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DECISION

Pursuant to Article 17(1)(a) of *Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)* (OJ L 352 of 9 December 2014, p. 1, as amended), hereinafter referred to as 'Regulation on PRIIPs', in conjunction with Article 3b of the *Act of 21 July 2006 on financial market supervision* (Polish Journal of Laws 2020 item 2059, as amended) and Article 2(2) of *Commission Delegated Regulation (EU) 2016/1904 of 14 July 2016 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council with regard to product intervention* (OJ L 295 of 29 October 2016, p. 11), hereinafter referred to as 'Delegated Regulation 2016/1904', in conjunction with Article 366(2) of the *Act of 11 September 2015 on the business of insurance and reinsurance* (Journal of Laws 2021 item 1130), hereinafter referred to as 'Act on the business of insurance',

the KNF Board

hereby imposes

prohibitions on the marketing, distribution and sale of insurance-based investment products – unit-linked life insurance contracts

– defined in part I of this decision,

within the scope of application specified in part II of this decision.

I. Prohibitions on the marketing, distribution and sale of insurance-based investment products – unit-linked life insurance contracts

Hereinafter, any reference to:

1) demands and needs questionnaire – shall mean the questionnaire referred to in Article 21(1) and (2) of the Act on the business of insurance;

2) RAF (BION) – shall mean the annual Risk Assessment Framework of insurance and reinsurance undertakings which involves, in particular, the identification and assessment of the existing and future risks to which insurance and reinsurance undertakings are or may be exposed. The purpose of that process is also to identify irregularities in the business pursued by insurance and reinsurance undertakings. The method of conducting and the scope of the Risk Assessment Framework of insurance and reinsurance undertakings and the rules for assigning ratings are described in the document entitled *Metodyka Rocznego Badania i Oceny Nadzorczej (BION) zakładów ubezpieczeń i zakładów reasekuracji* [RAF Methodology (BION) for insurance and reinsurance undertakings], available on the KNF website (www.knf.gov.pl);

3) Directive on UCITS – shall mean *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 of 17 November 2009, p. 32, as amended);

4) Solvency II Directive – shall mean 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), (OJ L 335 of 17 December 2009, p.1, as amended);

5) IDD – shall mean Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26 of 2 February 2016, p. 19, as amended);

6) EIOPA – shall mean the European Insurance and Occupational Pensions Authority, referred to in 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 (OJ L 331 of 15 December 2010, p. 48, as amended);

7) contingent convertibles or CoCos – shall mean contingent convertible bonds, subordinated loans and/or other instruments and contracts under which in the case of occurrence of a trigger event defined in the terms of issue or contract, the issuer or debtor cancels the instruments/contracts, by way of an impairment loss or a temporary write-down of the nominal value of the instrument or liability in whole or in part, or converts the instruments/contracts into shares, or cancels the interest, in whole or in part, for the relevant interest period or suspends the interest payments for an indefinite period, if such contingent convertible bonds, subordinated loans, instruments are issued, or such contracts are concluded, by the debtor to qualify them, or if they have been qualified, as:

   a) elements of own funds under Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit

institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176 of 27 June 2013, p. 1, as amended), or

b) own funds under Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 12 of 17 January 2015, p. 1, as amended);

8) closed-end investment fund – shall mean a closed-end investment fund established and functioning under the Act on investment funds and management of alternative investment funds;

9) group (of entities) – shall mean a participating undertaking and its subsidiary undertakings;

10) derivatives – shall mean property rights whose market price depends, directly or indirectly, on the price or value of the securities referred to in point 17 hereof, as well as other property rights whose market price depends, directly or indirectly, on the market price of foreign currencies or on changes of interest rates;

11) credit institution – shall mean a credit institution referred to in Article 4(1) point 17 of the Act of 29 August 1997 – the Banking Law;

12) KID – shall mean a key information document referred to in the Regulation on PRIIPs;

13) client or investor – shall mean, as appropriate, the policyholder, the insured, the beneficiary under a unit-linked life insurance contract, or a person interested in entering into a unit-linked life insurance contract;

14) criterion – shall mean the prohibition referred to in point I.1 or I.2 hereof as appropriate;

15) Polish supervisory authority or KNF Board – shall mean the Board of the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego), referred to in the Act of 21 July 2006 on financial market supervision (consolidated text: Journal of Laws 2020, item 2059, as amended);

16) EU Member State – shall mean a Member State of the European Union;

17) securities – shall mean:

a) shares, pre-emptive rights as defined in the Act of 15 September 2000 – the Commercial Companies and Partnerships Code (consolidated text: Journal of Laws 2020 item 1526, as amended), rights to shares, subscription warrants, depository receipts, bonds, covered bonds, investment certificates and other transferable securities, including securities incorporating property rights corresponding to rights attached to shares or debt, issued under applicable provisions of Polish or foreign laws,

b) other transferable property rights created by issuance which incorporate a right to acquire or subscribe for securities specified in point (a), or are exercised by way of cash settlement, related to securities specified in point (a), currencies, interest rates, rates of return, goods and other indicators or measures (derivative rights),

excluding derivatives;

18) PRIIP – shall mean a product specified in Article 4(3) of the Regulation on PRIIPs;

19) Rules of a fund – shall mean a reference to the Rules for investing assets of a unit-linked fund referred to in Article 23(1) point 3 of the Act on the business of insurance, and for a unit-linked fund offered by a foreign insurance undertaking – a document which obliged the foreign insurance undertaking to invest the assets of the unit-linked fund in a specific manner;

20) regulated market – shall mean a market referred to in Article 14 of the Act on trading in financial instruments;

21) Delegated Regulation 2017/653 – shall mean Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents (OJ L 100 of 12 April 2017, p. 1);

22) Delegated Regulation 2017/2358 – shall mean Commission Delegated Regulation (EU) 2017/2358 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to product oversight and governance requirements for insurance undertakings and insurance distributors (OJ L 341 of 20 December 2017, p. 1, as amended);

23) Delegated Regulation 2017/2359 – shall mean Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products (OJ L 341 of 20 December 2017, p. 8, as amended);

24) risk-free interest rate term structure – shall mean the appropriate risk-free interest rate term structure, prepared and published by EIOPA (Risk Free Rate, hereinafter: 'RFR'), calculated under Article 77e(1) of 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);

25) average return – shall mean internal rate of return *r* for a sequence of values of expected payments which is the solution to the following equation:

$$\sum_{k=1}^{N} \frac{{}_{k-1}p_x S_k}{(1+r)^{k-1}} - \frac{1}{(1+r)^N}\left({}_N p_x WP_N + \sum_{k=1}^{N} {}_{k-1}p_x q_{x+k-1}\, SU_k\right) = 0$$

The values in the formula above shall mean:

- S_k – the amount of the annual premium for the beginning of year k. For premiums paid more than once a year, the sum of premiums payable during year k applies;
- N – the period (in years). For insurance contracts concluded for a period of less than 10 years, N equals the period for which the contract was concluded. Otherwise, $N = 10$ and N = the recommended holding period if the period is longer than 10 years;
- $k\text{-}1px$, qx – in accordance to standard actuarial notation, the probability that a person aged x will live or die, computed according to the assumptions used to calculate the best estimate of technical provisions for solvency purposes. Those probabilities do not take into account early termination of contracts;
- SU_k – a death benefit payable at the end of year of death $k = 1, \dots, N$, accumulated at the end of year N, using appropriate RFRs for the period (k+1, N);
- WP_N – the contract value at the end of year N. The contract value at the end of year N includes the value of an assurance on account of a guarantee, the surrender value, or the value of an endowment, if any of those values occurs at the end of year N.

Additionally, for unit-linked insurance contracts under which the amounts of investment/capital premiums are expressly stated in the contract, it is permitted to simplify the equation determining the average return in each year by assuming that $qx+k = 0$, for all $k = 1, \dots, N$, and assuming that the amounts of annual premiums Sk correspond to investment/capital premiums in the relevant periods.

When determining the surrender value at the end of year N, the following is to be assumed as a spot rate of return on the underlying assets of a unit-linked fund in each year of the projection – 2.5%, or the current spot RFR, whichever is greater, increased by one percentage point[1]. The value of underlying assets means the value of the assets before deduction of any charges, including management fee, collected by asset management companies other than the insurance undertaking;

26) TFI – shall mean an investment fund management company referred to in the Act on investment funds and management of alternative investment funds;

27) UCITS – shall mean undertakings for collective investment in transferable securities, referred to in the Directive on UCITS;

28) unit-linked fund – shall mean a unit-linked fund referred to in Article 3(1) point 50 of the Act on the business of insurance;

[1] According to formal notation, the spot rate of return applicable to the period k is represented as Max(2.5%, RFR_spot_k) + 1%, where the value RFR_spot_k is determined within the risk-free interest rate term structure for the tenor of k years.

29) UKNF – shall mean the Polish Financial Supervision Authority (Urząd Komisji Nadzoru Finansowego), referred to in the *Act of 21 July 2006 on financial market supervision* (consolidated text: Journal of Laws 2020, item 2059, as amended);
30) unit-linked insurance contract – shall mean a unit-linked life insurance contract;
31) Act on investment funds and management of alternative investment funds – shall mean the *Act of 27 May 2004 on investment funds and management of alternative investment funds* (consolidated text: Journal of Laws 2021, item 605, as amended);
32) Act on public offering – shall mean the *Act of 29 July 2005 on public offering, conditions governing the introduction of financial instruments to organised trading, and public companies* (consolidated text: Journal of Laws 2020, item 2080, as amended);
33) Act on trading in financial instruments – shall mean the *Act of 29 July 2005 on trading in financial instruments* (consolidated text: Journal of Laws 2021, item 328, as amended);
34) recommended holding period – shall mean a period determined by an insurance undertaking in accordance with the requirements laid down in *Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents* (OJ L 2017 item 100, p. 1, as amended, hereinafter: 'Delegated Regulation 2017/653');

I.1 A prohibition is hereby imposed on the marketing, distribution and sale of insurance-based investment products – unit-linked life insurance contracts for which the average return is less than 50% of the interest rate for period *N* according to the appropriate risk-free interest rate term structure.

I.2 A prohibition is hereby imposed on the marketing, distribution and sale of insurance-based investment products – unit-linked life insurance contracts for which the investment rules and restrictions defined in the rules of the fund fail to ensure that the assets of the unit-linked fund will not be invested in contingent convertibles.

II. Scope of application of the prohibitions on the marketing, distribution and sale of insurance-based investment products – unit-linked life insurance contracts

II.1 The prohibitions provided for in this decision apply to unit-linked life insurance contracts concluded on or after 1 January 2022.

II.2 The prohibition provided for in point I.2 hereof does not apply to life insurance contracts if they are linked to a unit-linked fund established before 1 January 2022, and the method of investing the assets of the fund ensures that the assets are not invested in contingent convertibles.

II.3 This decision does not apply to Employee Capital Plans[2], Occupational Pension Schemes[3], Individual Retirement Protection Accounts[4], or Individual Pension Accounts[5].

II.4 Within the meaning of this decision, the insured party's act of joining a group unit-linked life insurance contract concluded before 1 January 2022 shall not be understood as conclusion of a new contract of insurance.

II.5 Individual continuation of group unit-linked life insurance contracts does not fall within the substantive scope of the decision.

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[2] Defined by the Act of 4 October 2018 on employee capital plans (consolidated text: Journal of Laws 2020, item 1342, as amended).

[3] Defined by the Act of 20 April 2004 on occupational pension schemes (consolidated text: Journal of Laws 2020, item 686, as amended).

[4] Defined by the Act of 20 April 2004 on individual pension accounts and individual retirement protection accounts (consolidated text: Journal of Laws 2019, item 1808, as amended).

[5] As above.

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A. Unit-linked insurance market

A unit-linked insurance contract is a specific form of insurance contract which combines insurance coverage (characteristic of insurance understood in its traditional sense) with savings and investment (in this sense, the contract shows features of a trust deed – an agreement on investing the assets held in trust). Under a unit-linked insurance contract, as a rule, an insurance undertaking pledges to pay a benefit in the form of insurance sum or other benefit following the occurrence of an accident specified in the contract, and to invest the assets from premiums accumulated in the unit-linked fund, at the client's risk, and the client pledges to pay the insurance premium. Thus, such a contract combines coverage with the accumulation of capital. However, the coverage component under unit-linked insurance contracts offered in Poland is often symbolic, while the dominant function is that of the investment component. Such contracts raise no concern about their acceptability under case-law, even if the investment component is clearly the dominant one (see, for example, Decision of the Supreme Court of 3 December 2015, Case File No III CZP 87/15; Judgment of the Supreme Court of 22 November 2017, Case File No IV CSK 61/17; Resolution of the Supreme Court of 10 August 2018, Case File No III CZP 13/18; Resolution of the Supreme Court of 10 August 2018, Case File No III CZP 20/18; Judgment of the Supreme Court of 28 September 2018, Case File No I CSK 179/18). It should also be stressed that provisions of law do not impose any requirements on the relation between the insurance sum and the amount from premiums which may be invested in unit-linked funds, or on the allocation of premiums to coverage and investment components of the unit-linked insurance contract – those aspects are decided on under the freedom of contract – such view is also supported by case-law (e.g. Decision of the Supreme Court of 21 May 2020, Case File No I CSK 772/19; Judgment of the Regional Court in Warsaw of 27 September 2018, Case File No XXV C 1829/16).

In 2020, unit-linked insurance contracts were offered by 22 domestic insurance undertakings. The total gross written premium in that life insurance segment at the end of 2020 was PLN 5.88 billion[6].

As at the end of 2020, unit-linked insurance contracts were distributed by 5 385 distributors and employees of undertakings (through own sales), who secured 60 711 contracts in 2020. Detailed information on the distribution of unit-linked insurance contracts in 2020 is provided in the table below.

[6] Based on data submitted to the Polish supervisory authority by supervised entities.

Table 1. Number of active distributors and unit-linked insurance contracts concluded through them in 2020

Type of distributor	Number of distributors	Number of contracts concluded in 2020
Tied agent	1 718	12 240
Multi tied agent	436	27 016
Broker	22	478
Undertaking – own sales	3 209	20 977
Total	**5 385**	**60 711**

Source: UKNF, based on data submitted by supervised entities

The table below provides information on the number of active unit-linked insurance contracts, the average value of assets invested in unit-linked funds, and the average number of active unit-linked insurance contracts in 2017–2020. The average values represent the mean values at the end of each quarter of a given year. The number of active contracts includes both individual contracts and the number of participants in group insurance contracts, where one contract may provide coverage to tens of individuals.

Table 2. Value of assets of unit-linked funds, and the number of unit-linked insurance contracts active in 2017–2020

YEAR	Average value of assets per year (PLN thousand)	Number of active unit-linked insurance contracts	Average value of assets of unit-linked funds per contract (PLN)
2017	58 963 615	3 506 031	16 818
2018	54 036 160	3 263 027	16 560
2019	49 728 138	3 006 169	16 542
2020	46 123 874	2 417 980	19 075

Source: UKNF, based on data submitted by supervised entities

The overall picture outlined by the above data is the constant trend of a decreasing number of active unit-linked insurance contracts, which translates into a decreasing total value of assets accumulated under those contracts. Another remarkable fact is that in the years 2017–2019, the average value of assets per contract was at the same level – approx. PLN 16 500.00. This means that statistically in 2017–2019, insurance undertakings did not generate any significant

investment value for their clients. A separate comment should be made in relation to the year 2020, in which the average value of the contract was higher than in previous years, despite a general decrease in the number of active contracts and in the value of assets held in unit-linked funds. In fact, in 2020 there was a marked one-off case of clients withdrawing from 381 thousand individual pension account (IKE) contracts and individual retirement protection account (IKZE) contracts. On average, the value of those contracts was lower compared to other unit-linked insurance contracts, so upon termination the average value of the active contracts increased. Without considering the termination of IKE and IKZE contracts, the average value of the contract in 2020 would be PLN 16 477, that is at the same level as in previous years.

At the end of 2020, according to additional reports submitted to the Polish supervisory authority, 22 insurance undertakings were managing the assets of 2 237 unit-linked funds[7]. The total net asset value of those unit-linked funds – representing the total value of the investment component of unit-linked insurance contracts – amounted to PLN 48 billion. A characteristic feature of the unit-linked funds market in Poland is its relatively high concentration, measured with a share of individual insurance undertakings in the net value of the assets managed by those funds – 3 undertakings with the highest share were managing, jointly, more than a half of net assets of unit-linked funds, and 5 undertakings were managing more than two-thirds of the assets. Another characteristic feature of that market is that a significant part of investments of unit-linked funds involve exposures due to participation in various types of domestic and foreign investment funds and collective investment institutions (hereinafter: 'participation in investment funds'), and such investments accounted for more than three-fourths of the total value of investments of unit-linked funds. For 8 insurance undertakings, the exposure due to participation in investment funds exceeded 90% of the net value of assets managed by their unit-linked funds, and for 3 insurance undertakings the exposure was as much as 100%. As many as four-fifths of all unit-linked funds reporting any investment at the end of 2020 participated in investment funds with more than 95% of their net assets, and 92% of those unit-linked funds reported participation in one investment fund only. Insurance undertakings usually invested the assets of unit-linked funds in shares of funds or collective investment institutions being undertakings for collective investment in transferable securities, regulated by the Directive on UCITS, or in shares of funds ensuring the same level of investor protection as UCITS – such investments accounted for nearly 70% of the net asset value of all unit-linked funds and 90% of the total participation by unit-linked funds in funds. The statistics show that in most cases domestic insurance undertakings do not actively pursue any investment policy involving unit-linked funds and engage all the assets from premiums allocated to unit-linked funds in investments linked to a specific investment fund or collective investment institution, most often a UCITS fund or any other fund providing the same level of investor protection as a UCITS fund.

The KNF Board has identified irregularities in unit-linked insurance contracts being offered on the insurance market in Poland which occur throughout the distribution period. The problems stems from both flawed structure and improper distribution of those contracts.

[7] The figure includes only the unit-linked funds to which the insurance undertaking allocates any assets.

An issue that emerged quite early and troubled the clients were high early termination fees (resulting from, among others, high commissions paid to insurance intermediaries). With the measures taken by the Polish supervisory authority and by the Office of Competition and Consumer Protection (hereinafter: 'UOKiK')[8], as well as changes in the legislation[9], investment products with high early termination fees have been removed from the market.

Other issues with such contracts that still persist despite the various efforts by the Polish supervisory authority described below include the practices of charging clients high fees and investing the money of unit-linked funds in risky and poorly diversified assets – both of those issues translate into investment performance that is highly unsatisfactory to clients, and into low value of such a contract for the client. Since the money of certain unit-linked funds was invested in risky and illiquid assets, in some cases the processing of requests for the payment of surrender value was delayed by many months, due to the funds losing financial liquidity.

The above findings of the Polish supervisory authority concerning the irregularities in unit-linked insurance contracts were also confirmed by other authorities and institutions. Specifically, the issue was raised in a report of the Insurance Ombudsman (currently: Financial Ombudsman): *Ubezpieczenia na życie z ubezpieczeniowym funduszem kapitałowym. Raport Rzecznika Ubezpieczonych [Unit-linked life insurance products. Report of the Insurance Ombudsman]* of 7 December 2012 and its continuation: *Ubezpieczenia na życie z ubezpieczeniowym funduszem kapitałowym. Raport Rzecznika Finansowego. Część II [Unit-linked life insurance products. Report of the Insurance Ombudsman. Part II]* of March 2016. In its 2012 report, the Ombudsman pointed to the following issues resulting from actual complaints:

- a unit-linked insurance contract was offered as a safe high-yield investment;
- a significant portion (up to 100%) of the money invested was lost where the contract was terminated before the end of the term stipulated on the conclusion of the contract;
- lack of profit at the end of a multi-year insurance contract;
- high administrative and other fees collected during the contract term, with no information about such fees being communicated on the conclusion of the contract.

According to the opinion of the Insurance Ombudsman expressed in the report, the lack of expected profits from unit-linked insurance contracts may have been mainly a consequence of fluctuations on stock markets, but also of multiple fees being collected during the contract term.

Another important document is the report *Nieprawidłowości na rynku finansowym a ochrona konsumenta [Irregularities in financial market vs consumer protection]* of September 2019 of the Advisory Scientific Committee of the Financial Ombudsman which states that unit-linked

[8] In 2013 and 2014, the UOKiK issued 6 decisions to punish insurance undertakings and other distributors with a total amount of over PLN 57 million. In 2015 and 2016, the UOKiK issued 17 decisions, without imposing penalties because the insurers promised to reduce their termination fees. The UOKiK also entered into agreements with 17 insurers, which reduced their termination fees for the clients not bound by the previous decisions of that body.

[9] On 1 January 2016, the Act on the business of insurance entered into force; Article 26 thereof regulates the issue of fees charged for termination of or withdrawal from a unit-linked insurance contract during the initial term.

insurance contracts are actually unprofitable due to the level of commissions and margins, and the fact that the contracts were complex and complicated in legal terms, thus being incomprehensible to an average consumer. The report also stresses the importance of transparency of the contracts, which allows an average consumer to understand the substance of contractual terms and to make an informed and optimum economic decision.

The issue of poor client protection under unit-linked insurance contracts was also raised by the National Bank of Poland (NBP) in its Financial Stability Report, stating that: *(...) having these [insurance] products – considering the fact that there are no specific legal regulations concerning the rules for their operation, the investment limits and fees charged – the customer is less protected against abuse than in the case of other domestic collective investment undertakings.*[10]

In the face of those problems, attempts were also made in the area of market self-regulation. Particular attention should be paid to the *3rd Recommendation on good practices for the Polish bancassurance market in relation to insurance products with an investment or savings component,* prepared in cooperation with the Polish Chamber of Insurance and approved by the Management Board of the Polish Bank Association on 10 July 2012. The Recommendation – which regulated the general principles of operation for banks and insurance undertakings in regard to the offering of insurance products with an investment or savings component, and to customer service under such products – defined the bank's obligations to provide information to clients by indicating the minimum information that should be communicated to the consumer before providing insurance coverage, in particular the documents related to the conclusion of the insurance contract and the terms and conditions of insurance that should contain at least information about the existence of investment risk.

The Recommendation also provides for the obligation to communicate additional information and to provide documents such as, for example, the rules for investing the assets of a unit-linked fund, including in particular the description of assets of the fund, the asset selection criteria, the rules for their diversification, and other investment restrictions in the rules for determining the amount of costs and any other charges deducted from premiums or from the unit-linked fund. It was stated that the documents provided to the client should be drafted in a clear, transparent and unambiguous fashion.

The foregoing shows then that throughout their distribution period, unit-linked contracts caused many problems, mainly low levels of client protection, which will be addressed further in the statement of reasons for this decision.

B. Activities taken by the Polish supervisory authority in the unit-linked insurance market

The KNF Board took a series of measures to eliminate the problems with unit-linked insurance, especially the irregularities addressed in the operative part of this decision.

[10] See: *Financial Stability Report – COVID-19 Pandemic Impact Assessment*, NBP, Warsaw, December 2020, p. 63.

B.1 Regulatory activities

1. On 24 June 2014, the KNF Board adopted *Guidelines for insurance undertakings on insurance distribution*, following the identification of irregularities in that respect in the insurance market, in order to raise the level of clients' trust in insurance undertakings and the entire financial market. The Guidelines aimed at harmonising the standards for insurance distribution regardless of the insurance distribution channel (method), to prevent the differentiation between customers of insurance undertakings. The Guidelines impose, in particular:
   a. the obligation to communicate information to clients in a clear and unambiguous manner to avoid any doubt as to interpretation; the prohibition of information which is misleading; the requirement that information for the client should cover the risks related to the investment and the fees the insured may be obliged to pay,
   b. the obligation to provide the client with information, including the terms of the insurance contract being entered into, relating to the rights and obligations of the client,
   c. for insurance-based investment products (thus also unit-linked insurance contracts) – the obligation to prepare information (a product data sheet) including a description of all the required essential features of insurance using a wording that is not misleading to clients, including information on the amount, dates for payment and calculation method of all the costs to be borne by the client;
2. On 22 March 2016, the KNF Board issued *Recommendations for insurance undertakings on product adequacy testing* to ensure compliance of the business of insurance undertakings with legislation, to prevent the harm to the interests of policyholders, the insured or beneficiaries under insurance contracts, and to mitigate the risk arising from the business of insurance undertakings. In its Recommendations, the KNF Board pointed out that unit-linked insurance contracts were characterised by a high degree of complexity, and that the lack of sufficient information policy on the part of an insurance undertaking and an insurance intermediary acting on its behalf caused a situation where clients were not always aware of the type of contract they entered into, the risks arising from the contract, or their duties. The said Recommendations provide for, in particular:
   a. the obligation to prepare in writing, introduce and ensure the enforcement of the rules and procedures for product adequacy testing, including in particular the rules for communication and marketing to provide clients with information about investment risk and the fees,
   b. the obligation to assess with utmost care, before a product is commercialised, whether the product is appropriate for the client's needs and capacities, which are identified according to the client's financial situation as well as knowledge and experience in the field of life insurance, including on the basis of information received from the client in the form of a questionnaire, adapted to the nature and complexity of the product,
   c. the obligation to offer clients a product which meets their needs and capacities, in writing or using electronic means of communication, with reasons how the proposed product is appropriate for the client's needs and capacities,

d. the obligation to make an offer for insurance contract to individuals who have been informed about the risks arising from the insurance contract (thus also the risk associated with the types of assets in which the money of the unit-linked fund are invested), who are ready to accept the risk of losing a portion of, or in the case of some contracts even the whole, premium invested,

e. the obligation to make an offer for insurance contract by presenting the main features of the product in such a manner and to such extent as to allow the client to understand the specific nature of the product and the related risks, including by indicating the type of the underlying instrument (a single financial instrument, index, pool of financial instruments), the risk of capital loss, the levels of fees stipulated in the insurance contract and documents attached thereto,

f. as regards presentation of information on the existing source of risk associated with the investment – the obligation to estimate the impact of materialisation of risk on the value of the investment;

3. On 22 March 2016, the KNF Board issued *Recommendations for insurance undertakings on product governance.* The said Recommendations cover the whole life cycle of a product, that is from the design phase to the moment when the insurance undertaking meets its obligations, and emphasise the adequate product quality, relations with customers, and distribution (including product adequacy testing). The said Recommendations provide for, in particular:

   a. in relation to design/creation of insurance-based investment products – the obligation to examine, at the selection stage, the financial instrument which is to be part of the product being designed/created, in particular the probability of execution; the examination should cover, *inter alia*, an investment strategy which allows for a profit from an investment in the instrument, the expected rate of return for the client, the range of volatility of the instrument value and profit, the maximum possible loss on invested capital, and the issuer risk,

   b. the obligation to carry out a qualitative analysis of the product which should cover, in particular, the assessment of the product's compliance with applicable laws, guidelines and recommendations of the KNF Board,

   c. the obligation to have in place arrangements to ensure that the products offered by the undertaking will not harm the interests of clients, or pose a threat to the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system. Such arrangements should take account of, in particular, the level of complexity and innovativeness of the product, including the type and transparency, the target group, the complexity of calculation of the result of the investment, any barriers, limits and thresholds regarding the exit from the investment, the selling practice, the financial position of the issuer and insurance undertaking, as well as the type and scale of risk, the potential amount of the loss on the client's funds, including the probability, scale and nature of possible losses, and the levels of all costs/charges;

4. On 23 October 2018, the KNF Board published *Position on the application of Article 21 of the Act on the business of insurance and reinsurance.* The reason for the publication was a practice of insurance undertakings consisting in the offering of unit-linked insurance contracts which were not appropriate for clients' needs and manifesting in an insurance undertaking choosing the offers of unit-linked insurance whose level of investment risk was significantly higher than the level accepted by the policyholder or the insured. The KNF Board emphasised that an insurance undertaking should each time suggest the conclusion of a contract of insurance appropriate for the requirements, which should involve, *inter alia*, the choice of unit-linked insurance at a level of risk which is acceptable to the insured and/or the policyholder in the demands and needs questionnaire.
5. On 17 July 2019, the KNF Board published *Position on insurance under Class 3 of Division I of the annex to the Act of 11 September 2015 on the business of insurance and reinsurance.* The Position aimed to point to important issues related to the area of distribution of insurance-based investment products and the investment activities pursued under such insurance contracts. In particular, the Polish supervisory authority expressed the expectation that insurance undertakings should:

   a. take actions to ensure that in the distribution process the clients would receive complete, accurate and transparent information about the products being offered, so that they could fully understand the structure, the risks and limitations related to the product as well as the determinants of its profitability,

   b. communicate information using a wording that is clear to the clients, especially in relation to the description of risks associated with the client's investment in insurance products with unit-linked funds investing in assets with high investment risk, including the risk associated with limited liquidity of the selected types of assets,

   c. communicate full and unambiguous information about the structure of the product, and the type and level of the fees, and the fee calculation rules,

   d. ensure appropriate diversification of assets in which money of unit-linked funds is invested.

   In the opinion of the Polish supervisory authority, in terms of information about the types, levels and calculation of charges, clients should receive complete and transparent information so that they can identify all the costs associated with the product and assess their impact on the profitability of the unit-linked insurance.

   The Polish supervisory authority also stressed that the structure of a unit-linked fund must not be used to circumvent the restrictions concerning the minimum threshold for investments for natural persons laid down in Article 117(3) of the Act on investment funds and management of alternative investment funds, or the provisions on the offering of investment certificates of closed-end investment funds.

   The Polish supervisory authority also noted that although in the case of the products under Class 3 of Division I of the annex to the Act on the business of insurance the investment risk is borne by the policyholder, insurance undertakings must observe the 'prudent person' principle, laid down in Article 276 of the Act on the business of

insurance. Moreover, insurance undertakings are required to invest financial resources only in the assets and financial instruments the risk of which they can properly determine, measure, monitor and manage.

The Polish supervisory authority concluded that it was appropriate that the assets of unit-linked funds should only be invested in such securities and other property rights which meet all the following requirements:

- they are marketable without restrictions or redeemable on each demand by the insurance undertaking, or the position taken in such assets can be closed at any time by a balancing transaction or liquidated,
- their liquidity enables the insurance undertaking to properly perform its obligations arising from the contractual rules of allocation of money from premiums to the units in a unit-linked fund, the date of conversion of premiums to participation units, and the rules of redemption of units in a unit-linked fund and their conversion to cash.

In the opinion of the Polish supervisory authority expressed in the Position, an insurance undertaking should not invest the assets of a unit-linked fund in securities or other property rights if the undertaking cannot have regular access to the full and accurate information on such securities or rights, or if the available information prevents the undertaking from properly determining, measuring, monitoring and managing the risk.

The above-described undertaken actions of a regulatory nature involve the efforts to ensure that the allocation activity under unit-linked insurance contracts is pursued in compliance with law and in the best interest of clients.

B.2 Analytical activities

The Polish supervisory authority carried out a series of analytical activities which allowed an in-depth analysis of unit-linked insurance products, with the aim of removing irregularities in terms of client protection in unit-linked insurance contracts and ensuring legal compliance of the activities of insurance undertakings. Since 2013, the following tasks have been performed:

1. the analysis of the value of units of each unit-linked fund being offered by 23 insurance undertakings and the data on the annual increases and decreases in the value of units of each unit-linked fund (2016),
2. the analysis of the content of selected unit-linked insurance contract forms in relation to the fees collected by insurance undertakings; the analysis covered 245 contract forms, including general terms and conditions of unit-linked insurance, rules of unit-linked funds, and Tables of Fees and Limits (2016),
3. the analysis of compliance by insurance undertakings with the requirement under Article 23(1) point 5 of the Act on the business of insurance, and compliance with the requirement under Article 24(1) point 7 of that Act; the analysis covered 785 contract forms, including general terms and conditions of unit-linked life insurance, rules of unit-linked funds, Tables of Fees and Limits, Product Sheets, Key information about the product, insurance

acceptance forms, request for insurance cover, and policies confirming the conclusion of an insurance contract (2017),

4. the analysis in respect of identification of activities and practices of supervised entities related to the marketing, distribution and sale of the packaged retail and unit-linked insurance products on the basis of a questionnaire submitted periodically by financial sector entities regarding information and explanations concerning the volume of sales, the fees and commissions collected, distribution – considering the breakdown into all types and categories of financial products offered by a given entity (since 2018),
5. stress tests to assess the impact on undertakings' solvency in the case of materialisation of scenarios envisaging that insurance undertakings would need to return a part of the fees collected from the assets (since 2019). The conditions of the tests presume that the fees to be reimbursed are the fees collected over the ten years preceding the effective date of the test (31 December 2019), in an amount exceeding 2%. The conditions of the test were to reflect an extreme scenario, in which following introduction of the product intervention measure, the market (including compensation offices) would respond by adapting the portfolios of contracts concluded prior to the end of 2019 to the criterion referred to in point I.1 of the operative part hereof,
6. the analysis of the degree of implementation and application, by insurance undertakings, of the requirements and obligations in the area of insurance distribution. The analysis covered, among others, distribution of unit-linked insurance, in particular: the use of incentives in the distribution process, including the analysis to assess whether an incentive or incentive scheme have a harmful effect on the quality of the services provided to clients (e.g. by constituting a motivation for an insurance intermediary or insurance undertaking to offer or recommend a specific product or service even if a different product or service would be more appropriate for the client's needs), compliance with information requirements, including informing the client about the level of the indicator of distribution costs related to the contract being offered, performance of the analysis of the client's needs, defining a target client, and methods used to mitigate the risk of excessively broad definition of the target market for a product that might negatively affect the selection of an adequate product, making an offer for insurance contract together with reasons (within this area, the analysis covered aspects such as: whether the reasons specified the level of investment risk or investment profile, and information about the acceptable level of risk for a given profile, the list of recommended unit-linked funds according to the risk level accepted) (2019),
7. the analysis of the process of entering into unit-linked insurance contract in the case of refusal to fill in the demands and needs questionnaire, or in the case of entering into such contracts on demand, in particular related to the use of the product adequacy analysis and supervision of insurance agents acting on behalf of insurance undertakings. The analysis covered the following areas: the process of entering into insurance contracts, considering the rules of procedure in the case of a client forgoing the demands and needs questionnaire, supervision over insurance distribution, considering the indication and description of control methods used in the cooperation with an agency, organisation of distribution

(including remuneration of the distributor) and the solutions used by the distributor to define 'sales targets', distribution in the management system considering the definition of tasks of the compliance function, management of the risk of relationships with clients, and the audit in the process of offering unit-linked insurance contracts (2020).

Based on the results of its analytical work, the Polish supervisory authority took supervisory actions towards individual supervised entities which, by their nature, were focused on the elimination of various irregularities in unit-linked insurance contracts, and ultimately led only to partial changes that did not guarantee continuous compliance with the legislation, recommendations or official positions by all insurance undertakings engaging in the distribution of such insurance contracts.

B.3 Supervisory activities

The Polish supervisory authority carried out the following supervisory activities in relation to insurance undertakings offering unit-linked insurance contracts:

1. since 2013, the Polish supervisory authority's inspection plan for subsequent years has systematically covered insurance undertakings offering unit-linked insurance contracts;
2. the irregularities identified during the inspections or supervisory visits were addressed in 111 recommendations issued in 2014–2021 in relation to 12 insurance undertakings, and where appropriate – they provided the grounds for a request to initiate administrative proceedings in respect of a financial penalty, and a request for notification of a suspected criminal offence. The material gathered during the inspection provided the grounds for further supervisory or preparatory measures in criminal proceedings;
3. as part of supervisory visits and inspections, the Polish supervisory authority verified, among others, compliance with the requirements laid down in Articles 21 and 22 of the Act on the business of insurance. Many irregularities were identified in relation to the offering of unit-linked insurance contracts, in particular:
    a. the failure to obtain – before concluding the insurance contract or before obtaining the consent of the insured to the insurance cover – through a questionnaire, information about the needs, knowledge and experience in the area of life insurance and about the current financial situation of the policyholders and/or the insured, as well as information about the purpose of joining the contract and the preferred frequency of premium payments,
    b. obtaining from policyholders, before concluding the insurance contract, information referred to in point 1 above, but such information was incomplete in relation to the information required under Article 21(1) of the Act on the business of insurance,
    c. offering a unit-linked insurance contract as an adequate contract for policyholders, without warning them about the lack of possibility of assessing whether the contract is appropriate for them,

d. the failure to submit to policyholders a justification for a recommendation, including an identification of their needs, and an explanation of how the proposed insurance cover under the unit-linked insurance contract satisfies those needs,

e. the failure to submit to the insured recommendations as part of their insurance cover under their insurance contract, together with a justification covering, in particular, the identification of needs of the insured, and an explanation of how the insurance satisfies those needs,

f. including, in the offers for unit-linked insurance contracts, insurance contracts that were not recommended to the policyholders, and presenting the characteristic features of unit-linked insurance contracts while ignoring their essential terms that reflect their specificity,

g. presenting an offer for unit-linked insurance contract to policyholders who, according to the information arising from the demands and needs questionnaire, did not accept the investment risk and the related risk of losing money,

h. the failure to provide the individuals interested in a unit-linked insurance contract with basic information about the contract or information about the risk profile of the unit-linked fund as referred to in Article 22(2) point 4 of the Act on the business of insurance;

4. notwithstanding the above, in the course of inspections at insurance undertakings offering unit-linked insurance contracts, the Polish supervisory authority identified, in particular, irregularities with regard to:

   a. investing financial means in a manner that – considering the type and structure of the relevant insurance products – ensures the highest level of protection and profitability, while maintaining the liquidity of the financial means,

   b. the documentation describing the accounting policy of the insurance undertaking – the lack of a description of the valuation methods for derivatives and structured certificates, and the lack of a complete description of the valuation rules for the provision for life insurance for a given product,

   c. the failure to review the valuation of structured certificates received from issuers and the valuation of all options (the review was only carried out in relation to some options).

   d. the failure to measure assets of unit-linked funds at fair value,

   e. causing harm to the interests of the policyholders, the insured and/or beneficiaries under insurance contracts due to the failure to keep accurate records of the number of unit shares of unit-linked funds on the unit accounts and due to the practice of collecting a management fee due for a given month in two tranches, i.e. in violation of the unit-linked insurance contracts,

   f. causing harm to the interests of the policyholders, the insured and/or beneficiaries under insurance contracts by the insurance undertaking determining the value and number of units of the unit-linked fund contrary to the provisions of the insurance contracts concluded by the insurance undertaking,

   g. the failure to provide, in the rules for the reviewed unit-linked funds, material information which is important to accurately define the features of assets forming part of the unit-linked fund, as well as material information about the restrictions on investments;

5. the Polish supervisory authority also identified, in the course of an inspection, a practice of offering group unit-linked life insurance contracts with kickbacks (i.e. additional remuneration for the insurance undertaking which materially reduced the value of the financial instruments underlying the unit-linked insurance plans, and consequently the value of units of unit-linked funds), without informing the insured about the kickbacks. As regards the above-mentioned activities, the KNF Board notified prosecuting authorities of suspected illegal activities;
6. the Polish supervisory authority considered the outcome of the inspections at insurance undertakings offering unit-linked insurance contracts in the ongoing supervision, both financial supervision and supervision of compliance, as well as in the RAF (Risk Assessment Framework) grades assigned by the Polish supervisory authority to insurance undertakings. Moreover, in 2019 the Polish supervisory authority changed the methodology for the annual Risk Assessment Framework by sectioning-off an area of assessment of the conduct risk based on various stages of the life cycle of the product. The change aimed to shift the focus of the supervisory assessment to activities that are unfavourable for the client, in of the area of offering unit-linked insurance contracts. In the case of 7 insurance undertakings where the Polish supervisory authority found defects in the value for the clients of unit-linked insurance products, adjustments were made to the qualitative assessment of management. The reasons of the downgrade were communicated to the management boards of those undertakings. Nevertheless, the Polish supervisory authority, monitoring the same products during 2020, did not find, in 6 cases, any material changes in those products. Only one of the seven undertakings recalled a product that got a negative assessment from the Polish supervisory authority.

The above-described activities, by their essence, rooted out irregularities in the activities of only single insurance undertakings, and did not have the value of effectiveness for all the insurance undertakings engaged in the distribution of such insurance contracts.

B.4 Cooperation between the Polish supervisory authority and other state authorities

As regards the irregularities in the functioning of unit-linked insurance contracts, a series of activities were undertaken as part of cooperation with other state authorities, in particular:

1. as part of cooperation with the President of the Office of Competition and Consumer Protection, the Polish supervisory authority:
   a. submitted, in 2013, a letter in which it pointed to the malpractices related to the offering of unit-linked insurance contracts, including malpractices of non-supervised entities which act as policyholders, including:

- offering products with high investment risk to individuals who are not willing to bear such risk,
- offering product with a complicated structure, often unverifiable for an average client,
- providing, during the sales process, incomplete or potentially misleading information about the actual features of the product, in particular: highlighting the information about the possibility for achieving higher-than-average profits while diminishing the information about the risk of losing at least part of the investor's funds, selective presentation of information about the costs of acquiring the product, disregarding some information about essential features of the product, providing inaccurate information about the nature and scope of any guarantee of return on the investment,

b. submitted, in several rounds, in 2014–2015, forms of unit-linked life insurance contracts used by insurance undertakings, which raised a reasonable suspicion that such contract forms contain ambiguous or abusive provisions, in particular with respect to the management fee, claim settlement fees, and the transaction fee; in total, information about 344 contract forms was submitted,

c. submitted, in 2015, a letter in which it communicated the findings from an inspection conducted by the Polish supervisory authority at an insurance undertaking offering unit-linked insurance contracts which revealed that clients had been receiving inaccurate information about the features of unit-linked funds,

d. submitted, in 2016, a letter in which it communicated the findings from an analysis of 711 contract forms used by insurance undertakings offering unit-linked insurance contracts, following the identification of an abusive contractual provision (lack of definition of management fees),

e. submitted, in 2017, a letter in which the KNF Board reported on practices that might breach the obligation to provide consumers with full, true and accurate information.

2. The Chair of the KNF Board replied to the letter of the Public Finances Committee of the Sejm of the Republic of Poland of 5 October 2016, in connection with the sitting of the Public Finances Committee of the Sejm on 21 September 2016 at which information was presented on 'the situation of customers of financial institutions who have purchased financial products taking the form of saving insurance policies.' The Chair of the KNF Board explained that no provision of law had ever provided for (during the period of functioning of a specialised Polish supervisory authority) the competence to approve insurance products, so no insurance product had ever been approved by the Polish supervisory authority. The Chair of the KNF Board also described the measures adopted by the Polish supervisory authority in response to the identified irregularities related to the offering of unit-linked insurance contracts.
3. The Polish supervisory authority answered oral question No 7939 from Ms Elżbieta Borowska of 21 November 2016. The oral question raised the issue of the failure to inform clients about the risk, the criteria for asset selection, and fees, as well as the issue of the lack

of possibility of making a profit on unit-linked insurance. In its reply, the Chair of the KNF Board outlined the supervisory measures adopted by the Polish supervisory authority in that regard and indicated the irregularities identified by means of those measures, i.e.:

a. irregularities in the sale process, consisting mainly in: addressing unit-linked insurance contracts to a wrong group of clients, the failure by insurance intermediaries to provide complete and accurate information about the essential features of the contracts offered, e.g. the amount of fees, and the failure to provide clients with insurance documents,

b. the practice of collecting, in the first months of the term of the contract, fees for acts performed by the insurance undertaking throughout the term of the unit-lined insurance contract, in connection with the immediate payment of the full amount of the commission to the intermediaries, which resulted in high claim settlement fees being charged by the insurers where the client terminated the unit-linked insurance contract,

c. unclear or ambiguous provisions of the general terms and conditions of insurance, e.g. the lack of precise rules for determining the early termination fee, or the lack of definitions of other fees.

4. The Chair of the KNF Board joined, as an aggrieved party, two preparatory proceedings in cases regarding the criminal offence punishable under Article 286 § 1 of the Act of 6 June 1997 – the Penal Code (consolidated text: Journal of Laws 2020, item 1444, as amended), consisting in an insurance undertaking offering unit-linked insurance contracts causing the policyholders or the insured to dispose of their own assets to their disadvantage, to gain an undue financial advantage by misleading those persons.

5. The Polish supervisory authority provided information in connection with multiple proceedings conducted by organisational units of the Police and prosecuting authorities in relation to the offering of unit-linked insurance contracts.

C. Description of the prohibitions in question

The supervisory activities undertaken and executed as well as other activities of the Polish supervisory authority described above have not ensured effective prevention of the above-mentioned existing threats to investor protection. Despite its efforts, the KNF Board continues to identify irregularities in the insurance market and notes the emerging new threats stemming from insurance undertakings offering unit-linked insurance contracts, in particular:

1. the persisting low value of unit-linked insurance contracts for clients, in particular due to low or negative level of the effective rate of return achieved by customers and to high level of fees charged under such contracts. Those factors disrupt the balance between the value of the product for customers and the margin generated by insurance undertakings,

2. the threat that customers entering into unit-linked insurance contracts might be exposed to excessive investment risk, including liquidity risk, arising from the investment of assets of unit-linked funds in contingent convertibles.

Those issues (discussed in more detail below, in points C.1–C.2 of the statement of reasons for this decision) have or may have such a serious negative impact on the level of client protection that the KNF Board has concluded that it is necessary to prohibit the marketing, distribution or sale of unit-linked insurance contracts with the features as specified in the operative part hereof. Point C.3 of the statement of reasons for this decision contains an explanation of the objectives of the prohibitions in question.

C.1 Low value of unit-linked insurance contracts for the client

As stated in the further part of the statement of reasons for this decision, neither European nor Polish law provides for any legal rules imposing on insurance undertakings any framework defining the minimum required return on investment, or any other fair distribution of profits under unit-linked insurance contracts. The lack of those rules ultimately disrupted the balance in the performance of obligations arising from the existing unit-linked insurance contracts between institutional participants in the financial market such as insurance undertakings and non-professional participants, that is the clients of those undertakings. The problem of imbalance does not occur for the Polish market only but, in terms of the value for the client, Poland is one of the European countries in which firms offer unit-linked insurance products with highest costs, which was also indicated by EIOPA in its opinion on the product intervention[11].

The surveys conducted by the KNF Board with regard to 7 major life insurance undertakings offering unit-linked insurance contracts show that the average rate of return in each year was negative and it ranged from -1.6% to -6.7%. At the same time, the margins generated by insurance undertakings for the products under assessment were positive and ranged from 5% to 20%. Therefore, it can be said that unit-linked insurance contracts are characterised by low value for the client, understood as a negative average return in each year. The negative value of average return in each year means that the client will receive amounts of benefits lower than the sum of the premiums invested. For example, for a unit-linked insurance product with a single premium, the negative average rate of return in each year at -1.6% means that after 5 years the client will receive about 8% less than the amount of the invested premium. In other words, with a single premium in the amount of PLN 100 thousand, the client will withdraw PLN 92 thousand after five years. The greater the negative value of the average return in each year, the greater the loss for the client. The direct cause of the low value of unit-linked insurance contracts offered in Poland is the relation of the return on investment to the amount of the costs collected under the contract. Apart from the multiplicity of cost titles in every contract, insurance undertakings started to change the costs titles for new product generations. For example, the Polish supervisory authority noted that the allocation fees (or early termination fees) were replaced by an increase of insurance risk charges or fees for asset

[11] In 2019, the impact of costs charged under unit-linked insurance contracts, measured with reduction in yield (RIY) achieved during the recommended holding period was 3.7% for the Polish market, while the average figure for the EEA countries was 2.5%. In 2018, the respective values were 3.3% for Poland and 2.3% for the EEA. The lowest value for the EEA countries is reported for the UK market – 0.6%. EIOPA's report is available here: https://www.eiopa.europa.eu/sites/default/files/publications/cost_and_past_peformance_report_corrigendum.pdf

management. From the client's perspective, a change to a cost title does not change the value of the contract but it makes the product structure more complicated and difficult to understand.

Since the costs collected under unit-linked insurance contracts are high, and thus the value of the products offered to the client is decreased, the Polish supervisory authority decided to introduce a prohibition on distribution of contracts for which the average return for the client would be less than 50% of the appropriate interest rate in the risk-free interest rate term structure, in accordance with the criterion specified in point I.1 of the operative part of the decision. Consequently, the prohibition should help improve the offers of unit-linked insurance contracts in terms of value for the client. In fact, the criterion defined in point I.1 of the operative part of the decision means that a unit-linked insurance product should be structured so as to ensure that at the end of the recommended holding period the rate of return for the client is not lower than 50% of the RFR. Point E.1.2.2 of the statement of reasons for this decision indicated the average amount an average client should obtain *per annum*. The recommended holding period means – as a rule, accordingly for products kept for up to 10 years – their term, while for long-term products – the period of 10 years and the recommended period defined in the KID, if it is more than 10 years. The rate of return for the client generated during the recommended period results from the modelling of financial flows of the insurance contract, from insurance premiums, the return on assets, the benefit payments, and the fees and commissions collected. It does not guarantee that the client will receive 50% of the RFR during the recommended holding period, but it is an element of assumptions for the design of the product which allows admission of the product to the marketing, distribution and sale. According to the objectives, the value of the average return (the rate of return for the client which is not less than 50% of the RFR during the recommended holding period) is to strike a balance between the interest of the client and the interest of the insurance undertaking, distributors and asset managers (e.g. TFI).

C.2 The possibility that customers entering into unit-linked insurance contracts might be exposed to excessive investment risk, including liquidity risk, arising from the investment of assets of unit-linked funds in contingent convertibles

The concerns of the Polish supervisory authority about whether insurance undertakings provide sufficient client protection in relation to the method of investing the assets of unit-linked funds stem from the expected dynamic development of the contingent convertibles market in Poland. In 2020, the Council of Ministers initiated legislative work on the amendment to the Act on bonds and certain other laws, aiming at defining the rules for the issue of contingent capital instruments under which in the case of occurrence of a trigger event defined in the terms of issue or contract, the issuer or debtor cancels the instruments/contracts, by way of a write-down or a temporary write-down of the principal amount of the instrument or liability in whole or in part, or converts the instruments/contracts into shares, or cancels the interest, in whole or in part, for the relevant interest period or suspends the interest payments for an indefinite period, which contingent capital instruments are qualified as regulatory capital of banks and brokerage houses, or as own funds of insurance undertakings or reinsurance undertakings, in accordance with the relevant provisions of EU law, including in particular the rules for the issue of a new category of bonds treated as such instruments, i.e. contingent convertible bonds. The proposed

solutions mainly aim to remove barriers to the process of issue of contingent convertibles that can be classified in Additional Tier I and Tier II capital in the case of credit institutions and investment firms (under Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012), or classified as own funds in Tier 1, Tier 2 and Tier 3 own fund items in the case of insurance sector entities (under Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). Since investments in the said contingent convertibles involve the need to accept very high investment risk, the KNF Board has concluded that in view of the forthcoming change of legislation – following which those capital instruments, being particularly complex and difficult to value, will become a popular instrument used by domestic banks, brokerage houses, insurance undertakings and reinsurance undertakings to improve their capital position – there is a serious and well-founded fear that also the assets of unit-linked funds will be invested in such instruments, due to their apparent attractiveness manifesting in high interest rates aimed at compensating for extremely high investment risk from such instruments, arising from their legal and economic structure which is supposed to ensure the absorption of potential losses of the issuer, which in consequence, in certain cases, may result in a complete loss of the investor's capital and in the lack of any interest payments due from the issuer. So far, insurance undertakings have engaged the assets of unit-linked funds in such instruments only negligibly, as their offer in Poland, due to the existing legal barriers preventing or discouraging them from engaging in such issue, was relatively small. The draft *Act amending the Act on bonds and certain other laws*[12], processed by the Council of Ministers, includes solutions to create obstacles to the acquisition of contingent convertible bonds by natural persons. The draft provides that contingent convertible bonds will only be offered to professional clients as defined in the Act on trading in financial instruments, and that the nominal value of a capital note will be at least EUR 100 thousand. The term 'professional client' as defined in the Act on trading in financial instruments refers also to insurance or reinsurance undertakings, which means that those instruments may also be offered to them. Regardless of that fact, and regardless of the current availability of various types of contingent convertibles in Poland, the Polish supervisory authority notes that already in the current legal and factual circumstances insurance undertakings may legally engage the assets of unit-linked funds in contingent convertibles which are popular in other EU markets, issued and offered by entities that are not bound by Polish legal regulations in that respect.

The KNF Board has concluded that the best way to provide the clients of insurance undertakings with appropriate level of protection and liquidity of deposits, and to mitigate the risk associated with CoCos, is to impose the prohibition specified in point I.2 of the operative part of the decision. The essence of the prohibition is to prevent the marketing, distribution and sale of unit-linked insurance products if the investment rules and restrictions defined in the rules of the unit-linked fund fail to ensure that the assets of the unit-linked fund will not be invested

[12] The reference number of the proposal according to the *List of legislative and programme work of the Council of Ministers* is UC32. More information about the proposal and the course of the legislative process is available here: https://legislacja.gov.pl/projekt/12335853.

in contingent convertible bonds, subordinated loans and/or other instruments and contracts under which in the case of occurrence of a trigger event defined in the terms of issue or contract, the issuer or debtor cancels the instruments/contracts, by way of an impairment loss or a temporary write-down of the nominal value of the instrument or liability in whole or in part, or converts the instruments/contracts into shares, or cancels the interest, in whole or in part, for the relevant interest period, or suspends the interest payments for an indefinite period, if such contingent convertible bonds, subordinated loans, instruments are issued, or such contracts are concluded, by the debtor to qualify them, or if they have been qualified, as regulatory capital of banks and brokerage houses, or as own funds of insurance undertakings or reinsurance undertakings.

At the same time, the KNF Board excluded the application of the prohibition specified in point I.2 to unit-linked insurance contracts if they are linked to a unit-linked fund established before 1 January 2022, and the method of investing the assets of the fund ensures that the assets are not invested in CoCos. The exclusion in question aims to maintain the previous offer of insurance undertakings where the method of investing the assets of available unit-linked funds satisfies the KNF Board's requirement regarding the expected level of protection for investors – clients of insurance undertakings.

C.3 Objectives of the prohibitions

A unit-linked insurance contract may be considered in the context of two aspects. The first aspect is the product structure, which takes into account the return on investment, the level and titles of fees and commissions, and the expected benefits under the insurance contract; the other aspect refers to the assets of the unit-linked fund which will be generating financial revenues (return on investment). The objective of the prohibition specified in point I.1 of the operative part of this decision is to structure an insurance-based investment product so as to ensure a balance between the interest of the client and the interest of the insurance undertaking, distributors and asset managers. The prohibition specified in point I.2 of the operative part of this decision will eliminate those unit-linked insurance contracts which fail to ensure that the assets of the unit-linked fund will not be invested in contingent convertibles. The combined application of the prohibitions may effectively help eliminate unit-linked insurance contracts which fail to ensure an appropriate level of client protection, i.e. the effective rate of return and reduced level of investment risk for the invested assets from premiums. The achievement of that result can be clearly seen following the activities undertaken by the Polish supervisory authority so far; the measures focused, though, on the elimination of individual irregularities in unit-linked insurance, which led only to partial changes that did not guarantee continuous compliance with the legislation, recommendations or official positions. An overall effect of the prohibitions imposed under the product intervention will be better client protection.

In view of the circumstances outlined above, the KNF Board deems it necessary to issue this decision, which aims to implement measures appropriate to the nature of the problem.

D. Legal regulations concerning the prohibitions referred to in Article 17 of the Regulation on PRIIPs

Under Article 17(1) of the Regulation on PRIIPs, a competent authority may prohibit the following in or from its Member State:

a) the marketing, distribution or sale of insurance-based investment products or insurance-based investment products with certain specified features; or

b) a type of financial activity or practice of an insurance or reinsurance undertaking.

Under 17(1) of the Regulation on PRIIPs, the prohibitions may apply to an insurance-based investment product, or a type of financial activity or practice of an insurance or reinsurance undertaking. The subject-matter of the prohibitions is therefore defined very broadly – it applies to such actions as the marketing, distribution or sale of certain insurance-based investment products (specified individually or by type), and to a type of financial activity or practice, which goes beyond the widely defined distribution of insurance-based investment products. The fact the legislator uses the conjunction 'or' in that provision means that the prohibitions may refer only to certain insurance-based investment products, insurance-based investment products with certain specified features, a certain type of financial activity or practice, and that the prohibitions may also apply to several or all of the actions listed above. Given the general nature of prohibitions, at the level of an act introducing such prohibitions, they should be specified at such a level so as to leave no doubt as to what actions are covered by each prohibition and why.

Under Article 17(2) of the Regulation on PRIIPs, a competent authority may take the action referred to in Article 17(1) if it is satisfied ('upewni się') on reasonable grounds that:

a) an insurance-based investment product, or activity or practice gives rise to significant investor protection concerns[13] or poses a threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system within at least one Member State;

b) existing regulatory requirements under Union law applicable to the insurance-based investment product, or activity or practice do not sufficiently address the risks referred to in point (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;

c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the insurance-based investment product, or activity or practice;

[13] The Polish translation of Delegated Regulation 2016/1904 uses the phrase: 'istotny problem w dziedzinie ochrony inwestorów' [an important problem in the area of investor protection], while Article 17(2)(a) of the Regulation on PRIIPs uses the phrase: 'wzbudza poważne obawy dotyczące ochrony inwestorów' [raises serious doubts concerning investor protection]. The English versions of both Delegated Regulation 2016/1904 and the Regulation on PRIIPs use the phrase: *significant investor protection concern*, which must be understood as: 'poważne obawy w dziedzinie ochrony inwestorów' [serious concerns in the area of investor protection].

d) the competent authority has properly consulted competent authorities in other Member States that may be significantly affected by the action;

e) the action does not have a discriminatory effect on services or activities provided from another Member State.

When analysing the provision in question, it should be noted that in accordance with the rules of the Polish language, the Polish phrase 'upewnić się' means 'to verify the credibility of something'. Therefore, before adopting the measures specified in Article 17(1) of the Regulation on PRIIPs, an authority should verify (analyse) the evidence gathered, including its accuracy and credibility, to be satisfied that each of the requirements indicated in points (a)–(e) above is fulfilled. Only after performing such verification, and obtaining the positive answer about whether each of the requirements have been fulfilled, a prohibition may be imposed.

Under Article 2(1) of Delegated Regulation 2016/1904, for the purposes of Article 17(2) of the Regulation on PRIIPs, competent authorities must assess the relevance of all factors and criteria listed in paragraph 2, and take into consideration all relevant factor(s) and criteria in determining when the marketing, distribution or sale of certain insurance-based investment products, or a type of financial activity or practice gives rise to a significant investor protection concern or poses a threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system within at least one Member State.

For the purposes of application of the first subparagraph of Article 2(1) of Delegated Regulation 2016/1904, competent authorities may determine 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 whole or part of the financial system within at least one Member State based on one or more of those factors and criteria.

Therefore, for the analysis of all the arguments pertaining to the materialisation of the condition referred to in Article 17(2)(a) of the Regulation on PRIIPs, a competent authority assesses the relevance of all factors and criteria listed in Article 2(2) of Delegated Regulation 2016/1904 and considers all relevant factors and criteria.

Under Article 2(2) of Delegated Regulation 2016/1904, the factors and criteria to be assessed by competent authorities to determine whether there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system within at least one Member State include the following:

1. the degree of complexity of the insurance-based investment product or type of financial activity or practice of an insurance or reinsurance undertaking, taking into account, in particular:
   - the type and transparency of the underlying assets,
   - the degree of transparency of fees and commissions associated with the insurance-based investment product, financial activity or financial practice and, in particular, the lack of transparency resulting from multiple layers of fees and commissions,

- the complexity of the performance calculation, taking into account whether the return is dependent on the performance of one or more underlying asset which are in turn affected by other factors,
- the nature and scale of any risks,
- whether the insurance-based investment product is bundled with other products or services, or
- the complexity of any terms and conditions;

2. the size of potential detrimental consequences, considering in particular:

- the notional value of the insurance-based investment product,
- the number of clients, investors or market participants involved,
- the relative share the product in investors' portfolios,
- the probability, scale and nature of any detriment, including the amount of loss potentially suffered,
- the anticipated duration of the detrimental consequence,
- the volume of the premium,
- the number of intermediaries involved,
- the growth of the market or sales,
- the average amount invested by each investor in the insurance-based investment product,
- the coverage level defined in national insurance guarantee schemes law, where such scheme exist, or
- the value of the technical provisions with respect to the insurance-based investment products;

3. the type of investors involved in a financial activity or financial practice or to whom an insurance-based investment product is marketed or sold, taking into account, in particular:

- whether the investor is a retail client, professional client or eligible counterparty as defined in Directive 2014/65/EU,
- investors' skills and abilities, including the level of education, experience with similar insurance-based investment products or selling practices,
- investors' economic situation, including their income and wealth,
- investors' core financial objectives, including pension savings and need for risk coverage,
- whether the product or service is being sold to investors outside the intended target market, or whether the target market has not been adequately identified, or
- the eligibility for coverage by an insurance guarantee scheme, where national insurance guarantee schemes exist;

4. the degree of transparency of the insurance-based investment product or type of activity or practice, taking into account, in particular:

- the type and transparency of the underlying assets,
- any hidden fees and commissions,

- the use of techniques drawing investors' attention but not necessarily reflecting the suitability or overall quality of the insurance-based investment product, financial activity or financial practice,
- the nature of risks and transparency of risks,
- the use of product names or terminology or other information that imply greater levels of security or return than those which are actually possible or likely, or which imply product features that do not exist, or
- whether there was insufficient, or insufficiently reliable, information about an insurance-based investment product to enable market participants to which it was targeted to form their judgment, taking into account the nature and type of insurance-based investment products;

5. the particular characteristics or underlying assets of the insurance-based investment product, financial activity or financial practice, including any embedded leverage taking into account, in particular: − the leverage inherent in the product,
    - the leverage due to financing, or
    - the features of securities financing transactions;
6. the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the insurance-based investment product, financial activity or financial practice, taking into account in particular:
    - the structuring cost of such insurance-based investment product, financial activity or financial practice and other costs,
    - the disparity in relation to the issuer's risk retained by the issuer, or − the risk/return profile;
7. the ease and cost with which investors are able to sell the relevant insurance-based investment product or to switch to another product, taking into account in particular:
    - the impediments when changing an investment strategy in relation to an insurance contract,
    - the fact that early withdrawal is not allowed or it is allowed at such contractual condition that it can be considered as not allowed, or
    - any other barriers to exit;
8. the pricing and associated costs of insurance-based investment product, financial activity or financial practice, taking into account in particular:
    - the use of hidden or secondary charges, or
    - charges that do not reflect the level of distribution service provided by the insurance intermediaries;
9. the degree of innovation of an insurance-based investment product, a financial activity or a financial practice, taking into account in particular:
    - the degree of innovation related to the structure of the insurance-based investment product, a financial activity or a financial practice, including embedding and triggering,

- the degree of innovation relating to the distribution model or length of intermediation chain,
- the extent of innovation diffusion, including whether the insurance-based investment product, financial activity or financial practice is innovative for particular categories of investors,
- innovation involving leverage,
- the lack of transparency of the underlying assets, or
- the past experience of the market with similar insurance-based investment products or selling practices for insurance-based investment products;

10. the selling practices associated with the insurance-based investment product, taking into account in particular:
    - the communication and distribution channels used,
    - the information, marketing or other promotional material associated with the investment, or
    - whether the decision to buy is secondary or tertiary following an earlier purchase;
11. the financial and business situation of the issuer of an insurance-based investment product, taking into account in particular:
    - the financial situation of the issuer, or
    - the suitability of reinsurance arrangements regarding the insurance-based investment products;
12. whether the underlying assets of the insurance-based investment product or financial activities or financial practice pose a high risk to the performance of transactions entered into by participants or investors in the relevant market;
13. whether the characteristics of an insurance-based investment product make it particularly susceptible to being used for the purposes of financial crime, in particular whether those characteristics could potentially encourage the use of the insurance-based investment products for:
    - any fraud or dishonesty,
    - misconduct in, or misuse of information, in relation to a financial market,
    - handling the proceeds of crime,
    - the financing of terrorism, or
    - facilitating money laundering;
14. whether the financial activity or financial practice poses a particularly high risk to the resilience or smooth operation of markets;
15. whether an insurance-based investment product, financial activity or financial practice could lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;
16. whether an insurance-based investment product, financial practice or financial activity poses a risk to the market or payment systems infrastructure, including trading, clearing and settlement systems;

17. whether an insurance-based investment product, financial activity or financial practice may threaten investors' confidence in the financial system; or
18. whether the insurance-based investment product, financial practice or financial activity poses a high risk of disruption to financial institutions deemed to be important to the financial system of the Member State of the relevant competent authority.

Pursuant to Article 17(3) of the Regulation on PRIIPs, a product intervention measure may only be adopted if, not later than one month before the measure is intended to take effect, all other competent authorities involved and EIOPA are notified in writing or through another medium agreed between the authorities of the details of:

a) the insurance-based investment product, or activity or practice to which the proposed action relates;
b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and
c) the evidence upon which the competent authority has based its decision and upon which it is satisfied that each of the conditions in Article 17(2) of the Regulation on PRIIPs are met.

After making the notification, under Article 18(2) of the Regulation on PRIIPs, EIOPA expresses an opinion on whether the prohibition intended to be imposed through product intervention is justified and proportionate. If EIOPA concludes that the measure must be adopted by other competent authorities to prevent the threat, EIOPA will state this in its opinion. The opinion is published on EIOPA websites. If EIOPA decides that a planned measure is not justified and proportionate, then in accordance with Article 18(3) of the Regulation on PRIIPs a Polish supervisory authority that is planning to adopt a measure, or adopts a measure contrary to EIOPA's opinion, or refuses to adopt a measure contrary to that opinion, must immediately publish on its websites a communication explaining the reasons of such conduct in detail.

Under Article 366(2) of the Act on the business of insurance, the Polish supervisory authority, i.e. Komisja Nadzoru Finansowego, hereby imposes the prohibitions referred to in Article 17 of the Regulation on PRIIPs, by way of decision. Under Article 366(3) of the Act on the business of insurance, the provisions of the Act of 14 June 1960 – the Administrative Procedure Code (consolidated text: Journal of Laws 2021, item 735), hereinafter: 'Administrative Procedure Code', apply accordingly to the decision referred to in Article 17 of the Regulation on PRIIPs, and the application of the provisions of the Administrative Procedure Code to the decision on product intervention is limited to appropriate application of the provisions of the Administrative Procedure Code pertaining to an administrative decision.

E. Justification based on facts

When adopting the measures specified in Article 17(1) of the Regulation on PRIIPs, the Polish supervisory authority reviewed the collected evidence, including its accuracy and credibility, in order to ascertain that each of the conditions laid down in Article 17(2)(a–e) of the Regulation on PRIIPs is fulfilled.

E.1 Raising significant investor protection concerns (Article 17(2)(a) of the Regulation on PRIIPs)

According to Article 17(2)(a) of the Regulation on PRIIPs, the Polish supervisory authority may take the action related to the imposition of a prohibition on the marketing, distribution or sale of insurance-based investment products with specified features if it is satisfied on reasonable grounds that an insurance-based investment product gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system within at least one Member State.

The condition in question indicates that a prohibition may be imposed if an insurance-based investment product, or activity or practice gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system within at least one Member State (Article 17(2)(a) of the Regulation on PRIIPs).

In reference to the foregoing in the context of this decision, it should therefore be stated that the condition for imposing a prohibition should be the fact that the Polish supervisory authority has ascertained that an insurance-based investment product (in this case a unit-linked insurance contract) with specified features, indicated above in the operative part of this decision, distributed in or from the territory of Poland:

1. gives rise to significant investor protection concerns, or
2. poses a threat to:
    a. the orderly functioning and integrity of financial markets or
    b. the stability of whole or part of the financial system.

In the Polish language, the word 'obawa' (concern) means 'a feeling of anxiety or uncertainty as to the effect or consequences of something'[14], and the adjective 'poważna' (significant) only intensifies that feeling. However, it should be noted that the phrase 'significant concern' does not mean in any case the certainty that specific negative events will occur, but only describes a state in which the occurrence of those events is highly probable. It should also be stated that the English version of the Regulation on PRIIPs uses the expression: 'significant investor protection concern', which should be understood precisely as: 'poważne obawy dotyczące ochrony inwestorów' [serious doubts concerning investor protection]. This interpretation is also

[14] The meaning of the word *obawa* as defined in the Dictionary of the Polish Language [*Słownik języka polskiego PWN*] (https://sjp/pwn.pl/).

confirmed in recital 25 of the Regulation on PRIIPs, which provides for the preventive function of that regulation.

The word 'zagrożenie' (threat), within the meaning assigned to that word in the Polish language, means 'a situation or state which threatens someone or in which someone feels threatened', and the verb "zagrozić" (to threaten) means 'to scare someone to force them to behave in a specific way' or 'to become a real danger for someone or something'[15]. In other words, a threat means a situation in which there is a serious danger to the orderly functioning and integrity of financial markets or the stability of the whole financial system or its part. The fact that when designing the wording of that condition the legislator used the conjunction 'or' means that for the fulfilment of that condition to be demonstrated, it is sufficient if the Polish supervisory authority ascertains that one of the facts indicated in points 1–2 above takes place.

Having analysed the unit-linked insurance contracts offered on the Polish market, the Polish supervisory authority ascertained that the unit-linked insurance contracts with the features specified in the operative part of this decision give rise to significant investor protection concerns. It should be noted that the existence of significant investor protection concerns is related to:

1. the low value of unit-linked insurance contracts for clients, in particular due to low or negative level of the effective rate of return for clients, and due to the level of fees collected under unit-linked insurance contracts which is overestimated and clearly does not correspond to the actual costs of management of such contracts borne by undertakings,
2. the possibility that customers entering into unit-linked insurance contracts might be exposed to excessive investment risk, including liquidity risk, arising from the investment of assets of unit-linked funds in contingent convertibles,

which leads to the conclusion that the level of protection of investors being parties to those insurance contracts is unacceptable and justifies the imposition of the prohibitions as described in the operative part of this decision.

In accordance with Article 2(1) of Delegated Regulation 2016/1904, the KNF Board assessed the relevance of all factors and criteria listed in Article 2(2) of that Regulation and considered the following relevant factor(s) and criteria in determining when the marketing, distribution or sale of certain insurance-based investment products (in this case: unit-linked insurance contracts) gives rise to a significant investor protection concern:

1. the degree of complexity of the insurance-based investment product or type of financial activity or practice of an insurance undertaking (Article 2(2)(a) of Delegated Regulation 2016/1904),
2. the size of potential detrimental consequences (Article 2(2)(b) of Delegated Regulation 2016/1904),

[15] The meaning of the word *zagrożenie* (threat) as defined in the Dictionary of the Polish Language [*Słownik języka polskiego PWN*] (https://sjp/pwn.pl/).

3. the type of investors involved in a financial activity or financial practice or to whom an insurance-based investment product is marketed or sold (Article 2(2)(c) of Delegated Regulation 2016/1904),
4. the degree of transparency of the insurance-based investment product or type of financial activity or practice (Article 2(2)(d) of Delegated Regulation 2016/1904),
5. the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the insurance-based investment product, financial activity or financial practice (Article 2(2)(f) of Delegated Regulation 2016/1904),
6. the selling practices associated with the insurance-based investment product (Article 2(2)(j) of Delegated Regulation 2016/1904),
7. whether an insurance-based investment product, financial activity or financial practice may threaten investors' confidence in the financial system (Article 2(2)(q) of Delegated Regulation 2016/1904).

Please find below a detailed analysis of the factors and criteria specified in points 1–7 and their effect on the identification of the condition indicated in Article 17(2)(a) of the Regulation on PRIIPs, i.e. serious investor protection concerns.

E.1.1 The degree of complexity of the insurance-based investment product (Article 2(2)(a) of Delegated Regulation 2016/1904)

In determining when the marketing, distribution or sale of unit-linked insurance contracts with features indicated in the operative part of this decision creates a significant investor protection concern, the Polish supervisory authority considered, as a relevant factor and criterion, the degree of complexity of the insurance-based investment product, taking into account, in particular, the type of the underlying assets and the degree of transparency of the underlying assets. Unit-linked insurance contracts are complex products. Entering into such contract, with full awareness of how it works, requires the necessary level of knowledge not only in the field of legal sciences, including insurance law, but also topics related to the functioning of financial markets, especially in the area of actuarial science, investment and financial analysis.

E.1.1.1 The type and transparency of the underlying assets

When analysing the condition concerning the degree of complexity of the insurance-based investment product, the Polish supervisory authority considered the type and transparency of the underlying assets of unit-linked funds. The complexity of unit-linked insurance contracts is also associated with the diversity of unit-linked funds offered with an insurance contract – an offer for one contract may include both funds managed internally by the insurance undertaking offering the insurance, and by domestic investment fund management companies and foreign fund managers. Another element determining the complexity of such insurance products is the diversity of property rights in which the assets from premiums may be invested – both financial assets (e.g. deposits, shares, debt instruments, standardised and non-standardised derivatives, any type of units in collective investment institutions, hybrid financial

instruments, financial assets whose underlying assets are non-financial assets, etc. – listed or non-listed on a regulated market), as well as non-financial assets (e.g. real property or raw materials). In practice, the knowledge of valuation rules and methods for those assets is not available to a vast majority of policyholders.

Moreover, since a unit-linked insurance contract is concluded on account of and at the risk of the policyholder, the assets accumulated in the unit-linked fund are owned by the insurance undertaking, and once the premium is paid, the policyholder loses any influence on how the assets are invested. The complex nature of the investment policy of unit-linked insurance contracts is also evidenced by the fact that in accordance with Article 276(9) of the Act on the business of insurance, where the insurance undertaking conducts the business of insurance in respect of insurance referred to in Division I Class 3 of the annex to that Act, it must employ an investment adviser or conclude an agreement with an entity authorised under separate provisions to manage the assets of the unit-linked fund on a fee or contract basis.

The KNF Board pointed to the complexity and riskiness of contingent convertibles, indicated in point I.2 of the operative part of this decision, which are hybrid and contingent financial instruments used to absorb the losses incurred by financial institutions issuing them and to mitigate the risk of insolvency of those institutions. The hybrid nature of those instruments stems from the fact that they are difficult to classify as debt instruments or equity instruments. This is related to their specific and complex structure, which is supposed to ensure secure and effective absorption of loss of the financial institution and envisages the existence of many complex and obligatory clauses which enable the classification of liabilities under CoCos as regulatory capital of financial institutions. The features of CoCos related to mandatory conversion or redemption, deep subordination,[16] perpetuality combined with the option of early buy-back by the issuer, the mechanism for changing the interest calculation method, including complete cancellation of a coupon payment, are the reasons why those instruments are considered to be extremely complex and difficult to value. Moreover, the difficulties in the estimation of the risk associated with acquisition of such instruments and their valuation occur not only for retail investors but also for professional ones. The research on the CoCos market[17] shows that investors usually have a wrong view of those instruments, seeing them as instruments with a fixed profit and a specified maturity date, which in reality is not the case. Thus, the instruments are valued incorrectly, because they are usually treated as if they could be redeemed at the first possible date (i.e. investors wrongly predict the profitability of those instruments until the early redemption date) and no sufficient consideration is given to the requirement to obtain the consent of the Polish supervisory authority to the buy-back of CoCos, or any type of economic conditions, which may discourage financial institutions from carrying out the early buy-back of those instruments. Even an appropriate approach to the valuation of CoCos, taking into account the actual nature of those complex financial instruments, carries

[16] Which in practice means that in case of insolvency of a financial institution, claims arising from CoCos are classified as separate and less privileged categories of claim settlement that other categories of debt of a financial institution.

[17] See: Piotr Jaworski, Aleksander Kowalski, Kamil Liberadzki, Marcin Liberadzki, *Obligacje typu CoCo i bail-in jako instrumenty rekapitalizacji banków i zwiększenia stabilności finansowej* [CoCos and bail-in as instruments for bank recapitalisation and increasing financial stability], NBP, Materiały i Studia No 335, Warsaw 2019.

high risk, because it involves the need to consider in the valuation model phenomena which are exceptionally difficult for stochastic modelling, being a technique used in the valuation of particularly complex financial instruments. Certain EU countries introduced various solutions to restrict the sale of those instruments to retail investors in those countries or to limit the exposure of those investors to the related investment risk[18].

The significant risk associated with investments in CoCos has also been highlighted by the Joint Committee of European Supervisory Authorities in its warning of 31 July 2014[19] and by the European Securities and Markets Authority (ESMA) in its statement published on the same day[20]. For these reasons, the KNF Board has concluded that CoCos are too complex and risky to be used as an investment of assets of unit-linked funds.

The inability to understand the complexity of contingent convertibles by a vast majority of policyholders and the insured, and thus the inability to consciously accept the high investment risk associated with investing the assets of unit-linked funds in those instruments, have led the Polish supervisory authority to the conclusion that there is significant investor protection concern, which justifies the prohibition specified in point I.2 of the operative part of this decision.

E.1.2 The size of potential detrimental consequences (Article 2(2)(b) of Delegated Regulation 2016/1904)

In determining when the marketing, distribution or sale of unit-linked insurance contracts with features indicated in the operative part of this decision creates a significant investor protection concern, the Polish supervisory authority considered, as a relevant factor and criterion, the size of potential detrimental consequences, considering in particular: the volume of the premium, the number of intermediaries involved, the average amount invested in a unit-linked insurance contract, the fees and commissions under the unit-linked insurance contract which are overly burdensome, and the coverage level defined in national insurance guarantee schemes law.

E.1.2.1 The volume of the premium, the number of intermediaries involved, the average amount invested in the unit-linked insurance contract

In assessing the size of detrimental consequences, it is necessary to consider, in the first place, the figures regarding the unit-linked insurance market. As stated above (point A of the statement of reasons for this decision), in 2020 unit-linked insurance contracts were offered by 22 insurance undertakings. The contracts were distributed by 5 385 distributors, who secured the conclusion of 60 711 contracts. The total gross written premium in that life insurance

[18] *Ibidem*, pp. 103–104.

[19] Reference: JC 2014 62, https://www.esma.europa.eu/sites/default/files/library/2015/11/jc_2014-62_placement_of_financial_instruments_with_depositors_retail_investors_and_policy_holders_self_placement.pdf.

[20] Reference: ESMA/2014/944, https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-944_statement_on_potential_risks_associated_with_investing_in_contingent_convertible_instruments.pdf.

segment was PLN 5.88 billion. The average value of a unit-linked life insurance contract at the end of 2020 was PLN 19.1 thousand.

Given the above values, the size of potential detrimental consequences related to irregularities in unit-linked insurance contracts may be significant so, in the opinion of the Polish supervisory authority, there is a significant investor protection concern which justifies the imposition of the prohibitions specified herein.

E.1.2.2 Overly burdensome fees and commissions in unit-linked insurance contracts

The size of potential detrimental consequences for customers who entered into or joined unit-linked insurance contracts entails the probability of materialisation of scenarios which may not be certain. To determine the scale of detrimental consequences with high probability, it is necessary to assess the actual costs under unit-linked insurance contracts in relation to the last 2–3 years. The Polish supervisory authority carried out an analysis of fees and commissions collected from the assets of unit-linked funds in 2017–2020. Then, based on the data for those years received from insurance undertakings, and assuming the level of assets that was reported for 2020, the Polish supervisory authority estimated the potential size of detrimental consequences for 2021.

Firstly, it should pointed out that the fees collected from the assets of unit-linked funds may be charged in two ways – directly by the insurance undertaking or indirectly by a third-party asset manager. A typical example of a third-party asset manager is an investment fund management company (*towarzystwo funduszy inwestycyjnych* – TFI). TFIs charge management fees which are then transferred, partly, as additional benefits to insurance undertakings (so-called kickbacks). It should be noted that the part of fees collected by TFIs which is not returned to the insurance undertaking in the form of additional benefit but is generally used to cover the operating costs and to generate profit of the TFI also creates costs under unit-linked insurance contracts.

The table below shows the average net asset value of unit-linked funds for 2017–2020, the fees and commissions collected from the assets of unit-linked funds, and the value of additional benefits (kickbacks). Based on those data, it should be concluded (as in the table below) that despite the continuous decline in the value of assets of unit-linked funds, the total amount of costs in relation to the assets of unit-linked funds for insurance undertakings remains at a stable level between 3.0% and 3.1%.

Table 3. Net asset value of unit-linked funds, the fees and commissions collected from the assets, and the value of additional benefits in 2017–2020

	2017	2018	2019	2020
Net asset value of unit-linked funds (in PLN thousand)	58 963 615	54 036 160	49 728 138	46 123 874
Fees and commissions collected from the assets of unit-linked funds (in PLN thousand)	1 380 968	1 292 341	1 176 886	1 056 196
Additional benefits (kickbacks) (in PLN thousand)	416 044	407 955	371 509	333 411
Fees, charges and benefits as % of the value of unit-linked funds	3.0%	3.1%	3.1%	3.0%

Source: UKNF, based on data submitted by supervised entities

The amounts of fees and commissions given in the table above represent the income of insurance undertakings, which by definition aims to, first of all, cover the asset management costs borne by insurance undertakings and the cost of the tax on certain financial institutions as referred to in the Act of 15 January 2016 on tax on certain financial institutions (consolidated text: Journal of Laws 2019, item 1836).

On the other hand, the table below shows a comparison of the revenues of insurance undertakings from the fees on assets and additional benefits for 2017–2020 with the actual asset management costs borne by the undertaking and the tax on certain financial institutions.

Table 4. Comparison of total fees collected with the total costs associated with the assets of unit-linked funds in 2017–2020 (for the whole unit-linked insurance market)

	2017	2018	2019	2020
Total fees and commissions collected from the assets of unit-linked funds (in PLN thousand) – (A)	1 797 012	1 700 296	1 548 396	1 389 607
Total asset management costs and the tax on certain financial institutions (in PLN thousand) – (B)	328 658	301 658	277 188	261 703
(A) / (B) ratio	547%	565%	559%	531%

Source: UKNF, based on data submitted by supervised entities

The figures in the table above show that the level of collected fees and commissions exceeded more than five times the level of actual costs borne by insurance undertakings. It is also important that the amount collected does not automatically represent technical profit of

insurance undertakings but may be used to cover other cost items such as contract administration costs or costs of distributors' commission, and cost of capital. Only after considering such additional costs, the remaining part will represent the undertakings' profit.

Polish supervisory authority estimated the negative impact of surplus fees on the value of unit-linked insurance contracts for 2021. The average estimated value of assets of unit-linked funds in 2021 is PLN 42.4 billion. The total estimated fees and commissions collected and the total estimated actual costs (for asset management and tax) for 2021 is PLN 1.28 billion and PLN 0.25 billion, respectively. The difference of PLN 1.03 billion is the actual reduction of value which will be recorded on unit-linked insurance contract accounts. One could say that in percentage terms, the average rates of return generated under unit-linked insurance contracts in the whole 2021 will be further reduced by 2.4%.

The estimated amount of PLN 1.03 billion does not automatically represent technical profit of insurance undertakings but – as stated above – it may be used to cover other cost items. After considering any additional cost, the remaining part of the amount of PLN 1.03 billion will represent the profit of the undertakings and potential additional return for the clients. As calculated by the Polish supervisory authority, following the application of the prohibition referred to in point I.1 of the operative part of this decision, in 2021 out of the amount of PLN 1.03 billion the value of all unit-linked insurance contracts would increase by the amount of PLN 0.5 billion.

In terms of the average estimated value of unit-linked insurance contracts for 2021, being PLN 19 785, this means that following the application of the value-for-the-client formula specified in the operative part of this decision, each client having a unit-linked insurance contract should be charged, on average, with costs of less than PLN 222 *per annum* compared to the case where the product intervention would not apply. The amount of PLN 222, which – from the client's perspective – increases the value of the client's contract (the average contract value being PLN 19 785), means that the annual return on investment generated from the assets of the unit-linked fund in UFK in 2021 would increase by 1.1%. It should be stressed at this point that those estimates serve only as an example showing a potential future effect of the prohibitions imposed by this decision for the newly concluded unit-linked insurance contracts, once the prohibitions come into effect. The calculations include both the scale of the phenomenon in question for the whole unit-linked insurance market and the effects of the prohibitions for the contract value per client.

As indicated above, based on its analytical exercises, the Polish supervisory authority has come to the conclusion that now, excessive charges apply to unit-linked insurance contracts. In fact, the above-mentioned excess of the fees collected over the actual costs borne by insurance undertakings determines the size of detrimental consequences for clients of insurance undertakings. Therefore, in the Polish supervisory authority's view, there is a significant investor protection concern which justifies the imposition of the prohibition specified in point I.1 of the operative part of this decision.

E.1.2.3 The coverage level defined in national insurance guarantee schemes law, where such scheme exist

In determining detrimental consequences, the Polish supervisory authority also considered the coverage level applicable in the event that a claim is made by beneficiaries under unit-linked insurance contracts, as specified in the Polish laws. In accordance with the Act on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau (consolidated text: Journal of Laws 2021, item 854), hereinafter: 'Act on compulsory insurance', the Insurance Guarantee Fund (hereinafter: 'Fund') must only satisfy the claims made by beneficiaries under life insurance contracts where an insurance undertaking is declared bankrupt, or where a request for declaration of bankruptcy of an insurance undertaking is dismissed, or where insolvency proceedings are discontinued, if the assets of the debtor are obviously not sufficient to even pay the costs of insolvency proceedings, or in the case of compulsory liquidation of an insurance undertaking, if the claims of the beneficiaries cannot be covered from the assets providing the coverage for technical provisions (Article 98(2) of the Act on compulsory insurance).

Moreover, the Fund may only pay a benefit under an insurance contract if the natural person being the beneficiary is entitled to such payment. Importantly, a beneficiary under an insurance contract may not receive the benefit in the full amount resulting from a life insurance contract because claims are satisfied in the amount of 50% of the amount due but up to an amount which is not greater than the PLN equivalent of EUR 30 000 according to the average exchange rate announced by the National Bank of Poland and applicable on the date of declaration of bankruptcy, dismissal of the request for declaration of bankruptcy or discontinuation of insolvency proceedings, or the order on compulsory liquidation (Article 98(2) point 2 of the Act on compulsory insurance).

The legislator has thus specified the cases where the Fund may satisfy the claims made by beneficiaries. Prior to the occurrence of such cases, beneficiaries under unit-linked insurance contracts have no claim whatsoever against the Fund. So if the investments made under unit-linked insurance contracts fail to deliver satisfactory return for the client, the client may only withdraw the money invested, by exercising the right to partial or total redemption, and seek damages from the insurance undertaking in line with general principles.

The guarantee scheme in Poland provides thus a very limited coverage level to beneficiaries under a unit-linked insurance contract, who may expect benefits form the Funds only in specified case listed above, and still to a very limited extent. In particular, those individuals are not entitled to any compensation for losses incurred as a result of an incorrect investment policy pursued by the insurance undertaking, or a low contract value for the client, related to excessive fees charged under such contract. Therefore, considering the above information regarding the premium and assets of unit-linked funds, the size of potential detrimental consequences may be significant, which has led the Polish supervisory authority to the conclusion that there is a significant investor protection concern and that it is appropriate to impose the prohibitions specified herein.

E.1.3 The type of investors to whom an insurance-based investment product is marketed or sold (Article 2(2)(c) of Delegated Regulation 2016/1904)

In determining when the marketing, distribution or sale of unit-linked insurance contracts with features indicated in the operative part of this decision creates a significant investor protection concern, the Polish supervisory authority considered, as a relevant factor and criterion, the type of investors to whom an insurance-based investment product is marketed or sold, taking into account, in particular: whether the investor is a retail client, professional client or eligible counterparty (as defined in Directive 2014/65/EU), investors' skills and abilities (including the level of education, experience with similar insurance-based investment products or selling practices), investors' economic situation (including their income and wealth), investors' core financial objectives (including pension savings and need for risk coverage), whether the product or service is being sold to investors outside the intended target market, or whether the target market has not been adequately identified, or the eligibility for coverage by an insurance guarantee scheme (where national insurance guarantee schemes exist).

E.1.3.1 Whether the investor is a retail client, professional client or eligible counterparty as defined in Directive 2014/65/EU

In determining whether the investor is a retail client, professional client or eligible counterparty as defined in Directive 2014/65/EU, the Polish supervisory authority considered that despite the fact that unit-linked insurance contracts are complex contracts, they are marketed mostly to investors who are retail clients. A unit-linked insurance contract is ultimately to meet their needs, regardless of whether they act as the policyholder (in personal insurance) or the insured (in group insurance) – in both cases their assets are used to finance the premium (except where the policyholder is an employer; in this case the employer may bear the economic burden of the premium). Professional clients and eligible counterparties sometimes join group insurance, usually as policyholders, in which case their role is practically limited to organising a group of the insured to take out group insurance (except where they take out group insurance for their employees).

The fact that unit-linked insurance contracts are addressed to retail clients who have less knowledge of the functioning of such contracts, combined with the irregularities identified and described in the operative part of this decision, have led the Polish supervisory authority to the conclusion that there is a significant investor protection concern, which justifies the prohibitions specified in the operative part of this decision.

E.1.3.2 Investors' skills and abilities, including the level of education, experience with similar insurance-based investment products or selling practices, and investors' economic situation, including their income and wealth, investors' core financial objectives (including pension savings and need for risk coverage), and whether the product is being sold to investors outside the intended target market

The Polish supervisory authority also considered investors' skills and abilities, including the level of education, experience with similar insurance-based investment products or selling practices, and investors' economic situation, including their income and wealth, investors' core

financial objectives (including pension savings and need for risk coverage), and whether the product is being sold to investors outside the intended target market. As already mentioned in point E.1. of the statement of reasons for this decision, clients in the Polish insurance market usually do not have sufficient knowledge of how a unit-linked insurance contract works, in particular cannot assess the value of the contract offered to them, and do not have sufficient knowledge that would allow them to assess how the assets under specific unit-linked funds are invested by insurance undertakings and TFIs.

That opinion is justified, in particular, by the results of a public opinion survey – e.g. according to the report on the survey 'Postawy konsumentów wobec produktów finansowych w kontekście tzw. polisolokat' [Consumers' attitude to financial products in the context of saving insurance policies] conducted by TNS Polska for the Office of Competition and Consumer Protection: *'(...) saving insurance policies, which are a kind of unit-linked life insurance* [this statement *per se* is inaccurate since those are different categories of financial products], *are known to 59% of Poles, but the majority of them (39%) do not understand how such policies work. Moreover, 41% of Poles have never even heard of them.'*

As shown by the survey *Financial literacy of Poles in 2019*[21], conducted at the request of the Warsaw Institute of Banking and the GPW Foundation, only 9% of Poles declare that their financial literacy is good or very good.

The Polish supervisory authority analysed 9 KIDs in the part defining the target investor for the product. In that part, KIDs are not standardised, and insurance undertakings adopt various criteria/methods to determine the target investor. Following the analysis, the Polish supervisory authority identified provisions according to which target investor means a person who is over 18 years of age. To determine the target investor, insurance undertakings add the requirement to have the knowledge of life insurance products or investment products. A target investor is often characterised as an investor who accepts investment risk and accepts the risk of losses on investment. Here is an example of definition of target investors: *'they have knowledge and experience in the field of investment, (...) they are aware of risks associated with investments in the product, and they accept the risk of losing all or part of their investment.'*

In this context it should be noted that according to the information obtained as a result of the introduction by the Polish supervisory authority in 2019 of reporting requirements for insurance undertakings, in the Polish market there persists a selling practice which raises significant concerns of the KNF Board. This practice consists in the fact that a significant part of unit-linked insurance contracts are concluded despite the failure to obtain information about investors' skills and abilities, including the level of education, experience with investment products, investors' economic situation, including their income and wealth, and investors' core financial objectives. Due to the application of that selling practice, about 1/3 of unit-linked insurance products may have been sold to investors outside the intended target market. The foregoing means that unit-linked insurance contracts are addressed to a much bigger group of clients, rather than to a small group of investors who have experience in investments and

[21] Source: Report *Nieprawidłowości na rynku finansowym a ochrona konsumenta* [Irregularities in financial market vs consumer protection], issued on 24 September 2019 by the Advisory Scientific Committee of the Financial Ombudsman.

who consciously accept the risk that they might incur losses on their investments. The data in the table below confirms the above findings of the Polish supervisory authority.

Table 5. Indicators of insurance contracts concluded despite the client's refusal to fill in the demands and needs questionnaire, and contracts concluded on demand (as the undertaking's offer did not include any contract that would meet the client's needs and expectations) during the period between March 2019 and December 2020

Period	Indicator of refusals to fill in the demands and needs questionnaire	Indicator of contracts concluded on demand	**(Total) mismatch indicator**
Q1 2019	23.3%	12.1%	**35.3%**
Q2 2019	23.3%	11.9%	**35.2%**
Q3 2019	23.6%	12.4%	**36.0%**
Q4 2019	23.3%	13.2%	**36.5%**
Q2 2020	17.9%	19.7%	**37.6%**
Q3 2020	16.6%	19.4%	**36.0%**
Q4 2020	15.4%	19.7%	**35.1%**

Source: UKNF, based on data submitted by supervised entities

The Polish supervisory authority also took account of the very limited level of coverage for beneficiaries under unit-linked insurance contracts, existing in the Polish guarantee scheme (for more information please see point E.1.2.3 of the statement of reasons for this decision).

Therefore, considering the type of investors to whom unit-linked insurance contracts may be marketed or sold, despite the negative features identified by the Polish supervisory authority and described in this decision, such as excessive fees, excessive investment risk and the practice of selling such insurance to a large group of retail clients, often despite the lack of information about the clients, the possibility of selling those contracts outside the intended target market, and the limited level of coverage for beneficiaries under unit-linked insurance contracts within the guarantee scheme, the size of potential detrimental consequence may be significant, which has led the Polish supervisory authority to the conclusion that there is a significant investor protection concern and that it is appropriate to impose the prohibitions specified herein.

E.1.4 The degree of transparency of the insurance-based investment product (Article 2(2)(d) of Delegated Regulation 2016/1904)

In determining when the marketing, distribution or sale of unit-linked insurance contracts with features indicated in the operative part of this decision creates a significant investor protection concern, the Polish supervisory authority considered, as a relevant factor and criterion, the

degree of transparency of unit-linked insurance contracts, taking into account, in particular, the use of product names or terminology or other information that imply greater levels of security or return than those which are actually possible or likely, or which imply product features that do not exist.

E.1.4.1 The use of product names or terminology or other information that imply greater levels of security or return than those which are actually possible or likely, or which imply product features that do not exist

The Polish supervisory authority identified cases where insurance undertakings offer unit-linked insurance contracts whose names directly refer to the element of security or 'guarantee' of a monetary benefit for the client. However, it should be noted that under such contracts the client may invest the money from premiums in, for example, equity funds, which are not, by their nature, a safe type of investment but are exposed to higher investment risk than other investments (e.g. bonds). At this point it should also be stressed that given the nature of unit-linked insurance contracts, the investment risk associated with investing the assets accumulated with unit-linked funds is borne by the client, and the contracts expressly provide that the insurance undertaking does not guarantee the achievement of the investment goal specified therein. Nevertheless, the very name of an insurance-based investment product which suggests a high level of certainty that the product would generate a return corresponding to at least the money invested by the client is the cause of the unsatisfactory degree of transparency of the product. In this context it should be noted that for an average client, a name of an insurance-based investment product which suggests a high level of protection may be one of the essential elements affecting the client's decision to enter into a given unit-linked insurance contract.

The use, by insurance undertakings, of product names or terminology or other information that imply greater levels of security or return than those which are actually possible or likely, or which imply product features that do not exist, have led the Polish supervisory authority to the conclusion that the degree of transparency of unit-linked insurance contracts is unsatisfactory. The foregoing indicates, in the Polish supervisory authority's view, that there is a significant investor protection concern which justifies the imposition of the prohibitions specified in the operative part of this decision.

The prohibitions in question should raise the level of security and return of unit-linked insurance contracts. Therefore, the names of those contracts meeting the criteria defined herein which suggest a specific level of security or return, due to the application of the average rate of return as well as the investment rules and restrictions provided for herein, will correspond, more than they do now, to the actual features of the products.

E.1.5 The existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the insurance-based investment product (Article 2(2)(f) of Delegated Regulation 2016/1904)

In determining when the marketing distribution or sale of unit-linked insurance contracts with features indicated in the operative part of this decision creates a significant investor protection concern, the Polish supervisory authority considered, as a relevant factor and criterion,

the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the insurance-based investment product, taking into account in particular: the structuring cost of such insurance-based investment product, and other costs.

The term ‘structuring cost of such insurance-based investment product’ means the level of costs incurred in unit-linked insurance contracts. The costs incurred represent the basic element determining the economic value of the contract both from the perspective of the client and of the insurance undertaking. In this context, structuring refers thus to the process of product valuation, in particular to the assumptions on the total costs to be incurred in a given contract, and hence to the impact of such costs on the value of the contract for the client.

To assess the economic value of the products, the Polish supervisory authority analysed the KIDs that insurance undertakings are required to create for unit-linked insurance contracts. A KID for each unit-linked fund offered under a contract presents, in particular, four investment scenarios with different rates of return on the fund’s underlying assets. The Polish supervisory authority focused on the moderate scenario in which product performance is most balanced and does not shift towards either pessimistic or optimistic results.

One of the measures of the value of a unit-linked insurance contract for the client is the ‘average rate of return in each year’ indicated in the KID. That measure reflects the annual rate of return on the premiums invested. The Polish supervisory authority has found that in all cases of unit-linked insurance contracts under assessment, over the recommended holding period the average rate of return in each year is negative. The negative average return (in each year) means that the amount of the surrender value in a unit-linked insurance contract available at the end of the recommended holding period is lower than the amount of the premiums paid, which means that the client incurs a loss.

For unit-linked insurance, it is important to note that the KID indicates the value of the unit-linked insurance contract related only to the unit-linked fund, but does not indicate the expected value of insurance benefits resulting from the coverage. On the other hand, the premiums for insurance risk, or the fees for insurance risk, are treated as a cost incurred by the policyholder. This is a certain imperfection of the KIDs, which indicate the cost of insurance cover but not the correct (actuarial) value of an insurance benefit. For that reason, for the products in which the average return for the client was negative, the Polish supervisory authority carried out an additional analysis, taking into account the element of the expected value of the insurance benefit resulting from the coverage under each unit-linked insurance contract. In this context, the word ‘expected’ means that appropriate calculations are made taking into account the mortality table by age of the insured.

In order to correctly and comprehensively assess the product value for the client, taking into account the expected value of benefit under the insurance contract stemming from its protection component is necessary. In fact, a KID focuses only on the product’s investment component, while the protection component is presented only as insurance sum. Such presentation follows from the KID specification laid down in the Regulation on PRIIPs, but it fails to fully reflect the actual economic value of the contract’s protection component, since it implicitly assumes that the insured will die at the end of the recommended holding period of the unit-linked insurance contract with probability 1. This is why the Polish supervisory authority has

developed, for the purposes of analysis of the value of unit-linked insurance contracts, a synthetic indicator measuring what portion of premiums the insurance undertaking will pay in the form of benefits. The benefits on account of the protection component and investment component of the contract are expressed as expected values, using death probabilities and life expectancies until the end of the recommended holding period, specific to the age of the insured. The synthetic indicator for each of the products under assessment was less than 100%, within the range from 44% to 85%. In the most optimistic case of the products under assessment, from the client's perspective it means that, statistically, approx. 85% of the premiums paid will be recovered by the client in the form of benefits, either on account of death or on account of survival to the end of the recommended holding period. The Polish supervisory authority has concluded that, not negating the essence of the business of insurance undertakings, the products under assessment do not generate appropriate value for their clients.

On the other hand, the Polish supervisory authority analysed the margin generated by insurance undertakings. The margin analysed by the Polish supervisory authority was defined as discounted future expected profit and cost of capital in relation to discounted future expected premiums. The undertakings' margin so defined takes into account all the costs/charges incurred by the client in relation to all the costs incurred by the insurance undertaking, to discharge the obligations under the contract. The margin indicator so defined takes into account all the expected costs/charges incurred by the client and the costs incurred by the insurance undertaking throughout the term of the unit-linked insurance contract. The word 'expected' means that appropriate calculations are made taking into account probabilities such as the death of the insured, or early termination of the unit-linked insurance contract. Having at its disposal the data on the costs incurred by insurance undertakings and the costs/charges paid by clients, the Polish supervisory authority calculated the margins for the products. In all cases, the margin of insurance undertakings was positive, within the range from 5% to 20%.

Since the essence of the business of insurance undertakings is to generate positive margins, the Polish supervisory authority finds that the balance between the margin of insurance undertakings and the value for the client has not been maintained.

Hence, considering the above-mentioned issues of low value of unit-linked insurance contracts on the Polish market for the client and the high margins of insurance undertakings, in the Polish supervisory authority's view there is a significant investor protection concern which justifies the imposition of the prohibition specified in point I.1. of the operative part of this decision.

With this in mind, in order to raise the level of investor protection, the Polish supervisory authority defined a formula according to which a unit-linked insurance contract should generate, over the expected holding period, a profit for the client of at least 50% of the risk-free rate. The mathematical formula, being the basis of the profitability criterion under the intervention measure, works so that with the assumed level of premiums required under the contract and the returns on investment, the reduction of charges resulting in an increase in the value of the endowment (until the end of the recommended holding period) actually translates into a higher average rate of return for the client.

E.1.6 The selling practices associated with the insurance-based investment product (Article 2(2)(j) of Delegated Regulation 2016/1904)

In determining when the marketing, distribution or sale of unit-linked insurance contracts with features indicated in the operative part of this decision creates a significant investor protection concern, the Polish supervisory authority considered, as a relevant factor and criterion, the selling practices associated with the insurance-based investment product.

It must be noted that due to the complex nature of unit-linked insurance contracts, separate provisions were laid down to regulate the method of entering into such contracts.

Namely, in Article 30(1) of the IDD, the European legislator requires that when providing advice on an insurance-based investment product, the insurance intermediary or insurance undertaking should also obtain the necessary information regarding the customer's or potential customer's knowledge and experience in the investment field relevant to the specific type of product or service, that person's financial situation including that person's ability to bear losses, and that person's investment objectives, including that person's risk tolerance, so as to enable the insurance intermediary or the insurance undertaking to recommend to the customer or potential customer the insurance-based investment products that are suitable for that person and that, in particular, are in accordance with that person's risk tolerance and ability to bear losses.

Additionally, in accordance with Article 30(2) of the IDD, an insurance intermediary or insurance undertaking, when carrying out insurance distribution activities other than those referred to in paragraph 1 of that Article, in relation to sales where no advice is given, should ask the customer or potential customer to provide information regarding that person's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the insurance intermediary or the insurance undertaking to assess whether the insurance service or product envisaged is appropriate for the customer. Where the insurance intermediary or insurance undertaking considers, on the basis of the information received under the above provision, that the product is not appropriate for the customer or potential customer, the insurance intermediary or insurance undertaking must warn the customer or potential customer to that effect.

Where customers or potential customers do not provide the information referred to above, or where they provide insufficient information regarding their knowledge and experience, the insurance intermediary or insurance undertaking must warn them that it is not in a position to determine whether the product envisaged is appropriate for them.

The said provisions of the IDD are reflected in the Polish Act on the business of insurance. Under Article 21(1) of the Act, before entering into a contract of insurance, the insurance undertaking must obtain, by means of a questionnaire, from the policyholder, information on the policyholder's needs, knowledge and experience in the area of life insurance and on the policyholder's financial situation, to be able to assess what insurance contract will be adequate to the policyholder's needs. Under Article 21(3) of the Act on the business of insurance, following the analysis of information referred to in paragraph 1 of that provision, the insurance undertaking must offer to the policyholder insurance appropriate for the policyholder's needs and provide the reasons for such offers, in particular the identified needs of the policyholder

and explanation of how the offers satisfy such needs. If the analysis of information referred to in Article 21(1) of the Act on the business of insurance shows that the policyholder's needs are inadequate to the policyholder's experience, knowledge in the area of life insurance or to the policyholder's financial situation, or if there is no insurance appropriate for the policyholder's needs, the insurance undertaking must, under Article 21(4) of the Act on the business of insurance, provide the policyholder with such information and, at the same time, warn the policyholder that no appropriate insurance may be offered based on the result of the analysis or from the range of insurance products offered by the insurance undertaking. The policyholder must confirm, in writing, the receipt of such information and state in writing that the policyholder is aware of the warning. In such a case, no insurance contract may be concluded with the policyholder, unless at the policyholder's written request.

A similar regulation is provided in paragraph 2 of that provision for insurance contracts concluded on another person's account, in particular group insurance referred to in Division I Class 3 of the annex to the Act, except that the insurance undertaking should obtain, by means of a questionnaire, information referred to in paragraph 1 concerning the insured, before the insured accepts the insurance cover, under the insurance contract concluded by the policyholder, to be able to assess what insurance contract will be adequate to the needs of the insured. In that case the insurance undertaking must provide the insured, before the insured gives their consent to be covered by the contract concluded by the policyholder, with a recommendation of such cover and a statement of reasons for the recommendation. The reasons must include in particular the identified needs of the insured and an explanation of how the cover provided under the insurance contract meets such needs. The above-mentioned provisions of Article 21(3) and (4) apply to the insured and the insurance undertaking accordingly.

In accordance with Article 21(6) of the Act on the business of insurance, if the policyholder or the insured refuses to complete the questionnaire referred to in paragraphs 1 or 2, the provisions of paragraphs 3 and 5 do not apply.

Therefore, unit-linked insurance contracts may be offered as follows:

1. according to the recommendations based on the information about the policyholder's needs, knowledge and experience in the area of life insurance and their financial situation, received by the insurance undertaking,
2. at the policyholder's written request, after the policyholder is warned by the insurance undertaking that given the results of the analysis or given the undertaking's offer no appropriate insurance can be offered to the policyholder,
3. where the insurance undertaking receives no information about the policyholder's needs, knowledge and experience in the area of life insurance and their financial situation, as the policyholder or the insured refused to fill in the questionnaire referred to in Article 21(1) of the Act on the business of insurance.

In the Polish supervisory authority's view, the conclusion of a unit-linked insurance contract otherwise than as recommended on the basis of the information about the policyholder's needs,

knowledge and experience in the area of life insurance and their financial situation, received by the insurance undertaking, should only take place occasionally because full completion of the analysis of the client's needs, knowledge and experience in the area of life insurance is of key importance for appropriate selection of the product according to the client's needs and capacities.

Meanwhile, as already mentioned (see: Table 5), a significant number of unit-linked insurance contracts, despite being complex products allowing for, under the current legislation, a very liberal investment policy (e.g. a much riskier policy than in the case of investment funds or UCITS-type collective investment institutions), are concluded regardless of the information about the policyholder's needs, knowledge and experience in the area of life insurance and their financial situation and without the insurance undertaking's assessment of whether the insurance contract concluded is suitable for the policyholder's needs.

Another group of irregularities identified by the Polish supervisory authority, for example during the inspection, are the failures related to the conclusion of unit-linked insurance contracts on the basis of questionnaire regarding the policyholder's needs which include information on the policyholder's needs, knowledge and experience in the area of life insurance and their financial situation, described in point B.3 of the statement of reasons for this decision.

The Polish supervisory authority has noted that some distributors try to attract new clients by using marketing or selling techniques that may distract the client from the risk associated with investments under unit-linked insurance contracts. An example of such techniques is the offering of unit-linked insurance contracts in a package with investment deposits. When acquiring such products, the client is granted more favourable interest rate of the investment deposit as compared to standard offers. However, a more favourable interest rate offer applies to short-term (revolving or non-revolving) deposits but with a standard interest rate as applied by a bank. Thus the client, encouraged by the short-term deposit offer with an interest rate slightly higher than the standard rate, not being able to properly assess the level of investment risk, additionally acquires a complex and complicated unit-linked insurance contract, under which they will allocate a portion of their assets for a several years' investment in which they bear the investment risk, and thus risk losing the money invested. The above-described practices cannot be considered as a conduct in the best interest of retail clients, who are thus exposed to the risk of losing a big sum of money because they enter into unit-linked insurance contracts more often than would be the case without the offer for additional benefits from distributors.

Therefore, considering the above issues related to the conclusion of a significant number of unit-linked insurance contract while disregarding information about the policyholder's needs, knowledge and experience in the area of life insurance and their financial situation, and with the insurance undertaking failing to assess whether the insurance contract is appropriate for the policyholder's needs (or regardless of the results of such assessment), and issues related to the use, by distributors, of marketing or selling practices which may distract the client from the investment risk in unit-linked insurance contracts, in the Polish supervisory authority's view there is a significant investor protection concern which justifies the imposition of the prohibitions specified in the operative part of this decision.

In the Polish supervisory authority's view, the prohibitions imposed herein aim to improve the quality of unit-linked insurance contracts distributed in the Polish market, so even if the above-described insurance distribution practices are not abandoned, investors will be receiving better products, so investor protection will be strengthened.

E.1.7 Whether an insurance-based investment product may threaten investors' confidence in the financial system (Article 2(2)(q) of Delegated Regulation 2016/1904)

In determining when the marketing, distribution or sale of unit-linked insurance contracts with features indicated in the operative part of this decision creates a significant investor protection concern, the Polish supervisory authority considered, as a relevant factor and criterion, whether an insurance-based investment product may threaten investors' confidence in the financial system.

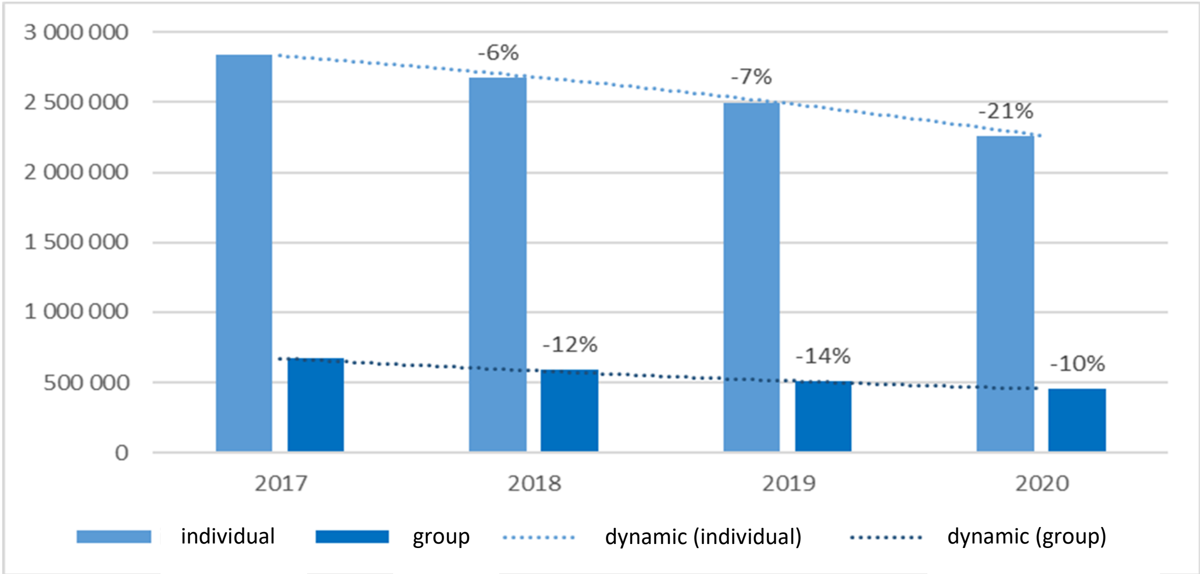
It must be stated that the problems associated with unit-linked insurance contracts as identified by the Polish supervisory authority clearly have a negative effect on the level of investors' confidence in the financial system. The Polish supervisory authority believes that distribution, to a large group of clients, of insurance-based investment products with a low value for the client, stemming from, among other things, high charges, which involve the pursuit of a risky investment policy carries a risk of losses for clients, who are not fully aware of such risk. Potential losses incurred by many clients will certainly have a negative impact on investors' perception of the insurance market. That could lead to reduced interest in any insurance products, which will ultimately affect the financial condition of the insurance market. Issues in the insurance market might, in turn, have a negative effect on the whole financial market, since insurance is an essential segment of it. At this point it is necessary to mention contagion, which consists in a decline in clients' confidence in insurance undertakings affecting the perception of financial products other than insurance products, and of entities offering such other products. Negative reactions from clients of one insurance undertaking may trigger similar reactions among clients of other undertakings offering similar (not necessarily defective) products, as well as unit-holders at domestic investment funds due to the cooperation between TFIs and insurance undertakings in 'repackaging' investment funds into unit-linked insurance contracts, a very strong engagement of insurance undertakings in units and investment certificates of such funds, and many times a significant share of insurance undertakings in the net asset value of such funds. In such a case, the reactions from a significant group of clients, caused by the loss of confidence in one financial institution, trigger similar behaviour among other clients of that institution and among clients of other institutions, because even if they do not share the same concerns as to the quality of their financial product, they still must be aware of the consequences of significant deterioration or even a complete loss of financial liquidity of an insurance undertaking, unit-linked fund, or investment fund due to the enhanced actions taken by the other clients/investors (actions such as requests for policy surrender, repurchase of units/shares, or redemption of investment certificates). Moreover, if a financial product was offered and sold as a result of cooperation between an insurance undertaking or investment fund management company and, for example, a bank, then such situation may also affect the bank's reputation and the behaviour of its customers, especially where the bank was largely responsible for creating the demand for the product by using unethical selling practices among its

customers, or failing to look into the actual needs of its customers before offering the product to them.

With regard to the foregoing, in the Polish supervisory authority's view, insurance undertakings as institutions of public trust should carry on their business, including the sale of insurance-based investment products, with utmost care, stemming from the professional nature of their business. In particular, insurance undertakings should establish and cultivate good relationships with customers in order to increase confidence not only in a specific insurance undertaking or insurance market, but also in the entire financial market. In this context, it is unacceptable to put financial performance before the principles of honesty, loyalty and client protection.

The issues with unit-linked insurance contracts start to reduce the number of new contracts. The diagram below shows the number of active individual unit-linked insurance contracts and the number of active participants in group unit-linked insurance contracts for the whole Polish market in 2017–2020. For the sake of data comparability, in the case of group contracts the number includes persons participating in insurance under one contract. Dotted lines in the diagram show year-on-year changes.

Diagram 1. The number of active unit-linked insurance contracts and year-on-year changes, broken down by individual contract and group contract, in 2017–2020



Source: UKNF, based on data submitted by supervised entities

The dynamic of changes in the number of contracts takes account of both new contracts and terminated contracts, considering that termination may be caused by notice of termination, withdrawal, death of the insured, or survival to the end of the contract specified therein. The negative dynamic for both individual and group contracts means that the number of new contracts or persons joining group contracts is lower than the number of individual and group contracts which were terminated. 2020 is characterised by a much heavier decline in the number of contracts compared to other years under assessment. The exceptionally dynamic decline was a one-off effect of termination, in 2020, of 383 thousand individual retirement account

(PL: IKE) contracts and individual retirement protection account (PL: IKZE) contracts. Without considering the one-off effect related to the termination of IKE/IKZE contracts, based on the 2020 data, the above-listed determinants of the change in the number of contracts can be shown as percentages, as follows.

Table 6. Determinants of the change in the number of active unit-linked insurance contracts based on the data for 2020

Determinant of change	% *per annum*
New contracts	3.17%
Death of the insured	-0.28%
Survival to the end of contract term	-0.45%
Early contract termination (surrender)	-12.40%
Withdrawal	-0.02%
Annual dynamic	**-9.98%**

Source: UKNF, based on data submitted by supervised entities

As shown in the table above, the main determinant of the decline in the number of contracts is the early termination of unit-linked insurance contracts (surrender). The other factors reducing the number of contracts, in particular withdrawal, are immaterial. The number of new contracts is four times lower than the number of contracts terminated by surrender, which makes the final number decrease significantly.

To sum up, the above data clearly show a material decline in both the number of insurance contracts and the assets of unit-linked funds in 2017–2020. The main driver of the decline in both those figures is surrender. The contraction of the unit-linked insurance market has been going on for a few years, and it continues. In the Polish supervisory authority's view, such situation is caused by the existence, in the Polish market, of unit-linked insurance contracts with features that trigger a loss of investors' confidence in the financial system. In particular, the contraction of this part of capital market is interpreted by the Polish supervisory authority as an effect of products with low profitability for the client, or products which invest in low-quality or low-liquidity assets. The above-mentioned negative features are addressed by the prohibitions under the intervention measure. In the Polish supervisory authority's view, the intervention measure should prevent that tendency and gradually restore investors' confidence in this market segment.

The KNF Board would also like to point to the detrimental consequences of material business and capital ties between entities operating in various financial market segments. The decline in the number of unit-linked insurance contracts with unacceptable features sold to a significant group of retails clients is not only a problem for insurance undertakings offering such contracts

but also for the entire insurance market and entities operating in other financial market segments. This concerns mainly entities from the same group as the insurance undertakings in question, entities cooperating with insurance undertakings in creating investment vehicles that become investments of unit-linked funds, and entities participating in distribution and marketing of unit-linked insurance products. Such entities automatically share financial and capital consequences of the sale of defective insurance products, further collapse of such sale, the significant decline in clients' confidence, policy surrender, and any claims for damages.

Therefore, considering the above-described issues of the impact of offers of defective unit-linked insurance contracts, in the first place, on the confidence in the insurance market, and hence on the confidence in the entire financial market, in the Polish supervisory authority's view there is a significant investor protection concern which justifies the imposition of the prohibitions specified in the operative part of this decision.

In the Polish supervisory authority's view, the prohibitions imposed herein aim to improve the quality of unit-linked insurance contracts distributed in the Polish market, which will definitely help enhance investor protection, and thus strengthen the confidence in the insurance market and in the entire financial market. In connection with the analyses and conclusions regarding the existence of the significant investor protection concern outlined in points E.1.1–E.1.7 of the statement of reasons for this decision, in relation to unit-linked insurance contracts, the Polish supervisory authority deems it necessary to issue this decision, which aims to implement measures appropriate to the nature of the problem.

E.2 Existing regulatory requirements under Union law applicable to the insurance-based investment product do not sufficiently address the risks associated with investor protection and the issue would not be better addressed by improved supervision or enforcement of existing requirements (Article 17(2)(b) of the Regulation on PRIIPs)

According to the wording of that requirement, the competent authority must ascertain that the existing regulatory requirements under Union law applicable to insurance-based investment products do not sufficiently address the risks associated with investor protection. In the next step, the Polish supervisory authority must ascertain that the existing issues in insurance-based investment products would not be better addressed by improved supervision or enforcement of existing requirements.

Considering that with regard to supervisory measures in the form of improved supervision or enforcement of existing requirements, the statement of reasons and the conclusions from the analysis are common for both criteria indicated in the operative part of this decision, in the first place, in points E.2.1.1–E.2.1.2 of the statement of reasons for this decision, an analysis regarding regulatory requirements under Union law will be presented separately for each criterion, and then, in point E.2.2 of the statement of reasons for this decision, an analysis will be performed to examine other solutions, such as improved supervision or enforcement of existing requirements.

E.2.1 Existing regulatory requirements under Union law applicable to the insurance-based investment product

Having regard to Article 17(2)(b) of the Regulation on PRIIPs in relation to regulatory requirements under Union law, the Polish supervisory authority analysed:

a. the existing regulatory requirements under Union law applicable to insurance-based investment products, and

b. whether such regulatory requirements under Union law are sufficient to prevent the risks associated with investor protection.

Two main points must be mentioned in this respect. Firstly, Article 17(2)(b) of the Regulation on PRIIPs refers to Union law, which means that the analysis covers the regulations listed in Article 288 of the Treaty on the Functioning of the European Union[22], i.e.: regulations, directives, decisions, recommendations, and opinions. Secondly, in Article 17(2)(b) of the Regulation on PRIIPs the legislator stipulated that before imposing prohibitions, the competent authority should ascertain that existing regulatory requirements do not sufficiently address the risks associated with investor protection. The phrase ‘to not sufficiently address the risks associated with investor protection’ may be understood in two ways:

a) it may mean that Union law includes regulations relating to, in principle, insurance-based investment products or the business of insurance undertakings, but provisions of such regulations in no way prevent the risks associated with investor protection, as they do not regulate this area;

b) it may also mean that Union law includes regulations relating to a specific risk associated with investor protection but the scope and substance of the regulations do not make it possible to ascertain that they sufficiently address that risk.

In examining the probability of fulfilment of this requirement for the decision, the Polish supervisory authority analysed the regulatory requirements under Union law regulating unit-linked insurance contracts, in particular the requirements laid down in:

1) Regulation on PRIIPs and Delegated Regulation 2017/653;

2) IDD and related implementing acts, including:

    a) Delegated Regulation 2017/2359, and

    b) Delegated Regulation 2017/2358;

3) Solvency II Directive and related implementing acts.

[22] The Treaty on the Functioning of the European Union, in Article 288 (Part six ‘Institutional and financial provisions’, title I ‘Institutional provisions’, Chapter 2 ‘Legal acts of the Union, adoption procedures and other provisions’, Section 1 ‘The legal acts of the Union’), stipulates that to exercise the Union’s competences, the institutions must adopt regulations, directives, decisions, recommendations and opinions.

E.2.1.1 Existing regulatory requirements under Union law pertaining to point I.1 of the operative part of the decision

In order to ascertain that Union law does not include regulatory requirements which would sufficiently address the risks associated with investor protection to the extent identified by the Polish supervisory authority and covered by point I.1 of the operative part of this decision, the KNF Board analysed the provisions of the Solvency II Directive and related implementing acts which regulate the conduct of the business of insurance. Following the analysis of those regulations, the Polish supervisory authority found that they did not include provisions relating to insurance-based investment products with respect to the issue described in point I.1 of the operative part of this decision. In consequence, it should be concluded that neither the Solvency II Directive nor the implementing acts include provisions which would address the risks associated with investor protection in relation to the issues identified by the Polish supervisory authority and related to product profitability for the clients who entered into, or joined, a unit-linked insurance contract.

The analysis of provisions of the IDD leads to a similar conclusion as in the case of the Solvency II Directive and its implementing acts. The IDD contains rules supporting client protection pertaining to the method of distribution, especially with regard to information requirements and the obligation to analyse the client's needs. However, the IDD does not regulate the aspect that the product should generate appropriate profit for the client, so it does not contain provisions which would address the risks associated with investor protection with respect to the issue identified by the Polish supervisory authority.

Detailed product oversight and governance requirements for insurance undertakings and insurance distributors are laid down in Delegated Regulation 2017/2358. The Regulation lays down, among other things, requirements on product oversight, identification of the target market, monitoring, testing and reviewing products. Under Article 6(1) of Delegated Regulation 2017/2358, manufacturers test their insurance products in a qualitative manner and, depending on the type and nature of the insurance product and the related risk of detriment to customers, quantitative manner. That provision represents a very vague guideline and does not clearly indicate how manufacturers should calculate the risk of consumer detriment in a quantitative manner. In addition to that general provision, Delegated Regulation 2017/2358 does not introduce any detailed requirements concerning the obligation of the insurance undertaking to guarantee a specific value for the client that acquired an insurance-based investment product. It should be concluded then that the regulation does not sufficiently address the risks associated with investor protection in the matter in question. Delegated Regulation 2017/2359 contains provisions pertaining to the distribution of insurance-based investment products, specifically: (i) conflicts of interest and inducements, and (ii) assessment of suitability and appropriateness of insurance-based investment products. However, Delegated Regulation 2017/2359 contains no provision pertaining to features, substance or terms and conditions of insurance-based investment products, so it does not cover any aspects related to the assurance of value of insurance-based investment products for customers. Therefore, Delegated Regulation 2017/2359 does not address the risks associated with investor protection identified by the Polish supervisory authority and listed in point I.1 of the operative part of this decision.

The analysis of the Regulation on PRIIPs reveals a number of elements which should be contained in KIDs, in particular:

- a description of the insurance-based investment product being sold,
- detailed information on insurance benefits,
- a description of the risk profile and profit, including a summary risk indicator and the possible maximum loss of invested capital,
- appropriate performance scenarios, and the assumptions made to produce them,
- the costs associated with an investment in the PRIIP.

However, the Regulation on PRIIPs does not lay down any requirement that a KID should contain data specifying the level of value for the customer which the insurance-based investment product should achieve, as discussed in detail in point E.1.5 of the statement of reasons for this decision. The Regulation does not contain provisions which would address the risks associated with investor protection in relation to the issues identified by the Polish supervisory authority.

In conclusion, the analysis carried out by the Polish supervisory authority has revealed that Union law does not contain regulations which would require insurance undertakings to ensure, even at the stage of product design, that the return for the customer in the form of insurance benefits defined in a unit-linked insurance contract meets the requirement to exceed the minimum threshold or minimum value. It should be stated then that there are no regulatory requirements under Union law which would impose on manufacturers of insurance products any requirement related to the creation of product value for the customer, which in consequence leads to the conclusion that the EU regulations pertaining to insurance-based investment products fail to sufficiently address the risks associated with investor protection identified by the Polish supervisory authority to the extent specified in point I.1 of the operative part of this decision.

E.2.1.2 Existing regulatory requirements under Union law pertaining to point I.2 of the operative part of the decision

In order to ascertain that Union law does not include regulatory requirements which would sufficiently address the risks associated with investor protection as identified by the Polish supervisory authority and as mentioned in point I.2 of the operative part of this decision, the Polish supervisory authority analysed the EU rules pertaining to investment activities of insurance undertakings. The rules have been laid down in the Solvency II Directive, specifically under Title I Chapter VI Section 6 'Investments.'

Under Article 132(1) of the Solvency II Directive, Member States must ensure that insurance and reinsurance undertakings invest their assets in accordance with the prudent person principle, as specified in Article 132(2–4) of the Solvency II Directive. It should be noted that the prudent person principle has been defined so as to contain rules for investing the entire asset portfolio of insurance and reinsurance undertakings, as well as detailed provisions on the

investment of assets held in connection with life insurance contracts under which the investment risk is borne by policyholders (hereinafter: investments at the customer's risk) and investment of assets other than the assets held in connection with life insurance contracts under which the investment risk is borne by policyholders (hereinafter: investments at the undertaking's risk).

The common area of provisions pertaining to the prudent person principle (i.e. to the investments at the customer's risk and investments at the undertaking's risk – Article 133(2) of the Solvency II Directive) stipulates that insurance and reinsurance undertakings must only invest in such assets and instruments whose risks can be properly identified, measured, monitored, managed, controlled and reported by the undertaking, and which can be considered in the undertaking's assessment of its overall solvency needs, in accordance with the second paragraph of Article 45(1)(a) of the Solvency II Directive. All assets, in particular those covering the Minimum Capital Requirement and the Solvency Capital Requirement, must be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole. The localisation of those assets must be such as to ensure their availability. Assets held to cover the technical provisions must also be invested in a manner appropriate to the nature and duration of the insurance and reinsurance liabilities, and in the best interest of all policyholders and beneficiaries, taking into account all disclosed policy objectives. In the case of a conflict of interest, insurance undertakings, or the entity which manages their asset portfolio, must ensure that the investments are made in the best interest of policyholders and beneficiaries.

The provisions pertaining to the prudent person principle in relation to the assets held in connection with life insurance contracts under which the investment risk is borne by policyholders are laid down in Article 132(3) and they only concern:

- the requirement that the technical provisions must be represented as closely as possible either by UCITS units, or by other assets, where the benefits provided by a contract are directly linked to the value of units in an UCITS, or to the value of assets contained in an internal fund held by the insurance undertakings, usually divided into units;
- the requirement that the technical provisions must be represented as closely as possible either by the units deemed to represent the reference value or, in the case where units are not established, by assets of appropriate security and marketability which correspond as closely as possible with those on which the particular reference value is based, where the benefits provided by a contract are directly linked to a share index or some other reference value other than those referred to in the first indent above.

Moreover, those provisions stipulate that if the benefits provided by a contract include a guarantee of investment performance, or some other guaranteed benefit, the assets held to cover the corresponding additional technical provisions are subject to the provisions pertaining to investments at the undertaking's risk.

The provisions on the prudent person principle which apply only to the investments at the undertaking's risk are very important in the context of this decision. For that case, four very important rules have been formulated in relation to the use of derivatives, the exposures to investments which are not admitted to trading on a regulated market, and to concentration risk:

- the use of derivative instruments is possible insofar as they contribute to a reduction of risks or facilitate efficient portfolio management,
- investment and assets which are not admitted to trading on a regulated financial market must be kept to prudent levels,
- assets must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings, or geographical area and excessive accumulation of risk in the portfolio as a whole,
- investments in assets issued by the same issuer, or by issuers belonging to the same group, must not expose the insurance undertakings to excessive risk concentration.

However, as stated above, the European legislator decided that the four above-mentioned rules would only apply to investments at the undertaking's risk, so *a contrario* – the legislator thus determined that they would not be used in relation to investments at the customer's risk. Investments at the customer's risk may then, in the light of the Solvency II Directive, be characterised by high concentration risk, high exposures to investments which are not admitted to trading on a regulated market, and derivatives may be used for any purpose (also for speculative purposes) and using any level of leverage.

It could be said, then, that for investments at the customer's risk, the application of the prudent person principle has been materially limited by the European legislator, who left a wide discretion for insurance undertakings in that respect. At the same time, the common provisions (pertaining to all investments of insurance undertakings) pointing to the need to ensure the security, quality and liquidity apply to the insurance undertaking's portfolio as a whole, not to individual investments or asset portfolios of individual unit-linked funds.

In addition to the prudent person principle, the European legislator also laid down additional rules regarding the freedom of insurance undertakings to invest assets and the localisation of assets (Article 133(1) and (2) and Article 134(1) of the Solvency II Directive which prevent Member States from:

- requiring insurance and reinsurance undertakings to invest in particular asset classes,
- subjecting the investment decisions of an insurance or reinsurance undertaking or its investment manager to any kind of prior approval or systematic notification requirements,
- requiring that the assets held to cover the technical provisions related to those insurance risks situated within the Community are localised within the Community or in any particular Member States.

The provision of Article 133(3) of the Solvency II Directive stipulates, however, that a Member State may define requirements restricting the types of assets or reference values to which policy benefits may be linked, providing that all such rules must be applied only where the investment risk is borne by the policyholder who is a natural person and must not be more restrictive than those set out in the Directive on UCITS. Poland has not used that option and has not defined, in national legislation, additional requirements on the method of investing assets at the risk of the policyholder who is a natural person, other than the requirements under the Solvency II

Directive. It should also be stressed that the clause on minimum harmonisation, following from Article 133(3) of the Solvency II Directive, does not represent an existing regulatory requirement under Union law, as referred to in Article 17(2)(b) of the Regulation on PRIIPs.

The foregoing leads to the conclusion that the provisions of the Solvency II Directive regulate to a very limited extent the investments of insurance undertakings made at the customer's risk, and provide to a minimum extent, in that respect, a universal and equal level of investor protection in all EU countries, leaving that matter to the discretion of each Member State.

It should therefore be stated that the existing regulatory requirements under Union law do not sufficiently address the risks associated with investor protection identified by the Polish supervisory authority, to the extent described in point I.2 of the operative part of this decision.

E.2.2 The identified investor protection concern will not be better addressed by improved supervision or enforcement of existing requirements

Under Article 17(2)(b) of the Regulation on PRIIPs, the competent authority should ascertain that the identified investor protection concern would not be better addressed by improved supervision or enforcement of existing requirements.

The analysis of the existing regulatory requirements under Union law, presented in points E.2.1.1–E.2.1.2 of the statement of reasons for this decision, had led the Polish supervisory authority to conclude that the regulatory requirements under Union law do not sufficiently address the risks associated with investor protection as explained in the operative part of this decision.

As stated above, in points B.1–B.4 of the statement of reasons for this decision, the issues related to unit-linked insurance contracts were addressed by many various actions, including supervisory activities of the KNF Board. However, the supervisory activities have not brought the expected result in terms of investor protection. Despite the actions taken by the Polish supervisory authority to enhance client protection, and in connection with the expected change of the legal and factual status regarding the possibilities and scale of issue, by domestic banks, investment firms and insurance and reinsurance undertakings, of contingent convertibles, clients were being offered and may still be offered, in the future, unit-linked insurance contracts which involve:

- low value for the customer, due to, among other things, high charges,
- potential excessive investment risk, including liquidity risk, associated with investing the assets of unit-linked funds in contingent convertibles.

The Regulation on PRIIPs does not define or indicate any criteria for assessing whether the issue would not be better addressed by improved supervision or enforcement of existing requirements. It seems that such assessment should take into account the achievement of the final effect in the form of a solution to the identified issue, as well as the time and workload necessary to achieve it.

The actions taken by the Polish supervisory authority so far, described above in points B.1–B.4 of the statement of reasons for this decision, both of a general nature, such as guidelines,

recommendations or official positions of the Polish supervisory authority for the whole market, and of individual nature, addressed to individual entities, such as recommendations of the Polish supervisory authority, although taken since 2014 and involving significant resources of the Polish supervisory authority, have not eliminated the irregularities occurring in the unit-linked insurance market, in particular the identified issues described in the operative part of this decision.

In the Polish supervisory authority's view, the imposition of the general prohibition referred to in Article 17(1) of the Regulation on PRIIPs is a much more effective solution than taking multiple measures which require much more work and – mainly – time, addressed to individual manufacturers of insurance products. In fact, the supervisory measure in question concerns all entities engaged in the marketing, distribution and sale of products with the features indicated herein, not to a specific irregularity found in an individual case.

Formulation of an individual recommendation addressed to a specific supervised entity does not automatically eliminate such irregularities at other entities. The achievement of the set final goal, which is to eliminate products with features that are unacceptable to the Polish supervisory authority, by taking measures addressed separately to individual entities, will be significantly extended over time, if possible at all. The measure in the form of prohibitions specified in the operative part of this decision is therefore more effective than the measures the Polish supervisory authority have taken and those that it would take in the future, towards individual entities.

The measure in question should also be assessed as being more fair, because it ensures that the prohibition becomes effective for all entities at the same time, which would not be the case if measures were to be taken in relation to individual entities.

It is also important that the intervention will also apply to entities established outside Poland, because the measure will be effective in the territory of Poland regardless of the location of the head office of the entity which markets, distributes and sells unit-linked insurance contracts.

In the light of the prohibition formulated in point I.1 of the operative part of this decision, it should be concluded that no regulatory requirements have been defined under Union law which could address the risks associated with investor protection, so the issue identified in that respect cannot be better addressed by enforcement of such requirements. The supervisory actions taken in that respect so far have been ineffective. In the opinion of the Polish supervisory authority, due to the lack of legal requirements to achieve an effective rate of return for the customer from the product, the Polish supervisory authority cannot take any other, more effective actions which would result in unit-linked insurance contracts designed by insurance undertaking generating higher product value.

As regards the prohibition referred to in point I.2 of the operative part of this decision, the KNF Board has concluded that not only do the existing regulatory requirements under Union law provide for a very wide discretion of insurance undertakings in choosing the method of investing the assets of unit-linked funds, but they also expressly indicate that such investments are not subject to a number of material, or even key, requirements that an insurance undertaking must fulfil when making investment at its own risk – as already explained in detail in the previous part of the statement of reasons for this decision. Thus, it should be concluded

that the identified investor protection concern related to how the assets of unit-linked funds could be invested cannot be better addressed without adopting a product intervention measure, i.e. by enforcement of existing legal requirements, or improved supervision which, in order to be effective in this respect, would have to be based on appropriate provisions of law regulating the investment of assets of unit-linked funds. It is highly probable that insurance undertakings would be investing assets of unit-linked funds in contingent convertibles, thus exposing the customers of the insurance undertaking to excessive investment risk and high liquidity risk. The previous experiences described above in points B.1–B.4 show that any activity of the Polish supervisory authority involving the formulation of further guidelines and good market practices regarding investment activities of insurance undertakings will probably be delayed in relation to the activity and innovativeness of certain insurance undertakings, and will involve the risk of claims that the Polish supervisory authority's actions are not based on the law. For the same reason, the enforcement of such rules and guidelines by the Polish supervisory authority will be hindered, and may be ineffective. Product intervention, on the other hand, is a measure which the Polish supervisory authority is entitled to adopt pursuant to the Regulation on PRIIPs and which can fully and effectively address the risks associated with investor protection. The intervention measure will apply not only to insurance products distributed by KNF-supervised domestic insurance undertakings but also to products sold by foreign insurance undertakings in Poland.

To sum up, the Polish supervisory authority ascertained that existing regulatory requirements under Union law applicable to the insurance-based investment product do not sufficiently address the risks associated with a significant investor protection concern, and the existing issues would not be better addressed by improved supervision or enforcement of existing requirements.

E.3 Proportionality of this decision (Article 17(2)(c) of the Regulation on PRIIPs)

Under Article 17(2)(c) of the Regulation on PRIIPs, a competent authority may take the action of introducing a prohibition on the marketing of insurance-based investment products with certain specified features if it is satisfied that the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the insurance-based investment product, or activity or practice.

Before proceeding with the analysis of this condition, the concept of proportionality itself should be decoded in the first place. The concept has been functioning for a long time in the case law of the Constitutional Tribunal and administrative courts and, in general, is related to the admissibility of and requirements for the limitation of substantive rights. The substance of the concept of proportionality in the case law is often derived from the 'test of proportionality.' The starting point is the assessment of whether the measure is useful, thus whether it will actually help achieve a set goal. Then, it is necessary to analyse whether the measure is indispensable (necessary), i.e. whether it is not unnecessarily intrusive for the legal sphere of the individual, and his or her rights and freedoms. Finally, it is necessary to compare the weight of the interest to be protected by the measure and the weight of the interest sacrificed through

the use of the measure and the achievement of a specific objective (in most cases the weights of the public interest and personal interest are compared) (Judgment of the Supreme Administrative Court of 4 December 2018, Case File No II GSK 1635/18).

The examination of the concept of proportionality should also consider factors which should be taken into account when assessing whether the action is proportionate, listed in Article 17(2)(c) of the Regulation on PRIIPs, i.e.:

(i) the nature of the risks identified,

(ii) the level of sophistication of investors or market participants concerned, and

(iii) the likely effect of the action on investors and market participants who may hold, use or benefit from the insurance-based investment product, or activity or practice.

As already mentioned, the reasons why the Polish supervisory authority adopted the measure referred to in Article 17(1)(a) of the Regulation on PRIIPs are:

a) the fact that for many years clients were offered complex and complicated insurance-based investment products in the form of unit-linked insurance contracts whose value for the client is not satisfactory, in particularly due to a low or negative level of the effective rate of return for the client,

b) the concern that the assets of unit-linked funds might be invested in contingent convertibles, due to the expected development of those instruments in Poland.

Referring then to the usefulness of the supervisory measure indicated in Article 17(1) of the Regulation on PRIIPs, it should be concluded that it will definitely help achieve the Polish supervisory authority's goal, which is to raise the level of protection for clients entering into or joining unit-linked insurance contracts. This decision applies to measures which aim to increase product value for the client and to mitigate the risk of losses that might be incurred by clients from investment activity. At this point, a reference should be made to the considerations in point E.2.2 of the statement of reasons for this decision, which indicates that a measure in the form of the prohibitions indicated in the operative part of this decision is suitable for removing the identified negative features of the product as it will ensure that unit-linked insurance contracts with any such features will be eliminated from distribution relatively fast and effectively on the date specified in this decision. The measure in question will apply over the same period of time to all insurance undertakings engaged in the marketing, distribution and sale of unit-linked insurance contracts in the territory of Poland and all domestic insurance undertakings engaged in the marketing, distribution and sale of unit-linked insurance contracts outside the territory of Poland.

The analysis of the aspect of indispensability should consider that, as already indicated in points B.1–B.4 of the statement of reasons for this decision, the various measures adopted so far by the Polish supervisory authority and other state authorities (or even self-regulatory measures) aimed at raising the level of protection of clients entering into or joining unit-linked insurance contracts have proved ineffective to such an extent that they failed to help remove the irregularities in the unit-linked insurance market. Taking all this into consideration, the measure referred to in Article 17(1)(a) of the Regulation on PRIIPs is necessary in the sense

that other corrective measures adopted by the Polish supervisory authority may prove ineffective. The failure to adopt the measures indicated in the operative part of this decision would correspond to the consent of the Polish supervisory authority to the maintenance of low level of client protection in unit-linked insurance contracts. The failure to introduce the measure in question would result in new clients entering into or joining unit-linked insurance contracts whose value for the customer is at an unacceptable level, e.g. due to a low or negative level of the effective rate of return for the clients, and because the assets of clients could be invested in risky low-liquidity financial instruments such as CoCos.

In the Polish supervisory authority's view, the measure in question will not be unnecessarily intrusive for the rights of insurance undertakings as it has no direct effect on the contractual terms of existing contracts, and the use of the measure will not result in the prohibition on the marketing, sale and distribution of all unit-linked insurance contracts but only those which show the features indicated in the operative part of this decision.

As regards the criterion specified in point I.1 of the operative part of this decision, it should be noted that the effect of the prohibition will be the balance between the interest of the client and the interest of the insurance undertaking, as the value of the average rate of return will not be less than 50% of the appropriate interest rate in the risk-free interest rate term structure. Moreover, the application of the measure indicated in point I.2 of the operative part of this decision will result in eliminating the possibility of investing the assets of the unit-linked funds offered after the effective date of the intervention measures in contingent convertibles.

Thus, the clients of insurance undertakings taking out unit-linked insurance will not be exposed to the risk associated with those complex instruments, which in certain cases might result in a partial or total loss of their capital, or in problems related to, e.g., suspension of surrenders by insurance policies due to loss of liquidity of the unit-linked fund. Finally, when comparing the weight of the interest to be protected by the measure chosen by the competent authority, referred to in Article 17(1)(a) of the Regulation on PRIIPs, and the interest sacrificed through the use of the measure and the achievement of a specific objective, the comparison is in fact between the interest of clients who, not having the appropriate experience and knowledge as professional manufacturers of products in this area have, acquire unit-linked insurance contracts with the negative features indicated in the operative part of this decision, and the interest of insurance undertakings which created the unit-linked insurance contracts with unacceptable features indicated in the operative part of this decision and make high profits from such contracts, as explained in point E.1.5 of the statement of reasons for this decision. The Polish supervisory authority has no doubt that there is a material imbalance in this respect, and the interest of insurance undertakings should not prevail over the interest of clients.

Moreover, when considering, in the context of proportionality, the element indicated in Article 17(2)(c) of the Regulation on PRIIPs, i.e. the nature of the risks identified, it should be concluded that the negative features of unit-linked insurance contracts indicated in the operative part of this decision cause the level of client protection to be very low. The contracts, by their essence, are characterised by high complexity. As a rule, they have always been designed in such a manner that they do not guarantee any profit or protection of the invested capital. That might be exacerbated by lack of information or complicated communications from the

insurance undertaking and the insurance intermediary acting on its behalf, so in consequence clients are not always aware of what type of contract they have entered into, what risks arise from it, and by what obligations they are bound (especially as the Polish supervisory authority has noted the tendency of insurance undertakings to reclassify costs or change the method of charging costs). In particular, clients of insurance undertakings are not always aware of the amount of charges or investment risk, manifesting in the possibility of making lower profits than expected, or even the possibility of losing a part or all of the money invested, which translates into clients being highly dissatisfied with their unit-linked insurance contracts.

In analysing another element in the context of proportionality, i.e. the one indicated in Article 17(2)(c) of the Regulation on PRIIPs – the level of knowledge of investors and market participants concerned, the Polish supervisory authority considered the insufficient level of knowledge of an average client entering into a unit-linked insurance contract[23] and the perfect knowledge about the structure and functioning of unit-linked insurance contracts on the part of the insurance undertaking – a professional which, being the maker of the contract, is a stronger party to that legal bond. Increasing the value of such insurance contracts for clients by reducing the fees and introducing a more secure investment policy will provide a significant value for the client, despite insufficient knowledge about that contract.

Finally, considering the probable effect of application of the measure for investors and market participants who may hold, use or benefit from the insurance-based investment product, generally speaking – that effect will be an increased level of protection of clients entering into or joining unit-linked insurance contracts. In fact, clients will be offered insurance contracts which are more beneficial – with higher value and a more secure investment policy. A more measurable effect of the intervention measure for clients will be a reduction in the fees collected by insurance undertakings under unit-linked insurance contracts. The potential effect of the intervention measure applies to the assets worth PLN 46.1 billion, managed directly by insurance undertakings or by investment fund management companies. The intervention measure in the proposed form may bring the customers of those undertakings savings of PLN 0.5 billion annually. That amount will increase, each year, the value of unit-linked fund accounts under existing contracts.

Moreover, when the Polish supervisory authority takes the actions referred to in the operative part of this decision, the situation of insurance undertakings will also improve, as insurance undertakings, by offering more beneficial products for clients, will be less exposed to reputational risk, the risks associated with a large number of court actions brought by dissatisfied clients, which will in turn improve the repute of the whole insurance industry. Another positive effect for insurance undertakings may also be the reversal of the downward trend – since, as stated in point E.I.7 of the statement of reasons for this decision, the unit-linked life insurance market has contracted systematically since 2017. Therefore, offering more beneficial unit-linked insurance contracts should, in the Polish supervisory authority's view,

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[23] See: Report *Nieprawidłowości na rynku finansowym a ochrona konsumenta* [Irregularities in financial market vs consumer protection], issued on 24 September 2019 by the Advisory Scientific Committee of the Financial Ombudsman: '(…) As shown by the survey *Financial literacy of Poles in 2019*, conducted at the request of the Warsaw Institute of Banking and the GPW Foundation, only 9% of Poles declare that their financial literacy is good or very good (...).'

restore the confidence of consumers in this sector of the financial market, or even raise the confidence in the whole financial system.

Having regard to the above arguments, the Polish supervisory authority has found the issuing of this decision to be proportionate.

E.4 Consultations with competent supervisory authorities in other Member States that may be significantly affected by this decision (Article 17(2)(d) of the Regulation on PRIIPs)

One of the conditions for product intervention is that proper consultations must be conducted with competent supervisory authorities in other Member States that may be significantly affected by the action (Article 17(2)(d) of the Regulation on PRIIPs).

Considering this condition, in the first place the Polish supervisory authority performed an analysis of which EU Member States should be consulted. The factors determining the choice of competent authorities in other Member States included, first of all, the active cross-border activity of insurance undertakings, i.e. the fact that the insurance undertakings disclosed the gross written premium on cross-border activities to or from Poland as part of the supervisory reporting under Solvency II, and secondly the analysis considered supervisory authorities in Member States supervising groups composed of insurance undertakings established in the territory of Poland and offering unit-linked insurance contracts. Thus, the KNF Board consulted supervisory authorities in 9 Member States: Austria, France, the Kingdom of the Netherlands, Ireland, Luxembourg, Germany, Romania, Slovakia, and Italy. Information about the planned product intervention was submitted to the authorities in the above-mentioned Member States by the letter of 7 September 2020 (Ref. No: DNM-DNMZWP.083.1.2020.MBW). Also at that stage, information about the planned product intervention was communicated to EIOPA.

According to that letter, the purpose of the intervention was to impose prohibitions on the marketing, distribution and sale, in or from the territory of Poland, of unit-linked insurance products:

- whose structure prevents investors from gaining real benefits measured by the rate of return – the product profitability criterion,
- where the assets of the fund – given the investment policy adopted by the insurance undertakings – are characterised by excessive investment risk, low liquidity and limited transferability, and are not properly diversified, which prevents the insurance undertakings from properly performing their obligations arising from the contractual rules for allocation of money from premiums to units in a unit-linked fund, the date of conversion of premiums to units, and the rules of redemption of units in a unit-linked fund and their conversion to cash, and which results in the investment risk associated with the investment being much higher than the investment risk in the case of investments in UCITS – the criterion regarding the asset classes in which the unit-linked fund invests in,
- which do not provide full information about the charges, such information is communicated in an inaccurate or incomprehensible manner or use expressions regarding charges which

contain references to terms not defined in the contract – the criterion of presentation of fees and commissions.

The authorities which replied to the letter of the KNF Board were: EIOPA, Finanzmarktaufsicht (the competent authority in Austria, hereinafter: ‘AT-FMA’), Autorité de Contrôle Prudentiel et de Résolution (the competent authority in France, hereinafter: ‘FR-ACPR’), Dutch Authority for the Financial Markets (the competent authority in the Netherlands, hereinafter: ‘NL-AFM’), Central Bank of Ireland (the competent authority in Ireland, hereinafter: ‘IE-CBI’), Bundesanstalt für Finanzdienstleistungsaufsicht (the competent authority in Germany, hereinafter: ‘DE-BaFin”), Financial Polish supervisory authority (the competent authority in Romania, hereinafter: ‘RO-FSA’), Národná banka Slovenska (the competent authority in Slovakia, hereinafter: ‘SK-NBS’), Istituto per la Vigilanza sulle Assicurazioni (the competent authority in Italy, hereinafter: ‘IT-IVASS’).

EIOPA admitted that there was a detriment to consumers in the unit-linked insurance market in Poland as identified by the KNF Board. EIOPA pointed out that due to the material scale of cross-border activities the proposed product intervention may have a material effect on the markets in other Member States and should be thoroughly analysed taking into account the legal requirements and the application of the intervention as a last-resort measure. EIOPA also pointed to the need to have more time for reviewing the measure proposed by the KNF Board and for issuing the opinion to that effect (the initial expected date for issuing this decision was the end of 2020).

AT-FMA (Austria)

AT-FMA pointed to the need to meet the requirements laid down in Article 17(2) of the Regulation on PRIIPs prior to the implementation of the intervention measure, and stated that the intervention should be a last-resort solution. AT-FMA also asked for more details about the functioning of the criterion regarding the average return for the client, especially the indicator of 50% of RFR and the appropriateness of reviewing this return over a 10-year time horizon for products with the expected holding period of more than 10 years. As regards the rules for investing the assets of unit-linked funds, AT-FMA expressed the doubt whether the intervention measure might go beyond the provisions of Article 133 of Solvency II and thus supersede the transposition of paragraph 3 of that provision to national law, as well as the doubt as to the appropriateness of the planned prohibition on investments in bonds issued with the purpose of classifying them as own funds of a bank or investment firm or insurance undertaking or reinsurance undertaking (contingent convertible bonds – CoCos). AT-FMA also suggested that the catalogue of prohibitions concerning the presentation of fees and commissions should be exhaustive.

FR-ACPR (France)

FR-ACPR pointed to the potential non-compliance of the proposed criteria of the intervention measure with Union law (without indicating any details of such non-compliance or related rules) and to the need to analyse the effect of the measure on the unit-linked insurance market in terms of its stability and possible fragmentation.

NL-AFM (the Netherlands)

NL-AFM reported that the issues identified by the KNF Board had occurred in the past in the Dutch market.

IE-CBI (Ireland)

IE-CBI raised concerns as to the proportionality and appropriateness of the instruments such as product intervention and as to the lack of clarity on whether the KNF Board has exhausted other supervisory mechanisms and measures.

DE-BaFin (Germany)

DE-BaFin stressed that they agreed that the measures of the KNF Board were necessary but the issues identified in Poland were – in their opinion – local issues, specific to the Polish market. DE-BaFin pointed to the need to comply with the requirements of Article 17(2) of the Regulation on PRIIPs prior to the adoption of an intervention measure, in particular with regard to the use of existing regulatory requirements under Union law as well as improved supervision or enforcement of existing requirements. DE-BaFin also expressed its interest in the details regarding the operating mechanisms of the planned intervention measure in relation to the average return for the client, including the co-efficient of 50% of RFR and the modified RFR. With regard to the presentation of fees and commission, DE-BaFin suggested the use of provisions of the IDD. With regard to the investment rules of unit-linked funds, DE-BaFin provided information about the approach adopted in the German law governing the business of insurance, based on the prudent person principle referred to in Article 132 of Solvency II. DE-BaFin also reported that the German legislator did not use the national option provided for in Article 133(3) of Solvency II, and issued decisions on the interpretation of the prudent person principle at the level of each unit-linked fund. DE-BaFin also mentioned the need to analyse the effect of the intervention measure on the unit-linked insurance market in terms of its stability and possible fragmentation.

RO-ASF (Romania)

RO-ASF did not raise any objection, stating that the planned intervention measure would have a negligible effect on the Romanian market.

SK-NBS (Slovakia)

SK-NBS reported the lack of objections to the intervention measure planned by the KNF Board.

IT-IVASS (Italy)

IT-IVASS expressed its support for the need to address the irregularities in the unit-linked insurance products which are not properly designed and managed, which may be detrimental to policyholders. It also requested that a discussion be held at the EU level to adopt a common approach to the problem.

At the meeting of the EIOPA Board of Supervisors[24] held on 30 September 2020, responding to comments, the Polish supervisory authority provided additional information about the planned intervention measure, outlining, among other things, the situation in the unit-linked insurance market in Poland, including the identified irregularities underlying the work on the intervention measure, the supervisory activities and measures adopted by the KNF Board and other national competent authorities in Poland, as well as the scope and criteria of the planned measure. The Polish supervisory authority provided, from time to time, information and explanations regarding the planned intervention measure to the competent authorities in Member States that may be significantly affected by this decision, and to EIOPA, until EIOPA issued the opinion referred to in point F.1 of the statement of reasons for this decision.

As part of the consultations with EIOPA referred to below in point F of the statement of reasons for this decision, the Polish supervisory authority stated that the comments submitted by the supervisory authorities in Member States will be thoroughly reviewed and considered in this decision. The statement of reasons for this decision contains a reference to the conditions for product intervention referred to in Article 17 of the Regulation on PRIIPs, a description of the actions taken so far by the KNF Board and aimed at securing investor protection, and a reference to the proportionality of the product intervention measure.

E.5 This decision does not have a discriminatory effect on services or activities provided from another Member State (Article 17(2)(e) of the Regulation on PRIIPs)

The prohibition imposed by this decision does not have a discriminatory effect on services or activities provided from another Member State. The prohibition applies to all insurance product manufacturers offering unit-linked insurance, to the same extent, regardless of the Member State in which the manufacturer is established.

F. Notification of all authorities and EIOPA of the details of the planned intervention measure (Article 17(3) of the Regulation on PRIIPs)

Under Article 17(3) of the Regulation on PRIIPs, the competent authority must not impose a prohibition under that Article unless, not less than one month before the measure is intended to take effect, it has notified all other competent authorities involved and EIOPA in writing or through another medium agreed between the authorities of the details of:

a) the insurance-based investment product, or activity or practice to which the proposed action relates;

[24] The EIOPA Board of Supervisors is the main decision-making body of EIOPA composed of, for example, the head of the national public authority competent for the supervision of financial institutions in each Member State, who must meet in person at least twice a year (Article 40 of 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).

b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and

c) the evidence upon which the competent authority has based its decision and upon which it is satisfied that each of the conditions in Article 17(2) of the Regulation on PRIIPs are met.

Pursuant to the above-mentioned Article 17(3) of the Regulation on PRIIPs, the KNF Board notified EIOPA and all other competent authorities in EU Member States, except for the Polish supervisory authority in the United Kingdom[25], of the details of the planned intervention measure by the letter of 2 October 2020 (Ref. No: DNM-DNMZWP.083.2.2020, hereinafter: ‘notification’). Hence, the KNF Board complied, within the time limit required under Article 17(3) of the Regulation on PRIIPs, with the obligation to notify the competent authorities designated by a Member State to enforce compliance with the requirements of the Regulation on PRIIPs and to EIOPA.

According to the notification, the intervention measure was to be based on three criteria with the same scope as those indicated in the above-mentioned letter of the KNF Board of 7 September 2020 referred to in point E.4 of this decision.

The performance by the KNF Board of the obligation under Article 17(3) of the Regulation on PRIIPs resulted in the appointment by EIOPA, in October 2020, of a special working group involving representatives of EIOPA and representatives of 16[26] competent authorities in Member States, including the KNF Board. On 4 November 2020, in the course of work of the working group, EIOPA asked the KNF Board to clarify certain aspects in the letter of the UKNF of 2 October 2020. In response to the request, the UKNF provided detailed explanations by the letter of 3 December 2020, Case Ref. No: DNM-DNMZWP.083.2.2020.MBW. Until the EIOPA Board of Supervisors[27] initiated the procedure for approving the opinion, that is until 12 March 2021, the UKNF was providing written and oral explanations and answers to the questions asked by EIOPA and competent supervisory authorities in EU Member States, including competent authorities in other Member States that may be significantly affected by this decision.

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[25] The United Kingdom was excluded from the said correspondence following its withdrawal from the European Union.

[26] The decision to participate in the work of individual committees or working groups at EIOPA is made by each competent authority in EU Member States individually. The information about the planned product intervention was communicated to all competent authorities in EU Member States.

[27] The EIOPA Board of Supervisors is the main decision-making body of EIOPA and one of its tasks is to adopt opinions (recital 52 and Article 43 of 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).

F.1 EIOPA's opinion

On 30 March 2021, pursuant to Article 18(2) of the Regulation on PRIIPs, EIOPA adopted an opinion (EIOPA-BoS-21/204; made on 23 March 2021) on the proposed product intervention measure of Komisja Nadzoru Finansowego in relation to unit-linked insurance contracts. On 31 March 2021, the opinion was published on the EIOPA website[28]. In its opinion:

1. in relation to the profitability criterion, EIOPA stated that the product intervention measure is justified and proportionate;
2. in relation to the criterion of the asset classes in which the unit-linked fund invests, EIOPA stated that the product intervention measure is justified and proportionate with regard to the prohibition on investments in CoCos, but to the other extent of this criterion, EIOPA believes that ensuring investor protection at a level at least equivalent to the level set for UCITS should be done by means of legislative measures taken by the Polish legislator;
3. in relation to the criterion of presentation of fees and commissions, EIOPA found that the issues addressed by that criterion should be the object, as far as possible, of appropriate legislative activities or enhanced supervisory measures.

The KNF Board did not participate in the vote on the opinion within EIOPA according to the internal procedure of the EIOPA Board of Supervisors defining the rules for the prevention and the management of conflict of interest, taking into account Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019.

F.2. The KNF Board's position on EIOPA's opinion

The KNF Board reviewed EIOPA's opinion and took it into account by:

- limiting, in this decision, the scope of the criterion on asset classes in which unit-linked fund invests, to the prohibition referred to in point I.2 of the operative part of this decision, and
- refraining from imposing a prohibition in relation to the criterion on presentation of fees and commissions.

Please find below the position of the KNF Board on the most essential statements in that opinion regarding the profitability criterion and the criterion on asset classes in which unit-linked fund invests, in relation to the prohibition on the investment in CoCos.

[28] https://www.eiopa.europa.eu/content/eiopa-partially-supports-planned-prohibition-of-some-unit-linked-lifeinsurance-products_en.

https://www.eiopa.europa.eu/content/opinion-of-european-insurance-and-occupational-pensions-authorityproposed-product_en.

F.2.1 Position of the KNF Board on EIOPA's opinion with regard to point I.1 of the operative part of this decision

EIOPA stated that the application of criterion 1 without any distinction between various types of target investors could potentially drive products targeted at professional investors out of the market (see: point 3.14 of EIOPA's opinion). EIOPA's line of argumentation is based on the assumption that a professional investor would be willing to pay more for access to unusual or non-retail financial instruments (in terms of management costs). In the Polish supervisory authority's view, the fees collected for asset management in unit-linked insurance products offered on the Polish market following the adoption of the intervention measure could be at a level that will ensure proper and effective management of those assets even in case of materialisation of unusual investment strategies for professional investors. A separate point is whether professional investors, as individuals naturally active and quite familiar with finance matters, do not look for cheaper products than those targeted at a mass/retail customer. In consequence, from this perspective, EIOPA's indication (point 3.14) concerning point I.1 of the operative part of this decision is completely wrong. Moreover, the intervention measure intends to create an effect opposite to that expected by EIOPA, which means that low-cost products should attract more customers, especially professional investors.

In point 3.15 of its opinion, EIOPA states that the correlation of the criterion to the risk-free rate (RFR) term structure entails the risk that low-cost products could be driven out of the market if the RFRs were to be high. Alternatively, in case of low RFRs, EIOPA points to the risk that products generating low value for customers will continue to exist in the market. Referring to the risk of low-cost products being replaced by high-cost products (in case of high risk-free rates), the Polish supervisory authority's view is that such risk could only materialise in case of complete passivity of the KNF Board. However, the Polish supervisory authority monitors the risk-free interest rate term structure on an ongoing basis and, when the intervention measure takes effect, it plans to monitor the unit-linked life insurance market on an ongoing basis. In case of strong increases in the RFR curve in the future, the Polish supervisory authority is going to propose a change to the parameters of the profitability criterion. In the Polish supervisory authority's opinion, the risk of new high-cost products emerging and replacing the low-cost products is immaterial. The process of implementing products even in the case of simple product structures takes at least three to six months. During that time, the Polish supervisory authority will be able to prepare changes to the parameters of the mathematical formula defining the product value for the customer. On the other hand, in relation to the risk indicated by EIOPA and related to low RFRs (which is actually the case right now), the Polish supervisory authority is of the view that this is the objective of the criterion indicated in point I.1 of the operative part of this decision. If a product fails to generate any value for the customer, even low value, at 50% of the RFR, it would be appropriate that the product should not be marketed and should be withdrawn from the offer (or, for new products, should not be added to the offer). In conclusion, in the Polish supervisory authority's view the risk related with low interest rates highlighted by EIOPA is actually not a risk but an advantage and a proper objective of the intervention measure.

In point 3.16 of its opinion, EIOPA refers to long-term products with recommended holding period shorter than 10 years. According to EIOPA, it would be appropriate to review

the criterion specified in point I.1 of the operative part of the decision at the end of the recommended holding period, and not at the end of the 10th year. In the course of its analytical exercises, the Polish supervisory authority identified products for which the recommended holding period was shorter than 10 years but the term of the unit-linked insurance contract had been agreed in advance and was equal to the recommended holding period for that contract. This means that, in general, in the market there are no unit-linked insurance contracts for which the recommended holding period is shorter than 10 years and different from the contract term. This means that in the unit-linked insurance market in Poland, there are no products to which point 3.16 of EIOPA's opinion would apply, i.e. long-term products (with the contract term longer than 10 years) with a recommended holding period shorter than 10 years. Additionally, even if such products existed, the criterion specified in point I.1 of the operative part of this decision would still ensure an appropriate long-term value for the client. The criterion specified in point I.1 of the operative part of the decision ensures for the Polish insurance market that the product value for the client, i.e. the average rate of return, is always verified over the recommended holding period, and – for long-term contracts – for the period of 10 years.

In point 3.17 of its opinion, EIOPA recommended a revision, that is the abolishment of the 10-year recommended holding period where the target market is property selected, and clients look for a long-term investment and can keep such investment for a period of more than 10 years. In the Polish supervisory authority's view, the criterion specified in point I.1 of the operative part of the decision properly addresses also the cases specified in point 3.17 of EIOPA's opinion. The criterion in question requires that the client's return on investment should be reviewed at two points of time: at 10 years of policy and in the recommended holding period. The abolishment of the 10-year period for reviewing the value for the client would lead to a situation where the criterion would cease to have a real effect on the products being offered. It would be easy to structure an insurance product, for example, with a recommended holding period of 30 years and high charges in the first years of the contract term which would still meet the criterion at the end of that period. However, the intention of the Polish supervisory authority is to ensure that clients who wish to terminate such a 30-year contract after at least 10 years can also expect a positive return on their investment.

F.2.2 Position of the KNF Board on EIOPA's opinion with regard to point I.2 of the operative part of this decision

In points 2.37 and 2.38 of its opinion, EIOPA stressed that the existing regulatory requirements under Solvency II Directive probably cannot be used to impose a prohibition on the marketing, distribution or sale of unit-linked products involving investments in contingent convertibles.

In its opinion, EIOPA also stated that although contingent convertibles represent a marginal share of assets of unit-linked insurance products in Poland, the KNF Board may consider, as a preventive measure, imposing a temporary prohibition on the marketing, distribution or sale of unit-linked insurance products investing in contingent convertibles (point 3.22 of EIOPA's opinion).

EIOPA concluded that the intervention measure was justified and proportionate in that respect, indicating at the same time that the KNF Board should consider adopting a separate decision in view of the narrow and specific scope (point 5.6 of EIOPA's opinion).

The KNF Board has concluded then that the imposition of the prohibition referred to in point I.2 of the operative part of this decision is justified and may be implemented by means of a product intervention measure. Given the expected amendment to national legislation, aimed at removing the barriers to the issue of CoCos by supervised domestic entities and given the possible material increase in the risk associated with investing the assets of unit-linked funds in those instruments, the KNF Board has concluded that considering the expected effectiveness and efficiency of the KNF Board's actions, it is not appropriate to adopt a separate decision, since in practice that might delay the entry into force of such prohibition. The KNF Board also considered the fact that the decision in its current form will help ensure better protection of customers of insurance undertakings and increase the value of unit-linked insurance contracts according to customers' expectations.

G. Consultations with the Polish Chamber of Insurance and insurance undertakings authorised to pursue the business of insurance in relation to Division I Class 3 of the annex to the Act on the business of insurance

In connection with the planned product intervention, the Polish supervisory authority consulted the Polish Chamber of Insurance and insurance undertakings that will be affected by this decision, that is undertakings authorised to pursue the business of insurance in relation to Division I Class 3 of the annex to the Act on the business of insurance. In the course of the consultations with the insurance industry from 13 January 2020, the Polish supervisory authority held a number of meetings to explain the material scope and objective of the planned intervention measure, to present the points of view of both parties, and to enable representatives of the insurance industry to express their position on the intervention measure. In addition to 11 individual working/expert meetings with representatives of insurance undertakings, the Polish supervisory authority also organised 9 meetings for a wide group of representatives of the insurance industry – representatives of the Polish Chamber of Insurance and representatives of management boards of insurance undertakings, including meetings on the current work progress with respect to the planned product intervention. At each stage of the work on the planned intervention, the Polish supervisory authority reviewed and provided feedback on the proposals submitted by representatives of the insurance industry.

The topics of meetings included a series of specific, including technical, matters, such as provision by the Polish supervisory authority of internal actuarial models, the material scope of intervention with related criteria and their objectives, the potential impact on business activities, and potential adaptation measures adopted by insurance undertakings. In addition to those meetings, representatives of the insurance industry had the opportunity to submit additional comments in writing. In the course of the consultations, the Polish supervisory authority received letters from the Polish Chamber of Insurance in which representatives of the insurance industry presented their proposals and comments regarding the objectives of the intervention

measure (letters of the Polish Chamber of Insurance: 109/2020 of 28 January 2020, 251/2020 of 2 March 2020, 586/2020 of 30 June 2020, 828/2020 of 2 November 2020, constituting a reply to the letter of the KNF Board of 7 December 2020 / Ref. No: DNM-DNM0.6043.3.2020.MBW/; letters: 929/2020 of 9 December 2020, 46/2021 of 25 January 2021, 47/2021 of 25 January 2021, and 187/2021 of 12 March 2021). The issues raised in the letters were analysed by the Polish supervisory authority and determined the evolution of the decision in question. Additionally, the Polish supervisory authority addressed two requests to insurance undertakings authorised to pursue the business of insurance in relation to Division I Class 3 of the annex to the Act on the business of insurance (letter of 14 October 2020, Ref. No: DNM-DNM0.6043.3.2.2020.MBW, and letter of 13 January 2021, Ref. No: DNM-DNM0.6043.3.2020.MBW) to obtain information and data which would allow the estimation of the effect of the intervention on the business activities of those insurance undertakings.

In the above-mentioned letter of 14 October 2020, the Polish supervisory authority also submitted a proposal for a description of features of the products to be addressed in the planned decision on the intervention measure. By the letter of 27 April 2021 (Ref. No: DNM0.6043.3.2.2020.MBW), the Polish Chamber of Insurance was informed about the preliminary content of the description of products with regard to the criterion specified in point I.2 of the operative part of this decision, and the Chamber replied to that letter on 30 April 2021 (Ref. No: 371/2021).

H. Material scope of the decision

The decision applies to manufacturers of insurance products – unit-linked insurance contracts, in particular insurance undertakings conducting the activities in relation to Division I Class 3 of the annex to the Act on the business of insurance.

I. Territorial scope of the decision

This decision applies:

- in the territory of Poland, which means that manufacturers of unit-linked insurance contracts, regardless of the place of their head office and country from which they operate, must comply with the decision if they provide services to clients having their head office or habitual residence in the territory of Poland; and
- from the territory of Poland, which means that manufacturers of unit-linked insurance contracts having their head office in the territory of Poland must comply with the decision if they provide services to clients having their head office or habitual residence outside the territory of Poland.

J. Material scope – exemptions

J.1 Exemption regarding pension products

This decision does not apply to Employee Capital Plans, Occupational Pension Schemes, Individual Retirement Protection Accounts, or Individual Pension Accounts. This exemption follows directly from Article 2(2)(e), (f) and (g) of the Regulation on PRIIPs. Under those provisions, the Regulation on PRIIPs does not apply to pension products which, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement and which entitle the investor to certain benefits, officially recognised occupational pension schemes within the scope of Directive 2003/41/EC of the European Parliament and of the Council or Directive 2009/138/EC, or to individual pension products for which a financial contribution from the employer is required by national law and where the employer or the employee has no choice as to the pension product or provider.

J.2 Exemption regarding the unit-linked funds established before 1 January 2022

The KNF Board excluded the application of the prohibition specified in point I.2 to unit-linked insurance contracts if they are linked to a unit-linked fund established before 1 January 2022, and the method of investing the assets of the fund ensures that the assets are not invested in contingent convertibles. The exemption aims to maintain the current offer of insurance undertakings if the method of investing the assets of unit-linked funds ensures that the customers entering into such contracts will not be exposed to the risk associated with investing the assets of unit-linked funds in contingent convertibles or acquiring the assets of unit-linked funds invested in contingent convertibles.

J.3 The insured joining a group unit-linked life insurance contract concluded before 1 January 2022

Within the meaning of this decision, the insured joining a group unit-linked insurance contract concluded before 1 January 2022 will not be treated as conclusion of a new insurance contract to which the criteria specified in the operative part of this decision apply. The exemption results from the fact that such contracts provide for framework parameters of insurance coverage, costs and investments in certain assets of unit-linked funds, which parameters are uniform for all the insured, irrespective of the date of joining such contract. Therefore, if the exemption in question is not introduced, and if an existing group unit-linked insurance contract does not meet any of the criteria of the intervention measure, it would be necessary to change the parameters of the contract for all the insured thereunder. In addition to business difficulties faced by insurance undertakings in such a case (especially new negotiations with policyholders, who are usually employers of the insured), there would arise an issue of the intervention measure operating with a retroactive effect, i.e. in relation to group unit-linked insurance contracts concluded before the effective date of this decision, while this decision will create effects as of its entry into force (*ex nunc*). It should also be noted that applying this decision to new persons joining an existing group unit-linked insurance contract might lead to unequal treatment of the insured within the same contractual relationship.

J.4 Individual continuation of a group unit-linked life insurance contract

Individual continuation of group unit-linked life insurance contracts will not fall within the substantive scope of this decision, in particular due to the fact that such continuation corresponds technically to insurance cover contracts, not investment contracts. Moreover, joining a group unit-linked life insurance contract individually is acceptable where the terms and conditions of such group contract provide for such continuation. In consequence, no new clients will be able to join such contract.

K. Announcement and entry into force of this decision

In accordance with Article 366(4) of the Act on the business of insurance, this decision shall be announced in the Official Journal of the KNF Board.

Information about the decision shall be immediately communicated to the public through the information agency referred to in Article 58(1) of the Act on public offering.

This decision shall enter into force on 1 January 2022.

Referring to the effective date of this decision indicated above, it should be stated that both the Regulation on PRIIPs and the Act on the business of insurance – providing the normative grounds for this decision – do not indicate the date by which this decision should enter into force from the date of its publication.

When setting the effective date for this decision, the KNF Board considered the following factors:

- the necessary time for supervised entities to adapt the content of the unit-linked insurance contracts they offer,
- the effective date of the legal amendments pertaining to the amount of fees collected by TFIs.

Moreover, the Polish supervisory authority informed supervised entities of its intention to adopt the intervention measure and of its scope, and communicated – during the consultations with supervised entities and with the Polish Chamber of Insurance – the substance of the prohibitions.

Thus, in the Polish supervisory authority’s view, the above-mentioned time for the intervention measure to take effect is sufficient to allow the addressees of this decision to comply with the prohibitions specified in this decision.

Having regard to the foregoing, it is appropriate to adopt the decision as per the operative part hereof.

Instructions

The decision shall be final.

The right to lodge a complaint against this decision to the Provincial Administrative Court pursuant to Article 3 § 2 point 4 of the Act of 30 August 2002 – the Law on proceedings before administrative courts (consolidated text: Journal of Laws 2019, item 2325, as amended), hereinafter: 'Law on proceedings', shall be vested in any person who has a legal interest in such complaint (Article 50 § 1 of the Law on proceedings).

The complaint to the administrative court, under Article 53 § 2 in connection with Article 54 § 1 of the Law on proceedings, shall be made through the KNF Board, within thirty days of the date on which the complainant became aware of this decision. In accordance with Article 61 § 1 of the Law on proceedings, a complaint made to the administrative court shall not suspend the enforcement of the decision of the KNF Board.

A fixed fee of PLN 200 shall be collected for the complaint (§ 2(6) of Regulation of the Council of Ministers of 16 December 2003 on the amounts and detailed rules for collection of the entry fee in proceedings before administrative courts (Journal of Laws 2021, item 535). The complainant may request for exemption from costs or for the right to assistance under the procedure and terms laid down in Articles 243–263 of the Law on proceedings and pursuant to Regulation of the Council of Ministers of 19 August 2015 on determination of the template and method of making available the official form of application for assistance in proceedings before administrative courts and the method of documenting the property, income or family status of the applicant (Journal of Laws, item 1257, as amended).

For
Komisja Nadzoru Finansowego

Dagmara Wieczorek-Bartczak

Deputy Chair
Komisja Nadzoru Finansowego

/signed with a qualified electronic signature/