



Gabriel Bernardino  
Chairman

Mr Jonathan Faull  
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19 September 2013  
Eiopa/13/331

**Subject: Enhancing consumer protection in insurance investment products**

Dear Mr Faull,

As you are fully aware, consumer protection is in the DNA of Eiopa and ranks highest on our agenda. With this in mind, I wanted to share with you that I see the inclusion in the EU legislation of specific rules on conflicts of interest and assessment of suitability and appropriateness regarding sales of insurance investment products as crucial in promoting a high level of protection for consumers. This is clearly an area where a higher level of regulatory intervention is necessary to reinforce the protection of policyholders' interests. In that respect, Eiopa stands ready to play its role in ensuring better consumer protection and enhancing consumer confidence both in its role as a European Supervisory Authority and in close co-operation with the other ESAs under the Joint Committee.

I fully support the general objectives of enhancing cross-sectoral consistency and ensuring a level playing field for financial institutions by having in the IMD, provisions similar to those contained in MiFID II because, if supervisors from different financial sectors treat the same issues differently, it will not mean a "consistent level of protection" for consumers, which is our final aim.

Nevertheless, I am particularly concerned about the potential for a lack of regulatory consistency and a detrimental impact on consumer protection to arise, were provisions on the sale of insurance investment products to be included under the scope of MiFID II. This would, in my view, run the risk of such products being sold in accordance with sub-optimal requirements, with the consequent potential for a detrimental impact on consumers and significant upheaval in a market characterised by very diverse distribution channels.

I would like to provide you with three examples why the inclusion of rules on the sale of insurance products with an investment element under the regime of the IMD, is preferential:

- *Keeping rules on the sale of insurance PRIPs in legislation designed for diverse forms of insurance distribution* - the original Directive 2002/92/EC on insurance

mediation ("IMD1") was designed to specifically take account of the diversity of distribution channels in the insurance and reinsurance sectors, namely everything from a vast number of natural persons to large multinationals who currently carry out the activity of insurance mediation across Europe. IMD1 recognised the specificities of insurance distribution, namely the fact that an insurance intermediary exercises contractual rights and fulfils pre-determined contractual obligations by the insurance undertaking, whereas an investment firm executes orders from, or transactions on behalf of, clients. The unique aspect of this existing legislative framework for insurance distribution would be lost if insurance products with an investment element were included under MiFID II, but, more specifically, if they were included under the detailed Level 2 MiFID legislation, which is designed for investment firms such as investment banks and stock brokers.

- *Avoiding MiFID-style client categorisation* - Notwithstanding the existence of a "large risks" exemption in Article 12(4), IMD1, there is no differentiation between retail and professional clients under IMD1, in the same way as MiFID. The objective of IMD1 is to grant the same protection to all customers concluding a contract of insurance, irrespective of their classification. Applying MiFID retail/professional client categorisation rules to the sale of life insurance, for example, could cause confusion and lead to less protection, particularly in cases where the insured person is different to the actual policyholder. This is classically the case for group (or collective) insurance policies where, for example, an undertaking (the policyholder) concludes a life insurance contract on behalf of its employees (the insured). Indeed, the 3L3 Committees stated in their Task Force Report on PRIPs in October 2010 that, "*as the PRIPs requirements would only be applicable when a product in the scope of the regime is to be sold to retail investors, MiFID-style client categorisation would not add much value for insurance-based PRIPs*".
- *Maintaining the "demands and needs" test* - bearing in mind our objective of enhancing consumer protection, I am not convinced that applying the appropriateness test in Article 25(2), MiFID II in a non-advised sale of a complex product such as an insurance PRIP, achieves an optimal outcome for consumers, since this test does not include specifying the "demands and needs" of customers as is currently contained in Article 12(3), IMD1, thus reducing consumer protection. I understand that some Member States such as the UK have preferred to retain the IMD's "demands and needs" test in relation to non-advised mediation of life insurance policies in order to ensure a more coherent regime specifically for insurance.

I believe it is particularly important to reach a legislative solution that avoids regulatory arbitrage, ensures a coordinated supervisory approach and preserves the legitimate specificities of each sector. I understand that different proposals have been put forward, but an agreement has not been reached yet.

In light of the fact that the negotiations on the IMD2 proposal are currently not progressing very rapidly, I believe that a possible way forward could be to include in the current MiFID II legislative process a number of simple amendments to the existing IMD1 so as to include provisions on the sale of insurance PRIPs, which are similar to those in MiFID II. This would have the benefit of keeping the sale of insurance-based investments still within the regulation of insurance mediation and at the same time preventing regulatory arbitrage. Any amendment would also make sure that the direct sales of insurance PRIPs is included.

The advantage of such an amendment would be that it would make it feasible for it to be adopted swiftly by the co-legislators within the MiFID II legislative process.

A drafting proposal is contained in the Annex to this letter.

I am sending this letter also to representatives in the European Parliament and the Lithuanian Council Presidency. I would be happy to discuss this matter further with you and my staff and me, remain at your disposal if you have any queries.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'G. Bernardino', is positioned above the printed name.

Gabriel Bernardino  
Chair of EIOPA

cc:  
Mario Nava, Acting Director, Financial Institutions, DG Markt, European Commission  
Klaus Wiedner, Head of Insurance & Pensions unit, DG Markt, European Commission

**Annex – Drafting proposal for amendments to IMD1 regarding sale of insurance investment products, to be contained in the MiFID II proposal**

This drafting proposal includes some suggested amendments to IMD1 to be included in the existing MiFID II legislative process. It is intended to propose a simple alternative solution to the formal inclusion of rules on the sale of insurance investment products under the scope of MiFID II.

A new amending Article should be inserted in the MiFID II proposal (for example, under the Scope provision in Article 1 or under Chapter II, Section 2 (Provisions to ensure investor protection)) as follows:

“Article [X]  
Amendments to the Insurance Mediation Directive

Directive 2002/92/EC is amended as follows:

(1) The following Recital 23 is added:

“(23) By means of delegated acts pursuant to Articles 290 and 291 of the Treaty on the Functioning of the European Union and in accordance with Articles 10 to 15 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), the Commission should adopt delegated acts as set out in Articles 15, 16 and 17 regarding management of conflicts of interest and conduct of business obligations in relation to insurance packaged retail investment products. These delegated acts should be developed in draft by EIOPA, working under the auspices of the Joint Committee of the European Supervisory Authorities”.

*Justification*

*Introduction of a recital originally envisaged in Chapter VII of the IMD2 proposal regarding additional consumer protection requirements in relation to insurance investment products. It also envisages delegated acts being developed in draft by EIOPA under the auspices of the Joint Committee of the ESAs. The new Chapter in the IMD1 would be Chapter IV.*

(2) The second sub-paragraph of Article 2(3) is replaced by the following:

“With the exception of Chapter IV of this Directive, these activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation”.

*Justification*

*This amendment makes clear that there is an exception to the general rule in IMD1 excluding direct sales when insurance investment products are sold (see new Chapter IV amendment below).*

- (3) The following new Article 2(4) is added:

“(4) 'insurance investment product' means a contract of insurance which could be also classified as an "investment product" as defined in Article 2(a) of [Regulation on key information documents for investment products (PRIPs Regulation)]”

*Justification*

*It is important to include a definition of "insurance investment product" in IMD1, which is linked to the relevant definition of "investment product" under the Regulation on key information documents for investment products so that the scope is very clear.*

- (4) The following new Chapter IV is added (N.B. Chapter VII of the IMD2 proposal (Articles 22-25) or the equivalent provisions in MiFID II would be inserted here, but re-numbered; **the whole text (with the exception of two drafting changes below) has not been reproduced here to keep this drafting proposal short**):

**CHAPTER IV**

**ADDITIONAL CUSTOMER PROTECTION REQUIREMENTS IN RELATION TO INSURANCE INVESTMENT PRODUCTS**

- (5) The following new Article 14 on Scope is added:

“Without prejudice to the second sub-paragraph of Article 2(3) of this Directive, this Chapter applies additional requirements to insurance mediation, when carried on in relation to the sale of insurance investment products by:

- (a) an insurance intermediary;
- (b) an insurance undertaking”.

*Justification*

*Chapter VII of the IMD2 proposal, or provisions on the sale of insurance PRIPs, which are similar to equivalent provisions in MiFID II, could be inserted as an additional Chapter in the IMD1 text. The Articles would be re-numbered Articles 14, 15, 16 and 17. N.B. Article 22 of the IMD2 proposal (to be renumbered Article 14) envisages that direct sales of insurance investment products would also be covered as an exception to the general rule under the second paragraph of Article 2(3), IMD1 excluding direct sales.*

(6) The following new Article 15(2) on Conflicts of Interest is added:

"Where steps taken by the insurance intermediary or insurance undertaking in compliance with Article 12 are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of customers and potential customers arising from conflicts of interest will be prevented, the insurance intermediary or insurance undertaking shall clearly disclose the general nature or sources of conflicts of interest to the customer before undertaking business on the customer's behalf".

*Justification*

*Chapter VII of the IMD2 proposal, or provisions on the sale of insurance PRIPs, which are similar to equivalent provisions in MiFID II, could be inserted as an additional Chapter in the IMD1 text. The Articles would be re-numbered Articles 14, 15, 16 and 17. N.B. Article 22 of the IMD2 proposal (to be renumbered Article 14) envisages that direct sales of insurance investment products would also be covered as an exception to the general rule under the second paragraph of Article 2(3), IMD1 excluding direct sales.*

*The reference to Articles 15, 16 and 17 in Article 23(2) of the IMD2 proposal in relation to conflicts of interest would also need to be amended so as to refer to Article 12, IMD1. Whilst extension of the scope of IMD1 to include direct sales of all types of insurance products is fully supported, it is proposed for the time being not to amend Article 12, IMD1 to include direct sales of non-insurance PRIPs such as non-life policies and pure protection life policies by insurance undertakings as well as this would require a substantial re-drafting of Article 12, IMD1.*

(7) The following new Articles 19 and 20 are added:

"Article 19  
Delegated acts

The Commission shall be empowered to adopt delegated acts in accordance with Article 20 concerning Articles 14, 15, 16 and 17".

"Article 20  
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Articles 14, 15, 16 and 17 shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Directive.

3. The delegation of powers referred to in Articles 14, 15, 16 and 17 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official

Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Articles 14, 15, 16 and 17 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council”.

*Justification*

*The provisions regarding adoption of delegated acts are linked to the new Articles 14-17 regarding insurance PRIPs and are included to allow for follow-up work by EIOPA on developing delegated acts in draft, in co-operation with the other European Supervisory Authorities under the Joint Committee (see Recital 23 amendment above).*