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COMMISSION DELEGATED REGULATION (EU) .../...

of 24.2.2021

**supplementing Regulation (EU) No 2019/1238 of the European Parliament and of the
Council with regard to product intervention**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

1.1. General background

Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP) introduces an EU-wide complementary personal pension savings framework.

Europe's population is ageing. In 2060, for every retired person there will be on average only two people of working age, compared to four today. As a result, despite the important reforms carried out by many EU Member States, the sustainability and adequacy of pension systems in the Member States will be under increasing strain. In particular state-run pension systems are already under pressure.

More savings are necessary to complement retirement incomes from traditional state-run pension systems by supplementary pensions. To this end, the PEPP Regulation is an important milestone on the road to addressing the pension gap and achieving a pan-European market for personal pension products within the Capital Markets Union.

It provides consumers with an additional option to save for retirement. The PEPP Regulation lays down the foundations for a pan-European personal pension market, by providing standardised rules for the core product features, such as transparency requirements, advice, investment rules, switching right, type of investment options, and type of out-payments.

1.2. Objectives

- In accordance with the PEPP Regulation, this delegated Regulation aims to achieve the following objectives:
- to supplement the PEPP Regulation with criteria and factors to be applied by EIOPA in determining when there is a significant PEPP saver protection concern and thus that its intervention is warranted against a particular PEPP product. These criteria and factors are based on the long-term retirement nature of the product, and provide further detail on what constitutes 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 referred to in Article 65.

1.3. Legal background

This act supplements Regulation (EU) No 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP) following the legal basis for empowerment provided to the Commission in Article 65(9) thereof.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

This Act is based on technical advice provided by EIOPA, in accordance with Article 10(1) of Regulation (EU) No 1094/2010. Before submitting the technical advice to the Commission, EIOPA conducted an open public consultation from 2 December 2019 to 2 March 2020. Before the public consultation EIOPA received joint opinions by its two stakeholder groups, Insurance and Reinsurance Stakeholder Group (IRSG) and Occupational Pension Stakeholder Group (OPSG). Further, EIOPA set up a consultative group of Expert Practitioners for the PEPP to discuss practical aspects of the developed ideas as well as exchanged views with the OECD and outstanding pension academics. On 24 February 2020, EIOPA organised a public hearing in which it sought stakeholder input. EIOPA also performed a cost-benefit analysis, which was included in the final report together with the outcome of the public consultation

and EIOPA's responses to stakeholders. EIOPA sent the final report with technical advice to the Commission on 14 August 2020.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

- This Delegated Regulation aims to specify supplementary elements of the PEPP regime that do not imply strategic decisions or policy choices. They complement the policy framework laid down in Regulation (EU) 2019/1238 with more details and clarifications for those elements covered by the empowerments.
- Articles 1 to 7 specify further the criteria and factors for determining when EIOPA's exercise of temporary and precautionary product intervention powers is warranted.

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THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP) and in particular Article 65(9) thereof,

Whereas:

- (1) It is necessary that EIOPA be able to apply clear criteria and factors in determining 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 the whole or part of the financial system in the Union. This Regulation further specifies those criteria and factors, including those listed in points (a), (b), (c) and (d) of the second subparagraph of Article 65(9) of Regulation (EU) 2019/1238.
- (2) It is essential to ensure a consistent approach within the Union whilst permitting appropriate action to be taken by the European Insurance and Occupational Pensions Authority (EIOPA) when unforeseen adverse events or developments occur that are consistent with Article 65(9) of Regulation (EU) 2019/1238. The Commission invited EIOPA to provide technical advice in the field of the pan-European personal pension product (PEPP).
- (3) The existence of a ‘threat’, which is one of the prerequisites for the intervention by EIOPA in the perspective of the orderly functioning and integrity of financial or commodity markets or stability of the financial system, requires a higher threshold of assessment than the existence of a ‘significant concern’, which is the prerequisite for the intervention by EIOPA so as to ensure investor protection. EIOPA should be able to intervene where at least one of the factors or criteria in this Regulation leads to such a concern or threat.
- (4) It is also necessary to take into account the specific situation and circumstances of the PEPP provider or PEPP distributor in relation to their potential contribution to concerns or threats of the type envisaged by Article 65(9) of Regulation (EU) 2019/1238,

HAS ADOPTED THIS REGULATION:

Article 1

EIOPA shall apply the following criteria and factors when considering the degree of complexity of the PEPP:

- (a) the long-term retirement nature of the PEPP;
- (b) the type, and degree of transparency, of the underlying assets;
- (c) the degree of transparency of costs and charges associated with the PEPP;
- (d) the use of techniques drawing PEPP savers' attention to non-essential features in the PEPP presentation;
- (e) the nature and transparency of risks;
- (f) 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 misleading product features;
- (g) whether there was insufficient, or insufficiently reliable, information about the PEPP to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of the PEPP;
- (h) 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;
- (i) the nature and scale of risks;
- (j) whether the PEPP is bundled with other products or services;
- (k) the complexity of any terms and conditions of the PEPP;
- (l) the existence and degree of disparity between the expected return of the PEPP and the risk of loss, taking into account the following:
 - (1) the cost structure and other costs;
 - (2) the disparity in relation to the provider's risk retained by the provider;
 - (3) the risk and return profile;
- (m) the pricing and associated costs of PEPP, taking into account the following:
 - (1) the use of hidden or secondary charges;
 - (2) charges that do not reflect the level of service provided;
 - (3) the costs of guarantees or costs that do not reflect the actual cost or the fair value of the capital guarantee in the case of a Basic PEPP;
- (n) the ease and cost with which the PEPP saver is able to make use of the switching and portability services, taking into account the following:
 - (1) use of switching and portability services in relation to the phase in which the service is used, the fees and charges applied, or the loss of advantages and incentives;

- (2) the fact that the use of switching and portability services is not permitted or is made factually impossible.

Article 2

EIOPA shall apply the following criteria and factors in considering the relation of the PEPP to the type of PEPP saver to whom the PEPP is marketed or sold:

- (a) features characterising the PEPP saver's skills and abilities, including the level of education, knowledge of and experience with other pension products, long-term investment products or selling practices and the PEPP saver's vulnerability;
- (b) features characterising the PEPP saver's economic situation, including income, wealth and the degree of dependence on the PEPP for an adequate retirement income;
- (c) the PEPP saver's core financial objectives, including pension savings and need for risk coverage, including biometric risks;
- (d) whether the PEPP is being sold to a PEPP saver outside the intended target market, or whether the target market has not been adequately identified;
- (e) the eligibility for coverage by a national guarantee scheme, where such schemes exist.

Article 3

EIOPA shall apply the following criteria and factors in considering the degree of innovation of the PEPP or of an activity or of a practice:

- (a) the degree of innovation related to the structure and features of the PEPP, in particular the degree of innovation of the risk-mitigation techniques or of the forms of out-payments or of the design of other PEPP benefits;
- (b) the extent of innovation diffusion, including whether the PEPP is innovative for particular categories of PEPP savers;
- (c) innovation involving leverage;
- (d) the past experience of the market with similar PEPPs or selling practices for PEPPs.

Article 4

EIOPA shall apply the following criteria and factors when considering the leverage that a PEPP or practice provides:

- (a) the particular characteristics of underlying assets of the PEPP, taking into account the leverage inherent in the PEPP;
- (b) the leverage due to financing;

- (c) the features of securities financing transactions.

Article 5

EIOPA shall apply the following criteria and factors when considering the size or the total amount of accumulated capital of the PEPP:

- (a) the size of potential detrimental consequences from the perspective of the individual PEPP saver and in the case of a large number of current and potential PEPP savers, the potential detrimental consequences for a cluster of PEPP savers, taking into account, in particular:
 - (b) the size and total amount of accumulated capital of the PEPP;
 - (c) the notional value of the PEPP;
 - (d) the probability, scale and nature of any detriment, including the amount of loss potentially suffered;
 - (e) the anticipated duration of the detrimental consequences;
 - (f) the volume of the contributions;
 - (g) the number, and the fit and proper requirements of intermediaries involved;
 - (h) the growth of the market or sales;
 - (i) the average amount invested by each PEPP saver in the PEPP;
 - (j) the coverage level specified in national insurance guarantee schemes law, where such schemes exist;
 - (k) the value of the technical provisions with respect to the PEPPs;
 - (l) whether the underlying assets of the PEPP pose a high risk to the performance of transactions entered into by participants or PEPP savers in the relevant market;
 - (m) whether the characteristics of the PEPP make it particularly susceptible to being used for the purpose of financial crime, in particular whether those characteristics could potentially encourage the use of the PEPP for:
 - (1) any fraud or dishonesty;
 - (2) misconduct in, or misuse of information in relation to a financial market;
 - (3) handling the proceeds of crime;
 - (4) the financing of terrorism.

Article 6

EIOPA shall also consider the following factors that may affect the orderly functioning and integrity of the financial markets:

- (a) whether financial activities or financial practices of the PEPP provider or PEPP distributor in relation to the PEPP pose a particularly high risk to the resilience or smooth operation of markets;
- (b) whether the PEPP or the financial activities or financial practices of the PEPP provider or PEPP distributor in relation to the PEPP could lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;
- (c) whether the PEPP or the financial activities or financial practices of the PEPP provider or PEPP distributor in relation to the PEPP pose a high risk to the market or payment systems infrastructure, including trading, clearing and settlement systems;
- (d) whether the PEPP or the financial activities or financial practices of the PEPP provider or PEPP distributor in relation to the PEPP may threaten PEPP savers' confidence in the financial system;
- (e) whether the PEPP or the financial activities or financial practices of the PEPP provider or PEPP distributor in relation to the PEPP pose a high risk of disruption to financial institutions deemed to be important to the financial system of the Union.

Article 7

EIOPA shall also consider the following factors that apply to the specific situation and circumstances of the PEPP provider or PEPP distributor, taking into account the following:

- (a) its financial situation and solvency;
- (b) its financial activities or financial practices;
- (c) its business model, including its sustainability and transparency;
- (d) the suitability of reinsurance and guarantee arrangements regarding the PEPP;
- (e) the PEPP provider's reliance on third parties for important features of the PEPP, such as coverage of biometric risks, guarantees and the portability of the PEPP;
- (f) the selling practices associated with the PEPP, taking into account:
 - (1) the communication and distribution channels used;
 - (2) the information, marketing or other promotional material;
 - (3) the degree of innovation related to the distribution model, such as the length of the intermediation chain or the reliance on innovative techniques for the distribution model.

Article 8

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24.2.2021

For the Commission
The President
Ursula VON DER LEYEN