

**PORTUGUESE BANKING ASSOCIATION RESPONSE TO EBA CONSULTATION PAPER ON
TECHNICAL ADVICE ON CRITERIA AND FACTORS FOR INTERVENTION POWERS CONCERNING
STRUCTURED DEPOSITS (EBA/CP/2014/20)**

Question 1:

Do you agree with the criteria and factors proposed?

No, the Portuguese Banking Association (APB) does not agree.

In APB's understanding, it is difficult to accept that - similar to MiFID II/MiFIR Consultation Paper - the EBA Consultation Paper, from inception, fails to fulfil its mission. EBA's mandate in this topic is to clearly specify the criteria and factors that should be taken into consideration when assessing whether there is a significant investor protection concern, 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, and whether intervention powers should be exercised.

Article 50/8 of Regulation (EU) No 600/2014 (MiFIR), establishes that *"the Commission shall adopt delegated acts in accordance with Article 50 to specify criteria and factors to be taken into account by 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"*. However, according to the EBA consultation paper *"criteria and factors presented [...] are generic, flexible, non quantitative and non-exhaustive"*. In that sense, the APB believes that the criteria proposed give rise to a considerable legal uncertainty as it mainly uses open - qualitative criteria and does not establish specific guidelines, which should govern the decision of an authority.

Additionally, we consider that the possibility of regulatory arbitrage should be mitigated by providing national competent authorities with quantitative criteria and factors to exercise their intervention powers. If that is not the case, competent authorities may adopt discretionary measures that may be prejudicial for market confidence and stability for the EU internal market.

Some factors to consider:

- Concepts like *“degree of complexity”*, *“degree of innovation”*, or even *“notional”*, have to be clearly defined with objective measures, rather than subjective criteria.
- The concept of *“reputational risks posed by structured deposits or practice or activity to the financial institution”* (mentioned in criterion xiii(c)) should be clarified.
- Intervention criteria should not be based on the client age, wealth or income, as there is no restriction to sell depending on personal characteristics.
- Criteria that investment firms do not have to consider when distributing their products, except when providing investment advice (for example, *“core financial objectives”*) should be excluded.
- The criteria number v: *“[...] any leverage a product or practice provides [...]”* must be clarified. According to consolidated practices in the market for structured deposits, we do not see cases of leverage inherent in the product.
- The criteria *“degree of disparity between expected return or benefit for investors and risk of loss in relation to the structured deposit, activity or practice”* (criteria number vi) should be amended. One must consider that structured deposits, like traditional deposits: (1) preserve the capital invested and (2) are subject to the credit risk of the bank holding the deposit. 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. If in the worst scenario, the investor obtains no return but receives the principal, it seems inappropriate to set the risk of loss as a criterion for the prohibition or restriction of the structured deposits.
- Although EBA recognizes that *“many of these products do not allow for early withdrawal”*, it proposes to use *“the fact that early withdrawal is not allowed”*, as a criteria to prohibit or restrict the marketing, distribution or sale of structured deposits. In our opinion, the criteria number 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. The possibility

of early withdrawal, as a rule, will render structured deposits uneconomical and endanger their viability as a funding source for credit institutions.

- EBA should determine what exactly is meant in the consultation paper (criterion ix, letter e) by *“the opacity of the underlying”*. It is not clear what this means and, moreover, it is not clear the reason behind the inclusion of this element in the context of the degree of innovation of a structured deposit, an activity or practice.
- Financial markets are competitive and efficient. Mentions such as *“charges that do not reflect the level of service provided”*, are dubious and contrary to the efficiency of the price formation mechanism. Therefore, they should be removed.

The list of criteria and factors present in the consultation paper disregard the EBA temporary intervention powers established in article 41/2 that establish that *“[...] EBA may impose the prohibition or restriction [...] on a precautionary basis before a structured deposit has been marketed, distributed or sold to clients”*.

In relation to the marketing, distribution or sale of the structured deposits, the consultation paper seems to set criteria and factors that apply before and after a structured deposit has been marketed, distributed or sold to clients, which in our opinion is wrong and not aligned with EBA’s mandate. In addition, this option leads to the unclear use of the criteria and factors. A good example is to consider the *“minimum subscription amount”* as an indicator of the *“average amount invested by each client in the structured deposit”*, with the latter not being known before the structured deposit is marketed, distributed or sold to clients.

If, contrary to our understanding, intervention powers are to be applied in a wider scope of the term *“precautionary”*, we consider that the prohibition or restriction of structured deposits should apply only before or during the commercialization phase (before the financial settlement in the clients’ account).

MiFIR mentions that competent authorities’ powers do not imply any requirement to introduce or apply a product approval or licensing by the competent authority and, as a result, this issue is, to some extent, out of the scope of the present consultation. However, taking into account that EBA must ensure that actions taken by national competent authorities are justified and proportionate, it would be of extreme importance to know EBA’s opinion regarding the possibility of prohibiting or restricting the marketing, distribution or sale of structured deposits,

where a product approval or licensing by national competent authorities already occurred, and the criteria and factors used to prohibit or restrict the structured deposit are the same as those previously used as a fundament for the approval of the structured deposit, when no substantial changes have occurred.

Although EBA recognizes that structured deposits 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: coverage by a deposit guarantee scheme and full repayment at maturity), the criteria and factors proposed fail to properly address that consideration.

Product intervention regime implies a serious restriction of the free functioning of the markets and the freedom to conduct business. Consequently, such regime should be considered as a last resort mechanism, only to be used in residual and specific cases.

Finally, we remember that there are several pieces of legislation that address threats and risks for investors that should be taken into consideration by EBA and NCAs when assessing whether they should exercise their intervention powers. For example, the new product governance requirements aim to ensure that products are structured to meet the need of an identified target market and distributed to the target market; PRIIPs regulation aims to improve the quality of information provided to retail clients; MiFID sets a wide framework to enhance investor protection (e.g. information to clients, assessment of suitability and appropriateness and reporting to clients). Therefore, we suggest calibrating some criteria proposed in the EBA consultation paper in the light of other rules under Union law, which address the same concerns. When intervention powers are already introduced in other legislative initiatives they should not lead to additional enforcement actions.

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

No.

More than new criteria, the Portuguese Banking Association considers that quantitative and objective criteria should be proposed.