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Consultation Paper

Draft Technical advice
on possible delegated acts on criteria and factors for intervention
powers concerning structured deposits under Article 41 and Article
42 of Regulation (EU) No 600/2014 (MiFIR)

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Responding to this Consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page **by 5 October 2014**. Please note that comments submitted after this deadline, or submitted via other means, may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

Executive Summary

In the context of its general mandate on consumer and investor protection set out in its founding regulation, the EBA has been given a specific mandate in Article 39(2) of the Regulation (EU) No 600/2014 (“MiFIR”) to “monitor the market for structured deposits which are marketed, distributed or sold in the Union.”

In addition, Article 41(1) of MiFIR provides that “EBA may [...] temporarily prohibit or restrict in the Union: (a) the marketing, distribution or sale of certain structured deposits or structured deposits with certain specified features; or (b) a type of financial activity or practice. A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by EBA.”

The EBA received on 15 May 2014 a request from the Commission to provide technical advice on criteria and factors for intervention powers concerning structured deposits. Given the fact that MiFIR establishes an identical framework for intervention powers in respect of structured deposits and financial instruments, factors and criteria to be taken into account for the exercise of such powers for structured deposits should be similar to those set for financial instruments.

Therefore and in accordance with the terms of the Commission’s request, the EBA took as a starting point for the development of its technical advice to the Commission the criteria and factors proposed by ESMA in section 2.24 (Product intervention) of its MiFID II/MiFIR Consultation Paper.

This paper sets out the criteria and factors proposed by the EBA, including explanatory notes to provide the rationale for each deviation. The EBA considers some criteria not to be applicable to structured deposits (such as those related to the price formation process), while others were modified (such as those related to the degree of complexity), and still others were added.

Background

1. In its founding regulation, the EBA is tasked with “foster[ing] depositor and investor protection (Article 8 (f) and (h)); “monitor[ing] new and existing financial activities and adopt[ing] guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practices (Article 9(2)); “contribut[ing] to strengthening the European system of national deposit guarantee schemes” (Article 26); as well as “develop[ing] common methodologies for assessing the effect of particular products or distribution processes on an institution’s financial position and on depositors, investors and customer information” (Article 32(2)(c)). Article 9(5) of this regulation also gives the EBA the power to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in specified cases and under certain conditions.¹
2. In the context of this general mandate, the EBA has been given a specific mandate in Article 39(2) of the Regulation (EU) No 600/2014 (“MiFIR”) to “monitor the market for structured deposits which are marketed, distributed or sold in the Union.”² In addition, Article 41(1) of MiFIR provides that “EBA may [...] temporarily prohibit or restrict in the Union: (a) the marketing, distribution or sale of certain structured deposits or structured deposits with certain specified features; or (b) a type of financial activity or practice. A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by EBA.” According to Article 41(2) EBA shall take such decisions when: (a) the proposed action addresses 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 in the Union; (b) regulatory requirements under Union law that are applicable to the relevant structured deposit or activity do not address the threat; and (c) a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat.³

¹ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 1).

² Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

³ Structured deposit is defined in Article 3 (43) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II) as a deposit as defined in point (c) of Article 2(1) of Directive 2014/49/EU of the European Parliament and of the Council, which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as:

(a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor;

(b) a financial instrument or combination of financial instruments;

(c) a commodity or combination of commodities or other physical or non-physical non-fungible assets;

3. Similar mandate and intervention powers are foreseen for national competent authorities (“NCAs”) in Articles 39(3) and 42 of MiFIR, in respect of structured deposits which are marketed, distributed or sold in or from their Member State.
4. The EBA received on 15 May 2014 a request from the Commission to provide technical advice on criteria and factors for intervention powers concerning structured deposits. The request is pursuant to Article 40(8), 41(8) and 42(7) of MiFIR, in which the Commission is empowered to adopt delegated acts specifying criteria and factors to be taken into account by ESMA, EBA and NCAs in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union.

(d) a foreign exchange rate or combination of foreign exchange rates.

Please also note that the above reference in MiFID II to "point (c) of Article 2(1) of Directive 2014/49/EU of the European Parliament and of the Council" should be read as "point (3) of Article 2(1) of ...", because points in Article 2(1) of this Directive are marked as numbers (1, 2, 3, etc.) and not as letters (a, b, c, etc.).

EBA analysis

5. The Commission requested a similar technical advice on criteria and factors for intervention powers concerning financial instruments from ESMA, and ESMA included it in section 2.24 (Product intervention) of the MiFID II/MiFIR Consultation Paper published in May 2014.⁴
6. Given the fact that MiFIR establishes an identical framework for intervention powers in respect of structured deposits and financial instruments, factors and criteria to be taken into account for the exercise of such powers for structured deposits should be similar to those set for financial instruments. Therefore and in accordance with the terms of the Commission's request, the EBA took as a starting point for the development of its technical advice to the Commission the criteria and factors proposed by ESMA in section 2.24 (Product intervention) of the MiFID II/MiFIR Consultation Paper.
7. The EBA considered the criteria and factors proposed by ESMA and their application to structured deposits. The EBA generally agrees that the structure, criteria and factors proposed in the MiFID II/MiFIR Consultation Paper also apply to structured deposits. Notwithstanding the fact that structured deposits might present lower risks for investors than most financial instruments - as a result of two features that are part of the definition of a structured deposit: coverage by a deposit guarantee scheme and full repayment at maturity - the EBA considers that in exceptional circumstances most of the criteria proposed for financial instruments are still applicable. However, the EBA proposes several amendments to address the specificities of structured deposits.
8. The criteria and factors proposed by the EBA are set out below, while a detailed comparison with the criteria and factors proposed by ESMA is provided in Annex 1, including explanatory notes that set out the rationale for each deviation. By way of overview, the proposed changes are as follows:
 - a) Criteria that the EBA considers not to be applicable to structured deposits have been deleted (these are outlined in Annex 1);
 - b) Criteria that the EBA considers relevant for structured deposits that do not apply to financial instruments have been added. These include the following criteria:
 - i. The coverage level defined in the Deposit Guarantee Schemes Directive⁵ and the average amount invested by each client in the structured deposit – included in section ii ('size of the potential problem or detriment');

⁴see: [http://www.esma.europa.eu/system/files/2014-549 - consultation paper mifid ii - mifir.pdf](http://www.esma.europa.eu/system/files/2014-549_-_consultation_paper_mifid_ii_-_mifir.pdf)

⁵ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

- ii. The eligibility for coverage by a deposit guarantee scheme – included in section iii ('type of clients involved');
- c) Criteria that the EBA considers appropriate for structured deposits but were not explicitly included in the criteria proposed by ESMA have been added. These include the following:
- i. The fact that the value of the underlying is no longer available or reliable – included in section v ('particular features or underlying components');
 - ii. The fact that early withdrawal is not allowed – included in section vii ('the ease and cost for investors to exit a structured deposit');
 - iii. New section xiii) 'The risk of disruption to financial institutions deemed to be important to the whole or part of the financial system of the EU or, in relation to NCAs' powers only, to the national financial system of the Member State of the NCA posed by a structured deposit or practice or activity'. Under this factor, more detailed elements to be considered could include:
 - the hedging of the structured deposit;
 - the relevance of the structured deposit as a funding source for the financial institution;
 - the reputational risks posed by the structured deposit or practice or activity to the financial institution;
 - iv. Additional elements to be considered when evaluating the performance calculation complexity - included in section i. c.:
 - the fact that the return is dependent on the performance of one or more underlyings which might in turn be affected by other factors;
 - the fact the return depends not only on the values of the underlying at the initial and maturity (or interest payment) dates, but also on the values during the lifetime of the product (path dependency).
- d) Replacement of the term 'financial instrument' by 'structured deposit' across all criteria.

Draft Technical advice on possible delegated acts on criteria and factors for intervention powers concerning structured deposits under Article 41 and Article 42 of Regulation (EU) No 600/2014 (MiFIR)

Scope

1. Articles 41(1) and 42(1) of the Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (“MiFIR”) empower the EBA and national competent authorities (“NCAs”) to temporarily prohibit or restrict in the Union, or, in the case of NCAs, in or from that Member State: (a) the marketing, distribution or sale of certain structured deposits or structured deposits with certain specified features; or (b) a type of financial activity or practice.
2. The EBA developed a list of criteria and factors that should be taken into consideration by EBA and NCAs when assessing whether there is a significant investor protection concern, a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union, and whether they should exercise their intervention powers.
3. This list is based on the criteria developed by ESMA in relation to financial instruments and modified, namely to reflect specificities of structured deposits as opposed to financial instruments. The list of criteria and factors slightly differs in the structure and numbers from the list developed by ESMA and therefore Annex 1 provides a table for easy comparison of both lists.
4. The factors and criteria should not apply cumulatively, i.e. not all factors would need to be present when EBA or NCAs are determining the need for intervention. Depending on the severity of the issue at hand, an intervention may be justifiable where only a subset of the criteria is met.
5. In accordance with the overall conditions for intervention specified under Articles 40, 41 and 42 of MiFIR, ESMA, EBA and NCAs should also be able to intervene in new instruments, services or activities that may not meet these factors or criteria or, conversely, not necessarily

intervene if given criteria are met but overall detriment is not foreseen or detected, or the relevant proportionality test is not satisfied.

6. The criteria and factors presented in this consultation paper are generic, flexible, non-quantitative and non-exhaustive and, in line with the provision in the EBA mandate that relevant case law should be taken into account, are in accordance with the analysis made by the EU Court of Justice under case C-270/12, of 22 January 2014.⁶

Criteria and factors for intervention powers concerning structured deposits

The EBA considers that the following criteria are relevant:

- i. The degree of complexity of the structured deposit or type of financial 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. 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 underlyings which might in turn be affected by other factors;
 - the return depends not only on the values of the underlying at the initial and maturity (or interest payment) dates, but also on the values during the lifetime of the product (path dependency);
 - d. the nature and scale of any risks;
 - e. whether the structured deposit 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 an issuance of structured deposits;
 - b. number of clients, investors or market participants involved;
 - c. relative share the product has in investors' portfolios;

⁶ EU Court of Justice case C-270/12, of 22 January 2014, relates to the “[c]riteria and factors to be taken into account in determining when adverse events or developments and threats arise” in the context of the Commission Delegated Regulation (EU) No 918/2012 on short selling and certain aspects of credit default swaps.

- 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 issuance;
 - g. number of institutions involved;
 - h. growth of the market or sales;
 - i. the average amount invested by each client in the structured deposit; and
 - j. the coverage level defined in the Deposit Guarantee Schemes Directive.
- iii. The type of clients involved in an activity or practice or to whom a structured deposit is marketed or 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 clients' skills and abilities, e.g. level of education, experience with similar financial products or selling practices;
 - c. features characterising clients' economic situation, e.g. income, wealth;
 - d. clients' core financial objectives, e.g. pension saving, home ownership financing;
 - e. whether the product or service is being sold to clients outside the intended target market, or the target market has not been adequately identified; and
 - f. the eligibility for coverage by a deposit guarantee scheme.
- iv. The degree of transparency of the structured deposit or type of financial 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 clients' attention but that do not necessarily reflect the suitability or overall quality of the instrument or service;
 - d. visibility of risks;
 - e. the use of product names 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 a structured deposit to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of structured deposit.

- v. The particular features or underlying components of the structured deposit 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 fact that the value of the underlying is no longer available or reliable.
- vi. The degree of disparity between expected return or benefit for investors and risk of loss in relation to the structured deposit, 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 exit a structured deposit. Under this factor, more detailed elements to be considered could include, for example:
 - a. the fact that early withdrawal is not allowed; and
 - b. 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 service provided.
- ix. The degree of innovation of a structured deposit, 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 structured deposit, activity or practice, e.g. embedding, triggering;
 - b. the degree of innovation relating to the distribution model/length of intermediation chain;
 - c. the extent of innovation diffusion, i.e. whether the structured deposit, activity or practice is innovative for particular categories of clients;
 - d. innovation involving leverage;
 - e. the opacity of underlying; and
 - f. the experience of the market with similar structured deposits or selling practices.
- x. The selling practices associated with the structured deposit. 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;
 - c. the assumed investment purposes; and
 - d. whether the decision to buy is secondary or tertiary following another purchase.
 - xi. The situation of the issuer of a structured deposit. Under this factor, more detailed elements to be considered could include, for example:
 - a. the financial situation of the issuer or any guarantor; and
 - b. the transparency of the situation of the issuer or guarantor.
 - 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 structured deposits 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 structured deposits 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 structured deposit 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;
 - activities or practices pose a particularly high risk to the resilience or smooth operation of markets and their infrastructure;
 - c. a structured deposit or activity or practice would lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;
 - d. a product or practice or activity poses particular risks to the market or payment systems infrastructure;
 - e. a structured deposit or practice would threaten the investors' confidence in the financial system; and
 - f. a structured deposit or practice would leave the national economy vulnerable to risks.
 - xii. The risk of disruption to financial institutions deemed to be important to the whole or part of the financial system of the EU or, in relation to NCAs' powers only, to the national
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financial system of the Member State of the NCA posed by a structured deposit or practice or activity. Under this factor, more detailed elements to be considered could include, for example:

- a. the hedging strategy pursued by the financial institution in relation to the issuance of the structured deposit, including the mispricing of the capital guarantee at maturity;
- b. the relevance of the structured deposit as a funding source for financial institutions; and
- c. the reputational risks posed by the structured deposit or practice or activity to the financial institution.

Consultation questions

Question 1: Do you agree with the criteria and factors proposed?

Question 2: Are there any additional criteria and/or factors that you would suggest adding?

Accompanying documents

Annex 1: Comparison table on intervention criteria for structured deposits vs. financial instruments

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed herewith)	Explanatory notes
4. ESMA considers that the following criteria are relevant:		
I. The degree of complexity of the financial instrument or type of financial activity or practice. Under this factor, more detailed elements to be considered could include, for example:	i. The degree of complexity of the <u>structured deposit</u> or type of financial 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. multiple layers of costs and charges;	b. non-transparent costs and charges, arising, for example, from multiple layers ;	A different wording is proposed to clarify the fact that a relevant criterion is not only the potential existence of different layers of costs, but the fact that costs and charges may not be transparent for clients. This does not represent a substantial change in relation to ESMA’s draft technical advice, as this aspect was also addressed in paragraph 4 of the said advice.
c. the performance calculation complexity;	c. the performance calculation complexity. <u>Under this criterion, more detailed elements to be considered could include, for example, whether:</u>	The EBA considers useful to mention some specific elements that could be taken into account when evaluating the performance calculation complexity of a structured deposit.
	– <u>the return is dependent on the performance of one or more underlyings which might in turn be affected by other factors;</u>	The fact that the return may be dependent on more than one underlying or on underlyings which are dependent on other factors could be taken into account when assessing the level of complexity of a structured deposit.
	– <u>the return depends not only on the values of the</u>	The fact that the return may be path dependent (i.e.

	<u>underlying at the initial and maturity (or interest payment) dates, but also on the values during the lifetime of the product (path dependency);</u>	dependent not only on the values of the underlying at the <u>initial and maturity and/or interest payment dates, but also on the values during the lifetime of the product</u>) could be taken into account when assessing the level of complexity of a structured deposit.
d. the nature and scale of any risks;		
e. whether the instrument or service is bundled with other products or services; and	e. whether the <u>structured deposit</u> 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 financial instrument;	a. the notional value of <u>an issuance of structured deposits</u> ;	An alignment of the wording of this criterion with Article 41(8) (b) of MiFIR is proposed.
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 issuance;		
g. number of intermediaries involved; and	g. number of <u>institutions</u> involved;	
h. growth of the market or sales.		
	i. <u>the average amount invested by each client in the structured deposit</u> ;	The EBA considers the average amount that clients may have invested in the structured deposit to be a relevant criterion. An indicator of these amounts could be, for instance, the existence of a minimum subscription amount. The existence of coverage by a deposit guarantee scheme up to a certain amount is one of the reasons why this criterion is relevant for structured

		deposits.
	j. <u>the coverage level defined in the Deposit Guarantee Schemes Directive.</u>	<u>The fact that structured deposits are covered by deposit guarantee schemes is a relevant factor to take into account in the assessment of the need for intervention. In particular, the coverage level defined in the DGSD is relevant to assess the severity of a potential problem.</u>
iii. The type of clients involved in an activity or practice or to whom a financial instrument is marketed or sold. Under this factor, more detailed elements to be considered could include, for example:	iii. The type of clients involved in an activity or practice or to whom a <u>structured deposit</u> is marketed or 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 clients' skills and abilities, e.g. level of education, experience with similar financial instruments or selling practices;	b. features characterising clients' skills and abilities, e.g. level of education, experience with similar financial <u>products</u> or selling practices;	
c. features characterising clients' economic situation, e.g. income, wealth;		
d. clients' core financial objectives, e.g. pension saving, home ownership financing; and		
e. whether the instrument or service is being sold to clients outside the intended target market.	e. whether the instrument or service is being sold to clients outside the intended target market, <u>or where the target market has not been adequately identified;</u>	The criterion can only be made to apply if it cannot be arbitrated by the target market not having been identified in the first place .
	f. <u>the eligibility for coverage by a deposit guarantee scheme.</u>	The fact that structured deposits are covered by deposit guarantee schemes is a relevant factor to take into account in the assessment of the need for intervention. With regard to the type of client involved, the eligibility for such coverage is an additional element that should be taken into consideration.
iv. The degree of transparency of the financial instrument or type of financial activity or practice. Under	iv. The degree of transparency of the <u>structured deposit</u> or type of financial activity or practice. Under	

<p>this factor, more detailed elements to be considered could include, for example:</p>	<p>this factor, more detailed elements to be considered could include, for example:</p>	
<p>a. the type and transparency of the underlying;</p>		
<p>b. any hidden costs and charges;</p>		
<p>c. the use of features that draw clients' attention but that do not necessarily reflect the suitability or overall quality of the instrument or service;</p>		
<p>d. visibility of risks; and</p>		
<p>e. the use of product names that imply greater levels of safety and/or return than are actually possible or likely.</p>		
<p>v. The particular features or underlying components of the financial instrument or transaction including any leverage a product or practice provides. Under this factor, more detailed elements to be considered could include, for example:</p>	<p>v. The particular features or underlying components of the <u>structured deposit</u> including any leverage a product or practice provides. Under this factor, more detailed elements to be considered could include, for example:</p>	
<p>a. the leverage inherent in the product;</p>		
<p>b. the leverage due to financing; and</p>		
<p>c. the features of securities financing transactions.</p>	<p>c. the features of securities financing transactions.</p>	<p>The criterion of 'the features of securities financing transactions' proposed for financial instruments is not applicable to structured deposits.</p>
	<p>c. <u>the fact that the value of the underlying is no longer available or reliable.</u></p>	<p>This new criterion applies to situations such as market manipulation, market disruption, etc., i.e. where the price or value of the underlying is no longer determined according to legitimate market forces of supply and demand; and/or market participants are no longer able to rely on the prices formed in the market. This criterion is based in part on the wording of ESMA criteria 5.iii, however it addresses all situations where the value of the underlying is no longer available or reliable (and not only the ones derived</p>

		from activities or practices related to structured deposits).
vi. The degree of disparity between expected return or benefit for investors and risk of loss in relation to the financial instrument, activity or practice. Under this factor, more detailed elements to be considered could include, for example:	vi. The degree of disparity between expected return or benefit for investors and risk of loss in relation to the <u>structured deposit</u> , activity or practice.	
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 an instrument. Under this factor, more detailed elements to be considered could include, for example:	vii. The ease and cost for investors to exit a structured deposit. Under this factor, more detailed elements to be considered could include, for example:	
a. the bid/ask spread;	a. the bid/ask spread;	Not applicable to structured deposits.
	a. the fact that early withdrawal is not allowed;	Exit barriers of the kind proposed in this criterion are relevant criteria for structured deposits, because many of these products do not allow for early withdrawal.
b. the frequency of trading availability;	b. the frequency of trading availability;	Not applicable to structured deposits.
c. the issuance size and size of the secondary market;	c. the issuance size and size of the secondary market;	The reference to 'secondary market' is not applicable to structured deposits. The 'issuance size' is already addressed in section ii above; however, it is not considered as relevant for the assessment of the ease and cost for investors to <u>exit a structured deposit</u>
d. the presence or absence of liquidity providers or secondary market makers;	d. the presence or absence of liquidity providers or secondary market makers;	Not applicable to structured deposits.
e. the features of the trading system; and	e. the features of the trading system; and	Not applicable to structured deposits.
f. any other barriers to exit.	b.	
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 service provided.		
ix. The degree of innovation of a financial instrument, an activity or practice. Under this factor, more detailed elements to be considered could include, for example:	ix. The degree of innovation of a <u>structured deposit</u> , an activity or practice.	
a. the degree of innovation related to the structure of the financial instrument, activity or practice, e.g. embedding, triggering;	a. the degree of innovation related to the structure of the <u>structured deposit</u> , 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”;	b. the degree of innovation relating to the distribution model/length of intermediation chain;	
c. the extent of innovation diffusion, i.e. whether the financial instrument, activity or practice is innovative for particular categories of clients;	c. the extent of innovation diffusion, i.e. whether the <u>structured deposit</u> , activity or practice is innovative for particular categories of clients;	
d. innovation involving leverage;		
e. the opacity of underlying; and		
f. the experience of the market with similar financial instruments or selling practices.	f. the experience of the market with similar <u>structured deposits</u> or selling practices.	
x. The selling practices associated with the financial instrument. Under this factor, more detailed elements to be considered could include, for example:	x. The selling practices associated with the <u>structured deposit</u> . 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;		
c. the assumed investment purposes; and		
d. whether the decision to buy is secondary or tertiary following another purchase.		
xi. The situation of the issuer of a financial instrument. Under this factor, more detailed elements to be considered could include, for example:	xi. The situation of the issuer of a <u>structured deposit</u> . Under this factor, more detailed elements to be considered could include, for example:	
a. the credit-worthiness of the issuer or any guarantor; and	a. the <u>financial situation</u> of the issuer or any guarantor; and	The criterion ‘financial situation’ is a more appropriate term to use than the criterion of ‘creditworthiness’ proposed for financial instruments, as the

		former allows for a range of situations to be covered that is wider than the strict evaluation of the repayment capability of the issuer.
b. the transparency of the situation of the issuer or guarantor.		
5. When considering factors in relation to a potential threat to the orderly functioning and integrity of financial markets or commodity markets and to the stability of the whole or part of the financial system, ESMA, EBA or NCAs should generally consider whether:	xii. The risks to the orderly functioning and integrity of financial markets. Under this factor, more detailed elements to be considered could include, for example, whether:	EBA considers that all criteria should be taken into consideration in relation to both pre-requisites for intervention (consumer protection and financial stability). In fact, this is also ESMA's view, as stated in point 6. of ESMA's draft advice. Therefore, it is suggested not to keep this division, and to replace this paragraph 5 by a paragraph xii. 'The risks to the orderly functioning and integrity of financial markets'.
i. there was insufficient, or insufficiently reliable, information about a financial instrument to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of instrument;	i. there was insufficient, or insufficiently reliable, information about a <u>structured deposit</u> to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of <u>structured deposit</u> ;	EBA considers this to be a transparency issue, so we propose this criterion to be reallocated under point 4 iv.
ii. the financial instruments or activities pose a high risk to performance of transactions entered into by participants or investors in the market or product in question;	<u>a. the structured deposits</u> or activities pose a high risk to performance of transactions entered into by participants or investors in the market or product in question;	
iii. the activities or practices would significantly compromise the integrity of the price formation process in the market concerned so that: a) the price or value of the financial instrument in question was no longer determined according to legitimate market forces of supply and demand; and/or b) market participants were no longer able to rely on the prices formed in the market or volumes of trading as a basis for their investment decisions;	iii. the activities or practices would significantly compromise the integrity of the price formation process in the market concerned so that: a) the price or value of the financial instrument in question was no longer determined according to legitimate market forces of supply and demand; and/or b) market participants were no longer able to rely on the prices formed in the market or volumes of trading as a basis for their investment decisions;	This factor speaks to an individual seeking to manipulate the level of an index. This would reflect trading behaviour and something to be treated in its own right rather than something which is inherent in a structured deposit. For example, we consider an individual could not seek to manipulate the level of an index by investing in a structured deposit. However, these product intervention powers should protect clients holding structured deposits where the underlying index on

		which any return is based has been subject to manipulation. The addition of criteria v. c – the fact the value of the underlying is no long available or reliable – seeks to, amongst other things, address this point.
iv. the characteristics of financial instruments 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 financial instruments for:	<u>b. the characteristics of structured deposits</u> 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 <u>structured deposit</u> for:	
a. any fraud or dishonesty;		
b. misconduct in, or misuse of information, relating to a financial market;		
c. handling the proceeds of crime;		
d. the financing of terrorism; or		
e. facilitating money laundering;		
v. activities or practices pose a particularly high risk to the resilience or smooth operation of markets and their infrastructure;		
vi. a financial instrument or activity or practice would lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;	<u>c. a structured deposit</u> or activity or practice would lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;	
vii. the financial instrument or practice or activity poses a high risk of disruption to financial institutions deemed to be important to the financial system of the EU or, in relation to NCAs' powers only, to the national financial system of the Member State of the NCA;	<u>xiii. the risk of disruption to financial institutions</u> deemed to be important to the whole or part of the financial system of the EU or, in relation to NCAs' powers only, to the national financial system of <u>the Member State-of the NCA posed by a structured deposit</u> or practice or activity. <u>Under this factor, more detailed elements to be considered could include, for example:</u>	The disruption to financial institutions that are deemed important to whole or part of the financial system of the EU, or of a Member State, is a source of significant risk to investors and to financial stability. Several criteria can be derived from this risk, which are proposed under new section xiii.
	<u>a. the hedging strategy pursued by the financial institution in relation to the issuance of the structured deposit;</u>	This is an element that could be taken into account when evaluating the risk of disruption to a financial institution posed by a structured deposit.
	<u>b. the relevance of the structured deposit as a funding source for the</u>	This is an element that could be taken into account when

	<u>financial institution;</u>	evaluating the risk of disruption to a financial institution posed by a structured deposit.
	<u>c. the reputational risks posed by the structured deposit or practice or activity to the financial institution;</u>	This is an element that could be taken into account when evaluating the risk of disruption to a financial institution posed by a structured deposit.
viii. a product or practice or activity poses particular risks to the market or payment systems infrastructure, including clearing and settlement and trading systems); and	xii. <u>d. a product or practice or activity poses particular risks to the market or payment systems infrastructure, including clearing and settlement and trading systems); and</u>	As structured deposits are not traded, cleared or settled products, references to a respective criterion, as is proposed for financial instruments, have been removed for structured deposits. According to the new proposed structure, this criterion would be renumbered to xii. d.
ix. a financial instrument or practice would threaten the investors' confidence in the financial system.	xii. <u>e. a structured deposit or practice would threaten the investors' confidence in the financial system.</u>	According to the new proposed structure, this criterion would be renumbered to xii. e.
	xii. f. a structured deposit or practice would leave the national economy vulnerable to risks.	When the size of the potential problem or detriment is large enough, or the number of involved customers or involved financial institutions is large enough, structured deposits may pose a threat to the orderly functioning and integrity of the national economic system.