

**FORMAL REQUEST TO EIOPA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING DIRECTIVE 2002/92/EC ON INSURANCE MEDIATION, AS AMENDED BY AMENDED BY THE DIRECTIVE ON MARKETS IN FINANCIAL INSTRUMENTS REPEALING DIRECTIVE 2004/39/EC (MIFID (EC) NO XX/2014)**

With this mandate the Commission seeks EIOPA's technical advice to prepare a possible delegated act concerning the conflicts of interest provisions in insurance distribution activities, as laid down by Article 91 of the Directive on markets in financial instruments repealing Directive 2004/39/EC [MiFID] (the "MiFID II Directive"<sup>1</sup> also referred to as IMD 1.5 or the "legislative act"). Any such delegated act that may be proposed by the Commission must be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

This mandate is based on Regulation No 1094/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Insurance and Occupational Pensions Authority (the "EIOPA Regulation"), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "290 Communication") and the Framework Agreement on Relations between the European Parliament and the European Commission (the Framework Agreement").

This request for technical advice will be made available on the DG Internal Market and Services website once it has been sent to EIOPA.

The mandate focuses on technical issues which follow from the MiFID II Directive. The following delegated act provided for by that Directive should be adopted so that it enters into application 30 months following the entry into force of the MiFID II Directive, taking into account the right of the European Parliament and the Council to object to a delegated act within 3 months (which can be extended by a further 3 months):

**According to Article 13c of the legislative act as laid down by Article 91 of Directive 2014/.../EC, the Commission may adopt by means of delegated acts the following measures:**

**(a) to define the steps that insurance intermediaries or insurance undertakings might reasonably be expected to take to identify, prevent, manage and disclose conflicts of interest when carrying out insurance distribution activities;**

**(b) to establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the customers or potential customers of the insurance intermediary or insurance undertaking.**

The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the established practice within the Expert Group on Banking, Payments and Insurance, the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of these possible delegated acts.

The powers of the Commission to adopt delegated acts are subject to Articles 13(e) and (f) of the legislative act. As soon as the Commission adopts a delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

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<sup>1</sup> The text referred to here is the text of the political agreement reached between the European Parliament and the Council revised by legal revisers and adopted by the European Parliament at the plenary session on 15 April 2014 but not yet published in the Official Journal. The text can be found at: **XXX**

## 1. Context

### 1.1 Scope

The Insurance Mediation Directive<sup>2</sup> of 2002 (hereinafter "IMD1") lays down requirements on insurance intermediaries selling insurance products but not on direct selling of insurance products by insurers. The main objectives of the IMD review (hereinafter "IMD2"), proposed by the Commission on 3 July 2012 (COM (2012)360), are to enhance consumer protection and to achieve undistorted competition between all types of sellers of insurance products.

As the Council suspended discussions on IMD 2 in November 2012, the European Parliament, in the course of the MiFID II negotiations, requested that Chapter VII of the Commission proposal on IMD2 relating to *"Additional customer protection requirements in relation to insurance investment products"* was lifted from the proposal and brought forward and dealt with during the negotiations on the Commission proposal to recast Directive 2004/39/EC - COM (2011) 656 (hereinafter MiFID2). As a result of these negotiations, which were concluded on 14 January 2014, a new Article 91 was added in MiFID2, which amends IMD1 in respect of the sale of insurance-based investment products.

As regards IMD2, the European Parliament reached a position on 26 February 2014 and the Council will resume the discussion on 19 May 2014. It is hoped that under the Italian Presidency and the newly elected European Parliament the text can be finalized. This request for technical advice is written on the assumption that the relevant empowerment for the Commission on conflicts of interests, introduced by Article 91 of MiFID II, will be upheld during the IMD 2 negotiations.

### 1.2 Principles that EIOPA should take into account

In providing its technical advice EIOPA is invited to take account of the following principles:

- It should respect the requirements of the EIOPA Regulation.
- In accordance with the MiFID II Directive, EIOPA should work together with ESMA to achieve as much consistency as possible in the conduct of business standards for insurance-based investment products.
- Internal market: the need to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to financial markets and insurance, and a high level of consumer protection.
- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the implementing acts set out in the legislative act. While preparing its advice, EIOPA should seek coherence within the regulatory framework of the Union, and in particular Commission Directive 2006/73/EC.
- In accordance with the EIOPA Regulation, EIOPA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.
- EIOPA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in

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<sup>2</sup> Directive 2002/92/EC of 9 December 2002.

such a way as to ensure coherence between different standards of work being carried out by the various expert groups.

- The provided technical advice should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology at European level.
- EIOPA should justify its advice by identifying, where relevant, a range of technical options and undertaking evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its impact assessment. Where administrative burdens and compliance costs on the side of the industry could be significant, EIOPA should where possible quantify these costs.
- EIOPA should provide sufficient factual data backing the analyses gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by EIOPA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated act.
- EIOPA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the legislative act, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.
- The technical advice given by EIOPA to the Commission should not take the form of a legal text. However, EIOPA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology in the Union.
- EIOPA should address to the Commission any question they might have concerning the clarification of the text of the legislative act, which they should consider of relevance to the preparation of EIOPA's technical advice.

## **2. Procedure**

The Commission would like to request the technical advice of EIOPA in view of the preparation of the possible delegated act to be adopted pursuant to the legislative act and in particular regarding the questions referred to in section 3 of this formal mandate.

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate will not prejudice the Commission's final decision in any way.

In accordance with the established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of the delegated act relating to the legislative act.

The Commission will duly inform the European Parliament and the Council about the final version of this mandate. As soon as the Commission adopts possible delegated acts, it will notify them simultaneously to the European Parliament and the Council.

## **3. EIOPA is invited to provide technical advice on the following issues:**

**a) to define the steps that insurance intermediaries or insurance undertakings might reasonably be expected to take to (1) identify, (2) prevent, (3) manage and (4) disclose conflicts of interest when carrying out insurance distribution activities;**

The requirements on conflicts of interest foreseen by the MiFID II Directive (Article 91) cover a broad range of situations that may occur in insurance distribution activities. Insurance intermediaries and insurance undertakings are required to maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 13b of the legislative act from adversely affecting the interests of customers (Article 13c of the legislative act).

Article 13c of the legislative act sets out the obligation for firms to take all appropriate steps to identify and to prevent or manage conflicts of interest. It appears that identification, prevention and management of conflicts of interest constitute the core requirements that insurance intermediaries or insurance undertakings must comply with while disclosure can only constitute a last resort measure and not a means for managing conflicts of interest.

Pursuant to Article 13c (3) the Commission is empowered to adopt delegated acts to further specify the appropriate steps insurance intermediaries and insurance undertakings are reasonably expected to take with respect to conflict of interests.

As regards remuneration, insurance intermediaries and insurance undertakings should take steps to identify, prevent, manage and disclose conflicts of interests when providing various investment and ancillary services, including those caused by the insurance intermediary's or insurance undertaking's own remuneration and other incentive structures.

The reception of third-party payments and benefits may influence insurance intermediaries and insurance undertakings in acting with the customer's best interests in mind, by incentivising them to recommend or sell a particular insurance-based investment product when another product may better meet the customer's needs. In order to strengthen the protection of customers and increase clarity as to the service they receive, conflicts of interest rules should take into consideration situations related to the reception of such third-party payments and benefits.

Certain investment products, such as insurance-based investment products, can be sold or distributed in different ways by insurance intermediaries or insurance undertakings. There are certain existing or potential conflicts of interests arising in the distribution of these products. These can be similar to the conflicts of interests found in the field of investments, but might have additional or different characteristics.

Therefore, EIOPA is invited to base its technical advice primarily on existing conflicts of interest rules, as laid down in Commission Directive 2006/73/EC, while at the same time ensuring regular consultation with ESMA as regards ESMA's work on its technical advice on Article 23 (4) (a) and (b) of MiFID II. In this respect, the EIOPA advice should be in line with the MiFID II Level 2 provisions as much as possible, in so far as it is consistent with IMD 1.5.

In particular, EIOPA is invited to consider the existing conflicts of interest framework under Commission Directive 2006/73/EC and to develop a similar framework for insurance intermediaries and insurance undertakings distributing insurance-based investment products. EIOPA should consider identifying remuneration or commission arrangements that lead to harm for the customers' interests and ways of avoiding these, or where avoiding these is not possible, examine monitoring, or placing conditions or limitations on conduct and other arrangements that aim to limit harm to customers' interests.

In this context, EIOPA should also consider the framework for disclosure, including online disclosure, while identifying that disclosure is not a measure in itself to manage conflicts of interest. This should include how to devise content and how to ensure the quality of the information provided

to customers in order to enable them to make an informed investment decision as regards insurance-based investment products.

EIOPA should also consider a requirement for periodical review of conflicts of interest policies or clarifications with respect to disclosure.

EIOPA is invited to consider in its technical advice the design of conflicts of interest frameworks to reflect the variety of the distribution channels that exist for the sale of insurance-based investment products. The size of firms carrying out the activity of insurance mediation should not alleviate responsibility on them from the obligation to devise a conflicts of interest policy.

**b) to establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the customers or potential customers of the insurance intermediary or insurance undertaking.**

With a view to establishing appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the customers or potential customers of insurance-based investment products, EIOPA is invited to verify to what extent the criteria in Directive 2006/73/EC need to be adapted and/or supplemented for insurance-based investment products.

Different products as well as different distribution channels might present different conflict of interest risks. EIOPA should also consider the timeframe of insurance-based investment products - notably what the conflict of interest issues are at the point of sale as well as during the products' lifetime.

EIOPA should consider that conflicts of interest are often related to the remuneration/inducements received by the insurance intermediary or insurance undertaking and therefore an essential element in designing the conflict of interest rules.

As the Directive establishes a similar framework for ESMA as regards conflicts of interest, EIOPA is invited to closely liaise with and consult ESMA when providing the technical advice to the Commission.

## 5. Indicative timetable

The delegated act on conflicts of interest in insurance distribution activities should enter into force at the same time as the delegated acts on conflicts of interest in investment services. In order to achieve this it would be necessary for EIOPA and ESMA to work in parallel.

This target date should allow EIOPA sufficient time to prepare its technical advice for the Commission delegated act.

The deadlines set to EIOPA to deliver its technical advice are as follows:

Deadline	Action
[June 2014 (estimated)]	Entry into force of the MiFID II Directive (the twentieth day following that of its publication in the Official Journal of the European Union).
7 months after the entry into force	EIOPA provides its technical advice.

<p>6 months after the delivery of the technical advice by EIOPA (12 months after the entry into force of the MiFID II Directive)</p> <p>At the latest 6 months after adoption by the Commission, deadline for the European Parliament and the Council to object (three months which can be extended by another three months)</p>	<p>Preparation, adoption of the delegated acts and objection period for the European Parliament and the Council: In the preparation of the delegated act, the Commission will consult with experts appointed by the Member States within the Expert Group on banking, payments and insurance.</p> <p>The Commission will provide the European Parliament with full information and documentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.</p> <p>After adoption by the Commission of the delegated act and notification to the European Parliament and the Council, there is an objection period for the European Parliament and the Council (three months which can be extended by another three months).</p>
<p>At the latest 18 months following the entry into force of the MiFID II Directive</p>	<p>Publication in the Official Journal of the European Union (entry into force twenty days later).</p>
<p>24 months following the entry into force of the MiFID II Directive</p>	<p>Date of transposition and publication by Member States.</p>
<p>30 months following the entry into force of the MiFID II Directive</p>	<p>Date of application of the MiFID II Directive.</p>