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Committee on Civil Liberties, Justice and Home Affairs

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DRAFT OPINION

of the Committee on Civil Liberties, Justice and Home Affairs

for the Committee on Economic and Monetary Affairs

on the proposal for a regulation of the European Parliament and of the Council
on key information documents for investment products
(COM(2012)0352 – C7-0179/2012 – 2012/0169(COD))

Rapporteur: Petru Constantin Luhan

PA_Legam

SHORT JUSTIFICATION

This proposal aims at improving transparency in the investment market for retail investors. Retail investment products – which include investment funds, retail structured products and certain types of insurance contracts used for investment purposes – are essential for meeting the needs of EU citizens for products with which to build up savings and investments.

However retail investment products are becoming increasingly complex and technically difficult to understand. Citizens are therefore confronted to difficulties to assess and compare them in order to take an appropriate and well informed decisions about the financial product they buy. During the last years retail investors have lost money with investments that implied risks that were not transparent or properly understood by them, particularly because of the unclear, poor and unsatisfactory information provided.

The proposal makes clearer rules and obligations for financial institutions with regard to the key information that will have to be disclosed by financial undertakings so as to improve the understanding of the products and facilitate their comparison. It also provides for powers for competent authorities to establish administrative sanctions and measures on financial undertakings for breaches to the obligations imposed by this legal instrument.

Your rapporteur welcomes the form of the legal instrument chosen. A Regulation will contribute to establish a more uniform system in the Union, thereby facilitating the comparison of products within the Union and the activities of financial undertakings and customers at the level of the Union.

The proposal contains provisions that will affect the fundamental rights. Your rapporteur considers that they are not sufficiently and properly addressed by the Commission's proposal. The proposal provides for the power of the national competent authorities to impose administrative sanctions for breaches of the obligations imposed by the proposal. It also provides for the publication of the sanctions imposed, which includes the identity of the persons. Finally the obligations imposed by the proposal will imply the processing of personal data.

The amendments proposed by your rapporteur aim at ensuring that fundamental rights of the individual are respected and duly taken into account. This is essential to ensure the lawfulness of the measures taken and to avoid that they can be reversed for not compliance with fundamental rights. Therefore the amendments proposed stress that any administrative sanction and measure taken by a competent authority shall be in writing and duly motivated indicating the means for judicial review before a tribunal and the name of that authority.

With regard to the publication of sanctions the amendments aim at ensuring that this publication respects fundamental rights. If a sanction was publicly disclosed for an unlimited or a long period of time or it could be considered several years after the adoption of the sanction, it would be in conflict with the principles of proportionality and necessity and would stigmatise the individual for a fact of the past which would not reflect the actual behaviour or situation of an individual. The publication of administrative decisions imposing sanctions or ending legal proceedings are subject in Member States to specific rules that in many cases do not allow the disclosure of the identity of the person or set out specific conditions. In addition

to data protection, Member States law imposes conditions relating to the respect for private and family life. In this context, it is important to recall the decision of the Court of Justice in case C-92/09 –Schecke, which declared void the publication of names of beneficiaries of farm subsidies for breach of the principle of proportionality.

AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a regulation Recital 24

Text proposed by the Commission

(24) In line with the Commission Communication of December 2010 on reinforcing sanctioning regimes in the financial sector and in order to ensure that the requirements set out in this Regulation are fulfilled, it is important that Member States take necessary steps to ensure that breaches of this Regulation are subject to appropriate administrative sanctions and measures. In order to ensure that sanctions have a dissuasive effect and to strengthen investors' protection by warning them about investment products marketed in breach of this Regulation, sanctions and measures should normally be published, except in certain well defined circumstances

Amendment

(24) In line with the Commission Communication of December 2010 on reinforcing sanctioning regimes in the financial sector and in order to ensure that the requirements set out in this Regulation are fulfilled, it is important that Member States take necessary steps to ensure that breaches of this Regulation are subject to appropriate administrative sanctions and measures. In order to ensure that sanctions have a dissuasive effect and to strengthen investors' protection by warning them about investment products marketed in breach of this Regulation, sanctions and measures should normally be published, except in certain well defined circumstances. ***The adoption and publication of sanctions should respect fundamental rights as laid down in the Charter of Fundamental Rights of the European Union, in particular the respect for private and family life, the protection of personal data and the right to an effective remedy and to a fair trial.***

Or. en

Justification

This amendment clarifies that adoption of administrative sanctions and measures as well as their publication has to respect fundamental rights, in particular the right for respect for private and family life, the right to the protection of personal data and the right to an effective remedy and to a fair trial.

Amendment 2

Proposal for a regulation

Recital 27

Text proposed by the Commission

(27) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data governs the processing of personal data carried out in the Member States in the context of this Regulation and under the supervision of the competent authorities. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data, governs the processing of personal data carried out by the European Supervisory Authorities pursuant to this Regulation and under the supervision of the European Data Protection Supervisor. Any processing of personal data carried out within the framework of this Regulation, such as the exchange or transmission of personal data by the competent authorities should be in accordance with Directive 95/46/EC and any exchange or transmission of information by the European Supervisory Authorities should be in accordance with Regulation (EC) No 45/2001.

Amendment

(27) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data governs the processing of personal data carried out in the Member States in the context of this Regulation and under the supervision of the competent authorities ***of the Member States competent authorities, in particular the public independent authorities designated by the Member States***. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data, governs the processing of personal data carried out by the European Supervisory Authorities pursuant to this Regulation and under the supervision of the European Data Protection Supervisor. Any processing of personal data carried out within the framework of this Regulation, such as the exchange or transmission of personal data by the competent authorities should be in accordance with Directive 95/46/EC and any exchange or transmission of information by the European Supervisory Authorities should be in accordance with Regulation (EC) No 45/2001.

Justification

This amendment clarifies that the supervision of data processing activities is carried out by independent public authorities, namely the data protection authorities, pursuant to Article 7 of the EU Charter and Article 16 of the Treaty on the Functioning of the European Union. The text of the Commission's proposal is unclear because the reference to "competent authorities" is used in the proposal as referring to authorities "competent for financial supervision".

Amendment 3**Proposal for a regulation****Recital 31***Text proposed by the Commission*

(31) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of the Fundamental Rights of the European Union

Amendment

(31) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of the Fundamental Rights of the European Union ***as enshrined in the Treaty, notably the protection of personal data, the right to an effective remedy and to a fair trial the presumption of innocence and right of defence, the principles of legality and proportionality of criminal offences and penalties, the right not to be tried or punished twice in criminal proceedings for the same criminal offence, and has to be applied in accordance with those rights and principles.***

Justification

The legal instrument must clearly identify the fundamental rights that are directly impacted and how they are addressed in the proposal in order to ensure that it respects these fundamental rights.

Amendment 4

Proposal for a regulation

Article 4 – point a

Text proposed by the Commission

(a) 'investment product' means an investment where regardless of the legal form of the investment the amount repayable to the investor is exposed to fluctuations in reference values or ***in the performance of one or more assets which are not directly purchased by the investor;***

Amendment

(a) 'investment product' means an investment where regardless of the legal form of the investment the amount repayable to the investor is exposed to fluctuations in reference values or ***on other values used as a reference;***

Or. en

Justification

To avoid confusion between fluctuation and performance.

Amendment 5

Proposal for a regulation

Article 5

Text proposed by the Commission

The investment product manufacturer shall draw up a key information document in accordance with the requirements laid down in this Regulation for each investment product it produces and shall publish the document on a website of its choice before the investment product can be sold to retail investors.

Amendment

The investment product manufacturer shall draw up a key information document in accordance with the requirements laid down in this Regulation for each investment product it produces and shall publish the document on a website of its choice before the investment product can be sold to retail investors. ***The investment product manufacturer is responsible for the contents of the key information document.***

Or. en

Justification

In view of improving legal certainty for the retail investor with regard to the liability for key investment documents, it is necessary to stress that key information documents are produced by one single party: the investment product manufacturer, who is responsible for the contents

of the key information documents it draws up.

Amendment 6

Proposal for a regulation Article 14

Text proposed by the Commission

The investment product manufacturer shall establish appropriate procedures and arrangements 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.

Amendment

The investment product manufacturer shall establish appropriate procedures and arrangements 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, ***in accordance with national law in order to avoid duplications.***

Or. en

Amendment 7

Proposal for a regulation Article 17 – paragraph 1

Text proposed by the Commission

1. Member States shall apply Directive **94/46/EC** to the processing of personal data carried out in that Member State pursuant to this Regulation.

Amendment

1. Member States shall apply Directive **95/46/EC** to the processing of personal data carried out in that Member State pursuant to this Regulation

Or. en

Justification

Technical correction.

Amendment 8

Proposal for a regulation Article 18 – paragraph 2

Text proposed by the Commission

2. In the exercise of their powers in Article 19, competent authorities shall cooperate closely to ensure that the administrative measures and sanctions produce the desired results of this Regulation and coordinate their action in order to avoid possible duplication and overlap when applying administrative measures and sanctions to cross border cases.

Amendment

2. In the exercise of their powers in Article 19, competent authorities shall cooperate closely to ensure that the administrative measures and sanctions produce the desired results of this Regulation and coordinate their action in order to avoid possible duplication and overlap when applying administrative measures and sanctions to cross border cases, ***with full respect of the right not to be tried or punished twice for the same breach.***

Or. en

Justification

The principle of ne bis in idem is an essential principle recognised by Article 50 of the EU Charter of Fundamental Rights and must be clearly established in this provision.

Amendment 9

Proposal for a regulation Article 18 – paragraph 2 a

Text proposed by the Commission

Amendment

2a. Member States shall ensure that any administrative measure and sanction adopted by the competent authorities pursuant to this Regulation shall be in writing.

Such administrative measure and sanction shall be duly motivated, shall specify the reasons for the decision and shall indicate the available remedies, including appeals or reviews, before a court or a tribunal, the authority competent for such remedy and the time

limit for such action.

Or. en

Justification

It is necessary to ensure the right to an effective remedy before a tribunal, recognised in Article 47 of the EU Charter of Fundamental Rights.

Amendment 10

Proposal for a regulation

Article 20 – paragraph 1 – point b

Text proposed by the Commission

(b) the degree of responsibility of the responsible person;

Amendment

(b) the degree of **legal liability of** the responsible person;

Or. en

Amendment 11

Proposal for a regulation

Article 20 – paragraph 1 – point e

Text proposed by the Commission

(e) any previous breaches by the responsible person.

Amendment

(e) any previous **legal** breaches by the responsible person.

Or. en

Amendment 12

Proposal for a regulation Article 22

Text proposed by the Commission

Sanctions and measures imposed for the breaches referred to in Article 19(1) shall be disclosed to the public without undue delay including at least information on the type of breach of this Regulation and the identity of those responsible for it, unless such disclosure would seriously jeopardise the financial markets.

Where a publication would cause a disproportionate damage to the parties involved, the competent authorities shall publish the sanctions or measures on an anonymous basis.

Amendment

Sanctions and measures imposed for the breaches referred to in Article 19(1) **and which have become final** shall be disclosed to the public without undue delay including at least information on the type of breach of this Regulation and the identity of those responsible for it, unless such disclosure would seriously jeopardise the financial markets.

Where a publication would cause a disproportionate damage to the parties involved, the competent authorities shall publish the sanctions or measures on an anonymous basis.

The publication of sanctions shall respect fundamental rights as laid down in the Charter of Fundamental Rights of the European Union, in particular the respect for private and family life and the protection of personal data.

Member States shall take any measures to ensure that administrative sanctions and measures are not published for longer than required under national law, after which they are automatically deleted. Member States shall take any technical measure and safeguard to prevent that third parties continue to disclose public administrative sanctions and measures after the period of publication.

Or. en

Justification

The publication of sanctions interferes with fundamental right, particularly the right of respect of private life and protection of personal data. Any limitation with these rights must comply with the conditions of Article 52 of the EU Charter. The principles of necessity and proportionality should be respected. To this purpose sanctions should be published for a

limited period of time, and technical measures should be taken to prevent the risk related to the use of external search engines and websites that will continue to publish the sanction after the limited period of publication, for instance by preventing automatic indexation.