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Technical advice

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

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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 16 May 2014 a request from the Commission to provide technical advice on possible delegated acts specifying 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. The EBA considered 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.

The list of criteria and factors was presented in the consultation between August 2014 and October 2014. Four responses were received and they have been published on the EBA website.

One respondent suggested several new criteria and factors to be added to the list of criteria and factors identified by the EBA. However, the EBA is of the view that many of the suggested criteria are already covered in the technical advice and therefore accepted one new criterion. Other suggestions have been made, which the EBA has incorporated into two existing criteria, as outlined in more detail in the EBA’s feedback appended to this document.

Background

1. In its founding regulation¹, the EBA is tasked with “monitor[ing] and assess[ing] market developments” (Article 8 (f)); “foster[ing] depositor and investor protection” (Article 8 (h)); and “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(1)); as well as “develop[ing] common methodologies for assessing the effect of particular products or distribution processes on an” (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.
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 only 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 on establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC

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 competent authorities (“CAs”) 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 16 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 CAs 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.

(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 referred to in Article 4(1)(43) of MiFID: repayment at maturity, and coverage by a deposit guarantee scheme in accordance with Directive 2014/49/EU on deposit guarantee schemes - the EBA considers that in exceptional circumstances most of the criteria proposed for financial instruments are still applicable. However, the EBA proposed several amendments to address the specificities of structured deposits and the list of criteria and factors was presented in the consultation between August 2014 and October 2014. Four responses were received and they are summarised, together with the EBA feedback to them in the Accompanying document attached to this technical advice. The received responses have been published on the EBA website.
8. One respondent suggested several new criteria and factors to be added to the list of criteria and factors identified by the EBA. However, the EBA is of the view that many of the suggested criteria are already covered in the technical advice and therefore accepted only three suggestions in result of which has added one new criterion and introduced changes to other two.

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)

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

Scope

1. This technical advice specifies the criteria and factors to be taken into account:
 - by the EBA 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 referred to in Article 41(2)(a) of MiFIR;
 - by competent authorities, to the extent that structured deposits are concerned, in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the financial system within at least one Member State referred to in Article 42(2)(a) of MiFIR.

General remarks

2. The factors and criteria should not apply cumulatively, i.e. not all factors would need to be present when EBA or CAs 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.
3. In accordance with the overall conditions for intervention specified under Title VII, Chapter 1 of MiFIR, EBA and CAs 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.

4. The criteria and factors proposed by the EBA are in line with the findings of the Court of Justice of the European Union in case C-270/12 of 22 January 2014⁵ and they need to be read in the context of the specific requirements for intervention defined in MiFIR. However, the criteria are non-quantitative given the fact that flexibility is required in order to ensure the possibility to exercise the powers in exceptional and unforeseen circumstances and before potential problems become widespread, mainly considering both the diversity of products and the permanent innovation characterising the market.

Specification of criteria and factors under Articles 41 and 42 of Regulation (EU) No 600/2014 (MiFIR)

The EBA considers that the criteria and factors should include the following:

- 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;

⁵ 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 or of terminology or other information that is misleading by implying product features that do not exist; and
 - f) whether there was insufficient, or insufficiently reliable, information about a structured deposit, provided either by the manufacturer or the distributor, to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of structured deposit;

- g) whether the identity of deposit takers which might be responsible for the client's deposit, is disclosed.
- 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.
- 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 CAs' powers only, to the national financial system of the Member State of the CA, 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 financial institutions 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 institutions.

Accompanying document

Overview of responses to the consultation and the EBA’s feedback

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
Responses to questions in Consultation Paper EBA/CP/2014/20			
<p>Question 1. Do you agree with the criteria and factors proposed?</p>	<p>1) Three respondents were of the view that the criteria proposed are open qualitative criteria; they do not establish specific guidelines for an authority and therefore give rise to a great legal uncertainty.</p> <p>The same respondents suggested that criteria should be clearly defined with objective measures rather than subjective criteria such as “degree of complexity”, or “degree of innovation”.</p> <p>One respondent stated that the EBA’s mandate was to clearly specify the criteria and factors and EBA failed to fulfil the mandate because the criteria and factors are presented in the consultation paper as generic, flexible, non-quantitative and non-exhaustive.</p>	<p>1) The technical advice provides the criteria that might be relevant and might be considered by the EBA or CAs before taking an action. The degrees of complexity and innovation are to be taken into account according to MiFIR (articles 40(8), 41(8) and 42(7)) although they cannot be objectively measured. In addition, considering the permanent innovation characterizing the market, a degree of flexibility is necessary to adapt to different scenarios and to address exceptional and unforeseen circumstances.</p>	<p>1) None</p>
	<p>2) Two respondents were of the view that the compliance function of banks, suitability, appropriateness testing and the new product governance rules should suffice in avoiding dangerous products entering the market and that responsibility of creating products should lie with the industry and not the regulators.</p> <p>The respondents were also of the view that proportionality should be the guidance of any kind of product intervention and when intervention powers are already introduced in other legislative initiatives, no additional enforcement actions should be introduced. The same respondents stated</p>	<p>2) The EBA notes that product intervention powers as introduced by MiFIR are complimentary to product governance. In addition to foreseeing these powers, MiFIR defines conditions to be fulfilled in order for these powers to be used; and states that proportionality is to be taken into account in its exercise (Articles 40 (3) (a), 41 (3) (a) and 42(2) (c)). Good product oversight and governance, if effectively applied and enforced, should reduce the</p>	<p>2) None</p>

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	<p>that product intervention regime implies restrictions of the free functioning of the market and therefore should be considered as a last resort mechanism and be used in specific cases.</p>	<p>need for the EBA or CAs to intervene the markets ex post.</p>	
	<p>3) One respondent supported the EBA's consideration of DGSD and the safeguards provided therein when defining the criteria and factors.</p>	<p>3) The EBA acknowledges in the technical advice two features that are part of the definition of a structured deposit: coverage by a deposit guarantee scheme and full repayment at maturity. As a result of these features, structured deposits might present lower risks for investors than most financial instruments and amended criteria and factors that address specific features of structured deposits were suggested in the consultation paper and are included in the technical advice.</p>	<p>3) None</p>
	<p>4) Three respondents were of the view that the criteria should not be based on the client age, wealth or income, as there are no restrictions to sell depending of personal characteristics.</p> <p>Two respondents suggested excluding criteria that investment firms do not have to consider when distributing their products, except when providing investment advice (for example, "core financial objectives").</p>	<p>4) The EBA does not concur with the view because according to MiFIR (articles 40(8), 41(8) and 42(7)) the type of client is included in the criteria to be taken into account in the definition of criteria and factors for intervention. Elements such as the MiFID categorization, the skills and abilities, the economic situation and financial objectives, are considered useful to characterise the type of clients, and have therefore been included in the proposed criteria.</p>	<p>4) None</p>
	<p>5) One respondent was of the view that the concepts mentioned in criterion xiii. c) (reputational risks), in the criterion v. (any leverage a product or practice provides) and in criterion ix. e) (the opacity of underlying) should be clarified.</p>	<p>5) The EBA considers these to be general and commonly known terms and therefore precise definitions are not required in the list of criteria.</p>	<p>5) None</p>
	<p>6) Three respondents proposed deleting references that may be harmful for market stability and may jeopardise the free efficient price information,</p>	<p>6) The respondents did not provide convincing arguments to support deleting the references. The EBA is of the view that the structure of charges</p>	<p>6) None</p>

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	such as criterion viii. b) (charges that do not reflect the level of service provided) and criterion xi. a) (situation of issuer).	sometimes represent that clients are getting very poor outcomes. Price structures could be one of the factors to be considered by the EBA or CAs before taking a decision.	
	7) One respondent suggested amending criteria vi. (degree of disparity between expected return or benefit for investors and risk of loss) to address the fact that the only specific risk of loss that affects the structured deposit is linked to the return, which depends on the performance of an underlying financial asset, product or benchmark.	7) The EBA does not agree with the suggested amendment. By definition, the performance of structured deposits is dependent on the underlying. The fact that structured deposits are repayable at par should be taken into account when assessing the need for intervention, but should not exclude the applicability of these criteria.	7) None
	8) One respondent expressed the view that the criteria vii. on the exit/early withdrawal costs should not be a relevant trigger for the exercise of the intervention powers concerning structured deposits, since many structured deposits, unlike traditional deposits, contain provisions that discourage the early withdrawal or the redemption before maturity.	8) The EBA is not convinced with the argument provided by the respondent because the fact that early withdrawal is not allowed is one relevant factor to be taken into account when evaluating the “ease and cost for investors to switch or sell”. Being a common feature of structured deposits is not considered a reason for not including this as part of criteria vii. In general terms, the presence of a single criterion in the market might not entail an intervention from the EBA or CAs. This particular criterion should be used as one of the aspects the EBA or CAs would have to consider before taking the decision to intervene the markets.	8) None
	9) One respondent stated in relation to the marketing, distribution or sale of structured deposits, that the prohibition or restriction of structured deposits should only apply before and during the commercialisation phase.	9) The conditions under which the EBA or CAs can prohibit or restrict the marketing, distribution or sale of certain structured deposits or structured deposits with certain features are defined in MiFIR (articles 41 and 42, respectively). The criteria and factors	9) None

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
		proposed by in the technical advice do not alter those conditions.	
	10) One respondent is of the view that the innovation of structured products should be considered negatively only if combined with other elements of danger (criteria under ix.).	10) As acknowledged by the EBA in Scope, in accordance with the overall conditions for intervention specified under Articles 40, 41 and 42 of MiFIR, ESMA, the EBA or CAs should not necessarily intervene if given criteria are met but overall detriment is not foreseen or detected or the relevant proportionality test is not satisfied.	10) None
	11) One respondent questioned the susceptibility of structured deposits being used for purposes of financial crime as the deposit itself cannot pose a threat in that sense, only the persons, who invests in it, can. The respondent also suggested including quantitative parameters in order to assess whether a deposit could pose a threat rather than listing examples of activities.	11) The EBA notes that financial institutions must comply with the AMLD provisions. Financial crime can be one of the aspects that the EBA or CAs would consider before intervening the markets.	11) None
	12) One respondent was of the view that EBA's and ESMA's criteria should be consistent and only differ in cases specific for structured deposits. To that end, the respondent stated that intervention powers for structured deposits must have a more lax approach as they pose lower risk than investment products. The respondent also doubted a need for different requirements concerning transparency on multiple layers of costs or return calculation complexity.	12) The EBA considered the criteria and factors proposed by ESMA in its MiFID II/MiFIR Consultation Paper and their application to structured deposits. The amendments introduced were related to: a) criteria that the EBA considers not to be applicable to structured deposits; b) criteria that the EBA considers relevant for structured deposits that do not apply to financial instruments; c) criteria that the EBA considers appropriate for structured deposits even though not explicitly included in the criteria proposed by ESMA.	12) None
	13) One respondent was of the view that the fact that the underlying is no longer available should not lead to intervention and that the underlying	13) The EBA considers that in accordance with the overall conditions for intervention specified under	13) None

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	substitution could be a better way to solve the situation.	<p>Articles 40, 41 and 42 of MiFIR, ESMA, the EBA or CAs should not necessarily intervene if given criteria are met but overall detriment is not foreseen or detected or the relevant proportionality test is not satisfied.</p> <p>The lack of substitution of the underlying might imply the need to take an action, though this might not always be the case. The presence of one feature might not automatically trigger an action. The EBA or CAs would have to carefully consider the circumstances of each case before taking a measure.</p>	
	14) One respondent suggested not including additional elements to criteria xiii. (risk of disruption to financial institutions), as the elements presented are addressed by other regulations and need to be considered on a portfolio basis.	14) The EBA considers that the elements included under xiii. letters a) to c) are useful when evaluating the risk of disruption to financial institutions.	14) For consistency reasons, references to “financial institution” under this section are replaced by “financial institutions”.
	15) One respondent referred in its response to comments made by the Securities and Markets Stakeholder Group on the ESMA’s consultation paper (ESMA/2014/549). The respondent stated that the criteria are overly complex and numerous and that the list of criteria does not provide a lot of legal certainty for users. The respondent is also of the view that the criteria under letter i. should distinguish between investor detriment and complexity and should focus on clear and understandable investment proposals and not mainly on the complexity.	<p>15) The EBA notes that the technical advice provides the criteria that might be relevant and might be considered by the EBA or CAs before taking an action. The EBA or CAs should not necessarily intervene if given criteria are met but overall detriment is not foreseen or detected or the relevant proportionality test is not satisfied.</p> <p>According to articles 40(8), 41(8) and 42(7) of MiFIR, the degree of complexity of a financial instrument or structured deposit is an element to be taken into</p>	15) None

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	are actually possible or likely (<u>including but not limited to words such as ‘guaranteed’, ‘protected’ or ‘secure’</u>);	restricted to the name or terminology.	<u>information</u> that is misleading by implying product features that do not exist;
	g) Whether the information provided about the product’s features, risks and possible returns are likely to be understandable by those clients in the target market for the product and the extent to which the issuer is able to prove that clients in the target market are able to understand the information.	3. g) The EBA considers this proposed criterion to be covered by iv.	3. g) None
	h) The projections provided to the client concerning the possible performance of the product and whether these represent a reasonable presentation of the returns expected to be generated by the product.	3. h) The EBA considers this proposed criterion to be covered by iv. and vi.	3. h) None
	i) The probability which has been communicated or not communicated to the client regarding the chance of achieving the advertised maximum or minimum return	3. i) The EBA considers this proposed criterion to be covered by iv and vi..	3. i) None
	j) Whether the financial promotion for the product includes a return calculated as an ‘Annual Equivalent Rate (AER).’	3. j) The EBA considers this proposed criterion to be too specific. General transparency criteria are already covered by iv.	3. j) None
	k) Whether the identity of all deposit takers which might be responsible for the client’s deposit are disclosed.	3. k) The EBA accepts this comment and added a new criterion to iv.	3. k) Whether the identity of deposit takers which might be responsible for the client’s deposit is disclosed.

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	<p>l) Whether the promotion highlights that when receiving a return linked to particular underlying, clients will not benefit from the receipt of dividends from the underlying such as a share, index or benchmark.</p>	<p>3. l) The EBA considers this proposed criterion to be too specific. General transparency criteria are already covered by iv.</p>	<p>3. l) None</p>
	<p>m) Whether accurate and understandable information about the product features, risks and possible returns was provided to the distributors of the structured deposit.</p>	<p>3. m) The EBA accepts this comments and has amended criterion iv.f) accordingly.</p>	<p>3. m) iv. f) whether there was insufficient, or insufficiently reliable, information about a structured deposit, <u>provided either by the manufacturer or the distributors,</u> to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of structured deposit.</p>
	<p>4. Amendments and additions to criterion vi. (degree of disparity between expected return or benefit for investors and risk of loss):</p> <p>vi) <u>The degree of disparity between expected return or benefit for investors and risk of loss or erosion in the real value of a client's</u></p>	<p>4. The EBA considers the proposed criteria to be too specific and already covered by iv. and vi.</p>	<p>4. None</p>

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	<u>deposit</u> in relation to the structured deposit, activity or practice.		
	d) The value-for-money of the structured deposit – whether the structured deposit offers a sufficiently attractive return above the risk-free rate or an alternative cash savings account to justify the client purchasing the product.		
	e) The value-for-money and actual returns of other, similar, structured deposits from the same issuer.		
	f) The probability of attaining the maximum and minimum returns offered by the product.		
	g) Whether the issuer has conducted a ‘stress test’ detailing how the product might perform in various different scenarios and the results of any ‘stress tests’ undertaken.		
	5. Additions to criterion vii. (ease and cost for investors to exit):	5. The EBA is of the view that the proposed criteria c), d) and e) are already covered by vii.	5. None
	c) The scale of any exit or withdrawal penalties which are payable in the event of exit or withdrawal from the product.		
	d) The presence of asymmetric exit penalties which means that if the underlying has fallen then an exit penalty is applied but if the underlying has raised then client receives only their original deposit.		
	e) The mechanism and process for calculating the early withdrawal or surrender value of the product and whether any conflicts of interests around the calculation of the surrender value are managed appropriately.		

Consultation question	Summary of responses received	EBA feedback	Amendments to the proposals
	f) The bid-ask spread.	The EBA considers that the criterion proposed under f) is not applicable to structured deposits.	
	6. Additions to criterion x: e) The qualifications held and the training received by the staff involved in selling the product.	6. e) The EBA considers the proposed criterion to be too specific and already covered by x.	6. e) None
	2) Two respondents were of the view that more than new criteria, quantitative and objective criteria should be proposed.	2) The technical advice provides the criteria that might be relevant and might be considered by the EBA or CAs before taking an action. Many of the criteria presented cannot be objectively measured. In addition, considering the permanent innovation characterizing the market, a degree of flexibility is necessary to adapt to different scenarios and to exceptional and unforeseen circumstances.	2) None
	3) One respondent proposed to add a criterion related to the magnitude of total charges and commissions borne by the client directly or indirectly.	3) The EBA considers this criterion to be covered by vi.a) and viii.	3) None

This Technical Advice will be published on the EBA's public website.

Done at London, on 11 December 2014.

(signed)

Andrea Enria
Chairperson
For the Board of Supervisors