

Appropriateness (for non-advised services) (MiFID provisions)

Chapter 10A

Appropriateness (for non-advised services) (MiFID and insurance-based investment products provisions)

10A.1 Application

[Note: ESMA has also issued guidelines under article 16(3) of the ESMA Regulation on complex debt instruments and structured deposits. See [https://www.esma.europa.eu/sites/default/files/library/2015-1787_-_guidelines_on_complex_debt_instruments_and_structured_deposits.pdf]

Application

10A.1.1

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This chapter applies to a *firm* which:

- (1) provides *investment services* in the course of *MiFID* or equivalent *third country business*; or
- (2) carries on *insurance distribution* in relation to *insurance-based investment product*,

other than when the *firm* makes a *personal recommendation* or carries out *portfolio management*.

10A.1.2

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This chapter applies to a *firm* which assesses appropriateness on behalf of a *MiFID investment firm* so that the other *firm* may rely on the assessment under ■ COBS 2.4.4R (Reliance on other investment firms: *MiFID* and equivalent business).

Effect of provisions marked EU

10A.1.3

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The effect of ■ GEN 2.2.22AR is that provisions in this chapter marked "EU" and including a Note ('Note:') referring to the *MiFID Org Regulation* also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

10A.1.4

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Provisions in this chapter marked "EU" and including a Note ('Note:') referring to the *IDD Regulation* apply as if they were *rules* to *firms*, to whom the *IDD Regulation* does not apply, when doing *insurance distribution*.



10A.2 Assessing appropriateness: the obligations

10A.2.1 **R** A firm must ask the client to provide information regarding that client's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded to enable the firm to assess whether the service or product envisaged is appropriate for the client.

[Note: article 25(3) of MIFID, first paragraph of article 30(2) of the IDD]

10A.2.1A **G** A firm carrying on insurance distribution is also required to comply with the requirements in COBS 7.3 (additional insurance distribution obligations: demands and needs).

[Note: first paragraph of article 30(2) of the IDD]

Bundled packages: MiFID business and insurance-based investment products

10A.2.2 **R** Where a bundle of services or products is envisaged pursuant to COBS 6.1ZA.16R (for MiFID business) or COBS 6.1ZA.16AR to COBS 6.1ZA.16E (for insurance-based investment products), the assessment made pursuant to COBS 10A.2.1R must consider whether the overall bundled package is appropriate.

[Note: article 25(3) of MiFID, first paragraph of article 30(2) of the IDD]

Assessing a client's knowledge and experience: MiFID business

10A.2.3 **EU** 56(1) Investment firms, shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service as referred to in Article 25(3) of Directive 2014/65/EU is appropriate for a client.

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

[Note: article 56(1) of the MiFID Org Regulation]

Assessing a client's knowledge and experience: insurance-based investment product

10A.2.3A EU

15 Without prejudice to the fact that, in accordance with Article 20(1) of Directive (EU) 2016/97, any contract proposed shall be consistent with the customer's demands and needs, insurance intermediaries or insurance undertakings shall determine whether the customer has the necessary knowledge and experience in order to understand the risks involved in relation to the service or product proposed or demanded when assessing whether an insurance service or product distributed in accordance with Article 30(2) of Directive (EU) 2016/97 is appropriate for the customer.

[Note: article 15 of the *IDD Regulation*]

Information regarding a client's knowledge and experience: MiFID business

10A.2.4 EU

55(1) Investment firms shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:

(a) the types of service, transaction and financial instrument with which the client is familiar;

(b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;

(c) the level of education, and profession or relevant former profession of the client or potential client.

[Note: article 55(1) of the *MiFID Org Regulation*]

Information regarding a client's knowledge and experience: insurance-based investment products

10A.2.4A EU

17(1) For the purposes of Article 30(1) and (2) of Directive (EU) 2016/97, the necessary information to be obtained by insurance intermediaries and insurance undertakings with regard to the customer's or potential customer's knowledge and experience in the relevant investment field shall include, where relevant, the following, to the extent appropriate to the nature of the customer, and the nature and type of product or service offered or demanded, including their complexity and the risks involved:

(a) the types of service, transaction, insurance-based investment product or financial instrument with which the customer or potential customer is familiar;

(b) the nature, number, value and frequency of the customer's or potential customer's transactions in insurance-based investment products or financial instruments and the period over which they have been carried out;

(c) the level of education, and profession or relevant former profession of the customer or potential customer.

17(3) Where information required for the purposes of Article 30(1) or (2) of Directive (EU) 2016/97 has already been obtained pursuant to Article 20 of Directive (EU) 2016/97, insurance intermediaries and insurance undertakings shall not request it anew from the customer.

[Note: article 17(1) and (3) of the *IDD Regulation*]

- Discouraging the provision of information: MiFID business**.....
- 10A.2.5 EU 55(2) An investment firm shall not discourage a client or potential client from providing information required for the purposes of Article 25(2) and (3) of Directive 2014/65/EU.
- [Note: article 55(2) of the *MiFID Org Regulation*]
- Discouraging the provision of information: insurance-based investment products**.....
- 10A.2.5A EU 17(2)The insurance intermediary or insurance undertaking shall not discourage a customer or potential customer from providing information required for the purposes of Article 30(1) and (2) of Directive (EU) 2016/97.
- [Note: article 17(2) of the *IDD Regulation*]
- Reliance on information: MiFID business**.....
- 10A.2.6 EU 55(3) An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.
- [Note: article 55(3) of the *MiFID Org Regulation*]
- Reliance on information: insurance-based investment products**.....
- 10A.2.6A EU 17(4)The insurance intermediary or insurance undertaking shall be entitled to rely on the information provided by its customers or potential customers unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.
- [Note: article 17(4) of the *IDD Regulation*]
- Use of existing information: MiFID business and insurance-based investment products**.....
- 10A.2.7 G When assessing appropriateness, a *firm* may use information it already has in its possession.
- Knowledge and experience: MiFID business and insurance-based investment products**.....
- 10A.2.8 G Depending on the circumstances, a *firm* may be satisfied that the *client's* knowledge alone is sufficient for him to understand the risks involved in a product or service. Where reasonable, a *firm* may infer knowledge from experience.
- Increasing the client's understanding: MiFID business and insurance-based investment products**.....
- 10A.2.9 G If, before assessing appropriateness, a *firm* seeks to increase the *client's* level of understanding of a service or product by providing information to him, relevant considerations are likely to include the nature and complexity of the information and the *client's* existing level of understanding.

No duty to communicate firm's assessment of knowledge and experience: MiFID business and insurance-based investment products

10A.2.10 **G**

If a *firm* is satisfied that the *client* has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service, there is no duty to communicate this to the *client*. If the *firm* does so, it must not do so in a way that amounts to making a *personal recommendation* unless it complies with the *rules* in ■ COBS 9A (MiFID and insurance-based investment products provisions).

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10A.3 Warning the client

10A.3.1 **R** (1) If a *firm* considers, on the basis of information received to enable it to assess appropriateness, that the product or service is not appropriate for the *client*, the *firm* must warn the *client*.

(2) This warning may be provided in a standardised format.

[Note: article 25(3) of *MiFID*, second paragraph of article 30(2) of the *IDD*]

10A.3.2 **R** (1) If the *client* does not provide the information to enable the *firm* to assess appropriateness, or if the *client* provides insufficient information regarding their knowledge and experience, the *firm* must warn the *client* that the *firm* is not in a position to determine whether the service or product envisaged is appropriate for the *client*.

(2) This warning may be provided in a standardised format.

[Note: article 25(3) of *MiFID*, third paragraph of article 30(2) of the *IDD*]

10A.3.3 **G** If a *client* asks a *firm* to go ahead with a transaction, despite being given a warning by the *firm*, it is for the *firm* to consider whether to do so having regard to the circumstances.

10A.4 Assessing appropriateness: when it need not be done due to type of investment

10A.4.1 R

- (1) A *firm* is not required to ask its *client* to provide information or assess appropriateness if either (a) or (aa), and both (b) and (c), are met:
- (a) the service:
 - (i) only consists of execution or reception and transmission of *client* orders, with or without *ancillary services*, excluding *ancillary service* (2) in section B of Annex I to *MiFID* (granting of credits or loans), where the relevant credits or loans do not comprise existing credit limits of loans, current accounts and overdraft facilities of *clients*;
 - (ii) relates to particular *financial instruments* (see paragraph (2)); and
 - (iii) is provided at the initiative of the *client*; or
 - (aa) the *insurance distribution* activity:
 - (i) relates to particular types of *insurance-based investment products* (see (2A)); and
 - (ii) is carried out at the initiative of the *client*; and
 - (b) the *client* has been clearly informed (whether in a standardised format or not) that, in the provision of the service or *insurance distribution* activity, the *firm* is not required to assess the appropriateness of the *financial instrument* or service or *insurance-based investment product* provided or offered and that therefore the *client* does not benefit from the protection of the *rules* on assessing appropriateness; and
 - (c) the *firm* complies with its obligations in relation to conflicts of interest.
- (2) The *financial instruments* referred to in (1)(a)(ii) are any of the following:
- (a) shares in companies admitted to trading on:
 - (i) a *regulated market*; or
 - (ii) an equivalent third country market; or
 - (iii) an *MTF*,
except shares that embed a derivative and *units* in a collective investment undertaking that is not a *UCITS*; or
 - (b) bonds or other forms of securitised debt admitted to trading on:
 - (i) a *regulated market*; or

- (ii) an equivalent third country market; or
- (iii) an *MTF*,

except those that embed a derivative or incorporate a structure which makes it difficult for the *client* to understand the risk involved; or

- (c) *money-market instruments*, excluding those that embed a derivative or incorporate a structure which makes it difficult for the *client* to understand the risk involved; or
- (d) shares or *units* in a *UCITS*, excluding structured *UCITS* as referred to in the second subparagraph of article 36(1) of the *KII Regulation*; or
- (e) *structured deposits*, excluding those that incorporate a structure which makes it difficult for the *client* to understand the risk of return or the cost of exiting the product before term; or
- (f) other non-complex *financial instruments*.

(2A) The *insurance-based investment products* referred to in (1)(aa) are:

- (a) *insurance-based investment products* which only provide investment exposure to *financial instruments* referred to in (2) and do not incorporate a structure which makes it difficult for the *client* to understand the risks involved; or
- (b) other non-complex *insurance-based investment products*.

(3) For the purposes of this *rule*, a third country market is considered to be equivalent to a *regulated market* if it is a market in relation to which the Commission has, at the request of a *competent authority*, adopted an affirmative equivalence decision in accordance with the requirements and procedure in article 25(4) of *MIFID*.

[**Note:** article 25(4) of *MIFID*, article 30(3) of the *IDD*]

[**Note:** *ESMA* has published guidelines which specify criteria for the assessment of (i) debt instruments incorporating a structure which makes it difficult for the client to understand the risk involved, and (ii) structured deposits incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term. The guidelines can be found here: [https://www.esma.europa.eu/sites/default/files/library/2015-1787_-_guidelines_on_complex_debt_instruments_and_structured_deposits.pdf.]

[**Note:** *EIOPA* has published guidelines under the *IDD* which specify criteria for the assessment of insurance-based investment products that incorporate a structure which makes it difficult for the customer to understand the risk involved. The guidelines can be found here: https://eiopa.europa.eu/Publications/Guidelines/EIOPA-17-651-IDD_guidelines_execution_only_EN.pdf.]

Other non-complex financial instruments

10A.4.2 EU

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

- (a) it does not fall within Article 4(1)(44)(c) of, or points (4) to (11) of Section C of Annex I to Directive 2014/65/EU;

- (b) there are frequent opportunities to dispose of, redeem, or otherwise realise that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;
- (c) it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument;
- (d) it does not incorporate a clause, condition or trigger that could fundamentally alter the nature or risk of the investment or pay out profile, such as investments that incorporate a right to convert the instrument into a different investment;
- (e) it does not include any explicit or implicit exit charges that have the effect of making the investment illiquid even though there are technically frequent opportunities to dispose of, redeem or otherwise realise it;
- (f) adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

[Note: article 57 of the *MiFID Org Regulation*]

Other non-complex insurance-based investment products

10A.4.3 EU

16 An insurance-based investment product shall be considered as non-complex for the purposes of Article 30(3)(a)(ii) of Directive (EU) 2016/97 where it satisfies all of the following criteria:

- (a) it includes a contractually guaranteed minimum maturity value which is at least the amount paid by the customer after deduction of legitimate costs;
- (b) it does not incorporate a clause, condition or trigger that allows the insurance undertaking to materially alter the nature, risk, or pay-out profile of the insurance-based investment product;
- (c) it provides options to surrender or otherwise realise the insurance-based investment product at a value that is available to the customer;
- (d) it does not include any explicit or implicit charges which have the effect that, even though there are technically options to surrender or otherwise realise the insurance-based investment product, doing so may cause unreasonable detriment to the customer because the charges are disproportionate to the cost to the insurance undertaking;
- (e) it does not in any other way incorporate a structure which makes it difficult for the customer to understand the risks involved.

[Note: article 16 of the *IDD Regulation*]



10A.5 Assessing appropriateness: guidance

The initiative of the client: MiFID business and insurance-based investment products

10A.5.1 **G** A service should be considered to be provided, or carried out, at the initiative of a *client* (see ■ COBS 10A.4.1R(1)(a)(iii) and (aa)(ii)), unless the *client* demands it in response to a personalised communication from or on behalf of the *firm* to that *client* which contains an invitation or is intended to influence the *client* in respect of a specific *financial instrument financial instrument, insurance-based investment product* or specific transaction.

[Note: recital 85 to MIFID]

10A.5.2 **G** A service can be considered to be provided, or carried out, at the initiative of a *client* notwithstanding that the *client* demands it on the basis of any communication containing a promotion for, or offer of, *financial instruments or insurance-based investment products* made by any means and that by its very nature is general and addressed to the public or a larger group or category of *clients*.

[Note: recital 85 to MIFID]

Personalised communications: MiFID business and insurance-based investment products

10A.5.3 **G**

- (1) Communications to the world at large, such as those in newspapers or in billboards, are likely to be by their very nature general and therefore not personalised communications.
- (2) Communications addressed to a *client* (such as, for example, an email, telephone call or letter), may or may not be personalised depending on the content.
- (3) A communication is not personalised solely because it contains the name and address of the *client* or because a mailing list has been filtered.
- (4) If a *firm* is satisfied that a communication does not contain any personalised content, it may wish to make clear that it does not intend the communication to be personalised and that the personal circumstances of the recipient have not been taken into account.



10A.6

Assessing appropriateness: when a firm need not assess appropriateness due to suitability assessment

10A.6.1 **G** A *firm* need not assess appropriateness if it is receiving or transmitting an order or carrying on *insurance distribution* in relation to an *insurance-based investment product*, for which it has assessed suitability under **■ COBS 9A** (Suitability (MiFID and insurance-based investment products provisions)).

10A.6.2 **G** A *firm* may not need to assess appropriateness if it is able to rely on a recommendation made by an *investment firm* (see **■ COBS 2.4.5G** (Reliance on other investment firms: MiFID and equivalent business)) or, in relation to an *insurance-based investment product*, made by an *insurance distributor* (see **■ COBS 2.4.5AR** (Reliance on other insurance distributors)).



10A.7 Record keeping and retention periods for appropriateness records

10A.7.1 **G** A *firm* is required to keep orderly records of its business and internal organisation, including all services and transactions undertaken by it. The records may be expected to include the *client* information a *firm* obtains to assess appropriateness and should be adequate to indicate what the assessment was.

Record keeping: MiFID business

10A.7.2 **EU** 56(2) Investment firms shall maintain records of the appropriateness assessments undertaken which shall include the following:

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

[Note: article 56(2) of the *MiFID Org Regulation*]

Record keeping: insurance-based investment products

10A.7.2A **EU** 19(1) Without prejudice to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council, insurance intermediaries and insurance undertakings shall maintain records of the assessment of suitability or appropriateness undertaken in accordance with Article 30(1) and (2) of Directive (EU) 2016/97. The records shall include the information obtained from the customer and any documents agreed with the customer, including documents that set out the rights of the parties and the other terms on which the insurance intermediary or insurance undertaking will provide services to the customer. Such records shall be retained for at least the duration of the relationship between the insurance intermediary or insurance undertaking and the customer.

19(3) In the case of an assessment of appropriateness undertaken in accordance with Article 30(2) of Directive (EU) 2016/97, the record shall further include the following:

(a) the result of the appropriateness assessment;

(b) any warning given to the customer where the insurance-based investment product was assessed as potentially inappropriate for the customer, whether the customer asked to proceed with concluding the contract despite the warning and, where applicable, whether the insurance intermediary or insurance undertaking accepted the customer's request to proceed with concluding the contract;

(c) any warning given to the customer where the customer did not provide sufficient information to enable the insurance intermediary or insurance undertaking to assess the appropriateness of the insurance-based investment product, whether the customer asked to proceed with concluding the contract despite the warning and, where applicable, whether the insurance intermediary or insurance undertaking accepted the customer's request to proceed with concluding the contract.

[Note: article 19(1) and (3) of the *IDD Regulation*]

Record keeping: MiFID business and insurance-based investment products

10A.7.3

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A *firm* should refer to ■ SYSC 3.3 (for *insurers* and *managing agents*) and ■ SYSC 9 (for other *firms*) for its obligations in relation to record keeping. These provisions require records kept for the purposes of this chapter to be retained for a period of at least five years.

10A