



**EACB response to  
the EBA Consultation Paper  
on  
Draft Technical Advice  
on possible delegated acts on criteria and factors for  
intervention powers concerning structured deposits  
under Article 41 and Article  
42 of Regulation (EU) No 600/2014 (MiFIR)**

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

The European Association of Co-operative Banks (EACB) considers that the compliance function of a bank, suitability and appropriateness testing, as well as the new product governance rules should suffice in avoiding dangerous products entering markets. Thus, the responsibility of creating a product should lie with the industry and not the regulators. Regulators would oversee these processes in the course of their normal supervisory process. If irregularities are detected, appropriate enforcement action should take place. Proportionality should be the guidance of any kind of product intervention. In this process product intervention powers should be used only as a measure of a very last resort. When the intervention powers are already introduced in other legislative initiatives (benchmarks, MAR, etc.), they should not give rise to additional enforcement actions.

Moreover, the fact that structured deposits are covered by deposit guarantee schemes is a relevant factor to be taken into account in assessing the need for intervention. In that regard the EACB supports EBA consideration of Deposit Guarantee Schemes Directive (DGSD)<sup>1</sup> and the safeguards provided therein, when defining the criteria and factors for intervention powers concerning structured deposits (MiFIR). A differentiation between structured deposits that fall under the definition of "covered deposits" (in line with the definition of DGSD) and the ones which are not seems appropriate.

Having said that, we also believe that some criteria proposed give rise to a great legal uncertainty as the draft technical advice focuses on open qualitative criteria and does not establish specific guidelines, which should govern the decision of an authority. Competent authorities may be empowered with discretionary measures that may be prejudicial for market confidence and stability for the EU internal market. Examples of these situations are:

- Factors like "degree of complexity", "degree of innovation" have to be clearly defined objective criteria that should be taken into account by ESMA, NCA or EBA.

<sup>1</sup> Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.



- Intervention criteria should not be based on permitted activities: references to client age, wealth or incomes should be deleted, as there is no restriction to sell depending on the age, wealth or incomes of clients.
- Some references may be harmful for market stability and may jeopardize the free efficient price formation. In particular, we consider that the following may negatively impact the basics of market functioning: (i) "the charges that do not reflect the level of service provided", as that may result in jeopardizing the freedom of price formation: if charges are too high for a product, market will opt for alternative products; or (ii) "the financial situation of the issuer or any guarantor", as this is a criterion that could result in the issuer/guarantor being expelled of the market (and again, financial situation will already be considered in terms of pricing and conditions of the issuance).

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

N/A