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REQUEST FOR EIOPA'S TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE REGULATION ON KEY INFORMATION DOCUMENTS FOR PACKAGED RETAIL AND INSURANCE-BASED INVESTMENT PRODUCTS (PRIIPS)

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

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

The Commission invites EIOPA to cooperate closely and take into account the result of work which has been already undertaken by ESMA and EBA in the context of the product intervention powers under Regulation (EU) No 600/2014 of the European Parliament and of the Council². Reference is made to the respective mandates to ESMA³ and EBA⁴.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the TFEU (the "290 Communication")⁵, the Regulation of the European Parliament and the Council establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing

¹ The text referred to here is the text of the political agreement reached between the European Parliament and the Council and adopted by the European Parliament at the plenary session on 15 April 2014. The text as revised by legal revisers, will be published by the Council in September 2014. The numbering of Articles is taken from the latest revised text which will be published in OJ.

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 L173, 12.6.2014, p. 84).

³ 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

⁴ 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

⁵ Communication of 9.12.2009 COM(2009) 673 final.

Commission Decision 2009/79/EC⁶, and the Framework Agreement on Relations between the European Parliament and the European Commission (the “Framework Agreement”)⁷.

This request for technical advice will be made available on DG Internal Market’s website once it has been sent to EIOPA.

I. Introduction

The Regulation on Key Information Documents for Packaged Retail and Insurance-based Investment Products, which was adopted by Parliament on 15 April 2014, introduces a key information document (KID) that will provide retail investors with information about a broad range of investment opportunities including insurance-based investment products, structured investment products as well as collective investment schemes (investment funds).

The KID is a standardized, concise, max 3 page document presenting the key features of an investment product and aims at improving retail investors' understanding of the investment product and at the same time facilitating comparison of different products also on a cross-sectorial basis.

This mandate focuses on issues related to the temporary product intervention powers which follow from Chapter III of the PRIIPs Regulation.

Supplementing the introduction of product intervention powers for competent authorities, ESMA and EBA under Regulation (EU) No 600/2014, the PRIIPs Regulation provides for EIOPA’s and relevant competent authorities’ temporary powers to intervene with respect to certain insurance-based investment products. The Regulation lays down procedures for prohibiting or restricting the marketing, distribution and sale of insurance-based investment products which give rise to serious concerns regarding investor protection, the 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.

This reflects the powers already provided in relation to financial instruments and structured deposits, and ensures that such mechanisms for intervention can be applied to all investment products irrespective of their legal form. The exercise of such powers by competent authorities and, in exceptional cases, by EIOPA should be subject to specific conditions. Where those conditions are met, the competent authority or, in exceptional cases, EIOPA should be able to impose a prohibition or restriction on a precautionary basis before an insurance-based investment product has been marketed, distributed or sold to investors. These powers should not imply any requirement to introduce or apply product approval or licensing by the competent authority or by EIOPA, and do not relieve the manufacturer of an insurance-based investment product of its responsibility to comply with all relevant requirements of this Regulation. Moreover, the powers given to competent

⁶ Regulation (EU) No 1094/2010 of the European Parliament and 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 331/48, 15.12.2010, p. 48.

⁷ The Framework Agreement on relations between the European Parliament and the European Commission OJ L304/47, 20.11.2010, p.47

authorities should be used exclusively in the public interest and should not give rise to civil liability for those authorities.

The delegated act provided for by the PRIIPs Regulation should be adopted so that they enter in to application by 24 months following the entry into force of the Regulation, taking into account the right of the European Parliament and Council to object to a delegated act within 3 months (which can be extended by a further 3 months).

II. Request to EIOPA for Technical Advice on possible Delegated Acts concerning the temporary product intervention powers laid down in the PRIIPs Regulation.

Supplementing similar provisions under Regulation (EU) No 600/2014, the PRIIPs Regulation reinforces the role and power of supervisory authorities by conferring upon competent authorities and EIOPA the power to monitor the financial products and, subject to certain conditions, temporarily to prohibit or restrict the marketing, distribution or sale of insurance-based investment products, financial activity or practices. While these powers need to be applied in a proportionate way, and are of an extraordinary nature and constitute a measure of last resort⁸, there is also a need to ensure that such powers are dynamic enough to address significant risks that may arise in the markets.

The following delegated acts are to be adopted in the context of product intervention by competent authorities:

Under Article 16 (8) of the Regulation specifying:

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 referred to in Article 16 (2) point (a) of the PRIIPs Regulation.

The PRIIPS Regulation already provides a framework for product intervention powers and sets that those criteria and factors shall include:

- (a) the degree of complexity of the insurance-based investment product and the type of investors to whom it is marketed and sold;
- (b) the size or the notional value of the insurance-based investment products;
- (c) the degree of innovation of the insurance-based investment product, activity or a practice; and
- (d) the leverage a product or practice provides.

Under Article 17 (7) of the Regulation specifying:

The criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of

⁸ It doesn't imply any form of systematic prior approval of insurance products terms and conditions.

financial markets or to the stability of the financial system within at least one Member State referred to in Article 17 (2) point (a) of the PRIIPs Regulation.

Those criteria and factors shall include:

- (a) the degree of complexity of an insurance-based investment product and the type of investors to whom it is marketed or sold;
- (b) the degree of innovation of an insurance-based investment product, activity or a practice;
- (c) the leverage a product or practice provides;
- (d) in relation to the orderly functioning and integrity of financial markets, the size or the notional value of an insurance-based investment product.

Those criteria and factors shall take into account the result of work conducted by ESMA and EBA under MIFIR and shall differentiate between situations where EIOPA takes action because a competent authority has failed to act.

Further criteria and factors should be consistent with the ones set out in the PRIIPS regulation itself and should preserve the degree of legal clarity ensuring a harmonised application of these powers and the need to intervene and react towards exceptional situations or new and evolving market products or practices. Relevant CJEU cases-law should be duly taken into consideration⁹.

Such possible factors could refer to the degree of complexity and transparency of a product or services, the type of investors and their financial sophistication, the potential scale of detriment in the market, possible contagion effect and any serious disruption in any payment or settlement systems and detrimental effect on the price formation mechanism in the underlying market.

EIOPA is invited to provide technical advice on measures specifying the criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system of the Union or to the stability of the financial system within at least one Member State. As Regulation (EU) No 600/2014 establishes an identical framework for competent authorities, ESMA and EBA intervention powers in respect to financial instruments and structured deposits, and as factors and criteria to be taken into account for the exercise of product intervention powers for financial instruments and structured deposits should be similar to (if not identical to) those set for competent authorities and EIOPA with respect to insurance-based investment products, EIOPA is invited to liaise closely with and consult ESMA and EBA when providing its technical advice to the Commission and propose factors and criteria for intervention powers in accordance with Articles 16 (8) and 17 (7) of the PRIIPs Regulation.

III. Timetable

⁹ Judgment of the Court (Grand Chamber) of 22 January 2014, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union, Case C-270/12

This mandate takes into consideration the expected date of application of the PRIIPs Regulation¹⁰, the fact that ESMA and EBA have already begun their work on the draft Consultation Paper on product intervention and expect to deliver their technical advice in January 2015, that EIOPA needs enough time to prepare its technical advice, and that the Commission needs to adopt the delegated acts in accordance with Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article of the PRIIPs Regulation.

The deadline set to EIOPA to deliver the technical advice is six months after the entry into force of the PRIIPs Regulation.

¹⁰ The entry into application of the PRIIPs Regulation will be 2 years from the entry into force (Nov/Dec2016).