

| Comments Template on Consultation Paper on the proposal for Guidelines under the Insurance Distribution Directive on insurance-based investment products that incorporate a structure which makes it difficult for the customer to understand the risks involved | | Deadline 28 April 2017 18:00 CET |
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| Name of Company: | European Federation of Financial Advisers and Financial Intermediaries (FECIF) | |
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| <p>Please follow the following instructions for filling in the template:</p> <ul style="list-style-type: none"> ⇒ <u>Do not change the numbering</u> in the column "reference"; if you change numbering, your comment cannot be processed by our IT tool ⇒ Leave the last column <u>empty</u>. ⇒ Please fill in your comment in the relevant row. If you have <u>no comment</u> on a paragraph or a cell, keep the row <u>empty</u>. ⇒ Our IT tool does not allow processing of comments which do not refer to the specific numbers below. <p>Please send the completed template, in Word Format, to CP-17-001@eiopa.europa.eu.</p> <p>Our IT tool does not allow processing of any other formats.</p> <p>The numbering of the questions refers to the Consultation Paper on the proposal for Guidelines under the Insurance Distribution Directive on insurance-based investment products that incorporate a structure which makes it difficult for the customer to understand the risks involved</p> | | |
| Reference | Comment | |

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| General Comments | <p>Due to the nature of IBIPs (for example, as concerns the financial instruments in which these can be invested, the varying tax treatment across the EU and the fact that these are generally medium to long-term products), we believe that determining only the "needs and demands" of the customer is insufficient and it is essential that an assessment of the "suitability and appropriateness" for the customer is also carried out before a product is recommended and sold. Consideration should also be given to the fact that many people use IBIPs as part of their overall financial planning, including for retirement (now more important than ever in view of the unsustainability of State pension systems and the extending of State retirement ages). Hence, a holistic view should be taken of the customer's total financial situation and future objectives, when recommending sales of IBIPs.</p> <p>Therefore, we do not feel that IBIPs can be sold on an "execution-only" basis, under the provisions of Article 30(3) of the IDD.</p> | |
| Question 1 | <p>For the sake of investor protection, we believe that for all types of IBIPs the assessment of appropriateness shall be required (i.e., execution-only sales shall not be admitted). Investor protection is paramount to any other considerations arising from the IDD. Whilst some certainty is provided in Article 30(3)(a)(i) by referring to financial instruments deemed non-complex under Directive 2014/65/EU, this is insufficient. Therefore, we agree with Policy Option 1.1 that Guidelines on "other non-complex insurance-based investments" should be issued. We feel that this reduces the risk of variations in interpretation occurring across the EU, for example, if NCAs and distributors of IBIPs are permitted to decide whether or not the insurance-based investment is complex or not.</p> | |
| Question 2 | <p>We do not feel that IBIPs can be sold on an "execution-only" basis, under the provisions of Article 30(3) of the IDD for the reasons stated above.</p> | |
| Question 3 | <p>We do not feel that IBIPs can be sold on an "execution-only" basis, under the provisions of Article 30(3) of the IDD for the reasons stated above.</p> | |
| Question 4 | <p>We do not feel that IBIPs can be sold on an "execution-only" basis, under the</p> | |

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provisions of Article 30(3) of the IDD.
 However, in the event that Member States are allowed to derogate from the obligations of Article 30(2) of the IDD, it is essential that the Guidelines on “other non-complex insurance-based investments” are sufficiently robust to ensure the highest level of consumer protection necessary. We believe that the following “product-based” principle shall be generally valid: the identification of complex and non-complex IBIPs shall not be merely based on the types of underlying financial instruments; rather, it shall be based on the content of the product. Indeed, all the features of the insurance product (and their interaction) result in the complex or non-complex nature of the product itself; that is to say, the idea of considering only the underlying financial instruments is not enough, especially from the point of view of thorough customer protection.

2.14 of Guideline 1 refers to contracts where the maturity or surrender value is guaranteed by the insurance undertaking. However, the ‘value’ of this guarantee can be affected by the financial strength of the insurance undertaking – which can evolve over time – and so due to the medium to long-term nature of IBIPs, cannot be wholly depended upon as attributing the IBIP to being a non-complex product.

Consideration should also be given to the limit of the protection provided to policyholders under investor compensation schemes, which may be insufficient to wholly guarantee the the full value of the IBIP, in the event of the failure of the insurance undertaking.

Furthermore, changes in national legislation can lead to a situation whereby the risks to the customer who has invested in an IBIP are increased, regardless of the guarantee provided by the insurance undertaking. This is the case in France, whereby the Article L. 631-2-1 of the Code Monetaire was amended, following the enactment of Loi no. 2016-1691 on 9th Decemebr 2016 (also known as “Sapin II”).

Question 5

We do not feel that IBIPs can be sold on an “execution-only” basis, under the

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provisions of Article 30(3) of the IDD.
 However, in the event that Member States are allowed to derogate from the obligations of Article 30(2) of the IDD, the assessment of whether or not a contract “incorporates a structure which makes it difficult for the customer to understand” should be considered in relation to both the financial instrument(s) in which the contract is invested and the terms and conditions of the contract. The identification of complex and non-complex IBIPs shall be based on the content of the product. That is to say, all the features of the insurance product (and their interaction, let’s not forget the effects of financial engineering) result in the complex or non-complex nature of the product itself.

As concerns 2.19 of Guideline 2, the reference to “exit penalties” should be considered and compared to IBIPs that make an initial charge deduction from the premium paid – typically up to 5%. Whilst the IBIP making the initial charge may be surrendered at any time without the application of an exit penalty, this does not guarantee that this is better for the customer than the comparable IBIP applying an exit penalty rather than an initial deduction charge. For those IBIPs not making an initial charge deduction, the potential exit penalty diminishes over time and therefore, should not be an issue if the product is retained for the medium to long-term. In effect, this strengthens the argument that IBIPs should not be sold on an “execution-only” basis, since the insurance intermediary (or other distributor) is needed to assess the “suitability and appropriateness” of the IBIP in meeting the customer’s objective, including the time horizon for the investment.

We also propose to amend Guideline 2 in light of the statements exposed in the Consultation Paper (p. 23, 2.20 and 2.21): “guarantee” is a term that creates certain customer expectations (in particular, customers may assume there are no conditions attached to it) and the nature of the guarantee needs to be considered. We also consider that guarantees are typically product features developed to meet the

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| | <p>customer's demands and needs (cf. p. 24, 2.20 of the Consultation Paper) and manufacturers incur costs to provide these guarantees. Accordingly, the cost of the guarantee may be reflected in the price of the product and surrender fees (specifically, these fees may decrease over time, in order to disincentive early surrender). Specifically, we propose the following amendment:</p> <p><i>3. Where the contract contains any of the following features, the insurance undertaking or insurance intermediary should deem it as not satisfying the conditions in Article 30(3)(a) of the IDD: [...]</i></p> <p><i>(e) the guarantee regarding the amount of premiums paid or the maturity or surrender value or pay out upon death are conditional or have time limitations which makes it difficult for the customer to understand the risks involved.</i></p> | |
| Question 6 | We do not have any specific comments. | |
| Question 7 | We do not distribute IBIPs on an "execution-only" basis. | |
| Question 8 | <p>Examples 3, 8 and 10 confirm our request to amend Guideline 2 to consider the importance of the guarantee mechanism (cf. our answer to Q5). In particular, it is necessary to verify that the guarantee is actually effective, thereby complying with precise standards of customer protection (specifically, a guarantee by a third party that is subject to the supervision of a competent national authority). Indeed, it is of utmost importance that the guarantee is not influenced by specific risks pertaining to the activities of the insurance undertaking which developed the IBIP distributed to the customer.</p> <p>Example 2 needs further explanation, particularly with regard to the definition of a surrender fee which is/is not « disproportionate to the cost to the insurance undertaking ».</p> <p>The definition of Example 5, being too extended, may lead to the improper qualification of a product as "non-complex" where it would be too difficult for the</p> | |

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customer to understand the underlying investments. Let's consider, for instance, a unit-linked product whose underlying financial instruments are equity funds which invest in the markets of different countries (encompassing both EU Member States and third countries). On the contrary, a prudential approach is needed, based on the "product-based" principle espoused in our answer to Q4.

The product described in Example 6 should be deemed complex in order to try and avoid possible cases of mis-selling.

We do not believe that Example 7 refers to a non-complex product: although the "other" product structures may not be "difficult", the way in which the surrender or maturity value reflects the performance of underlying investments makes the product difficult to understand for the "average" retail investor (let's consider, for instance, a unit-linked product whose underlying financial instruments are equity funds which invest in the markets of different countries, encompassing both EU Member States and third countries).

We do not believe that Example 10 refers to a non-complex product: despite the guarantee, there is actually a structure which makes it difficult for the customer to understand the performance of the product, in as much as « the insurer also invests in some derivatives ».

Finally, we also consider that Example 11 should refer to a complex product: in order to avoid regulatory loopholes, all products with profit participation mechanisms should be deemed complex.

Question 9

The Consultation Paper does not address the post-sale consequences of an "execution-only" sale. In particular, if the customer who has invested in the IBIP does not benefit from on-going advice, as their personal and financial situation evolves or perhaps there are changes in legislation (including fiscal), resulting in the IBIP no longer being suitable but the product is retained, this could be detrimental to the customer.

Moreover, the Consultation Paper misses one important aspect which was conversely

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considered in the "Survey on the empowerment for EIOPA to develop Guidelines in Article 30(7) of the Insurance Distribution Directive"; the relationship between IBIPs and tax regulations may lead an IBIP to incorporate a structure which makes it difficult for the customer to understand the risks involved. Let's consider, for instance, tax regulations subject to frequent changes which make it difficult, particularly in the case of long term investments, to monitor the impact of taxation on investment returns. This is the case in Italy, where tax rates for financial income have been reformed and increased twice (in 2011 and 2014) in a short time span.