



EIOPA-15/564
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Technical Advice on criteria and factors to be taken into account in applying product intervention powers

The Commission seeks EIOPA's Technical Advice on the content of the delegated acts pursuant to Articles 16(8) and 17(7) of the Regulation on key information documents for packaged retail and insurance-based investment products ("PRIIPs Regulation")¹. These provisions cover temporary product intervention powers for EIOPA and competent authorities. These delegated acts should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

Supplementing similar provisions under Regulation (EU) No 600/2014², the PRIIPs Regulation reinforces the role and power of supervisory authorities by conferring upon competent authorities and EIOPA the power to monitor insurance-based investment products and, subject to certain conditions, temporarily to prohibit or restrict the marketing, distribution or sale of insurance-based investment products, financial activities or practices. While these powers need to be applied in a proportionate way, and are of an extraordinary nature and constitute a measure of last resort, there is also a need to ensure that such powers are dynamic enough to address significant risks that may arise in the markets.

EIOPA is providing its Technical Advice, as requested by the Commission³, on measures specifying the criteria and factors to be taken into account in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system of the Union or to the stability of the financial system within at least one Member State.

For the purposes of delivering its Technical Advice, EIOPA took into account the specificities of insurance-based investment products, the outcome of EIOPA's public consultation⁴ and the work undertaken by ESMA⁵ and EBA⁶ on product intervention powers in respect to financial instruments and structured deposits. In addition to its draft policy proposal, EIOPA elaborates on possible costs and benefits of the proposed advice in the second part of this Technical Advice. This may aid the Commission in preparing an impact assessment on the relevant delegated act it has to adopt under Article 30 of the PRIIPs Regulation.

The Commission's request for advice

EIOPA is invited to provide Technical Advice on measures specifying the criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system of the Union or to the stability of the financial system within at least one Member State.

As Regulation (EU) No 600/2014 establishes an identical framework for competent authorities, ESMA and EBA intervention powers in respect to financial instruments and structured deposits, and as factors and criteria to be taken into account for

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:352:TOC>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:173:TOC>

³ [Request from the European Commission](#) for EIOPA's Technical Advice on delegated acts in the Regulation on key information for packaged retail and insurance based investment products.

⁴ In order to provide stakeholders with an early orientation on issues that will need to be addressed in the Technical Advice to the Commission and to gather feedback from the market, EIOPA published a [Consultation Paper](#) on 27 November 2014.

⁵ ESMA's Technical Advice to the Commission on MiFID II and MiFIR, Final Report published on [ESMA's website](#).

⁶ EBA's Technical Advice on possible delegated acts on criteria and factors for intervention powers concerning structured deposits under Articles 41 and 42 of Regulation (EU) No 600/2014 (MiFIR), published on [EBA's website](#).

the exercise of product intervention powers for financial instruments and structured deposits should be similar to (if not identical to) those set for competent authorities and EIOPA with respect to insurance-based investment products, EIOPA is invited to liaise closely with and consult ESMA and EBA when providing its Technical Advice to the Commission and propose factors and criteria for intervention powers in accordance with Articles 16(8) and 17(7) of the PRIIPs Regulation.⁷

Analysis of measures specifying the criteria and factors

EIOPA deems it appropriate to develop its Technical Advice to the Commission on the basis of the criteria and factors proposed by ESMA and EBA. Because of the specificities of insurance-based investment products, not all the criteria proposed by EBA and ESMA in their consultation papers may be considered relevant and easily applicable. At the same time, EIOPA tries to be as consistent as possible, while carefully tailoring the examples specifically for insurance-based investment products.

It is essential that product intervention powers are dynamic enough to enable NCAs and exceptionally the ESAs to deal with a range of different exceptional situations and to allow steps to be taken to address issues before they become widespread. EIOPA, therefore, shares the view of ESMA and EBA that flexibility is required, both to be able to intervene in relation to new PRIIPs that may not meet given criteria, or conversely not necessarily intervene if given criteria are met but overall consumer detriment or disorderly functioning of markets is not detected.

Assessment and conclusion

Criteria and factors should be non-exhaustive and high-level and it appears impracticable to suggest specific quantitative thresholds for intervention. This is further supported by the possibility to exercise these powers on a precautionary basis, a possibility that would not seem compatible with a quantitative definition of detriment or disorderly functioning of markets.

EIOPA has taken into consideration the relevant case-law of the Court of Justice of the European Union. In particular, following the judgment of the Court of Justice of the European Union in *UK v European Parliament and Council Case C-270/12*⁸, EIOPA advises the Commission to assess the need to set the list of criteria and factors, as suggested in the Technical Advice, as an exhaustive list for EIOPA. Such an approach would ensure that EIOPA acts within the limits of its legitimate powers thereby ensuring that EIOPA applies an appropriate margin of discretion in relation to the imposition of a temporary prohibition or restriction.

In addition, specifying an exhaustive list of criteria and factors to be taken into account by EIOPA in determining in which cases there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or the stability of the financial system of the Union would clearly delineate the powers of intervention available to EIOPA in a transparent manner.

Furthermore, such an exhaustive list of criteria and factors would serve as a benchmark against which judicial review of an EIOPA decision regarding temporary prohibitions or restriction would be performed.

⁷ http://ec.europa.eu/finance/finservices-retail/docs/investment_products/20140730-request-eiopa-advice_en.pdf

⁸ Judgment of the Court (Grand Chamber) of 22 January 2014, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union, Case C-270/12

In this respect, EIOPA is of the view that the criteria and factors are adequately outlined in the Technical Advice.

Technical Advice

EIOPA considers that the criteria and factors should include the following:

i. The degree of complexity of the insurance-based investment product or type of financial activity or practice of an insurance or reinsurance undertaking. Under this factor, more detailed elements to be considered could include, for example:

- a. the type and transparency of the underlying;
- b. non-transparent costs and charges, arising, for example, from multiple layers;
- c. the performance calculation complexity. Under this criterion, more detailed elements to be considered could include, for example whether:
 - the return is dependent on the performance of one or more underlying which might in turn be affected by other factors;
- d. the nature and scale of any risks;
- e. whether the insurance-based investment product is bundled with other products or services; and
- f. the complexity of any terms and conditions.

ii. The size of the potential problem or detriment. Under this factor, more detailed elements to be considered could include, for example:

- a. the notional value of the insurance-based investment product;
- b. number of clients, investors or market participants involved;
- c. relative share the product has in investors' portfolios;
- d. probability, scale and nature of any detriment, including the amount of loss potentially suffered;
- e. anticipated persistency of the problem or detriment;
- f. volume of the premium;
- g. number of intermediaries involved;
- h. growth of the market or sales;
- i. the average amount invested by each investor in the insurance-based investment product;
- j. the coverage level defined in national insurance guarantee schemes law, where such scheme exist; and
- k. the value of the technical provisions with respect to the insurance-based investment products.

iii. The type of investors involved in an activity or practice or to whom an insurance-based investment product is marketed and sold. Under this factor, more detailed elements to be considered could include, for example:

- a. whether the client is a retail client, professional client or eligible counterparty under MiFID;

- b. features characterising investors' skills and abilities, e.g. level of education, experience with similar insurance-based investment products or selling practices;
- c. features characterising investors' economic situation, e.g. income, wealth;
- d. investors' core financial objectives, e.g. saving for income in retirement, need for risk coverage;
- e. whether the product or service is being sold to investors outside the intended target market, or the target market has not been adequately identified; and
- f. the eligibility for coverage by an insurance guarantee scheme, where national insurance guarantee schemes exist.

iv. The degree of transparency of the insurance-based investment product or type of activity or practice. Under this factor, more detailed elements to be considered could include, for example:

- a. the type and transparency of the underlying;
- b. any hidden costs and charges;
- c. the use of features that draw investors' attention but that do not necessarily reflect the suitability or overall quality of the product or service;
- d. visibility of risks;
- e. the use of product names or of terminology or other information that imply greater levels of safety and/or return than are actually possible or likely; and
- f. whether there was insufficient, or insufficiently reliable, information about an insurance-based investment product to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of insurance-based investment products.

v. The particular features or underlying components of the insurance-based investment product or transaction including any leverage a product or practice provides. Under this factor, more detailed elements to be considered could include, for example:

- a. the leverage inherent in the product;
- b. the leverage due to financing; and
- c. the features of securities financing transactions.

vi. The degree of disparity between expected return or benefit for investors and risk of loss in relation to the insurance-based investment product, activity or practice. Under this factor, more detailed elements to be considered could include, for example:

- a. the structuring and other costs;
- b. the disparity in relation to issuer's risk (where retained by issuer); and
- c. the risk/return profile.

vii. The ease and cost for investors to switch or sell a product. Under this factor, more detailed elements to be considered could include, for example:

- a. the impediments when changing an investment strategy in relation to an insurance contract;
- b. the fact that early withdrawal is not allowed or it is allowed at such contractual condition that it can be considered as not allowed; and

- c. any other barriers to exit.
- viii. The pricing and associated costs. Under this factor, more detailed elements to be considered could include, for example:
- a. the use of hidden or secondary charges; and
 - b. charges that do not reflect the level of distribution service provided by the insurance intermediaries.
- ix. The degree of innovation of an insurance-based investment product, an activity or practice. Under this factor, more detailed elements to be considered could include, for example:
- a. the degree of innovation related to the structure of the insurance-based investment product, activity or practice, e.g. embedding, triggering;
 - b. the degree of innovation relating to the distribution model/length of intermediation chain, e.g. "originate-to-distribute";
 - c. the extent of innovation diffusion, i.e. whether the insurance-based investment product, activity or practice is innovative for particular categories of investors;
 - d. innovation involving leverage;
 - e. the opacity of underlying; and
 - f. the experience of the market with similar insurance-based investment products or selling practices for insurance-based investment products.
- x. The selling practices associated with the insurance-based investment product. Under this factor, more detailed elements to be considered could include, for example:
- a. the communication and distribution channels used;
 - b. the information, marketing or other promotional material associated with the investment; and
 - c. whether the decision to buy is secondary or tertiary following another purchase.
- xi. The situation of the issuer of an insurance-based investment product. Under this factor, more detailed elements to be considered could include, for example:
- the financial situation; and
 - the suitability of reinsurance arrangements regarding the insurance-based investment products.
- xii. The risk to the orderly functioning and integrity of financial markets. Under this factor, more detailed elements to be considered could include, for example, whether:
- a. the underlyings of the insurance-based investment product or activities pose a high risk to the performance of transactions entered into by participants or investors in the market or product in question;
 - b. the characteristics of insurance-based investment products make them particularly susceptible to being used for the purposes of financial crime. Under this factor, more detailed elements to be considered could include, for example, whether the characteristics could favour the use of the insurance-based investment products for:
 - any fraud or dishonesty;
 - misconduct in, or misuse of information, relating to a financial market;

- handling the proceeds of crime;
- the financing of terrorism; or
- facilitating money laundering;

c. activities or practices pose a particularly high risk to the resilience or smooth operation of markets;

d. an insurance-based investment product or activity or practice would lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;

e. a product or practice or activity poses particular risks to the market or payment systems infrastructure, including clearing and settlement and trading systems); and

f. an insurance-based investment product or practice would threaten the investors' confidence in the financial system.

xiii. the insurance-based investment product or practice or activity poses a high risk of disruption to financial institutions deemed to be important to the financial system of the European Union or, in relation to NCAs' powers only, to the national financial system of the Member State of the NCA.

Annex I: Possible costs and benefits of the Technical Advice measures

In developing its Technical Advice on intervention powers under the PRIIPs Regulation, EIOPA is incorporating an analysis of costs and benefits into its work from the beginning.

The draft Technical Advice, including the analysis of costs and benefits, was subject to public consultation and the comments received from the stakeholders were duly taken into account and served as a valuable input in order to improve the Technical Advice. Stakeholders were specifically consulted with respect to the estimated costs and benefits of the proposed measures. Criteria and factors to be taken into account for the measures can be found in Articles 16(8) and 17(7) of the PRIIPs Regulation.

However, these criteria and factors are high-level criteria and could be understood in different ways. This could lead to inconsistencies when it comes to the supervision of different sectors. It could also lead to inconsistencies in the exercise of such intervention powers by insurance supervisory authorities in the EU Member States. EIOPA is providing more detail with its Technical Advice with the clear objective of trying to avoid these inconsistencies.

The objective of this Technical Advice is to provide the necessary detail regarding the mentioned criteria and factors, following a common approach whilst taking account of the specificities of the insurance-based investment products. This specific objective is consistent with the general objective of the protection of investors under the PRIIPs Regulation.

When analysing the impact from proposed policies regarding different measures specifying criteria and factors, a baseline scenario is applied as the basis for comparing policy options. For the analysis of the potential related costs and benefits of the proposed non-exhaustive list of examples on measures specifying the criteria and factors, EIOPA has applied as a baseline scenario the effect from the requirements specified in the examples in Articles 16(8) and 17(7) of the PRIIPs Regulation.

The baseline scenario already has factors and criteria that need to be considered. Adding certain factors and criteria neither change direct impacts such as the impact in relation to regulatory compliance costs and administrative burden nor does it change indirect impacts.

The proposed list of examples adds a level of detail to the criteria and factors, while at the same time allows for flexibility, when needed. No incremental costs have been identified with regards to the factors and criteria specifying when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system. The responses to the public consultation are in line with these assumptions. Respondents raise the valid point that costs and benefits may very well depend on the concrete application of such powers either by EIOPA or the NCAs.

Even though the higher flexibility given by the list of non-exhaustive examples might give the impression of increasing the level of uncertainty for insurance undertakings, the approach nevertheless enhances cross-sectoral consistency and reduces uncertainties in cross-border situations when NCAs want to make use of these powers. This can lead to more effective supervision, an increased level of protection of policyholders/insured persons and ultimately, more legal certainty for insurance undertakings.