



EIOPA-CP-14/064  
27 November 2014

**Consultation Paper**

**on**

**Product Intervention Powers under the  
Regulation on Key Information  
Documents for Packaged Retail and  
Insurance-Based Investment Products  
(PRIIPs)**

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## Responding to the Consultation Paper

EIOPA welcomes comments on the Consultation Paper on Product Intervention Powers under the Regulation on key information documents for packaged retail and insurance-based investment products (hereinafter the 'PRIIPs Regulation')<sup>1</sup>.

EIOPA invites comments on any aspect of this paper and in particular on the specific questions summarised in Annex II. Comments are most helpful if they:

- respond to the question stated, where applicable;
- contain a clear rationale; and
- describe any alternatives EIOPA should consider.

Please send your comments to EIOPA in the provided Template for Comments, by email [CP-14-064@eiopa.europa.eu](mailto:CP-14-064@eiopa.europa.eu), by 27 February 2015.

Contributions not provided in the provided template for comments, or sent to a different email address, or after the deadline will not be processed.

### Publication of responses

Contributions received will be published on EIOPA's public website unless you request otherwise in the respective field in the template for comments. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.

Please note that EIOPA is subject to Regulation (EC) No 1049/2001 regarding public access to documents and EIOPA's rules on public access to documents<sup>2</sup>.

Contributions will be made available at the end of the public consultation period.

### Data protection

Please note that personal contact details (such as name of individuals, email addresses and phone numbers) will not be published. They will only be used to request clarifications if necessary on the information supplied.

EIOPA, as a European Authority, will process any personal data in line with Regulation (EC) No 45/2001 on the protection of the individuals with regards to the processing of personal data by the Community institutions and bodies and on the free movement of such data. More information on data protection can be found at <https://eiopa.europa.eu/> under the heading 'Legal notice'.

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<sup>1</sup> 2012/0169(COD). At the time of publication, the final version of the PRIIPs Regulation had not been published in the Official Journal of the EU.

<sup>2</sup> [Public Access to Documents](#)

## Reasons for publication

### Scope and aim of this Consultation Paper

With this Consultation Paper, EIOPA is preparing its technical advice, as requested by the Commission<sup>3</sup>, 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 takes into account the specificities of insurance-based investment products and the work undertaken by ESMA and EBA on product intervention powers in respect to financial instruments and structured deposits. As the policy making process on product intervention powers is not in the early stages and the policy options are limited because of Article 16(8) and 17(7) of the PRIIPs Regulation, EIOPA chose to consult on its draft policy proposal and not publish an initial discussion paper.

In addition to its draft policy proposal, EIOPA elaborates on possible costs and benefits of the proposed advice in the second section of the Consultation Paper. This may aid the Commission in preparing an impact assessment on the delegated act it shall adopt.

### Background information

The PRIIPs Regulation confers upon EIOPA and the national competent authorities (NCAs) specific intervention powers<sup>4</sup> in relation to insurance-based investment products<sup>5</sup>. For EIOPA, the intervention powers under the PRIIPs Regulation relate to its product intervention powers under Article 9(5)<sup>6</sup> of Regulation (EU) No 1094/2010<sup>7</sup> (hereinafter the 'EIOPA Regulation').

Recital 25 of the PRIIPs Regulation states that the NCAs' intervention powers and EIOPA's intervention powers should be complemented with an explicit mechanism for temporarily prohibiting or restricting the marketing, distribution and sale of insurance-based investment products giving rise to serious concerns regarding investor protection, orderly functioning and integrity of financial markets, or the stability of the whole or part of the financial system, together with appropriate coordination and contingency powers for EIOPA.

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<sup>3</sup> 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.

<sup>4</sup> For EIOPA and the NCAs - Articles 16 and 17 of the PRIIPs Regulation respectively.

<sup>5</sup> According to Article 4(2) PRIIPs Regulation, 'insurance-based investment product' means an insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations. The Regulation covers insurance-based investment products, but does not apply to the in Article 2 PRIIPs Regulation referred non-life insurance products, "pure" protection insurance products and officially recognised occupational pension schemes (Article 2 (2.) PRIIPs Regulation).

<sup>6</sup> Article 9 paragraph 5 subparagraph 1 of the Regulation 1094/2010 reads: "The Authority may 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 the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or, if so required, in the case of an emergency situation in accordance with and under the conditions laid down in Article 18".

<sup>7</sup> Regulation (EU) No 1094/2010 of the European parliament and of the Council of 24 November 2010 establishing a European supervisory authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

In accordance with Articles 16 and 17 of the PRIIPs Regulation, NCAs and, in exceptional cases, EIOPA, are required to take a decision to temporarily prohibit or restrict:

- the marketing, distribution or sale of certain insurance-based investment products or insurance-based investment products with certain specified features; or
- a type of financial activity or practice of an insurance or reinsurance undertaking.

The PRIIPs Regulation specifies additional conditions that need to be fulfilled when NCAs, and, in exceptional cases, EIOPA, take a decision under the PRIIPs Regulation to temporarily prohibit or restrict a product. But, with this Consultation Paper, EIOPA will **not** cover the additional conditions set out by the PRIIPs Regulation below:

A NCA may take a prohibiting or restricting decision under the PRIIPs Regulation if it is satisfied on reasonable grounds that:

- The proposed action relates to criteria and factors, such as the ones discussed in this Consultation Paper;
- Existing regulatory requirements under Union law applicable to the insurance-based investment product or activity or practice do not sufficiently address the risks and the issue would not be better addressed by improved supervision or enforcement of existing requirements;
- The action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the insurance-based investment product or activity or practice;
- The NCA has properly consulted NCAs in other Member States that may be significantly affected by the action; and
- The action does not have a discriminatory effect on services or activities provided from another Member State.

EIOPA may take a prohibiting or restricting decision under the PRIIPs Regulation only if all of the following conditions are fulfilled:

- The proposed action relates to the criteria and factors discussed in this Consultation Paper;
- Regulatory requirements under Union legislation that are applicable to the relevant insurance-based investment product or activity do not address the threat; and
- An NCA (or NCAs) has not taken action to address the threat or the action that has been taken does not adequately address the threat.

### **Invitation for feedback**

EIOPA invites comments on any aspect of this paper and in particular on the specific questions summarised in Section 4: Annex II. Comments are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives EIOPA should consider.

# 1. Draft Technical Advice

## Request from the Commission for technical advice

- 1.1. EIOPA is invited to provide technical advice on measures specifying the criteria and factors to be taken into account by NCAs and EIOPA 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.

## Framework for product intervention powers under the PRIIPs Regulation

- 1.2. The criteria and factors for 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 can be found in Article 16(8) and 17(7) of the PRIIPs Regulation.
- 1.3. Under Article 16(8) of the PRIIPs Regulation, the criteria and factors to be taken into account by EIOPA 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 are referred to in Article 16(2)(a) of the PRIIPs Regulation.
- 1.4. In particular, the PRIIPs Regulation sets out the following criteria and factors:
  - The degree of complexity of the insurance-based investment product and the relation to the type of investors to whom it is marketed and sold;
  - The size or the notional value of the insurance-based investment products;
  - The degree of innovation of the insurance-based investment product, activity or a practice; and
  - The leverage a product or practice provides.
- 1.5. Under Article 17(7) of the PRIIPs Regulation, the criteria and factors to be taken into account by NCAs 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 financial system within at least one Member State are referred to in Article 17(2)(a) of the PRIIPs Regulation.
- 1.6. In particular, the criteria and factors include:
  - The degree of complexity of an insurance-based investment product and the relation to the type of investors to whom it is marketed and sold;
  - The degree of innovation of an insurance-based investment product, an activity or a practice;
  - The leverage a product or practice provides;
  - In relation to the orderly functioning and integrity of financial markets, the size or the notional value of an insurance-based investment product.

## Analysis

- 1.7. The Commission requested EIOPA to liaise closely with and consult ESMA<sup>8</sup> and EBA<sup>9</sup> when providing its technical advice to the Commission. ESMA and EBA have published Consultation Papers<sup>10</sup> in the context of the product intervention powers under Regulation (EU) No 600/2014 of the European Parliament and of the Council<sup>11</sup>.
- 1.8. Given that:
- Regulation (EU) No 600/2014 establishes an identical framework for NCAs, ESMA and EBA intervention powers in respect to financial instruments and structured deposits; and
  - The factors and criteria for the exercise of product intervention powers of NCAs and EIOPA with respect to insurance-based investment products should be similar (if not identical) to the criteria and factors for the exercise of intervention powers in the context of financial instruments and structured deposits.
- 1.9. 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 in their Consultation Papers.**
- 1.10. 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<sup>12</sup> specific for insurance-based investment products.
- 1.11. It is essential that product intervention powers are dynamic enough to enable NCAs and 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 foreseen or detected. Therefore, criteria and factors should be non-exhaustive and general 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.
- 1.12. EIOPA appreciates that the concept of innovation per se should not be the sole reason for making use of product intervention powers, fully acknowledging that innovation can be a driving force for development and prosperity. However, innovation can, depending on the circumstances, be a cause for detriment to investors or the financial market or system. For that reason and because

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<sup>8</sup> Request for ESMA technical advice concerning the Markets in Financial Instruments Directive and Regulation (MiFID 2) [http://ec.europa.eu/internal\\_market/securities/docs/isd/mifid/140423-esma-request\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/isd/mifid/140423-esma-request_en.pdf)

<sup>9</sup> Request for EBA technical advice concerning the Markets in Financial Instruments Directive and Regulation (MiFID 2) [http://ec.europa.eu/internal\\_market/securities/docs/isd/mifid/140516-request-for-eba-technical-advice-concerning-mifid-2\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/isd/mifid/140516-request-for-eba-technical-advice-concerning-mifid-2_en.pdf)

<sup>10</sup> ESMA published the MiFID II/ MiFIR Consultation Paper in May 2014; EBA published the Consultation Paper in August 2014.

<sup>11</sup> 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 L173, 12.6.2014, p. 84).

<sup>12</sup> See table below.

innovation is provided by the PRIIPs Regulation as an aspect of the criteria and factors under the Commission's possible Delegated Act, EIOPA has included the innovation aspect in its draft technical advice as well.

- 1.13. EIOPA's draft technical advice refers to insurance-based investment products. Therefore, the wording relating to the products has been aligned. In addition, EIOPA proposes several amendments in its technical advice to address the specificities of insurance-based investment products. Although EBA added examples specific to structured deposits, not all these examples apply to insurance-based investment products e.g. coverage under EU legislation on Deposit Guarantee Schemes. EIOPA included these examples in its technical advice with a reference to existing national insurance guarantee schemes, bearing in mind that there is currently no EU Insurance Guarantee Schemes Directive.
- 1.14. Furthermore, insurance-based investment products are based on a contractual relationship between the investor and the insurance undertaking. The ease and cost for investors to switch or sell is therefore dependent on this contractual relationship and not on a secondary market.
- 1.15. The PRIIPs Regulation uses investor when referring to policyholder. To be consistent with the PRIIPs Regulation, the draft technical advice uses the term investor.

### **Draft Technical Advice**

1.16. Against this background, EIOPA suggests drafting the technical advice by clarifying the following:

- 1.16.1. **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;
  - (d) the nature and scale of any risks;
  - (e) whether the insurance-based investment product or service is bundled with other products or services; and
  - (f) the complexity of any terms and conditions.
- 1.16.2. **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 issuance;

- (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; and
- (j) the coverage level defined in national insurance guarantee schemes law.

1.16.3. **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. pension saving;
- (e) whether the instrument or service is significantly 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.

1.16.4. **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 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 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.

1.16.5. **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.

1.16.6. **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.

1.16.7. **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:

(a) the fact that early withdrawal is not allowed; and

(b) any other barriers to exit.

1.16.8. **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.

1.16.9. **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.

1.16.10. **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.

- 1.16.11. **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.
- 1.16.12. 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**, EIOPA or NCAs should generally consider 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:
    - (i) any fraud or dishonesty;
    - (ii) misconduct in, or misuse of information, relating to a financial market;
    - (iii) handling the proceeds of crime;
    - (iv) the financing of terrorism; or
    - (v) 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.
- 1.16.13. **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 EU or, in relation to NCAs' powers only, to the national financial system of the Member State of the NCA.

Questions to stakeholders:

Q1: Do you agree with the criteria and factors proposed?

Q2: Are there any additional criteria and/or factors that you would suggest adding?

Q3: Is there evidence that certain criteria do not apply under any circumstances to insurance-based investment products? Please elaborate.

## 2. Possible costs and benefits of the draft Technical Advice measures

- 2.1. 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.
- 2.2. EIOPA wants to support its technical advice with data and evidence on the potential impacts of proposals identified. This Consultation Paper represents a good opportunity for stakeholders to comment both on the outline high level analysis of costs and benefits and to provide evidence and data when responding to questions to support arguments or cases put forward. EIOPA will make public all responses to this consultation<sup>13</sup> and publish reasoned feedback on responses received. The provision of such data and evidence may aid the Commission in preparing an impact assessment on the measures it shall adopt.
- 2.3. 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 wants to provide more detail with its technical advice and help to avoid inconsistencies.
- 2.4. 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.
- 2.5. 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.
- 2.6. The baseline scenario already has factors and criteria that need to be considered. Adding certain factors and criteria does neither change direct impacts like the impact in relation to regulatory compliance costs and administrative burden nor does it change indirect impacts.
- 2.7. The proposed list of non-exhaustive examples adds a level of detail to the criteria and factors, while at the same time allows for flexibility, when needed. **No major costs can be 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**. Even though the higher flexibility given by the list of non-exhaustive examples might seem to increase the level of uncertainty for insurance undertakings, the approach reduces cross-sectoral and cross-border uncertainties when NCAs want to make use of these powers. This can lead to a more effective supervision, increased

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<sup>13</sup> Unless the respondent requests otherwise, as explained under the section "Responding to the Consultation Paper".

level of protection of policyholders and ultimately more certainty for insurance undertakings.

- 2.8. To further gather input from market participants and interested parties, EIOPA has also included a specific question in this Consultation Paper related to the assessment of impacts. Respondents are invited in general to supply EIOPA with any data that they have related to the possible impacts of the proposals outlined.

Questions to stakeholders:

Q4: What would you estimate as the costs and benefits of the possible changes outlined in this Consultation?

Where possible, please provide estimates of one-off and ongoing costs of change, in Euros and relative to your turnover as relevant. If you have evidence on potential benefits of the possible changes, please consider both the short and longer term. As far as possible, please link the costs and benefits you identify to the possible changes that would drive these.

### 3. Annex I: Comparison table on intervention criteria

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
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 structured deposit 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>insurance-based investment product</u> or type of financial activity or practice of <u>an insurance or reinsurance undertaking</u> . Under this factor, more detailed elements to be considered could include, for example:	
a. the type and transparency of the underlying;	a. the type and transparency of the underlying;	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;	b. non-transparent costs and charges, arising, for example, from multiple layers;	No substantial differences between ESMA's and EBA's draft technical advice, while EBA clarifies 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 investors.
c. the performance calculation complexity;	c. the performance calculation complexity. Under this criterion, more detailed elements to be considered	c. the performance calculation complexity;	The draft Technical Advice is following ESMA's approach on this point, as the EBA's draft technical advice refers to

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
	could include, for example, whether:		structured deposits specifically and is not relevant for insurance-based investment products.
	- the return is dependent on the performance of one or more underlyings which might in turn be affected by other factors;		See above.
	- 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);		See above.
d. the nature and scale of any risks;	d. the nature and scale of any risks;	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 structured deposit is bundled with other products or services; and	e. whether the insurance-based investment product or service is bundled with other products or services; and	
f. the complexity of any terms and conditions.	f. the complexity of any terms and conditions.	f. the complexity of any terms and conditions.	
ii. The size of the potential problem or detriment. Under this factor, more detailed	ii. The size of the potential problem or detriment. Under this factor, more detailed	ii. The size of the potential problem or detriment. Under this factor, more detailed	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
elements to be considered could include, for example:	elements to be considered could include, for example:	elements to be considered could include, for example:	
a. the notional value of the financial instrument;	a. the notional value of an issuance of structured deposits;	a. the notional value of the <u>insurance-based investment product</u> ;	
b. number of clients, investors or market participants involved;	b. number of clients, investors or market participants involved;	b. number of clients, investors or market participants involved;	
c. relative share the product has in investors' portfolios;	c. relative share the product has in investors' portfolios;	c. relative share the product has in investors' portfolios;	
d. probability, scale and nature of any detriment, including the amount of loss potentially suffered;	d. probability, scale and nature of any detriment, including the amount of loss potentially suffered;	d. probability, scale and nature of any detriment, including the amount of loss potentially suffered;	
e. anticipated persistency of the problem or detriment;	e. anticipated persistency of the problem or detriment;	e. anticipated persistency of the problem or detriment;	
f. volume of the issuance;	f. volume of the issuance;	f. volume of the issuance;	
g. number of intermediaries involved; and	g. number of institutions involved;	g. number of intermediaries involved;	
h. growth of the market or sales.	h. growth of the market or sales;	h. growth of the market or sales;	
	i. the average amount invested by each client in the structured deposit; and	i. the average amount invested by each <u>investor</u> in the <u>insurance-based investment</u>	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
		product; and	
	j. the coverage level defined in the Deposit Guarantee Schemes Directive.	j. the coverage level defined in <u>national insurance guarantee schemes law</u> .	The addition by EBA was made to reflect the coverage by DGS under the Deposit Guarantee Schemes Directive. This factor makes sense in the case of structured deposits, as some of them are covered by the DGS and others are not. For insurance-based investment products the situation is different. Insurance guarantee schemes do not exist in all Member States.
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 structured deposit is marketed or sold. Under this factor, more detailed elements to be considered could include, for example:	iii. The type of <u>investors</u> involved in an activity or practice or to whom an <u>insurance-based investment product</u> 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;	a. whether the client is a retail client, professional client or eligible counterparty under MiFID;	a. whether the client is a retail client, professional client or eligible counterparty under MiFID;	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
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 products or selling practices;	b. features characterising <u>investors'</u> skills and abilities, e.g. level of education, experience with similar <u>insurance-based investment products</u> or selling practices;	
c. features characterising clients' economic situation, e.g. income, wealth;	c. features characterising clients' economic situation, e.g. income, wealth;	c. features characterising <u>investors'</u> economic situation, e.g. income, wealth;	
d. clients' core financial objectives, e.g. pension saving, home ownership financing; and	d. clients' core financial objectives, e.g. pension saving, home ownership financing;	d. <u>investors'</u> core financial objectives, e.g. pension saving;	Example of home ownership financing seems not be one of the core financial objectives of investors buying insurance-based investment products, therefore the example was deleted.
e. whether the instrument or service is being sold to clients outside the intended target market.	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	e. whether the instrument or service is <u>significantly</u> being sold to <u>investors</u> outside the intended target market, or the target market has not been adequately identified; and	Changed to align it with EIOPA's work on product oversight & governance arrangements.

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
	f. the eligibility for coverage by a deposit guarantee scheme.	f. the eligibility for coverage by <u>an insurance guarantee scheme, where national insurance guarantee schemes exist.</u>	The addition by EBA was made to reflect the coverage by DGS under the Deposit Guarantee Schemes Directive. This factor makes sense in the case of structured deposits, as some of them are covered by the DGS and others are not. For insurance-based investment products the situation is different. Insurance guarantee schemes do not exist in all Member States.
iv. The degree of transparency of the financial instrument or type of financial activity or practice. Under this factor, more detailed elements to be considered could include, for example:	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:	iv. The degree of transparency of the <u>insurance-based investment product</u> 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;	a. the type and transparency of the underlying;	a. the type and transparency of the underlying;	
b. any hidden costs and charges;	b. any hidden costs and charges;	b. any hidden costs and charges;	
c. the use of features that draw clients' attention but that do not necessarily reflect the	c. the use of features that draw clients' attention but that do not necessarily reflect the	c. the use of features that draw <u>investors'</u> attention but that do not necessarily reflect	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
suitability or overall quality of the instrument or service;	suitability or overall quality of the instrument or service;	the suitability or overall quality of the instrument or service;	
d. visibility of risks; and	d. visibility of risks;	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.	e. the use of product names that imply greater levels of safety and/or return than are actually possible or likely; and	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.	f. whether there was insufficient, or insufficiently reliable, information about an <u>insurance-based investment product</u> to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of <u>insurance-based investment products</u> .	
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	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:	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	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
example:		considered could include, for example:	
a. the leverage inherent in the product;	a. the leverage inherent in the product;	a. the leverage inherent in the product;	
b. the leverage due to financing; and	b. the leverage due to financing; and	b. the leverage due to financing; and	
c. the features of securities financing transactions.	c. the fact that the value of the underlying is no longer available or reliable.	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 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 structured deposit, 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>insurance-based investment product</u> , activity or practice. Under this factor, more detailed elements to be considered could include, for example:	
a. the structuring and other costs;	a. the structuring and other costs;	a. the structuring and other costs;	
b. the disparity in relation to issuer's risk (where retained	b. the disparity in relation to issuer's risk (where retained	b. the disparity in relation to issuer's risk (where retained	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
by issuer); and	by issuer); and	by issuer); and	
c. the risk/return profile.	c. the risk/return profile.	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:	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:	
a. the bid/ask spread;			Insurance-based investment products are based on a contractual relationship between the investor and the insurance undertaking. The ease and cost for investors to switch or sell is therefore dependent on this contractual relationship and not on a secondary market.
	a. the fact that early withdrawal is not allowed; and	a. the fact that early withdrawal is not allowed; and	
b. the frequency of trading availability;			See above.
c. the issuance size and size of the secondary market;			See above.

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
d. the presence or absence of liquidity providers or secondary market makers;			See above.
e. the features of the trading system; and			See above.
f. any other barriers to exit.	b. any other barriers to exit.	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:	viii. The pricing and associated costs. Under this factor, more detailed elements to be considered could include, for example:	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	a. the use of hidden or secondary charges; and	a. the use of hidden or secondary charges; and	
b. charges that do not reflect the level of service provided.	b. charges that do not reflect the level of service provided.	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 structured deposit, an activity or practice. Under this factor, more detailed elements to be considered could include, for example:	ix. The degree of innovation of <u>an insurance-based investment product</u> , 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 financial instrument, activity or practice, e.g. embedding,	a. the degree of innovation related to the structure of the structured deposit, activity or practice, e.g. embedding,	a. the degree of innovation related to the structure of the <u>insurance-based investment product</u> , activity or practice,	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
triggering;	triggering;	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;	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 financial instrument, activity or practice is innovative for particular categories of clients;	c. the extent of innovation diffusion, i.e. whether the structured deposit, activity or practice is innovative for particular categories of clients;	c. the extent of innovation diffusion, i.e. whether the <u>insurance-based investment product</u> , activity or practice is innovative for particular categories of investors;	
d. innovation involving leverage;	d. innovation involving leverage;	d. innovation involving leverage;	
e. the opacity of underlying; and	e. the opacity of underlying; and	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 structured deposits or selling practices.	f. the experience of the market with similar <u>insurance-based investment products</u> or selling practices.	
x. The selling practices associated with the financial instrument. Under this factor, more detailed elements to be	x. The selling practices associated with the structured deposit. Under this factor, more detailed elements to be	x. The selling practices associated with the <u>insurance-based investment product</u> . Under this factor, more	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
considered could include, for example:	considered could include, for example:	detailed elements to be considered could include, for example:	
a. the communication and distribution channels used;	a. the communication and distribution channels used;	a. the communication and distribution channels used;	
b. the information, marketing or other promotional material associated with the investment;	b. the information, marketing or other promotional material associated with the investment;	b. the information, marketing or other promotional material associated with the investment; and	
c. the assumed investment purposes; and	c. the assumed investment purposes; and		This factor seems redundant with criterion 3.e
d. whether the decision to buy is secondary or tertiary following another purchase.	d. whether the decision to buy is secondary or tertiary following another purchase.	c. 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 structured deposit. Under this factor, more detailed elements to be considered could include, for example:	xi. The situation of the issuer of an <u>insurance-based investment product</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 financial situation of the issuer or any guarantor; and	- the financial situation.	Examples provide no further clarification in this case, as the issuer of an insurance-based investment product is the insurance undertaking.

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
b. the transparency of the situation of the issuer or guarantor.	b. the transparency of the situation of the issuer or guarantor.		See above.
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 risk to the orderly functioning and integrity of financial markets. Under this factor, more detailed elements to be considered could include, for example, whether:	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:	
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;			Example relates to transparency and is covered under the criteria and factors relating to transparency.
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;	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;	a. the <u>underlyings of the insurance-based investment product</u> or activities pose a high risk to the performance of transactions entered into by participants or investors in the market or product in question;	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
<p>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;</p>			
<p>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:</p>	<p>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:</p>	<p>b. the characteristics of <u>insurance-based investment products</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>insurance-based investment products</u> for:</p>	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
a. any fraud or dishonesty;	- any fraud or dishonesty;	- any fraud or dishonesty;	
b. misconduct in, or misuse of information, relating to a financial market;	- misconduct in, or misuse of information, relating to a financial market;	- misconduct in, or misuse of information, relating to a financial market;	
c. handling the proceeds of crime;	- handling the proceeds of crime;	- handling the proceeds of crime;	
d. the financing of terrorism; or	- the financing of terrorism; or	- the financing of terrorism; or	
e. facilitating money laundering;	- facilitating money laundering;	- facilitating money laundering;	
v. activities or practices pose a particularly high risk to the resilience or smooth operation of markets and their infrastructure;	- activities or practices pose a particularly high risk to the resilience or smooth operation of markets and their infrastructure;	c. activities or practices pose a particularly high risk to the resilience or smooth operation of markets;	Deletion of infrastructure, as insurance-based investment products may not have a direct impact on the infrastructure of markets
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;	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. an <u>insurance-based investment product</u> or activity or practice would lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;	
viii. a product or practice or activity poses particular risks to the market or payment systems infrastructure,	d. a product or practice or activity poses particular risks to the market or payment systems infrastructure;	e. a product or practice or activity poses particular risks to the market or payment systems infrastructure,	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
including clearing and settlement and trading systems); and		including clearing and settlement and trading systems); and	
ix. a financial instrument or practice would threaten the investors' confidence in the financial system.	e. a structured deposit or practice would threaten the investors' confidence in the financial system; and	f. an <u>insurance-based investment product</u> or practice would threaten the investors' confidence in the financial system.	
	f. a structured deposit or practice would leave the national economy vulnerable to risks.		The example of leaving the national economy vulnerable to risks is not adding more detail when it comes to criteria and factors, as it is contained in the high level principle
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;	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 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:	xiii. the <u>insurance-based investment product</u> 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.	

Criteria for financial instruments (as proposed in ESMA Consultation Paper, section 2.24)	Criteria for structured deposits (as proposed in EBA Consultation Paper)	Criteria for insurance-based investment products (as proposed herewith)	Explanatory Notes
	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;		EBA's specific criterias are relating to Structured Deposits and the examples used by EBA do not relate to insurance-based investment products.
	b. the relevance of the structured deposit as a funding source for financial institutions; and		See above.
	c. the reputational risks posed by the structured deposit or practice or activity to the financial institution.		See above.

## 4. **Annex II: Summary of Questions to Stakeholders**

Q1: Do you agree with the criteria and factors proposed?

Q2: Are there any additional criteria and/or factors that you would suggest adding?

Q3: Is there evidence that certain criteria do not apply under any circumstances to insurance-based investment products? Please elaborate.

Q4: What would you estimate as the costs and benefits of the possible changes outlined in this Consultation?

Where possible, please provide estimates of one-off and ongoing costs of change, in Euros and relative to your turnover as relevant. If you have evidence on potential benefits of the possible changes, please consider both the short and longer term. As far as possible, please link the costs and benefits you identify to the possible changes that would drive these.