Ref: CEIOPS CCP-59/10
Date: 10 November 2010

CEIOPS Advice to the European Commission on the revision of the Insurance Mediation Directive (2002/92/EC)

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Executive Summary

The following Advice is a response to a Request for Advice sent by the European Commission to CEIOPS on 27 January 2010. Recital 139, Solvency II Framework Directive[1] requires the European Commission ("Commission") to put forward *"as soon as possible and in any event by the by the end of 2010",* a proposal for the revision of the Insurance Mediation Directive (IMD)[2], *"taking into account the consequences of the Directive for policyholders".* To assist the Commission with drafting this proposal, the Commission requested that CEIOPS provide technical advice on the following seven issues:

- Legal framework of the IMD2[3];
- Scope;
- International dimension of insurance intermediation;
- Professional requirements;
- Cross-border aspects of insurance intermediation;
- Management of conflicts of interest and transparency; and
- Reduction of administrative burden

This advice is structured along the lines of the seven issues which the Commission asked CEIOPS to consider. It contains 39 recommendations, which are listed on pages 5-15 for the purposes of this Executive Summary and are also reproduced in the main body of the Advice.

In its Request for Advice, the Commission also stated that it would welcome some initial advice from CEIOPS by summer 2010. Unfortunately, it was not possible for CEIOPS to provide this initial advice to the Commission before summer 2010 due to the depth and complexity of the issues that had to be discussed, some of which were also of a very challenging nature.

The following advice is the result of in-depth discussions within the CEIOPS Membership and represents its initial views on the revision of the IMD. (More detail on the background to how the Advice was produced is provided below). Wherever possible, consensus was sought on the issues discussed, but in a number of instances, alternative positions have been stated. Due to the length of the Advice produced, the various Recommendations reached have been placed at the front of the Advice.

CEIOPS is aware that the Commission will require it (and its successor body, EIOPA (the European Insurance and Occupational Pensions Authority)) to provide further input into the draft legislative proposal that will follow and stands willing and ready to do so.

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[1] 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). Recital 139 provides: *"Adoption of this Directive changes the risk profile of the insurance company vis-à-vis the policy holder. The Commission should as soon as possible and in any event by the end of 2010 put forward a proposal for the revision of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, taking into account the consequences of this Directive for policy holders".*

[2] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation.

[3] N.B. The term IMD2 was used by the Commission in its Request for Advice to refer to the revisions to the existing IMD. This term has also been employed in the same way in this Advice.

Background to how the Advice was produced

CEIOPS Members approved a structure for responding to the Commission's Request for Advice at its Members Meeting of 27 January 2010. This structure was a specialized IMD Revision Task Force set up under the auspices of CEIOPS' Committee on Consumer Protection (CCP). The objective of the Task Force was to draft advice which would be submitted to Members for approval and then onward transmission to the Commission.

The CCP first met on 9 February 2010 to discuss the substance and process for responding to the Commission's Request for Advice. 21 out of 30 CCP Members agreed to take part in the work of the Task Force. It was agreed that the TF would be split into three separate "Drafting Teams" (DTs), to be chaired by three separate CCP Members with participants in those Drafting Teams working as "Chief Draftspersons" and "Assistant Draftspersons". The three Drafting Teams agreed were:

- Drafting Team (DT) 1 ("Form of the Directive") (chaired by FR) – considering what legal framework and scope the Directive should have and what professional requirements should apply to insurance intermediaries;

- Drafting Team (DT) 2 ("Consumer Protection") (chaired by DK) – considering what the appropriate provisions should be for managing conflicts of interest and ensuring transparency of intermediary remuneration; and

- Drafting Team (DT) 3 ("Miscellaneous") (chaired by UK) – considering the current notification system, the general good and reduction of administrative burdens.

The work of DT2 was divided into the following four main issues:

1. Transparency of remuneration;
2. Conflicts of interests;
3. Information provided by the insurance intermediary (Article 12(4)); and
4. Possible improvement of Articles 12 and 13.

Whilst the first two subjects were included in the scope of DT2 remit as a result of the request for advice from the Commission, the third and the fourth subjects concerning Article 12(4) and the possible improvement of Articles 12 and 13 were included in the advice, following an oral request put forward by the Commission.

A number of meetings of the Drafting Teams were held and updates were provided to CCP Members at the end of April 2010, in mid-June 2010 and at the end of September 2010. CEIOPS Members were also updated on the progress of the Task Force at the Members Meetings on 29-30 March 2010 and 1-2 July 2010. The CCP also sought informal stakeholder input into this Advice from BIPAR (the European Association of Insurance Intermediaries), CEA (the European Insurers' Association) and consumer input from consumer representatives on CEIOPS' Consultative Panel.

The advice was formally approved by CEIOPS Members on 10 November 2010.

List of Recommendations

LEGAL FRAMEWORK

Recommendation 1

- The majority of Members support a classical directive. However, as a compromise, in light of the Commission's preference for a Lamfalussy Directive, Members could accept a "multi-level structure" as an alternative to a "Lamfalussy structure" for IMD2.
- The Luxembourg Protocol should be retained, albeit that some provisions could be incorporated in IMD2.

Recommendation 2

- Members recommend a single Directive with two parts: (i) organization of the profession/registration, for insurance and reinsurance intermediaries; and (ii) conduct of business requirements should be adopted for IMD2 for distributors of insurance products.

SCOPE

Recommendation 3

- The majority of Members agree that "direct sales" by insurance undertakings should be included within the scope of IMD2.

Recommendation 4

- Members are in favour of reinsurance intermediaries remaining within the scope of IMD2 on the basis of retaining the integrity of the Single Market and the ability of reinsurance intermediaries to exercise the right of freedom of establishment and services.

Recommendation 5

- The majority of Members support a revised definition of insurance intermediation.
- The majority of Members agree to the removal of "introducing" from the definition of "insurance intermediation" but coupled with clearer drafting of the activities that are considered to be insurance intermediation or exempt activities.

- The majority of Members support the IMD remaining an "activity-based" directive without the introduction of additional definitions of types of intermediaries (e.g. brokers/agents).

Recommendation 6

- Having regard to Recommendation 5, Members deem that a more precise wording of the activities within the scope of the IMD should tackle which "professions" fall out of scope.
- Members agree that the "outsourcing" of insurance intermediation activities to a third party should be caught by the scope of IMD2 and subject to the same rules applicable to insurance intermediaries.

Recommendation 7

- The majority of Members agree that the scope of the IMD should remain as broad as possible, but with little support for the removal of existing exemptions.
- Members, in general, support the current exemptions being clarified and strengthened in order to ensure legal certainty of the provisions, with flexibility for Member States to disapply exemptions where they impinge on their ability to tackle domestic market failures.
- However, a safeguard could be introduced in the form of a notification procedure in rare circumstances, in order to ensure that stricter provisions are not introduced without reason.

INTERNATIONAL DIMENSION OF INSURANCE INTERMEDIATION

Recommendation 8

- Members recommend that Article 1(3) subpara.2, IMD be amended to clarify the treatment of intermediaries from third countries. This amendment will have the effect of these intermediaries having to apply directly for 'permission' from every Member State that they wish to carry out insurance intermediation activities.
- Members also agreed that this Article might be further elaborated upon by reference to related provisions in MiFID (Articles 15 and 63), whereby:

  (a) difficulties in dealing with third countries might be drawn to the Commission's attention; and

  (b) the possibility and conditions for exchanging information with third countries could be clearly articulated.

Recommendation 9

- Member States may retain the ability to apply 'due credit' to an application for registration of an intermediary already registered in another Member State, but Members agree that this should be an option and not be binding on Competent Authorities in every circumstance.

Recommendation 10

- Members recommend that the Competent Authorities in each Member State be responsible for the application of IMD provisions to intermediaries from third countries. Accordingly, Members are not persuaded by the need to amend the IMD on this issue.

PROFESSIONAL REQUIREMENTS

Recommendation 11

- The majority of Members are in favour of the general aim of finding a common basic principle of knowledge and ability, irrespective of the method of distribution.
- Most Members support, as a minimum basis, a high-level principle which gives Member States the possibility to graduate the knowledge and ability requirements according to the activity pursued or type of intermediary.
- Members are unanimous in their view that **employees of insurance undertakings** should not be registered under IMD2. It should be the responsibility of the insurance undertaking to check the qualification and good repute of its employees.

Recommendation 12

- The majority of Members generally support a mutual recognition clause of intermediaries' knowledge and ability, preferably in IMD2 rather than in the Luxembourg Protocol.

Recommendation 13

- The majority of Members support the development of a mutual recognition clause of intermediaries' knowledge and ability, taking inspiration from the repealed system of the first Mediation Directive 77/92 or under the general Directive 2005/36. (Note that this is in addition to the provisions relating to freedom to provide services (FOS) and freedom of establishment (FOE)). This solution could, for example,

recognise a previous minimum registration period that the insurance or reinsurance intermediary was registered by another Member State on condition that the registration had not been revoked by a sanction and the licence was concurrent. Note: consideration should be given to freedom of movement under the Treaty.

- the pursuit of the previous intermediation activity shall not have ceased for a defined period before the date when the application for the new registration is made (see Article 7, Directive 77/92);

- the proof of the previous registration shall be established by a certificate, issued by the Competent Authority or body in the Member State of origin or Member State whence the person concerned comes, which the latter shall submit in support of his application presented to the new Member States (see Article 9, Directive 77/92).

CROSS-BORDER ASPECTS OF INSURANCE INTERMEDIATION, INCLUDING GENERAL GOOD RULES

Recommendation 14

- Members are in favour of retaining a system of formal notifications, as this is considered important for enhancing consumer protection. This is without prejudice to the possibility of Members publishing the above mentioned information on their websites (either as a list, a general database or any other means).

Recommendation 15

- Members agree that Article 6, IMD could be redrafted to provide greater detail and clarity.

- The majority of Members agree that the requirement for reinsurance intermediaries to notify under FOS should be removed. This is consistent with the approach applied to reinsurance undertakings under Directive 2005/68/EC which requires notification only in respect of FOE. It is entirely appropriate that the same approach is applied to reinsurance intermediaries and to achieve a corresponding reduction in administrative burden.

Recommendation 16

- Members agree that the IMD should be redrafted to require communication of any changes to the initial notification by the insurance/reinsurance intermediary to the home Member State supervisory authority and by the home Member States supervisory authority to the Host Member State supervisory authority.

Recommendation 17

- Members recommend that Member States and relevant non-Members of CEIOPS/EIOPA could review the Luxembourg Protocol to assist the Commission and update it to reflect the relevant changes arising from IMD2, with particular regard to a revised common set of harmonised templates for the content of passport notifications.

- It was noted by Members that it would be helpful to review the Protocol and be able to update it where necessary. This work should not commence until the changes to IMD2 have been agreed, but prior to implementation.

Recommendation 18

- Members agree that electronic notifications are a more immediate and efficient form of notification, but are mindful of the need to ensure security of such notifications.

Recommendation 19

- The majority of Members are in favour of amending the notification in Article 6(2). As a consequence, Article 6 would need to be redrafted to remove the exemption for Member States not to be informed.

Recommendation 20

- Members are in favour of the IMD being redrafted to remove the 'wait period' of one month for freedom to provide services (FOS) and replaced by a provision consistent with other insurance directives; that an intermediary may commence its activities as soon as its Home State Competent Authority has forwarded the notification to the host state Competent Authority.

- Where the notification is in respect of freedom of establishment (FOE), then the intermediary may, if it wishes, establish its branch at the earlier of:

  (a) one month from the date that the Home State Competent Authority forwarded the notification to the host state Competent Authority; or
  (b) receipt of a communication from the host state Competent Authority.

Recommendation 21

- Members are generally in favour of maintaining the *status quo* in relation to recording the evidence of a passport especially given its acceptance that 'registration', including cross-border activity, is a Home State responsibility.

- The majority of Members support recording the passport on their own Home State registers, but on a voluntary basis (i.e. they can choose to establish a list of incoming intermediaries as host state Competent Authority), on the basis that consumers will prefer to refer to the website of their Home State authority rather than that of the intermediary's Home State.

Recommendation 22

- Members are generally in favour of an abridged version of the definition of "freedom of services" contained within the Luxembourg Protocol to be included with the definitions in IMD2.

- Similarly, Members feel that the remaining explanatory narrative in the Luxembourg Protocol – detailing the circumstances when notification under freedom of services would be required – could be transposed into new recitals to IMD2.

- By definition, the non-exhaustive nature of the list of examples contained in the Luxembourg Protocol should not be transposed into IMD2 but remain in the Luxembourg Protocol. Provisions in other relevant insurance directives (e.g. Solvency II Directive, Article 13) should be taken into consideration in order to retain consistency of approach.

- Members recommend that the Luxembourg Protocol is similarly redrafted to take into account the changes proposed, but that this work should not commence until the changes to IMD2 have been agreed and effected.

Recommendation 23

- Members support an amendment to the IMD to better articulate those precautionary measures that may be taken by host Member States.

Recommendation 24

- The majority of Members that indicated a preference support amending the IMD, but amending the Luxembourg Protocol could be accepted by some as a compromise. Although material aspects regarding general good conditions (scope, limitations, etc.) are subject to courts' interpretation (EU and national; in the latter case, when applying EU law under the terms of the Treaties and secondary acts) and have also, as a reference, the Commission Interpretative Communication (2000/C43/03) 'Freedom to provide services and the general good in the insurance sector', Members believe that transparency could be enhanced, for more clarity and

accessibility and for the sake of increasing consumer protection.

Recommendation 25

- The majority of Members are in favour of amending the wording of Recital 14 and Article 2(9)(b) and Article 3(1) to take account of the ambiguity that has arisen in relation to the location of an intermediaries "registered office" and "head office", especially given practical examples where misinterpretation had given rise to significant difficulties for Competent Authorities and intermediaries alike.

Recommendation 26

- The majority of Members are not in favour of substantially changing the existing registration requirements.

CONSUMER PROTECTION

Recommendation 27

- The majority of Members regard an "on request" regime as a minimum harmonisation regime, maintaining the possibility for Member States to impose stricter requirements as the best possible solution to the improvement of the transparency of remuneration. Under the "on request" regime, the intermediary should be obliged to inform the customer if the intermediary receives any kind of remuneration.

- However, a safeguard could be introduced in the form of a notification procedure in order to ensure that stricter provisions are not introduced without reason.

- The majority of Members agree that, in this context, the disclosure of information need not be given either when the insurance intermediary mediates in the insurance of large risks or in the case of intermediation by reinsurance intermediaries.

Recommendation 28

- With regards to the minimum harmonisation of an "on request" regime, Members recommend that customers are given the right to request information on remuneration.

- In addition, the majority of Members consider the best possible way to ensure that the customers are aware of their right to request for information is to oblige the intermediary to inform the customer of his right to request for information on remuneration. The customer should, as a minimum, be informed of his right to request the information:

1. before the conclusion of the contract; and

2. before any amendment or renewal of the contract.

- The right of the customer to request the information shall exist until the contract has ended.

- If the customer asks for the information from the intermediary, the intermediary shall provide the information promptly (i.e. without undue delay).

Recommendation 29

- With regards to the disclosure of remuneration, Members recommend that all kinds of remuneration are included in a disclosure of remuneration.

- The majority of Members recommend that, in the case where remuneration is uncertain in amount, the information provided by the intermediary should consist of a description of the benefit received (in connection to the remuneration in kind) or a description of the calculation criteria (e.g. in connection to contingent commissions). The estimated amount or basis of calculation will only have to be disclosed if the consumer requests the information.

Recommendation 30

- Members recommend that the current regulatory approach of the IMD to the issue of conflicts of interest be based on the mandatory disclosure of certain situations as a good regulatory starting point which should be maintained but also supplemented.

- Members do not consider the current provisions in the IMD as sufficient to avoid significant conflicts of interest. Therefore, Members recommend that the IMD is supplemented with a separate article concerning conflicts of interest.

- To this extent, Members recommend that the MiFID Level 1 regime could be regarded as an orientation point for the management of conflicts of interest. for insurance intermediation.

- Members also recommend that a general "duty of care" principle should be included in the IMD in connection with the conflicts of interest requirements.

- Members recommend that the intermediary be required to always identify and manage conflicts of interest (disclosure could be a form of managing the conflict of interest). But if the conflict of interest is not manageable or avoidable, the intermediary should consider, according to a set of pre-defined principles, whether or not he is able to act in the customer's best interest and whether or not to refuse the business.

- Members also recommend that the provisions concerning conflicts of interest should apply to both intermediaries and insurance undertakings. In order to ensure proportionality, a three-level approach could be used:

1. High-level principles;

2. Detailed provisions - European Level; and

3. Detailed provisions - National Level.

- While all types of intermediaries as well as insurance undertakings should comply with the high-level principles in the first level, the requirements in the second and third levels should apply to the insurance intermediaries and, where appropriate, tailored provisions from the second and third levels should be drafted for direct selling performed by insurance undertakings.

- In addition, due to the differences between the markets in Europe, Members recommend that it is made possible for Member States to introduce stricter national requirements, including the possible banning of some activities where the conflict is considered not manageable without leading to policyholder detriment.

- Members recommend that a distinction can be made in conflicts of interest regulation at national level with regards to intermediaries, who provide a fair analysis of the market, and intermediaries who are under a contractual obligation to conduct insurance intermediation business exclusively with one or more insurance undertakings. This is because different activities may result in different conflicts of interest for different types of intermediaries.

- Members support CEIOPS/EIOPA considering the possibility of elaborating on non-binding guidelines in connection to national conflicts of interest provisions and in connection to the distinction between "independent" and "dependent" insurance intermediation activities.

Recommendation 31

- Members recommend that some of the information requirements which are currently set out in Article 12(1) e.g. the provisions in Article 12(1)(c), (d), (e), (ii), (iii) as the Directive is currently worded should be included in the conflicts of interest provisions. It was also noted that duplication of these provisions should be avoided. Members recommend that the requirements in (c) and (d) are drafted more clearly in order to enhance transparency over the potential conflict of interest between the intermediary and the insurance undertaking in relation to the intermediary firm/chain ownership.

- Members generally recommend the introduction of two separate articles for information disclosure and conflicts of interest provisions in order to avoid confusion. Members also find it very important that the information requirements in the IMD are organised in a way that the customers are able to understand.

- A large majority of Members are in favour of not subjecting reinsurance intermediaries to the conduct of business requirements under the proposed revisions to Articles 12 and 13.

- Members recommend that both insurance undertakings and insurance intermediaries will have to comply with the same information requirements.

- Finally, Members support all sales of insurance products being subject to similar information requirements under Article 12, IMD.

Recommendation 32

- Members do not find it necessary to change Article 12(2). In addition, Members do not consider the article appropriate for direct selling.

Recommendation 33

- All Members can accept the wording of Article 12(3) as currently interpreted by Member States, if it is combined with Article 12(5) which leaves room for the introduction of stricter national requirements (minimum harmonisation). In addition, the Members recommend that Article 12(3) should also apply to direct sales.

Recommendation 34

- Members support maintaining the *status quo* under Article 12(4), IMD for reinsurance intermediaries and the intermediation of contracts of large risks.

Recommendation 35

- Members recommend that the current drafting of Article 12(5) is maintained. Members favour maintaining a minimum harmonisation directive due to the differences between the European markets for insurance intermediation.

Recommendation 36

- Members recommend that the requirements in Article 13 should also be applied to direct distance selling. In addition, Members recommend that the Commission take into consideration the existing provisions in the Distance Marketing of Consumer Financial Services Directive (DMCFSD) if it decides to apply the provisions in Article 13 to direct sales. This should be done in order to ensure sufficient compatibility between the IMD and DMCFSD, which currently regulates the provision of information in connection to direct distance sellers.

Recommendation 37

- As mentioned in Recommendation 36 above, Members recommend that Article 13 be revised with a focus on compatibility between the IMD and DMCFSD. For example, it is the opinion of Members that it should ensure that the term "durable medium" is understood in the same way in both the IMD and DMCFSD.

- In addition, Members also recommend that consideration be given to the possible provision of guidance on the presentation of the information that has to be provided to the customer.

Recommendation 38

- Members recommend that the current drafting of Article 13(2), IMD be maintained.

Recommendation 39

- Members recommend that the requirements in Article 13(3), IMD be aligned with the requirements set out in the DMCFSD in order to offer consumers the best possible protection in connection to distance selling.

SECTION 1: LEGAL FRAMEWORK

1 Questions posed by the Commission

1.1 The relevant section from the Commission's Request for Advice is as follows:

"Legal Framework of the IMD2"

The Commission is keen to receive the views of CEIOPS concerning the legal framework of the IMD2. The starting point of our consideration relating to the legal basis of the revised IMD is to convert the Directive into a Lamfalussy Directive. Such a legal framework would not only introduce more flexibility but also ensure that at level 1 we might concentrate on high level fundamental principles, leaving the details to level 2 and 3.

The following questions should in particular be addressed:

- *What would be practical advantages of a Lamfalussy structure for IMD2?*
- *What would be practical disadvantages of a Lamfalussy structure for IMD2*
- *How should IMD2 be structured under the new supervisory framework? For example, what are the areas, if any, where CEIOPS could usefully adopt binding technical standards?*"

1.2 In addition, the Commission asked when reviewing this area for CEIOPS to give further consideration "*to a list of areas under the IMD, which would be suitable for further detailed/precise guidance at subsequent levels (2 and potentially 3)*" - having taken into account the "*current legal structure of the MiFID*" – as well as "*a list of areas where* CEIOPS *could imagine binding technical standards (or preferences for such a system) in IMD2*".

1.3 Members expressed concerns about the difficulty in providing advice in this area, because of a variety of reasons, such as:

A number of different terms have been used as a means of suggesting how technical changes could be made to the directive all of which may have a different impact if adopted. For purposes of consistency, the Members proposed that the following terms be used to address these concerns:

- "Lamfalussy structure": when referring to the use of the 4-level structure as proposed in the Lamfalussy report (e.g. MiFID-style Directive);

- "Classical structure": when referring to a single level Directive (e.g. current IMD);

- "Multi-level structure": when referring to a structure that accommodates both high level principles and more detailed rules whilst not specifying the EU legislative procedure to be used.

Despite the fact that the formulation of the new European Supervisory Framework has been agreed at EU political level, there is still some uncertainty about the nature of the rules on regulatory technical standards, implementing technical standards and its impact in the Lamfalussy structure.

1.4 Bearing this in mind, this section focuses on the following three areas:

- Lamfalussy Structure/Classical Directive and Luxembourg Protocol (CEIOPS-DOC-02/06 Rev 1);
- Possible areas eligible for regulatory technical standards and implementing technical standards under the new Supervisory Framework; and
- One or Two Directives

2 Lamfalussy Structure/Classical Directive and Luxembourg Protocol

2.1 Introduction

This section sets out the options for modifying the legislative framework of the IMD. The advantages and disadvantages of a Lamfalussy Structure compared to a Classical Directive, and the future of the Luxembourg Protocol[4], that provides guidance to CEIOPS Members and Observers in relation to IMD provisions.

2.2 Advantages and disadvantages of a Lamfalussy Structure

Members have noted the following non-exhaustive list of advantages and disadvantages in relation to a Lamfalussy Structure in the table below.

[4] Protocol relating to the Cooperation of the Competent Authorities of the Member States of the European Union in Particular Concerning the Application of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on Insurance Mediation (revised version of October 2008).

Figure 1: Comparison of Advantages & Disadvantages of a Lamfalussy Structure

Advantages	Disadvantages
• More efficient organisation of the legal framework using Lamfalussy Directive – Level 1, Level 2 and Level 3 (or as an alternative, through a Classical Directive, but adopting Level 2 requirements in eligible areas e.g. information requirements, conflicts of interest). • Introduction of more flexibility in a dynamic environment – can adapt to innovative products with scope for detailed rules to be developed by CEIOPS/EIOPA on non-harmonised issues. • Improvement in the quality of legislation through targeted consultation procedures (although this could be achieved in the Classical Directive/Protocol model, through the promotion of typical consultation procedures from the Commission and CEIOPS). • Use of expert regulators, as the L3 Committees are involved in the legislative procedures which is also the case with a Classical Directive.	• More difficult to amend a Lamfalussy Directive. • Less flexibility; not adaptable to specific market structures/market failures in Member States as limited or no discretion available at Level 2. • Potential risks of Level 2 requirements resulting in "maximum harmonisation" measures which may, in certain situations, prove inefficient and counter-productive. • The legislative process may result in an elongated transposition period for Member States, creating a degree of uncertainty about final measures. • Additional regulatory requirements associated with a Lamfalussy Structure may be difficult to interpret by market players and consumers, and have the possible negative effect of multiple co-existing legal interpretations resulting in legal uncertainty. • Different levels of regulation (the Directive and national law/regulations as the EU framework will influence domestic level) lead to overly complicated regulatory landscape and lack of harmonisation. • Not all Member States system of supervisory competences are integrated in a single regulatory body, making it difficult to implement legislative changes, particularly as not all authorities are represented in CEIOPS/EIOPA. • Unpredictable influence within the scope of EU legislative procedures.

Advantages	Disadvantages
	• A multi-level approach can be adopted without going through the Lamfalussy process e.g. UCITS IV Directive.

2.3 Alternative legislative solutions

1. Members also considered other legislative solutions, such as the possibility of making the provisions in the Luxembourg Protocol legally binding. However, without prejudicing the possibility of incorporating some of the guidance in the Luxembourg Protocol into IMD2, some Members have expressed concern about the feasibility of the Luxembourg Protocol becoming a legally binding EU instrument. Moreover, consideration should be given to how non-CEIOPS Members could adopt these measures and how its implementation will be enforced.

2. A different approach to a Lamfalussy Structure or a Classical Directive, that could be accepted by most Members as an alternative, is a "multi-level structure", meaning the adoption of high-level rules, plus more detailed rules where agreed necessary. The majority of Members favour this approach which retains the conventional structure of the IMD, but adopts more detailed requirements (possibly in the form of regulatory technical standards or implementing technical standards) in limited areas where agreed necessary. Such an alternative could be complemented by amending or incorporating provisions of the Luxembourg Protocol.

2.4 Preferred options

1. The majority of Members are not in favour of adopting a Lamfalussy Structure and prefer retaining the Classical Directive structure of the IMD (single tier). Also, some Members have put forward some strong views against a Lamfalussy Structure with only a minority of Members supporting this approach for IMD2.

2. Whilst most Members support the possible adoption of a multi-level structure as an alternative solution to keeping the directive as a classical directive the majority of Members only support this approach under certain conditions, which are noted below:

   - The proposal should be limited and subject to clear identification of areas were multi-level of rules (i.e. high-level and more detailed requirements) are necessary and should not be disproportionate in their application;

   - This approach should be based on the objective of increasing consumer protection in those areas; and

   - Eligible areas should receive support from a majority of Members (if possible, by consensus).

3. The table below contains some examples of eligible areas for a "multi-level" approach either as regulatory technical standards or implementing technical standards by the new European Supervisory Authority - EIOPA. One Member does not support the compromise solution and only supports a classical directive. The examples below are separated into two categories: (i) the areas which received most support from Members (marked in bold) and (ii) other areas referred to by a few Members.

Figure 2: Examples of eligible areas for multi-level approach

Legal Framework	• Areas which received most support: **- Professional requirements** • Other areas referred to: - Scope and exemptions to the general scope; - Definitions; - Financial requirements.
Consumer Protection	• Areas which received most support: **- Information requirements;** **- Remuneration disclosure;** **- Conflicts of interest.** • Other areas referred to: - Exemptions to the disclosure obligations (e.g. business-to-business contracts).
Miscellaneous	• Areas referred to: - Cross border activities; - Treatment of third countries.

4. At this stage, it is difficult to predict the precise future impact of the new EU Supervisory Framework as this, in itself, will affect the future structure of IMD2 as well as future work carried out by CEIOPS/EIOPA following delivery of this Advice to the Commission. This uncertainty has limited Members ability to elaborate on the whether or not the Luxembourg Protocol could become a legally binding instrument or what its role could be within the new EU Supervisory Framework.

5. Nonetheless, the majority of Members would like to retain the Luxembourg Protocol in conjunction with IMD2, as it acts as a useful guide and point of reference for Member States and Observers. This option could be adopted without prejudice to the revision of the Luxembourg Protocol (in light of the revised Directive) and the incorporation of certain provision in IMD2. For example, the guidance on freedom to provide cross-border services (FOS) was identified by Members as eligible of being integrated in IMD2.

6. The areas suggested meet the requirements foreseen in the general framework for regulatory technical standards or implementing technical standards[5].

[5] See Articles 10-15 of the latest publicly available text of the draft Regulations establishing the EBA, ESMA and EIOPA and recitals 9-16 of the "Omnibus I" Directive (on the Council public register), dated 9th November 2010.

Recommendation 1

- The majority of Members support a classical directive. However, as a compromise, in light of the Commission's preference for a Lamfalussy Directive, Members could accept a "multi-level structure", as an alternative to a "Lamfalussy structure" for IMD2.

- The Luxembourg Protocol should be retained, albeit that some provisions could be incorporated in IMD2.

3 One or Two Directives?

3.1. The majority of Members prefer a single Directive with two separate sections on: (i) organization of the profession/registration of insurance and reinsurance intermediaries and (ii) conduct of business requirements for distributors of insurance products.

3.2 Some Members noted that there is a need to ensure a clear organization of the structure of IMD2, guaranteeing that there is no uncertainty about which set of rules apply to each section. For example, conduct of business rules do not appear necessary for reinsurance intermediaries, due to the nature of the reinsurance activity and only some market conduct rules, for example, should be applied to direct sales as measures exist in other insurance directives that should be taken into account.

Recommendation 2

Members recommend a single Directive with two parts: (i) organization of the profession/registration, for insurance and reinsurance intermediaries; and (ii) conduct of business requirements should be adopted for IMD2 for distributors of insurance products.

SECTION 2: SCOPE

2.1 Introduction

1. The Commission asked CEIOPS, in its Request for Advice, to address, in particular, the following questions regarding the scope of the IMD:

    1. *What should be the scope of insurance intermediation to be covered by IMD2?*

    2. *What should be the conditions for exemption from IMD2, taking into account the need to ensure legal certainty?*

    3. *How could direct sales by the insurance undertakings be effectively incorporated in order to guarantee a level playing field with the sale of insurance products through insurance intermediaries?*

2. This section aims to address, or at least indicate possible options, in relation to the questions noted above as well as areas closely related thereto.

3. In addition, this section considers issues relating to markets/activities which operate on the perimeter of the IMD, the so called "grey area", where the application of the IMD is not sufficiently clear, for example, price comparison websites and the application of the directive to introducers of insurance business. In this respect it would be preferable to address the level of legal certainty in those areas in IMD2.

4. It should be noted that some amendments to the scope of the IMD could have an adverse affect on administrative burdens of Competent Authorities, markets and intermediaries alike.

2.2 What should the scope of the "Insurance Intermediation" be under IMD2?

1. Members are generally in favour of IMD2 having as broad a scope as possible in order to ensure adequate market coverage in terms of intermediation activities carried on throughout the European Community.

1. The majority of Members support the inclusion of **direct sales by insurance undertakings** in the scope of IMD2. The main rationale for their inclusion is to ensure consumer protection. Members are in favour of a "level playing-field" in this respect. Members regard the protection afforded to consumers should be the same regardless of the sales channel through which they choose to purchase their insurance. Members were unanimous in their view that **employees of insurance undertakings** should <u>not</u> be registered under IMD2.

    <u>Sales by an insurance contract by an Insurance undertaking of other insurance undertakings (Intra-group arrangements)</u>

2. The majority of Members agreed that an insurance undertaking which is intermediating contracts of insurance on behalf of another insurance undertaking as agent, should be regarded as an insurance intermediary for the purposes of IMD2. However, some Members pointed out the need to ensure whether, in the opinion of the Commission, that performing intermediation activities by insurance

undertakings is permissible, taking into account the limitations imposed on the scope of their activities in other insurance directives.

3. There was general support for a system whereby if an Insurance Undertaking (A) is selling products of another Insurance Undertaking, in branches than those for which they are authorised (B), the members of the senior management of (A) (whose nominees are responsible for distributing those products) and the company name of (A), should appear on the home Member State register.

4. One Member suggested that separate articles in the conduct of business section of IMD2 should be drafted to take account of different distribution channels.

Recommendation 3

- The majority of Members agree that "direct sales" by insurance undertakings should be included within the scope of IMD2.

Reinsurance intermediaries and large risks

5. Members' opinions were divided with regards to the application of the IMD to **reinsurance intermediaries.** Some Members are of the view that reinsurance intermediation should not be covered by the scope of IMD2 as it relates to a business-to-business relationship. Other Members feel that reinsurance intermediation should remain within the scope of IMD2 in order preserve the Single Market objective of the IMD and to allow these types of intermediaries to benefit from the European passport.

6. CEIOPS was also asked to consider whether the exemption in Article 12(4), IMD is (i) still justified and particularly whether a more distinguished/flexible regime as regards the intermediation of large risks might be an option and (ii) if there might be advantages to enhancing transparency requirements in this respect. The exemption states that the information in Articles 12(1), (2) and (3) need not be given in the intermediation of reinsurance contracts and large risks.

7. Members discussed the questions tabled by the Commission in this regard, taking into account other Insurance Directives (notably, Solvency II) as far as the concept of "large risks" is concerned, as well as MiFID provisions on client categorization. Moreover, Members considered the results of a survey on national experiences regarding the transposition of this Article into domestic legislation.

8. The conclusions of such survey were the following:

   - The exemption was implemented in all the Member States participating in the survey:

     a. Member States did not find it necessary, from a national regulatory policy perspective, to regulate the matters of information requirements/advice regarding intermediation of large risks and reinsurance contracts;
     b. Member States reported that they were not aware of any particular problems and/or national discussions (past and/or on-going) regarding the application of the exemption; and
     c. Member States were not able to identify any practical evidence to support removing the exemption.

9. Members considered the nature and characteristics of the reinsurance and large risks as well as the specific type/profile of the parties, in particular, the customer,

who is usually sophisticated, in these contractual relationships in respect of improving consumer protection. Members recognized that these customers are usually sophisticated in terms of knowledge and financial capability and normally receive information and advice often tailored to their needs and rendered by professionals. The degree of information asymmetry is considered to be minimal and these types of customers typically have long-standing relationships with the reinsurer/intermediary, formally reviewed.

10. Given the above, it is the view of Members that the exemption in Article 12(4) should be maintained. Members have not seen any reasons to go further in relation to this subject.

Recommendation 4

- Members are in favour of reinsurance intermediaries remaining within the scope of IMD2 on the basis of retaining the integrity of the Single Market and the ability of reinsurance intermediaries to exercise the right of freedom of establishment and services.

2.3 Definition of "Insurance Intermediation"

1. The majority of Members are in favour of retaining the **activity-based definition** of insurance intermediation in IMD2. Most Members are in favour of improving the existing definitions and some pointed out that such improvement should be linked to a clarification of the information requirements in the IMD. Members who wish to align insurance intermediation activities with different types of insurance intermediaries (e.g. brokers/agents) in their national legislation should be free to do so. Members recognise the importance of distinguishing between dependent and independent intermediaries, for example, in the area of conflicts of interest.

2. An activity-based approach provides an appropriate degree of flexibility to overcome the variation in national markets. A significant number of Members' national regimes are based on associating intermediation activities with defined types of insurance intermediaries, which may or may not be restricted by the definition (e.g. brokers are only allowed to carry out intermediation of the basis of fair analysis). In some cases, Members use the same description of an insurance intermediary (e.g. broker) but the underlying criteria is different. These findings were illustrated in Annex 2 of the CEIOPS IMD implementation report. Only three Members were not in favour of amending the existing definitions.

3. Members favoured developing a more precise definition of insurance intermediation will assist in addressing those activities of professions that fall into the "**grey area**" (i.e. price comparison websites, car rental companies …) and whether or not they are in or out of the scope of IMD (see Section 3 below).

4. Members considered whether a policyholder was an insurance intermediary in the context of a collective policy to which insured persons adhere, when the policyholder does not receive any remuneration, collect premiums from the insured on account of the insurance undertaking, nor perform any other intermediation activities, such as claims-handling. Members concluded that this should not be regarded as insurance intermediation.

5. The majority of Members did not support a definition in parallel of **dependent and independent intermediaries** in addition to the activity-based definition. However, there was general support for a mechanism to enable Member States to align requirements such as registration requirements and information requirements to those intermediaries operating as brokers (independent) and tied insurance intermediaries (dependent), by defining more precisely the activities in scope of the IMD, whilst maintaining flexibility for Member States who have not adopted a demarcation of IMD requirements in their national legislation, in this area to continue to do so.

6. A number of Members support the idea of basic definitions of **agents and brokers** being included in IMD2, in addition to the activity-based definition, as these categories appear to exist in most Member States. In their view, this could constitute a common minimum standard and could be a starting point for further harmonisation. During discussions, there was general agreement that this could be achieved by making clearer links between provisions in order to achieve the same outcome. For example, linking Member State ability to adjust the knowledge and ability requirements in line with the activity of insurance or reinsurance intermediation (e.g. fair analysis) could largely achieve the same result, without having to introduce "defined" types of intermediaries in the directive.

7. Three Members pointed out problems they had encountered with narrow definitions of types of intermediaries for example, difficulties to find the criteria to define what

are independent or non-independent intermediaries. In their view, this provided a greater risk of regulatory arbitrage as intermediaries may seek to align their business models to avoid fitting in the predefined categories and could lead to consumer confusion as the focus should be on the information needs of the customer not the type of intermediary.

8. Members generally agree to exclude **introducing** as an activity in the scope of IMD2, should this activity merely consist of forwarding contact details of potential policyholders to insurance undertakings or insurance intermediaries without giving information regarding the product. If any information about the product is passed to the consumer then this must be considered as an insurance intermediation activity. It should be noted that only some Members have included provisions on introducers in their national legislation transposing the IMD whilst other Member States are not familiar with the term "introducer". Two Members do not support the above recommendation, preferring to keep the concept of "introducing". One Member pointed out if there is a clear exemption concerning simply passing information the removal of introducing would not be necessary.

Recommendation 5

- The majority of Members support a revised definition of insurance intermediation.
- The majority of Members agree to the removal of "introducing" from the definition of "insurance intermediation" but coupled with clearer drafting of the activities that are considered to be insurance intermediation or exempt activities.
- The majority of Members support the IMD remaining an "activity-based" directive without the introduction of additional definitions of types of intermediaries (e.g. brokers/agents).

2.4 What type of professionals should be included within the scope of IMD2 to ensure legal certainty?

Price comparison websites

1. Members note that price comparison websites may operate EU-wide, but generally support the view that they should be treated equally in Member States for the sake of consumer protection.

2. Some Members viewed the activity of introducing and proposing by virtue of displaying or ranking, for example, 50 insurance contracts, as an insurance intermediation activity. In addition, a number of Members considered price comparison websites as brokers, which should to be regulated, particularly if, for example, they are remunerated on the number of click-throughs to insurance undertakings websites or number of contracts sold.

3. It will be difficult to tackle this issue by simply including or excluding price comparison websites from the scope of IMD2. There will have to be a distinction made about how far the user of such a website can go in order to be informed about or conclude an insurance contract. In other words, if there is no support (from the website) to the sale of an insurance contract, the activity should be excluded from the scope. It should fall within the scope if the consumer, at the end of the process, can conclude the contract of insurance or if the consumer receives a recommendation to buy one or more contracts of insurance.

5. A practical issue was raised about how to identify the home Member State of such websites. In addition, it was also noted that, not only websites could be used to compare insurance products by price or other criteria, but also other media could be used, such as magazines or even consumer bodies/associations who use comparative tables to inform general members of the public.

Car rental companies

5. Some Members expressed concern over excluding car rental companies from the scope of IMD2 as this might set a precedent and, in addition, it could lead to competition issues with other intermediaries operating in those markets. In fact, other stakeholders might follow and ask for exemptions. Note that there is significant variation among Member States as to whether car rental companies are caught within the scope of the existing IMD.

6. Some Members stated that car rental companies should not to be exempted as they do not meet the requirements for exemption of Article 1(2), IMD. It appears that the majority of Members have not placed car rental companies under a special regime within their national provisions regarding insurance intermediation.

7. Several options were considered to bring about legal certainty on this specific issue but a majority view could not be reached on the most appropriate approach. Subsequently, Members agree that a more precise drafting of the scope of intermediation activities could facilitate a clearer view of what activities are outside the scope of the directive.

Wholesale (master) brokers

8. A variety of approaches exist amongst Member States in relation to the regulation of wholesale brokers and there appears to be some doubt, by some Members, as to whether the scope of their activities is captured under the current IMD provisions. Some Members also questioned the level of "responsibility to the

consumer" conferred on these types of intermediaries.

9. Some Members were of the opinion that this should be targeted for further analysis especially, as this activity often engages cross-border relationships. This could focus on, at the very least, some of the following areas regarding liability and applicable law:

- Accountability and (type of/respective) liability of the several insurance intermediaries intervening;
- The definition of the location/place where the services are rendered; or
- Which are the obligations of (each of) the insurance intermediaries involved? etc.

10. Members concluded that current provisions in the IMD should not be amended to reflect any separate treatment of wholesale intermediaries. However, Member States may wish to modify their national legislation to take into account any specific requirements relating to these types of intermediaries.

Outsourcing

11. A survey amongst CEIOPS Members illustrated that it was important that, where intermediaries outsource[6] insurance intermediation activities to a third party, this should be caught within the scope of IMD2, to prevent circumvention of the provisions through this route.

12. Two Members consider that total or partial outsourcing of intermediation activities (e.g. outbound call centres) should not be considered as insurance intermediation. However, some consumer protection provisions should be introduced such as:

- The outsourcing agreement should clearly state that the undertaking is fully responsible for activities carried out by the outsourcer and its employees;

- The appointment of a responsible manager in charge of controlling and coordinating the outsourcer's activities as well as assisting customers with problems regarding outsourcer's employees; and

- Outsourcer employees should be subject to some professional requirements and periodical training in order to obtain a specific knowledge of the contracts they sell.

[6]Outsourcing is primarily covered under Article 49 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):

1. Member States shall ensure that insurance and reinsurance undertakings remain fully responsible for discharging all of their obligations under this Directive when they outsource functions or any insurance or reinsurance activities.

2. Outsourcing of critical or important operational functions or activities shall not be undertaken in such a way as to lead to any of the following:

(a) materially impairing the quality of the system of governance of the undertaking concerned;
(b) unduly increasing the operational risk;
(c) impairing the ability of the supervisory authorities to monitor the compliance of the undertaking with its obligations;
(d) undermining continuous and satisfactory service to policy holders.

3. Insurance and reinsurance undertakings shall, in a timely manner, notify the supervisory authorities prior to the outsourcing of critical or important functions or activities as well as of any subsequent material developments with respect to those functions or activities.

The minority of Members are of the opinion that outsourcing of direct sales constituted insurance intermediation.

Recommendation 6

- Having regard to Recommendation 5, Members deem that a more precise wording of the activities within the scope of the IMD should tackle which "professions" fall out of scope.

- Members agree that the "outsourcing" of insurance intermediation activities to a third party should be caught by the scope of IMD2 and subject to the same rules applicable to insurance intermediaries.

2.5 What should be the conditions for exemption from IMD2, taking into account the need to ensure legal certainty?

1. Members agreed, almost unanimously, that exemptions should be retained in IMD2. Some Members preferred to remove all exemptions because, with the impending legislation on Packaged Retail Investment Products (PRIPs), there was no need for any exemptions in the "non-PRIPS area". These Members argued that the PRIPs regime would, in any event, create a two-level regime and there was no need to add another one. Another reason was that consumers often did not receive sufficient information about insurance contracts from the intermediaries falling under the exemptions.

2. The majority of Members were against an exemption for **low-risk products**, because the primary focus of IMD2 should be consumer protection and legal certainty. Therefore, excluded activities should be clearly identified. It was noted that setting a low level of risk as the condition for exemption, would impact on the number of intermediaries registered and on the primary aim of consumer protection. It was also noted that it may be difficult to distinguish, among other things, between differences in markets' maturity and societies' legal and insurance awareness, "low-high risk products/services" for non-PRIPs products. Also some Members were not familiar with such a separation in their domestic legal framework.

3. Some Members prefer a more general exemption based on the **sum assured**, rather than a long list of exemptions. This approach would, for example, ensure the inclusion of travel agents within scope, if they met the directive requirements, but keep sellers of low-value/low-risk products outside the directive. However, Members agreed that there should be flexibility for Member States to make a distinction in their own national legislation between low risk products and/or markets.

4. The majority of Members agreed that "label-based" exemptions i.e. based on specific types of professions should not be proposed. As regards "activity-based" exemptions, the views of Members seemed to be slightly in favour.

5. The majority of Members are in favour of a **clarifying and amending the exemptions in Article 1(2) IMD**.

6. One Member suggested that the exemption regime was not needed. The directive should provide for "declared intermediaries": persons distributing insurance products on an ancillary basis to appear on the national register, along with their authorising persons; they would not be subject to the same registration requirements as fully authorised intermediaries. Furthermore, they could be removed from the register or banned for carrying out intermediation activities in the case of non-compliance with the conduct of business requirements.

Recommendation 7

- The majority of Members agree that the scope of the IMD should remain as broad as possible, but with little support for the removal of existing exemptions.

- Members, in general, support the current exemptions being clarified and strengthened in order to ensure legal certainty of the provisions, with flexibility for Member States to disapply exemptions where they impinge on their ability to tackle domestic market failures.

- However, a safeguard could be introduced in the form of a notification procedure in rare circumstances, in order to ensure that stricter provisions are not introduced without reason.

SECTION 3: INTERNATIONAL DIMENSION OF INSURANCE INTERMEDIATION

3.1 Introduction

This section includes, but is not limited to the following question posed by the Commission:

- *How can the legal certainty of services offered by insurance intermediaries, established in third countries, in the territory of Member States, be improved?*

Current arrangements under IMD and issues arising

1. The existing provisions under IMD are set out in Article 1(3) subparagraph 2 and Article 2(9) and recital 14:

   - Article 1(3) subparagraph 2 states that *"this Directive shall not affect a Member State's law in respect of insurance intermediation business pursued by insurance and reinsurance intermediaries established in a third country and operating on its territory under the principle of freedom to provide services, provided that equal treatment is guaranteed to all persons carrying out or authorised to carry out insurance intermediation activities on that market"*.

   - According to Article 2(9) and recital 14 in conjunction with Article 3(1), the intermediaries should be registered with "the Competent Authority of their home Member State". "Home Member States" means where the intermediaries have their residence or their head office. Following from that, the IMD does not apply to intermediaries established in third countries.

   Therefore, third country intermediaries have to apply directly for 'permission' from every Member State they want to intermediate within, otherwise the intermediation is illegal.

2. According to a survey of the Members, only a few have registered subsidiaries from third countries. Other than one Member, there are no branches of companies from third countries acting within one Member State. The requests of intermediaries from third countries concerning the registration within one Member State are significantly low.

3. In comparison with other European directives, the IMD is less prescriptive concerning the relationship with third countries. This gave rise to the following issues which are examined below:

3.2 *Is there a need to clarify the scope of the IMD in this respect?*

1. Directive 2006/123/EC on services in the internal market contains in recital 36 a detailed definition of the personal scope of application including a reference to Article 48 of the Treaty establishing the European Community (TEC) (now Article 54 TFEU). There it explicitly states that the Directive does not apply to persons not having the nationality of an EU Member State or not being established according to the law of an EU Member State.

2. Article 1(3) subparagraph 2, IMD states that it does not apply to intermediaries established in a third country. However, the statement is limited to the condition

that "equal treatment is guaranteed to all persons …". This condition is in some way ambiguous as it is not based on the superior law of the Treaty. According to Article 49 and 56 TFEU in conjunction with Article 54 the freedom of services and the freedom of establishment does only apply to persons having the nationality of an EU Member State or being established according to the law of an EU Member State without any limitation.

3. Provisions in MiFID, Articles 15 and 63, provide a basis for treatment of intermediaries from third countries which could be adapted for the IMD.

Recommendation 8

- Members recommend that Article 1(3) subpara. 2, IMD be amended to clarify the treatment of intermediaries from third countries. This amendment will have the effect of these intermediaries having to apply directly for 'permission' from every Member State that they wish to carry out insurance intermediation activities.

- Members also agreed that this Article might be further elaborated upon by reference to related provisions in MiFID (Articles 15 and 63), whereby:

  (a) difficulties in dealing with third countries might be drawn to the Commission's attention; and

  (b) the possibility and conditions for exchanging information with third countries could be clearly articulated.

3.3 *Should there be set up some kind of relief for those intermediaries established in third countries who are already licensed for insurance intermediation in one Member State?*

1. Directive 2005/36/EC provides, in Article 3(3), that formal qualifications issued by a third country shall be regarded as evidence of formal qualifications if the holder has three years' professional experience in the profession concerned on the territory of the Member State which recognised that evidence of formal qualifications in accordance with this Directive, certified by that Member State. However, Directive 2005/36/EC does again apply only to persons having the nationality of an EU Member State.

2. Members considered the pros and cons of facilitating freedom of services and freedom of establishment for intermediaries established in third countries already licensed by one Member States and concluded that because of the harmonisation by the IMD, Member States have the same minimum standards for insurance intermediation as a basis for the mutual recognition of a license given to an intermediary established in a third country. As such, Members agreed that Member States may retain the ability to apply 'due credit' to an application for registration of an intermediary already registered in another Member State, but Members agree that this should be an option and not be binding on Competent Authorities in every circumstance.

Recommendation 9

- Member States may retain the ability to apply 'due credit' to an application for registration of an intermediary already registered in another Member State, but Members agree that this should be an option and not be binding on Competent Authorities in every circumstance.

3.4 ***Should the IMD contain an explicit authorisation provision for Member States to conclude agreements with one or more third countries to apply certain provisions of the IMD?***

1. For instance, Directive 2006/48/EC on credit institutions sets out in Article 38(3) the following authorisation:

   "3. Without prejudice to paragraph 1, the Community may, through agreements concluded with one or more third countries, agree to apply provisions which accord to branches of a credit institution having its head office outside the Community identical treatment throughout the territory of the Community.

   Cooperation with third countries' Competent Authorities regarding supervision on a consolidated basis."

   The concrete scope of such agreements is set out in Article 39 as follows:

   "1. The Commission may submit proposals to the Council, either at the request of a Member State or on its own initiative, for the negotiation of agreements with one or more third countries regarding the means of exercising supervision on a consolidated basis over the following:

   (a) credit institutions the parent undertakings of which have their head offices in a third country; or

   (b) credit institutions situated in third countries the parent undertakings of which, whether credit institutions or financial holding companies, have their head offices in the Community.

   2. The agreements referred to in paragraph 1 shall, in particular, seek to ensure the following:

   (a) that the Competent Authorities of the Member States are able to obtain the information necessary for the supervision, on the basis of their consolidated financial situations, of credit institutions or financial holding companies situated in the Community and which have as subsidiaries credit institutions or financial institutions situated outside the Community, or holding participation in such institutions; and

   (b) that the Competent Authorities of third countries are able to obtain the information necessary for the supervision of parent undertakings the head offices of which are situated within their territories and which have as subsidiaries credit institutions or financial institutions situated in one or more Member States or holding participation in such institutions.

   3. Without prejudice to Article 300(1) and (2) of the Treaty, the Commission shall, with the assistance of the European Banking Committee, examine the outcome of the negotiations referred to in paragraph 1 and the resulting situation."

2. Article 218 TFEU (ex-Article 300 TEC) sets out the procedure for negotiating agreements with third countries by the EU. According to the Treaty, it is up to the Council, on the basis of a Commission recommendation, to authorise the opening of negotiations and to nominate the EU negotiator. The Council also concludes agreements on behalf of the EU. The European Parliament, however, has to give its assent to agreements covering fields to which (internally) "the ordinary legislative procedure applies".

Members concluded that it was not necessary to introduce new provisions in IMD2 in respect of agreements between Member States and third countries on the treatment of third country intermediaries.

Recommendation 10

- Members recommend that the Competent Authorities in each Member State be responsible for the application of IMD provisions to intermediaries from third countries. Accordingly, Members are not persuaded by the need to amend the IMD on this issue.

SECTION 4: PROFESSIONAL REQUIREMENTS

4.1 Introduction

1. The Commission asked CEIOPS' advice on the following questions:

   - *What high level requirements on knowledge and ability of insurance intermediaries would be appropriate, in view of the existing differences in applicable qualification systems in Member States?*

   - *Could the provisions of the Luxembourg Protocol relating to the mutual recognition clause be integrated into IMD2?*

2. As a first step, Members examined the existing legislation relating to the knowledge and ability of insurance intermediaries, taking into account the existing differences in the qualification systems that apply in Member States.

3. These findings, in turn, facilitated an evaluation of whether or not to propose incorporating the mutual recognition clause in the Luxembourg Protocol into IMD2.

Current legislative provisions

4. IMD Recital 14, IMD states that "*insurance and reinsurance intermediaries should be registered with the Competent Authority of the Member State where they have their residence or their head office, provided that they meet strict professional requirements in relation to their competence, good repute, professional indemnity cover and financial capacity*".

5. Furthermore, Article 4, IMD requires that "*insurance and reinsurance intermediaries shall possess appropriate knowledge and ability, as determined by the home Member State of the intermediary*".

6. According to Article 4(2), h*ome "Member States may adjust the required conditions with regard to knowledge and ability in line with the activity of insurance or reinsurance mediation and the products distributed, particularly if the principal professional activity of the intermediary is other than insurance mediation. In such cases, that intermediary may pursue an activity of insurance mediation only if an insurance intermediary fulfilling the conditions of this Article or an insurance undertaking assumes full responsibility for his actions*".

7. In addition, Article 4(2) states that "*Insurance and reinsurance intermediaries shall be of good repute. As a minimum, they shall have a clean police record or any other national equivalent in relation to serious criminal offences linked to crimes against property or other crimes related to financial activities and they should not have been previously declared bankrupt, unless they have been rehabilitated in accordance with national law".*

8. In order to analyse the current legislation regarding knowledge and ability of insurance intermediaries taking into account the existing differences in MS, the

"CEIOPS' Report on the implementation of the Insurance Mediation Directive's Key Provisions" might be a useful starting point.

9. The analysis of the above mentioned CEIOPS Report, in particular from Annex 2, noted that not all of the Member States have implemented the IMD in the same way. This annex also includes training and competence requirements of Member States.

10. There are differences depending on the various categories of intermediaries that must be registered in the national registers. The majority of Member States divide intermediaries into different categories and, in some cases, adapt the knowledge and ability requirements to the different categories, as allowed by Article 4(2), IMD. The most common categories of intermediaries in the Member states are insurance agents, insurance brokers, sub-agents, insurance consultants, and some have chosen to use the definition of tied insurance intermediary in Article 2(7).

11. In some Member States, a qualifying examination is necessary to become an agent or a broker, and, in others, a training course, which can range from 50 hours to a maximum of 500 hours. Some Member States have a mixed approach incorporating practical experience which can vary from 6 months to 4 years.

12. Furthermore, some Member States differentiate between regulation regarding knowledge and ability requirements for intermediaries who do not exercise intermediation as a principal profession, where a lower level of professional requirements is applied.

13. However, from the recent CEIOPS survey on intermediary populations, it is clear that differences in terminology exist between Member States. For example, some Member States specify that primary intermediaries must conduct only insurance intermediation business, others adjudge intermediation to be a firm's primary activity if more than 50% of persons employed carry out intermediation as their primary activity, or if more than 50% of revenue arises from insurance intermediation.

14. Nevertheless, such a distinction between "primary" intermediaries, who pursue insurance intermediation as an exclusive or main activity, and "secondary" intermediaries, who do not pursue insurance intermediation as a main activity, do not exist in all Member States. As a consequence, some Member States do not differentiate between the knowledge and ability requirements. One Member noted that clarification is needed to distinguish between these two types of intermediaries. Therefore, such a differentiation of the professional requirements based on the main activity, or not of pursuing insurance intermediation activity, would not be adequate as it would not be applicable to all the Member States.

15. However, Members have a clear preference to move away from defining types of intermediaries to focusing on clear definitions of the activities that signify insurance intermediation, given this variation in approach. Nevertheless, in order to find an appropriate level of knowledge and ability most adaptable to the different national markets, it could be useful to take into account at least the most common different categories of intermediaries existing in Member States.

4.2 High level requirements of knowledge and ability

1. Members discussed if IMD2 should prescribe the professional requirements by the different types or kinds of intermediaries. One possible way to differentiate the level of knowledge and ability requirements was not according to whether this was the main activity of the intermediary or the kind of intermediation activity pursued, but whether or not there is direct contact with the insurance undertaking. By making a distinction in this way (as already implemented by some Member States) between agents and brokers on one hand, and on the other those intermediaries who have a contractual relationship with agents and brokers and acting under their responsibility. In this regard, the aim of consumer protection could be fully fulfilled, considering that the lower level of professionalism requirements would be stated only for the intermediaries acting on behalf of and under the responsibility of an agent or broker.

2. However, this approach is not universal across Member States and it will be necessary to consider quite carefully how greater harmonisation could be achieved via this route. With regards to this, some Member States underlined a possible significant disadvantage of the approach based on the relationship with insurance undertakings as intermediaries who are usually in direct contact with the customer and for this reason, they should possess a higher knowledge and ability in order to provide advice. As such, the knowledge and ability requirements could be differentiated according to whether or not they have direct contact with the customer, instead of contact with the insurance undertaking.

3. From all the considerations above, different possible criteria emerged to differentiate the knowledge and ability requirements according to the category of intermediary. Therefore, it would be difficult to provide a differentiation of professional requirements according to the type of intermediary in IMD2.

4. In addition, in application of Article 4(5), IMD, the knowledge and ability of intermediaries are monitored, not only at registration, but also on an on-going basis, imposing sanctions in cases of infringements. For example, one Member requires that intermediaries must regularly update their professional knowledge through the annual attendance of updating courses lasting a minimum of 30 hours.

5. From the conclusion of the CEIOPS Report, it emerged that all Member States implemented at least the minimum standards provided for in the IMD and in some cases stricter regulations have been adopted, in accordance with the minimum harmonisation provisions in the IMD.

6. So, the following areas could be taken into account in determining the high-level professional requirements:

   - A clear desire by Member States for intermediaries to act ethically i.e. the standard of professional behaviour that is expected;
   - IMD2 to move away from defining roles and focus on definitions of activities to account for national differences;
   - Intermediaries to maintain the appropriate standard of skills, knowledge and

ability on an on-going basis;

- Member States' ability to retain responsibility for setting the appropriate professionalism standards in their own jurisdiction based on the high level principles provided by IMD2.

7. From the above, it is clear that there is a desire to engender a minimum level of professional standards. However, the current legislation has a mix of what defines competence e.g. the measures that define effective performance to a certain standard, such as possessing the appropriate knowledge and ability with how good repute should be demonstrated e.g. the behaviours or ethical standards that should be displayed, such as having a clean police record and not being declared bankrupt. It should be noted that some of these requirements are already enshrined in national laws. It was noted that Members prefer to retain responsibility for specifying details of professional standards at national level.

8. During the discussion, different alternatives were analysed in order to identify the high-level requirements of knowledge and ability as requested by the European Commission.

9. In particular, many Members are not in favour of the potential accreditation of private organisations (both at the domestic and at EU level) recognised by supervisors as responsible for training and competence requirements, among other things, given the risk of conflict of interest between private business and the sake of a public objective.

10. It has been suggested instead to find high-level principles that could include ethics (which would encompass both competence and consumer protection), rather than prescribing specific content, in order to avoid the necessity to update it on a regular basis and also the risk of creating barriers to entry.

11. However, there may be a need to go further than a high-level principle with regards to verifying knowledge and ability, in some specific areas, but note that the obligation to carry out this activity should be carefully considered as any duty on the Competent Authority to carry out this function may prove unduly burdensome. It could also be useful for IMD2 to specify the following further illustrative principles, such as:

    (a) **Necessary verification of the competence of intermediaries** (for example, requiring a qualifying examination for intermediaries who have direct contact with insurance undertakings, who are agents and brokers, and the attendance of training courses for intermediaries acting on behalf of, and under the responsibility of agents and brokers, such as subagents and collaborators of agents and brokers, with the possibility of differentiating depending on the category of intermediaries. Some Members proposed, as another option, imposing stricter requirements on the latter group of collaborators rather than the intermediaries in contact with insurance undertakings while they are in direct contact with customers and are the main risk factors for causing losses to customers. A Member suggested that for tied agents, as defined in Article 2(7), IMD, the insurance undertaking should be responsible for the training); and

(b) **Updating professional knowledge** through attendance at updating courses, in order that professional requirements are fulfilled on a permanent basis, as stated by Article 4(5), IMD. (As regards to this, two Members underlined the administrative burden of an annual obligation. Among those, one Member proposed looking at Article 22, Directive 2005/36/EC on the recognition of professional qualifications which states that *"continuing education and training shall ensure that persons who have completed their studies are able to keep abreast of professional developments to the extent necessary to maintain safe and effective practice".* According to Directive 2005/36/EC, this requirement of continuing education and training does apply to higher education e.g. doctors, dentists, veterinary surgeons or architects. The organisation of the training is ceded to the Member States).

(c) **the required competence could be adequate to the activity to be pursued and to the types of insurance contracts to be mediated, aimed to obtain an up-to-date level of theoretical knowledge, technical and operating skills and skills in dealing with customers**;

(d) **the knowledge of legislation**, technical, fiscal and of economic matters relating to insurance, with special regard to the regulation of insurance contracts as well as the technical features and legal aspects of the insurance contracts that the intermediaries seeking registration, will distribute;

(e) **the provisions on consumer protection as provided by the IMD and other relevant legislation, with particular reference to the rules of conduct and transparency towards policyholders and insured persons, conflict of interest, pre-contractual and contractual information to provide to the customers and adequacy of contractual proposals to the demands and needs of the customer.**

12. However, specifying "how" intermediaries demonstrate competence, at Directive level, may be difficult to achieve in practice for a number of reasons. For example, restricting competence to a qualifications framework may put up barriers for intermediaries who may be able to demonstrate competence through market experience.

13. On the other hand, the IMD2 could be reformulated in order to increase the level of consumer protection, by providing for a set of common provisions aimed at achieving an adequate level of competence verified by Member States, which could take into account the possible integration of the mutual recognition clause of knowledge and ability. In addition, to develop a non-exhaustive list of all the desired competencies that suits each Member State would be challenging. This approach would also not account for market innovations or changes in structure and could quickly become out of date and necessitate revisions to the directive on a regular basis. **However, this does not preclude an indicative list of competencies being included as an Annex to the Directive, for guidance purposes.**

Recommendation 11

- The majority of Members are in favour of the general aim of finding a common basic principle of knowledge and ability, irrespective of the method of distribution.

- Most Members support, as a minimum basis, a high-level principle which gives Member States the possibility to graduate the knowledge and ability requirements according to the activity pursued or type of intermediary.

- Members are unanimous in their view that **employees of insurance undertakings** should not be registered under IMD2. It should be the responsibility of the insurance undertaking to check the qualification and good repute of its employees.

4.3 Possible integration of the provisions of the Luxembourg Protocol relating to the mutual recognition clause into IMD2

1. Members evaluated the possibility of integrating a mutual recognition clause into IMD2 connected with harmonising knowledge and ability requirements, taking into account the existing differences between Member States.

2. The general system of the Directive 2005/36 on the recognition of professional qualifications which the Luxembourg Protocol refers to (Title III, Chapter I), states that "*if access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the Competent Authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory*" (see Article 13). The Directive provides a mechanism for recognising equivalent qualifications, but it does not specify the level of competency that should be demonstrated i.e. markets and product knowledge.

3. Furthermore, Article 14(3), Directive 2005/36 provides that "*By way of derogation from the principle of the right of the applicant to choose, as laid down in paragraph 2, for professions whose pursuit requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity, the host Member State may stipulate either an adaptation period or an aptitude test*".

4. Members were of the opinion that a minimum level of harmonisation of knowledge and ability requirements is desirable in order to avoid unnecessary burdens on Member States to put in place systems to recognise qualifications by non-national intermediaries. But, given the variability among Member States of fiscal regimes, markets, etc, the ability to embed this at directive level may be difficult to achieve. In addition, as some Member States specify professional requirements by the different types of intermediaries, to include a non-exhaustive list of the equivalent requirements for each intermediary, which closely matches the descriptions in each Member state, would be a challenge. However, consideration should be given to whether there is merit in determining a minimum set of requirements on which to base a mutual recognition clause of knowledge and ability. Note: some Members maintain that the less harmonisation achieved, the higher the duration of previous experience required in order to ensure a level playing field.

5. One Member suggested that the mutual recognition clause should be extended to persons who are employees of intermediaries and directly involved in intermediation activities. This would allow such persons to move from one Member State to another and work as employees of intermediaries in another Member State.

Recommendation 12

- The majority of Members generally support a mutual recognition clause of intermediaries' knowledge and ability, preferably in IMD2 rather than in the Luxembourg Protocol.

Recommendation 13

- The majority of Members support the development of a mutual recognition clause of intermediaries' knowledge and ability, taking inspiration from the repealed system of the first Mediation Directive 77/92 or under the general Directive 2005/36. (Note that this is in addition to the provisions relating to FOS and FOE). This solution could, for example, recognise a previous minimum registration period that the insurance or reinsurance intermediary was registered by another Member State, on condition that the registration had not been revoked by a sanction and the licence was concurrent. Note: consideration should be given to freedom of movement under the Treaty.

  - the pursuit of the previous intermediation activity shall not have ceased for a defined period before the date when the application for the new registration is made (see Article 7, Directive 77/92);

  - the proof of the previous registration shall be established by a certificate, issued by the Competent Authority or body in the Member State of origin or Member State whence the person concerned comes, which the latter shall submit in support of his application presented to the new Member State (see Article 9, Directive 77/92).

SECTION 5: CROSS-BORDER ASPECTS OF INSURANCE INTERMEDIATION, INCLUDING GENERAL GOOD RULES

5.1 Introduction

This section includes, but is not limited to the following questions posed by the Commission:

- *Can you provide concrete examples of how you would make the current notification system more efficient?*
- *Could certain provisions of the Luxembourg Protocol relating to the notification system be integrated into IMD2?*
- *How would you ensure that appropriate and transparent use of general good rules in order to avoid unwanted negative effects on the functioning of the Single Market for insurance and reinsurance intermediaries?*

Current arrangements under the IMD and issues arising

1. The existing cross-border notifications provisions under IMD are set out in Article 6 and further elaborated upon in the Luxembourg Protocol. These arrangements, where harmonised documentation is used to make the necessary notification, work reasonably well in practice, providing certainty for consumers, intermediaries and Competent Authorities alike.

2. However, there are a number of key features to the current arrangements, and certain omissions or where the IMD is silent, which give rise to issues requiring further analysis and discussion. These are presented and examined below:

5.2 *Is there a need to make formal passport notifications between Member States?*

1. In the interests of efficiency and the reduction of administrative burden, there has been a debate as to whether formal notification is required at all. If 'freedom to provide services' (FOS) and 'freedom of establishment' (FOE) are an EC right, then why adopt a formal process to exercise such rights? That said, all other single market directives – and new directives such as for payment services and electronic money – have specific provisions for formal notification of passporting firms. In addition, consumers have shown an affinity for the register/website of their home Competent Authority (whether acting as Home State or Host State), for reassurance that they are dealing with appropriately licensed insurance intermediaries.

2. Members recognised that the 'single passport' under IMD is derived from an intermediary's registration in its Home State. As such, it follows that details of an intermediary's intention to undertake insurance intermediation activities in another Member State under FOS should either be communication by formal notification or clearly reflected on the website of the Home State Competent Authority.

3. Some Members stated that they already hold a public 'register' through their website. Such registers list all insurance intermediaries carrying on business in their territory, irrespectively of the specific nature of its institutional framework.

4. As such, some Members were simply in favour of each Home State website publishing a list of intermediaries passporting into other Member States, to contain the following data:

   (i) name, address and registration number of intermediary;
   (ii) type of intermediary (e.g. tied, independent);
   (iii) classes of business (life/non-life) to be undertaken (where applicable);
   (iv) Member States in which the intermediary intends to operate; and
   (v) whether activities will be on a FOS or FOE basis (if FOE, then the address of the branch and the name of the person responsible for it should be recorded).

5. These lists should be accessible in the language of the home Member State and, where appropriate, in a common language (e.g. English).

6. A hyperlink to the relevant web address for each list could be forwarded to CEIOPS and similarly published on its website (in the public area).

7. As a consequence, formal notifications between Competent Authorities would no longer be required under this approach.

8. Members that already maintain and disclose such information through their website by the means of a general database or similar record should be allowed to make use of it (thus being exempt from keeping specific lists), provided that the above mentioned conditions are met.

Recommendation 14

- Members are in favour of retaining a system of formal notifications, as this is considered important for enhancing consumer protection. This is without prejudice to the possibility of Members publishing the above mentioned information on their websites (either as a list, a general database or any other means).

5.3 *Notification requirements for freedom to provide services ("FOS") and freedom of establishment ("FOE") contained in a single Article.*

1. Other single market directives – e.g. the Insurance Directives, Banking Directive and MiFID – have separate articles detailing the different notification requirements under FOS and FOE. Whilst the current requirements of IMD are relatively straightforward and easy to follow, the lack of any differentiation has contributed to the need to provide clarification of information requirements within the Luxembourg Protocol. Whilst it may still be desirable to preserve and adapt the Luxembourg Protocol, it might nevertheless provide greater clarity and transparency for intermediaries and Competent Authorities alike if these differences could be better articulated by reference to separate articles. Notwithstanding the arguments for a differentiated approach, Article 6 could still be revised to take account of those issue identified elsewhere in this paper.

2. Also, during the discussions, it was noted that special attention should be brought to the fact that reinsurance undertakings for their reinsurance activity do not need to notify their intention to provide services in another Member State and questioned whether reinsurance intermediaries should be required to do so.

   - A minority of Members are not in favour of not subjecting reinsurance intermediaries to the notification procedure for freedom to provide services.

Recommendation 15

- Members agree that Article 6, IMD could be redrafted to provide greater detail and clarity.

- The majority of Members agree that the requirement for reinsurance intermediaries to notify under FOS should be removed. This is consistent with the approach applied to reinsurance undertakings under Directive 2005/68/EC which requires notification only in respect of FOE. It is entirely appropriate that the same approach be applied to reinsurance intermediaries and to achieve a corresponding reduction in administrative burden.

5.4 *Although addressed in the Luxembourg Protocol, the IMD makes no mention of how changes to notifications are to be made*

1. If notifications are to continue to be made, then it follows that Competent Authorities need to be informed of any changes to the details of those initial notifications to ensure that records are fully up to date. The current arrangements under the Luxembourg Protocol seem to work effectively enough.

Recommendation 16

- Members agree that the IMD should be redrafted to require communication of any changes to the initial notification by the insurance/reinsurance intermediary to the home Member State supervisory authority and by the home Member State supervisory authority to the Host Member State supervisory authority.

5.5 *Harmonised notification documents for FOS and FOE in the Luxembourg Protocol*

1. Any amendment to the drafting of the existing notification requirements in IMD will likely require consequential redrafting of the Luxembourg Protocol. Subsequent to the General (Siena) Protocol and, indeed, the Luxembourg Protocol itself, the other 3L3 Committees (and the Commission) have seen the advantage in developing similar protocols or guidelines regarding passport notifications, particularly with regard to developing harmonised notification templates and relevant notification contacts at Competent Authorities.

2. Members agreed it was appropriate to update the Luxembourg Protocol to reflect the relevant changes arising from IMD2 with particular regard to a common set of harmonised templates for the content of passport notifications. The Luxembourg Protocol has proved useful up until now and it is a necessary harmonisation of notification documents to ensure an efficient, consistent and transparent approach across Europe.

Recommendation 17

- Members recommend that Member States and relevant non-Members of CEIOPS/EIOPA could review the Luxembourg Protocol to assist the Commission and update it to reflect the relevant changes arising from IMD2, with particular regard to a revised common set of harmonised templates for the content of passport notifications.

- It was noted by Members that it would be helpful to review the Protocol and be able

to update it where necessary. This work should not commence until the changes to IMD2 have been agreed, but prior to implementation.

5.6 *No mention of the possible methods of delivery of the notification (e.g. email) in the Luxembourg Protocol*

1. The method of passport notification may contribute to making the current notification system more effective. For example, other similar documents (e.g. CEIOPS' General Protocol, CESR MiFID Passporting Protocol) have foreseen the advantages of e-mail notifications – efficiency and immediacy – and have incorporated text within these documents to specifically allow and encourage greater use of email, subject to national legislation, where appropriate. Further, the most recent compromise text changes to the 'Omnibus' directive, make clear reference to the need to make electronic notification within the text of the directive itself, through the development of regulatory technical standards and implementing technical standards: *"…establish a uniform notification procedure…and the process for transmitting this information by secure electronic means."*

2. Members generally agreed that electronic communication was more efficient and discussed two approaches to deliver this. The first was to update the Luxembourg Protocol – or indeed the directive itself - to allow more certainty regarding the formal possibility of notifications and other correspondence associated with notifications to be exchanged by email. This is a more efficient and immediate means of notification; consistent with approach adopted by other 3L3 Protocols for the insurance directives and MiFID, but may not be compatible with some MS' national legislation as a secure means of communication.

3. The second option followed a similar approach as noted above, but notifications could be made using a common electronic platform e.g. XML. This single method of delivery across EEA would ensure consistency of information, pose little administrative burden; and facilitate a more secure and reliable means of communication. However, this approach may not be compatible with some MS' national legislation; costs in adopting XML and training staff to use it; inefficiencies for single regulators using a (broadly) single notification process.

Recommendation 18

- Members agree that electronic notifications are a more immediate and efficient form of notification, but are mindful of the need to ensure security of such notifications.

5.7 *IMD allows an exemption for host state Competent Authorities to be notified*

1. This exemption gives rise to a possible mismatch in information available to consumers, insurers and Competent Authorities alike. As consumers tend to refer to their domestic Competent Authority's register/website for details of financial institutions 'licensed' to undertake activities in their territory, absence of notification equates to absence of entry on the register/website.

2. Members sought the comments of those Competent Authorities of those Member States of the EU and the EEA/CEIOPS members and observers which currently take advantage of this exemption and have expressed a desire not to be notified (for FOS or to be only notified for brokers) to seek their rationale for such an approach.

Without exception, the response was that dealing with many thousands of notifications was disproportionate and administratively burdensome, and they would seek to maintain this exemption.

3. However, Members agreed that all Member States to be notified of intermediaries passporting into their territory in order to maintain a minimum level of consumer protection.

Recommendation 19

- The majority of Members are in favour of amending the notification in Article 6(2). As a consequence, Article 6 would need to be redrafted to remove the exemption for Member States not to be informed

5.8 *IMD sets out a one month 'wait period' for intermediaries where the host state Competent Authorities wish to be notified*

1. IMD states that an intermediary may only commence its activities "one month after the date" of notification, where the host state wishes to be notified; this wait period is disapplied if the host state Competent Authority does not wish to be notified. This gives rise to two issues. Firstly, the creation of an unlevel playing field whereby the timing for commencement of operations may be driven by the position of the host state. Secondly, the need for any "wait period" at all. There are different approaches across the directives (in respect of FOS), all of which appear more favourable than IMD e.g. Insurance & MiFID – immediately upon notification by home to host, Banking – immediately upon receipt by the Home State of the firm's intention to passport under FOS.

2. Members agreed that the IMD should be amended to allow intermediaries to commence insurance intermediation activities as soon as they have been advised by the Competent Authority of the Home State that a notification has been forward to the Competent Authority of the Host State.

Recommendation 20

- Members are unanimously in favour of the IMD being redrafted to remove the 'wait period' of one month for FOS and replaced by a provision consistent with other insurance directives; that an intermediary may commence its activities as soon as its Home State Competent Authority has forwarded the notification to the host state Competent Authority.

- Where the notification is in respect of FOE, then the intermediary may, if it wishes, establish its branch at the earlier of:

  (a) one month from the date that the Home State Competent Authority forwarded the notification to the host state Competent Authority; or

  (b) receipt of a communication from the host state Competent Authority.

5.9 *No specific reference to obligations for Competent Authorities to record the 'passport'*

1. Whereas registration of the intermediary itself is a Home State responsibility, it has been customary across the relevant directives for the host state Competent Authority to similarly record details of those firms notified of the intention to

conduct business in their territory. Again, whilst this has not been a directive requirement, many of the other passporting protocols/guidelines make reference to this. Members were in favour of retaining the status quo on the basis that registration obligations are sufficiently transparent.

Recommendation 21

- Members are generally in favour of maintaining the *status quo* in relation to recording the evidence of a passport especially given its acceptance that 'registration', including cross-border activity, is a Home State responsibility.

- The majority of Members support recording the passport on their Home State registers, but on a voluntary basis (i.e. they can choose to establish a list of incoming intermediaries as host state Competent Authority), on the basis that consumers will prefer to refer to the website of their Home State authority rather than that of the intermediary's Home State.

5.10 *There is a limited definition of "freedom of services" set out in the Luxembourg Protocol, as approved by CEIOPS Members Meeting*

1. A number of issues arise: whether it is appropriate to have any definition of FOS in the directive itself (no other single market directive does); there is no corresponding definition of FOE in the Luxembourg Protocol; the continued relevance and applicability of the Commission Interpretative Communication (2000/C 43/03) *'Freedom to provide services and the general good in the insurance sector.'*

2. There was much discussion regarding a definition of "freedom of establishment". Whilst this would appear to be a natural consequence of defining "freedom of services", there was no immediately clear definition available. The Commission has provided much guidance in this area in its Interpretative Communication (2000/C 43/03), and it is recommended that this vehicle be used to expand more fully on this subject if necessary.

Recommendation 22

- Members are generally in favour of an abridged version of the definition of "freedom of services" contained within the Luxembourg Protocol to be included with the definitions in IMD2.

- Similarly, Members feel that the remaining explanatory narrative in the Luxembourg Protocol – detailing the circumstances when notification under freedom of services would be required – could be transposed into new recitals in IMD2.

- By definition, the non-exhaustive nature of the list of examples contained in the Luxembourg Protocol should not be transposed into IMD2 but remain in the Luxembourg Protocol. Provisions in other relevant insurance directives (e.g. Solvency II Directive, Article 13) should be taken into consideration in order to retain consistency of approach.

- Members recommend that the Luxembourg Protocol is similarly redrafted to take into account of the changes proposed, but that this work should not commence until the changes to IMD2 have been agreed and effected.

5.11 *Better articulate those precautionary measures that may be taken by host Member States*

1. Where an intermediary operating in a host Member State is found to be in breach of certain obligations or local requirements, Article 8, IMD sets out those steps that a host state Competent Authority may take to regularise the situation. Members support an amendment to the IMD to better reflect the right of the host state Competent Authority to refer to the Home State Competent Authority.

Recommendation 23

- Members support an amendment to the IMD to better articulate those precautionary measures that may be taken by host Member States.

5.12 *'General good' referred to in non-specific terms*

1. IMD states that Competent Authorities *"may take the necessary steps to ensure the appropriate publication of…the general good…",* implying that they have an option. Furthermore, the scope and limitations of the general good is not specified. Again, there must be reference to the Commission Interpretative Communication (200/C 43/03) *'Freedom to provide services and the general good in the insurance sector.'*

2. In Members' view, the adaptation of national supervisory authorities' websites does not entail such an administrative burden, taking into account the envisaged objectives of transparency of general good requirements and because similar procedures are already in place for insurance. In fact, an example is given in the General Protocol regarding insurance activities, according to which CEIOPS Members and Observers already ensure proper disclosure of its general good provisions (in their respective website and in the CEIOPS website[7]). Member States include information in English, which may be an alternative to home Member State own language(s). Members also believe such procedures could be implemented through CEIOPS (or EIOPA). Preliminary draft provisions could be inserted in the IMD/Luxembourg Protocol (if it is to be retained).

3. Amending the Luxembourg Protocol and/or adding a/some new provision(s) to the IMD (as alternative or complementary options) may be envisaged and will require redrafting. Based upon the "Omnibus I Directive", there may be room for a possible discussion on whether this area could also be eligible for integration in the scope of regulatory and implementing technical standards.

4. Further work on the substantial regime of general good conditions is, at this stage, suggested to be left for the interpretation of the courts and might be the object of analysis within the scope of a possible review (to be undertaken by the Commission) of the said Commission Communication. Some Members have already pointed out that this could be the subject of further consideration by CEIOPS/EIOPA. Taking into account the degree of complexity of this discussion, Members recommend that the analysis of those substantial aspects is postponed (and not taken into account in the final advice).

[7] http://www.ceiops.eu/media/files/supervisory-disclosure/20100216/CEIOPS-General-Good-Provisions-General-Protocol-(2010-02-15).xls.

Recommendation 24

- The majority of Members that indicated a preference support amending the IMD, but amending the Luxembourg Protocol could be accepted by some as a compromise. Although material aspects regarding general good conditions (scope, limitations, etc) are subject to courts' interpretation (EU and national; in the latter case, when applying EU law under the terms of the Treaties and secondary acts) and have also, as a reference, the Commission Interpretative Communication (2000/C 43/03) 'Freedom to provide services and the general good in the insurance sector', Members believe that transparency could be enhanced, for more clarity and accessibility and for the sake of increasing consumer protection.

5.13 *The registration requirements in IMD are not sufficiently aligned with other relevant EU legislation with regards to location of 'home Member State'*

1. Discussions regarding the 'registration' requirements of the passport highlighted a particular deficiency in the IMD requirements for registration proper. Article 3(1), IMD states that insurance and reinsurance intermediaries must be registered in their home Member State, which is defined (Article 2(9)(b)) for a legal person as *"the Member State in which its registered office is situated or, if under its national law it has no registered office, the Member State in which its head office is situated".*

2. The IMD does not prescribe that a legal person must have its head office in the same Member State as its registered office. However, when considering whether an insurance intermediary should be registered it is legitimate to take account of whether the Competent Authority will be able to supervise the intermediary effectively and the geographical distribution of the intermediary's activities will be relevant to such an assessment. The Commission has previously confirmed that the Post-BCCI Directive (Directive 95/26/EC) could be considered as useful guidance in this regard and that the relevant article of the IMD should be read in conjunction with its recital 14, which states: *"Insurance and reinsurance intermediaries should be registered with the Competent Authority of the Member State where they have their residence or their head office, provided that they meet strict professional requirements in relation to their competence, good repute, professional indemnity cover and financial capacity".*

3. The Post-BCCI Directive first introduced these requirements. In particular, in relation to the insurance sector, Article 3 of the Directive inserted the following:

   "1. The following paragraph shall be inserted in Article 8 of Directive 73/239/EEC [the First Life Directive] and in Article 8 of Directive 79/267/EEC [the First Non-Life Directive]:

   '1a. Member States shall require that the head offices of insurance undertakings be situated in the same Member State as their registered offices.'"

   It did so recognising in its recitals that:

   "Member States" Competent Authorities should not grant or should withdraw authorisation where factors such as the content of programmes of operations, the geographical distribution of the activities actually carried on indicate clearly that a financial undertaking has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within whose territory it carries on or intends to carry on the greater part of its activities"

(Recital 7).

4. MiFID and the Banking Directive both contain authorisation (registration) provisions requiring Member States to ensure that a legal person has its head office in the same Member State as its registered office.

5. Neither the Post-BCCI Directive, MiFID, nor the IMD define what is meant by 'head office'. This is not necessarily the intermediary's place of incorporation or the place where its business is wholly or mainly carried on. The key issue in identifying a head office is the location of its central management and control, that is, the location of:

   (1) the directors and other senior management, who make decisions relating to the intermediary's central direction, and the material management decisions on a day-to-day basis; and

   (2) the central administrative functions of the intermediary (for example, central compliance, internal audit).

6. In Regulation No 2137/85 of 25 July 1985 on the European economic interest grouping, the term 'head office' is referred to as the place of central administration (Article 4). The English language version of Regulation No 2157/2001 of 8 October 2001 on the European company uses the term '*head office*' (Article 2), while the term '*administration centrale*' is used in the French version. The term head office is also used in Regulation No 1435/2003 of 22 July 2003 on the European Cooperative Society (Article 2).

7. Members considered whether or not to retain the status quo on the basis that with minor exceptions, all Member States have applied the spirit of the Post-BCCI Directive to their national implementation of IMD and this presented minimal administrative burden on Competent Authorities. Alternatively, the IMD could be redrafted e.g. recital 14, Article 2.9(b), Article 3.1 in current Directive to make more specific the need for a legal person to have both registered office and head office situated in the same Member State (the 'home' Member State). This would ensure absolute clarity, avoid misinterpretation by Member States and intermediaries alike and would be consistent with the Post-BCCI Directive and the other single market directives and, therefore, unlikely to require significant changes to national legislation.

Recommendation 25

- The majority of Members are in favour of amending the wording of Recital 14 and Article 2(9)(b) and Article 3(1) to take account of the ambiguity that has arisen in relation to the location of an intermediary's "registered office" and "head office", especially given practical examples where misinterpretation had given rise to significant difficulties for Competent Authorities and intermediaries alike.

5.14 *The registration provisions in IMD are not sufficiently aligned with other relevant EU legislation with regards to process and conditions for registration*

1. Members have examined the possibility of introduce other registration requirements in addition to the existing ones. In particular, the discussion was focused on two specific issues: 1) the possible introduction of a 'programme of operations' to be provided prior to the granting of registration; 2) a pre-registration assessment of the 'controllers' and of the 'close links' to an

intermediary.

2. The majority of Members shared view is that introducing a requirement for a 'programme of operations' to be provided prior to the granting of registration is not appropriate for the insurance intermediation sector and that, taking into account the principle of proportionality, the resulting administrative burden would not be balanced by any improvement in consumer protection.

3. Within the majority, additionally, some Members recognise a need for the assessment of participations in intermediary companies by insurance undertakings, but not necessarily at the moment of the registration. Otherwise, they foresee a clear prohibition of insurance undertakings acquiring holdings in intermediary companies, in order to avoid conflicts of interest (at least in the case of brokers).

4. A minority of Members suggest that a more transparent approach, considering matters such as the assessment of the suitability of the 'controllers' of and 'close links' to an intermediary, would be beneficial, particularly given that Article 12 requires the intermediary to disclose to a customer details of any shareholding by an insurance undertaking in excess of 10%. These Members deem it inconsistent that information, as an example, is provided to a customer, yet not is required to be provided to the Competent Authority prior to registration. The overarching concern is, not in relation to the identification and managing of conflicts, but more the desire to safeguard customers and the reputation of the sector itself, by prohibiting access to 'undesirables', and possible increase of risk of exposure to illegal activities such as money laundering. Moreover these Members consider that if a 'programme of operations' is provided for a freedom of establishment notification, it was counter-intuitive not to expect something at least equivalent prior to registration.

5. A minority of Members support the integration of the registration requirements for intermediaries using MiFID as a possible example. One view within this minority supports the proportionality principle being taken into account when setting registration requirements e.g. considering the distinction between dependent and independent intermediaries.

6. A more general principle was suggested by one Member, aimed at giving the Competent Authority the power to monitor, periodically, the participations in intermediary companies in order to assess the suitability of the shareholders or members that have qualifying holdings.

Recommendation 26

- The majority of Members are not in favour of substantially changing the existing registration requirements.

SECTION 6: CONSUMER PROTECTION

The questions tabled by the Commission

This section provides a brief overview of the questions covered under each of the main issues included in this section.

Transparency of remuneration
With regards to the section concerning transparency of remuneration, the following question posed by the Commission was addressed:

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

Conflicts of interest
With regards to the section concerning conflicts of interests, the following questions posed by the Commission were addressed:

1. *What high level principles would you propose for an effective management of conflicts of interest, taking into account the differences between investments packaged as life insurance policies and the remaining categories of insurance products?*

2. *How could these principles be reconciled for all actors involved in the selling of insurance products?*

Information provided by the insurance intermediary
With regards to this section, the following questions were addressed:

1. *Is the exemption of Article 12(4) is still justified, and in particular whether a more distinguished/flexible regime as regards large risks might be an option?; and whether*

2. *Might there be certain advantages of enhancing the transparency requirements in this perspective?*

Possible improvements of Articles 12 and 13

With regards to the section concerning the possible improvements of the whole of Articles 12 and 13 of the IMD, the following questions were addressed:

1. *Are the provisions in Articles 12 and 13 still justified?*

2. *Is there a need to change the current wording of Articles 12 and 13?*

The following section contains more detailed descriptions of the subjects, the discussions in CEIOPS and the recommendations that Members have agreed upon in the course of the discussions. If there were any diverging views amongst Members in connection to a subject, this was also indicated in the Advice.

6.1 Transparency of remuneration

Regarding the subject of transparency of remuneration, the following main issues were discussed:

i. Possible regulation of the disclosure of remuneration;
ii. The conditions under which information on remuneration should be disclosed;
iii. Content of the disclosure of remuneration; and
iv. Remuneration through the chain.

6.1.1 Possible regulation of the disclosure of remuneration

1. The IMD does not give any instructions in relation to either the structure or transparency of intermediaries' remuneration.

2. Several Member States have implemented some form of remuneration disclosure regime based on Article 12(5), IMD (which allows Member States to adopt stricter provisions regarding information requirements). These provisions include mandatory disclosure and disclosure on request. Some Member States have also introduced a ban on commission paid to the "independent" intermediary. The disclosure regime is not always applied evenly across all insurance products in any given market. Depending on the different disclosure frameworks, the scope of the regime may only cover certain insurance classes (e.g. only for Class 10 motor vehicle liability), contracts (e.g. complex insurance products), or retail policyholders (e.g. not professional).

3. There are some arguments both for and against the disclosure of remuneration. From one point of view, a disclosure of remuneration could enable the customers to have a deeper understanding of the costs related to the services provided, in particular, with respect to those services that appear to be free of charge, while the intermediary is actually compensated by the insurance undertaking. Moreover, it would allow customers to evaluate the advice received, taking into account the economic advantage for the intermediary connected with the policy's subscription. A disclosure of remuneration may also increase competition among intermediaries and lead to lower levels of commission and premiums as a consequence.

4. Any form of disclosure represents an additional cost on intermediaries to comply with these requirements. This is obviously an administrative burden. Transparency of intermediary remuneration could also reduce the volume of contracts subscribed through intermediaries and favour the direct channel, as the consumer has the impression (usually not justified) that, in such circumstance, he does not support any commission cost.

5. Members also discussed if the disclosure of the calculated costs by the insurance undertaking expressed as a percentage of the premium was a suitable equivalent to the disclosure of the remuneration received by the intermediary. Two Members stated that in their view, this technically posed no difficulty for an insurance undertaking to determine this figure, in contrast to determining the exact amount of the provision paid to the intermediary in certain circumstances e.g. chain commission. The disclosure of the calculated costs may help to make the prices for insurance more comparable. But it would not address the conflict of interest that exists between the insurance undertaking as product provider and the intermediary to whom it pays commission. Only the actual amount of provision received by the individual intermediary may give information about the conflict of interest the intermediary faces.

6. Members discussed three possible options for regulating the disclosure of remuneration:

   - an on request regime, with the possibility of the Member State introducing stricter national provisions;
   - a mandatory disclosure regime; and
   - a mandatory risk-based disclosure regime.

7. The first option discussed was the introduction of an **"on request" regime**. This option requires the insurance intermediary to only present information to the customer on the remuneration received if the customer asks for the information. This option is based on minimum harmonization and contains the possibility that Member States may introduce stricter national provisions. This could, for example, be in the terms of mandatory disclosure with regards to certain national high risk products or markets.

8. By giving the opportunity for the Member States to introduce stricter provisions concerning certain national high risk products or markets (for example, in terms of mandatory disclosure), it would ensure that the consumers are always presented with the information about the remuneration paid to the intermediary in the cases where it is considered important to do so.

9. A minority of Members are in favour of extending the on-request remuneration disclosure regime to direct sales for the sake of reaching a real level playing field. In this particular case only acquisition costs should be disclosed.

10. The second option discussed was the **introduction of a mandatory disclosure on remuneration**. This option requires the insurance intermediary to always present the customer with information on the remuneration that the intermediary receives, irrespective of the type of product or market. This option implies that all customers will receive information regarding remuneration, avoiding the risk that the information about the existence of the right to know will be confused with the other information received prior to the conclusion of the contract.

11. A third option could be a variation of a mandatory regime, i.e. **a mandatory regime which could also be a risk-based approach**. Here, a duty to disclose the remuneration received would only exist for products of high importance which protect against existential risks, or which entail a higher risk of mis-selling, e.g. life insurance and occupational disability. The types of insurance falling under the mandatory regime would have to be identified on a black list.

12. There are advantages and disadvantages connected to all possible ways of regulating the disclosure on remuneration. In terms of costs, the first option represents a better solution for the intermediary as only the customers who value this information as part of their decision making will ask for it, whereas mandatory disclosure could impose costs, without any real benefits particularly where customers choose not to use commission information. In other words, there is a smaller administrative burden associated with this solution than with the mandatory disclosure regime which constitutes the second solution. On the other hand, the mandatory disclosure regime can constitute a way of guaranteeing the efficient and wide availability of the information about the remuneration paid to the insurance intermediary, which could potentially offset the increased administrative burden. In that sense, mandatory disclosure might be the best solution also having regard to the risk that the information on the customer's right to ask about the remuneration paid to the intermediary could be confused with the other information given prior to the conclusion of a contract. The additional costs of a

mandatory regime with a risk-based approach would be limited to the identified types of insurance, thus following the principle of proportionality as to the costs and benefits.

13. The following table considers some of the advantages and disadvantages of an "on request" and mandatory disclosure regime:

Option 1: On request disclosure (all products), with possible stricter national provisions	**Option 2: Mandatory disclosure (all products)**	**Option 3: Mandatory risk-based approach**
Ensures that only those customers who value commission information can access it, as long as they are aware of their right to ask.	Ensures that all customers receive commission information without relying on the intermediary to tell customers they have a right to ask.	Ensures that all customers receive commission information for products of high importance where there is a higher risk of mis-selling.
Intermediaries can respond to *ad hoc* requests for commission information without putting in place complex systems to deal with requests, thereby minimizing costs. However, the intermediaries will have to put in place some kind of measures so that they are able to fulfill the request for information. But because the information will only have to be presented to the customer on request, the costs will probably be lower in connection to this regulatory regime than the cost associated with a mandatory disclosure regime.	This solution may impose significant costs on firms (particularly the smaller intermediaries) to put systems in place to provide the information automatically, and could lead to structural changes in markets if firms exit due to the increased regulatory burden.	This solution only imposes additional costs for certain contracts (principle of proportionality).
On request disclosure sets a minimum standard which applies to all Members States and if adopted, the ability to apply stricter standards, to address specific market or product failures.		Risk-based mandatory disclosure sets a minimum standard which applies to all Member States and would allow expansion of the scope of mandatory disclosure in a Member States in order to address specific market or product failures.
On request minimizes the impact on smaller intermediaries where the cost of introducing systems to account for mandatory disclosure may be disproportionate to the number of customers who use and act on this information.	Mandatory disclosure may impose costs in markets where there is a lower risk of consumer detriment so the effect of disclosure of commission is minimal.	Risk-based mandatory disclosure minimizes the impact on smaller intermediaries and limits it to certain types of insurance.
An on request regime introduces a minimum level of transparency and a level playing field.	Mandatory disclosure improves market transparency and ensures a level playing field between those intermediaries who do disclose and those who do not.	Risk-based Mandatory disclosure improves market transparency and ensures a level playing field between those intermediaries who do disclose and those who do not.

14. The majority of Members oppose the introduction of a mandatory disclosure regime due to the fact that the market for insurance intermediation is very different across Member States, bearing in mind the arguments identified above. These members were in favour of an on request disclosure regime based on minimum harmonisation, with the possibility to introduce stricter conditions at a national level (option 1).

15. Some Members were in favour of a mandatory disclosure regime for all non-PRIPS products (option 2).

16. Other Members were in favour of a mandatory risk-based approach with regards to certain products with a higher risk of mis-selling, including a "black list" containing the selected high risk products (option 3).

17. There was general agreement amongst Members that the introduction of an "on request" regime implies that the consumers should be very effectively informed about the possibility of obtaining information on the remuneration that the intermediary receives for all products.

18. One Member suggested that, under the new regime (IMD2), the client should also be entitled to the right to ask the insurance undertaking (or any other intermediary in the chain (see discussion on remuneration through the chain below). Granting the client the right to address the insurance undertaking and becoming mandatory for the insurance undertaking to answer or provide information to the client would grant the client a second layer or potential source of information.

19. During the discussions in CEIOPS, it was also discussed whether an "on request" regime would make it possible for the Member States to maintain or introduce a ban on commission, as is currently the case in some Member States. There was general consensus amongst Members that it would not be possible to introduce or maintain a general ban on all commissions. However, Members agreed that it should be possible to introduce a ban on commissions or mandatory disclosure in connection to certain national high risk products and market conditions. This is because Members consider it important to maintain a certain degree of flexibility to adjust to national market conditions.

20. In addition, Members also agreed that some sort of safeguard could be introduced in order to ensure that stricter provisions are not introduced without reason. When a Member State wishes to introduce stricter provisions, a safeguard could be to require a notification procedure to the Commission (e.g. similar to MiFID, Article 4). In that connection, the Member States should carry out a market failure analysis or a cost benefit analysis. This kind of notification should only be followed in circumstances such as a ban.

21. It should, therefore, be considered whether such a notification procedure fits in a system of minimum harmonisation with the possibility of Member States to go further. It is also important that the notification procedure does not build up any kind of a hurdle in terms of Member States imposing restrictions, as issues surrounding intermediaries remuneration are the main source of typical misuses in some Member States, as clearly shown by consumer complaints.

22. For this reason, Members also agreed that the current Article 12(5), IMD should be maintained to ensure a minimum harmonisation regime. In other words, it should be possible for Member States to adopt stricter provisions regarding information requirements (including remuneration disclosure) provided that such provisions comply with European law.

Recommendation 27

- The majority of Members regard an "on request" regime as a minimum harmonisation regime, maintaining the possibility for Member States to impose stricter requirements, as the best possible solution with regards to the improvement of the transparency of remuneration. Under the "on request" regime, the intermediary should be obliged to inform the customer if the intermediary receives any kind of remuneration.

- However, a safeguard could be introduced in the form of a notification procedure in rare circumstances, order to ensure that stricter provisions are not introduced without reason.

- The majority of Members agree that, in this context, the disclosure of information need not be given either when the insurance intermediary mediates in the insurance of large risks, or in the case of intermediation by reinsurance intermediaries.

6.1.2 Under which conditions should information on remuneration be disclosed?

1. Members also considered, under which conditions, information on remuneration should be disclosed to the customer in connection to an "on request" regime.

2. The majority of Members agree that the intermediary, before the conclusion of the contract and before any amendment or renewal of the contract, shall inform the customer of his right to request information on remuneration. The right of the customer to request the information shall exist until the contract has ended. If the customer asks for the information from the intermediary, the intermediary shall provide the information promptly (i.e. without undue delay)[8].

3. As a second option, one Member suggested the following solution:

4. When subscribing to an insurance contract, the customer should be reminded of his right to be supplied with a yearly statement mentioning all the commissions paid by the insurance undertaking(s) relating to one given contract, no matter how that amount is split between different intermediaries; the customer would be supplied with one figure. Intermediaries' remuneration is often a composite one and it is becoming more difficult to disclose full and fair information at pre-contractual level. The one figure approach is not designed to create a decision-making tool for the customer, but to increase confidence and transparency.

Recommendation 28

- With regards to the minimum harmonisation of an "on request" regime, Members recommend that customers are given the right to request information on remuneration.

- In addition, a majority of Members consider that the best possible way to ensure that the customers are aware of their right to request for information is to oblige the intermediary to inform the customer of his right to request for information on remuneration. The customer should, as a minimum, be informed about his right to

[8] See the requirement to provide immediate cover under the Distance Marketing of Consumer Financial Services Directive (DMCFSD).

request the information:

1. before the conclusion of the contract; and
2. before any amendment or renewal of the contract.

- The right of the customer to request the information shall exist until the contract has ended.
- If the customer asks for the information from the intermediary, the intermediary shall provide the information promptly (i.e. without undue delay).

6.1.3 Content of the disclosure of remuneration

1. In CEIOPS, the content of the disclosure of remuneration has also been discussed with regards to the question of the types or kinds of remuneration needed to be included in the information on remuneration.

2. The structure of intermediaries' remuneration depends on the type of activities taken up by the intermediary and, specifically, on the relationship the intermediary has with the insurer and the insured. The structure of the remuneration of the intermediaries can also differ between life and general insurance markets.

3. In general, Members agree that all types of remuneration should be included in a disclosure on remuneration. However, Members did not reach complete agreement on how to disclose the types of remuneration, where there is uncertainty about the amount that the intermediary receives.

4. The majority of Members agree that, in the case where remuneration is uncertain in amount, the information provided by the intermediary should consist of a description of the benefit recognized (in connection to the remuneration in kind) or a description of the calculation criteria (e.g. in connection to contingent commissions). The estimated amount or basis of the calculation will only have to be disclosed if the consumer requests the information.

5. It was pointed out that the disclosure of remuneration should only consist of information on the existing remuneration (without further details on e.g. calculation criteria). This avoids creating an information overload for consumers.

6. Based on this, a second possible solution was suggested concerning the disclosure of remuneration, where the amount is uncertain. According to this solution, an intermediary will only have to disclose the fact that he receives a type of remuneration which is uncertain in amount (e.g. the existence of contingent commission), but the intermediary will not have to give the customer any further description of the type of remuneration or the calculation criteria. This option is based on the assumption that giving too much information might not help to address consumer protection, because the information provided is so abstract and difficult to understand that it does not enhance the consumer's knowledge and, on the contrary, could create a false impression of how much the intermediary could or would earn.

7. Finally, a third possible solution concerning remuneration, which is uncertain in amount, was discussed. This solution involves the introduction of a ban on remuneration such as contingent commission, which is uncertain in amount and which is believed to be associated with a particularly high risk of conflicts of interest.

Recommendation 29

- With regards to the disclosure of remuneration, Members recommend that all kinds of remuneration are included in a disclosure of remuneration.

- The majority of Members recommend that, in the case where remuneration is uncertain in amount, the information provided by the intermediary should consist of a description of the benefit recognized (in connection to the remuneration in kind) or a description of the calculation criteria (e.g. in connection to contingent commissions). The estimated amount or basis of calculation will only have to be disclosed if the consumer requests the information.

6.1.4 Remuneration through the chain

1. The discussions on the content of the disclosure of remuneration revealed a challenge especially with regards to information on remuneration through the chain in connection to non-PRIPS products. The challenge can be seen in the different types of chains with regard to retail sale and wholesale markets.

2. Members agreed that the existence of remuneration through the chain, other than the remuneration paid to the intermediary who is facing the customer, could have relevant effects on customer protection. If remuneration through the chain is not included in a disclosure of remuneration, certain remuneration (directly or indirectly paid by the customer) remains unknown. This situation could lead to a rise in the amount of remuneration which is not disclosed because the remuneration is paid to an intermediary who is not facing the customer.

3. Nevertheless, Members do not agree on how this issue should be regulated. Two different regulatory options were proposed. Both proposals were based on "minimum harmonization" and took into account the fact that it could be very difficult or almost impossible to introduce a general disclosure of all remuneration through the chain, considering the differences among all the existing types of chains and the fact that certain remuneration could remain unknown by the intermediary and the insurance undertaking.

4. The first option states that, if requested, the intermediary should present the customer with the existence of a chain of intermediaries. The intermediary is neither required to disclose the name of the intermediary involved nor the amount of the remuneration paid.

5. The rationale behind this approach is that, while the chain of intermediaries is usually relatively simple in connection to retail sale with a typical chain consisting of one to two parts, in connection to wholesale, the chain is often very complicated and consists of many different parts. This leads to a difficult challenge with regards to the disclosure of remuneration, since for complicated chains, neither the intermediary nor the insurance undertaking necessarily knows the exact amount which is apportioned to remuneration through the chain or how it breaks down, particularly where a number of insurers/intermediaries are involved. Due to both the differences between the retail and the wholesale markets and the different markets for insurance intermediation across Member States, it is possible only to provide for a general requirement for the intermediary who is facing the customer, consisting of disclosing the existence of other remuneration that is paid through the chain.

6. The second option states that if requested, the intermediary should present the customer with the total cash amount of all the remunerations paid through the chain, as a percentage of the premium paid by the customer.

7. The rationale behind this approach is that the intermediary facing the customer, prior to the conclusion of the contract, should disclose, besides the remuneration he earns, the total amount of all the remuneration paid through the chain (aggregated amount) in order to give a fair evaluation of the remuneration earned in connection with a contract. Moreover, a wider disclosure could help to avoid an unjustified rise in the amount of remuneration which is not disclosed because the remuneration is paid to an intermediary, who is not customer-facing.

8. Considering the information that the intermediary knows, or could know, for instance, from the insurance undertaking, only the remuneration paid through the chain which is related to the premium paid by the consumer should be disclosed (i.e. a proportion of the premium). Other potential remuneration through the chain should not be included because the remuneration may not be relevant to the consumers and the remuneration can remain unknown either by the undertaking or the intermediary, who is in contact with the customer. It should be noted that that it is possible and quite easy for the intermediary to disclose this kind of remuneration because the amount is always known by the undertaking as it consists in a percentage of the premium. The undertaking could then provide the intermediary with the information for disclosure to the customer.

9. One Member emphasised that they would only be in favour of option 1 as a "minimum harmonization" (which is where the intermediary has to disclose the existence of other remuneration paid through the chain). In the opinion of this Member, the customer should be entitled to the right to receive, upon request, information about the names or identification of the other intermediaries involved in the chain, as well as the amount that the intermediaries receive as remuneration for rendering their services (if not individually, then on a global basis). Another Member mentioned that they also favour the option that the total remuneration through the chain should be disclosed.

10. The disclosure of the total remuneration through the chain is consistent with the approach of full disclosure of remuneration upon request and may be relevant for the customer (who, when buying or subscribing to an insurance product, should be in a position that allows him/her to distinguish which part of the premium is allocated to (all) remuneration received by the intermediary or intermediaries), due to its possible influence on the decision of concluding the contract and impact on the business and contractual relationship. Should the intermediary facing the customer not be able to provide that information (e.g. because he is not aware of it), then it should be at least possible for the customer to address the insurance undertaking in order to request it[9].

13. Members regard it as important to enhance transparency in connection to remuneration through the chain. Nevertheless, Members do not agree on how this

[9] One Member would like to have the possibility of maintaining in its national legislation a set of provisions that allow the customer the right to ask the intermediary and receive information about the names or identification of the intermediaries incorporating the chain, and the amounts received by hose intermediaries (if not on an individual basis, on a global basis), if such information is known by the intermediary facing the customer or may be obtained by the customer or intermediary from the insurance undertaking.

The legislation of one Member already includes a provision to establish that the insurance intermediary shall inform the customer, concerning the contract that is provided, of whether other insurance intermediaries intervene in the contract, and identify them. Also, the national rules on remuneration disclosure upon request have been interpreted as allowing the customer to ask (and receive) from the intermediary as well as the insurance undertaking information about remuneration received by all the intermediaries involved in the chain.

issue should be regulated. Two different regulatory options have been proposed. Each of the two proposals were supported by approximately half of the Members. There was no majority for a single solution.

The two options are:

1. If requested by the customer, the intermediary should present the customer with the existence of the remuneration paid through the chain of intermediaries. The intermediary is neither required to disclose the name of the intermediary involved nor the amount of the remuneration paid.

2. If requested by the customer, the intermediary should provide the customer with the total cash amount of all the remunerations paid throughout the chain, as a percentage of the premium paid by the customer. Other types of potential remuneration earned by other intermediaries and which are not connected with the premium, do not have to be disclosed (e.g. the remuneration paid by the insurance undertaking to the broker for designing the product).

14. It is important to emphasise that the view of Members is that a solution concerning disclosure of remuneration through the chain should be based on "minimum harmonization". It should also take into account the fact that it could be very difficult or almost impossible to introduce a general disclosure of all remuneration through the chain, considering the differences among all the existing types of chains and also that certain remuneration can remain unknown to the intermediary and the insurance undertaking.

6.2 Conflicts of interest

With regards to the subject of conflicts of interest, the main issues discussed were:

1. The possible conflicts of interest which are relevant to insurance intermediation; and

2. The question of what should be done in order to manage these conflicts.

6.2.1 Possible conflicts of interest

1. There are various circumstances in which an insurance intermediary might encounter a conflict of interest, whether or not related to remuneration. This could be where his interest is in the outcome of a service provided to the customer, or a transaction carried out on behalf of the customer is distinct to that of the customer's. Non- exhaustive examples include:

    a) intermediaries integrated in or part of an insurance group, which may represent a risk of their independence and impartiality in relation to the insurance undertakings integrated in the corporate structure;

    b) incompatibilities where intermediaries who are also members of the governing bodies or fixed staff of an insurance or reinsurance undertaking; intermediaries who also exercise functions as appointed actuaries or auditors of insurance or reinsurance undertakings; intermediaries who also exercise functions as investigation experts of claims or claim adjusters or who are shareholders or members of the board of directors of a company that exercises that activity;

    c) marketing or selling insurance products in association with the supply of other products or services (e.g. credit insurance offered by a bank associated to a loan), which is likely to enable the intermediary to make a financial gain at the expense of the customer (remuneration arbitrage);

    d) contingent commissions, profit shares, volume over-riders, corporate hospitality and gifts, soft loans, training support;

    e) reinsurance conflicts where placement of business is used to encourage insurers to use the intermediary to arrange reinsurance contracts, which trigger commission payments;

    f) claims-handling and binding authorities: where the intermediary would not be able to act in the best interests of both customer and insurer, especially in the circumstances of a contested claim;

    g) broker/agent: where an intermediary is both a broker (and thus representing interests of the insurance policy seekers) and an agent (representing the interests of insurers);

    h) when an intermediary has a relative pursuing insurance intermediation or employed by an insurance undertaking; and

    i) when an intermediary directly or indirectly receives a benefit from the loss

settlement.

6.2.2 Management of conflicts of interest

1. Conflicts of interest can be defined as situations that have the potential to negatively influence the independence of an intermediary because of the possibility of a misalignment between the intermediary's and his customer's interest resulting in detriment to the customer. This situation creates a set of negative incentives which may undermine the intermediary's duty to act in the best interests of his customer. In this regard, the recitals 18-20, Article 12(1)(c),(d) and Article 12(1)(e), (2), IMD can be seen as efforts to partly address this issue.

2. Article 12(1)(c) and (d), IMD meets the concern that mutual holdings between insurance undertakings and intermediaries can create a personal interest sufficient to appear to influence the intermediary's duty towards his customers. Therefore, the situation has to be disclosed to the customer prior to the conclusion of the contract.

3. Article 12(1)(e) and (2), IMD acknowledge the fact that the knowledge of whether an intermediary is under a contractual obligation to conduct insurance intermediation business exclusively with one or more insurance undertakings makes a difference to the expectations of the customer with regards to the independence and value of the advice.

4. In these situations, a potential conflict of interest cannot be avoided. Therefore, the IMD states that customers should receive clear information about the services intermediaries provide and about the capacity in which they are acting. In other words, the IMD has adopted a regulatory approach to conflicts of interest based on the mandatory disclosure of certain situations. Members consider this a good regulatory starting point which should be maintained and, at the same time, supplemented with other stricter provisions.

5. Some Member States have already addressed the issue of conflicts of interest in their national regulations by exceeding the requirements of the IMD as described above. This is the case in France, Ireland, Italy, Poland, Portugal and the UK.

6. In abstract terms, conflicts of interest can be managed through some non-regulatory techniques, e.g. private contracting, internal firm procedures, reputational risk, market discipline and the discounting of conflict risk. However, Members do not see such techniques as sufficient.

7. In connection to the managing of conflicts of interest, Members consider the provisions in MiFID could act as a point of orientation. This view should be seen in line with the fact that PRIPs has also taken its starting point in the provisions on conflicts of interests from MiFID.

8. The sophisticated MiFID regime for the identification, management and disclosure of conflicts of interest provides undertakings with some flexibility to determine the appropriate approach for their business, depending on its nature, size and complexity. However, these rules will have to be adapted to meet the requirements of the insurance intermediation business where natural persons operate. It should also be considered that customers need clear information about the services that the intermediary provides, including the breadth of search undertaken, as well as the capacity in which an intermediary is acting. Moreover, Members consider it important to require the intermediary to act in the best interests of the customer and to refuse the business if, due to the existence of a

conflict of interest, his activity can prejudice the customer's position.

9. The majority of Members regard the MiFID regime could act as a point of orientation for the management of conflicts of interest. However, Members agree, on one hand, that the whole MiFID provisions on conflicts of interest, in particular the Level 2 Directive[10], cannot be used to regulate the insurance market and on the other hand, that stricter provisions should be introduced for the following two main reasons:

   a) MiFID provisions seem to be inconsistent with the insurance market. In particular, the provision concerning the situations to be taken in account when identifying conflicts of interest (Article 18, L2) does not fit with the peculiarity that may arise from insurance intermediation, as well as the provision regarding the establishment of a written and complex policy (Article 19, L2) are not in line with the massive presence of natural persons and small firms operating as insurance intermediaries;

   b) There should be room for a more precise regulation, as put forward in CEIOPS Report to the European Commission on PRIPs (CEIOPS-CPP-35/2009 of 2/11/2009). This includes the introduction of a general duty of care principle and the legal identification of relevant situations prohibited or to be disclosed mandatory.

10. Members, therefore, agreed that the MiFID provisions will have to be adapted to meet the requirements of insurance intermediation. Members also agree that there is a need for more detailed provisions with regards to insurance intermediaries than with regards to insurance undertakings. In order to support the creation of a level playing field, regardless of whether the customer buys the insurance through an insurance intermediary or through direct sales, Members agreed that the following three-level approach could be used:

    1. High-level principles;
    2. European requirements concerning the insurance intermediary; and
    3. National requirements concerning the insurance intermediary.

[10] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

6.2.3 Level 1 – High level principles

1. While all types of intermediaries as well as insurance undertakings should comply with the high-level principles in the first level, in order to support the creation of a level playing field, the requirements in the second and third level should only apply to insurance intermediaries. This is due to the fact that level two and three should be seen as tailored for intermediaries and, therefore, do not seem to fit properly for direct sales. However, this does not mean that there is no need for detailed provisions for insurance undertakings corresponding to the provisions in level 2 and 3.

2. During discussions, Members agreed on the importance of taking into account the activities of the intermediaries when defining the requirements of conflicts of interest, since different intermediaries are involved in different types of conflicts of interest[11]. Members, therefore, agree that it is important to stress the linkage between the capacity in which the insurance intermediary acts (see Article 12(1), e, (i), (ii), (iii)) and the conflicts of interest provisions.

3. One Member suggested that a distinction of dependent and independent intermediaries might be used to identify two different sets of rules, as some general (legal) prohibitions only seem adequate to tackle the potential conflicts of interest of independent intermediaries (and do not seem appropriate for dependent intermediaries).

4. Members consider it important to require both intermediaries and insurance undertakings to take reasonable steps to identify and manage the situations of conflicts of interest and, if the conflict is not manageable or avoidable, to disclose it to the customer. Meanwhile, Members believe that in some situations, the disclosure is not a sufficient tool to guarantee the avoidance of any prejudice of customer interest. A general "duty of care" principle should be included in any high-level principles[12].

5. It should be noted that, besides the "duty of care" principle and the disclosure of conflicts of interest, Members also proposed, that despite disclosing the situation of conflict, the intermediary should consider refusing the business if the activity can prejudice the customer position.

6. Members are of the view that the obligation on the intermediary to keep internal procedures could be considered as very burdensome, in particular, as a significant share of the market in some Member States is constituted by one-man entrepreneurs. There is no doubt that internal procedures are useful tools; however, it must be taken into account whether the administrative burden set is not too heavy. Moreover, if intermediaries are obliged to keep internal procedures, the requirement might need to be checked during the registration procedure. It could make those procedures longer and more complicated.

[11] See discussion on "Scope" in Section 2 above regarding an activity-based definition of intermediaries.

[12] The introduction of a general duty to act in the best interests of the customer does not imply that, for instance, a tied intermediary cannot meet his contractual obligations to an insurance undertaking. However, the intermediary will have to consider the best interests of the customer when providing his service, based on the range of products offered by the insurance undertakings to which he has a contractual obligation. But this should not prejudice existing provisions in the civil law governing the duties of the different types of intermediaries in the Member States.

6.2.4 Level 2 – Detailed provisions European Level

1. In connection to the second level of the proposal, Members agree that as a general requirement, the intermediary shall himself identify any relevant situation to be managed and eventually disclosed to the customer. Members recognized that the decision regarding the relevance of certain situations in terms of conflicts of interest should not be left to the intermediary's discretion but should instead be clearly indicated by the IMD or by stricter provisions in national regulations.

2. During the discussions, the proposal to include a provision in the IMD2 stating a number of situations where an intermediary would not be allowed to complete the contract and perform the activity (banned activities) was made. However, due to national differences in the market for insurance intermediation, the majority of Members do not support to introduce, at European level, a "blacklist" of situations that would always lead to a ban in connection to the performance of the service. One Member highlighted that such a ban would only be theoretical since it would not translate across all Member States. Based on this consideration, Members agreed on including a third level in the conflicts of interest proposal which leaves the possibility for Member States to introduce stricter national provisions e.g. in form of the banning of situations where conflicts of interest cannot be avoided (see below).

3. Level 2 of the conflicts of interest proposal contains the types of situations which should always be disclosed to the customer (in such case, disclosure does not relieve the intermediary to act on the best interest of the customer). For example, this includes the existing IMD provisions regarding mandatory disclosure of conflicts of interest (i.e. IMD Article 12 (1), (c), (d), (e), (ii) and (iii) naturally fall into this category without any text amendment). In other words, when one of the situations stated in the IMD, Article 12 (1), (c), (d) (e), (ii) and (iii) is met the intermediary will be required to act in the best interest of the customer, to manage such situations and to disclose them as conflicts of interest to the customer.

6.2.5 Level 3 – Detailed provisions National Level

1. Level 3 of the conflicts of interest proposal covers the possibility of introducing stricter national requirements and, if necessary, to prohibit the performance of the activity of the insurance intermediary in certain situations, where the competent national authority considers it impossible for the intermediary to act in the best interest of the customer.

2. In that connection, it was also suggested to include a provision concerning the possibility for Member States to separate the activities set out in Article 2(3), IMD in order to avoid conflicts of interest, when an intermediary performs more than one of the aforementioned activities. However, the majority of the Members do not support the inclusion of such a provision.

3. During discussions in CEIOPS, it was also proposed that a general provision should be included, stating that the Member States can require that the intermediary receive a written declaration from the customer giving consent to proceed despite the existence of the disclosed conflict of interest. However, since Members agree that there should be room for Member States to introduce stricter national provisions, Members do not consider it necessary to include the provision in the proposal.

4. Members also discussed the possibility of making a distinction in the conflicts of interest proposal with regard to intermediaries who provide a fair analysis of the market, and intermediaries who are under a contractual obligation to conduct

insurance intermediation business exclusively with one or more insurance undertakings. This is due to the fact that different activities result in different conflicts of interest.

5. During the discussions, it was clear that Members were not able to agree on a clear distinction between those intermediaries who are "dependent" and those who are "independent". Members, therefore, agreed that the national authorities should have their own definitions of "dependent" and "independent" intermediaries in the third level of the proposed approach to the regulation of conflicts of interest.

6. However, it was also noted amongst Members that it is important to have a harmonized identification criteria across Europe. This is due mainly to considerations of cross-border activity. Members, therefore, support and encourage the adoption of non-binding guidelines by CEIOPS/EIOPA that clarify the criteria to be followed by Member States when implementing their national frameworks. One Member suggested that a distinction of dependent and independent intermediaries might be used also to identify two different sets of rules, as some general (legal) prohibitions only seem adequate to tackle the potential conflicts of interest of independent intermediaries (and do not seem appropriate for dependent intermediaries).

7. During discussions in CEIOPS concerning the introduction of a ban on certain situations related to conflicts of interest, it was clear that due to national differences in the market for insurance intermediation, Members could not agree on a common framework. Therefore, Members agreed that if a ban is to be introduced, it is important that it is introduced at a national level.

Recommendation 30

- Members recommend that the current regulatory approach of the IMD to the issue of conflicts of interest be based on the mandatory disclosure of certain situations as a good regulatory starting point which should be maintained but also supplemented.

- Members do not consider the current provisions in the IMD as sufficient to avoid significant conflicts of interest. Therefore, Members recommend that the IMD is supplemented with a separate article concerning conflicts of interest.

- To this extent, Members recommend that the MiFID Level 1 regime could be regarded as an orientation point for the management of conflicts of interest for insurance intermediation.

- Members also recommend that a general "duty of care" principle should be included in the IMD in connection with the conflicts of interest requirements.

- Members recommend that the intermediary be required to always identify and manage conflicts of interest (disclosure could be a form of managing the conflict of interest). But if the conflict of interest is not manageable or avoidable, the intermediary should consider, according to a set of pre-defined principles, whether or not he is able to act in the customer's best interest and whether to refuse the business.

- Members also recommend that the provisions concerning conflicts of interest should apply to both intermediaries and insurance undertakings. In order to ensure proportionality, a three-level approach could be used:

  1. High-level principles;

2. Detailed provisions - European Level; and
3. Detailed provisions - National Level.

- While all types of intermediaries as well as insurance undertakings should comply with the high-level principles in the first level, the requirements in the second and third levels should apply to the insurance intermediaries and, where appropriate, tailored provisions from the second and third levels should be drafted for direct selling performed by insurance undertakings.

- In addition, due to the differences between the markets in Europe, Members recommend that it is made possible for Member States to introduce stricter national requirements, including the possible banning of some activities, where the conflict is considered not manageable without leading to policyholder detriment.

- Members recommend that a distinction can be made in conflicts of interest regulation at national level with regards to intermediaries, who provide a fair analysis of the market, and intermediaries who are under a contractual obligation to conduct insurance intermediation business exclusively with one or more insurance undertakings. This is because different activities may result in different conflicts of interest for different types of intermediaries.

- Members support CEIOPS/EIOPA considering the possibility of elaborating on non-binding guidelines in connection to national conflicts of interest provisions and in connection to the distinction between "independent" and "dependent" insurance intermediation activities.

6.3 Possible improvements of Articles 12 and 13, IMD

1. As a fourth subject, CEIOPS also analysed the current Articles 12 and 13 with regards to possible improvements. Article 12, IMD covers the requirements for insurance intermediaries with respect to the information that they must provide to their customers. The provisions of Article 12 should be seen in close connection with the provisions in Article 13, which determines how the information mentioned in Article 12 should be disclosed to the customer.

2. The range of information to be provided by the intermediary (as required by Article 12) can be classified on the basis of the aim to be achieved. The first type of information is meant to let the customer know about the characteristics of the intermediary (Article 12(1)(a), (b) and (e), (i), (ii), (iii)). The second type of information is to make the customer aware of the existence of a conflict of interest (Article 12(1)(c) and (d)).

3. The discussion of the possible improvements of Articles 12 and 13 is closely linked to the discussions that Members have had in connection to conflicts of interest, as well as the transparency of remuneration. In fact, the proposal regarding conflicts of interest and transparency of remuneration represent in themselves an improvement of Article 12 to which other improvements regarding the intermediary activity could be added.

4. During the discussions, Articles 12 and 13 were analysed with the aim to identify any needed adjustments. Each of the provisions in the two articles will be reviewed below in order to identify the possible improvements or changes that Members consider necessary.

6.3.1 Possible improvements of Article 12

1. There is general agreement amongst Members that the desired outcome of Article 12 is to ensure that the customers have a clear understanding about who they are doing business with, and the nature of the services being provided. It is, therefore, very important that changes made to Article 12 make it more transparent to the customer whether they are buying the products or service directly or through an intermediary. In addition, Members also agree that the requirements in Article 12 should be tailored to the different distribution channels in order to ensure a level playing field between intermediaries and insurance undertakings (direct sales).

Article 12(1)

2. In connection to Article 12(1), Members have considered whether the current information requirements set out in Article 12(1) are sufficient, or if there is a need to include further information requirements in the IMD. In addition, it is important to notice that Members agreed that the proposal concerning conflicts of interest will have to include some of the information requirements, which are currently set out in Article 12(1) e.g. the provisions in Article 12(1)(c) and (d). In that connection, it was highlighted during the discussions that the requirements in (c) and (d) could be drafted more clearly to achieve their intended outcome, which is to give the customer transparency over the potential conflict of interest between the intermediary and the insurance undertaking in relation to intermediary firm/chain ownership.

3. One Member suggested including a new area called "white labelled products" in connection to the disclosure requirements in Article 12(1). "White labelled" products are products that are sold under a different brand or trading name where the underlying risk is underwritten by an insurance undertaking, which is a different legal entity. It was pointed out that this form of disclosure is important because otherwise the customer is unsighted about who the actual provider of their insurance contract is and that this information is essential, not only in understanding the nature of the commitment, but also who claims should be directed to, should the customer wish to make a complaint.

4. Two Members highlighted their experiences which indicated that customers are often confused when buying a white labelled product, and often think that they have actually purchased a product that is provided and underwritten by the intermediary. This can lead to confusion at claims-handling or if the customer needs to make a complaint about the product. Based on this problem, the Member suggested that the disclosure is made sufficiently clear so that the customer not only understands who is providing the intermediation services, but the identity of the underlying insurance undertaking.

5. Regarding the requirements concerning conflicts of interest, it should be noted that the Members unanimously agree that it would be sensible to make a distinction in the Directive between conflicts of interest provisions and general information requirements.

6. This emphasizes the close connection between the discussion of the improvement of Article 12 and the discussions with regard to conflicts of interest and the transparency of remuneration. In other words, there is a significant overlap between the review of Article 12 and the recommendations previously given in this Advice. During the discussions of the possible improvements of Article 12(1), several Members also stressed that the provisions in Article 12(1), c, d and e, (ii) and (iii) which describes different types of intermediaries and their activities, should be either closely linked to or included in the provisions on conflicts of

interest. In any case, Members agree that a duplication of provisions should be avoided.

7. Members also discussed whether the provisions in Article 12(1) should also apply to direct sales and which information requirements should be added or excluded in relation to direct sales. In that connection, Members agreed that both insurance undertakings and insurance intermediaries will have to comply with the same rules. This was among the other things that the customers need to know, including the insurance undertaking behind each product. It was also noted that it is important to avoid duplication of the current directives. A solution could be to keep all disclosure provisions in one directive.

8. Finally, one Member noted that Article 12(1)(ii) could be modified for insurance undertakings so that the disclosure of any contractual obligations is mandatory. This would enhance transparency for the customer since it is not obvious to a customer when an insurance undertaking has a contractual obligation to another insurance undertaking.

Recommendation 31

- Members recommend that some of the information requirements which are currently set out in Article 12(1) e.g. the provisions in Article 12(1)(c), (d), (e), (ii), (iii) as the Directive is currently worded should be included in the conflicts of interest provisions. It was also noted that duplication of these provisions should be avoided. Members recommend that the requirements in (c) and (d) are drafted more clearly in order to enhance transparency over the potential conflict of interest between the intermediary and the insurance undertaking in relation to the intermediary firm/chain ownership.

- Members generally recommend the introduction of two separate articles for information disclosure and conflicts of interest provisions in order to avoid confusion. Members also find it very important that the information requirements in the IMD are organised in a way that the customers are able to understand.

- A large majority of Members are in favour of not subjecting reinsurance intermediaries to the conduct of business requirements under the proposed revisions to Articles 12 and 13.

- Members recommend that both insurance undertakings and insurance intermediaries will have to comply with the same information requirements.

- Finally, Members support all sales of insurance products being subject to similar information requirements under Article 12, IMD.

Article 12(2)

1. In connection to the discussion of Article 12(2), Members unanimously agree that there is no need to change the current drafting of Article 12(2). In addition, Members also agreed that Article 12(2) is not appropriate for direct sales.

Recommendation 32

- Members do not find it necessary to change Article 12(2). In addition, Members do not consider the article appropriate for direct selling.

Article 12(3)

1. In connection to the discussion of Article 12(3), Members unanimously agree that there is no need to change the current drafting of Article 12(3) and that Article 12(3) should also apply to direct sales.

2. During the discussions of the provision, Members had different suggestions on how to improve the article. One Member suggested that it could be helpful to have a reference to risk in connection to the obligation of the intermediary to specify certain information to the customer. However, during the discussions it was highlighted that to include risk could have a significant impact across the market due to the differences between wholesale and retail customers. Several Members did not, therefore, want to include a reference to risk in the article.

Recommendation 33

- All Members can accept the wording of Article 12(3) as currently interpreted by Member States, if it is combined with Article 12(5) which leaves room for the introduction of stricter national requirements (minimum harmonisation). In addition, the Members recommend that Article 12(3) should also apply to direct sales.

Article 12 (4)

1. The discussions of Members regarding the exemptions in Article 12(4) have previously been referred to in this Advice. In that connection, Members recommend that the current exemptions in Article 12 should be maintained[13].

Recommendation 34

- Members support maintaining the *status quo* under Article 12(4) of the IMD for reinsurance intermediaries and the intermediation of contracts of large risks.

Article 12(5)

2. In connection to the discussion of Article 12(5), Members discussed the possibility of introducing a notification procedure, obliging the Member States to notify the Commission of the introduction of more stringent provisions. However, Members unanimously agree that there is no need to change the current drafting of the article. It is important to notice, in connection to Article 12(5), that Members prefer to maintain the directive as a minimum harmonisation directive due to the differences between the different Member States.

Recommendation 35

- Members recommend that the current drafting of Article 12(5) is maintained. Members favour maintaining a minimum harmonisation directive due to the differences between the European markets for insurance intermediation.

[13] See section 4 of this Advice.

6.3.2 Possible improvements of Article 13

1. During the discussions on Article 13, Members unanimously agreed that the whole article should also apply to direct sales. Currently, the Distance Marketing of Consumer Financial Services Directive (DMCFSD) regulates the provision of information in connection to direct-distance sellers. For example, according to the DMCFSD, all information can be provided after conclusion of the contract if the contract is concluded at the customer's request. This implies a risk of having two conflicting regimes for direct selling. Based on this, Members agree that Article 13 should be applied only to face-to-face selling, considering that the form of information disclosure for direct-distance selling is already covered by the DMCFSD.

2. Meanwhile, Members also agree that a level playing field should be guaranteed between intermediaries and direct distance sellers. Currently, a level playing field is not present due to the differences between Article 13, IMD and the provisions set out in the DMCFSD. This is shown in the following examples:

   - Internet-selling: an insurance undertaking is required to provide the pre-contractual information prior to the conclusion of the contract; an insurance intermediary can provide pre-contractual information after the conclusion, if the customer asks for immediate coverage (Article 13(2), IMD).

   - Outbound telephone marketing: an insurance undertaking is required to provide the pre-contractual information prior to the conclusion of the contract because the latter was not concluded at the customer's request (Article 5(2), DMCFSD); an insurance intermediary can always give pre-contractual information after the conclusion (Article 13(3), IMD).

Recommendation 36

- Members recommend that the requirements in Article 13 should also be applied to direct distance selling. In addition, Members recommend that the Commission take into consideration the existing provisions in the Distance Marketing of Consumer Financial Services Directive (DMCFSD) if it decides to apply the provisions in Article 13 to direct sales. This should be done in order to ensure sufficient compatibility between the IMD and DMCFSD, which currently regulates the provision of information in connection to direct distance sellers.

Review of Article 13(1)

In connection to the discussion of the differences between the requirements set out in DMCFSD and the IMD, Members discussed the use of the term "durable medium" set out in Article 13(1)[14]. In that connection, Members agree that it is very important that the same understanding of the term "durable medium" is valid in both the DMCFSD and the IMD.

It was also discussed if the provision should be supplemented with recommendations on the best possible way to present the information to the customers.

[14] For further reference to the use of the term "durable medium" in the DMD, see EFTA judgement http://www.eftacourt.int/images/uploads/4_09_Judgment_Final_EN.pdf

Recommendation 37

- As mentioned in Recommendation 36 above, Members recommend that Article 13 be revised with a focus on compatibility between the IMD and DMCFSD. For example, it is the opinion of Members that it should ensure that the term "durable medium" is understood in the same way in both the IMD and DMCFSD.

- In addition, Members also recommend that consideration be given to the possible provision of guidance on the presentation of the information that has to be provided to the customer.

Review of Article 13(2)

According to Article 13(2), an oral disclosure of the information in Article 12 may be provided if the customer requests the information or where immediate cover is necessary. During the discussions, it was considered whether or not to oblige the intermediary to also provide the information orally when providing his service face-to-face, without having to rely on the customer to "request the information". This oral information could be given in addition to the pre-contractual written information. In other words, it should not substitute the information which is given in accordance with the current Article 13(1). An argument for introducing mandatory oral information in connection to services provided face-to-face was that it would address the potential risk that important information about the status of the intermediary, the capacity in which they are acting and the services that they offer, are obscured in written disclosures and may go unnoticed by the customer.

However, since it may be common practice for intermediaries to provide this information orally, and because it is difficult to supervise whether or not the intermediary provides the information orally, Members agree to maintain the current wording of Article 13(2).

Recommendation 38

- Members recommend that the current drafting of Article 13(2), IMD be maintained.

Review of Article 13(3)

Article 13(3) refers to the case of telephone selling. In this connection, Members discussed the need for uniformity between the provisions in the DMCFSD and the IMD. Besides this, Members do not regard it as necessary to make any kind of adjustments of the provision.

Recommendation 39

- Members recommend that the requirements in Article 13(3), IMD be aligned with the requirements set out in the DMCFSD in order to offer consumers the best possible protection in connection to distance selling.

SECTION 7: REDUCTION OF ADMINISTRATIVE BURDEN

The following questions were tabled by the Commission in its Request for Advice:

- *What practical measures could you envisage for reducing the administrative burden caused by the implementation of the IMD?*

- *Are there any areas of the current IMD, which have proven to be too costly compared with the intended objective and benefits?*

- *If regulation of the areas is still appropriate, how might they be regulated in a less costly way?*

During discussions, Members focused on possible areas where administrative burdens could be reduced. However, since there is no significant focus on consumer protection in the IMD at the moment, and, since Members recommend the introduction of new provisions concerning both conflicts of interest and transparency of remuneration, Members also recommend that several administrative burdens are introduced.

However, it should be noted that Members, in the discussions of the different subjects, were very aware not to recommend any actions that will be unnecessarily burdensome for both authorities, insurance intermediaries or insurance undertakings.

The following areas were identified to reduce administrative burdens:

- Removal of the "one month" wait period from the notifications requirements for the freedom to provide services (see Recommendation 20);

- Removal of the exemption in Article 6(2) for Members States to notify the Commission of whether or not they wish to receive notifications of intermediaries operating across their jurisdiction (see Recommendation 19); and

- Removal of the requirement for reinsurance intermediaries to notify of their intention to provide freedom of services to bring this into line with the requirements for reinsurance undertakings (see Recommendation 15).

Another area which was suggested to be eligible for reducing administrative burdens on which no consensus was reached is as follows:

Restriction of the requirement to hold Professional Indemnity Insurance for the entire EEA territory if an insurance intermediary (not a reinsurance intermediary) is only operating in their national jurisdiction (i.e. has not exercised the right of freedom to provide services or freedom of establishment).