



IRSG Position paper on the Insurance Mediation Directive II

1. General

The EC IMD2 proposal aims to upgrade consumer protection in the insurance sector by creating common standards across insurance sales and ensuring proper advice. It will do so by improving transparency and establishing a level playing field for insurance sales by intermediaries and sales by insurance undertakings that is proportionate between distribution channels.

The IRSG supports the EC initiative to improve consumer information and enhance the level of consumer protection as well as to establish a level playing field for sellers of insurance products.

The IRSG recognises the need for an alignment with some of the provisions on financial products in MiFID1 and in the future MiFID2. However, the IRSG emphasizes the difference between investment products, to which can be assimilated some products in life insurance, and insurance products. The transfer of risk that distinguishes the insurance product with respect to the financial product requires a consistent regulatory approach.

IMD2 still has a minimum harmonisation approach. Therefore the IRSG believes that Member States should be allowed to introduce or maintain stricter provisions, where appropriate to their market.

2. Scope

IMD2 is designed to clarify the uncertainty that has emerged from the scope of IMD1, in order to reduce the risk of confusion for consumers and the variation of levels of consumer protection between Member States.

IRSG supports the EC's proposal to improve level playing field between different market players by preventing regulatory arbitrage and promoting equal conditions of competition. The level of consumer protection cannot depend solely on the distribution channel.

To this end, IMD2 should be a Directive on the distribution of insurance products, which increases the seminal IMD1 attempt to regulate the insurance sales market. Accordingly, should direct writers fall within the scope of such a Directive as well as providers whose main professional activity is not the sale of

insurance products, the rules should be balanced and tailored to the different distribution channels and care should be taken to avoid creating loopholes and affect the level playing field.

Conversely, loss adjusters, professional managers of claims and the expert appraisals of claims should be outside the scope of IMD2, which does not cover the entire life cycle of insurance.

3. Transparency

Transparency takes on different meanings in the regulation of insurance. While transparency is critical, the limits of disclosure should also be recognised. Disclosure on its own is not a panacea, particularly where consumer protection is concerned.

With reference to the insurance contract law, comprehensibility, unambiguity and certainty describe different aspects of the concept of transparency. IMD1 reflects this concept by requiring that all information be provided in a clear and accurate manner, comprehensible to the customers. IMD2 follows such an approach and this is strongly supported by the IRSG.

IMD2 also introduces a number of expressions such as ‘honest and professional advice’, ‘honestly, fairly and professionally’, ‘fair clear and not misleading’ or ‘best interest’. The IRSG recognises that some of these expressions are used in the MiFID1 or could be introduced in the MiFID2. Therefore, an alignment of legislation on consumer protection in the insurance sector as well as financial sector can be pursued. It is of utmost importance that a duty of care to clients is clearly articulated and understood.

However, the IRSG notes that these expressions are likely to have an impact on the law of the insurance contract, which is far to be harmonised within the EU. Therefore the differences between the various legal systems, i.e. civil law and common law, suggest the careful use of such expressions by the EU legislator.

To this purpose, the IRSG suggests that the introduction of general duties of intermediaries and insurance undertakings to their customers also take into account the existence of consolidated concepts into many national laws (e.g. good faith, fairness), which can already usefully be invoked to protect customers. However, we also support the view that IMD2 should articulate a high level duty of care to clients.

Furthermore the IRSG suggests assessing whether the introduction of these expressions overlaps with EU rules directly aimed at protecting consumers and which also apply to insurance sector, e.g. the rules on unfair commercial practices laid down in Directive 2005/29/EC.

At any rate, consumer’s protection requires that duties and obligations of intermediaries and insurance undertakings are clearly defined and unambiguous in all Member States and the IRSG strongly supports such an approach in IMD2.

Therefore, the IRSG supports harmonised rules that increase the transparency of intermediaries and direct insurers to their customers by compensating the policyholder’s knowledge deficit by means of advice and information. Customers should ideally be aware of the economic, professional and legal basis on which the insurance intermediation is founded as well as be able to assess the quality of the advice and information as provided by the intermediaries. We do, though, recognise the current levels of financial capability and understand that for many consumers being able to assess the information and advice they receive in a meaningful way will be challenging. This is why enhanced consumer protection that takes this asymmetry

of knowledge between consumer and industry into account is critical and why there needs to be consistency in consumer protection legislation across current legislative initiatives. Consumers should also be able to purchase any insurance product without advice, so as not to restrict consumer choice or their ability to access products if they are not in a position to afford advice. In any case, even in the case of sales without advice, all relevant information requirements will still be followed.

Consistent with this function of transparency, harmonised rules should cover the knowledge of the professional and personal qualification of the intermediary, of his legal relationship with the insurer, of the type of remuneration the intermediary would receive, of potential conflict of interest and of the material basis on which advice and information were rendered.

To this purposes, IMD1 uses a risk-based approach to differentiate on information requirements. The informational paradigm under IMD1 sees mass risks v large risks because IMD1 acknowledges that there is less of a need that such information is disclosed when the customer is seeking reinsurance or insurance cover for commercial and industrial risks.

The IRSGR agrees with this risk-based approach by IMD2 and emphasizes that regular consumer testing is essential due to the recognition of consumer challenges in terms of information and knowledge asymmetry and impact of behavioural economics.

4. Conflict of interest/remuneration

IMD1 identifies three possible relationships between insurance intermediaries and their customers and builds the rules of information around these relationships. IMD2 follows the same approach and identifies the same relationships, i.e. intermediary gives advice on the basis of a fair analysis, or he is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings, or he is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and does not give advice on he basis of a fair analysis. Therefore the transparency that is required in the customer relationship allows the customer to rely on an intermediary behaviour that is consistent with the relationship established between them.

The IRSG supports a set of rules consistent with the above relationships. These rules must be proportionate to the customer's expectations regarding the intermediary. At the pre-contractual stage, a mandatory disclosure of the nature (commission, fee, salary) and source (insurance undertaking, policyholder, other intermediary) of the remuneration strikes an appropriate balance in terms of providing relevant, useful information to the costumer that will be beneficial in his decision-making.

Consistent with its minimum harmonisation approach, IMD2 should allow Member States to maintain or adopt additional rules on conflict of interest and remuneration where it is appropriate to their markets.

Regardless the relationship between the parties, and even in the case of non-advised sales, IRSG 's views is that the manufacturer (in case of insurance products that are included in the forthcoming regulation on investment products) and the distributor (intermediary and direct insurer) has to give the customer the relevant information about the insurance product in a comprehensible form to allow the customer to make an informed decision. Where advice is provided, the seller must actively inquire into the needs of its customer, while taking into account the complexity of the insurance product and the type of costumer.

Legislation also needs to take into account the development of the KID, about which the IRSG would like to refer to its specific opinion on PRIPs (Packaged Retail Investment Products) where responsibility for content must lie with the provider/manufacturer.

5. Cross-selling practices

IMD2 allows bundling practices but not tying practices and sets forth the definition of cross-selling practices, bundling practices and tying practices.

The IRSG supports a clarification of the above definitions. If cross-selling practice means the offering of an insurance service or product together with another service or product, both definitions of bundling practices and tying practices relates only to the offering of one or more ancillary services with an insurance service or product. No reference is made to the ancillary products other than insurance products. Moreover, the rule should clarify whether the relevant discipline shall also apply if the service (or product) used as “gateway” is other than an insurance service or product.

On this basis, IRSG’s view is that tying and bundling practices need to be addressed consistently across the different financial services legislation at EU level. Therefore the IRSG supports the IMD2 is aligned to the text of MiFID2.

6. PRIPs

The IRSG fully support the application of enhanced consumer protection standards to insurance investment products (insurance PRIPs). The draft regulation on PRIPs, however, includes both the format of the pre-contractual disclosure document (KID) and the rules of conduct for its delivery to customers. Therefore, the IRSG supports coordination between PRIPs regulation and IMD2 in order to avoid overlaps on the business conduct rules. IMD2 is the appropriate instrument to cover non-product related information, while the PRIPs regulation is the appropriate instrument for products disclosure.

More generally, the IRSG refers to the specific opinion given on PRIPs.

7. Cross-border operations

The current IMD1 acknowledges that the inability of insurance intermediaries to operate freely throughout the Union hinders the proper functioning of the single market in insurance. Therefore, one of the priorities of the IMD1 is to allow insurance and reinsurance intermediaries to avail themselves of the freedom of establishment (FOE) and the freedom to provide services (FOS), which are enshrined in the Treaty.

The introduction of a definition of FOE and FOS and mutual recognition system as well as a simpler notification system process would not substantially affect consumer protection because they manly relate to the goal of market integration.

However, the IRSG supports the introduction of a centralised registration system at EIOPA containing records of insurance and reinsurance intermediaries, which have notified their intention to carry on cross-

border business, because this system is able to achieve the objective of consumer protection. The consumer would be able to check the status of an intermediary, i.e. in which capacity he is acting as well as where he is registered.

On the other hand, the potential increase of cross-border operation of intermediaries is likely to increase the contact of the customers of the host Member State with laws other than their own, i.e. the law of the home Member State of the intermediary. Therefore, the IRSG supports introducing harmonised rules for the settlement of cross-border disputes as well as clear pre-contractual information to the consumers on the access to such procedures, in line with the recently agreed ADR directive.