to the firm's execution policy to ensure execution as soon as market conditions allow.



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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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## SECTION 7

### **Eligible counterparties**

#### *Article 71*

#### **Eligible counterparties(Article 30 of Directive 2014/65/EU)**

1 In addition to the categories which are explicitly set out in Article 30(2) of Directive 2014/65/EU, Member States may recognise as eligible counterparty, in accordance with Article 30(3) of that Directive, an undertaking falling within a category of clients who are to be considered professional clients in accordance with paragraphs 1, 2 and 3 of Section I of Annex II to that Directive.

2 Where, pursuant to the second subparagraph of Article 30(2) of Directive 2014/65/EU, an eligible counterparty requests treatment as a client whose business with an investment firm is subject to Articles 24, 25, 27 and 28 of that Directive, the request should be made in writing, and shall indicate whether the treatment as retail client or professional client refers to one or more investment services or transactions, or one or more types of transaction or product.

3 Where an eligible counterparty requests treatment as a client whose business with an investment firm is subject to Articles 24, 25, 27 and 28 of Directive 2014/65/EU, but does not expressly request treatment as a retail client, the firm shall treat that eligible counterparty as a professional client.

4 Where the eligible counterparty expressly requests treatment as a retail client, the investment firm shall treat the eligible counterparty as a retail client, applying the provisions in respect of requests of non-professional treatment specified in the second, third and fourth subparagraphs of Section I of Annex II to Directive 2014/65/EU.

5 Where a client requests to be treated as an eligible counterparty, in accordance with Article 30(3) of Directive 2014/65/EU, the following procedure shall be followed:

- a the investment firm shall provide the client with a clear written warning of the consequences for the client of such a request, including the protections they may lose;
- b the client shall confirm in writing the request to be treated as an eligible counterparty either generally or in respect of one or more investment services or a transaction or type of transaction or product and that they are aware of the consequences of the protection they may lose as a result of the request.

## SECTION 8

### **Record-keeping**

#### *Article 72*

#### **Retention of records(Article 16(6) of Directive 2014/65/EU)**

1 The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

- a the competent authority is able to access them readily and to reconstitute each key stage of the processing of each transaction;

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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- b it is possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
- c it is not possible for the records otherwise to be manipulated or altered;
- d it allows IT or any other efficient exploitation when the analysis of the data cannot be easily carried out due to the volume and the nature of the data; and
- e the firm's arrangements comply with the record keeping requirements irrespective of the technology used.

2 Investment firms shall keep at least the records identified in Annex I to this Regulation depending upon the nature of their activities.

The list of records identified in Annex I to this Regulation is without prejudice to any other record-keeping obligations arising from other legislation.

3 Investment firms shall also keep records of any policies and procedures they are required to maintain pursuant to Directive 2014/65/EU, Regulation (EU) No 600/2014, Directive 2014/57/EU and Regulation (EU) No 596/2014 and their respective implementing measures in writing.

Competent authorities may require investment firms to keep additional records to the list identified in Annex I to this Regulation.

#### *Article 73*

##### **Record keeping of rights and obligations of the investment firm and the client(Article 25(5) of Directive 2014/65/EU)**

Records which set out the respective rights and obligations of the investment firm and the client under an agreement to provide services, or the terms on which the firm provides services to the client, shall be retained for at least the duration of the relationship with the client.

#### *Article 74*

##### **Record keeping of client orders and decision to deal(Article 16(6) of Directive 2014/65/EU)**

An investment firm shall, in relation to every initial order received from a client and in relation to every initial decision to deal taken, immediately record and keep at the disposal of the competent authority at least the details set out in Section 1 of Annex IV to this Regulation to the extent they are applicable to the order or decision to deal in question.

Where the details set out in Section 1 of Annex IV to this Regulation are also prescribed under Articles 25 and 26 of Regulation (EU) No 600/2014, these details should be maintained in a consistent way and according to the same standards prescribed under Articles 25 and 26 of Regulation (EU) No 600/2014.

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## Article 75

### **Record keeping of transactions and order processing(Article 16(6) of Directive 2014/65/EU)**

Investment firms shall, immediately after receiving a client order or making a decision to deal to the extent they are applicable to the order or decision to deal in question, record and keep at the disposal of the competent authority at least the details set out in Section 2 of Annex IV.

Where the details set out in Section 2 of Annex IV are also prescribed under Articles 25 and 26 of Regulation (EU) No 600/2014, they shall be maintained in a consistent way and according to the same standards prescribed under Articles 25 and 26 of Regulation (EU) No 600/2014.

## Article 76

### **Recording of telephone conversations or electronic communications(Article 16(7) of Directive 2014/65/EU)**

1 Investment firms shall establish, implement and maintain an effective recording of telephone conversations and electronic communications policy, set out in writing, and appropriate to the size and organisation of the firm, and the nature, scale and complexity of its business. The policy shall include the following content:

- a the identification of the telephone conversations and electronic communications, including relevant internal telephone conversations and electronic communications, that are subject to the recording requirements in accordance with Article 16(7) of Directive 2014/65/EU; and
- b the specification of the procedures to be followed and measures to be adopted to ensure the firm's compliance with the third and eighth subparagraphs of Article 16(7) of Directive 2014/65/EU where exceptional circumstances arise and the firm is unable to record the conversation/communication on devices issued, accepted or permitted by the firm. Evidence of such circumstances shall be retained and shall be accessible to competent authorities.

2 Investment firms shall ensure that the management body has effective oversight and control over the policies and procedures relating to the firm's recording of telephone conversations and electronic communications.

3 Investment firms shall ensure that the arrangements to comply with recording requirements are technology-neutral. Firms shall periodically evaluate the effectiveness of the firm's policies and procedures and adopt any such alternative or additional measures and procedures as are necessary and appropriate. At a minimum, such adoption of alternative or additional measures shall occur when a new medium of communication is accepted or permitted for use by the firm.

4 Investment firms shall keep and regularly update a record of those individuals who have firm devices or privately owned devices that have been approved for use by the firm.

5 Investment firms shall educate and train employees in procedures governing the requirements in Article 16(7) of Directive 2014/65/EU.

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*Status: Point in time view as at 31/01/2020.*

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6 To monitor compliance with the recording and record-keeping requirements in accordance with Article 16(7) of Directive 2014/65/EU, investment firms shall periodically monitor the records of transactions and orders subject to these requirements, including relevant conversations. Such monitoring shall be risk based and proportionate.

7 Investment firms shall demonstrate the policies, procedures and management oversight of the recording rules to the relevant competent authorities upon request.

8 Before investment firms provide investment services and activities relating to the reception, transmission and execution of orders to new and existing clients, firms shall inform the client of the following:

- a that the conversations and communications are being recorded; and
- b that a copy of the recording of such conversations with the client and communications with the client will be available on request for a period of five years and, where requested by the competent authority, for a period of up to seven years.

The information referred to in the first sub-paragraph shall be presented in the same language(s) as that used to provide investment services to clients.

9 Investment firms shall record in a durable medium all relevant information related to relevant face-to-face conversations with clients. The information recorded shall include at least the following:

- a date and time of meetings;
- b location of meetings;
- c identity of the attendees;
- d initiator of the meetings; and
- e relevant information about the client order including the price, volume, type of order and when it shall be transmitted or executed.

10 Records shall be stored in a durable medium, which allows them to be replayed or copied and must be retained in a format that does not allow the original record to be altered or deleted.

Records shall be stored in a medium so that they are readily accessible and available to clients on request.

Firms shall ensure the quality, accuracy and completeness of the records of all telephone recordings and electronic communications.

11 The period of time for the retention of a record shall begin on the date when the record is created.

## SECTION 9

### **SME growth markets**

#### *Article 77*

#### **Qualification as an SME(Article 4(1)(13) of Directive 2014/65/EU)**

1 An issuer whose shares have been admitted to trading for less than three years shall be deemed an SME for the purpose of point (a) of Article 33(3) of Directive 2014/65/EU where its market capitalisation is below EUR 200 million based on any of the following:

*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

- a the closing share price of the first day of trading, if its shares have been admitted to trading for less than one year;
- b the last closing share price of the first year of trading, if its shares have been admitted to trading for more than one year but less than two years;
- c the average of the last closing share prices of each of the first two years of trading, if its shares have been admitted to trading for more than two years but less than three years.

[<sup>F12</sup> An issuer that has no equity instrument traded on any trading venue shall be deemed an SME for the purposes of Article 4(1)(13) of Directive 2014/65/EU if the nominal value of its debt issuances over the previous calendar year, on all trading venues across the Union, does not exceed EUR 50 million.]

#### Textual Amendments

- F1** Substituted by [Commission Delegated Regulation \(EU\) 2019/1011 of 13 December 2018 amending Commission Delegated Regulation \(EU\) 2017/565 as regards certain registration conditions to promote the use of SME growth markets for the purposes of Directive 2014/65/EU of the European Parliament and of the Council \(Text with EEA relevance\).](#)

### Article 78

#### Registration as an SME growth market(Article 33(3) of Directive 2014/65/EU)

1 When determining whether at least 50 % of the issuers admitted to trading on an MTF are SMEs for the purposes of registration as an SME growth market in accordance with point (a) of Article 33(3) of Directive 2014/65/EU, the competent authority of the home Member State of the operator of an MTF shall calculate the average ratio of SMEs over the total number of issuers whose financial instruments are admitted to trading on that market. The average ratio shall be calculated on 31 December of the previous calendar year as the average of the twelve end-of-month ratios of that calendar year.

Without prejudice to the other conditions for registration specified in points (b) to (g) of Article 33(3) of Directive 2014/65/EU, the competent authority shall register as an SME growth market an applicant with no previous operating history and, after three calendar years have elapsed, shall verify that it complies with the minimum proportion of SMEs, as determined in accordance with the first subparagraph.

2 With regard to the criteria laid out in points (b), (c), (d) and (f) of Article 33(3) of Directive 2014/65/EU, the competent authority of the home Member State of the operator of an MTF shall not register the MTF as an SME growth market unless it is satisfied that the MTF:

- a has established and applies rules providing for objective and transparent criteria for the initial and ongoing admission to trading of issuers on its venue;
- b has an operating model which is appropriate for the performance of its functions and ensures the maintenance of fair and orderly trading in the financial instruments admitted to trading on its venue;
- c has established and applies rules that require an issuer seeking admission of its financial instruments to trading on the MTF, to publish, in cases where Directive 2003/71/EC does not apply, an appropriate admission document, drawn up under the responsibility of the issuer and clearly stating whether or not it has been approved or reviewed and by whom;

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*Status: Point in time view as at 31/01/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)*

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- d has established and applies rules that define the minimum content of the admission document referred to under point (c), in such a way that sufficient information is provided to investors to enable them to make an informed assessment of the financial position and prospects of the issuer, and the rights attaching to its securities;
- e requires the issuer to state, in the admission document referred to under point (c), whether or not, in its opinion, its working capital is sufficient for its present requirements or, if not, how it proposes to provide the additional working capital needed;
- f has made arrangements for the admission document referred to under point (c) to be subject to an appropriate review of its completeness, consistency and comprehensibility;
- g requires the issuers whose securities are traded on its venue to publish annual financial reports within 6 months after the end of each financial year, and half yearly financial reports within 4 months after the end of the first 6 months of each financial year;
- h ensures dissemination to the public of prospectuses drawn up in accordance with Directive 2003/71/EC, admission documents referred to under point (c), financial reports referred to under point (g) and information defined in Article 7(1) of Regulation (EU) No 596/2014 publicly disclosed by the issuers whose securities are traded on its venue, by publishing them on its website, or providing thereon a direct link to the page of the website of the issuers where such documents, reports and information are published;
- i ensures that the regulatory information referred to under point (h) and direct links remain available on its website for a period of at least five years<sup>[F1];</sup>
- <sup>[F2]</sup> requires issuers seeking admission of their shares to trading on its venue for the first time to allocate a minimum amount of their issued shares available for trading on the MTF, in accordance with a threshold to be established by the operator of the MTF and expressed either as an absolute value or as a percentage of the total issued share capital.]

<sup>[F2]</sup>The operator of an MTF may exempt issuers that have no equity instruments traded on the MTF from the requirement to publish half-yearly financial reports referred to in point (g) of the first subparagraph of this paragraph. Where the operator of an MTF exercises the option pursuant to the first sentence of this subparagraph, the competent authority shall not require, for the purposes of point (g) of the first subparagraph, that issuers that have no equity instruments traded on the MTF be required to publish half-yearly financial reports.]

#### Textual Amendments

- F1** Substituted by [Commission Delegated Regulation \(EU\) 2019/1011 of 13 December 2018 amending Commission Delegated Regulation \(EU\) 2017/565 as regards certain registration conditions to promote the use of SME growth markets for the purposes of Directive 2014/65/EU of the European Parliament and of the Council \(Text with EEA relevance\).](#)
- F2** Inserted by [Commission Delegated Regulation \(EU\) 2019/1011 of 13 December 2018 amending Commission Delegated Regulation \(EU\) 2017/565 as regards certain registration conditions to promote the use of SME growth markets for the purposes of Directive 2014/65/EU of the European Parliament and of the Council \(Text with EEA relevance\).](#)

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## Article 79

### **Deregistration as an SME growth market(Article 33(3) of Directive 2014/65/EU)**

1 With regard to the proportion of SMEs, and without prejudice to the other conditions specified in points (b) to (g) of Article 33(3) of Directive 2014/65/EU and in Article 78(2) of this Regulation, an SME growth market shall only be deregistered by the competent authority of its home Member State where the proportion of SMEs, as determined in accordance with the first subparagraph of Article 78(1) of this Regulation, falls below 50 % for three consecutive calendar years.

2 With regard to the conditions specified in points (b) to (g) of Article 33(3) of Directive 2014/65/EU and in Article 78(2) of this Regulation, the operator of an SME growth market shall be deregistered by the competent authority of its home Member State where such conditions are no longer satisfied.

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Delegated Regulation (EU) 2017/565, CHAPTER III. (See end of Document for details)

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- (1) Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions ([OJ L 126, 26.5.2000, p. 1](#)).



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