CEIOPS Proposals for a Definition of Cross-Border Provision of Service under the Insurance Mediation Directive ("IMD")

Purpose

To respond to the EIOPC¹ request to present an extensive analysis of different proposals for defining cross-border services under the Insurance Mediation Directive (IMD)², prompted by the Commission Services definition proposed³ at the EIOPC meeting of November 2006.

CEIOPS’ analysis presents different options expressed by the members of its Intermediaries Expert Group. The European Federation of Insurance Intermediaries (BIPAR) was invited to participate to the discussion in order to integrate the position of the intermediaries’ sector.

This paper aims to summarise the pro and contra arguments analysed by members of CEIOPS Intermediaries Expert Group (IMEG) and grouped under the headings of 3 main options. The first and second proposals reflect the Commission Services’ paper. The last proposal was formulated after the discussion of the first two approaches. It was approved by the CEIOPS Members Meeting as being the most workable definition in line with the objectives of the IMD regarding the intention of the intermediary, the creation of the Single Market and consumer protection. CEIOPS would welcome an input from the EC in order to clarify this issue for the sake of legal certainty.

Background

The IMD as a single market directive falls within the Commission’s Financial Services Action Plan to improve the Single Market for financial services. Its objectives include ensuring open and secure retail markets, i.e. fostering competition in the insurance sector and enhancing the level of consumer protection at European level.

Neither the IMD nor the CEIOPS Luxembourg Protocol has defined “Cross-Border Provision of Service”.

In its November paper, the Commission Services propose that business should be regarded as being carried out under “Freedom of Services” (FOS) if the member state of the intermediary’s establishment differs from where the customer has his residence or head office (the “residence of policyholder” test – proposal 1). An alternative suggestion has been to determine whether FOS is being exercised by reference to the test in the Second Non-Life Insurance Directive (the “situation of the risk” test – proposal 2).

These two EC approaches and another, new approach (proposal 3), along with the corresponding arguments for and against, are outlined below.

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¹ European Insurance & Occupational Pensions Committee. (Level 2 Committee in the Lamfalussy process)
³ Markt/2536/26 November 2006 Insurance Mediation
Proposal 1 (Residence of Policyholder)

1. Definition:

An insurance intermediary is carrying out business under FOS if the Member State in which it is established is different from the Member State where the recipient of its services (i.e. the consumer/policyholder) is established.

2. Arguments for:

- **Same approach** as adopted in the Life Assurance Directive 2002/83/EC and consistency with the rules on the law applicable to insurance contracts

- This approach is consistent with one of the main objectives of the IMD that is the protection of an intermediary’s customer. The conditions, under which, in the interest of the general good, the business concerned must be conducted, are those of the policyholder’s state of residence, which the policyholder is familiar with.

- **Legal proof**

  The place of residence of the policyholder should be easy to prove.

3. Arguments against

- **The IMD is fundamentally different from the Insurance Directives**

  The IMD concentrates on the relationship between the insurance intermediary (IIM) and its client and on consumer protection, not on the contractual relationship between an insurance undertaking and a consumer, i.e. an insurance contract.

- **Single Market**

  This option gives rise to an outcome, in which essentially local transactions (IIM and risk located in one Member State) have the more complex elements of cross-border activity artificially introduced to them, due to the residence of the policyholder located in another Member State (MS). This could lead to situations where the IIM is not aware that it is acting on a cross-border basis and therefore has to be compliant with the general good rules of the MS in which its client has his habitual residence. In addition, IIM will have to passport to all member states just to be sure to be in compliance with the definition on FOS. This administrative burden would deter small IIM to taking cross-border business. It would favour large IIMs that already have a network of international branches and can easily comply with all the rules and obligations of each MS. This is not consistent with the IMD’s aim of enabling insurance intermediaries to operate freely across the community.

- **General good provisions**

  The general good rules to apply as regards the service of intermediary will be different from those with regard to the service of an insurance undertaking (IU). Such a situation can be confusing for a client.

In addition, this proposal does not seem to take into account consumer protection issues in cases where the policyholder and the insured are different persons or entities. This is quite a common situation in particular in group insurance, where the policyholder is an employer, a bank, a university and the insured persons are the employees, the card or account holders, or the students).
Consumer Protection

In certain circumstances, policyholders seeking insurance coverage in a MS different from the one where they are established or resident could be denied such coverage. This could be due to the fact that the local IIM to whom they address themselves is not willing to write business by freedom of services, as it did not wish to go through the notification procedure. It could also happen that this local IIM may simply not be allowed to sell an insurance contract because the deadline of one month after the reception of the answer of the authority on the notification delivery (IMD- Art 6) has not yet been met.

Proposal 2 (Situation of the risk)

1. Definition

An IIM carries on business under FOS if the IIM is not established in the MS where the risk to be underwritten is located.

2. Arguments for


- **Single Market (Consistency between Insurance undertakings and IIM)**
  If the “situation of risk” approach is applied, both insurance undertakings (IU) and IIM will follow the general good rules of the same MS, which is important to avoid distortions of competition between IU and IIM. This will e.g. avoid a situation where it will be allowed for an IU to advertise its insurance product (under the law of one MS) but not for the IIM to advertise its mediation service with respect to that product (because of the law of second MS).

- **Legal proof**
  In most cases, it is not difficult to prove the localisation of the risk.

3. Arguments against

- **The IMD is fundamentally different from the Insurance Directives**
  The IMD concentrates on the relationship between the IIM and its client and consumer protection, not on the contractual relationship between an insurance undertaking and a consumer, i.e. an insurance contract.

- **Single Market**
  This option gives rise to an outcome, in which essentially local transactions (IIM and policyholder located in one MS) have the more complex elements of cross-border activity artificially introduced to them, because the risk is located in another MS. IIMs will have to passport to all MS just to be sure to be in compliance with the definition on FOS. This is not consistent with the IMD’s aim of enabling insurance intermediaries to operate freely across the EU.
Consumer Protection

In certain circumstances, policyholders seeking insurance coverage in a MS different from the one where they are established or resident could be denied such coverage. This could be due to the fact that the local IIM to whom they address themselves is not willing to write business by freedom of services, as it did not wish to go through the notification procedure. It could also happen that this local IIM may simply not be allowed to sell an insurance contract because the deadline of one month after the reception of the answer of the authority on the notification delivery (IMD- Art 6) has not yet been met.

Proposal 3:

CEIOPS Members Meeting approved the third provided definition as being the most workable solution. Not only does it rebut the different contra arguments of the two first proposals but it also responds to the main objectives of the IMD: the intention of the intermediary provided in Art 6 of the IMD is taken into consideration; this definition creates no artificial barriers for existing mediation activities and it minimises the administrative burden; the protection of the consumer is guaranteed since it is the decision of the consumer to request the services of a IIM operating in another Member State.

1. Definition

An IIM is operating under FOS if it intends to supply a policyholder, who is established in a Member State different from the one where the IIM is established, with an insurance contract relating to a risk situated in a MS different from the MS where the IIM is established.

The IIM should notify its intention to operate under freedom of services in the sole MS where the policyholder is established or has his residence, also in the case the policyholder acts on behalf of different insured and/or risks established or situated in one or more other MS.

If the IIM already notified its intention to operate under FOS in a MS other than the one where the IIM has its residence, this notification procedure is considered as the legal proof of its intention to write business under FOS with residents of that MS.

If the IIM did not notify its intention to operate under FOS in an other MS, an intermediary shall nevertheless be considered as having the intention to write business under FOS with residents of that MS, when it is marketing, providing insurance mediation services or when it is actively seeking business from a client/consumer resident or established in that MS.

Non exhaustive lists of examples:
- The IIM asks for and organises, on its own initiative meetings with clients established in another country.
- Re advertisement: the IIM gives/sends information on specific products, conditions etc to selected groups of clients established in a given country / in specific languages of some EU MS etc. Here the advertisement has an active character, the intention of the intermediary to contact clients in another country is clear.
- Re electronic distance or distance marketing activities: If the content of the website of the IIM is general and only in the language of the MS of the intermediary, if it is not
addressed to a specific group of clients or clients in specific countries, then the IIM cannot be considered as actively seeking for these clients and therefore cannot be considered as having the intention to do FOS in the countries where those clients are established. If the IIM is contacted by those clients it will not be considered as doing FOS in the countries of these clients.

2. Arguments for:

- **Consistency with Article 6 IMD (intention of the IMD to provide cross-border services):**
  The intermediary is only carrying on cross-border services when it conscientiously decides to do so. The IIM will only notify for those MS where it intends to provide cross-border services.

- **Single Market**
  There are no artificial barriers for the IIM. The other advantage of this approach is that the same IIM is not obliged to notify its intention to write business by FOS for some classes of business, and not for others.

- **Consumer protection**
  The policyholder who takes the initiative to request the services of an IIM established in another MS (and/or with regard to a risk located in another MS), is aware that this IIM does, a priori, only comply with the general good provisions of its (home) MS.

  It can be presumed that the reasons for a consumer for choosing an IIM in another MS than his own is primarily not based on the question which general good rules will apply in his relation with the IIM. It can even be presumed that the consumer, consciously or unconsciously, renounces to be submitted to the general good regulations of the MS of his residence. This does however not mean that in this case the consumer does not benefit from any protection rule. He remains, after all, protected not only by the common minimum information requirements imposed by the IMD (Art 12), but also by the national law on insurance contracts, and finally by the general good rules provided for in the MS of the establishment of the IIM.

  However, when the IIM has notified its intention to provide cross-border services in the MS where the policyholder has his residence, then it goes without saying that it has to comply with this host MS’s general good provisions.

  Finally, this approach will not place the consumer in a situation where he might be denied an insurance cover abroad, specifically for short-term policies and/or for small risks situated in another MS than his own.

- **Legal proof**
  The notification procedure or the exercise of one of the indicative activities shall proof the intention of the IIM to provide cross-border services.