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COVER NOTE

from: Mario DRAGHI, President of the European Central Bank
date of receipt: 20 December 2012
to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union

Subject: ECB opinion on a proposal for a regulation of the European Parliament and of the Council on key information documents for investment products (CON/2012/103)

Delegations will find attached the above mentioned opinion.

Encl.:

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 December 2012

**on a proposal for a regulation of the European Parliament and of the Council
on key information documents for investment products**

(CON/2012/103)

Introduction and legal basis

On 11 and on 18 September, the European Central Bank (ECB) received a request from the Council of the European Union and from the European Parliament, respectively, for an opinion on a proposal for a regulation of the European Parliament and of the Council on key information documents for investment products¹ (hereinafter the ‘proposed regulation’).

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, since the proposed regulation contains provisions affecting the European System of Central Banks’ contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB welcomes the proposed regulation, which aims to improve the transparency of retail investment products and ensure that retail investors are able to understand the key features and risks of investment products and to compare the features of different products. Appropriate disclosure facilitates consumer protection, which plays a key role in preserving the stability of the financial system.

Specific comments

1. Consistency with other European Union legislative initiatives

- 1.1 Disclosure requirements should be accompanied by adequate supervisory powers, both at the national and Union level, to prohibit or restrict the marketing, distribution or sale of certain financial instruments in the case of a threat to the orderly functioning of financial markets, the stability of the whole or part of the financial system or investor protection². The ECB underlines the importance of

¹ COM(2012) 352 final.

² See paragraph 12.1 of ECB Opinion CON/2012/21 of 22 March 2012 on: (i) a proposal for a directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council; (ii) a proposal for a regulation on markets in financial instruments and amending Regulation (EMIR) on OTC derivatives, central counterparties and trade repositories; (iii) a proposal for a directive on criminal sanctions for insider dealing and market manipulation; and (iv) a

ensuring that Union legislation in the area of financial services provides the European Supervisory Authorities (ESAs) and national competent authorities with adequate intervention powers. In particular, the banking and insurance supervisors may obtain intervention powers similar to those assigned to the European Securities and Markets Authority (ESMA) and to national competent authorities under the proposal for a regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (hereinafter the ‘proposed MiFIR’)¹.

- 1.2 In addition to the harmonisation of pre-contractual information introduced by the proposed regulation, the ECB recommends that market conduct requirements relating to the selling of financial products should also be made consistent across financial services sectors following, where appropriate, already proposed measures².
- 1.3 Finally, a level playing field between different types of investment products should be ensured with a view to avoiding regulatory arbitrage at the expense of the investment products that are not covered by the proposed regulation, such as non-complex financial instruments. Disclosure requirements for other categories of financial products under existing Union legislation should be complemented with the standardised key information document (KID) introduced by the proposed regulation. This may, in particular, concern the products covered by Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC³ and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)⁴.

2. Responsibility to produce the KID

The proposed regulation allocates the responsibility for preparing the KID to the investment product manufacturer that is also liable on the basis of the information provided⁵. However, retail investors are in direct contact with the distributors, and not the manufacturers, of investment products. Therefore, the distributor of an investment product should also be responsible for ensuring that a retail investor has an effective way of submitting a complaint against the manufacturer in relation to the KID and of initiating a redress procedure. Moreover, the ECB considers that the proposed arrangement should allow for effective redress procedures also in the event of cross-border disputes, in particular where the manufacturer is located in another Member State or in a third country.

proposal for a regulation on insider dealing and market manipulation (market abuse) (OJ C 161, 7.6.2012, p. 3). All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

¹ COM(2011) 652 final, see Articles 31 and 32.

² See, for instance, the rules concerning the allowed scope of execution-only services offered by investment firms contained in Article 25(3) of the proposal for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM(2011) 656 final (hereinafter the ‘proposed MiFID’).

³ OJ L 345, 31.12.2003, p. 64.

⁴ OJ L 335, 17.12.2009, p.1. See, in particular, Articles 183 to 185.

⁵ See Article 5 of the proposed regulation.

3. Content of the KID

The ECB recommends that the proposed regulation explicitly requires the KID to include the following elements: (i) counterparty, operational and liquidity risks affecting the investment product; (ii) sensitivity of the products' performance to effective stress scenarios; and (iii) the leveraged component of the product insofar as this component may multiply the applicable risks. Such additional information components will ensure that the KID does not lead investors to rely excessively on past performance patterns and that it provides a complete and fair outline of the risks related to investment products.

4. Administrative sanctions and measures

The ECB recommends that the proposed regulation should be amended so as to ensure harmonisation with other proposed Union legislation¹ introducing administrative sanctions, in particular by including provisions on administrative pecuniary sanctions.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in the Annex accompanied by explanatory text to this effect.

Done at Frankfurt am Main, 11 December 2012.

The President of the ECB

Mario DRAGHI

¹ See Article 75(2) (e) and (f) of the proposed MiFID. See also Article 99a(2) (e) and (f) to be inserted in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32) by the proposal for a directive of the European Parliament and the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, COM(2012) 350 final (hereinafter the 'proposed UCITS V directive').

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ¹
Amendment 1 Article 25	
<p>‘Article 25</p> <p>1. Four years after the date of entry into force of this Regulation, the Commission shall review this Regulation. The review shall include a general survey of the practical application of the rules laid down in this Regulation, taking due account of developments in the market for retail investment products. As regards UCITS as defined in Article 1 (2) of Directive 2009/65/EC, the review shall assess whether the transitional arrangements under Article 24 of this Regulation shall be prolonged, or whether, following the identification of any necessary adjustments, the provisions on key investor information in Directive 2009/65/EC might be replaced by or considered equivalent to the key investor document under this Regulation. The review shall also reflect on a possible extension of the scope of this Regulation to other financial products.</p> <p>2. After consulting the Joint Committee of the European Supervisory Authorities, the Commission shall submit a report to the European Parliament and the Council,</p>	<p>‘Article 25</p> <p>1. After the entry into force of this Regulation, the Commission shall review the Union legislation in the area of financial services with a view to assessing the merits of: (i) introducing standardised key information documents in accordance with the rules introduced by this Regulation in relation to classes of financial instruments not covered by this Regulation, in particular in relation to the products covered by Directive 2003/71/EC and Directive 2009/138/EC; (ii) introducing harmonised market conduct requirements relating to the selling of financial products; and (iii) granting the European Supervisory Authorities and the national competent authorities powers to intervene in relation to specific categories of financial products, including through product prohibitions introduced in the interests of investor protection and financial stability, taking account of the powers introduced in this respect by Regulation (EU) No xx/xx of the European Parliament and of the Council of [date] on</p>

¹ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the Commission	Amendments proposed by the ECB ¹
<p>accompanied, if appropriate, by a legislative proposal.’</p>	<p>markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories(*).</p> <p>12. Four years after the date of entry into force of this Regulation, the Commission shall review this Regulation. The review shall include a general survey of the practical application of the rules laid down in this Regulation, taking due account of developments in the market for retail investment products. As regards UCITS as defined in Article 1 (2) of Directive 2009/65/EC, the review shall assess whether the transitional arrangements under Article 24 of this Regulation shall be prolonged, or whether, following the identification of any necessary adjustments, the provisions on key investor information in Directive 2009/65/EC might be replaced by or considered equivalent to the key investor document under this Regulation. The review shall also reflect on a possible extension of the scope of this Regulation to other financial products.</p> <p>23. After consulting the Joint Committee of the European Supervisory Authorities, the Commission shall submit a report to the European Parliament and the Council, accompanied, if appropriate, by a legislative proposal.’</p> <p>(*) OJ L ..., ..., p. ... ’</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>A level playing field between different types of investment products should be ensured with a</i></p>	

Text proposed by the Commission	Amendments proposed by the ECB ¹
<p><i>view to avoiding regulatory arbitrage at the expense of the investment products that are not covered by the proposed regulation, such as non-complex financial instruments. Disclosure requirements for other categories of financial products under existing Union legislation should be complemented with the standardised KID introduced by the proposed regulation. Similarly, market conduct requirements relating to the selling of financial products should be introduced in a harmonised manner in relation to a widely defined set of products. The ESAs and national competent authorities should at the same time be granted powers to intervene in relation to specific categories of financial products, including through their prohibition in view of investor protection and financial stability concerns. In this respect, account should be taken of the outcome of the ongoing legislative process in which such market conduct requirements and supervisory intervention powers are to be introduced through the proposed MiFIR.</i></p>	
<p style="text-align: center;">Amendment 2</p> <p style="text-align: center;">Article 8(2)</p>	
<p>‘2. The key information document shall contain the following information:</p> <p>(a) under a section at the beginning of the document, the name of the investment product and identity of the investment product manufacturer;</p> <p>(b) under a section titled “What is this investment?”, the nature and main features of the investment product, including:</p> <p style="padding-left: 20px;">i) the type of the investment product;</p> <p style="padding-left: 20px;">ii) its objectives and the means for achieving them;</p> <p style="padding-left: 20px;">iii) an indication of whether the investment product manufacturer targets specific environmental, social or governance outcomes, either in respect of his conduct of business or in respect of the investment product, and if so, an indication of the outcomes being sought and how these are to be achieved;</p>	<p>‘2. The key information document shall contain the following information:</p> <p>(a) under a section at the beginning of the document, the name of the investment product and identity of the investment product manufacturer;</p> <p>(b) under a section titled “What is this investment?”, the nature and main features of the investment product, including:</p> <p style="padding-left: 20px;">i) the type of the investment product;</p> <p style="padding-left: 20px;">ii) its objectives and the means for achieving them;</p> <p style="padding-left: 20px;">iii) an indication of whether the investment product manufacturer targets specific environmental, social or governance outcomes, either in respect of his conduct of business or in respect of the investment product, and if so, an indication of the outcomes being sought and how these are to be achieved;</p>

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<p>iv) where the investment product offers insurance benefits, details of these insurance benefits;</p> <p>v) the term of the investment product, if known;</p> <p>vi) performance scenarios, if this is relevant having regard to the nature of the product;</p> <p>(c) under a section titled "Could I lose money?", a brief indication of whether loss of capital is possible, including</p> <p>i) any guarantees or capital protection provided, as well as any limitations to these;</p> <p>ii) whether the investment product is covered by a compensation or guarantee scheme;</p> <p>(d) under a section titled "What is it for?" an indication of the recommended minimum holding period and the expected liquidity profile of the product including the possibility and conditions for any disinvestments before maturity, having regard to the risk and reward profile of the investment product and the market evolution it targets;</p> <p>(e) under a section titled "What are the risks and what might I get back?", the risk and reward profile of the investment product, including a summary indicator of this profile and warnings in relation to any specific risks that may not be fully reflected in the summary indicator;</p> <p>(f) under a section titled "What are the costs?", the costs associated with an investment in the investment product, comprising both direct and indirect costs to be borne by the investor, including</p>	<p>iv) where the investment product offers insurance benefits, details of these insurance benefits;</p> <p>v) the term of the investment product, if known;;</p> <p>vi) performance scenarios, if this is relevant having regard to the nature of the product;</p> <p>(c) under a section titled "Could I lose money?", a brief indication of whether loss of capital is possible, including</p> <p>i) any guarantees or capital protection provided, as well as any limitations to these;</p> <p>ii) whether the investment product is covered by a compensation or guarantee scheme;</p> <p>(d) under a section titled "What is it for?" an indication of the recommended minimum holding period and the expected liquidity profile of the product including the possibility and conditions for any disinvestments before maturity, having regard to the risk and reward profile of the investment product and the market evolution it targets;</p> <p>(e) under a section titled "What are the risks and what might I get back?", the risk and reward profile of the investment product, including a summary indicator of this profile, and a warning that the return on the product may be negatively affected by the risks listed followed by a description of:</p> <p>i) counterparty, operational and liquidity risks affecting the product;</p> <p>ii) sensitivity of the products'</p>

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<p>summary indicators of these costs;</p> <p>(g) under a section titled “How has it done in the past?”, the past performance of the investment product, if this is relevant having regard to the nature of the product and the length of its track record;</p> <p>(h) for pension products, under a section titled “What might I get when I retire?”, projections of possible future outcomes.’</p>	<p>performance to effective stress scenarios;</p> <p>iii) the leveraged component of the product insofar as this component may multiply the risks;</p> <p>iv) and warnings in relation to any other specific risks that may not be fully reflected in the summary indicator;</p> <p>(f) under a section titled “What are the costs?”, the costs associated with an investment in the investment product, comprising both direct and indirect costs to be borne by the investor, including summary indicators of these costs;</p> <p>(g) under a section titled “How has it done in the past?”, the past performance of the investment product, if this is relevant having regard to the nature of the product and the length of its track record, including a warning that past performance does not guarantee future investment outcomes and that the risks referred to in the other sections of the KID may have a substantive negative impact on the investment;</p> <p>(h) for pension products, under a section titled “What might I get when I retire?”, projections of possible future outcomes.’</p>

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<p style="text-align: center;"><u>Explanation</u></p> <p><i>The proposed additional information components will ensure that the KID does not lead investors to rely excessively on past performance patterns and that it provides a complete and fair outline of the risks related to investment products.</i></p>	
<p style="text-align: center;">Amendment 3</p> <p style="text-align: center;">Article 14</p>	
<p>‘Article 14</p> <p>The investment product manufacturer shall establish appropriate procedures and arrangements</p> <p>which ensure that retail investors who have submitted a complaint in relation to the key information document receive a substantive reply in a timely and proper manner.’</p>	<p>‘Article 14</p> <p>The investment product manufacturer and the distributor shall establish appropriate procedures and arrangements which ensure that: (i) retail investors have an effective way of submitting a complaint against the investment product manufacturer and hence of initiating a redress procedure; (ii) retail investors who have submitted a complaint in relation to the key information document receive a substantive reply in a timely and proper manner; and (iii) effective redress procedures are also available to retail investors in the event of cross-border disputes, in particular where the investment product manufacturer is located in another Member State or in a third country.’</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The proposed regulation allocates the responsibility for preparing the KID to the investment product manufacturer that is also liable on the basis of the information provided. However, retail investors are in direct contact with the distributors, and not the manufacturers of investment products. Therefore, the distributor of an investment product should also be responsible for ensuring that a retail investor has an effective way of submitting a complaint against the manufacturer in relation to the KID and of initiating a redress procedure. The redress procedures should also be effective in the case of cross-border disputes, in particular where the investment product manufacturer is located in another Member State or in a third country.</i></p>	

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Text proposed by the Commission	Amendments proposed by the ECB ¹
Amendment 4 Article 19(2)	
<p>‘2. Member States shall ensure that the competent authorities have the power to impose at least the following administrative measures and sanctions:</p> <ul style="list-style-type: none"> (a) an order prohibiting the marketing of an investment product; (b) an order suspending the marketing of an investment product; (c) a warning, which is made public and which identifies the person responsible and the nature of the breach; (d) an order for the publication of a new version of a key information document.’ 	<p>‘2. Member States shall ensure that the competent authorities have the power to impose at least the following administrative measures and sanctions:</p> <ul style="list-style-type: none"> (a) an order prohibiting the marketing of an investment product; (b) an order suspending the marketing of an investment product; (c) a warning, which is made public and which identifies the person responsible and the nature of the breach; (d) an order for the publication of a new version of a key information document; (e) in the case of a legal person, administrative pecuniary sanctions of up to 10% of the total annual turnover of that legal person in the preceding business year; where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year; (f) in the case of a natural person, administrative pecuniary sanctions of up to EUR 5 000 000, or in the Member States where the euro is not the official currency, the corresponding value in the national currency on the date of entry into force of

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Text proposed by the Commission	Amendments proposed by the ECB¹
	this Regulation.’
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The recommended amendments would ensure harmonisation as regards the imposition of administrative pecuniary sanctions with other proposed Union legislation, in particular the proposed MiFID and and the proposed UCITS V directive.</i></p>	