Financial Services User Group's (FSUG)

opinion on

Review of the Insurance Mediation Directive (IMD)

7 March 2011

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EXECUTIVE SUMMARY

1. Importance of the IMD Directive for consumers

Insurance is a very important issue for consumers who have to make the right choice for the protection of their home and personal belongings, the financial protection of family members or others in the event of death or for the protection of their long-term savings.

As insurance products much more often are sold (by intermediaries) than actively bought by consumers and as they are complex products consumers have to rely on the information and advice received from intermediaries. If this advice is not accurate or of poor quality, consumers will make wrong choices and buy (or are sold) the wrong products (including being over- or under-insured).

2. Necessity of preventing and reducing conflicts of interest

Following the sector inquiry conducted by the Directorate-General for Competition, the Commission published an important Communication on 25 September 2007 – COM(2007)556 – after a sector inquiry which contained important remarks about conflicts of interest:

- Brokers acting as advisors – in that role they have to be objective and on the consumer side – as well as being distributors (with own commercial interests) which present a potential source of conflict of interest.
- Disclosure of remuneration received from insurers and third parties is weak and often not complete, clear and understandable. It is doubtful however if disclosure alone can be a sufficient remedy for the problems.
- Brokers are often encouraged to undertake business only with particular insurers and this can undermine fair competition when insurers compete against each other by way of offering high incentive levels of remuneration. This influences the choice that is offered to the consumer.
- Insurance intermediaries should be obliged to act honestly, professionally and in line with the best interests of their customers at all times.

FSUG can only concur with these remarks and support this last statement and that the principle expressed should be incorporated in the text of the directive.

3. Suitability of the insurance product to consumer needs

Without a prior analysis and an active inquiry into the needs of the consumer no product should be sold. Recommended products have to be appropriate to the specific needs of each consumer. An according advice by the intermediary and the correct documentation of this advice is vital for a sound conduct of business.

4. Harmonised rules between IMD, PRIPs and MiFID

In the area of investment products these three directives/initiatives regulate similar aspects: intermediary-based information, advice and conduct of business rules. In order to create a real level playing-field and to avoid unjustified arbitrage, a number of common principles have to apply to all these directives assuring the same level of consumer protection and fair, plain and not misleading information. This can be done by means of an omnibus directive or by harmonising the Consumer Protection approach. Moreover, it has to be stated that MiFID is a Lamfalussy directive, whereas IMD is not, resulting in the technical and legal clarification only being produced on the EIOPA level.

At a minimum, the conduct of business rules of MiFID (including MiFID implementation Directive of 2006) – in particular on clear, fair and not-misleading information, on advice and on 'inducements' – should apply as well to all professionals selling insurance products, and therefore have to be introduced in the PRIPs scope.

Also, as already set out in FSUG's reply on the PRIPs project, it is essential that all retail life insurance products with an investment or saving component be included in the PRIPs scope.

5. Effective enforcement

Rules have to be accompanied by close monitoring, deterrent sanctions and effective supervision; otherwise the best meaning rules lose their potential.

OPINION ON THE CONSULTATION DOCUMENT

3.1 Policy objectives

A A high and consistent level of policy holder protection embodied in EU law

A1. Do you agree with the Commission services general approach outlined in the box above? Should information requirements as contained in Article 12 of the IMD be extended to direct writers taking into account the specificities of existing distribution channels?

Concerning insurance undertakings, Article 12(1) need not be applied (the necessary rules are part of directives life and non-life), but Article 12(2) and (3) should be.

Furthermore, an explicit warning information statement is needed to state that there is no requirement to check if there are better-suited products to be found on the market.

A3. In the context of the information requirements for the mediation of insurance products other than PRIPs, do you think that the possibility for Member States to impose stricter requirements should be maintained? Please provide reasons for your reply.

Article 12 of the Directive which currently is not a base for a full harmonisation approach does not offer a high level of protection. For example, there is no obligation to inquire actively about the customer's needs; even if the intermediary has undertaken an impartial analysis of the market he can rely on the information given to him by the consumer. In the future the intermediary should be obliged to pose questions making it possible to obtain all the information needed for correctly determining the needs.

The main reason that limits cross-border activity of intermediaries is the difference in civil contract law and liability.

A4. In the context of the information requirements, do you think a definition of 'advice' should be introduced? Please provide reasons for your reply.

Like in MiFID a definition is useful so that it is possible to distinguish between information, advertising and personalised advice which can only be given and products proposed after the needs and demands of the consumers have been actively detected and analysed by the intermediary. The products proposed must fit to those needs.

Insurance intermediaries cannot give independent advice paid by fee from consumer. The 'advice' is part of the sales talk proposing an insurance product by analysing consumer's needs and testing appropriateness of the recommended insurance product to the customer's needs. In Germany insurance intermediaries try to avoid giving 'advice' to consumer. It is allowed by national law. As a result of a telephone survey only 52 % of the consumers have received 'advice' from insurance intermediaries.

Two separate worlds do exist: distribution financed by commission and gross premium on the one hand and advice financed by fee and net premium on the other hand. No mixture of both systems! All insurers have to offer net products without commission.

If a product shall be sold without an advice there has to be a specific warning that the product may not match an appropriateness check.

With reference to FSUG response relating to Solvency II it should be stated that the intended disclosure of solvency and financial information of undertakings arises as a very important issue. Insurance intermediaries have to act honestly, professionally and in line with the best interests of their customers. Solvency and financial information has to be given under the criteria of usefulness for the recipients of information as well as under the obligation of correct interpretation of key figures provided.

A5. If you think that a definition of advice is needed for the mediation of insurance products other than PRIPs, would a definition similar or identical to the definition in MiFID be appropriate? Please provide reasons for your reply.

FSUG believes that the definition of advice in MiFID is an appropriate model (personalised recommendation to sign an insurance contract).

A6. Do you consider that certain insurance products (other than PRIPs) can be sold without advice? If yes, which products would you have in mind and how could possible detriment for consumers be mitigated?

Only within the framework of direct sales should it be possible to sell insurance products without advice; Article 12(3) and (4) should however be applied. And the contract must be appropriate to the consumer’s needs as offered by the distributor having asked the consumer to specify these needs (e.g. via an online questionnaire).

B. Effective management of conflicts of interest and transparency

The current provisions in the IMD would not appear sufficiently clear and effective to mitigate significant conflicts of interest. Therefore, it would appear appropriate to revise the current rules.

The application of the high level principles concerning conflicts of interest and transparency both to insurance intermediaries and insurance undertakings could be considered.

In this context, one option could be to use the MiFID Level 1 regime as a starting point for the management of conflicts of interest, notably with regard to remuneration. In addition, requirements regarding the disclosure of remuneration could be introduced.

B1. What high level principles would you propose to effectively manage conflicts of interest, taking into account the differences between investments packaged as life insurance policies and other categories of insurance products?

First of all conflicts of interest – both for PRIPs and other insurance products – must be avoided; secondly, those that cannot be avoided must be made transparent to the consumer. Competition has to work on the level of products' quality and price and not on distribution channels and remunerations which are not related to the service quality. Commissions should be defined clearly (often not only money is being paid, but non-cash benefits given); the level of commissions and benefits could be capped:

- cap on the commissions in life and private health;
- no commissions at all when cover is transferred, underwriters are changed;
- in life insurance no more up-front loading; instead all commissions have to be distributed over the whole lifetime of the contract.

It is also important that brokers/intermediaries have to identify their status, that is, if they are mainly co-operating with one or more insurance companies or if they offer the whole range of products/insurers. There is a need for a European standard for a status declaration and explanatory handout information sheet about the different types of intermediaries.

Tied agent and direct writers have to give warnings about the limited range of products and possible suboptimal appropriateness of the product.

In Germany one harmful remuneration principle is the ban on passing all or part of the commission onto the consumer.

B2. How could these principles be reconciled for all participants involved in the selling of insurance products?

B3. Do you agree that the MiFID Level 1 regime could be regarded as starting point for the management of conflicts of interests? If not, please explain why.

B4. How can the transparency of remuneration in the sale of non-PRIPS insurance policies be improved for all participants involved in the selling of insurance products, taking into account the need for a level playing field?

B5. Do you agree that all insurance intermediaries should have the right to be treated equally in terms of the structure of their remuneration, e.g. that brokers should be allowed to receive commissions from insurance undertakings as insurance agents?

Distribution channels across Europe are very diverse but it does not justify the lack of a level playing field. Within high principles certain rules should be issued, such as an obligatory presentation of the value of the distribution fee for natural person and institution insurance cover alongside the premium for the products. Remuneration as price for the certain services such as independent advice, limited advice and sales without advice should be presented independently of the premium. Distribution costs should be separated from product costs.

Possible conflict of interest declarations and transparency requirement rules regarding the services provided should be applied to all intermediaries.

B6. What conditions should apply to disclosure of information on remuneration?

All kinds of remuneration paid or given to the intermediary should be brought to the attention of the customer as a matter of best practice (not only on demand).

B7. What types/kinds of remuneration need to be included in the information on remuneration?

No remuneration, direct or indirect, in cash or non-cash, must be concealed from the consumer.

Conflicts of interest don't depend on categories of insurance products, they depend on level of inducements, e.g. a commission of 18 monthly premiums will cause a serious conflict of interest and must be disclosed by indicating the commission value in euro and cent. This indication must be mandatory and not only on the consumer's demand.

C. Introducing clearer provisions on the scope of the IMD

It would be appropriate to retain the activity-based definition of insurance intermediation. It is suggested that exemptions from the scope should be activity-based and not based on types of 'professions' e.g. travel agents. Reinsurance intermediaries should remain within the scope of the IMD. In addition, 'direct sales' by insurance undertakings and their employees could also be included. Finally, where an insurance undertaking (A) sells the products of another insurance undertaking (B), A should be considered to be the intermediary of B and subject to the provisions relating to insurance intermediaries.

C1. In order to guarantee a real level-playing field between all participants involved in the selling of insurance products, to what extent should the current IMD requirements also be applicable to direct writers and their employees? Please, specify which particular requirements should apply and reflect on the particularities of direct sales with examples (how, where, under what circumstances, etc.)

IMD provisions should be applied if insurance contracts are recommended or distributed (by agents or directly). At least the following rules should apply:

- The intermediary must act honestly, professionally and in line with the best interests of the customer.
- The advice given must be adequate to the customer's needs (suitability test) and documented in all cases.
- If a product is sold without advice, its appropriateness in relation to the customer's needs must be checked.
- Remuneration structures cannot work contrary to the obligation to act honestly, professionally and in line with the best interests of the customer.

C4. Should a website or a person who just gives information about insurance fall under the scope of the IMD? How could the boundaries be more clearly defined in respect to insurance intermediation?

While “the wolf in sheep’s clothing has to be avoided”, activities like websites, comparative tests/software or pieces of information made or given by independent consumer organisations should remain outside the scope of the IMD. But there can also be insurers, intermediaries or providers on the market that launch websites (especially for comparison reasons) or produce comparative software (with pre-ticking of boxes and other tricks) established or paid for – by commissions or any other payment methods – by insurers or intermediaries. Even editorials can be dangerous when sponsored by providers and containing advertising material that can mis- lead consumers to certain product offers.

C5. Do you have examples of activities which, in the majority of Member States, fall under the IMD but which you believe should not be covered, such as sales of certain insurance products by car rental companies? Or conversely, do you have examples of activities which currently do not fall under the IMD but which should be covered?

The current IMD does not guarantee a real level playing field between all participants involved in the selling of insurance products. The obligations for tied agents and persons who carry on the activity of insurance mediation in addition to their principal professional activity at the moment are lower than those for multiple agents and brokers. Moreover, rules concerning front-end loading have to be comparable for all PRIPs and MiFID products.

C6. Which particular requirements stemming from the Directive on the Distance Marketing of Financial Services (DMFS) need to be taken into account in IMD2? How does the definition of supplier in the DMFS Directive affect the definition of insurance intermediation?

Articles 10 (unsolicited communications) and 15 (burden of proof).

E. Achieve a higher level of professional requirements

It would appear appropriate to establish basic common principles for professional requirements for all sellers of insurance products.

In this context, one option would be to consider imposing a Member State requirement to ensure that all persons in insurance undertakings who are responsible for insurance distribution and sales in respect of insurance products, as well as all other employees directly involved in insurance or reinsurance distribution or sales, demonstrate the knowledge and ability necessary for the performance of their duties and that they become subject to a relevant continuous professional development requirement regime in respect to the insurance products and services they sell or advise on.

E1. What high level requirements on the knowledge and ability of all participants involved in the selling of insurance products would be appropriate in view of the existing differences in the applicable qualification systems in Member States?

E2. Should these requirements be adapted according to the distribution channel? If so, how?

Concerning qualification some pieces of legislation concentrate on certain degrees. Much more important are the competencies taught in the training. Besides economic and product knowledge the learning contents should comprise advisory skills focussing on consumer needs. Most of the current training offers don't pass this test. Central element of the authorisation must be methods and knowledge on how consumer needs are identified and building on this how an ideal solution/recommendation can be developed. An independent body has to certify that qualification.

Every natural person has to fulfil the qualification requirements.

3.2. Distribution of insurance PRIPs (investments packaged as life insurance policies)

In the context of PRIPS, it would appear important to ensure that consistent conduct of business, inducements and conflict of interest rules are applied to all persons selling packaged retail investment products, irrespective of whether the relevant entity is an intermediary or whether it is the product originator. Detailed requirements should take into account the service being offered (advice, sales without advice). However, it is vital that market failings or risks for customers should always be addressed in an effective or appropriate manner, irrespective of the channel through which a sale is being concluded. The rules of MiFID would appear to be the appropriate benchmark in this regard.

The person selling insurance PRIPs should be responsible for providing pre-contractual disclosure document(s) to the client. As regards direct sales, the responsibility would fall on the product originator (PRIPS insurer). For indirect sales, the intermediary would be responsible for providing the document to the client.

In respect to the sales process and any services provided in relation to that process, the following main principles should be considered: Insurers or insurance intermediaries selling or giving advice on insurance PRIPs should act honestly, fairly and professionally in accordance with the best interests of their clients. In the context of tied agents, the responsibility to act in the best interest of the client would remain with the insurance undertaking.

Insurance undertakings or insurance intermediaries selling PRIPs need to ensure that the client receives information as regards the remuneration of the sellers (making clear the difference between the premium paid and the actual invested part of the premium).

Remuneration structures should not be such that they materially impact on the ability of the intermediary to act in the best interest of the client and should be structured in a way that effectively avoid or manage any conflicts of interest that may arise.

When providing investment advice for insurance PRIPs, the insurance intermediary or the insurer should obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives. This information should be obtained so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for that client or potential client.

Member States could be required to ensure that the insurance intermediary and the insurer, when selling insurance PRIPs without providing advice, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or requested. This information request should enable the insurance intermediary or the insurer to assess whether the investment service or product envisaged is appropriate for the client. If the insurer or intermediary considers, on the basis of the information received, that the product or service is not appropriate to the client or potential client, the insurer or intermediary should warn the client or potential client. This warning could be provided in a standardised format.

Member States could be required to ensure that insurance intermediaries and insurers take all reasonable steps to identify conflicts of interest between themselves. This should include conflicts in relation to the intermediaries' or insurers' managers, employees and tied intermediaries, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course of providing any insurance, insurance intermediation and ancillary services related to PRIPs insurance policies.

Where organisational or administrative arrangements put in place by the insurance intermediary or the insurer to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the PRIPs intermediary and insurer could be required to clearly disclose the general nature and/or sources of conflicts of interest to the client before undertaking business on the client's behalf.

Questions

1. What practical challenges do you think should be addressed when drafting new legislation on the distribution of insurance PRIPs?

2. What are the most important practical issues to be considered when applying the MiFID benchmark to the selling of insurance PRIPs?

FSUG supports the Commission believing that professional conduct of business, inducements and conflicts of interest rules should apply to everyone selling PRIPS products be it an intermediary or a product originator.

The main principle however should not be limited to the distribution of PRIPS. The duty to act honestly, fairly and professionally in accordance with the best interests of their clients should always be applicable.

The suggested measures concerning conflict of interests should be more precise; first of all conflicts of interest must be prevented. They must be identified, avoided whenever possible, otherwise reduced and disclosed.

Information on the remuneration must be more than the difference between the total premium and the invested part of the premium; kickbacks, other advantages, soft inducements also have to be disclosed.