



12 November 2012

## **EIOPA procedures for issuing warnings, temporary prohibitions and restrictions**

THE BOARD OF SUPERVISORS,

Having regard to the Regulation No. 1094/2010 of the European Parliament and the Council of 24 November 2010 ("The Regulation") establishing EIOPA)<sup>1</sup>, in particular Article 9, paragraphs 3 and 5 and Article 43.1 thereof,

Whereas:

1. Article 9(3) of The Regulation can be applied where EIOPA's objectives of contributing to financial stability and effectiveness of the financial system are seriously threatened. Article 9(5) of The Regulation can be activated where certain financial activities threaten the orderly functioning of the markets, financial stability or an emergency situation arises. Given the placement of these provisions under Article 9 and not under Article 18 on emergency situations itself, they can only be activated where financial instability or ineffectiveness affect consumers. Therefore, the focus of protection is not only on financial stability as such but also on consumer protection. At the same time, any decision taken under Article 9 of The Regulation to protect consumers, must also be taken in the light of the overall objective of EIOPA to contribute to financial stability and should not undermine that overall objective.
2. Whilst the title of Article 9 of The Regulation refers to consumer protection and financial services, consumer protection constitutes the very basis and justification for the provision. This can be derived from recital 50 of The Regulation concerning crisis management and the

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<sup>1</sup> Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, O.J. L 331, 15.12.2010, p.48.

safeguard against decisions impinging on the fiscal responsibilities of the Member States. In this respect, recital 50 lays down that the safeguard mechanism should not be abused in particular in relation to a decision taken by the Authority, which does not have a significant or material fiscal impact, such as a reduction of income linked to the temporary prohibition of specific activities or products for consumer protection purposes. Thus, although Article 9(5) does not refer to consumer protection, recital 50 clarifies that consumer protection purposes underlies its application. At the same time, a warning or a temporary prohibition or restriction of financial activities could by itself often cause a serious disruption of market functioning and would infringe legitimate expectations of the market participants. Therefore, it is equally important to ensure that the decision to issue such measures is not applied lightly and only with a view to achieving EIOPA's objectives. A warning or a temporary prohibition or restriction should therefore be applied in accordance with the proportionality principle subject to which they will only be issued if the remedy can not be achieved by less intrusive means. Financial innovation plays a role in its own right, which is supported by the fact that EIOPA's objective includes the contribution to the effectiveness of the financial system to which financial innovation pertains. Moreover, Article 9(4) of The Regulation lays down a specific obligation to establish a committee competent regarding innovative financial activities. However, the over all emphasis of Article 9 lies on consumer protection.

3. As part of the crisis management work, the decision making process for Article 9 of The Regulation has to be completed. In this respect, the scope of both paragraphs 3 and 5 of Article 9 of The Regulation and their importance from a consumer protection perspective is of relevance, noting that in particular Article 9(5) of The Regulation feeds into the work on the emergency situation related issues under Article 18 of the Regulation.
4. According to the first paragraph of Article 9(5) of The Regulation EIOPA may 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 two different situations: either in the cases specified and under the conditions laid down in the sectoral legislation referred to in Article 1(2) of The Regulation or, alternatively, if so required, in the case of an emergency situation in accordance with and under the conditions laid down in Article 18(2). It is noted that sectoral legislation does not at the current juncture further specify and/or provide conditions for the application of Article 9(5) of The Regulation. Should such sectoral legislation be adopted, EIOPA will have to consider whether these procedures will have to be further amended, e.g. by way of adopting separate procedures for warnings and temporary prohibitions/restrictions, respectively.

HAS DECIDED AS FOLLOWS:

## **Article 1**

### **Scope**

1. The scope of these procedures is to establish procedures for the issuing of warnings and temporary prohibitions and restrictions that may be adopted by the Board of Supervisors, with a view to ensuring a higher degree of legal certainty for any potential use of Article 9(3) and (5) of The Regulation.
2. Temporary prohibitions and restrictions must not impinge in any way on the fiscal responsibilities of Member States.
3. Warnings and temporary prohibitions and restrictions are to be issued in accordance with the proportionality principle subject to which they may not exceed what is necessary to achieve EIOPA's objectives. In addition, EIOPA are bound by other fundamental Union principles such as non-discrimination and transparency, as laid down in the Treaty on the European Union (TEU).

## **Article 2**

### **Definitions**

For the purposes of this Decision:

1. An "addressee" or "addressees" of a warning, temporary prohibition or restriction are determined by the Board of Supervisors on a case-by-case basis, and can be:
  - a. For warnings: consumers, issuers of contracts, insurance intermediaries and/or National Supervisory Authorities;
  - b. For temporary prohibition or restriction: issuers of contracts, insurance intermediaries and/or National Supervisory Authorities.
2. "EIOPA's objectives" as laid down in the first paragraph of Article 1(6) of The Regulation are to protect public interest by contributing to the

short, medium and long-term stability and effectiveness of the financial system for the Union economy, its citizens and businesses. In doing so, EIOPA shall contribute to tasks listed in litra a-f of the first paragraph of Article 1(6), which represents ways of ensuring the fulfilment of the objectives of stability and effectiveness of the financial system but not objectives in their own right.

3. A "contract" means an insurance or pension product falling within EIOPA's fields of competence as laid down in Articles 1(2)-(4) and 8-39 of The Regulation.
4. A "financial activity" and "certain financial activities" mean an activity or activities undertaken at any stage during the entire cycle of a contract from the very design level and throughout the life of the contract, including the execution of the commitment by the issuer of the contract.
5. A "warning" means a measure adopted in order to address a financial activity that poses a serious threat to EIOPA's objectives as decided by the Board of Supervisors in accordance with Article 9(3) of The Regulation. A warning does not suspend the continued activity but alerts as to such activity.
6. A "temporary prohibition" means an absolute ban on certain financial activities for a defined duration.
7. A "temporary restriction" means the continuation of a financial activity, for a defined duration, with the limitation that the execution of the activity is restricted in scope and/or made subject to specific conditions.

### **Article 3**

#### ***Identification of threats and initiation of further assessment process***

1. The identification of threats that may lead to the adoption of warnings, temporary prohibitions or restrictions can be undertaken by the National Supervisory Authorities or EIOPA staff, depending on who has the available information.
2. The initiation of the process to assess the threats under this Decision shall be done by the party referred to in Article 3(1) above, which in possession of the information.

3. The party in possession of the information shall assess whether the identified threat could lead to action under Article 9(3) and/or Article 9(5) of The Regulation. This party will consult other affected NSAs and/or EIOPA staff, as the case may be, before making its assessment. The information should be copied to the Board of Supervisors, the Committee on Consumer Protection and Financial Innovation (CCPFI) and the Internal Monitoring Group (IMG) when it is passed to EIOPA.
4. Where the identified threat is of a nature that could lead to the adoption either of a warning under Article 9(3) of The Regulation or a temporary prohibition or restriction under Article 9(5) of The Regulation, the further assessment process is undertaken by the CCPFI and the IMG. Where the CCPFI or the IMG consider that the identified threat is of a qualifying nature, the CCPFI shall prepare a proposal for a warning or the IMG shall prepare a proposal for a temporary prohibition or restriction, as the case may be.
5. EIOPA's Chairperson shall submit any such proposal for a warning, a temporary prohibition or a restriction to the Board of Supervisors for adoption by simple majority with the exemption of cases covered by Article 8(3) of this Decision.
6. Where the addressee(s) of a warning, temporary prohibition or restriction is/are a/the National Supervisory Authorities, the Board of Supervisors shall invite it/them in a meeting of the Board of Supervisors to specifically present its/their views before or, in the case of reviews of or request to reconsider temporary prohibitions and restrictions, after adoption of such warnings, temporary prohibitions or restrictions. The Board of Supervisors shall take due account of these views
7. The National Supervisory Authorities shall be specifically consulted on any draft warning or temporary prohibition/restriction addressed to issuers of contracts or insurance intermediaries established in their jurisdiction. The Board of Supervisors shall take due account of these views.
8. The Board of Supervisors may invite other addressee(s) of warnings, temporary prohibitions or restriction to one of its meetings to present its/their views before or, in the case of reviews of or request to reconsider temporary prohibitions and restrictions, after adoption of such warnings, temporary prohibitions or restrictions. The Board of Supervisors may alternatively also invite such addressee(s) to provide its/their views in written form. In both cases, the Board of Supervisors shall take due account of these views.

9. In order to avoid potentially prolonged consumer detriment, all parties involved in the process shall take due account of the urgency of the matter when preparing the proposed decision.

#### **Article 4**

##### **Named decisions**

1. Where the addressee of a warning, temporary prohibition or restriction is named, the decision making procedures laid down in Article 39(1)-(3) of The Regulation have to be complied with.
2. The named addressee(s) of a draft decision shall be informed in writing by means of a recorded delivery. If the Board of Supervisors adopts the decision the named addressee(s) of the decision shall be informed in writing by means of a recorded delivery.
3. Draft decisions and adopted decisions under Article 4(2) above shall be provided in the language of the addressee(s).
4. Where the named addressee(s) of the draft decision wishes to express its views on the matter, the deadline for doing so shall be set taking into full account the urgency, complexity and potential consequences of the decision.
5. Decisions to issue a warning or a temporary prohibition and restrictions shall specifically state the reasons on which they are based. In particular they shall refer to the significance of the financial activities in terms of the threat they pose to EIOPA's objectives.
6. EIOPA shall inform named addressee(s) about legal remedies available for under this Regulation. This includes the right of appeal under Article 60(1) of The Regulation, where a decision is addressed to another person but is of direct and individual concern to the appealing person, and actions before the Court of Justice of the European Union according to Article 61 of The Regulation. EIOPA may also provide information as to the option of complaining to the European Ombudsman.

#### **Article 5**

##### **Decisions without specific addressee(s)**

1. In situations where the EU Council has not adopted a decision determining the existence of an emergency situation under Article 18(2) of The Regulation, the Board of Supervisors may decide to undertake a

public consultation on the draft decision to issue a warning or a temporary prohibition or restriction. The Board of Supervisors may also decide to invite representatives of the group(s) affected by the decision to express its/their views on the matter, for example where such groups may be materially adversely affected. The deadline for potentially doing so shall be set taking into full account the urgency, complexity and potential consequences of the decision.

2. Decisions to issue a warning or a temporary prohibition and restriction shall state the specific reasons on which they are based. In particular it shall refer to the significance of the financial activities in terms of the threat they pose to EIOPA's objectives.
3. EIOPA shall in the warning or temporary prohibition or restriction inform about legal remedies available for under this Regulation. This includes an action before the Court of Justice of the European Union according to Article 61 of The Regulation. EIOPA may also provide information as to the option of complaining to the European Ombudsman.

#### **Article 6**

#### ***Communication of warnings, temporary prohibitions and restrictions***

1. Decisions to issue a temporary prohibition or restriction shall be made public and shall state the identity of the relevant National Supervisory Authority(ies), issuer of contracts or insurance intermediary concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of the issuer of contracts in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union.
2. Warnings, temporary prohibitions and restrictions may be but are not restricted to be communicated in the form of letters when addressed to National Supervisory Authorities.
3. Without prejudice to Articles 4(2) and 6(1) above, warnings, temporary prohibitions and restrictions are not limited to but will generally be communicated in the form of press releases when addressed to either consumers (in respect of warnings) or issuers of contracts and insurance intermediaries (in respect of either warnings or temporary prohibitions and restrictions).
4. Without prejudice to Article 6(1) above, the National Supervisory Authorities may further communicate EIOPA warnings, temporary prohibitions or restrictions to the public by the channels they deem appropriate.

## **Article 7**

### ***Duration of temporary prohibitions and restrictions***

1. In accordance with the second subparagraph of Article 9(5) of The Regulation, the duration of a temporary prohibition or restriction in the cases specified and under the conditions laid down in sectoral legislation referred to in Article 1(2) of The Regulation can be of a duration up to three months (including weekends and public holidays).
2. Where the EU Council either does not renew or specifically discontinues an emergency decision under Article 18(2) of The Regulation, temporary prohibitions and/or restrictions adopted by EIOPA will be revoked automatically and immediately as a consequence, and simultaneously be communicated to the addressee(s).

## **Article 8**

### ***Review***

1. The Chairperson shall, in consultation with the CCPFI and the IMG, ensure an on-going monitoring of the follow-up to an adopted warning, temporary prohibition or restriction and keep the Board of Supervisors informed accordingly.
2. In the case of a decision to temporarily prohibit or restrict a financial activity, the Board of Supervisors shall review the decision as soon as possible and at least every third month with a view to considering whether the decision has been followed and/or needs to be either repealed or extended. In the absence of a review, the decision automatically expires in accordance with the second paragraph of Article 9(5) of The Regulation.
3. Where a Member State requests EIOPA to reconsider its decision, the Board of Supervisors shall decide with qualified majority whether it maintains its decision. Where the Board of Supervisors revokes its decision this has to be communicated publically and, in the case of a named addressee(s), the latter has to be notified without delay.
4. Where the IMG and/or the CCPFI are of the view that a certain type of financial activity should be permanently prohibited or restricted, they shall prepare and EIOPA's Chairperson shall submit a proposal to this effect to the Board of Supervisors. Where the Board of Supervisors adopts the proposal in line with Article 44 of The Regulation (simple

majority), EIOPA's Chairperson shall inform the European Commission accordingly for its further consideration.

***Article 9***

***Final provision***

These procedures shall enter into force immediately after their adoption.

Frankfurt am Main  
[Signed]

Gabriel Bernardino  
Chairperson of EIOPA