Commission Delegated Regulation (EU) 2016/1904 of 14 July 2016 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council with regard to product intervention (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2016/1904

of 14 July 2016

supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council with regard to product intervention

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)[(1)] and in particular Article 16(8) and Article 17(7) thereof,

Whereas:

(1) This Regulation specifies certain aspects of the intervention powers granted to competent authorities and, in exceptional circumstances, the European Insurance and Occupational Pensions Authority (EIOPA) established and exercising its powers in accordance with Regulation (EU) No 1094/2010 of the European Parliament and of the Council[(2)], as regards the criteria and factors to be taken into account for determining the existence of a significant investor protection concern or threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system of at least one Member State or respectively of the Union.

(2) A list of criteria and factors to be taken into account by competent authorities and EIOPA when determining such a concern or threat should be established to ensure a consistent approach while permitting appropriate action to be taken where unforeseen adverse events or developments occur. The existence of a 'threat', one of the prerequisites of the intervention in the perspective of the orderly functioning and integrity of financial or commodity markets or stability of the financial system, requires a higher threshold than the existence of a 'significant concern', which is the prerequisite of the intervention for investor protection. The need to assess all criteria and factors that could be present in a specific situation should not, however, prevent the temporary intervention power from being used by competent authorities and EIOPA where only one of the factors or criteria leads to such a concern or threat.

(3) The provisions in this Regulation are closely linked, since they deal with the product intervention powers vested in both the national competent authorities and EIOPA. To ensure coherence between those provisions which should enter into force at the same time, and in order to facilitate a comprehensive view for stakeholders and, in particular,

Changes to legislation: Commission Delegated Regulation (EU) 2016/1904 is up to date with all changes known to be in force on or before 24 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

for EIOPA and competent authorities exercising the intervention powers, it is necessary to include these provisions in a single Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Criteria and factors for the purposes of EIOPA temporary product intervention powers(Article 16(2) of Regulation (EU) No 1286/2014)

1 For the purposes of Article 16(2) of Regulation (EU) No 1286/2014, EIOPA shall assess the relevance of all factors and criteria listed in paragraph 2, and consider all relevant factors and criteria in determining when the marketing, distribution or sale of certain insurance-based investment products or a type of financial activity or practice creates 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.

For the purpose of the first subparagraph, EIOPA may determine the existence of a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system of the Union based on one or more of those factors or criteria.

2 The factors and criteria to be assessed by EIOPA to determine whether there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system of the Union shall be the following:

a the degree of complexity of the insurance-based investment product or type of financial activity or practice of an insurance or reinsurance undertaking, taking into account, in particular:
   - the type of the underlying assets and the degree of transparency of the underlying assets,
   - the degree of transparency of costs and charges associated with the insurance-based investment product, financial activity or financial practice and, in particular, the lack of transparency resulting from multiple layers of cost and charges,
   - the complexity of the performance calculation, taking into account in particular whether the return is dependent on the performance of one or more underlying assets which are in turn affected by other factors,
   - the nature and scale of any risks,
   - whether the insurance-based investment product or service is bundled with other products or services, or
   - the complexity of any terms and conditions;

b the size of potential detrimental consequences, considering in particular:
   - the notional value of the insurance-based investment product,
   - the number of clients, investors or market participants involved,
   - the relative share the product in investors' portfolios,
   - the probability, scale and nature of any detriment, including the amount of loss potentially suffered,
   - the anticipated duration of the detrimental consequences,
   - the volume of the premium,

***Changes to legislation:** Commission Delegated Regulation (EU) 2016/1904 is up to date with all changes known to be in force on or before 24 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

- — the number of intermediaries involved,
- — the growth of the market or sales,
- — the average amount invested by each investor in the insurance-based investment product,
- — the coverage level defined in national insurance guarantee schemes law, where such scheme exist, or
- — the value of the technical provisions with respect to the insurance-based investment products;

c the type of investors involved in a financial activity or financial practice or to whom an insurance-based investment product is marketed or sold, taking into account, in particular:

- — whether the investor is a retail client, professional client or eligible counterparty as defined in Directive 2014/65/EU of the European Parliament and of the Council[(3)],
- — features characterising investors' skills and abilities, including the level of education, experience with similar insurance-based investment products or selling practices,
- — features characterising investors' economic situation, including their income and wealth,
- — investors' core financial objectives, including pension savings and need for risk coverage,
- — whether the product or service is being sold to investors outside the intended target market, or whether the target market has not been adequately identified, or
- — the eligibility for coverage by an insurance guarantee scheme, where national insurance guarantee schemes exist;

d the degree of transparency of the insurance-based investment product or type of activity or practice, taking into account, in particular:

- — the type and transparency of the underlying assets,
- — any hidden costs and charges,
- — the use of techniques drawing investors' attention but not necessarily reflecting the suitability or overall quality of the insurance-based investment product or financial activity or financial practice,
- — the nature of risks and transparency of risks,
- — the use of product names or terminology or other information that imply a greater level of security or return than those which are actually possible or likely, or which imply product features that do not exist, or
- — 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;

e the particular characteristics or underlying assets of the insurance-based investment product, financial activity or financial practice, including any embedded leverage, taking into account, in particular:

- — the leverage inherent in the product,
- — the leverage due to financing, or
- — the features of securities financing transactions;

Changes to legislation: *Commission Delegated Regulation (EU) 2016/1904 is up to date with all changes known to be in force on or before 24 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

f the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the insurance-based investment product, financial activity or financial practice, taking into account, in particular:
- — the structuring cost of such insurance-based investment product, financial activity or financial practice and other costs,
- — the disparity in relation to the issuer's risk retained by the issuer, or
- — the risk/return profile;

g the ease and cost with which investors are able to sell the relevant insurance-based investment product or to switch to another product, taking into account, in particular:
- — the impediments to a change of investment strategy in relation to an insurance contract,
- — the fact that early withdrawal is contractually not allowed or made factually impossible, or
- — any other barriers to exit;

h the pricing and associated costs of insurance-based investment product, financial activity or financial practice, taking into account, in particular:
- — the use of hidden or secondary charges, or
- — charges that do not reflect the level of distribution service provided by the insurance intermediaries;

i the degree of innovation of an insurance-based investment product, a financial activity or a financial practice, taking into account in particular:
- — the degree of innovation related to the structure of the insurance-based investment product, financial activity or financial practice, including embedding and triggering,
- — the degree of innovation related to the distribution model or length of intermediation chain,
- — the extent of innovation diffusion, including whether the insurance-based investment product, financial activity or financial practice is innovative for particular categories of investors,
- — innovation involving leverage,
- — the lack of transparency of the underlying assets, or
- — the past experience of the market with similar insurance-based investment products or selling practices for insurance-based investment products;

j the selling practices associated with the insurance-based investment product, taking into account, in particular:
- — the communication and distribution channels used,
- — the information, marketing or other promotional material associated with the investment, or
- — whether the decision to buy is secondary or tertiary following an earlier purchase;

k the financial and business situation of the issuer of an insurance-based investment product, taking into account, in particular:
- — the financial situation of the issuer, or
- — the suitability of reinsurance arrangements regarding the insurance-based investment products;

l whether the underlying assets of the insurance-based investment product or financial activities or financial practice pose a high risk to the performance of transactions entered into by participants or investors in the relevant market;

***Changes to legislation:** Commission Delegated Regulation (EU) 2016/1904 is up to date with all changes known to be in force on or before 24 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

m whether the characteristics of an insurance-based investment product make it particularly susceptible to being used for the purposes of financial crime, in particular whether those characteristics could potentially encourage the use of the insurance-based investment products for:
- — any fraud or dishonesty,
- — misconduct in, or misuse of information in relation to a financial market,
- — handling the proceeds of crime,
- — the financing of terrorism, or
- — facilitating money laundering;

n whether the financial activity or financial practice poses a particularly high risk to the resilience or smooth operation of markets;

o whether an insurance-based investment product, financial activity or financial practice could lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;

p whether an insurance-based investment product, financial practice or financial activity poses a high risk to the market or payment systems infrastructure, including trading, clearing and settlement systems;

q whether an insurance-based investment product, financial activity or financial practice may threaten investors' confidence in the financial system; or

r whether the insurance-based investment product, financial practice or financial activity poses a high risk of disruption to financial institutions deemed to be important to the financial system of the Union.

Article 2

Criteria and factors to be taken into account by competent authorities for the purposes of insurance-based investment product intervention powers(Article 17(2) of Regulation (EU) No 1286/2014)

1 For the purposes of Article 17(2) of Regulation (EU) No 1286/2014, competent authorities shall assess the relevance of all factors and criteria listed in paragraph 2, and take into consideration all relevant factor(s) and criteria in determining when the marketing, distribution or sale of certain insurance-based investment products or a type of financial activity or practice creates 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 within at least one Member State.

For the purposes of the first subparagraph, competent authorities may determine the existence of a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system within at least one Member State based on one or more of those factors and criteria.

2 The factors and criteria to be assessed by competent authorities to determine whether there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system within at least one Member State shall include the following:

a the degree of complexity of the insurance-based investment product or type of financial activity or practice of an insurance or reinsurance undertaking, taking into account, in particular: