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AT 1 Preliminary remarks

1. This Circular issued by the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) expands on certain requirements of Part 11 of the WpHG and Article 21ff. of Delegated Regulation (EU) 2017/565 (in the following: DR). It provides a flexible and practical framework for structuring the organisation of the investment services business of enterprises that are covered by the requirements. The Circular is also designed to give guidance, in particular for smaller enterprises. At various points, it contains illustrative lists of possible measures to help enterprises comply with the requirements of the provisions mentioned.

2. The objective of the Circular is to promote investor confidence in the proper functioning of securities markets and to strengthen the protection of all investors and the ability of the capital markets to function as an institution, as well as to protect investment services enterprises and their employees. The Circular also aims to introduce appropriate measures to mitigate the risk of regulatory measures, claims for damages brought against enterprises and reputational damage for enterprises due to violations of the provisions contained in Part 11 of the WpHG and Article 21ff. of the DR.

3. This Circular serves as a compendium consolidating BaFin’s administrative practice relating to individual requirements of the above-mentioned legislation. It provides enterprises with a compilation of all valid administrative practices relating to Part 11 of the WpHG and Article 21ff. of the DR that have been published by BaFin and that can be updated if necessary.

4. As the Circular only explains individual requirements of the above-mentioned legislative instruments in detail, it does not claim to be a comprehensive guide. BaFin will maintain an ongoing dialogue with the industry to meet the need for further detailed information.

5. The Circular has a modular structure so that any necessary adjustments to specific regulatory areas can be restricted to the immediate revision of individual modules. The General Part (AT module) sets out basic principles relating to the organisational requirements and rules of conduct laid down in Part 11 of the WpHG. Specific individual requirements and obligations are explained in detail in the Special Part (BT).

6. On the one hand, the Circular contains requirements that are considered by BaFin to be mandatory stipulations based on Part 11 of the WpHG (in most cases denoted by the use of the words “shall” or “required to”). These stipulations shall be complied with by all enterprises subject to the relevant requirements. The Circular also contains stipulations that are normally to be complied with, but from which enterprises may depart in certain circumstances. Such stipulations are denoted by the use of the words “should”, “as a matter of principle” or “generally”. In some of these cases, the Circular requires any departures to be justified in writing.

In addition to the requirements that must normally be complied with in accordance with BaFin’s administrative practice, the Circular also contains recommendations that are either expressly worded as a recommendation or are denoted by the use of the
words “may” or “can”. A recommendation illustrates non-binding suggestions or alternative courses of action.

The Circular also contains numerous examples that illustrate the requirements as well as uncomplicated guidance on non-binding, informative objectives, which are also denoted as such.

7. The requirements contained in BT 1 of this Circular are aimed at the compliance function of investment services enterprises. The General Part as well as BT 2 to BT 5 of this Circular are aimed at investment services enterprises as such. Investment services enterprises themselves determine the business unit responsible for these areas.

AT 2 Sources

AT 2.1 International/European sources and guidance

The legal requirements defined in detail in this Circular are based on the following supranational legal sources, agreements and publications:

1. International Organisation of Securities Commissions (IOSCO): *Objectives and Principles of Securities Regulation*


3. Delegated Regulation (EU) 2017/565

4. Publications

   - Publications by the European Securities and Markets Authority (ESMA) or its predecessor, the Committee of European Securities Regulators (CESR):
     - Guidelines on knowledge and competence dated 17 December 2015 (ESMA/2015/1886)
     - Guidelines on MiFID II product governance requirements dated 2 June 2017 (ESMA35-43-620)
     - Joint guidelines for complaints-handling for the securities (ESMA) and banking (EBA) sectors dated 13 June 2014 (JC 2014/43)
     - Guidelines on complex debt instruments and structured deposits dated 26 November 2015 (ESMA/2015/1783)
     - Guidelines on cross-selling practices under MiFID II dated 22 December 2015 (ESMA/2015/1861)
     - Guidelines on certain aspects of the MiFID compliance function dated 6 July 2012 (ESMA/2012/388)
     - Guidelines and Recommendations on remuneration policies and practices dated 11 June 2013 (ESMA/2013/606)
AT 2.2 National legal sources

This Circular is based on the following national legal sources:

2. German Securities Trading Act (Gesetz über den Wertpapierhandel – Wertpapierhandelsgesetz – WpHG)

3. German Banking Act (Gesetz über das Kreditwesen – Kreditwesengesetz – KWG)

4. German Regulation specifying rules of conduct and organisational requirements for investment services enterprises (Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung – WpDVerOV)

5. German Regulation relating to the use of employees in the provision of investment advice, as distribution officers or as compliance officers and to the reporting requirements under section 87 of the Securities Trading Act (Verordnung über den Einsatz von Mitarbeitern in der Anlageberatung, als Vertriebsbeauftragte oder als Compliance-Beauftragte und über die Anzeigepflichten nach § 87 des Wertpapierhandelsgesetzes – WpHG-Mitarbeiteranzeige-Verordnung – WpHGMaAnzV).

AT 3 Scope

AT 3.1 Affected enterprises

The requirements of this Circular apply to all investment services enterprises within the meaning of section 2 (10) of the WpHG. These are all credit institutions and financial services institutions as defined by section 1 (1) and (1a) of the KWG and all enterprises operating under section 53 (1) sentence 1 of the KWG that, in accordance with section 2 (8) of the WpHG, provide investment services on a commercial basis or on a scale that requires commercially organised business operations. The requirements do not apply to enterprises that meet the exemption criteria defined in section 3 of the WpHG.

The requirements of this Circular apply to branches whose registered office is in Germany and tied agents who are ordinarily resident in Germany within the meaning of section 53b of the KWG and who provide investment services, with the exception of AT 4 to AT 7, AT 9, BT 1, BT 2, BT 5 (to the extent that it relates to the requirements under section 80 (9) to (13) of the WpHG), BT 8 (to the extent that it does not relate either to the requirements to act in the best interests of the client or the recommendation of certain financial instruments and structured deposits), BT 9, BT 11 (to the extent that it relates to requirements governing portfolio managers, distribution officers and compliance officers) and BT 12. The provisions of the AT as well as BT 1, BT 2, BT 5, BT 8 and BT 9 of this Circular apply to branches and tied agents of German investment services enterprises resident in the EEA.
Credit and financial services institutions that are not investment services enterprises within the meaning of section 2 (10) of the WpHG are subject to the general organisational requirements under section 25a (1) of the KWG, but not the requirements under sections 63ff. of the WpHG and in this Circular.

The requirements of this Circular apply to asset management companies to the extent that they provide services and ancillary services within the meaning of section 20 (2) nos. 1, 2 and 3 of the German Investment Code (Kapitalanlagegesetzbuch – KAGB) and subsection (3) nos. 2, 3, 4 and 5 of the KAGB, subject to the condition that the requirements of the AT and BT 1 do not apply (see also Part 2, paragraph 3 of Circular 1/2017 Minimum requirements for the risk management of asset management companies (Mindestanforderungen an das Risikomanagement von Kapitalverwaltungsgesellschaften – KAMaRisk) dated 10 January 2017) and the requirements of BT 2 to BT 10, BT 12 and BT 14 apply, to the extent that the corresponding provisions of sections 63ff. of the WpHG apply via section 5 (2) of the KAGB.

**AT 3.2 Principle of proportionality**

This Circular reflects the heterogeneous corporate structure and the variety of business activities of investment services enterprises. It contains numerous opening clauses that simplify implementation, depending in particular on the size of the enterprises, their business focuses and risk situation. In this respect, the Circular can also be implemented flexibly by smaller enterprises. The nature, scale, complexity and risks of the relevant business, as well as the type and range of the investment services offered, shall be taken into account when determining the appropriate arrangements.

**AT 4 Overall responsibility of management board members**

The management board members are responsible for complying with the obligations laid down in the WpHG. All management board members within the meaning of section 1 (2) of the KWG are responsible for ensuring an orderly business organisation and for the further development of this organisation, regardless of the internal division of responsibilities within the enterprise or the group. Irrespective of this, investment services enterprises shall, in accordance with the second subparagraph of Article 25 (1) of the DR, define which members of the management board are responsible for overseeing and maintaining the relevant organisational requirements in the enterprise. This responsibility also extends to outsourced activities and processes. It also continues to apply if duties are delegated.

**AT 5 Cooperation between several investment services enterprises**

If investment services are provided for a client by two or more investment services enterprises domiciled in the EEA, for example where an investment services enterprise transmits a client order from one investment services enterprise to another for execution, the enterprises involved are entitled to expect that the other enterprises involved will meet their regulatory obligations. This also applies to the regulatory obligations to the
client, insofar as the enterprise that must fulfil them is legally or contractually defined. Section 71 of the WpHG contains such a statutory definition.

This shall not apply if one of the investment services enterprises has clear evidence that one of the other enterprises is not meeting its regulatory obligations.

**AT 6 General requirements for investment services enterprises under section 80 (1) of the WpHG**

1. An investment services enterprise shall establish adequate policies, maintain resources and put in place procedures designed to ensure that the investment services enterprise itself and its employees comply with the obligations of the WpHG. In particular, this requires the establishment of a permanent and effective compliance function that supports processes and acts preventively, and that can perform its duties independently.

2. The policies established and procedures put in place shall ensure effective implementation of the necessary control activities. The operating areas are responsible for complying with the provisions and implementing controls (internal controls). In addition, the enterprise shall ensure – at least on a random sampling basis – that monitoring activities are performed by other areas, such as monitoring of trading by the back office and/or the compliance function.

3. The compliance function monitors the arrangements implemented to comply with the provisions of the WpHG, in particular Part 11, and the measures taken under the DR. The specific requirements for the compliance function are presented under BT 1 of this Circular.

**AT 6.1 Organisational and operational structure of the investment services enterprise**

The arrangements described under AT 6 paragraph 1 shall consider the extent to which investment services enterprises and their employees could be subject to conflicts of interest or whether they regularly have access to compliance-relevant information.

Access to compliance-relevant information is particularly given where persons have access to inside or other confidential information. Inside information in accordance with Article 7 (1) of Regulation (EU) No. 2014/596 means in particular knowledge of the issues listed in chapter IV 2.2.4., pp. 56–57 of the Issuer Guideline where this knowledge could materially affect the quoted/market price of a financial instrument if disclosed to the public: [link to BaFin’s Issuer Guideline, version dated 28 April 2009, chapter IV 2.2.4. – link to new version once revision has been completed].

The designated ability to obtain knowledge of client orders shall also be regarded as compliance-relevant information if this knowledge can be used to the detriment of the client through proprietary trading by the enterprise or personal transactions of employees (in particular for front or parallel running or scalping).

**AT 6.2 Resources and procedures of the investment services enterprise**

1. The necessary resources and procedures of an investment services enterprise include in particular
a. effective arrangements allowing appropriate measures to be taken to identify conflicts of interest that arise during the provision of investment services or ancillary investment services between the enterprise itself, including its employees, and any persons and enterprises directly or indirectly linked to it by control as defined by Article 4(1) no. 37 of Regulation (EU) No. 575/2013, and its clients or between its clients, and to prevent such conflicts of interest adversely affecting the interests of its clients,

b. arrangements to minimise delays in order execution or transmission in the event of system failures and malfunctions,

c. effective and transparent procedures for the appropriate and immediate handling of complaints by retail clients,

d. effective procedures for developing and monitoring product approval procedures,

e. arrangements to ensure that the appropriateness and effectiveness of the organisational measures taken are regularly monitored and assessed, and that the measures required to remedy deficiencies are taken.

2. Investment services enterprises that do not usually have access to compliance-relevant information within the meaning of AT 6.1 of this Circular and whose employees are not usually subject to conflicts of interest shall develop general measures as part of their organisational requirements in the event that they receive such information in individual cases.

Investment services enterprises that usually have access to such information shall make sufficient arrangements and take measures to record the information to which the enterprise has access and to monitor whether the information is being disclosed in accordance with compliance rules.

The relevant requirements for the compliance function are explained in module BT 1 of this Circular.

3. The following illustrative list of measures and tools shall be regarded as suitable for recording and monitoring the disclosure of compliance-relevant information within the meaning of AT 6.1 of this Circular.

a. Chinese walls

The goal of Chinese walls is to ensure that information within the meaning of AT 6.1 of this Circular that is disclosed in a particular area of an investment services enterprise only leaves the area in which it originated in accordance with the requirements of 3.b. below. The following organisational measures may be taken:

- the functional or physical separation of confidential areas (e.g. between client trading and proprietary trading),
- the creation of access restrictions,
- the development of rules governing access rights to data.
Chinese walls serve to minimise the effects of conflicts of interest between the investment services enterprise and its clients or between its various clients. They therefore aim to ensure the continuous and unrestricted ability of the individual areas of the investment services enterprise to act without conflicts of interest by confining compliance-relevant information to the area in which it has arisen. In agreement with the compliance function, the relevant area is therefore individually responsible for taking all precautions to ensure the confidentiality of compliance-relevant information. If such measures cannot be taken, other comparable organisational measures shall be implemented to minimise conflicts of interest.

b. Flow of information across areas (wall crossing)

The flow of information across areas is permitted if this is required to fulfil the tasks of the investment services enterprise. It may be necessary for an investment services enterprise that operates in many business areas but has a division of responsibilities to involve staff members from other areas or to disclose information across different areas, in particular in the case of complex transactions entailing a high degree of complexity and/or risk, or to fully utilise the investment services enterprise’s product range.

The disclosure of information across areas within the meaning of AT 6.1 of this Circular and the involvement of staff members from other areas is therefore permitted if the disclosure of information is restricted to the extent necessary (need-to-know principle).

c. Monitoring tools

Transactions involving financial instruments may be monitored in particular using a watch list and/or a restricted list.

- **Watch list**

A watch list is a non-public list of financial instruments updated on an ongoing basis about which an investment services enterprise has compliance-relevant information within the meaning of AT 6.1 of this Circular. The watch list shall be maintained in strict confidence by the compliance function. The securities recorded in the watch list are not generally subject to any restrictions on trading and/or advice. The watch list is used by the compliance function to monitor proprietary trading or personal transactions of employees involving the relevant securities. It also serves to monitor compliance with Chinese walls between the different compliance-relevant areas of the enterprise. The watch list shall include all financial instruments of an enterprise about which compliance-relevant information exists (reportable securities). Employees of the investment services enterprise who receive compliance-relevant information in the course of their duties (parties subject to reporting requirements) are obliged to submit a watch list report without undue delay.

- **Restricted list**

An investment services enterprise may also maintain one or more restricted lists as a compliance tool in addition to the watch list. The restricted list is also a list of reportable securities that is updated on an ongoing basis. In contrast to the watch list, however, it need not be kept confidential within the enterprise and serves to
inform the relevant employees and areas of the investment services enterprise of any restrictions on personal transactions and proprietary trading as well as on client and advisory transactions – with the exception of client transactions that are entered into at the client’s initiative without prior advice. The reasons for including securities in the restricted list can only be provided to the extent that the relevant information is already known to the public.

**AT 7 Relationship between sections 63ff. of the WpHG and sections 25a and 25e of the KWG**

1. The reference in section 80 (1) sentence 1 of the WpHG to sections 25a (1) and 25e of the KWG clarifies that the requirements also apply to the provision of investment services. In addition to the requirements set out in sections 25a (1) and 25e of the KWG, including the more detailed requirements contained in the MaRisk, the requirements set out in section 80 (1) of the WpHG and Article 22 of the DR shall apply to investment services.

2. The compliance function is part of the internal control system defined in section 25a (1) sentence 3 no. 3 of the KWG. The required policies, resources and procedures listed in AT 6 of this Circular are therefore part of the investment services enterprise’s internal control system.

**AT 8 Record-keeping obligations**

The minimum scope of documentation required by law is described in particular by the List of minimum record-keeping obligations in accordance with section 83 (11) of the WpHG (Verzeichnis der Mindestaufzeichnungspflichten gemäß § 83 Abs. 11 WpHG) issued by BaFin.

**AT 9 Requirements for outsourcing under Article 32 of the DR**

In addition to the requirements under sections 25b of the KWG and (80) 6 of the WpHG, Articles 30 and 31 of the DR and AT 9 of the MaRisk, the requirements set out in Article 32 shall complied with, if relevant.

1. Under Article 32(1) of the DR, portfolio management may only be outsourced to an enterprise located in a third country subject to the additional condition that the external service provider is authorised or registered to provide the service in the country in question and is supervised by an authority that is included in the List of supervisory authorities in a third country with which BaFin has entered into an appropriate cooperation agreement in accordance with Article 32(3) of the DR (Liste der Aufsichtsbehörden mit Sitz in einem Drittstaat, mit denen die Bundesanstalt eine angemessene Kooperationsvereinbarung gemäß Art. 32 Abs. 3 DV unterhält).

2. Specific explanations on the partial or full outsourcing of the compliance function can be found in module BT 1.3.4.
BT: Special requirements under sections 63ff. of the WpHG

BT 1 Organisational requirements and tasks of the compliance function under section 80 (1) of the WpHG and Article 22 of the DR

This module explains the requirements relating to the organisation and activities of the compliance function under section 80 (1) of the WpHG and Articles 22 and 26(7) of the DR. In accordance with Article 22(1) of the DR, investment services enterprises shall apply the principle of proportionality when implementing these requirements.

BT 1.1 Status of the compliance function

1. The management board of an investment services enterprise shall establish and provide the resources for a permanent and effective compliance function that can perform its duties independently. The management board shall bear overall responsibility for the compliance function and shall monitor its effectiveness.

2. The compliance function is a management tool. It may also report to a member of the management board. Irrespective of this, the enterprise shall ensure that the chair of the supervisory body can obtain information directly from the compliance officer in consultation with the management board.

3. The investment services enterprise shall appoint a compliance officer who is responsible for the compliance function and the reports provided to the management board and the supervisory body, without prejudice to the management board’s overall responsibility. The compliance officer is appointed and removed by the management board.

4. The significance of the compliance function is expected to be reflected by its position within the enterprise’s organisational structure.

5. The investment services enterprise shall encourage and reinforce an enterprise-wide compliance culture to create the conditions for promoting investor protection by the employees and appropriate awareness of compliance issues.

BT 1.2 Tasks of the compliance function

BT 1.2.1 Monitoring tasks of the compliance function

1. The compliance function monitors and assesses the policies and procedures established by the enterprise as well as the measures taken to remedy deficiencies, including the operations of the complaints-handling process.

2. The compliance function shall perform regular risk-based monitoring activities to ensure that the established policies and procedures, and hence the investment services enterprise’s organisational and working instructions, are being complied with, and that the employees of the business units that provide investment services have the necessary awareness of compliance risk.

3. The compliance function shall ensure that conflicts of interest are prevented or that unavoidable conflicts of interest are adequately taken into account. This applies in

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1 Alternatively, if the investment services enterprise has established an audit committee, the enterprise may ensure that the chair of the audit committee can obtain the information.
particular to the protection of client interests. The goal of the compliance function is also to ensure that organisational measures are taken within the enterprise to prevent the prohibited disclosure of compliance-relevant information within the meaning of AT 6.1 of this Circular.

**BT 1.2.1.1 Risk analysis**

1. The scope and focus of the compliance function’s activities shall be defined on the basis of a risk analysis. The compliance function shall perform such a risk analysis at regular intervals in order to assess the relevance and appropriateness of the definition. In addition to the regular review of identified risks, an ad hoc assessment shall be made if necessary in order to include emerging risks in the analysis. Examples of emerging risks include risks from the development of new business areas and risks attributable to changes in the structure of the investment services enterprise.

2. As part of its regular risk analysis, the compliance function shall determine the risk profile of the investment services enterprise in relation to compliance risk. The risk profile shall be based on the nature, scale and complexity of the investment services and ancillary investment services offered, as well as the types of financial instruments traded and distributed, taking into account the information resulting from the monitoring of complaints-handling. This shall take into account the obligations under the WpHG to be complied with by the investment services enterprise and its employees, the existing organisation and working instructions and workflows, as well as all monitoring and control systems in the area of investment services. In addition, the results of previous monitoring activities by the compliance function and internal audit, the findings of audits by external auditors and all other relevant sources information, such as aggregated risk measurements, shall be included. Priorities shall be established in order to ensure the comprehensive monitoring of compliance risk.

**BT 1.2.1.2 Monitoring activities**

1. The compliance function shall assess whether the control activities stipulated in the organisational and working instructions are performed regularly and properly by the specialist departments.

2. In addition, the compliance function shall conduct its own on-site inspections or other own reviews. The compliance officer shall use risk-based criteria to determine which on-site inspections his or her organisational unit will perform itself (core compliance area)\(^2\). This shall be justified in an auditable form. The number of random samples shall be recorded.

3. The monitoring activities to be performed may not be based exclusively on audit findings of the internal audit function.

4. Appropriate sources, methodologies and tools shall be used for the necessary monitoring activities. For example,

   - there should be an assessment of reports warranting the attention of the management board to material deviations between expected and actual processes (exceptions report) or to situations requiring action (issues log);

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\(^2\) Note, for example, that churning control is typically performed directly by compliance staff.
• workflows should be observed, files reviewed and/or interviews held with responsible staff;

• trading surveillance is recommended.

5. The compliance function monitors the operations of the complaints-handling process and includes complaints as a source of information in the context of its general monitoring responsibilities. The investment services enterprise shall grant the compliance function unrestricted access to all complaints. However, the compliance function may not be involved in the operational handling of complaints.

6. The monitoring activities performed shall take into account the controls conducted by the business units, the supervisory requirements to be complied with by the investment services enterprise and the review procedures of the risk management function, internal audit, financial control or other control functions in the area of investment services.

7. It is recommended that other control functions should coordinate their review procedures with the monitoring activities performed by the compliance function, while taking into account the different functions’ mandate and independence. In contrast to the audits and reviews by the internal audit function, the compliance function monitors the policies and procedures established for investment services and ancillary investment services on a continuous basis, if possible in parallel with the processes, or at least in a timely manner.

8. If deficiencies in the policies and measures are identified, the compliance function shall determine the measures necessary to remedy the deficiencies in existing organisational measures and shall inform the management board about this, and shall monitor and regularly assess the implementation of measures. In turn, corresponding monitoring activities are also necessary to review this.

BT 1.2.2 Reporting obligations of the compliance function

1. The investment services enterprise shall ensure that the regular written compliance reports are sent to the management board. The reports shall contain a description of the implementation and effectiveness of the overall control environment relating to investment services, as well as a summary of risks that have been identified and the measures undertaken or to be undertaken to remedy or rectify deficits or deficiencies, and to reduce risk. The reports shall be prepared at appropriate intervals, and at least once a year.

2. In addition to disclosures in the regular reports, the compliance officer shall report significant findings, such as serious breaches of the provisions of the WpHG, promptly to the management board by means of an ad hoc report. The report shall contain a proposal for the remedial steps to be taken.

3. The reports shall also be sent to the supervisory body, if any. However, the management board is generally responsible for forwarding the report to the supervisory body. There is no obligation to submit compliance reports directly to the supervisory body without informing the management board in advance.
4. Amendments to the content of the report that have been made by the management board shall be documented separately. The chair of the supervisory body shall be informed of such amendments.

5. The compliance reports shall cover all business units involved in the provision of investment services and ancillary investment services and information about complaints-handling. If a report does not contain all of this information, this shall be justified in detail.

6. As a minimum, the compliance reports shall contain the following information, where relevant:

   • a summary of the major findings of the review of the policies and procedures of the investment services enterprise;
   
   • a summary of the reviews and inspections conducted by the compliance function (in particular on-site inspections and desk-based reviews), including information about breaches and deficiencies identified in the organisation and compliance processes, as well as the appropriate measures taken as a result;
   
   • a description of the risks identified in the area monitored by the compliance function;
   
   • if the management board has not been previously made aware through other channels: a description of the relevant changes and developments in regulatory requirements over the period covered by the report and the measures taken or to be taken to ensure compliance with the changed requirements;
   
   • significant compliance issues that have occurred in the period covered by the report or other necessary measures and strategies resulting from knowledge gained in the reporting period;
   
   • if the management board has not been previously made aware through other channels: information about material correspondence with the competent authorities;
   
   • information about the appropriateness of the human and other resources allocated to the compliance function;
   
   • information about the review of the implementation of and compliance with requirements governing the expertise and reliability of employees;
   
   • information about the financial instruments manufactured and recommended by the investment services enterprise, in particular about the distribution strategy.

7. At the time of preparation of each compliance report, the compliance function shall examine whether it is also necessary to report to the superordinate compliance function within the group of companies.

**BT 1.2.3 Advisory tasks of the compliance function**

1. The investment services enterprise shall ensure that the compliance function discharges its advisory responsibilities. These include providing support for staff
training, providing day-to-day assistance for staff and participating in the establishment of new policies and procedures within the investment services enterprise.

2. The investment services enterprise shall ensure that its employees are adequately trained. The compliance function shall support the operating units (i.e. all employees involved directly or indirectly in the provision of investment services) in performing any training or shall provide that training itself. The compliance function shall focus in particular on the following areas:

- the internal policies and procedures of the investment services enterprise and its organisational structure in the area of investment services;
- changes in the WpHG, the DR, the WpDVerOV and the WpHGMaAnzV, relevant publications by ESMA (especially guidelines), publications by BaFin and other relevant supervisory requirements, as well as any changes to these.

3. Training should be performed at regular intervals and on an as-needed basis where necessary. Depending on requirements, training should be delivered to all staff, individual business units or individual employees.

4. The content of the training shall be updated promptly to reflect relevant changes, such as legislative changes, new publications by ESMA (especially guidelines), publications by BaFin and changes in the investment service enterprise’s organisation and its organisational and working instructions.

5. The compliance staff shall advise and support the enterprise’s business areas and employees with regard to compliance with statutory requirements and the organisational and working instructions. They shall be available in particular to answer questions arising out of daily business activity.

BT 1.2.4 Involvement of the compliance function in processes

1. The investment services enterprise shall ensure that the compliance function is involved in the development of the relevant policies and procedures in the area of investment services and ancillary investment services, in particular in the development of internal organisational and working instructions and their continuous updating, to the extent that they are relevant for compliance.

2. Without prejudice to the operating areas’ responsibility, the compliance function shall be involved in this as early as possible, to ensure that the organisational and working instructions are appropriate for preventing violations of the statutory provisions.

3. The compliance function shall be integrated so that it is able to advise the operating areas in particular with regard to all strategic decisions, material organisational changes – for example as part of the decision-making process for developing new business lines, services, markets and trading venues, or developing new financial products and launching new advertising strategies in the area of investment services – and to contribute its expertise. The compliance function shall have the right to participate at an early stage in the product approval processes for financial instruments to be taken up in the distribution process – for example through a right of intervention. This shall not entail the transfer of responsibility from the operating areas to the compliance function.
4. In other respects, the management board shall encourage the business units to involve the compliance function in their activities. If material recommendations provided by the compliance function are not followed, the compliance function shall document this accordingly and present it in its compliance reports.

5. The investment services enterprise shall ensure that the compliance function is involved in all material, non-routine correspondence with the competent authorities in the area of investment services and ancillary investment services, and with the trading surveillance units at stock exchanges.

6. The compliance function shall also be involved in the following tasks in particular:

- defining the criteria for determining whether staff positions are compliance-relevant;
- determining the principles governing sales targets when designing the remuneration system for relevant persons within the meaning of BT 8; if the investment services enterprise is a subsidiary of an enterprise whose registered office is outside Germany and receives requirements from the parent company relating to these issues, the compliance function shall examine whether the parent company’s requirements are consistent with German supervisory requirements;
- establishing Chinese walls;
- designing processes to monitor personal transactions in the enterprise;
- determining best execution policies and, if appropriate, policies for transmitting orders executed by a third party;
- designing the product governance process.

**BT 1.3 Organisational requirements relating to the compliance function**

**BT 1.3.1 Effectiveness**

Investment services enterprise shall consider which measures, in particular with regard to the organisation and resources of the compliance function, are best suited to ensuring its effectiveness, taking into account the individual circumstances of the enterprise. The following criteria in particular shall be factored into this analysis:

- the type of investment services, ancillary investment services and other activities offered (including those that are entirely unrelated to investment services and ancillary investment services);
- the interaction between investment services, ancillary investment services and the other business activities;
- the scope and volume of the investment services and ancillary investment services carried out (absolute and relative to the other business activities), the total assets and the income of the investment services enterprise from commissions, fees and other sources of income in connection with the investment services and ancillary investment services offering;
• the type of financial instruments offered;
• the type of clients targeted by the investment services enterprise (professional, retail, eligible counterparties);
• the number of employees;
• whether the investment services enterprise is part of a group of companies within the meaning of Article 2(11) of Directive (EU) No. 2013/34;
• services provided through a commercial network, such as tied agents or branches;
• cross-border activities provided by the investment services enterprise;
• organisation and sophistication of the IT systems.

BT 1.3.1.1 Resources and budget

1. The compliance function shall have the appropriate resources to fulfil its tasks. When allocating human, material and other resources to the compliance function, the investment services enterprise shall take into account the business model, the scope and type of investment services, ancillary investment services and other services provided, and the resulting tasks of the compliance function. In particular, the investment services enterprise shall ensure that sufficient IT resources are allocated to the compliance function.

2. Where the investment services enterprise establishes budgets for specific activities or units, the compliance function shall generally be allocated a budget that is consistent with the level of compliance risk to which the enterprise is exposed. The compliance officer shall be consulted when the budget is being determined. An integrated budget may be determined for investment services enterprises that are part of a group. Significant cuts in the budget shall be justified in writing. The supervisory body shall be informed of all significant cuts.

3. If the activities of business units are significantly expanded, the resources and activities of the compliance function shall be adapted to reflect the changed compliance risk. The management board shall regularly review whether the number of staff in the compliance function is still sufficient to perform its tasks.

BT 1.3.1.2 Authority of the compliance staff

1. The staff of the compliance function shall have the authority required to perform their tasks. They shall be granted access to all relevant information for their work and they shall be involved in all relevant information flows that may be significant for the compliance function’s tasks. They shall be granted unrestricted rights to information and rights of inspection and access with regard to all premises and documents, records, tape recordings, databases and IT systems, and other information that is required to investigate relevant issues. Employees may not refuse to hand over documents or provide compliance-relevant information. It must be possible to exercise the rights to information and of inspection and access on the compliance staff’s own initiative.
2. To ensure that the compliance officer has a permanent overview of the areas of the investment services enterprise where confidential information or information that is necessary for the compliance function to perform its tasks may arise, the compliance officer shall additionally have access to internal and external audit reports or other reports to the management board or supervisory body (if any) to the extent relevant for the compliance officer’s tasks. To the extent necessary for the performance of the compliance function’s tasks and permitted by law, the compliance officer should also be granted the right to attend meetings of the management board or the supervisory body (if any). Where this right is not granted, this should be documented and explained in writing. In order to be able to identify which meetings the compliance officer should attend, the compliance officer shall have in-depth knowledge of the investment services enterprise’s organisation, corporate culture and decision-making processes.

3. In order to ensure that the compliance staff have the authority required to perform their tasks, the management board shall support them in the exercise of their duties. The ability to exercise their authority requires the compliance staff to possess the necessary expertise and the relevant skills.

**BT 1.3.1.3 Expertise of the compliance staff**

1. The persons entrusted with the compliance function shall have the necessary specialist knowledge for the tasks assigned to them. This requires – at the latest after an induction period – knowledge in the following areas, to the extent that it is relevant for them to perform their tasks:

   - knowledge of the statutory requirements to be complied with by the investment services enterprise in the provision of investment services and ancillary investment services, including directly applicable European legislation; knowledge of the European legislative basis of the requirements to be complied with is recommended;

   - knowledge of the administrative provisions and publications issued by BaFin to expand on the requirements of the WpHG, as well as knowledge of the relevant ESMA guidelines and standards;

   - knowledge about the key elements of BaFin’s organisation and responsibilities;

   - knowledge of the requirements for and the structure of appropriate processes used by investment services enterprises to identify violations of regulatory provisions;

   - knowledge of the compliance function’s tasks and responsibilities;

   - knowledge of alternative structures for sales targets and the organisational and operational structure of the investment services enterprise and of investment services enterprises in general;

   - knowledge of the functioning and risks of the types of financial instrument in which the investment services enterprise provides investment services or ancillary investment services;
• to the extent that the investment services enterprise provides investment services with an international element: knowledge of the specific legal requirements to be complied with in this case;

• to the extent that there are algorithmic trading systems and trading algorithms in the investment services enterprise: an understanding of at least the fundamentals of algorithmic trading systems and trading algorithms.

2. Compliance staff shall be regularly trained in order to maintain their specialist knowledge.

BT 1.3.2 Permanence

1. The compliance function shall be established permanently.

2. The compliance officer shall be assigned a deputy who shall be sufficiently qualified to perform the compliance officer’s duties during any absence of the compliance officer. In other respects, the organisational and working instructions shall ensure the adequate performance of duties during the absence of the compliance offer by means of corresponding stand-in arrangements.

3. The tasks and competences of the compliance function shall be laid down in the organisational and working instructions of the investment services enterprise. The competences comprise responsibilities and powers. They also include information on the monitoring programme and the reporting duties of the compliance function as well as a description of the risk-based monitoring approach, in particular of risk analysis. Relevant amendments to regulatory requirements shall be reflected promptly.

BT 1.3.2.1 Monitoring programme

1. Monitoring activities shall not only be performed as needed, but also regularly and on the basis of a monitoring programme (recurring or continuous). The monitoring programme shall regularly cover all key areas of investment services and ancillary investment services, taking into account the risks associated with the business units, as well as the area of complaints-handling. The compliance function shall respond promptly to unforeseen events, adapting the focus of its monitoring activities accordingly if necessary.

2. The monitoring programme shall provide for a review of whether the activities of the investment services enterprise comply with the requirements of the WpHG. It must also be geared to the review of whether the organisation, the established policies and procedures, and the control mechanisms of the investment services enterprise are still effective and appropriate.

3. The monitoring programme shall be designed to ensure that compliance risks are comprehensively monitored. It describes the priorities for the monitoring activities on the basis of the risk analysis.

4. The scope, scale and frequency of the monitoring activities established in the monitoring programme, as well as the choice of the appropriate tools and
methodologies, are determined by the compliance function based on the risk analysis. The compliance function ensures that its monitoring activities are not only desk- or IT-based, but also use on-site inspections or other own reviews.

5. The monitoring programme shall be adapted continuously to reflect changes to the investment service enterprise’s risk profile (for example due to significant events such as corporate acquisitions, IT system changes, or reorganisations). The monitoring programme shall also extend to the implementation and effectiveness of remedial measures taken by the investment services enterprise in response to breaches of the WpHG.

**BT 1.3.2.2 The compliance function in a group of companies**

Even if an investment services enterprise is affiliated with other enterprises, responsibility for the compliance function remains with the investment services enterprise itself. The investment services enterprise therefore ensures that its compliance function remains responsible for monitoring its own compliance risk. This also applies if an investment services enterprise has outsourced the compliance function to affiliated enterprises. When performing its tasks, however, the compliance function should take into account any affiliation of the investment services enterprise to a group of entities, for example by working closely with the staff responsible for internal audit, regulatory affairs and compliance, and the legal department, in other parts of the group. Attention is drawn in this context to the fact that the shared use of an office building by the affiliated enterprises may lead to a better supply of information to the compliance officer and improved efficiency in the compliance function.

**BT 1.3.3 Independence**

1. The compliance function performs its tasks independently of the other business units of the investment services enterprise and performs its monitoring tasks independently of the management board. The investment services enterprise shall ensure that other business units cannot issue instructions to compliance staff and cannot otherwise influence their activities.

2. Significant assessments and recommendations by the compliance officer that are overruled by the management board shall be documented and included in the report defined in Article 22(2)(c) of the DR. A recommendation by the compliance officer not to permit a particular financial instrument to be included in distribution activities is an example of a significant recommendation.

3. If an investment services enterprise wishes to depart from the requirements of Article 22(3)(d) and (e) of the DR as described in the following on the basis of the principle of proportionality, it shall assess, in particular taking into account the criteria set out in paragraph 1.3.1, whether this compromises the effectiveness of the compliance function. The assessment shall be repeated at regular intervals.

**BT 1.3.3.1 Involvement of compliance staff in processes to be monitored**

1. To enable compliance duties to be performed effectively, compliance staff, including the compliance officer, may not be involved in the investment services that they monitor.
2. Exemptions are only permitted if it would be unreasonable to entrust the compliance function to a separate person who is not involved in the investment services due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise’s business activities, or the nature and scope of the services offered. Conflicts of interest within the enterprise, the classification of the enterprise’s clients in accordance with section 67 of the WpHG and the financial instruments distributed or traded must be taken into account here in particular.

3. An investment services enterprises can make use of this exemption, for example, if the performance of the compliance function – including in combination with financial control functions – does not require a full-time position due to the nature, scale and complexity of the enterprise’s business activities or the nature and scope of the investment services or ancillary investment services.

4. In this case, the position of compliance officer can be held by a member of the management board, for example, even if that person is involved in the enterprise’s operations. However, the enterprise must still appoint a compliance officer if it makes use of the exemption. If a member of the management board is not involved in the enterprise’s operations, he or she can act as compliance officer without the exemption criteria being met within the meaning of this paragraph.

5. For example, appointing a dedicated compliance officer may be unreasonable for smaller enterprises that only employ auxiliary administrative staff in addition to member(s) of the management board. However, if an enterprise employs at least two people, they are required to monitor each other to comply with the principle of effective monitoring activities defined in AT 6 of this Circular. In the case of sole proprietorships, control activities may be conducted as part of the annual audit in accordance with section 89 (1) of the WpHG after consultation with BaFin. All monitoring activities and their results shall be documented even if the enterprise does not establish an independent organisational unit.

6. Instead of exercising the exemption, outsourcing the compliance function to a third party may also be an appropriate solution in individual cases, provided that the criteria for outsourcing under sections 25a (2) of the KWG and 80 (6) of the WpHG are observed.

7. The involvement of compliance staff in investment services that they monitor is generally prohibited to the extent that employees of the enterprise regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular. Enterprises are individually responsible for determining whether the criteria in sentence 1 have been met and shall document this in an auditable form.

8. Exceptionally, after considering the conflicts of interest existing due to the compliance-relevant information within the meaning of AT 6.1 of this Circular, compliance staff may be involved in investment services they monitor even if employees regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular if such a separation would be unreasonable due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise’s business activities, or the nature and scope of the services offered.

9. To the extent that the enterprise makes use of an exemption on the basis of the principle of proportionality, it shall justify why the criteria for making use of the exemption have been met. Information on the additional activities that are performed
by compliance staff and an assessment whether the effectiveness of the compliance function has been compromised shall be documented in an auditable form. In all cases, conflicts of interest arising from the different tasks performed by compliance staff shall be kept to an absolute minimum. The assessment of whether the compliance function has been compromised shall be performed regularly.

**BT 1.3.3.2 Combining the compliance function with other control functions**

1. The compliance function may be combined with other control units at the same level (also termed “compliance in the broader sense”), such as money laundering prevention or risk control, if this does not compromise the effectiveness and independence of the compliance function. Any such combination shall be documented in an auditable form, giving the reasons for the combination.

2. However, combination with the internal audit function is generally not permitted because the internal audit function is charged with the oversight of the compliance function and combining the two functions is likely to undermine the independence of the compliance function.

3. In certain circumstances, however, it may be appropriate to designate one person for both functions in consultation with BaFin. If the investment services enterprise makes use of this exemption, it shall ensure that both functions are performed properly, in particular soundly, honestly and professionally.

**BT 1.3.3.3 Combining the compliance function with the legal department**

1. Investment services enterprises may combine the compliance function with the legal department if they could make use of the exemption under Article 22(3)(d) and (e) due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise’s business activities, or the nature and scope of the services offered.

2. However, such a combination is not generally permitted for larger investment services enterprises or those with more complex activities if this will undermine the independence of the compliance function. This is regularly the case if an investment services enterprise performs a not insubstantial volume of investment services in the form of proprietary trading as defined in section 2 (8) no. 2c) of the WpHG, underwriting business as defined in section 2 (8) no. 5 or ancillary investment services as defined in section 2 (9a) no. 3, no. 5 or no. 6 of the WpHG.

3. If the compliance function is combined with the legal department, this must be documented in an auditable form, explaining the reasons.

**BT 1.3.3.4 Other measures for ensuring the independence of the compliance function**

1. As a rule, it is generally necessary to establish the compliance function as an independent organisational unit if employees of the enterprise regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular. Enterprises are individually responsible for determining whether the criteria in sentence 1 have been met and shall document this in an auditable form.

2. Exceptionally, after considering the conflicts of interest existing due to the compliance-relevant information within the meaning of AT 6.1 of this Circular, an enterprise shall not be required to establish an independent organisational unit even
if its employees regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular if it would be unreasonable to establish an independent organisational unit due to the size of the enterprise or the nature, scale, complexity or risks of the enterprise's business activities, or the nature and scope of the services offered.

3. As a minimum, if an investment services enterprise performs a not insubstantial volume of investment services in the form of proprietary trading as defined in section 2 (8) no. 2c) of the WpHG, underwriting business as defined in section 2 (8) no. 5, or ancillary investment services as defined in section 2 (9) no. 3, no. 5 or no. 6 of the WpHG, the compliance officer shall report directly to the member of the management board responsible for the compliance function with regard to organisational and disciplinary matters.

4. To ensure independence, it is recommended that the compliance officer be appointed for at least 24 months. Additionally, an appropriate measure for strengthening the compliance officer's position is to agree a 12-month notice period for the employer.

5. It is recommended that the position, powers and remuneration of the compliance officer is aligned to the position, powers and remuneration of the managers of internal audit, risk control and the legal department of the investment services enterprise. The differences relating to personnel and other responsibilities of the relevant position may be taken into account when determining the remuneration.

6. The remuneration of compliance staff (who are normally "relevant persons" within the meaning of BT 8) may not depend on the activities of the employees they monitor. However, performance-related remuneration may be permitted in individual cases if it does not give rise to conflicts of interest. In the case of performance-related remuneration that exceeds this in accordance with the exemption under Article 22(4) in conjunction with (3)(e) of the DR, for example where the remuneration of the compliance officer who has sole responsibility for monitoring all business areas is based on the enterprise's performance, effective precautions are required to counter the resulting conflicts of interest. This shall be documented in an auditable form.

7. In other respects, the requirements of the Regulation on the Supervisory Requirements for Institutions’ Remuneration Systems (Verordnung über die aufsichtsrechtlichen Anforderungen an Vergütungssysteme von Instituten (Instituts-Vergütungsverordnung) – InstitutsVergV) shall apply.

BT 1.3.4 Outsourcing of the compliance function or of individual compliance activities

1. In the event of the partial or full outsourcing of the compliance function, all relevant supervisory requirements shall be complied with, regardless of whether it has been outsourced partially or fully. Civil law arrangements or agreements do not change or modify the relevant supervisory requirements; in particular they may not exclude the existence of outsourcing subject to supervisory law. The management board is responsible for compliance with the requirements, in particular for the specific, clear and transparent establishment of the fully or partially outsourced compliance function.

a. The management board of an investment services enterprise can either appoint one of its own employees or an employee of an external service provider or an independent/self-employed person as the compliance officer.
– The responsibility of the compliance officer for performing the entire compliance function of the investment services enterprise in accordance with the WpHG may not be assigned to more than one person, including in the event of outsourcing.

– The compliance officer can require both the outsourcing investment services enterprise and the external service provider to provide him or her with the human, material and other resources that could reasonably be considered to be necessary for proper performance of his or her function and the discharge of his or her responsibilities.

– The compliance officer performs his or her activity independently, including if the compliance function is outsourced; in his or her function as compliance officer, he or she is also not subject to the instructions of the external service provider. The same shall apply to compliance staff of the investment services enterprise and/or the external service provider who report to him or her.

b. An investment services enterprise may combine its own staff, staff of the external service provider, staff of third-party enterprises and/or independent/self-employed specialists to form a specific, uniform compliance organisation under the responsibility and leadership of the compliance officer.

– The question of whether and in what form the outsourced activities of the compliance function are to interact organisationally under the responsibility and leadership of the compliance officer shall be addressed clearly and transparently with the compliance officer and the external service provider before outsourcing begins, especially in an institution-specific policy or a service level agreement.

– Even if individual compliance activities are performed by an external service provider, the service provider’s employees performing those activities are directly subject to the functional instructions of the compliance officer appointed by the management board of the investment services enterprise.

– The fragmentation of the compliance function through outsourcing and/or sub-outsourcing to more than one external service provider and/or through other supplementary external procurement should only be permitted if this is necessary for functional and/or technical reasons. This shall not affect the requirements of BT 1.3.2.2.

2. The requirements of sections 25b of the KWG, 80 (6) of the WpHG, Articles 30 and 31 of the DR, and of this Circular shall apply to and in the case of the partial or full outsourcing of the compliance function. Organisational, functional and operational areas outsourced by the investment services enterprise are subject to the same supervisory requirements at the external service provider as at the outsourcing investment services enterprise itself.

3. Before an investment services enterprise chooses a service provider for outsourcing, it shall assess with the necessary due diligence whether the relevant requirements of sections 25b of the KWG, 80 (1) and (6), and Articles 30 and 31 of the DR are also met in the case of outsourcing. The scope of the assessment shall be guided by the nature, scale, complexity and risk of the tasks and processes to be outsourced. The investment services enterprise is responsible for ensuring that the service provider has the necessary organisation and specialist expertise, and the human, material and other resources required in the specific circumstances, and that the employees of the
service provider have the necessary expertise and access to all information necessary for the effective, and in particular the preventive, performance of the outsourced compliance functions, including IT systems and IT access.

4. If the compliance function is outsourced partially or fully, the investment services enterprise shall ensure its permanence in particular. Compliance with the requirements of this Circular governing the rights and obligations and the legal position of the compliance officer and his or her compliance staff shall also be ensured in the external service provider. The selected service provider shall be in a position to ensure the adequate exercise of the compliance activities of the compliance officer and the compliance staff continuously and not merely as needed, and in the necessary quality, including on-site at the investment services enterprise and its relevant branches.

5. Investment services enterprises shall effectively supervise the adequate performance of tasks by the service provider, in particular the quality and quantity of its services, based on appropriate material criteria to be defined on a case-by-case basis. The management board is responsible for continuously supervising and monitoring the outsourced compliance function and/or compliance activities and it shall have the necessary resources and expertise to be able to do this. The management board may appoint a specific person employed by the enterprise to supervise and monitor the outsourced function on its behalf.
BT 2 Monitoring of personal transactions in accordance with Articles 28, 29 and 37 of the DR and section 25a of the KWG

This module expands on the requirements of Articles 28, 29 and 37 of the DR. It also explains the requirements relating to the monitoring of personal transactions that are outside the scope of Article 28, 29 and 37 of the DR.

BT 2.1 Definition of relevant persons

1. Articles 28 and 29 of the DR govern the handling of personal transactions by relevant persons. Relevant persons are legally defined in Article 2(1) of the DR. Article 2(1)(c) of the DR covers persons who directly provide investment services themselves, as well as all persons who are involved in providing investment services, both by performing support activities and by performing subsequent control activities. Support functions are regularly performed in particular by research department, compliance department, back office or IT support staff, assistants, or members of other support areas in an investment services enterprise. Staff members are considered to be employees and self-employed contractors, as well as agency workers, temporary staff and interns/trainees at an enterprise.

2. Persons who perform these activities without being employees of an investment services enterprise but who work for an enterprise to which activities or processes have been outsourced in accordance with section 25a (1) of the KWG and Articles 30 to 32 of the DR are also covered by way of Article 2(1)(d) of the DR.

3. Those relevant persons whose activities may give rise to conflicts of interest or who have access to inside information or other confidential information and to whom the requirements under Article 29 of the DR apply shall be selected from the group of persons listed in Article 2(1) of the DR.

BT 2.2 Definition of personal transactions

1. Article 28(a) of the DR covers all transactions that are outside the scope of activities of relevant persons that they enter into for their own or for third-party account. Transactions for third-party account are in particular all transactions that relevant persons enter into using a privately issued power of attorney. It therefore not only covers transactions for related parties of relevant persons.

   Own account transactions are all transactions in which relevant persons may have a beneficial interest. Own account transactions of a relevant person are also considered to be transactions by a third party in the name of or for the account of the relevant person insofar as the relevant person has knowledge of this or has arranged the transaction.

2. The majority of the personal transactions defined in Article of the 28 DR are subject to Article 28(a) of the DR. Article 28(b) of the DR broadens the scope to include transactions by relevant persons within the scope of their activities, and hence transactions that relevant persons enter into to perform their duties at the investment services enterprise. They comprise transactions by relevant persons for their own
account and for the account of related parties within the meaning of Article 2(3a) of the DR. These are transactions that, if entered into, could expose relevant persons to conflicts of interest, such as the risk of preferring a close relative when assigning an order or when managing a portfolio.

3. Whether or not a transaction falls within the scope of the activities of a relevant person shall be assessed on the basis of the relevant person’s function, for example his or her job description. It is irrelevant whether the relevant person should have entered into the specific transaction in accordance with the instructions issued to him or her.

**BT 2.3 Organisational requirements under Article 29 of the DR**

1. Investment services enterprise shall implement adequate arrangements aimed at preventing relevant persons whose activities may give rise to a conflict of interest or who have access to inside information from entering into the transactions set out in Article 29(2), (3) and (4) of the DR. Enterprises are individually responsible for determining which of the relevant persons covered by Article 2(1) of the DR perform activities that could give rise to conflicts of interest or have access to compliance-relevant information within the meaning of AT 6.1 of this Circular by virtue of their activities. The requirements under Article 29(1) of the DR apply to these persons.

2. The management board shall designate a unit or units in the enterprise that is or are tasked with identifying and regularly reviewing the employees covered by Article 29(1) of the DR. Enterprises are also obliged to maintain an organisational structure that ensures that this unit is regularly informed of the existence of conflicts of interest and of inside and other confidential information within the enterprise.

Enterprises shall use risk criteria to assess which areas and persons to include; for example, the volume of information available to investment advisers or tied agents may determine whether they are included.

3. Conflicts of interest within the meaning of Article 29(1) of the DR are not only conflicts of interest that arise in a personal transaction. Such conflicts occur if the interests of a relevant person in entering into a personal transaction within the meaning of Article 29(1) of the DR could conflict with the interests of a client or of the investment services enterprise. Other conflicts of interest are covered by section 80 (1) sentence 2 no. 2 of the WpHG.

4. Appropriate measures shall be taken to prevent prohibited personal transactions. This may require different measures for different relevant persons. It is therefore possible to prepare different lists of requirements applying to different relevant persons. Potential appropriate measures are in particular the measures specified in AT 6.2. paragraph 3 of this Circular.

**BT 2.4 Organisational requirements under Article 29(5)(b) of the DR**

1. In accordance with Article 29(5)(b) of the DR, the arrangements to be implemented by investment services enterprises under Article 29(1) of the DR shall be designed to ensure that they can be informed promptly of any personal transaction entered into
by a relevant person in accordance with Article 29 of the DR. This can be assured using a variety of procedures, including the following:

- an appropriate and proven procedure is for the enterprise maintaining the account or securities account to send duplicate copies of personal transactions entered into by relevant persons within the meaning of Article 29 of the DR to the investment services enterprise.

- another appropriate procedure is the voluntary and prompt notification of personal transactions together with a declaration of completeness sent by an enterprise’s relevant persons to the management board or to a unit specified by the management board.

- the introduction of approval requirements for relevant persons before personal transactions are entered into shall also be considered to be an appropriate measure.

In each case, the activities shall be performed by a unit that is independent of the operations departments, front office and back office, unless this is unreasonable due to the size of the enterprise.

2. Under Article 29(5) of the DR, personal transactions by relevant persons of an external service provider shall be documented by the external service provider if the activities of the relevant persons may give rise to conflicts of interest or if they have access to inside information or other confidential information by virtue of their activities. In line with BaFin’s current administrative practice, it is not necessary to monitor the external service provider’s compliance with these documentation requirements if the external service provider is itself an investment services enterprise within the meaning of section 2 (10) of the WpHG. If the outsourcing enterprise and the external service provider are part of a group, all personal transactions of relevant persons in the group may be documented at one of those enterprises.

In the case of outsourcing to a multi-client service provider, this provider may be monitored by one or more of the outsourcing entities on behalf of the outsourcing enterprise.

3. The documentation of personal transactions required by Article 29(5)(c) of the DR and of which the investment services enterprise becomes aware in accordance with Article 29(5)(b) and the second subparagraph of Article 29(5) of the DR, as well as the documentation of all authorisations and prohibitions that the enterprise issues in connection with this, must be performed in such a way that compliance with the statutory provisions can be verified in an examination as defined by section 89 of the WpHG.

**BT 2.5 Organisational requirements under Article 37(2) of the DR**

Market makers as defined in Article 27(2)(a) of the DR are equivalent to order book brokers.

**BT 2.6 Exemptions**
Under Article 29(6) of the DR, certain personal transactions are exempted from the requirements set out in Article 29(1) to (5) of the DR. In addition, investments in accordance with the German Capital Accumulation Act (Vermögensbildungsgesetz) and other contractually agreed savings plans are exempted.

BT 2.7 Requirements under section 25a of the KWG

Employees of investment services enterprises who are not involved in the provision of investment services may not enter into any transactions that violate Article 14 of Regulation (EU) No. 596/2014 or a provision of Part 11 of the WpHG. Credit and financial services institutions that are not investment services enterprises within the meaning of section 2 (10) of the WpHG shall also comply with Article 14 of Regulation (EU) No. 596/2014. Appropriate measures for personal transactions shall be taken to comply with this statutory provision as part of the general organisational requirements under section 25a (1) of the KWG. The precautions taken shall ensure that employees who could have access to inside information and other confidential information do not enter into any transactions that violate the above-mentioned provisions. For example, this could affect staff in M&A departments, legal departments, the lending business or management board assistants.

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3 Under section 25a (1) sentence 1 of the KWG, this requirement applies to all institutions defined in section 1 (1b) of the KWG, but not to branches in accordance with section 53b (1) of the KWG.
**BT 3 Requirements for fair, clear and not misleading information under section 63 (6) of the WpHG**

This module expands on the requirements of section 63 (6) of the WpHG and Article 44 of the DR.

**BT 3.1 Scope**

**BT 3.1.1 Scope/Scope of requirements**

1. The requirements of section 63 (6) of the WpHG and Article 44 of the DR generally apply without distinction to all information relating to financial instruments or (ancillary) investment services that investment services enterprises address to clients, regardless of whether or not it is marketing information; by contrast, information addressed solely to eligible counterparties is exempted from the scope of section 68 (1) of the WpHG. In addition, section 63 (6) sentence 2 of the WpHG specifically stipulates that marketing communications shall be clearly identifiable as such. A marketing communication is information intended to induce the addressees to acquire a financial instrument or commission an investment service (goal of sales promotion). Information that is merely used in an advisory situation does not necessarily have the goal of sales promotion. Neutral product information made available to meet obligations to provide advice appropriate to the investment and the client does not fall under the definition of marketing. There is only a statutory obligation to expressly identify the information when the marketing nature of the information is not otherwise clearly recognisable. Such recognisability may result from the manner and form in which the information is presented or from the content of the information. As a rule, the assessment shall be made on a case-by-case basis. Pure image marketing is not covered by the provisions.

2. Possible examples of marketing information that may be required to be indicated as such are:

   - articles in client magazines of an investment services enterprise that appear to be objective but that primarily have the goal of sales promotion;

   - letters to clients (especially when addressed to them personally) suggesting the purchase of certain securities, provided that this does not constitute investment advice.

   Such information shall be distinguished from the information required to be identified as marketing communication in accordance with section 63 (6) of the WpHG.

3. Clients within the meaning of section 63 (6) of the WpHG and Article 44 of the DR are persons for whom investment services enterprises provide or arrange investment services or ancillary investment services (see section 67 (1) of the WpHG). The concept of a client thus encompasses not only existing clients but also all persons with whom no client relationship yet exists, but to whom an investment services enterprise addresses information with a view to acquiring them as clients.

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4 This requires the individual financial situation of the addressee to be taken into account (see Joint information document on the new definition of investment advice issued by BaFin and the Deutsche Bundesbank dated 12 November 2007, version dated July 2013).
The requirements apply equally to information addressed to retain clients and to professional clients. They are only not relevant for information addressed by investment services enterprises to eligible counterparties.

**BT 3.1.2 Relationship with other legal requirements**

Section 302 of the KAGB, section 15 of the WpPG and the requirements of Regulation (EU) No. 2017/1129 governing advertisements shall apply in addition to the provisions of section 63 (6) of the WpHG and Article 44 of the DR.

The distribution of financial instruments is also governed by various statutory requirements for information documents to be provided to clients. Preparation of the relevant information documents is governed by separate rules in order to do justice to the specific characteristics of the individual financial instruments. The relevant statutory requirements, such as the provisions on key investor information documents in accordance with section 166 of the KAGB, the provisions on packaged retail investment products in accordance with Regulation (EU) No. 1286/2014 in conjunction with Article 1ff. of Delegated Regulation (EU) 2017/653, as well as the rules governing capital investment information documents in accordance with section 13 of the VermAnlG shall apply, in addition to the provisions of section 63 (6) of the WpHG and Article 44 of the DR.

**BT 3.2 Availability of information**

1. Under section 63 (6) sentence 1 of the WpHG and Article 44 of the DR, all information made available by investment services enterprises to retail and professional clients falls under the scope of the requirements. Because of the broad interpretation of the term “client” (it also includes potential clients; see BT 3.1.1 paragraph 3 above), all marketing information of an investment services enterprise is also covered.

2. Information that is disseminated in such a way that it is likely to be received by private and professional clients is also covered. Since the legal requirements presume that the information is made available to the client by the investment services enterprise, it does not matter whether the information originates from the investment services enterprise. For this reason, information that is initially provided to the investment services enterprise by a third party and that is then made available to the clients by the investment services enterprise also falls under the scope of the requirements.

**Example:**
Marketing materials of an asset management company or an issuer

If an investment services enterprise makes information from third-party sources available to clients (for example by handing out information in print form or by making available information from third-party sources on its own website and/or by links to the websites of other providers), as a general rule it is itself fully responsible in the first instance for ensuring compliance with the requirements of section 63 (6) of the WpHG and Article 44 of the DR. If the third party itself is an investment services enterprise, the requirements of section 63 (6) of the WpHG and Article 44 of the DR shall also apply to the third-party enterprise, regardless of whether it makes the information available to its clients directly or – for example as issuer – provides the information to other investment services enterprises for marketing purposes.
Example:
X bank issues a bond, which will (also) be distributed through Y bank. For this purpose, X bank provides Y bank with marketing materials. In this case, X bank must ensure that this information satisfies section 63 (6) of the WpHG and Article 44 of the DR. Apart from obvious cases, Y bank does not itself have any obligation to check the information.

3. If the third-party source is also an investment services enterprise in the EEA and the information is addressed to clients to whom identical requirements apply, the investment services enterprise that receives the information and then makes it available to clients may as a rule (except in the case of manifest violations) rely on the information supplied being in compliance with the law because the supplying investment services enterprise is itself under an obligation to comply with the corresponding requirements under section 63 (6) of the WpHG and Article 44 of the DR. However, this applies only to the extent the information is communicated unchanged and is clearly identifiable as information from the third-party investment services enterprise.

Other specific issues may arise in such third-party scenarios. If the third-party source is not itself an investment services enterprise, the overall circumstances shall be assessed in order to decide whether this information is considered to have been made available to clients by the investment services enterprise. In such cases, attributability depends on whether the client considers the information to have come from the investment services enterprise or whether the third party itself has a sales interest and may therefore have to be attributed to the investment services enterprise. This is normally assumed to be the case not only for marketing materials, but also particularly for product-specific information of issuers.

Example:
X bank makes product information of Y asset management company (Y AMC) available to its clients. Since, in the context of product distribution, Y-AMC is attributed to X bank in this case, X bank must ensure that the information made available by it to its clients satisfies the requirements of section 63 (6) of the WpHG and Article 44 of the DR.

If, on the other hand, X bank makes daily newspapers containing information on the performance of financial instruments available in its sales premises, X bank is not responsible for ensuring that this information satisfies the requirements of Article 44 of the DR, since daily newspapers do not typically have any marketing interest in respect of the financial instruments to which the price information they publish relates, and are therefore not attributable to X bank in this respect.

4. Particularly in connection with information on websites, investment services enterprises have an obligation to ensure that information exclusively intended for eligible counterparties and that therefore does not meet all the requirements of Article 44 of the DR is not additionally made available to retail and professional clients. With regard to information provided over the internet, investment services enterprises are encouraged to post only information suitable for retail or professional clients on freely accessible web pages, or to post information that describes the information offering for eligible counterparties but only satisfies the requirements of Article 44 of the DR. The latter may be made available to eligible counterparties either in an restricted access area after access has been granted (e.g. using a password), or
separated from the other information by a clearly visible notice, to be confirmed by the user, that the information was not posted for retail or professional clients.

5. By contrast, when making available other sales documents that are subject to a special statutory regime, such as offering prospectuses, key investor information documents, key information documents and capital investment information documents that are provided to the investment services enterprise by the issuer and whose content satisfies the statutory requirements, the provisions of section 63 (6) WpHG and Article 44 of the DR do not give rise to any additional disclosure obligations on the part of the investment services enterprise.

6. If an investment services enterprise forwards third-party information to its securities account holders on the basis of its obligation under No. 16 of the Standard Terms and Conditions for Securities Transactions (Sonderbedingungen für Wertpapiergeschäfte) and thus makes it available to them, the investment services enterprise shall not generally be responsible for compliance of the content of this information with the requirements of section 63 (6) of the WpHG and Article 44 of the DR. However, when it forwards the information, the investment services enterprise shall take suitable measures, such as using bold type, to indicate prominently that it is merely forwarding information from a third party and has not verified the information. When forwarding statutory compensation or exchange offers, as well as voluntary purchase or exchange offers, the investment services enterprise shall also draw attention to the fact that investors must themselves assess the intrinsic value of the offer and decide whether or not to accept the offer.

BT 3.3 Requirements relating to the presentation of information addressed to retail and professional clients

For information addressed to retail and professional clients, Article 44 of the DR contains various requirements relating to the manner in which it is presented.

BT 3.3.1 Sufficient and comprehensible presentation

1. As a general principle, information that investment services enterprises make available to professional and retail clients shall generally be fair, clear and not misleading (see section 63 (6) sentence 1 of the WpHG). Among other things, this means that material statements may not be expressed ambiguously and that material information may not be omitted.

Example: Product names such as “guarantee certificate” or similar, as well as references, for example to “100% capital protection” or similar, do not indicate sufficiently clearly, without further explanation, who provides the guarantee (the issuer, a group affiliate or a third party) or the source of the capital protection. To ensure the clarity of the information, a clarifying reference to the identity of the guarantor is therefore generally required (for example: “100% capital guarantee by X bank”) or, for references to capital protection, an additional statement clarifying the source of the capital protection.

In this connection, further reference shall be made, where applicable, to the risk of a capital or repayment guarantee lapsing as a result of extraordinary rights of termination being exercised, as well as to any conditions or (especially quantitative) restrictions existing in respect of a guarantee.
Likewise, the product description shall clearly set out whether, for example, a capital guarantee applies only at the maturity date or whether a deduction of charges for hedging transactions should be expected (e.g. in the case of early sale of capital guarantee products).

2. Additionally, information shall be sufficient for, and presented in a way that is likely to be understood by, the group of clients to whom it is made available or by whom it is likely to be received:

The information shall be sufficient, based on the expected level of understanding of the average member of the group of clients to whom it is directed. The necessary scope and depth of product descriptions shall therefore be geared to the average knowledge of the target group. The more complicated a product or service (including its risks) is, the more explanations the related product information shall, as a rule, contain. If information is addressed expressly and in a clearly identifiable way to only a single clearly defined group of clients who can be expected to possess an advanced level of expertise, this may be taken into consideration when determining the scope and depth of the product description.

3. Furthermore, the information that is sufficient in scope for the average member of the client group addressed must be presented in a way that is comprehensible to such member. That means, among other things, that the way in which the information is worded must be all the more straightforward and generally comprehensible the less knowledgeable and experienced the addressed clients can be assumed to be.

Example: Although a reference to the “credit risk of X bank” in marketing material for a certificate is sufficiently comprehensible for a client group with prior knowledge in financial matters, it may be more appropriate to use less specialised terms in marketing material addressed to retail clients in general (e.g.: “Risk of financial loss due to the default or insolvency of X bank”).

4. In particular, it shall be ensured that the way in which the information is presented does not disguise, diminish or obscure important items, statements or warnings.

Negative example: Although readers will find the opportunities offered by a product expressly described in a section entitled “Advantages of the product”, they are forced to deduce the associated risks of the product from the features described in the section entitled “Who is the product suitable for?”.

In the first place, it is not clear from the heading “Who is the product suitable for?” that this section contains information on risks that is of particular importance for the investor. Secondly, the risks must be clearly identified: it is not sufficient that the risks can be deduced from the product description.

5. Where information relating to the yield on the capital invested is provided, the question of whether the promised yield is subject to conditions shall be considered. Although it is not normally necessary to mention issuer default risk specifically (e.g. for a corporate or government bond; unlike certificates, see above) provided that the risk premium and/or default risk of the issuer is not unusually high, it is in all cases necessary to provide a clarifying reference when the promised yield is subject to further conditions.
Example: A certificate pays the specified interest only if there is no default of a reference company.

In such cases, formulations such as “Opportunity for a return of x% p.a.” or “Return of up to x% p.a.” should be used instead of absolute statements such as “Return: x% p.a.”.

**BT 3.3.2 Up-to-date presentation**

1. The requirement for the information distributed to be up-to-date is generally governed by the principle that the information shall be fair and not misleading in accordance with section 63 (6) sentence 1 of the WpHG and by the general principle of proportionality. Although information distributed via online databases shall generally be up-to-date and shall in some circumstances be made available in real time, prospectus material made available for downloading is subject to lower requirements regarding how up to date the data are, and printed marketing materials intended to be made accessible at branches to still lower requirements. The decision will always depend on the specific information as well as the product or service and its specific features. In individual cases, however, the aforementioned principle that information shall be presented in a way that is fair and not misleading may make it necessary, including in the case of materials for which the time between the editorial and publication dates would normally be sufficient, either to not to distribute such materials or to update them if significant changes occur shortly after the editorial deadline.

Example: Although it may have been acceptable before the 2008 financial crisis to regard the risk of default of an issuer of certificates as being so negligible as to justify not mentioning that risk in the description of a product’s risks (see 3.3), the situation is now different. After such changes become known, it may therefore be necessary to adapt the information materials accordingly or to withdraw them from circulation. The same applies, for example, to performance data (see 3.4) after significant changes in value that have taken place within a short time.

In light of the requirement to present information in a way that is clear, fair and not misleading, it is advisable and sensible in any case to provide an easily identifiable reference to the preparation date of the information.

2. An exception to the general requirement for information made available online to be up-to-date is possible in cases where, for example, marketing materials relating to certificates are kept available on the website of the issuer or the distributing investment services enterprise after expiry of the subscription period. This satisfies an interest of the investors in having access to the information. At the same time it is not reasonable to continue requiring companies to keep such marketing materials up-to-date. In particular in this case, it is vital to provide a clear and easily identifiable reference to the preparation date of the information.

**BT 3.3.3 Presentation of benefits and risks**

1. Under Article 44(2)(b) of the DR, any potential benefits of an investment service or financial instrument may be referred to if the information always gives a fair and prominent indication of any relevant risks.
2. In contrast to securities offering prospectuses, risks need only be referred to if the information also refers to potential benefits of the presented product. As a minimum, the presentation is fair and clear if the principle of proportionality is applied, i.e. the scope and accuracy of the presentation of benefits and risks shall be balanced. The more extensively benefits are highlighted, the more extensively any risks shall also be addressed. That does not mean that the number of benefits and risks always has to be the same. Where a product has more benefits than risks, these may outnumber the risks in the presentation and vice versa. Also, benefits and risks do not always have to correspond to each other in substance, i.e. like "the two sides of a coin". What is decisive is that, where all material benefits of a product are specified, reference is also made to all material risks, and that where only particularly important benefits are mentioned, reference is also made to the particularly important risks.

3. There are different ways of referring to a benefit (e.g. through the language used or typographically). The reference to a benefit does not have to refer to a specific financial instrument (e.g. using a specific securities identification number). The rules governing the presentation of benefits and risks also apply if the information refers to a specific group of financial instruments with a similar structure.

Example:
In the marketing material for a certain type of certificate (for example, leveraged certificates) emphasising their benefits (e.g. prospect of disproportionate gains versus the underlying), reference would also have to be made to their risks (e.g. disproportionate risks of losses being incurred versus the underlying; issuer risk).

As already mentioned above, it is particularly important when presenting the risks and rewards to ensure that the way in which such information is presented may not disguise, diminish or obscure important items, statements or warnings. In addition, Article 44(2)(c) of the DR clarifies that the relevant risks shall be presented in a font size that is at least equal to the predominant font size used throughout the information. Moreover, the layout shall ensure that the relevant risks are easy to identify.

4. For information in print form, the references to risks shall be contained in the same document as the benefits. It is not sufficient to make reference to other locations (in particular a website or other information materials) or the possibility of having an advisory meeting.

Example:
It is not possible to mention the risks only in a footnote, although the benefits are presented outside the footnotes. Nor is it possible to describe only the benefits in a letter to clients, while referring clients to other documents, e.g. a product information sheet, for information on the risks. This also applies if the document presenting the risks is directly attached to or sent together with the letter.

5. The above principles apply regardless of the type of information medium used.

Examples of possible risks include:

- issuer default risk in the case of certificates
- guarantor default risk
• exchange rate risk (retail clients only)
• market-induced price or rate fluctuations
• possibility of tradability being restricted or absent
• possible obligation to make additional contributions
• extraordinary termination rights of issuer

BT 3.3.4 Presentation of performance

Where information contains statements on the performance of a financial instrument, a financial index or an investment service, the period to which the information refers shall be clearly stated and the fact that past performance, simulations or forecasts are not a reliable indicator of future performance shall be clearly indicated (Article 44(4)(c) and (d) of the DR). A specific requirement applies to information on performance presented in a currency other than the euro. In this case, information addressed to retail clients shall contain a prominent warning that the return may increase or decrease as a result of currency fluctuations. This warning is not necessary for information addressed to professional clients (see Article 44(4)(e) of the DR).

The requirements relating to performance information distinguish in some cases between information on past (Article 44(4) and (5) of the DR) and future (Article 44(6) of the DR) performance.

BT 3.3.4.1 Information on past performance

As a rule, information on past performance may not constitute the most prominent feature of the information (Article 44(4)(a) of the DR). That means that statements relating to past performance may not be given any special prominence, either typographically or in respect of the order they are presented, the depth in which they are described or in any other way.

BT 3.3.4.1.1 Appropriate information

1. Under Article 44(4)(b) of the DR, information on performance must be “appropriate”. Information that appears to be appropriate as a rule is any absolute or relative percentage information such as:
   • “50% increase in value between 10 January 2008 and 10 January 2009” or
   • “Between 10 January 2008 and 10 January 2009, 50% greater increase in value compared with [comparison object]”.

2. Within the meaning of Article 4(4)(b) of the DR, absolute or relative performance statements may also be suitable in certain circumstances, such as:
   • “Price on 10 January 2008: €40.00/Price on 10 January 2009: €50.00” or
   • “€1,000.00 increase between 10 January 2008 and 10 January 2009” or
• “Increase in value €50.00 higher than [comparison object] between 10 January 2008 and 10 January 2009”.

3. The performance data shall always reflect actual performance over a twelve-month period. That means that cumulative performance data relating to the entire reference period (e.g. “500% in 10 years”) is not appropriate because this data does not allow for any conclusions to be made with regard to the volatility and risk of the investment. For the same reason, annualised average values for multi-year periods (e.g. “5% p.a. on average over the past 5 years”) are also inappropriate. Exceptionally, annualised data may be appropriate if the actual performance was nearly constant over the reference period.

BT 3.3.4.1.2 Minimum period: generally the immediately preceding five years

1. The DR contains detailed requirements regarding the period to which the performance data refers:

As a rule, the performance data shall refer to the immediately preceding five years (Article 44(4)(b) of the DR), with “years” in this context meaning twelve-month periods and not calendar years.

2. The requirements governing what is meant by “immediately”, i.e. the length of the period permitted between the most recent performance information and the date the information is disseminated, are determined by the principle of proportionality and the principle of fair presentation of information in accordance with section 63 (6) of the WpHG. As a result, the information must be as up-to-date as is possible with reasonable effort.

3. In individual cases, however, the requirement to present information fairly and the prohibition on providing misleading information (section 63 (2) sentence 6 of WpHG) may mean that materials that would normally be sufficiently up-to-date may either no longer be disseminated or may have to be updated if significant changes in value occur shortly after the editorial deadline (see also 3.2).

BT 3.3.4.1.3 Exception: data is only available for a shorter period

If performance data is only available for a period shorter than five years for the relevant financial instrument, financial index or investment service, information shall in all cases be stated for the entire period for which it is available.

BT 3.3.4.1.4 Limit to the exception: general principle of no information for periods of less than one year

1. As a general principle, under Article 44(4)(b) of the DR, no performance information may be given in cases where performance could only be presented over a period of less than twelve months (for example because trading in the financial instrument only started less than twelve months ago).

2. It should be noted in this context that the prohibition only relates to the presentation of the performance of the financial instrument, the financial index or the investment service over a period of less than one year. By contrast, statements relating to the current value only are certainly permitted.
BT 3.3.4.1.5 Exception to prohibition on information for periods of less than one year

However, in light of the purpose of the requirement and the legitimate interest of the clients in receiving information, however, it appears possible to allow an exception from the general prohibition on performance information for a period of less than one year for non-marketing, unbiased information requested by clients (for example, information in automated online share price databases or in the case of product information necessary for advisory services in accordance with the WpHG) (see also 3.3.4.1.7).

BT 3.3.4.1.6 Supplementary information

Supplementary performance information may also be given in addition to the statutory requirements. However, this information may not be given greater importance than the legally required information in terms of substance and form. In other words, as a minimum, equal prominence shall be given to the legally required information.

BT 3.3.4.1.7 Effect of commissions, fees and other charges

1. If gross performance information is presented, the effect of commissions, charges and other fees shall be disclosed (see Article 44(4)(f) and Article 44(5)(b) of the DR).

   In this connection, commissions, fees and other charges are understood to mean all financial expenditures necessarily arising for the client from the purchase, holding or sale of a financial instrument, or the use of an investment service, such as
   
   - front-end loads in the case of fund units
   - transaction costs such as order fees and brokerage fees
   - any securities account fees and other custody fees.

2. Article 44(4)(f) and Article 44(5)(b) of the DR require quantified information on the effect of commissions, fees and other charges. It is by no means sufficient in this respect to provide an unquantified, general indication that commissions, fees and other charges reduce performance, since this is already immediately clear from such terms by definition. However, it is very difficult to provide an accurate presentation of adjusted performance that takes into account the performance reducing factors specified by law, because the relevant parameters to be considered vary significantly depending on the individual case. The reason for this is that the amount of the values to be applied depends either on the institution that performs the service in question (example: transaction and custody costs) or on the investor (example: the total amount invested, which in turn influences the transaction and custody costs). As a result, it is practically impossible, at least in the case of general information, to present values that apply to all clients. The following approach is recommended to nevertheless satisfy the statutory requirements in Article 44(4)(f) and (5)(b) of the DR:

   When calculating adjusted performance, investment services enterprises present the performance required by Article 44(4)(f) and (5)(b) of the DR reflecting the effect of commissions, fees and other charges by applying the aforementioned charges in the amounts typically incurred, either in the amount of their own fee schedule or using average standard market values. It is irrelevant whether the investment services enterprise determines the average values itself or uses data provided by associations.
or by other third parties. Precise market analyses employing empirical mathematical methodologies are not prescribed for the determination of “average standard market values”. Rather, the use of values that are assumed to be close to reality is sufficient, provided that these do not appear to be arbitrarily distorted. An amount of €1,000.00 or an average investment amount typically encountered in practice for the financial instrument in question is applied by the investment services enterprise as a standardised model value, and a period of five years or a shorter period typically encountered in practice is used as the investment period. The inclusion of securities account costs may be replaced by a reference to the fact that securities account costs that could additionally reduce performance may be incurred. In addition to this standardised model calculation, the investment services enterprise may give clients an opportunity to calculate individual adjusted performance using an online performance calculator available on the institution’s website. In this case, clients would have to enter the values applicable to them for the individual variable parameters, including the investment amount.

If an institution offers investment services as part of online offerings, it may give its clients an opportunity to calculate individual adjusted performance for these offerings using an online performance calculator available on the institution’s website, instead of the standardised model calculation. In this case, clients would have to enter the values applicable to them for the individual variable parameters, including the investment amount.

The investment services enterprise may also use the online performance calculator as an alternative to the standardised model calculation to calculate individual adjusted performance, for example if the investment advice is provided at a branch office. In this case, the investment adviser must determine the individual variable parameters, including the investment amount, individually for each client. A printout of the online performance calculator shall be made available to the client. In both of the cases described above, the online performance calculator can replace the standardised model calculation.

**BT 3.3.4.1.8 Simulated performance information**

1. Simulations of past performance or references to such a simulation may relate only to a financial instrument, the underlying of a financial instrument or a financial index (see Article 44(5(a) of the DR). This list of items that a simulation might contain is exhaustive. This means, for example, that client information may not contain simulations of the performance of a mere trading or investment strategy.

2. Moreover, simulations of past performance must be based on the actual past performance of one or more financial instruments, underlyings or financial indices that are the same as, or substantially the same as, or underlie, the financial instrument concerned, as well as satisfying all conditions stated under 3.3.4 above (see Article 44(5(a) of the DR).

3. Moreover, the financial instrument, the underlying or the financial index to be used in the simulation must have a clearly defined composition for a simulation to be possible at all. For this reason it is not permitted to simulate in client information the past performance of a financial instrument or a financial index whose respective composition depends on discretionary decisions.
Example:
For a newly launched fund, a certain investment strategy including certain weighting provisions is defined for the fund’s management. However, the actual choice of securities and the decision on specific transactions is left to the discretion of the fund’s management. In this case it is not possible to determine what the fund’s exact composition would have been in the past because it is impossible to know what discretionary decisions the fund’s management would have taken in the past.

4. For the same reason, it is not generally permitted to simulate the past performance of such structured products in client information for which, beyond the pure costs of the individual components, margins of the issuer that vary over the entire term are used in pricing, unless it is clearly prominently stated that the margins of the issuer assumed in the calculation of performance are notional and variable and therefore do not provide any reliable indication of the future effect of issuer margins on the performance of the product.

Example:
The structure of a guarantee certificate is made up of several components (e.g. securities and forward transactions). The issue price is calculated by adding the prices of the individual components as well as a profit margin of the issuer. However, the amount of this margin changes constantly over the term as a result of the issuer’s pricing. In this case it is not possible to know how high the issuer would have calculated its margin at individual points in time in the past. It is therefore equally not possible to determine what the price of the certificate would have been at dates before the issue.

5. As a rule, it is permissible to present a combination of actual and simulated performance data. In this case, however, it must be clear and unambiguous from the presentation which information is actual nature and which information is simulated.

Example:
A certificate launched six months ago tracks the performance of share A “1:1”. Although it would not be permitted to present performance information for the certificate only for the past six months in light of the prohibition of presenting performance information for periods of less than one year (see point 3.4.1.4), a reference to the actual performance of share A during the preceding four and a half years nevertheless makes it possible to present the performance of the certificate for the period of the past five years.

Lastly, as a general principle the effect of commissions, fees and other charges shall also be given in the case of simulated performance data in the same way as for the disclosure of actual performance information.

Example:
A newly launched fund continuously tracks a certain index “1:1” as stated in the fund’s terms and conditions. As there is insufficient actual historical price data, a simulation of its past performance will be presented. In this case, the simulation has to take account of any front-end load and/or redemption fees as well as transaction costs in the same way as for the presentation of actual performance.

BT 3.3.4.2 Information on future performance
Data provided on future performance may not be based on simulated past performance or refer to such a simulation. The information must be based on reasonable assumptions supported by objective data and, if based on gross performance, clearly state the effect of commissions, fees and other charges. The information shall be based on both negative and positive scenarios performance scenarios in different market conditions and reflect the nature and risks of the specific types of instruments included in the analysis, and it shall contain a prominent warning that such forecasts are not a reliable indicator of future performance.

**BT 3.4 Tax information**

Information referring to a particular tax treatment shall state prominently that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future (see Article 44(7) of the DR).

**BT 3.5 Consistency of marketing and product information**

Information provided in marketing communication may not contradict information that the investment services enterprise makes available to the client when performing investment services and ancillary investment services (see Article 44(2)(b) of the DR). This means in particular that information provided in offering prospectuses or other information materials must be consistent with information provided for marketing purposes.

**BT 3.6 Information referring to the competent authority**

The name of any competent authority may not be mentioned in such a way that could indicate or suggest endorsement or approval by that authority of the products or services of the investment services enterprise (Article 44(8) of the DR).

Consequently, advertising for a financial instrument may not provide information that BaFin has approved the prospectus published in the course of the issue in such a way as to give clients the impression that BaFin has explicitly endorsed or approved the financial instrument as such. Nor is it permitted to refer to the fact of existing supervision by BaFin in such a way as to give rise to the impression that the services or products offered by the investment services enterprise are explicitly endorsed or approved by BaFin.

**BT 3.7 Documentation of marketing communications**

Besides the requirement to keep one copy of the marketing communication, no further record-keeping obligations apply to marketing communications provided that it is clear from the marketing communication to which client group the communication is addressed (see Article 72 of the DR). To the extent that the marketing communication is issued periodically using a particular standard template, retention of one sample copy of such standardised information is sufficient if the creation of the individual documents can be reconstructed from the additional documentation.

**Annex:**

Some non-binding illustrative examples suggesting possible ways of presenting performance for the past 5 years are presented in the following:
A. **Bar chart (return expressed as a percentage)**

![Bar chart image]

Front-end load/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

1/05–1/07: gross minus securities account fee for investment amount of [1/4 average account]

1/08–1/09: net = minus redemption fee/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

Note: The specific return for your planned investment amount can be calculated using a return calculator available on our website (www.a-bank.de/renditerechner).
B. **Line chart (return expressed as a percentage)**

1/04–1/05: net = minus front-end fee/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

1/05–1/07: gross minus securities account fee for investment amount of [1/4 average account]

1/08–1/09: net = minus redemption fee/order fee/brokerage fee/securities account fee for investment amount of [1/4 average securities account]

Note: The specific return for your planned investment amount can be calculated using a return calculator available on our website (www.a-bank.de/renditerechner).
Curve chart (performance of EUR 100 investment expressed in euros)
BT 4 Best execution of client orders in accordance with section 82 of the WpHG

This module expands on the requirements of section 82 of the WpHG and Articles 66–66 of the DR.

BT 4.1. Exercise of discretion in selecting execution venues and in developing the execution policy

1. The investment services enterprise shall select execution venues at its discretion. The investment services enterprise is obliged to use the discretion granted to it and, when exercising this discretion, to consider all relevant execution venues and all factors that are significant for determining the best possible result. The different execution venues shall be compared and assessed using uniform and non-discriminatory criteria.

2. In addition to the criteria listed in section 82 (2) and (3) of the WpHG and Article 64 of the DR, the selection process may take other factors into account in the exercise of discretion, provided that these factors do not conflict with the obligation to obtain the best possible result for the client. In doing so, the investment services enterprise takes into account in particular the reports published by the execution venues on the quality of execution in accordance with section 82 (10) and (11) of the WpHG in conjunction with Delegated Regulation (EU) 2017/575 (RTS 27). In light of this requirement, the investment services enterprise may also consider qualitative factors relating to the execution venues (such as the monitoring of trading by a trading surveillance unit, complaints management and processing, the trading hours of the individual execution venues, the reliability of performance promises made, the reliability of quotes and other price information, the selection of order supplements and execution types, the service and information offering for investors, the type of order book, the counterparty risk of trading partners, the reliability of settlement, etc.).

3. In the retail client business, best execution shall be based on the total fees paid. The total fees paid are an extremely important criterion when exercising discretion. Minor differences in the total consideration paid may be disregarded provided that this is clearly justified. The costs to be taken into account when calculating the total fees paid also include implicit trading costs. Fees and remuneration charged by execution venues as well as clearing and settlement costs may only be included when calculating the total fees paid if they are passed on to the client.

BT 4.2 Content of the execution policy

1. The execution policy shall be based on the nature and extent of the investment services business, securities orders and client structure. This applies in particular to the degree of detail and the depth of regulation in the execution policy.

2. In accordance with Article 66(3)(b) and (c) of the DR, the execution policy shall specify the key factors that determined the selection of the relevant execution venue and the execution venues to which securities orders will be transmitted for execution.

3. The information on the execution policy shall explain clearly, in sufficient detail and understandably how client orders are executed by the investment services enterprise.

BT 4.3 Assessment procedure and review of the execution policy
1. The requirements for the methodology used to determine the execution venues that provide the best possible results (assessment procedure) are determined by the nature and extent of the investment services business conducted by the investment services enterprise.

2. The assessment procedure should be implemented using current and meaningful market data. The information published in accordance with section 82 (9) to (11) of the WpHG shall be taken into account. The same applies to the regular, and at least annual, review of the enterprise’s own execution policy. Investment services enterprises are also encouraged to examine, using meaningful random samples (back testing), whether the execution of securities orders at another trading venue would have led to better execution. If the assessment procedure or the random sampling examination allows the use of non-binding price information in the review of the execution policy, the investment services enterprise shall also examine whether orders are regularly executed at the bid and offer prices prevailing at the time the orders were placed.

3. If there are significant changes during the year in the aspects relevant for best execution within the meaning of Article 66(1) sentence 2 and Article 65(7) of the DR, the investment services enterprise shall promptly review its execution policy and adapt it if necessary.

**BT 4.4 Transmission of securities orders for execution by another investment services enterprise**

1. The minimum requirements for investment services enterprises that transmit client orders to another investment services enterprise for execution or that provide portfolio management services without executing the orders or decisions themselves are contained in Article 65 of the DR. In its execution policy, the investment services enterprise shall determine and select the investment services enterprises that will be instructed to execute securities orders for each group of financial instruments (selection policy) (see Article 65(5) of the DR) in accordance with the criteria specified in section 82 (2) and (3) of the WpHG. The investment services enterprises that are instructed to execute securities orders shall be named in the selection policy.

2. The investment services enterprise that is instructed to execute securities orders shall be selected in particular on the basis of its execution policy. The instructing enterprise shall examine whether the execution policy of the instructed investment services enterprise ensures best execution of securities orders and adequately reflects client interests.

3. As part of the regular monitoring of best order execution, the investment services enterprise shall examine whether the investment services enterprise instructed to execute securities orders is executing the orders in accordance with the execution policy of the instructed investment services enterprise, and whether execution via this investment services enterprise permanently ensures the best execution of securities orders. As part of the monitoring activities, the actual execution of securities orders shall be compared with the execution policy of the instructed investment services enterprise on a random sampling basis.

4. If the investment services enterprise concludes as a result of its review that the execution policy of the instructed investment services enterprise no longer ensures best execution, the investment services enterprise shall either transmit the orders to another investment services enterprise for best execution or issue an instruction to the current investment services enterprise with regard to the execution venue.
5. The investment services enterprise is not obliged to select another investment services enterprise to execute the securities orders if the selection was made by the client itself, for example if the client selects the enterprise maintaining the securities account via which the securities transactions will be executed as part of the investment services provided by an asset manager for the client. In this case, too, the investment services enterprise shall explicitly warn its clients that the obligation to ensure best execution does not apply (Article 66(3)(f) of the DR) and that best execution of the securities orders cannot be assured.

6. The investment services enterprise is obliged to draw up its own execution policy in accordance with the requirements specified in BT 4.1 to BT 4.3 of this Circular if the instructed investment services enterprise has no execution policy or only executes securities orders on the instructions of the transmitting investment services enterprise.

**BT 4.5 Publication requirements**

The investment services enterprise shall publish the top five execution venues in terms of trading volumes for all executed client orders per class of financial instruments at least once a year and a summary of the quality of execution obtained in accordance with the requirements of Delegated Regulation (EU) 2017/576 (RTS 28) for the annual publication of information by investment services enterprises of information on the identity of execution venues and on the quality of execution.

The publication obligations of investment services enterprises that transmit client orders to other investment services enterprises for execution are set out in section 82 (13) no. 4 of the WpHG in conjunction with Article 65(6) of the DR.
BT 5 Product governance requirements in connection with the provision of investment services and ancillary investment services

This module expands on the requirements of sections 63 (4) and (5), 80 (9) – (13), 81 (4) and (5) of the WpHG, and sections 11 and 12 of the WpDVerOV.

BT 5.1 Preliminary remarks and definitions

1. Products within the meaning of this BT mean financial instruments within the meaning of section 2 (4) of the WpHG and structured deposits within the meaning of section 2 (19) of the WpHG.

   In accordance with section 11 (1) sentences 1 and 2 of the WpDVerOV, manufacturers within the meaning of this BT 5 mean investment services enterprises that create, develop, issue or design new products.

   Distributors within the meaning of this BT 5 are investment services enterprises that sell, distribute, offer, recommend or market products.

2. In implementing and complying with the requirements of this BT 5, an investment services enterprise shall consider the type of product, the relevant product characteristics, such as complexity (including the costs and charges structure of the product), risk-reward profile, liquidity or innovative character, as well as the nature and scope of the investment services it offers.

   The product governance requirements in accordance with sections 63 (4) and (5), 80 (9) – (13), 81 (4) and (5) of the WpHG, and sections 11 and 12 of the WpDVerOV and the requirements of this BT 5 shall apply regardless of whether primary or secondary market products are concerned.

   Investment services enterprises that are both the manufacturer and the distributor of a financial instrument are only required to consider all of the requirements of this BT 5 once, to the extent that they are the same.

3. There is generally no requirement to identify a target market for products manufactured and distributed before 3 January 2018.

   For products that were manufactured before 3 January 2018 but that are distributed after that date, the requirements for distributors under BT 5.3 shall apply to the extent that they are to be treated as products that were manufactured by enterprises that do not fall within the scope of Directive 2014/65/EU. Example: Distributors shall generally identify their own target market for these products.

   For products manufactured before 3 January 2018 and distributed after that date, manufacturers shall identify an actual target market as part of the product review process after 3 January 2018. Distributors shall consider this actual target market in their own subsequent product review process.

BT 5.2 Requirements for manufacturers

BT 5.2.1 Identification of the potential target market by the manufacturer; target market categories to be considered
1. In accordance with section 11 (8) of the WpDVerOV, manufacturers may determine the financial markets and the needs, characteristics and objectives of potential end-clients on the basis of theoretical knowledge of and experience with the product (or a comparable product) ("potential target market").

2. The identification of the potential target market by the manufacturer may not be conducted solely on the basis of quantitative criteria, but shall also be based on sufficient qualitative considerations. This applies in particular in the mass market with a high degree of process automation. Examples of quantitative criteria include: criteria based on arithmetic operations or algorithms that process quantitative data about clients and products or are generated by scoring systems that assign values for certain characteristics or convert factual data into numerical systems (e.g. using issuer ratings or product volatility).

3. Manufacturers shall identify the potential target market based on the following five categories. Statements on each category shall be made for each financial instrument. The statements on the individual categories may not be made in isolation, but shall consider interactions between the categories.

4. In exceptional cases in which the five categories are not sufficient to identify a meaningful target market, manufacturers may decide to use additional categories. In deciding to use additional categories, manufacturers shall take into account an exchange of information about target markets with distributors that is as effective as possible, the characteristics of the communication channels designated for this purpose and possible effects on an open product architecture of the distributors concerned.

5. The level of detail of the statements to be made regarding the individual categories shall be based on the type of product and the relevant product characteristics, such as complexity (including the costs and charges structure of the product), risk-reward profile, liquidity or innovative character; the principles set out in BT 5.2.2 shall be taken into account.

6. The five target market categories are:

   1. Category of client: The investment services enterprise shall describe the type of client within the meaning of section 67 of the WpHG (retail clients, professional clients, eligible counterparties) to which the product is targeted.

   2. Knowledge and experience: The investment services enterprise shall describe the knowledge that the target clients are required to have about the product, such as the type of product, its features or knowledge in thematically related areas that help to understand the product. Example: For structured products with complicated return profiles, manufacturers could specify that target clients should have knowledge of how this type of product works and the likely outcomes from the product.

      It shall also describe how much practical experience target clients should have with elements such as the type of product, its features or experience in thematically related areas that help to understand the product. Example: Manufacturers could specify a minimum time period for which target clients should have been active in the financial markets.

      In certain cases, knowledge and experience could be dependent on each other.

      Example:
A client with limited or no experience can compensate this with correspondingly extensive knowledge.

3. Financial situation with a focus on the ability to bear losses: The investment services enterprise shall specify the amount of losses that target clients should be able and willing to afford (for example “minor losses” or “total loss”) and whether there are potential losses that exceed the amount invested (e.g. additional payment obligations). The investment services enterprise could also describe the maximum proportion of a target client’s assets that should be invested in the relevant product.

4. Risk tolerance and compatibility of the product’s risk/reward profile with the target client: The investment services enterprise shall describe the attitude that target clients should have in relation to the risks from the product. To satisfy the requirements of this target market category, manufacturers can use the risk indicator stipulated by the legislative requirements applicable to the product, such as Regulation (EU) No. 1286/2014 or Directive 2009/65/EC. If it uses its own risk categories for the description (example: “conservative”, “balanced”, “risk-oriented”, “speculative”), they shall be described in greater detail.

5. Objectives and needs: The investment services enterprise shall specify the investment objectives and needs of the target clients that the product is designed to meet. The investment objectives comprise the general purpose of the investment or the overall strategy that target clients can follow with the investment (e.g. “retirement planning,” “capital accumulation”, “education planning,” “regular wealth consumption”). Additionally, the target client’s investment horizon can be specified as the number of years in which the product is to be held. The investment objectives can be fine-tuned by specifying other aspects, such as specific product features or certain expectations of target clients (for example: products that are designed to meet the needs of a target clients in a specific age demographic; products designed to achieve tax efficiency based on the target client’s specific tax regime; currency protection products, sustainable investment products).

7. When identifying the target market using the above categories, a manufacturer is not required to expressly identify target client groups that are already covered by another target client group within the same category.
   Example: For a product that is compatible with all levels of knowledge and experience of potential target clients, it is enough only to identify those target clients who have the lowest level, e.g. “basic knowledge and experience“, as this means that the product is also compatible with clients who have more extensive knowledge and experience.

8. When describing the above five target market categories, manufacturers shall endeavour to use clear and understandable concepts and terminology in order to prevent misunderstandings and misinterpretations. The terms and concepts used to define the target market categories (e.g. risk classes defined by the manufacturer itself) shall be described clearly and explained.

BT 5.2.2 Identification of the potential target market: consideration of the nature of the product manufactured

1. The potential target market shall be described in an appropriate and proportionate manner, considering the nature of the product, and shall consider in particular product characteristics such as complexity (including the costs and charges structure of the product), risk/reward profile, liquidity or the product’s innovative character.
2. Consequently, for more complicated products, such as structured products with complicated return profiles, the target market shall be identified in greater detail. For simple, more common products, by contrast, the target market shall be identified in less detail. For simple, more common products, in particular

- the target market categories can be identified for all products in a product type with sufficiently comparable product features (e.g. inclusion in an external benchmark or membership of a specific stock exchange segment with certain requirements) following a common approach, or

- the description of the target market categories can be more generic, whereby the simpler a product is, the lower the requirements placed on the description.

3. In all cases, however, the target market shall be identified at a sufficiently granular level to avoid the inclusion of any groups of target clients for whose needs, characteristics and objectives a product is not compatible.

4. For tailor-made products, the target client can generally be considered to be the client who ordered the product, unless the distribution of the product to other clients is planned or this results from the circumstances.

**BT 5.2.3 Interaction between the distribution strategy of the manufacturer and its definition of the target market**

1. The distribution strategy to be defined by the manufacturer for each product in accordance with section 80 (9) sentence 4 of the WpHG shall encourage the distribution of the product to the target market. If a manufacturer is able to influence which distributors will distribute its products, it shall make its best efforts to select distributors whose client base and services offering are compatible with the target market of the product.

2. In defining the distribution strategy, the manufacturer shall determine which information about the clients is necessary to enable a distributor to properly identify and reconcile the actual target market. Depending on this, a manufacturer shall specify the investment services through which target clients can acquire the product. If the product is designed to be distributed without advice, the manufacturer could, as a minimum, designated a preferred distribution channel.

**BT 5.3 Requirements for distributors**

**BT 5.3.1 Relationship between the target market identification and other product governance processes of the distributor**

1. Target market identification by distributors (i.e. identifying the “actual” target market) shall be conducted for each product as part of a decision-making process in accordance with section 12 (1) of the WpDVerOV about which products and services will be offered by the distributor. This process shall occur at the earliest possible time in the distributor's business organisation in order to ensure from the very beginning that the products and related services are compatible with the needs, characteristics and objectives of the target clients. Accordingly, it is necessary to complete the process of target market identification before the product goes into distribution.

2. The question of which products and services will be offered by the distributor, how the target market for the product concerned and how the relevant distribution strategy are defined, is a business policy decision for which the management board bears responsibility. The decision shall be given a key role in planning the daily business; in
addition, it shall be taken into account in all other relevant processes in connection with the distributor’s product and services offering (for example budget planning or staff remuneration).

3. As part of target market identification and of the process of deciding which products and services will be offered by the distributor, the consistency of the product concerned with the services through it is to be offered shall be ensured. In this context, the distributor shall decide which products it wishes to recommend (without advice) to which clients (investment advice or portfolio management), actively distribute (e.g. by selecting clients based on common features in terms of knowledge, experience, financial situation, etc.) or make available passively without active marketing (for example as execution-only business). Particular care shall be paid to considering the following:

- situations in which no comprehensive target market identification is made or no complete overview of reaching the target market can be obtained due to the nature of the service provided or the resulting information (in particular in non-advised business with or without an assessment of appropriateness)
- decisions about complex, risky, illiquid or innovative products or products with similar features
- situations in which there is a particular conflict of interest (e.g. in the case of products that are issued by the distributor itself or the group of which it is a member).

**Example 1:**
In light of the detailed information about clients that the distributor has gained from investment advice, it decides not to offer these clients products with a particular risk/reward profile without investment advice.

**Example 2:**
Although certain simple products could be offered without investment advice in execution-only business, the distributor decides to offer them only after an assessment of appropriateness or suitability in the interests of better investor protection.

**Example 3:**
For a certificate, the potential target market of a manufacturer imposes requirements about the financial situation that a target client for the product should have. The distributor normally distributes certificates in non-advised business with an assessment of appropriateness. Because of the fact, however, that the client assessment in the non-advised business does not provide any information about the client’s financial situation, and hence the target market for the client cannot be reconciled with the “financial situation” category, the distributor decides to distribute the certificate only through the provision of investment advice.

4. A product that the distributor can see will never be compatible with the needs, characteristics and objectives of its clients may not be added to the product range.

**BT 5.3.2 Relationship between the target market identification and the assessment of suitability or appropriateness**

The obligation of the distributor to identify the actual target market and to ensure that distribution of a product is consistent with the actual target market shall be conducted in addition to the assessment of suitability or appropriateness in accordance with section 64 (3) and section 63 (1) of the WpHG and shall not be substituted by it.
BT 5.3.3 Identification of the actual target market by the distributor: basis of identifying the target market

1. Regardless of the identification of the potential target market by the manufacturer, distributors shall identify their own target market for a product at a more concrete level in order to identify the group of clients to which the product will actually be marketed (“actual target market”). The actual target market shall be identified on the basis of the following:

- The distributor’s information about its own clients

This requires distributors to conduct a thorough analysis of their client base. The client base consists of existing and potential clients (e.g. clients of the deposit business to whom a bank wishes to offer investment services). To do this, all information available from investment services and ancillary investment services and that could be considered useful for identifying the target market shall be used. In addition, distributors can also use for this purpose all information available from other sources and deemed useful for identifying the target market.

If the service will be provided to clients who are not natural persons (e.g. investment advice to an asset management company with regard to a fund), comparable (and additional, if appropriate) relevant information for identifying the needs, characteristics and objectives of the client shall be used (e.g. the fund’s investment policy).

- information about the product communicated by the manufacturer or obtained by the distributor itself

- the investment service or ancillary investment service with which the product will be distributed.

2. In other respects, the requirements in BT 5.2.1 and BT 5.2.2 apply to distributors, with the necessary modifications. If the manufacturer identifies a potential market, the distributor is not required itself to identify all aspects of the target market again. To identify the actual target market in such cases, it is sufficient to assess the manufacturer’s potential target market in accordance with BT 5.2.1 and BT 5.2.2 and this BT 5.3.3 and BT 5.3.4. and to refine it if necessary.

3. Distributors shall implement a dedicated process to assess whether and, if applicable, how the manufacturer’s target market fits the distributor’s own client base. The depth of the assessment shall be determined by the type of product and its features, such as complexity, risk, illiquidity or innovative character. Example: The assessment will be more intensive for more complex products, while it will be less intensive for simple, more common products. If, as a result of the assessment, the distributor comes to the conclusion that the target market of the manufacturer does not need to be refined or adapted, the manufacturer’s target market may be used as it is. The assessment in accordance with sentence 1 above shall also be conducted in all cases for simple, more common products (i.e. it cannot be reduced to “zero” even for very simple products); for such products, however, it will normally be possible to use the potential target market.

4. If the distributor comes to the conclusion that the potential target market of the manufacturer has to be adapted or refined, distributors should not deviate from the fundamental decisions made therein. For example, all decisions associated with a lower level of investor protection than provided for by the manufacturer (e.g. making
a product for professional clients accessible to retail clients as well) may only be taken on the basis of a thorough analysis of the target clients and the characteristics of the product. As a general principle, the manufacturer shall be informed about such decisions.

5. Usually, the actual target market is defined by the distributor after the manufacturer has communicated its target market for the product to the distributor. However, it is also possible for the manufacturer and the distributor together to define both the potential and the actual target market in accordance with the requirements of this BT 5. In such cases, the manufacturer and the distributor remain responsible for identifying their own target market.
Example: The manufacturer and the distributor develop a target market standard for the products on which their business relationship is based.

BT 5.3.4 Identification of the actual target market by the distributor: interaction of target market identification with investment services; reconciliation of the target market

1. In addition to the obligation to identify the actual target market, distributors shall ensure that distribution of a product is consistent with the target market (section 12 (4) sentence 1 no. 1 and (5) sentence 1 of the WpDVerOV). To do this, the distributor shall in each and every case, in addition to any assessment of appropriateness or suitability to be performed depending on the investment service, reconcile the needs, characteristics and features of the relevant investment services client with the corresponding requirements from the target market categories ("reconciliation of the actual target market").

2. A distributor make take into account the fact that the scope of both the identification of the actual target market and the subsequent reconciliation of the actual target market depend on the level of information gained about the client concerned from the relevant investment service as follows:

- **Investment advice and portfolio management**
  - For products that will, as a minimum, also be distributed through investment advice and portfolio management, a comprehensive actual target market shall be identified, since the client analysis to be conducted in order to perform the suitability assessment continuously provides an insight into all information necessary for defining, assessing or refining the target market categories. The distributor shall obtain corresponding information in advance from other sources the first time a product is offered or when operations commence.
  - All aspects of the reconciliation of the actual target market shall be conducted in each case.

- **Non-advised business with assessment of appropriateness**
  - For products that will, as a minimum, also be distributed in the non-advised business with an assessment of appropriateness, and not also through investment advice or portfolio management, it is sufficient to identify the actual target market only in terms of the target market categories of “client category” and “knowledge and experience”, as the client analysis to be conducted in order to perform the assessment of appropriateness only provides a continuous insight into this information. The distributor shall obtain corresponding information in advance from other sources the first time a product is offered or when operations commence.
It is sufficient to conduct the reconciliation of the actual target market in terms of the target market categories of “client category” and “knowledge and experience”. The client shall be informed about the limited reconciliation. This information can be provided in a standardised format (e.g. in the basic information). Target market categories from the manufacturer’s potential target market that have not been reconciled may be communicated to the client if they have been made available to the distributor.

- Non-advised business without assessment of appropriateness (execution-only business)
  - For products that will only be distributed in the non-advised business without an assessment of appropriateness (execution-only business), it is sufficient to identify the actual target market only in terms of the target market category of “client category”.
  - It is sufficient to conduct the reconciliation of the actual target market only in terms of the target market category of “client category”. The client shall be informed about the limited reconciliation. This information can be provided in a standardised format (e.g. in the basic information). Target market categories from the manufacturer’s potential target market that have not been reconciled may be communicated to the client if they have been made available to the distributor.

3. If a product is distributed through a range of different services, the identification of the actual target market for this product shall generally be conducted in accordance with the principles for the service with the most comprehensive client analysis obligations. In such cases, the reconciliation of the actual target market is performed in accordance with the principles described above applicable to the actual service provided.

**Example 1:**
A distributor distributes a simple, more common product that is issued by a manufacturer who is not a “manufacturer” within the meaning of section 11 (1) of the WpDVerOV (see also BT 5.3.7 for more details) in the execution-only business. When identifying the actual target market, the distributor cannot use information provided by the manufacturer and defines the target market category of “client category” to be identified in this scenario as “retail clients”. In the actual distribution scenario to the client, only its client category will therefore be reconciled, i.e. assessed whether the client really is a retail client.

**Example 2:**
A distributor offers a certificate both in the non-advised business with an assessment of appropriateness and through investment advice. To identify the actual target market, the distributor is required to identify all target market categories for the product. In the investment advice scenario, the distributor reconciles all of the target market categories with the needs, characteristics and features of the actual client. By contrast, in the case of a sale in the non-advised business with an assessment of appropriateness, the seller only reconciles the categories of “client category” and “knowledge and experience” with the information about the client gained from the client analysis and informs the client about the limited reconciliation.

4. If, before or during the provision of an investment service, a distributor uses information about clients that would actually not apply to the identification and reconciliation of the target market in accordance with the principles described above, the distributor shall nevertheless take it into account.
Example:
A distributor offers certificates issued by another investment services enterprise exclusively in the non-advised business with an assessment of appropriateness. To identify and subsequently reconcile the actual target market, the target market categories of “client category” and “knowledge and experience” would therefore have to be taken into account, and the client would also have to be informed about the limited reconciliation. In a mailing campaign to distribute the certificates, however, the enterprise only targets those clients about whom it knows from other sources that they have assets available for investment of more than €100,000. By using this information to address clients, the distributor is required to additionally reconcile the target market category of “financial situation” and to use it to identify the target market.

5. If a distributor provides portfolio management, it shall take into account the specific characteristics of this service as follows:

- The distributor shall identify an actual target market in accordance with BT 5.3.3 for the investment strategies that are to be used for portfolio management. If a tailored investment strategy is developed, BT 5.2.2 no. 4 shall apply, with the necessary modifications.

- The actual target market of the relevant investment strategy shall be reconciled with the client concerned. Tailored investment strategies to which BT 5.2.2 no. 4 applies, with the necessary modifications, do not require any reconciliation.

- The distributor shall implement the process under section 12 (1) of the WpDVerOV expanded on in BT 5.3.1 to decide which products and services will be offered by distributors on condition that, in addition to applying to products that are to be used in the clients’ portfolios, the process will also be applied to investment strategies that are to be used in the context of portfolio management.

- Refinement of the potential target market or distribution strategy for products of manufacturers who are subject to Directive 2014/65/EU or the separate identification of an actual target market or distribution strategy for products of manufacturers who are not subject to Directive 2014/65/EU is not necessary for portfolio management.

- A product related target market reconciliation is not necessary at the level of the individual transaction executed for the client, provided that it is covered by the agreed investment strategy.

BT 5.3.5 Definition of the distribution strategy by distributors

1. The distributor shall review the manufacturer’s distribution strategy with a critical look and shall take it into account when it defines its own distribution strategy in accordance with section 80 (10) sentence 2 of the WpHG. The principles set out in BT 5.3.3 shall apply to the definition of the distributor’s distribution strategy, with the necessary modifications.

Example 1:
In the case of a product for which the distribution strategy of a manufacturer provides for distribution in non-advised business with an assessment of appropriateness, the distributor decides to offer it only through investment advice in the interests of better investor protection because its client base consists largely of retail clients with limited knowledge and experience, a short investment horizon and an uncertain financial situation.
2. In cases in which the distributor decides to adopt a distribution strategy with a lower level of investor protection than provided for by the manufacturer, this should only be done on the basis of a thorough analysis of the target clients and the characteristics of the product. This decision shall be reported to the manufacturer to allow it to incorporate this situation into its product governance processes, in particular the process of selecting distributors.

Example 2:
The distributor decides to distribute a particular product for which the manufacturer provided for investment advice in its distribution strategy as a non-advised service.

**BT 5.3.6 Distribution outside the target market; identification and reconciliation of the target market in the context of portfolio management, investment advice relating to portfolios, hedging and diversification**

1. As a rule, a product should not be distributed to clients outside the positive target market. Any departures from this principle shall be justified by the circumstances applicable to the particular case. They shall be documented, justified, included in any suitability statement to be issued and notified to the manufacturer in the course of the exchange of information in accordance with BT 5.4.2.

2. Except in rare exceptions, a product should not be distributed to clients inside the negative target market. Any departures from this principle must be justified by particularly serious circumstances applicable to the particular case. They shall be documented, justified in detail, included in any suitability statement to be issued and notified to the manufacturer in the course of the exchange of information in accordance with BT 5.4.2.

3. If a distributor offers portfolio management or investment advice relating to portfolios, products may be distributed outside the positive target market for diversification or hedging purposes without requiring a report to the manufacturer on the sale outside the target market, provided that the client’s total portfolio or the combination of a product with its hedging transaction is suitable for the client. The departure shall be included in any suitability statement to be issued. If the distribution in sentence 1 above is into the negative target market, the manufacturer shall be informed of this situation. As a general principle, any distribution into the negative target market should be an exception.

4. If distributors establish, for example because of corresponding client complaints or other sources of information, that a product is being distributed – subject to the exceptions set out above – regularly outside the positive target market (e.g. to a large number of clients), this shall be taken into account appropriately in the review process for products and services.

Example:
The distributor examines whether the actual target market has been correctly identified or comes to the conclusion that the distribution strategy for the product must be modified.

**BT 5.3.7 Distribution of products manufactured by entities not subject to Directive 2014/65/EU**

1. Distributors that distribute products manufactured by entities that are not subject to Directive 2014/65/EU are required to examine these products to the extent necessary to ensure a level of investor protection and service to their clients that is comparable with that which would exist if the product had been designed in accordance with the
requirements of sections 63 (4) and (5), 80 (9) – (13), and 81 (4) and (5) of the WpHG. In particular, there is a requirement for

- the separate identification of an actual target market for the product in accordance with BT 5.3.3;
- an appropriate information gathering process to obtain adequate, reliable information in order to identify an actual target market and distribute the product in accordance with that market.

2. Corresponding information may be obtained from publicly available sources if it is clear, reliable and produced to meet regulatory requirements (e.g. publications in accordance with Directives 2011/61/EU, 2003/71/EC, 2013/50/EU or 2009/65/EC, or Regulation (EU) No. 1286/2014, such as the PRIIPS KID, a securities offering prospectus or publications in accordance with equivalent third country regulatory requirements). If necessary information is not publicly available, the distributor should obtain the information from the manufacturer under a corresponding agreement.

3. Among other factors, the appropriateness of the information gathering process is determined by the availability of information about the product and the type and complexity or other relevant features of the product. Information about simple, more common products, such as shares, can normally be obtained from the regulatory publications necessary for such products, and do not generally need an agreement with the manufacturer.

4. If a distributor is unable to obtain sufficient information about a product that was manufactured by an entity not subject to Directive 2014/65/EU, the product may not generally be included in its product range.

5. If entities that are not subject to Directive 2014/65/EU identify a potential target market or distribution strategy (e.g. voluntarily or on the basis of a contractual arrangement), the distributor may treat this information in the same way as information that has been identified by a manufacturer who is subject to Directive 2014/65/EU, provided that it is evident to the distributor that the identification complies with the requirements of this BT 5.

**BT 5.4 Requirements for both manufacturers and distributors**

**BT 5.4.1 Identification of the negative target market**

1. Manufacturers and distributors are required to examine whether, in addition to the description of those target clients with whom the product is compatible (“positive target market”), the potential or actual target market should be described by those target clients with whom the product is incompatible (“negative target market”). The principles for identifying the positive target market generally apply to this examination, in particular

- the examination shall be performed for the five target market categories described in BT 5.2.1;
- the volume and level of detail of any information to be given about the negative target market categories in accordance with BT 5.2.2 depend on the type of product and its features, such as complexity, liquidity, innovative character or risk/reward profile. Simple, more common products normally have a smaller number of target clients with whom the product is incompatible compared with more complex products.
2. If features of the positive target market already imply a clear indication of the corresponding negative target market in this category, it is enough for the manufacturer or the distributor to identify the negative target market globally in this respect, for example by using information such as “clients outside this positive target market feature”.

BT 5.4.2 Product review process in terms of the identification of the target market; exchange of information between the manufacturer and the distributor about reaching the target market

1. In the course of the regular review of a product in accordance with section 11 (13) of the WpDVerOV, manufacturers are required to define which information they need in order to determine whether a product is still consistent with the target market and the distribution strategy is appropriate, and how they obtain this information. The information can, for example, consist of the following:

- the number and type of distribution channels employed by distributors for the product;
- the proportion of sales of the product inside and outside the target market;
- a summary description of the typical client groups who buy the product;
- a summary of complaints received by distributors about the product;
- answers to questionnaires that the manufacturer has provided to the distributor for a particular group of clients.

2. The distributor shall support the manufacturer in its regular review of a product in accordance with section 11 (13) of the WpDVerOV by providing the manufacturer with corresponding sales information and other relevant information resulting from the distributor’s own regular review of the product in accordance with section 12 (9) of the WpDVerOV. Distributors shall consider the following in particular:

- information that may give an indication that the target market for the product was wrongly identified;
- information that a product is no longer consistent with the currently identified target market, for example because it is illiquid or market conditions are very volatile;
- information about decisions to distribute products outside the target market or inside the negative target market or to modify the distribution strategy recommended by the manufacturer (see BT 5.3.6 above).

3. The corresponding information does not have to be transmitted on a case-by-case or product-by-product basis, but may also be transmitted in aggregated form, unless certain information is particularly relevant for an individual product (e.g. if the distributor comes to the conclusion that the potential target market was wrongly determined for a product, or that there are frequent deviations from the target market for a product).

BT 5.5 Identifying the target market in the business with professional clients or eligible counterparties

BT 5.5.1 Professional clients or eligible counterparties as links in an intermediation chain

The requirement to identify the potential or actual target market is product-related and thus independent of the distribution of the product to retail or wholesale markets. In accordance with section 80 (9) sentence 2 of the WpHG, the target market shall relate to “end-clients”, i.e. those clients who are at the end of an intermediation chain. It is therefore not necessary for the manufacturer and the distributor to identify the target market for clients who are links in an intermediation chain and not end-clients.
Professional clients or eligible counterparties who buy a product in order to redistribute it are not “end-clients” in this sense but rather “distributors”, who are in turn required to comply with the product governance requirements applicable to them.

Example:
If an eligible counterparty buys a product from an investment services enterprise in order to distribute it to professional and retail clients as end-clients, it is required, for example, to identify an actual target market for the product. If the eligible counterparty makes changes to the product prior to distributing it, it is also required to comply with the product governance requirements applicable to manufacturers.

BT 5.5.2 Professional clients or eligible counterparties as end-clients

As a general principle, the manufacturer is required to identify all aspects of the potential market, regardless of whether a product is to be distributed fully or partly to eligible counterparties or professional clients as end-clients.

BT 5.5.2.1 Professional clients as end-clients

When identifying the actual target market, distributors may take account of section 67 (2) of the WpHG and the second subparagraph of Article 54(3) of the DR as follows:

- If a product is distributed solely to per se professional clients (and, possibly, to eligible counterparties as well), the distributor is not required to identify the categories of “knowledge and experience” and “financial situation” of the actual target market.

- If a product is distributed solely to elective professional clients as an investment service for which they were classified as professional (and, possibly, to eligible counterparties or per se professional clients as well), the distributor is not required to identify the category of “knowledge and experience” of the actual target market.

- In the specific case, a distributor is not required to reconcile the target market categories of “knowledge and experience” and “financial situation” for a per se professional client (even if this category was identified in the actual target market, for example because the product is distributed to both retail and professional clients). The target market category of “knowledge and experience” does not have to be reconciled for elective professional clients if their classification as a professional client applies for the investment service provided with relation to the product.

BT 5.5.2.2 Eligible counterparties as end-clients

1. If a product is manufactured exclusively for the client category of “eligible counterparty”, the manufacturer may take into consideration the fact that eligible counterparties generally have a detailed understanding of and a high level of information about capital markets when identifying the other target market categories: the level of detail in which the target market is identified can be modified accordingly.

2. To identify the actual target market, distributors may take account of section 68 (1) sentence 1 of the WpHG as follows:

- If a product is distributed solely to eligible counterparties (and, possibly, to per se professional clients as well), the distributor is not required to identify the categories of “knowledge and experience” and “financial situation” of the actual target market.
• A distributor is not required to identify an actual target market if a product is distributed exclusively to eligible counterparties.

• In the specific case, a distributor is not required to reconcile a target market for an eligible counterparty (even if an actual target market has been identified, for example because the product is also distributed to retail and professional clients).
BT 6 Provision of the suitability statement in accordance with section 64 (4) of the WpHG

1. The requirements for the preparation of a suitability statement are set out in section 64 (4) of the WpHG and Article 54(12) of the DR. These provisions require a suitability statement to be prepared whenever investment advice as defined in section 2 (8) sentence 1 no. 10 of the WpHG is provided to a retail client. Under section 64 (4) sentence 1 of the WpHG, the suitability statement shall be provided to the client in a durable medium before the contract is concluded. It can also be sent to the client’s e-mail address. The wording “before the contract is concluded” refers – regardless of the actual contractual arrangement – to the contractual agreement governed by the law of obligations (e.g. brokerage agreement, including a conditional brokerage agreement, fixed price transaction, agency agreement in the case of investment or contract broking) between the investment services enterprise providing investment advice and the client.

2. The wording “before the contract is concluded” in section 64 (4) sentence 1 of the WpHG clarifies that any contract that is based on investment advice may only be concluded after the suitability statement has been provided to the client so that the client has had an opportunity to take note of it. An exception to this principle is permitted under the conditions set out in section 64 (4) sentence 3 of the WpHG, for example if telecommunication media are used to provide the investment advice and the prior provision of the suitability statement is therefore not possible. In such cases, the suitability statement shall be provided to the client immediately after conclusion of the contract. “Immediately” in this case means transmission after no later than five working days.

3. The wording “before the contract is concluded” in section 64 (4) sentence 1 of the WpHG does not restrict the requirement to provide the suitability statement to cases in which a contract is concluded. Rather, it defines the timing of providing the suitability statement in cases where the advice is followed by the conclusion of a contract. If the investment advice is not followed by the conclusion of agreement contract, for example in the case of a hold recommendation or a recommendation not to buy a financial instrument, the suitability statement shall be provided to the client promptly, and in any event no later than five working days after the investment advice. This also applies to persons who are not yet clients of the investment services enterprise.

4. If the investment advice is provided to an authorised representative, the suitability statement shall be provided to that authorised representative, i.e. to the person who participated in the meeting.

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5 The consent of the client to provision of the suitability statement after conclusion of the contract if telecommunication media are used required by section 64 (4) sentence 4 of the WpHG must be express. For this reason, a contract through the use of general terms and conditions, for example, is not permitted.

6 The wording “recommendation not to buy a financial instrument” shall be interpreted narrowly. For example, the presentation of several financial instruments to the client without issuing a recommendation does not trigger a requirement to prepare a suitability statement. This also applies to cases in which the client is recommended to buy one of several financial instruments and no recommendation is issued for the other financial instruments. No suitability statement has to be prepared for the other financial instruments that were not recommended.
(Note: Modules BT 7 and BT 8 will be revised as soon as ESMA has revised and published the Guidelines underlying these modules)

**BT 7 Suitability assessment statement in accordance with section 31 (4) of the WpHG**

**BT 7.1 Information to clients about the suitability assessment**

1. Investment services enterprises should inform clients, clearly and simply, that the reason for assessing suitability is to enable the investment services enterprise to act in the client’s best interest. At no stage may investment services enterprises create any ambiguity or confusion about their own responsibilities in the process.

2. Information on investment advice and portfolio management services shall include information about the suitability assessment. “Suitability assessment” should be understood as meaning the whole process of collecting information about a client, and the subsequent assessment of the suitability of a given financial instrument for that client.

3. The suitability assessment is not limited to recommendations to buy a particular financial instrument. Every recommendation must be suitable, whether it is a recommendation to buy, hold or sell, for example. Information about the suitability assessment should help clients to understand the purpose of the requirements and hence encourage them to provide accurate and sufficient information about their knowledge, experience, financial situation and investment objectives. Investment services enterprises should highlight to the clients that it is important to gather complete and accurate information so that the enterprise can recommend suitable products or services. It is up to the enterprises to decide how they will inform their clients about the suitability assessment, and this information can also be provided in a standardised format. However, the format used shall enable a posteriori controls to check if the information was provided.

4. Investment services enterprises shall take steps to ensure that the client understands the notion of investment risk as well as the relationship between risk and return on investments. To enable the client’s understanding of investment risk, enterprises are encouraged to consider using indicative, comprehensible examples of the levels of loss that may arise depending on the level of risk taken, and should take into account the client’s response to such scenarios. The client should be made aware that the purpose of such examples, and their responses to them, is to obtain a better picture of the client’s attitude to risk (their risk profile) and the types of financial instruments (and the corresponding risks attached to them) that are suitable.

5. The suitability assessment is the responsibility of the investment services enterprise. Enterprises may not give the impression that it is the client who decides on the suitability of the investment, or that it is the client who establishes which financial instruments fit their own risk profile. For example, enterprises shall avoid indicating to the client that a certain financial instrument is the one that the client chose as being suitable, or requiring the client to confirm that a particular financial instrument or service is suitable.

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*See section IV of CESR “Questions and answers. Understanding the definition of advice under MiFID”, 19 April 2010, CESR/10-293.*
BT 7.2 Arrangements necessary to understand clients and investments

1. Investment services enterprises shall have in place adequate policies and procedures to enable them to understand the essential facts about their clients and the characteristics of the financial instruments available for those clients.\(^8\)

2. Investment services enterprises are required to establish and maintain all policies and procedures (including appropriate tools) necessary to be able to understand those essential fact and characteristics.\(^9\) These include policies and procedures that enable them to collect and assess all information necessary to conduct a suitability assessment for each client. Enterprises are encouraged to use questionnaires completed by their clients or during discussions with them.

3. Information necessary to conduct a suitability assessment includes different elements that may impact, for example, the client’s financial situation or investment objectives.

   This may comprise the following aspects:

   a. marital status (especially the client’s legal capacity to commit assets that may belong also to their spouse);

   b. family situation (evolutions in the family situation of a client may impact their financial situation e.g. a new child or a child of an age to start university);

   c. employment situation (the fact for a client to lose his job or to be close to retirement may impact their financial situation or their investment objectives);

   d. need for liquidity in certain relevant investments.

   e. the client’s age.

4. When determining what information is necessary, enterprises should consider the impact that any change regarding that information could have concerning the suitability assessment.

5. The persons in investment services enterprises involved in the investment services shall know the products they are offering. This means that enterprises shall implement policies and procedures designed to ensure that they only recommend investments, or make investments on behalf of their clients, if the enterprise understands the characteristics of the product or financial instrument involved.

BT 7.3 Qualifications of staff of investment services enterprises

1. To the extent that investment advisers possess the expertise required by section 1 of the WpHGMAAnzV, they meet the requirements set out in paragraphs 2 to 4.

\(^8\) Adequate records about the suitability assessment should also be kept, as illustrated in guideline 9.

\(^9\) Section 33 (1) sentence 2 no. 1 of the WpHG
2. Investment services enterprises are required to ensure that staff involved in portfolio management have an adequate level of knowledge and experience.

3. Staff shall understand the role they play in the suitability assessment process and possess the skills, knowledge and expertise necessary, including sufficient knowledge of the relevant regulatory requirements and procedures, to discharge their responsibilities.

4. Staff shall be able to assess the needs and circumstances of the clients and shall have sufficient expertise in financial markets to understand the financial instruments to be purchased on the client’s behalf and then to determine whether the features of the instrument match the needs and circumstances of the client.

BT 7.4 Extent of information to be collected from clients (proportionality)

1. Investment services enterprises shall determine the extent of information to be collected from clients in light of all aspects of the investment advice or portfolio management services to be provided to those clients.

2. Before issuing recommendations in the context of investment advice or portfolio management, investment services enterprises shall always collect the necessary information about the client’s knowledge and experience, financial situation and investment objectives.

3. The extent of information collected will vary. In determining what information is “necessary” and relevant, investment services enterprises shall consider, in relation to a client’s knowledge and experience, financial situation and investment objectives:

   a. the type of the financial instrument or transaction that the enterprise may recommend or enter into (including the complexity and level of risk);

   b. the nature and extent of the services that the enterprise provides;

   c. client classification and the needs and circumstances of the client.

4. While the extent of the information to be collected may vary, the standard for ensuring that a recommendation to the client, or an investment made on the client’s behalf as part of portfolio management, is suitable for the client will always remain the same. The principle of proportionality in MiFID allows enterprises to collect the level of information proportionate to the products and services they offer, or on which the client requests specific investment advice or portfolio management services. Enterprises may not depart from this obligation at the expense of the client.

5. For example, when providing access to complex\(^{10}\) or risky\(^{11}\) financial instruments, investment services enterprises shall carefully consider whether they need to collect more in-depth information about the client than they would collect when less complex or risky financial instruments are at stake. This is so enterprises can assess

\(^{10}\) See section 31 (7) no. 1 of the WpHG

\(^{11}\) It is up to each investment services enterprise to define a priori the level of risk of the financial instruments it distributes. However, if the competent authority has issued guidelines on this, they shall be taken into account.
the client’s capacity to understand, and financially bear, the risks associated with such financial instruments.\(^{12}\)

For illiquid financial instruments\(^{13}\), the “necessary information” to be gathered shall include information on the length of time for which the client is prepared to hold the investment.

For illiquid or risky financial instruments, “necessary information” to be collected may include all of the following elements as necessary to establish whether the client’s financial situation allows them to invest or be invested in such instruments:

a. the extent of the client’s regular income and total income, whether the income is earned on a permanent or temporary basis, and the source of this income (e.g. from employment, retirement income, investment income, rental yields);

b. the client’s assets, including liquid assets, investments and real property, which would include what financial investments, personal and investment property, pension funds and any cash deposits, etc. the client may have. The enterprise can also gather information about conditions, terms, access, loans, guarantees and other restrictions, if applicable, to the above assets that may exist;

c. the client’s regular financial commitments, which would include what financial commitments the client has made or is specifically planning to make (client’s debits, total amount of indebtedness and other periodic commitments, etc.).

6. In determining the information to be collected, investment services enterprises shall also take into account the nature of the service to be provided. Practically, this means that:

a. When investment advice services are provided, enterprises shall collect sufficient information in order to be able to assess the ability of the client to understand the risks and nature of each of the financial instruments that the enterprise envisages recommending to that client.

b. When portfolio management services are provided, the level of knowledge and experience needed by the client with regard to all the financial instruments that can potentially make up the portfolio may be less detailed than the level that the client should have when an investment advice service is provided. Nevertheless, even in such situations, the client shall at least understand the overall risks of the portfolio and possess a general understanding of the risks linked to each type of financial instrument that can be included in the portfolio. Enterprises shall gain a very clear understanding and knowledge of the client’s investor profile.

7. Similarly, the extent of the service requested by the client may also impact the level of detail collected about the client. Enterprises shall collect more information about clients asking for investment advice covering their entire investment portfolio than

\(^{12}\) In any case, to ensure that the clients understand the investment risk and potential losses they may have to bear, the enterprises should, as far as possible, present these risks in a clear and understandable way, potentially using illustrative examples of the extent of loss in the event of an investment performing badly. A client’s ability to accept losses may be aided by measuring the loss-sustaining capacity of the client.

\(^{13}\) It is up to each investment services enterprise to define a priori which of the financial instruments it distributes it considers as being illiquid. However, if the competent authority has issued guidelines on this, they shall be taken into account.
about clients asking for specific advice on how to invest a given amount of money that represents a relatively small part of their overall portfolio.

8. An investment services enterprise shall also take into account the relevant profile of the client when determining the information to be collected. As a general principle, more in-depth information shall be collected for clients asking for investment advice services for the first time. By contrast, where an enterprise provides investment advice or portfolio management to a professional client (who has been correctly classified as such), it is generally entitled to assume that the client has the necessary level of experience and knowledge, and therefore is not required to obtain information on these points.

9. Similarly, where the investment service consists of the provision of investment advice or portfolio management to “per se” professional clients, the enterprise is generally entitled to assume that the client is able to financially bear any related investment risks consistent with the investment objectives of that client and therefore is not generally required to obtain information on the financial situation of the client. However, such information shall be obtained where the client’s investment objectives demand it. For example, where the client is seeking to hedge a risk, the enterprise will need to have detailed information on that risk in order to be able to propose an effective hedging instrument.

10. Information to be collected will also depend on the needs and personal circumstances of the client. For example, an enterprise is generally likely to need more detailed information about the client’s financial situation where the client’s investment objectives are multiple and/or long-term, than when the client seeks a short-term secure investment.

11. If an investment services enterprise does not obtain the necessary information about the knowledge and experience of the clients in respect of transactions in particular types of financial instruments or investment services, the investment objectives of the clients and their financial situation, it may not provide any investment advice. The same applies to recommendations made in the course of portfolio management. Recommendations include statements, wishes and advice to the effect that the client should issue or modify an instruction to the portfolio manager that defines the level of discretion available to the portfolio manager.

**BT 7.5 Reliability of client information**

1. Investment services enterprises shall take suitable steps to ensure that the information collected about clients is reliable and complete. In particular,

   a. they shall ensure that all tools employed in the suitability assessment are appropriately designed (for example, questions should not be drafted in such a way that they lead the client to a specific type of investment),

   b. appropriate steps shall be taken to ensure the consistency and reliability of information about clients (as a minimum they shall check whether the information provided by the client contains obvious inconsistencies) and

   c. Investment services enterprises are encouraged not to rely on clients’ self-assessment in relation to their knowledge, experience and financial situation.

2. Clients are expected to provide correct, up-to-date and complete information necessary for the suitability assessment. However, enterprises are responsible for
ensuring that they have adequate, appropriate information for conducting the suitability assessment. Enterprises shall ensure that the questions they address to their clients are likely to be understood correctly and that any other method used to collect information is designed to obtain the information required for a suitability assessment.

3. Investment services enterprises are encouraged to ensure that self-assessment by the is counterbalanced by objective criteria. For example:
   a. instead of asking whether a client feels sufficiently experienced to buy a certain instrument, the enterprise could ask the client what types of instruments the client is familiar with,
   b. instead of asking whether clients believe they have sufficient funds to invest, the enterprise could ask for factual information about the client’s financial situation,
   c. instead of asking whether a client is willing to take risks, the enterprise could ask what level of loss over a given time period the client would be willing to accept, either on the individual investment or on the overall portfolio.

4. Where investment services enterprises rely on tools to be used by clients to assess suitability (such as online questionnaires or risk-profiling software), they should ensure that they have appropriate systems and controls to ensure that the tools are fit for purpose and produce satisfactory results. For example, risk-profiling software could include controls of coherence of the replies provided by clients in order to highlight contradictions between different pieces of information collected.

5. Enterprises are additionally required to take reasonable steps to mitigate potential risks associated with the use of such tools. For example, potential risks may arise where clients (on their own initiative or where encouraged by customer-facing staff) change their answers in order to get access to financial instruments that may not be suitable for them.

6. In order to ensure the consistency of client information, the information collected shall be viewed as a whole. Investment services enterprises shall be alert to any relevant contradictions between different pieces of information collected, and shall contact the client if necessary in order to resolve any material potential inconsistencies or inaccuracies. Examples of such contradictions are clients who have little knowledge or experience and have a prudent risk profile, but still have ambitious investment objectives.

**BT 7.6 Updating client information**

1. Where an investment services enterprise has an ongoing relationship with the client, it shall establish appropriate procedures to ensure that it has adequate and updated information about the client at all times. Clients shall be required to notify the enterprise of any changes in their circumstances.

2. When providing investment advice or portfolio management on an ongoing basis, investment services enterprises shall maintain adequate and updated information
about the client in order to be able to perform the suitability assessment. Enterprises shall therefore adopt procedures defining:

a. what part of the information collected has to be updated and how often it has to be updated;

b. how the updating should be done and what the enterprise should do when it receives additional or updated information or when the client fails to provide the information requested.

3. Frequency might vary depending on, for example, clients’ risk profiles: based on the information collected about a client under the suitability requirements, the enterprise determines the client’s investment risk profile, i.e. it decides what type of investment services or financial instruments can in general be suitable for the client, taking into account the client’s knowledge and experience, financial situation and investment objectives. A higher risk profile requires more frequent updating than a lower risk profile. Certain events might also trigger an updating process, for example the client reaches retirement age.

Updating can, for example, be carried out during regular meetings with clients or by sending a questionnaire to clients to update their information. Resulting measures could include changing the client’s profile based on the updated information collected.

**BT 7.7 Client information for legal entities or groups**

1. 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, to identify who should be subject to the suitability assessment, the investment services enterprise shall first rely on the applicable legal framework.

2. If the legal framework does not provide sufficient indications in this regard, and in particular where no sole representative has been appointed (as may be the case for a married couple), the investment services enterprise, based on a policy it has defined beforehand, shall agree with the relevant persons (the representatives of the legal entity, the persons belonging to the group or the natural persons represented) as to who should be subject to the suitability assessment and how this assessment will be done in practice. This shall include the question of from whom information about knowledge and experience, financial situation and investment objectives, should be collected. The investment services enterprise shall make a record of the agreement.

3. MiFID Annex II states that the assessment of “expertise, experience and knowledge” required for small entities requesting to be treated as professional should be performed on "the person authorised to carry out transactions on behalf of the entity”. This approach also applies, with the necessary modifications, to suitability assessments of small entities and to cases in which a natural person is represented by another natural person. In these situations, the financial situation and investment objectives should be those of the underlying client (small entity or natural person who is represented), while the experience and knowledge should be those of the representative of the natural person or of the person authorised to carry out transactions on behalf of the entity or the natural person who is represented.
4. Investment services enterprises should determine who should be subject to the suitability assessment when dealing with 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 enterprise’s policy shall provide that the best interests and need for protection of all the persons concerned are taken into consideration.

5. Where there is no agreement and where the financial situations of the persons belonging to the group differ, the enterprise should consider the most relevant person in this respect (i.e. the person with the weakest financial situation). The same should be done when considering their investment objectives (i.e. the person with the most conservative investment objectives), or their experience and knowledge (i.e. the person authorised to carry out transactions with the least experience and knowledge).

6. In situations where two or more persons are authorised to carry out transactions on behalf of the group jointly (as may be the case for joint accounts), the client profile as defined by the enterprise should reflect the ability of the different relevant persons to take investment decisions, as well as the potential impact of such decisions on their individual financial situation and investment objectives.

BT 7.8 Arrangements necessary to ensure the suitability of an investment

1. In order to match clients with suitable investments, investment services enterprises shall establish policies and procedures to ensure that the following aspects are continuously taken into account:

   a. all available information about the client that could be relevant in assessing whether an investment is suitable, including the client’s current portfolio of investments (and asset allocation within that portfolio);

   b. all material characteristics of the investments considered in the suitability assessment, including all relevant risks and any direct or indirect costs to the client.

2. Investment services enterprises that rely on tools in the suitability assessment process (such as model portfolios, asset allocation software or a risk-profiling tool for potential investments), shall have appropriate systems and controls to ensure that the tools are fit for purpose and produce satisfactory results.

   In this regard, the tools shall be designed so that they take account of all the relevant specificities of each client or financial instrument. For example, exclusively using tools that classify clients or financial instruments broadly would not be fit for purpose.

3. The strategies and processes in the enterprise shall ensure the following:

   a. the investment advice and portfolio management provided to the client take account of an appropriate degree of risk diversification,

   b. the client has an adequate understanding of the relationship between risk and return, i.e. of the necessarily low remuneration of risk free assets, of the incidence of time horizon on this relationship and of the impact of costs on their
investments,

c. the financial situation of the client can finance the investments and the client can bear any possible losses resulting from the investments,

d. any personal recommendation or transaction entered into in the course of providing investment advice or portfolio management, where illiquid financial instruments are involved, takes into account the length of time for which the client intends to hold the investment,

e. any conflicts of interest are prevented from adversely affecting the quality of the suitability assessment.
BT 8 Requirements relating to remuneration systems in connection with the provision of investment services and ancillary investment services

BT 8.1 Scope and relationship with other legal requirements

1. To the extent that the Banking Act, the Regulation on the Supervisory Requirements for Institutions’ Remuneration Systems, the Investment Code, a regulation issued under section 37 (3) of the Investment Code or the Insurance Supervision Act, or the Remuneration Regulation for Insurance Undertakings applies in addition to BT 8, and a requirement of BT 8 contradicts one of the above-mentioned legislative requirements, the application of those legislative requirements shall have priority over BT 8.

2. Relevant persons within the meaning of this BT 8 are persons who can have a material impact on the investment services or ancillary investment services provided or the behaviour of the investment services enterprise, including persons who are client-facing front-office staff (e.g. investment advisers), sales force staff or tied agents, or other staff involved in the provision of investment and ancillary investment services, whose remuneration may create inappropriate incentives to act against the best interests of the client. This also includes all other persons who oversee the sales force (such as line managers or distribution officers) and who may pressurise sales staff, as well as financial analysts whose literature may be used by sales staff to induce clients to make investment decisions.

Depending on their function, staff involved in complaints handling, claims processing, client retention and product development may also be relevant persons within the meaning of this BT 8.

3. Remuneration within the meaning of this BT 8 is all forms of payments or benefits provided directly or indirectly by investment services enterprise to relevant persons who are involved in the provision of investment services or ancillary investment services to clients. It can be both financial (cash, shares, options, extension or assumption of loans, pension contributions, remuneration by third parties, e.g. through carried interest models, salary increases, etc.) and non-financial (career progression, health insurance, special allowances for cars, private use of company mobile phones, generous expense accounts, seminars in exotic destinations, etc.).

4. Financial or non-financial benefits that are awarded or paid on the basis of a statutory requirement or as statutory contributions are not considered to be remuneration. These include in particular contributions to statutory pension insurance within the meaning of Book Six of the German Social Security Code (Sozialgesetzbuch) and to occupational pension arrangements within the meaning of the German Occupational Pensions Act (Betriebsrentengesetz).

5. The requirements of this BT 8 are not applicable to remuneration that
   - is agreed under a collective bargaining agreement,
is agreed within the scope of a collective bargaining agreement through an agreement by the parties to an employment agreement on the application of the provisions of the collective bargaining agreement, or

is agreed in a works or service agreement on the basis of a collective bargaining agreement.

BT 8.2 Formal criteria for the design and governance of remuneration systems

BT 8.2.1 Establishment and implementation of remuneration systems

1. In consultation with its conflict of interest and risk management functions, an investment services enterprise shall establish an appropriate remuneration system that, among other things\(^\text{15}\), is also designed to ensure that clients’ interests are not impaired by the remuneration of relevant persons in the short, medium or long term.

2. The management board is responsible for the appropriate design and implementation of the remuneration system and for avoiding remuneration-related risk and the management of any residual risk. Within the scope of its business judgement, it is thus also ultimately responsible for determining the remuneration of individual relevant persons. To the extent that relevant persons are members of the management board, the administrative or supervisory body shall be responsible, rather than the management board.

3. Investment services enterprises shall document their remuneration system in writing and review it regularly. The compliance function shall be consulted in the design of remuneration systems before they are applied to relevant persons.

4. Relevant persons shall be informed at the outset in an understandable manner about the criteria that will be used to determine the amount of their remuneration and the steps and timing of their performance reviews. The criteria used by investment services enterprises to assess the performance of relevant persons (e.g. also the weighting of criteria, the exercise of judgement by the management board, the applicability of group-wide processes) shall be documented and accessible to and understandable by relevant persons.

5. Investment services enterprises shall ensure that the policies and practices for launching new products or services include an assessment of whether remuneration-related conduct of business and conflict of interest risks are associated with these products or services (for example, if particular remuneration features are already linked to the distribution of the product when the product is being developed) and whether the investment services enterprise’s remuneration systems take adequate account of identified risks. If this is not the case, either the new product or service will have to be modified or the remuneration system will have to be adapted accordingly. Investment services enterprise shall appropriately document this assessment.

6. Appropriate organisational units shall be tasked with implementing remuneration systems.

\(^{15}\) Other criteria that are applicable in this respect arise from banking supervision law (e.g. section 25a of the KWG, section 4 of the InstitutsVergV or section 37 of the KAGB).
7. The remuneration systems shall stipulate the effective performance of control activities by the operating areas to enable them to effectively identify cases in which relevant persons fail to act in the best interests of the client for remuneration-related reasons and to take remedial action.

**BT 8.2.2 Governance of remuneration systems**

1. The compliance function oversees the establishment, design and implementation of remuneration systems in accordance with the principles set out in BT 1.2.1. The assessment can be made using abstract criteria in relation to the remuneration of the management board.

2. Examples of good governance practice:

   - An investment services enterprise uses a wide range of information on business quality monitoring and sales patterns, including trend and root-cause analysis, to identify areas of increased risk and to support a risk-based approach to sales monitoring, with a particular focus on high performing relevant persons (e.g. persons responsible for high levels of sales or persons with a high variable remuneration). The investment services enterprise ensures that the results of such analyses are documented and reported to the management board together with proposals for corrective action.

   - An investment services enterprise uses information-gathering tools to assess the investment returns received by clients over various timelines in respect of the investment services provided by relevant persons who are remunerated by variable remuneration. The assessment of this information, rather than a sales target, is a factor in the provision of variable remuneration.

   - An investment services enterprise annually assesses whether it adequately captures the qualitative data required to determine the variable remuneration it pays to relevant persons.

   - In order to assess whether its incentive schemes are appropriate, an investment services enterprise undertakes a programme of contacting a sample of clients shortly after the completion of a sale involving a face-to-face sales process where it is not able to monitor recorded telephone sales conversations.

   - A potentially higher risk is assumed in the case of persons with a particularly high variable remuneration, which is why they are subject to more detailed scrutiny.

   - Information such as the results of earlier compliance assessments and the regular assessment in accordance with section 36 of the WpHG, justified complaints or information about reversals (e.g. because of reversals of transactions or cancellations of contracts) is used in the compliance assessment. The results flow into the design/review of the remuneration systems.

3. Example of practices that are generally prohibited:

   - An investment services enterprise fails to monitor, assess or prevent the risk posed by basing some or all variable remuneration on quantitative data.

**BT 8.3 Substantive criteria for designing remuneration systems**

1. When designing and reviewing remuneration systems, all
• factors, for example the role performed by relevant persons, the type of products offered or the method of distribution (e.g. advised or non-advised distribution, face-to-face or through telecommunications), and

• the conduct of business and conflict of interest risks that could arise

that are relevant for the remuneration and the impact of the remuneration shall be identified and considered. In addition, the enterprise shall ensure that any residual risk is adequately managed (for example by clearly identifying the nature and source of remuneration-related conflicts of interest).

2. Remuneration systems may not be unnecessarily complicated. In particular, their design may not be so complex that any controls in place will not be as effective to identify the risk of detriment to the client. The investment services enterprise shall ensure the consistent design, application and control of remuneration systems.

**BT 8.3.1 Use of variable remuneration components**

1. Remuneration systems may not create incentives that may lead relevant persons to favour their own interest or the investment services enterprise’s interests to the potential detriment of clients (for example in the case of self-placement or where products are sold that are more lucrative for the investment services enterprise).

2. Variable remuneration elements can be a legitimate component of performance-based remuneration systems if the requirements set out in this BT 8 are met.

3. If the remuneration consists of a variable and a fixed component, the ratio between both components shall be appropriate. The ratio is inappropriate if it is designed in contravention of the criteria set out in section 25a (5) of the KWG.

4. The remuneration systems shall enable the flexible management of variable remuneration and, in individual cases, the complete cancellation of the variable remuneration component.

5. When determining the remuneration for tied agents, investment services enterprise may take the tied agents’ special status into account, in particular the fact that tied agents are normally self-employed sales representatives in accordance with section 84 of the German Commercial Code (Handelsgesetzbuch).

**BT 8.3.2 Measuring the amount of variable remuneration components**

1. The determination of variable remuneration may not be based solely on quantitative criteria (such as the value of instruments sold, sales volumes, establishment of targets for sales or new clients).

2. To measure the amount of variable remuneration, remuneration systems shall define appropriate criteria for aligning the interests of relevant persons or the investment services enterprise with those of the clients. Appropriate criteria are in particular qualitative that encourage the relevant persons to act in the best interests of the client.

3. Examples of qualitative criteria are

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16 If section 25a (5) of the KWG does not apply because of the exemption in section 2 (8)ff. of the KWG for financial services institutions, sentence 2 shall also not apply.
compliance with regulatory requirements (especially conduct of business rules and, in particular – if relevant – the proper conduct of the assessment of suitability of appropriateness) and internal procedures;

fair treatment of clients, which can, for example, be measured – quantitatively – by a very low number of justified complaints over a large timescale;

client satisfaction.

**BT 8.3.3 Examples of practices for the use and measurement of variable remuneration components**

1. Examples of good practice:

   - The variable part of the remuneration paid out is calculated and awarded on a linear basis rather than being dependent on meeting an “all or nothing” target.

   - The investment services enterprise decides to pay out the variable remuneration in several tranches over an appropriate time period or after deferral over an appropriate time period, in order to adjust for and take into account the long term results (for example, in the case of financial instruments without a fixed term, the remuneration is deferred for a certain number of years or until the financial instrument is paid out).

   - The variable component of the remuneration is also based on qualitative criteria and more closely reflects the desired conduct of the employees to act in the best interests of the clients.

   - References used in the calculation of variable remuneration of relevant persons are common across products sold and include qualitative criteria.

   - Payment of variable remuneration may be aligned with the investment term or deferred in order to ensure that the product sold does in fact take into consideration the final return of the product for the client and, where applicable, an adjusted award of variable remuneration is made.

   - Employees are paid in relation to both volume of products sold and effective return of these products for the client over an appropriate timeframe. In this instance, the assessment of financial data is used as a measure of the quality of the service provided.

2. Example of poor practices that are generally prohibited:

   - The management board has defined a range of strategic objectives that the investment services enterprise should achieve in a particular year. All objectives appear to relate solely to financial or business aspects, without taking account of the potential detriment for clients of the investment services enterprise. The remuneration policy is aligned with these strategic objectives and will thus be driven to a large extent by short-term financial and business interests.

   - An investment services enterprise has introduced a special bonus remuneration for advisers to encourage clients to buy particular financial instruments that are especially advantageous for the enterprise. There is a risk in this case that relevant persons will advise their clients to buy these financial instruments and sell other products that they would otherwise recommend holding.
• Executives and employees receive a large bonus for selling a particular product. There is a risk that warnings by the risk management function will be ignored because the investment products are very lucrative for the investment services enterprise. If the identified risks occur, the products have already been sold and the bonus has been paid out.

• Remuneration systems that – without prejudice to section 5 (2) no. 2a of the WpDVerOV – could induce relevant persons to give preference to selling or pushing a financial instrument or a category of financial instruments or to make unnecessary/unsuitable sales or acquisitions for the client, because they offer different incentives for different financial instruments or use incentives to put the spotlight on new or certain financial instruments (e.g. as “product of the month” or by preferring “in-house products” over other financial instruments that are also in the enterprise’s product range)

  • Example: An enterprise uses remuneration systems linked to individual sales of financial instruments where the relevant person receives different levels of incentives depending on the specific financial instrument or category of products they sell.

  • Example: An investment services enterprise uses remuneration systems linked to individual sales of financial instruments where the relevant person receives the same level of incentive across a range of financial instruments. However, at certain limited times, to coincide with promotional or market activity, the investment services enterprise increases the incentive paid on sales of certain financial instruments.

  • Example: Incentive systems that might influence relevant persons (who may be remunerated solely by commission, for example), in cases where various groups of financial instruments may be equally suitable for clients, to sell one group of financial instruments rather than another suitable group of financial instruments because the sale of the first group of financial instruments pays substantially higher commissions.

• Inappropriate requirements that affect whether incentives are paid – in particular if payment of incentives is linked to particular conditions. These include, for example, remuneration systems that include a requirement to achieve a quota minimum sales levels for a group of financial instruments in order to earn any bonus at all, that include a requirement that the award of bonuses for sales depends on reaching a minimum sales target for each financial instrument in a range of different product types, or that reduce bonus or incentive payments if a secondary target or threshold has not been met.

  • Example: Relevant persons in an investment services enterprise sell a range of financial instruments that meet different client needs, and the product range is split into three “buckets” based on the type of client need. The relevant persons can accrue incentive payments for each product sold, but these are only paid out at the end of the month if they have reached at least 50% of the target requirements for the individual buckets.

  • Example: An investment services enterprise sells financial instruments with a range of optional add-on products. The relevant person receives incentive payments for sales and an additional payment if the client purchases an add-on product. However, no incentive payments are made at the end of the month unless at least 50% of the financial instruments are sold together with an add-on product.
Remuneration systems that create a disproportionate return for marginal sales, for example where relevant persons need to achieve a minimum level of sales before incentive payments can be earned or incentives are increased, or that include “accelerators” where crossing a threshold increases the proportion of bonus earned, or incentives are payable retrospectively based on all sales rather than just those above a threshold.

Example: An investment services enterprise makes accelerated incentive payments to relevant persons for each product sold during a quarterly period as follows:

<table>
<thead>
<tr>
<th>Percentage of Target</th>
<th>Incentive Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-80% of target</td>
<td>no payments</td>
</tr>
<tr>
<td>80-90% of target</td>
<td>EUR 50 per sale</td>
</tr>
<tr>
<td>91-100% of target</td>
<td>EUR 75 per sale</td>
</tr>
<tr>
<td>101-120% of target</td>
<td>EUR 100 per sale</td>
</tr>
<tr>
<td>&gt;120% of target</td>
<td>EUR 125 per sale</td>
</tr>
</tbody>
</table>

This example can also apply where the relevant person receives an increasing share of commission or income generated.

Example: An investment services enterprise uses the same accelerated scale as the enterprise in the example shown above, but the increase in payments per sale is applied retrospectively to all sales in the quarter, e.g. on passing 91% of target the incentive payments accrued to date at the rate of EUR 50 per sale are increased to EUR 75 per sale. This creates a series of “cliff edge” points where one additional sale required to reach a higher target band causes a disproportionate increase in the incentive payment.

3. Examples of poor practices that are always prohibited:

Rather than considering the suitability of a product for a client, relevant persons focus on the sale of products that have a short investment term in order to earn remuneration from re-investing the product after the short term.

Relevant persons engage in frequent buying and selling of financial instruments in a client’s portfolio in order to earn additional remuneration without considering the suitability of this activity for the client.

Variable salaries where the arrangements vary base pay (up or down) for relevant persons based on performance against sales targets (i.e. purely quantitative criteria): in such cases, the relevant person’s entire salary can become – in effect – variable remuneration.

Example: An investment services enterprise will reduce a relevant person’s basic salary substantially if they do not meet specific sales targets. There is therefore a risk that they will make inappropriate sales of financial instruments to avoid this outcome. Equally, relevant persons may be strongly motivated to sell by the prospect of increasing basic salary and associated benefits.
BT 9 Conflicts of interest in connection with sliding scale commissions

1. A “sliding scale commission” is the performance-related award of monetary or non-monetary benefits with variable, and normally progressive, rates or scales. Depending on the commission model, the nature and scope of the commission can depend on certain variables, e.g. reaching certain sales, revenue or portfolio levels. The performance-related component of the benefits also applies if it affects a different measurement period.

2. If it is possible that an investment services enterprise will receive sliding scale commissions relating to investment services or ancillary investment services, this shall be explicitly stated as a potential conflict of interest in the conflict of interest policy to be prepared by investment services enterprises in accordance with Article 34(1) sentence 1 of the DR, which shall explicitly specify which procedures were followed and which measures were adopted in order to prevent or manage the potential conflicts of interest resulting from the potential receipt of sliding scale commissions.

3. This shall not affect the other requirements relating to conflicts of interest and inducements, in particular Articles 11–13 of the DR.
BT 10 Record-keeping obligations under section 70 (1) sentence 2 of the WpHG

The record-keeping obligations under section 70 (1) sentence 2 of the WpHG in conjunction with section 6 (3) of the WpDVerOV are set out in greater detail in the following.

1. Under section 70 (1) sentence 2 of the WpHG, investment services enterprises shall hold evidence that all inducements paid or received by them are designed to enhance the quality of the relevant service to the client.

2. To meet this condition, section 6 (3) no. 1 of the WpDVerOV requires investment services enterprises to keep an internal list of all inducements they receive from a third party in relation to the provision of investment services or ancillary investment services (list of inducements).

3. Under section 6 (3) no. 2 of the WpDVerOV, investment services enterprises shall also record

   - how the inducements received or paid, or inducements that it intends to receive or pay, enhance the quality of the services provided to the relevant clients (list of applications), and
   - the steps taken in order not to impair the duty of the investment services enterprise to act honestly, fairly and professionally in accordance with the best interests of the client (list of measures).

BT 10.1 List of inducements

1. Any and all inducements accepted by investment services enterprises from third parties in relation to the provision of investment services or ancillary investment services in each financial year shall be recorded in an internal list of inducements. As a minimum, the description shall distinguish between monetary inducements from sales commissions, trail commissions, brokerage commissions and other commissions and fees, and non-monetary inducements.

2. The list of inducements shall be updated continuously and finalised once a year for each financial year without undue delay following the end of the financial year. If annual financial statements are required to be prepared, finalisation of the list of inducements within the period specified for preparation of the annual financial statements is considered to be without undue delay. The list of inducements can be maintained in written or electronic form.

3. Monetary inducements received, i.e. accepted and kept, in the previous financial year shall be listed by amount. The amount of non-monetary inducements that are not minor (see section 6 (1) of the WpDVerOV) and were received shall be disclosed. For minor non-monetary inducements, it is enough to described them generically.

4. Inducements that are forwarded to clients do not have to be included in the list of inducements. In this case, the amount forwarded shall be recorded separately in accordance with section 83 (1) of the WpHG. Alternatively, however, inducements forwarded to clients may be included in the list of inducements and shall then be
designated as such.

**BT 10.2 List of applications**

1. To the extent that investment services enterprises accept and keep monetary and/or non-monetary inducements, they shall maintain and continuously update a list of applications in addition to the list of inducements.

   When managing the list of applications, a distinction shall be made between inducements received on the one hand and inducements paid on the other, with their application presented in each case in a separate section of the list of applications. In separate sections of the list of applications that are not required to be continuously updated, enterprises shall also describe how inducements whose receipt or grant is intended in the coming financial year are expected to enhance the quality of the services provided to the relevant clients.

2. The investment services enterprises shall also describe in the list of applications how the inducements received or granted enhance the quality of the services provided to the relevant clients. If these are monetary inducements, they shall disclose the amount for which inducements were used or are expected to be used for the quality enhancement concerned.

   In the case of minor non-monetary inducements, it is enough to describe generically the quality enhancement concerned for the relevant clients. For inducements that have been granted and for inducements that are intended to be granted, it is also enough to describe generically the quality enhancement concerned for the relevant clients of the investment services undertaking granting the inducement.

3. A simple summary comparison of inducements received and granted or future inducements across the company and their actual or planned application for enhancing quality is not enough.

   The applications for quality enhancement purposes related to the individual investment services and ancillary investment services shall be broken down by

   - the relevant standard cases in section 6 (2) sentence 1 no. 1 of the WpDVerOV. As well as the standard cases, one or more additional categories shall be established for potential further additional or higher level services for the client concerned;
   
   - the clients concerned for whom the additional or higher level service offered represents a quality enhancement. Homogeneous client groups in which a majority of clients are combined may be formed for this description.

   The application of the inducements for each standard case used and for each client or client group concerned shall be recorded in detail.

4. With the exception of the section on future inducements, the list of applications shall be continuously updated. The list of applications shall be prepared once a year for each financial year without delay following the end of the financial year. If annual financial statements are required to be prepared, finalisation of the list of applications within the period specified for preparation of the annual financial statements is
considered to be without undue delay. The list of applications can be maintained in written or electronic form.

5. If quantification of the payments for the application to enhance quality for the client or group of clients concerned as an exact amount is only possible with significant effort, the enterprise may also make estimates.

This applies in particular to the amount of still unpaid inducements whose receipt or grant is intended (for example because the payment of an inducement still depends on a future event). In connection with the intended inducements, however, there should also be intended or planned measures to enhance quality. The inducements and applications for quality assurance that have not yet been paid shall be compared separately in the list of applications. In particular – subject to no. 6 – it is not possible to offset payments in the financial year with inducements already received.

6. As a general principle, inducements received shall be used promptly for quality enhancements for the client or group of clients concerned. An application in the following financial year is only permitted in objectively justified cases. If inducements were not used for measures to enhance quality for the client or group of clients concerned in the financial year in which they were received by the enterprise, they shall be reported as such in the list of applications.

7. On request, the investment services enterprise shall be able to explain to BaFin and the auditor in accordance with section 89 of the WpHG in detail the application of monetary and non-monetary inducements received for measures to enhance the quality for the clients concerned.

**BT 10.3 List of measures**

1. The steps (measures) taken in order not to impair the duty of the investment services enterprise to act honestly, fairly and professionally in accordance with the best interests of the client shall be documented in a list of measures. The description of the individual measures relating to the relevant investment service or ancillary investment service shall distinguish between non-recurring, recurring and continuous measures.

2. The list of measures shall be updated continuously and finalised once a year for each financial year without undue delay following the end of the financial year. If annual financial statements are required to be prepared, finalisation of the list of measures within the period specified for preparation of the annual financial statements is considered to be without undue delay. The list of measures can be maintained in written or electronic form.

**BT 10.4 Quality enhancement**

1. In line with Recital 23 of Delegated Directive (EU) 2017/593, maintaining an enhanced level of quality that has already been reached shall be considered to be a permitted quality enhancement of the service provided to the client concerned.

2. In accordance with section 6 (2) sentence 1 no. 1 of the WpDVerOV, an inducement is designed to enhance the quality of the service provided to the client if it is justified by the provision of an additional or higher level service to the relevant client that is proportional to the level of inducements received.
In light of this, the ongoing services within the meaning of section 6 (2) sentence 1 no. 1 (b) (bb) of the WpDVerOV should also generate appropriate value added for the client. Advice about optimally structuring the client’s assets should therefore not merely be based on simple, global assumptions about asset allocation. Rather, structuring the total assets should consider the client’s individual risk appetite, investment objective and investment horizon – and in particular also the client’s liquidity requirements over time. The financial instruments held by the client should be structured using appropriate financial ratios based on the relevant client portfolio in order to qualify as an additional or higher level service.
BT 11 Qualifications of staff of investment services enterprises

The requirements relating to the qualifications of staff in accordance with section 63 (1) and section 87 (1) sentence 1, (2) and (3), (4) sentence 1 and (5) sentence 1 of the WpHG, Article 21(1)(d) and Article 22(3)(a) of the DR, Article 2(1) sentence 1 of Delegated Regulation (EU) 2017/589 and sections 1 to 6 of the WpHGMaAnzV are set out in greater detail in the following.

Staff within the meaning of this BT 11 means investment advisers, sales staff, portfolio managers, distribution officers and compliance officers, as well as staff involved in content-related aspects of the suitability assessment process. This shall also apply to tied agents within the meaning of section 2 (10) of the KWG.

BT 11.1 General requirements

1. Investment services enterprises shall ensure that their staff possess the necessary competence, knowledge and experience to meet the relevant regulatory and legal requirements and business ethics standards, and that they know, understand and apply the internal rules and internal procedures of the investment services enterprise that ensure compliance with the regulatory and legal requirements. Staff shall have the qualifications necessary to fulfil the obligations of the investment services enterprise to be complied with in their relevant activities, reflecting the types of investment services and ancillary investment services provided.

Examples of good practice are:

- regular mandatory training relating to conduct of business rules and organisational requirements,
- issuing policies for staff to define standards of business conduct and behaviour necessary for the proper provision of relevant services, whereby the investment services enterprise shall obtain written acknowledgements from staff that they have read, understood and complied with them.
- the publication of the criteria in a way that is consistent and meaningful to clients on how staff qualification is ensured.

Investment services enterprise shall ensure that a staff member who has not obtained the necessary qualifications may not provide the relevant investment services and ancillary investment services.

2. Investment services enterprises are required to define the roles and responsibilities of their staff.

The assignment of staff and their relevant activities and responsibilities shall be documented, in particular for investment advisers, sales staff, portfolio managers and distribution officers.

For investment advisers and sales staff, investment services enterprises shall ensure, when documenting the assignment of these staff members and their responsibilities, that there is a clear distinction between the responsibilities of investment advisers and sales staff, reflecting the investment services and ancillary investment services
provided and in accordance with the internal organisation of the investment services enterprise.

3. Staff shall possess and maintain an appropriate qualification for which training and continuous professional development is necessary, including through specific training – especially in advance of any new investment services, ancillary investment services, financial instruments and structured deposits being offered by the investment services enterprise.

Investment services enterprises shall, on at least an annual basis, assess the knowledge and experience of their investment advisers, sales staff, portfolio managers and distribution officers, and shall verify the relevance of continuous professional development measures offered to these staff members in order to update them. The assessment of competence shall include a review of the knowledge and experience requirements for each staff member. Examples of good practice are:

- regular mandatory training in the form of courses, seminars, independent studies or learning with updated materials, as well as tests to verify that staff have the necessary knowledge and experience,

- training content about functions and features, including potential risks, of the (especially new) financial instruments and structured deposits available on the market, as well as about current regulatory changes,

- guidance for staff about situations in which conflicts of interest may arise and training about how to apply the rules regarding the management of conflicts of interest; this shall include in particular situations in which investment services enterprises may pay or receive inducements and training about the legal requirements regulating inducements,

- monitoring the suitability assessments provided by investment advisers and their ability to assess suitability.

4. For staff of investment services enterprises involved in content-related aspects of the suitability assessment process, this paragraph will be updated once the Guidelines on certain aspects of the MiFID II suitability requirements dated 13 July 2017 (ESMA35-43-748) have been finalised.

5. The responsible provision of investment advice to clients in the case of supervised activities also includes the provision of the suitability statement by the supervising staff member.

6. Investment services enterprises shall train investment advisers, sales staff and portfolio managers to ensure that particular care is taken when providing information, investment services and ancillary investment services with respect to financial instruments and structured deposits characterised by greater levels of complexity. Investment advisers and portfolio managers shall know their role in the assessment of suitability; they shall be able to assess the client’s needs and situation. This paragraph will be updated after the Guidelines on certain aspects of the MiFID II suitability requirements dated 13 July 2017 (ESMA35-43-748) have been updated.

BT 11.2 Additional requirements for compliance officers
1. The compliance officer shall have a sufficiently high level of expertise and experience so as to be able to assume responsibility for the compliance function as a whole and ensure that it is effective.

It should be noted that the necessary expertise of the compliance officer may differ from investment services enterprise to investment services enterprise because of the range of business activities, the different types of investment services and ancillary investment services, and hence the different inherent risks and conflicts of interest in each case, as these differences can lead to differences in material compliance risks; with regard to section 80 (1) sentence 1 of the WpHG in conjunction with section 25a (1) sentence 3 no. 2 of the KWG and Article 22(3)(a) of the DR, a newly appointed compliance officer may therefore have to acquire additional specialist knowledge tailored to the specific business model of the investment services enterprise, even if that compliance officer has already worked as a compliance officer in another investment services enterprise.

2. In addition to the knowledge described in section 3 (1) of the WpHGMaAnzV, the compliance officer shall have knowledge about trading surveillance if the staff of the investment services enterprise regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular. Compliance officers of investment services enterprises that use algorithmic trading systems and trading algorithms shall have an understanding of at least the fundamentals of algorithmic trading systems and trading algorithms.

3. The necessary expertise of the compliance officer also comprises the practical application of the knowledge described in BT 1.3.1.3 no. 1 of this Circular, which can be achieved in particular by specialist professional experience. Specialist professional experience can be acquired, for example, in operational positions, in control functions or in regulatory functions. As a general principle, compliance officers of investment services enterprises whose staff regularly have access to compliance-relevant information within the meaning of AT 6.1 of this Circular require necessary specialist professional experience of at least six months. In light of the principle of proportionality, a shorter period may be considered for other, and in particular smaller, investment services enterprises. The specialist professional experience may also generally be acquired during a probationary period.
BT 12 Complaints management and complaints report under Article 26 of the DR

The minimum requirements for complaints management and the complaints report in accordance with Article 26 of the DR are set out in greater detail in the following.

BT 12.1 Complaints management

BT 12.1.1 Definitions

1. A complaint means any statement of dissatisfaction that a client within the meaning of section 67(1) of the WpHG or a potential client (complainant) addresses to an investment services enterprise relating to its provision of an investment service or an ancillary investment service. It is not mandatory to use the term “complaint”. There is no specific requirement governing the form of a complaint.

BT 12.1.2. Internal arrangements for complaints handling

1. Investment services enterprises must establish, implement and maintain effective and transparent complaints management policies and procedures for the prompt handling of clients’ or potential clients’ complaints (Article 26(1) sentence 1 of the DR).

2. The complaints management policy must provide clear, accurate and up-to-date information about the complaints handling process (Article 26(1) sentence 3 of the DR). The policies must define the procedure for submitting complaints, complaints handling, including responsibilities, the procedure for following up measures instituted to comply with policies and procedures, and the internal reporting system.

3. These policies must be endorsed by the management board of the investment services enterprise (Article 26(1) sentence 4 of the DR). The management board is also responsible for implementing and monitoring compliance with the complaints management policies and procedures.

4. The complaints management policies and procedures must be documented in writing (e.g. in working and organisational instructions, manuals) and made available to all relevant employees of the investment services enterprise through suitable internal channels.

5. Investment services enterprises must safeguard the internal flow of information and the establishment of and compliance with the internal reporting lines.

6. Investment services enterprises must establish a complaints management function responsible for the investigation of complaints (Article 26(3) sentence 1 of the DR). This function may be carried out by the compliance function (Article 26(3) sentence 2 of the DR).

7. The complaints management function ensures that
   - all complaints are examined objectively and appropriately in line with the complaints management policies and procedures; and that
   - potential conflicts of interest are identified and that anything that compromises the handling of complaints is avoided.

BT 12.1.2. Internal complaints handling procedures
1. Investment services enterprises must keep a record of the complaints received and the measures taken for their resolution (Article 26(1) sentence 2 of the DR).

2. All complaints, their handing, the measures taken and the final decisions must be systematically recorded without any unnecessary delay (internal complaints register, see Annex I to the DR, penultimate row). The requirements of Article 72 of the DR apply to the manner in which records are retained and to the internal complaints register.

3. The records must be retained for a period of at least five years (section 9 (4) of the WpDVerOV).

4. The investment services enterprise’s compliance function must analyse complaints and complaints handling data to ensure that it identifies and addresses any risks or issues (Article 26(7) of the DR), e.g. by means of the following measures.

   - Analysing the causes of each and every complaint so as to identify the causes that are common to types of complaint,
   - Considering whether such root causes may also affect other processes or products; this also applies to processes or products that are not directly complained of,
   - Correcting the causes, where it appears reasonable to do so and is possible.

5. The knowledge obtained from the handling of complaints must be incorporated into the risk management system and taken into consideration by the internal audit function.

6. Investment services enterprises must publish the details of the process to be followed when handling a complaint (Article 26(2) sentence 1 of the DR). The detailed information must be easily accessible (e.g. in brochures, pamphlets, contract documents, or on the investment services enterprise’s website). Such details must include information about the complaints management policy and the contact details of the complaints management function (Article 26(2) sentence 2 of the DR). The following issues in particular must be addressed:

   - How to complain (e.g. the information to be provided by the complainant, the complainant’s contact details, the person or office at the supervised enterprise to whom the complaint should be directed).
   - The process that will be followed when handling a complaint (e.g. indicative handling timelines).
   - The availability of a competent authority or alternative dispute resolution mechanism.

The information provided must be clear, accurate and up-to-date.

7. The information on the complaints management procedure must also be provided to clients or potential clients on request or when acknowledging a complaint (Article 26(2) sentence 3 of the DR).

8. Investment services enterprises must enable clients and potential clients to submit complaints free of charge (Article 26(2) sentence 4 of the DV).

9. Investment services enterprises must seek to gather and investigate all relevant evidence and information regarding the complaint.
10. When handling a complaint, investment services enterprises must communicate with clients or potential clients clearly in plain language that is easy to understand, and must reply to the complaint without undue delay (Article 26(4) of the DR). When an answer cannot be provided within the defined reasonable time limit, investment services enterprises must inform the complainant about the causes of the delay and indicate when the investigation by the investment services enterprise is likely to be completed.

11. Investment services enterprises must communicate their position on the complaint to the clients or potential clients and inform the clients or potential clients about their options, including that they may be able to refer the complaint to an alternative dispute resolution entity, or that the client may be able to take civil action (Article 26(5) of the DR).

12. All final answers to the complainant must be provided on paper or in another durable medium, to the extent that the complainant has not expressly demanded an oral answer only. Alternatively, oral complaints can only be answered only orally if the complainant consents to this.

**BT 12.2 Complaints report**

1. The complaints report in accordance with Article 26(6) of the DR (complaints report) shall be submitted once a year by 1 March for the preceding calendar year.

   The first complaints report, which shall contain all the information required by no. 3 below, shall be submitted by 1 March 2020 for calendar year 2019.

   The complaints report for calendar year 2018 shall be submitted by 1 March 2019 and shall, as a minimum, contain the following information: the number of complaints in accordance with Section A (b) and (c) of no. 3 below, as well as the information required by Section C of no. 3 below.

2. The complaints report should be submitted electronically in accordance with BaFin’s requirements for the file format and submission method.

3. The complaints report contains the following information, which shall be aggregated in accordance with the Annex to BT 12.2. of this Circular:

   **Section A:**

   a. The number of complaints, both as a total and broken down by the individual investment services in accordance with section 2 (8) of the WpHG, the safe custody business in accordance with section 2 (9) no. 1 of the WpHG, the other ancillary investment services in accordance with section 2 (9) of the WpHG and “Miscellaneous”;

   a complaint shall be allocated to a category based on the primary focus of the complaint, i.e. complaints shall be counted singly and not more than once;

   b. information about the processing status as at 31 December of the calendar year, in each case in aggregated form (broken down by the number of complaints received in the calendar year, the number of complaints resolved in the calendar
year, the number of complaints outstanding at the reference date, the number of complaints that were outstanding as at 31 December of the preceding calendar year);

c. information about how many complaints in the calendar year were resolved at least partly in favour of the complainant, the number of goodwill payments made in the calendar year and court and arbitration proceedings pending in the calendar year as a result of complaints;

Section B:

an overview of the reasons for complaints, disclosing the number of cases classified by the following reasons for complaints: (1) “Order execution (recording, execution including best execution, settlement)”, (2) “Record-keeping obligations (e.g. suitability statement)”, (3) “Collecting client information”, (4) “Recommendation (suitability)”, (5) “Fees, charges, costs, inducements”, (6) “Conflicts of interest (avoiding, managing, disclosing)”, (7) “Explanation of risks”, (8) “Secondary market (price quotations)”, (9) “Custody, administration” and (10) “Miscellaneous”;

c. complaints shall be allocated to reasons for complaints based on the primary focus of the complaint, i.e. complaints shall be counted singly and not more than once;

Section C:

Information about any staff-related and organisational consequences of complaints.

4. The complaints report shall comprise complaints by clients within the meaning of section 67 (1) of the WpHG and potential clients, as well as complaints received by tied agents within the meaning of section 2 (10) sentence 1 of the KWG.
BT 13 Complex debt instruments and structured deposits in accordance with section 63 (11) no. 1 of the WpHG

This module expands on the requirements of section 63 (11) no. 1 b), c) and e) of the WpHG. It defines criteria used to assess whether debt instruments incorporate a structure that makes it difficult for clients to understand the risk involved. This module also defines criteria used to assess whether structured deposits incorporate a structure that makes it difficult for clients to understand the risk of return or the cost of exiting before term. Additionally, this module defines the term “embedded derivative” for the purpose of section 63 (11) no. 1 b) and c) of the WpHG.

The examples given in the following are not exhaustive.

BT 13.1 Debt instruments embedding a derivative, section 63 (11) No. 1 b) and c)

For the purpose of section 63 (11) no. 1 b) and c) of the WpHG, an embedded derivative is interpreted as meaning a component of a debt instrument that causes some or all of the cash flows resulting from the financial instrument to be modified according to one or more defined variables.

Examples:
- convertible and exchangeable bonds;
- index-linked bonds and turbo certificates;
- CoCo bonds (contingent convertible bonds);
- callable und puttable bonds;
- credit linked notes;
- warrants.

BT 13.2 Debt instruments incorporating a structure making it difficult for the client to understand the risk

For the purpose of points (b) and (c) of section 63 (11) no. 1 of the WpHG, debt instruments incorporating a structure making it difficult for the client to understand the risk include any of the following, among others:

1. Debt instruments whose return or performance depends on the receivables, either fixed or revolving, generated by the assets in the underlying pool.

   Examples:
   asset-backed securities (ABSs) and asset-backed commercial paper (ABCP), residential mortgage-backed securities (RMBSs), commercial mortgage-backed securities (CMBSs), collateralised debt obligations (CDOs)

2. Debt instruments structured in such a way that in the event of the default by the issuer, subordinated holders only have access to the assets of the issuer after the claims of senior holders have been satisfied.

   Examples:
   - subordinated liabilities;
   - certificates (as defined in Article 2(1)(27) of Regulation (EU) No 600/2014);

3. Debt instruments structured in such a way that the anticipated revenue stream or repayment of principal is dependent on variables set by the issuer at its discretion.
4. Debt instruments structured in such a way that there is no specified maturity date and typically therefore no repayment of the principal amount invested.

   Example:
   perpetual bonds.

5. Debt instruments structured in such a way that the anticipated revenue stream or repayment of principal is dependent on variables which are unusual or unfamiliar for the average retail investor.

   Examples:
   - debt instruments referencing e.g. the following underlyings: non-public benchmarks, synthetic indices, niche markets or highly technical measures (e.g. volatility or combinations of variables);
   - catastrophe bonds.

6. Debt instruments with complex mechanisms to determine or calculate the return. These include debt instruments structured in such a way that the anticipated revenue stream may vary frequently and/or markedly at different points of time over the duration of the financial instrument, either because certain pre-determined threshold conditions are met or because certain time-points are reached.

7. Debt instruments presenting a structure or subject to a mechanism which, under certain circumstances, triggers a partial repayment (or no repayment) of the principal.

   Example:
   debt instruments that can be used for a bail-in.

8. Debt instruments issued by a special purpose vehicle (SPV) in circumstances in which the name of the debt instrument or the legal name of the SPV may mislead the investors as to the identity of the issuer or guarantor.

9. Debt instruments guaranteed by a third party and structured in a way that makes it complex for the investor to assess accurately how the guarantee mechanism affects the risk of the investment.

   Examples:
   - debt instruments with a guarantee mechanism where the trigger for the guarantee depends upon one or several conditions in addition to the default of the issuer;
   - debt instruments with a guarantee mechanism where the level of guarantee or the actual trigger of the guarantee are subject to time limitations.

10. Debt instruments with leverage features. These include debt instruments structured in such a way that the return or losses to the investor may occur at multiples to the initial investment.

**BT 13.3 Structured deposits incorporating a structure making it difficult for the client to understand the risk of return**

The following criteria shall be used if the investment service relates to a structured deposit in accordance with section 2 (19) of the WpHG. For the purpose of section 63 (11) no. 1 e) of the WpHG, a structure making it difficult for the client to understand the risk of return exists in the following cases:
1. More than one variable affects the return received.

Examples:
- structured deposits where a basket of instruments or assets have to outperform a specified benchmark for a return to be paid;
- structured deposits where the return is determined by the combination of two or more indices.

2. There is a complex relationship between the return and the relevant variable or the mechanism to determine or calculate the return.

Examples:
- structured deposits that are structured in a way that the mechanism under which the price level of an index is reflected in the return involves different market data points (i.e. one or more thresholds have to be met), or several index measurements at different dates;
- structured deposits that are structured in a way that the capital gain or interest payable steps up or down in certain specific circumstances;
- structured deposits that are structured in a way that the anticipated revenue stream may vary frequently and/or markedly at different points in time.

3. The variable involved in the calculation of the return is unusual or unfamiliar to the average retail investor.

Example:
structured deposits where the return is linked to a niche market, an in-house index or other non-public benchmark, a synthetic index, or a highly technical measure such as asset price volatility.

4. The contract gives the credit institution the unilateral right to terminate the agreement before maturity.

BT 13.4 Structured deposits incorporating a structure making it difficult for the client to understand the cost of exiting before term

The following criteria shall be used if the investment service relates to a structured deposit in accordance with section 2 (19) of the WpHG. For the purpose of section 63 (11) no. 1 e) of the WpHG, a structure making it difficult for the client to understand the cost of exiting the product before term exists in the following cases:

1. No fixed sum is given as an exit fee.

Examples:
- structured deposits having a variable or “capped” exit fee (i.e. a fee up to EUR 300 is charged in case of early exit);
- structured deposits referencing a variable factor such as an interest rate for the calculation of the exit fee.

2. The exit fee given is not a fixed sum for each month (or part thereof) remaining until the end of the agreed term:

Example:
structured deposits having a variable or capped exit fee per month remaining until the agreed term (i.e. a fee up to EUR 50 per month in case of early exit).
3. The exit fee given is not a fixed percentage of the deposit.

Example:
structured deposits having an exit fee that is at least equal to the amount of the returns accrued until the early exit date.
BT 14 Cross-selling

This module expands on the requirements of section 63 (9) of the WpHG.

BT 14.1 Scope and definitions

1. Cross-selling in accordance with section 63 (9) of the WpHG relates to investment services that are offered as part of a tied package or a bundled package. Additional, differing conduct of business rules may apply to specific products and services used to create the packages covered by BT 14. This section shall not affect in any way the obligations of investment services enterprises to comply with such applicable requirements.

2. A tied package is a package of products and/or services where at least one of the products or services offered is not available separately to the client of the investment services enterprise and thus becomes a condition for the transaction. At least one of the components of the package must be an investment service.

3. A bundled package is a package of products and/or services where each of the products or services offered can also be purchased separately and where the client retains the option to purchase the various components of the package separately from the investment services enterprise. At least one of the components of the package must be an investment service.

4. A component is the separate product/and or service that constitutes part of the bundled or tied package.

BT 14.2 Full, clear and timely communication of price and cost information

1. Investment services enterprises that distribute a tied or bundled package shall provide their clients with separate information on the price of its components. They shall provide their clients with a clear breakdown and the amount of all relevant known costs associated with the purchase of its components, e.g. administration fees, transaction costs and exit or prepayment penalties.

Where costs cannot be calculated with precision on an ex ante basis, but these will nevertheless be incurred by clients after the purchase of the package, the investment services enterprise shall provide the client with an estimate based on reasonable assumptions.

Example:
If the cross-selling relates to an interest rate swap with a variable rate loan to hedge interest rate risk (i.e. the client swaps their floating rate payment for a fixed interest rate payment), the investment services enterprise provides key information to the client on all aspects of the swap agreement that will materially affect the cost the client finally incurs. The scope of the information on costs for the swap is governed by section 63 (7) of the WpHG in conjunction with Article 50 of the DR.

2. In addition, the information on price and all relevant costs of the individual components of the package shall be made available in good time before a transaction
is entered into to allow the client to make an informed decision. The information shall be provided in a prominent, accurate manner and in simple language. All technical terminology shall be explained.

3. When promoting individual components of a bundled or tied package, investment services enterprises shall always assign equal prominence to the price and cost information of the components so that the client can identify clearly and quickly how the purchase of the components impacts the cost of the package.

**Example 1:**
In any marketing communications used by the investment services enterprise, the font used to communicate the relevant price and cost information of each of the components of a package in the enterprise’s offering is the same. Relevant information concerning one of the components is not given more emphasis through the use of a larger or bolder font.

**Example 2:**
Where the sale takes place on the internet or through another channel without a sales person directly involved, the price and cost information of both products that will form the package appears at an early stage on the relevant websites. It must be easily navigated by clients, i.e. the price and cost information of any product and/or service that will form part of a bundled package is not placed or hidden further down in the investment services enterprise’s online sales form.

4. Investment services enterprises that distribute a tied or bundled package may not present price and cost information to clients in a way that is misleading or that distorts or obscures the real cost. Nor may clients be prevented by the manner of presentation from making a meaningful comparison with alternative products and/or services.

**BT 14.3 Full, clear and timely communication of key information on non-price features and risks, where relevant**

1. Investment services enterprises that distribute a tied or bundled package shall provide their clients with key information on non-price features and risks, where applicable, of each of the components and the package. This shall also include in particular information on how the risks are modified if the bundled package is purchased, rather than each of the components are purchased separately.

**Example:**
An investment services enterprise offers a preferential rate savings account only if the client purchases a structured bond at the same time. In this case, the level of risk posed by this total package is different from the risks posed by the savings account alone: the initial capital in a savings account is guaranteed; the only variable is the interest paid. By contrast, the initial capital investment in a structured investment product may not be guaranteed; as a result, it could be lost in part or altogether. In this example, the risk profiles of the components are clearly very different. If the two components are combined, the level of risk associated with the structured investment product could negate the safety of the savings product to such an extent that the overall risk profile of the package is significantly increased. The investment services enterprise clearly informs the client about how the risk is modified as a result of purchasing the bundled package rather than each of the products separately. In this case, for example, the client should be informed that the overall return from the package could be reduced by price losses attributable to the structured bond.
2. Key non-price factors and the relevant risks shall be communicated to clients with the same prominence and weight as information on prices and costs of the individual components. These factors and risks shall be made clear to the client in simple language in good time before the agreement is entered into. All technical terminology shall be explained. The information shall be presented in a way that is not misleading and may not distort the presentation of the potential impact of these factors for the client.

Example:
It is not enough for the investment services enterprise to exclusively make a general reference to its terms and conditions to alert or disclose non-price information to clients. Instead, the enterprise has to explain the risks, if relevant, and non-price information to the client in plain language.

BT 14.4 Prominent display and communication of “optionality of purchase”

1. Investment services enterprises that distribute a tied or bundled package shall ensure that their clients are properly informed whether they have the option to purchase the components separately. In particular, clients shall be informed whether they have a choice to purchase only one of the components of a bundled package or, to the extent permitted by applicable law, whether they have to purchase another component of a bundled package.

2. Investment services enterprises that distribute a bundled package shall design their product/services purchase options in a way that enables clients to actively select a purchase and therefore make a conscious decision to purchase each individual component of the bundled package. Investment services enterprises that offer products or services as a package under a cross-selling arrangement are prohibited from anticipating client’s purchase choices on digital platforms (such as apps or websites) or in other sales documents, for example by using pre-ticked boxes.

3. In addition, such investment services enterprises shall ensure that they present their purchase options in a way that avoids giving the impression that the purchase of the bundled package is compulsory, when in fact it is an optional purchase.

Example 1:
An investment services enterprise offers a range of different investment products. It sets out the client’s options clearly and unmistakably. For example, it makes clear that the client has the option to purchase a non-advised, execution-only service without an assessment of appropriateness and with no additional products or services such as market data and financial analysis. It also clarifies whether the client’s choice is restricted to particular bundles of component products, or if the client has a free choice as to which products/services can be combined.

Example 2:
The purchase option for a bundled package of a non-advised, execution-only service without an assessment of appropriateness and market research on the sales pages of the investment services enterprise’s website is left blank. The client has to opt in to the purchase by clicking “yes” to the simple question of whether he/she wants to buy the market research as an add-on product (and therefore as a bundled package together with the non-advised service).
BT 14.5 Adequate training for staff

Investment services enterprises that distribute tied or bundled packages shall ensure that adequate training, including cross-sectoral training where relevant, is provided to staff in charge of distributing each of the products and/or services sold as components of a package. The staff training shall ensure that staff are familiar with the risks, where relevant, of the components and the bundled and tied package, and be able to communicate these to clients in plain (non-technical) language.

BT 14.6 Conflicts of interest in the remuneration structure of sales staff

Investment services enterprises that distribute tied or bundled packages shall ensure that suitable remuneration models and sales systems encouraging responsible business conduct by sales staff in business transactions, fair treatment of clients and avoidance of conflicts of interest for sales staff are in place. They shall be monitored by the management board.

Example 1:
The investment services enterprise refrains in its remuneration policy from operating practices and performance-based competitions that encourage sales staff who are remunerated on a commission basis to push the sale of the bundled package and which may therefore encourage the unnecessary or unsuitable sales of either a component of the package or the package itself. For instance, if sales staff are incentivised to cross-sell a loan with a portfolio management offering, this remuneration structure would result in the risk of incentivising a potential misselling of the loan and therefore also of the package.

Example 2:
The investment services enterprise does not use any remuneration structures and practices that substantially reduce the basic salary, bonuses or performance incentives of sales staff if a specific sales target in relation to the bundled or tied package is not met, thereby reducing the risk that the sales person will make inappropriate sales of the bundled package to avoid this outcome.

BT 14.7 Cancellation right

1. Investment services enterprises that distribute tied or bundled packages shall ensure that where cancellation or revocation rights apply to one of more components of a package (if the components are sold on a stand-alone basis), these rights shall continue to apply to those components within the package.

2. In addition, clients shall be allowed to subsequently split the components of a cross-selling offering without disproportionate penalties, unless there are justified reasons to reject this.

BT 14.8 Examples of cross-selling practices that do not comply with the requirements of section 63 (9) of the WpHG

Examples with a monetary detriment for clients:

1. Two components are offered together as a package, where the price of this package is higher than the price of the stand-alone products/services offered separately by the
same investment services enterprise (provided that the product components offered
and the products/services offered on a stand-alone basis have the same features).

2. An investment services enterprise wants to induce a client to buy a cross-selling
offering by promoting the fact that, as of the date of the sale, the overall amount of
the costs and charges payable by the client is below the cumulative price of each
component when sold separately, although in reality this amount of costs and charges
is already scheduled to be increased to a higher amount over time, for example
because of running costs or fees incurred.