MFSA

MALTA FINANCIAL SERVICES AUTHORITY

PROPOSED AMENDMENTS TO THE INSURANCE BUSINESS ACT AND INSURANCE INTERMEDIARIES ACT

FEEDBACK STATEMENT ISSUED FURTHER TO INDUSTRY RESPONSES TO MFSA CONSULTATION DOCUMENT

MFSA REF: [04-2017]

5TH FEBRUARY 2018

1. Background

On 3rd July 2017, the MFSA issued a Consultation Document on the proposed amendments to the Insurance Intermediaries Act (Cap.487), *("IIA")*, (which is proposed to be renamed as "*the Insurance Distribution Act")*, and to the Insurance Business Act (Cap.403), *("IBA").*

The purpose of the Consultation Document was to highlight the main changes proposed to be carried out to the IIA primarily as a consequence of transposing Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), (the "*Insurance Distribution Directive" or "IDD"*). It was also proposed to carry out consequential amendments to the IBA so as to align the said Act with the proposed terminology and amendments to the IIA. In the said Consultation, the MFSA also issued the proposed Insurance Distribution (Exemption) Regulations, 2017, to be issued under the Insurance Distribution Act *("IDA")*, which transpose some of the provisions of the IDD.

Further to the said Consultation Document, the MFSA is issuing a feedback statement on the comments received in relation to the proposed amendments to the IIA and IBA. An outline of the main comments received and the MFSA's position in relation thereto is provided below.

2. Main Comments received on the proposed amendments to the IIA and the MFSA's position

2.1 Transposition and Application of the Insurance Distribution Directive

Industry comment: It was pointed out that the Insurance Distribution Directive will be transposed into national law by means of the Insurance Distribution Act and regulations, Insurance Distribution Rules and Conduct of Business Rules issued thereunder. Some industry respondents requested clarification as to whether the MFSA expects intermediary networks to be perfectly aligned with the said requirements as from **23rd February 2018**, especially when considering that, in the context of the renewals process at the end of 2017, some intermediary networks may not satisfy the proposed new IDD requirements, with immediate effect.

MFSA's Position: In terms of the current Article 42 of the IDD, Member States are to transpose and bring into force the legislative framework necessary to ensure compliance with the provisions of the IDD, by 23rd February 2018. However, in so far as the date of application of the IDD is concerned, on 20th December 2017, the Commission published the proposal for a Quick-Fix Directive *(Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2016/97 as regards the date of application of Member States' transposition measures)*, whereby it is being proposed to extend the implementation date by seven months, to **1st October 2018**.

In addition, on 20th December 2017, the European Commission also published a proposal for a *Commission Delegated Regulation (EU) .../... of 20.12.2017 amending Delegated Regulation (EU) 2017/2358 and Delegated Regulation (EU) 2017/2359 as regards their dates of application*. It is being proposed that the dates of application of the two Commission Delegated Regulations supplementing the IDD *(that is, Commission Delegated Regulation (EU) 2017/2358 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European*

Parliament and of the Council with regard to product oversight and governance requirements for insurance undertakings and insurance distributors, as well as Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products), are to be aligned with the proposed amended date of application of the IDD, i.e. 1st October 2018.

The change in the implementation date is being proposed to give the insurance sector, particularly small operators, more time to better prepare for a correct and effective implementation of the IDD and to implement the necessary technical and organisational changes to comply with the two Commission Delegated Regulations supplementing the IDD. In view of the above, if the proposals are adopted, the MFSA expects that current insurance and reinsurance intermediaries and authorised insurance and reinsurance undertakings have the procedures in place to ensure compliance with the new applicable requirements by the **1st October 2018**.

2.2 Introducers

Industry Comment: Some industry participants, requested clarification as to whether the MFSA intends to retain the regime of introducers in terms of the current Insurance Intermediaries Rule 24 of 2009.

MFSA's Position: The MFSA intends to retain the regime for introducers as currently outlined in the Insurance Intermediaries Rule 24 of 2009 in the new Insurance Distribution Rules.

2.3 Freedom of Establishment and Freedom to Provide Services

Industry comment: A market participant suggested an amendment to the IDA so that where a Maltese intermediary pursues distribution activities in a Member State, other than Malta, such Maltese intermediary can choose whether to apply the IDD requirements adopted by the host Member State or the home Member State, depending on how stringent the requirements transposed in such Member States.

MFSA's Position: It is to be noted that Chapter III of the IDD (which will be transposed in the *European Passport Rights for Intermediaries Regulations, 2017* to be issued under the IDA) contains provisions on freedom of services and freedom of establishment by insurance, reinsurance and ancillary insurance intermediaries, as well as provisions for notifications and close cooperation between the home and host Member States. In terms of recitals (21) and (22) of the IDD, the competent authority of the home Member State is considered responsible for ensuring compliance with obligations set out in the IDD with regard to the entire business carried out across the EU. In the case of the establishment of a branch, the IDD specifies the competent authority of the host Member State as responsible for enforcing the rules on information requirements and conduct of business with regard to the services provided within its territory, in terms of Article 7(2) of the IDD.

2.4 Definition of *"binding authority agreement"*

Industry Comment: An industry respondent pointed out that the current definition of "*binding authority agreement"* in article 2 of the IIA is restricted to agreements between members of

Lloyd's and coverholders. Therefore, it was suggested to amend the said definition so that a binding authority arrangement is no longer restricted to Lloyd's, but is also extended to other authorised undertakings in terms of article 32 of the IIA.

MFSA's Position: A *"binding authority agreement"*, which is similar to an underwriting agreement, forms part of Lloyd's practice. This is an agreement entered into between a member of Lloyd's or a person acting on its behalf and a coverholder, under which agreement the coverholder may, in accordance with the terms thereof, accept risks or commitments on behalf of that member of Lloyd's. The MFSA would like to point out that, in so far as enrolled insurance brokers are concerned, these may make or enter into *underwriting agreements* with any *authorised undertaking*, in terms of article 32 of the current IIA. The term *"authorised undertaking",* as laid down in article 2 of the current IIA, permits agreements with undertakings which have passported in Malta by establishing a branch or providing services in Malta, in exercise of a European right. Therefore, the MFSA is of the view that that the current definition of *"binding authority agreement"* is to be retained.

2.5 Article 25 of the Insurance Distribution Act

Industry Comment: Some market participants requested clarification as to whether in terms of the proposed article 25 of the draft IDA, tied insurance intermediaries ("TIIs") will be expected to submit information to the MFSA on a regular basis under the Insurance Distribution Rules and, or Conduct of Business Rules, since, such a requirement would be onerous for certain TIIs. These respondents also requested which requirements is the MFSA minded to introduce for the purposes of article 25.

MFSA's Position: In terms of article 25(1) of the IDA, an enrolled person is required to submit to the competent authority any information which is necessary for the purposes of supervision, as may be specified by means of regulations, Insurance Distribution Rules or Conduct of Business Rules. Thus, the MFSA would like to point out that the said article applies to a person enrolled under article 13 of the IDA, that is, insurance agents, insurance brokers and insurance managers, and does not apply to TIIs.

2.6 Article 28(13)(c) of the Insurance Distribution Act

Industry Comment: In terms of the proposed article 28(13)(c) of the draft IDA, an approved auditor is required to report any matter which relates to and may have a serious adverse effect, including any matter that is *"a material breach of the provisions of this Act, regulations or Insurance Distribution Rules which lay down the conditions governing registration or enrolment or which specifically govern the carrying out of insurance distribution activities and reinsurance distribution activities by an enrolled person*."

In this respect, clarification was sought as to whether the approved auditor would be expected to carry out more in-depth reviews of an intermediary's compliance with the provisions of the Act, regulations or Insurance Distribution Rules, as well as whether the auditor's review should be limited to the financial aspects of the business.

MFSA's Position: The MFSA would like to clarify that this requirement to report any material breaches only arises when the approved auditor becomes aware of any matter which relates to

and may have a serious adverse affect upon the stability and soundness of the company or the integrity of the distribution activities carried out in terms of the IIA. This includes material breaches as laid down in the proposed article 28(13)(c) of the draft IDA.

2.7 Knowledge and Ability and Continuing Professional Training and Development Requirements

2.7.1 Knowledge and Ability Requirements

Industry Comment: Some market participants noted that in terms of proposed provisions in the Insurance Distribution Act, the concept of knowledge and ability is also to be introduced in the case of tied insurance intermediaries, ancillary insurance intermediaries and employees of an insurance undertaking carrying out insurance distribution activities. Clarification is sought as to:

(a) whether it will fall within the responsibility of an authorised insurance undertaking or an authorised reinsurance undertaking, as the employer, to verify the knowledge and ability requirements of their employees carrying out insurance and reinsurance distribution activities, given that the said employees are not usually subject to the approval of the MFSA upon engagement;

(b) whether, even though compliance with the minimum professional knowledge and competence requirements laid down in Annex 1 of the Directive is limited only to insurance and reinsurance intermediaries, the knowledge and ability requirements applicable to employees of an authorised insurance or reinsurance undertaking carrying out distribution activities may be benchmarked with the requirements contained in the said Annex, without the need to specifically demonstrate compliance therewith;

(c) the manner in which persons registered in the Tied Insurance Intermediaries Company Register will be expected to demonstrate compliance with the relevant knowledge and competence requirements, and also as to how the minimum requirements laid down in Annex 1 to the IDD, and demonstration of compliance with the said Annex, will tie up with the pre-enrolment qualifications in terms of the current Insurance Intermediaries Rule 17 of 2007, particularly in the case of tied insurance intermediaries currently registered in the Tied Insurance Intermediaries Company Register of authorised undertakings;

(d) the knowledge and ability requirements to be made applicable to ancillary insurance intermediaries registered in the Ancillary Insurance Intermediary Company Register;

MFSA's Position: Article 10(1) of the IDD contains the general basic obligation requiring insurance and reinsurance distributors to possess appropriate knowledge and ability in order to complete tasks and perform duties adequately. The MFSA is currently preparing the draft Insurance Distribution Rules containing the requirements to be complied with in relation to knowledge and ability and continuing professional training and development requirements, to be issued for consultation shortly.

It is to be noted that Article 10(2), sixth sub-paragraph of the IDD provides that *insurance and reinsurance intermediaries* shall demonstrate compliance with the relevant professional knowledge and competence requirements laid down in Annex I to the IDD. In the MFSA's view, the *minimum necessary competence and knowledge requirements* laid down in the said Annex refer to the fact that intermediaries are not only to have theoretical knowledge but also need to have the relevant practical experience, and this is linked to conduct of business, particularly to protect consumers against fraud or unethical practices. Moreover, in order to adopt a consistent approach across all distribution channels, the MFSA intends to extend the application of Annex I to *insurance and reinsurance undertakings.* The relevant professional knowledge requirements will be linked to the level of complexity of the particular activity and the products distributed.

In so far as the responsibility of an authorised insurance or reinsurance undertaking for the verification of the knowledge and ability requirements of their employees is concerned, it is to be pointed out that the MFSA intends to adopt the option laid down in Article 10(2), fourth sub-paragraph of the IDD, so that the insurance or reinsurance undertaking would be required to verify that the knowledge and ability of their employees who are engaged in insurance or reinsurance distribution, are in conformity with the obligations set out in Article 10 of the IDD.

2.7.2 Continuing Professional Training and Development Requirements ("CPD")

Industry Comment: It was noted that the proposed articles 14A, 35A and 43M of the draft IDA introduce a requirement of continuing professional training for persons to be enrolled in the Agents, Managers, Brokers List and Tied Insurance Intermediaries List and their employees, and for employees of an insurance undertaking involved in insurance distribution activities. It was also argued that AIIs are not subject to CPD requirements. For the purposes of the assessment of knowledge and competence, it is important for market participants to know whether the MFSA intends to adopt the minimum requirement of 15 hours of professional training or development per year, as provided for in Article 10(2) of the IDD.

Some industry respondents requested detailed guidance as to what is expected in practice to ensure compliance with CPD requirements. It was maintained that it is necessary for them to know what continuing professional training and development entails and who will be permitted to provide such training. In this respect it was suggested that insurance undertakings are to be permitted to control this process, for instance by allowing insurance or reinsurance undertakings to provide in-house training and provide their own certifications. Moreover, guidance is also required as to when continuing professional training requirements will come into force.

MFSA's Position: The CPD requirements laid down in Article 10(2) of the IDD provide for a specific aspect of the general obligation found in Article 10(1) IDD, that is, the updating of knowledge and ability according to the respective roles performed. In terms of Article 10(2) of the IDD, the assessment of knowledge and competence is to be based on at least 15 hours of professional training or development per year and in this respect it is to be noted that, for the time being, the MFSA intends to adopt the requirement of at least 15 hours per year, with the possibility of increasing the number of hours, at a later stage.

Further detail as to what is expected in practice to ensure compliance with CPD requirements will be included in draft proposals of new Insurance Distribution Rules to be issued under the

IDA relating to knowledge and ability and CPD requirements which will be issued for consultation shortly.

In so far as AIIs are concerned, AIIs are required to satisfy the general basic obligation contained in Article 10(1) of the IDD, that is, the requirement to possess appropriate knowledge and ability. This is further explained in recital (28) of the IDD which states that AIIs should be required to know the terms and conditions of the policies they distribute and where applicable, rules on handling claims and complaints. Moreover, in so far as CPD requirements are concerned, it is to be noted that AIIs are not covered by the more specific obligation contained in Article 10(2), first sub-paragraph, of the IDD, that is, the CPD requirements based on at least 15 hours of professional training or development per year.

However, in terms of Article 10(2), fourth sub-paragraph of the IDD, where an authorised undertaking assumes responsibility in terms of the third sub-paragraph of Article 3(1) IDD (one of the instances includes the appointment of AIIs), the Member State may place responsibility on the said undertaking which has to verify compliance with the basic knowledge and ability requirements and if need be, provide any necessary training to AIIs acting under the undertaking's responsibility. The MFSA intends to adopt the option referred to in Article 10(2), fourth sub-paragraph of the IDD so that the obligation to ensure that AIIs have the necessary knowledge and ability will be vested in the undertaking or company appointing them.

2.7.3 Article 43M of the draft Insurance Distribution Act – CPD requirements of employees of insurance undertakings

Industry Comment: Some industry participants noted that the term *"insurance distribution activities"* is wide and includes advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, concluding such contracts, and assisting in the administration and performance of such contracts, in particular in the event of a claim. These respondents required clarification as to their understanding that in the case of employees of an insurance undertaking, it is not only those employees which are involved in sales and underwriting who are required to complete CPD, but also those employees involved in the claims department.

With respect to article 43M(2) of the proposed IDA, another market respondent suggested that this article needs to be amended so that the application of CPD requirements is to be restricted only to employees directly involved in the selling or distribution of insurance products on behalf of an authorised insurance or reinsurance undertaking.

MFSA's Position: In so far as the query relating to claims is concerned, it is to be noted that the IDD definition of *"insurance distribution"* mirrors the IMD definition of *"insurance mediation",* other than the activity of introducing, which does not feature in the IDD. Therefore, the *"administration and performance of contracts of insurance, in particular in the event of a claim*" is considered as amounting to insurance distribution activities.

However, it is to be noted that in terms of Article 2(2)(b) and recital (14) of the IDD, the "*professional management of claims on behalf of an insurance or reinsurance undertaking"* (that is, when this function is outsourced by undertakings), is not to be considered as constituting insurance distribution under the IDD. Further details as to which persons will be subject to CPD

requirements will be specified in draft Insurance Distribution Rules to be issued for consultation shortly.

With respect to the suggested amendments to article 43M(2) of the draft IDA, it is to be noted that in the proposed provision there is already a reference to employees carrying out distribution activities, which includes the selling of insurance products.

2.7.4 The Transitional Period pursuant to Article 40 of the IDD

Industry Comment: The insurance industry requested clarification as to the transitional period which will apply in terms of article 40 of the IDD, as well as to any envisaged grandfathering of existing intermediaries.

MFSA's Position: It is to be noted that Article 40 of the IDD provides that Member States shall ensure that *intermediaries* already registered under IMD comply with the relevant provisions of national law implementing Article 10(1) of the IDD, by **23rd February 2019**. Therefore, compliance by existing intermediaries with Article 10(1) of the IDD is to be made by the said date. Since no amendments were proposed to Article 40 of the IDD, purusant to the European Commission proposals referred to in section 2.1 of this Feedback Statement, it appears that this date will be retained.

2.8 Tied Insurance Intermediaries ("TIIs")

2.8.1 Article 37(13) of the Act

Industry Comment: Some market participants are of the view that article 37(13) of the Insurance Intermediaries Act which provides for the requirement that an authorised insurance undertaking is to be at all times responsible for any act or omission of its registered tied insurance intermediaries, encompasses the financial requirements of tied insurance intermediaries under Articles 10(4) and 10(6)(b) of the IDD. In this respect, confirmation was sought as to whether the existing regime for tied insurance intermediaries will continue to apply, so that tied insurance intermediaries will not be required to have professional indemnity insurance and meet the financial capacity requirements specified in the said IDD provisions. For the purposes of clarity, these respondents suggested that this is to be specifically included as part of the legislative framework.

Clarification was also sought as to the extent of responsibility of an authorised insurance undertaking for the acts and omissions of a tied insurance intermediary appointed through an insurance agent who acts on behalf of the authorised insurance undertaking (the principal), in particular since the insurance agent is subject to financial requirements. In this respect, some market participants are of the view that, in order to avoid regulatory arbitrage, in the case of a tied insurance intermediary appointed by an insurance agent, the acts and omissions of such insurance agent are not to be considered to fall within the responsibility of the authorised insurance undertaking and are to be addressed in their entirety through the professional indemnity insurance taken out by such agents in terms of the current article 10(1)(v) of the IIA.

MFSA's Position: It is to be pointed out that requirements for enrolment applicable to the different types of intermediaries are laid down in the various parts of the current Insurance

Intermediaries Act. In so far as TIIs are concerned, article 37 which lays down the enrolment requirements of a TII, does not provide for a professional indemnity insurance (as opposed to the enrolment requirements laid down for persons enrolled in terms of article 13 of the Act). The requirements for registration or enrolment of TIIs found in the current IIA and insurance intermediaries rules issued thereunder do not specifically require a TII to hold a professional indemnity insurance policy. However, article 37(9) of the current IIA clearly states that authorised undertakings shall at all times be responsible for any act or ommission of its registered tied insurance intermediaries provided that such act or ommission is an act or ommission pertaining to a contract of insurance issued by the undertaking or offered on its behalf through the services of such TIIs. Moreover, in terms of Appendix I to the current Insurance Intermediaries Rule 12, insurance agents are required to provide a professional indemnity insurance cover for tied insurance intermediaries registered in its Tied Insurance Intermediaries Company Register.

Therefore, the MFSA intends to retain the existing regime for TIIs so that TIIs will not be required to hold professional indemnity insurance and meet other financial capacity requirements under Articles 10(4) and 10(6)(b) of the IDD. In so far as the request to have this specifically set out in the legislative framework is concerned, the MFSA is of the view that this is not necessary since Article 10(4) IDD specifically provides for the possibility to require that an undertaking on whose behalf the TII is acting, takes full responsibility for the intermediary's actions.

In so far as the extent of responsibility of an authorised insurance undertaking for acts and ommissions of its TIIs is concerned, the MFSA is of the view that the contract of insurance, irrespective of whether it is issued directly by a principal or through an insurance agent, the said contract is still issued by the authorised insurance undertaking (insurance principal) and thus, such authorised insurance undertaking ultimately remains responsible for the obligations arising from the contracts of insurance. Therefore, it is important that insurance undertakings sign off the TIIs appointed by their insurance agents.

2.8.2 Close Links

Industry Comment: Some industry participants noted that the proposed article 44(3) of the draft Insurance Distribution Act provides that authorised undertakings will be responsible to inform the MFSA of any changes to the shareholding and close links of the tied insurance intermediaries and ancillary insurance intermediaries registered in their company registers.

However, these respondents maintained that it would be unduly burdensome to place on such authorised undertakings the responsibility to notify the MFSA with any changes to the shareholding and close links of their enrolled TIIs and AIIs, and to expect the authorised undertakings to carry out extensive due diligence regarding the corporate structure of their TIIs and AIIs. Therefore, it is suggested that the responsibility to notify the MFSA with any changes to the shareholding and close links of their enrolled TIIs and AIIs, is to be placed on the TIIs and AIIs themselves.

MFSA's Position: The requirement that the competent authority is to be informed of any changes to the shareholding and close links emenates from Article 3(6) of the IDD. The MFSA acknowledges the comments made and has therefore amended the proposed article 44(3) of the

draft IDA so that, TIIs and AIIs will be obliged to inform the authorised undertaking/s appointing them, of any changes in the disclosure of its holdings and close links, and the authorised undertakings would then be expected to submit the said information to the MFSA.

2.8.3 Possible re-classification of TIIs as AIIs

Industry Comment: In view of the proposed definition of *"ancillary insurance intermediaries activities"* in the draft Insurance Distribution Act, as well as the proposed amendments to the current definition of *"tied insurance intermediaries activities"*, with a view to distinguish between the TII and AII regime, the industry requested clarification as to whether authorised undertakings are expected to carry out an analysis of their existing portfolio of enrolled tied insurance intermediaries to determine whether any of their TIIs would fall within the definition of *"ancillary insurance intermediary"*. Moreover, given that article 43A of the draft IDA provides for the enrolment of AIIs in the new Ancillary Insurance Intermediaries List, clarification is also sought as to whether the MFSA expects that persons currently enrolled as TIIs and who are considered to fall within the new definition of *"ancillary insurance intermediary*" are to be re-classified accordingly and consequently, be re-enrolled with the MFSA as AIIs, or whether it is to be left at the discretion of the particular TII as to whether to retain its status as TII or be re-enrolled as AIIs in the new Ancillary Insurance Intermediaries List.

In addition, some industry participants requested confirmation as to their understanding that insurance products to be distributed by an AII need not complement the good or service provided by such AII as its principal professional activity.

MFSA's Position: As part of the continuance process of TIIs for 2018, the MFSA in its communication with authorised undertakings on 14th November 2017 asked the undertakings to identify those TIIs who will seek to be re-classified and change their enrolment to that of an AII, to provide the grounds upon which the insurance distribution activity is considered to fall within the definition of an AII, as well as the insurance products which are deemed to be complementary to the good or services offered.

In so far as the insurance products which an AII may distribute, it is to be highlighted that in terms of the definition of *"ancillary insurance intermediary"* as laid down in point 4 of Article 2(1) of the IDD (which is transposed in the Schedule to the draft IDA), an AII may only distribute insurance products which are complementary to a good or service. In the case of insurance products covering life assurance and liability risks, it is required that the cover complements the good or service which the AII provides as its principal professional activity.

2.9 The regulatory regime of Ancillary Insurance Intermediaries (AIIs)

2.9.1 The proposed article 43E(7) of the IDA

Industry Comment: The industry requested guidance as to what is meant by the term "*products in competition"* contained in the proposed article 43E(7) of the draft IDA which provides that in the case of general business, a person cannot be appointed and registered as AII in the company register of more than one authorised undertaking if the insurance products to be sold relate to products which are in competition. In this respect, industry respondents also requested

clarification as to whether the requirements laid down in the said article will create a new duty for the authorised undertaking appointing and registering an AII to monitor on a regular basis what products are being sold by such AII, since in their view such a duty would create an unreasonable burden on authorised undertakings.

MFSA's Position: An authorised undertaking needs to be aware of the insurance products sold by its appointed AIIs, in particular, since, in terms of the proposed article 43E(13) of the draft IDA, an authorised undertaking shall at all times be responsible for any act or omission of its registered AIIs.

In addition, in terms of the proposed article 43E(7) of the draft IDA, where an AII seeks more than one appointment relating *"to any class, or any group of classes, of general business of the same kind, if the insurance products to be distributed in terms of such class or group of classes relate to products which are in competition"* only one appointment may be made. Thus, it is to be noted that for the purposes of determining the products which are in competition, an assessment should be made on the specific insurance cover to be distributed.

2.9.2 Enrolment of AIIs in the Ancillary Insurance Intermediaries List.

Industry comment: Some market participants requested clarification as to whether, in the case of AIIs registered and enrolled by an insurance agent acting on behalf of an authorised insurance undertaking, the process of registration of such AIIs in the Ancillary Insurance Intermediaries Company Register and of enrolment with the MFSA in the Ancillary Insurance Intermediaries List, is to be led by the authorised insurance undertaking (the principal), particularly in view of the new online registration system pursuant to Article 2 of the IDD. Moreover, these respondents are of the view that in such a case, the authorised insurance undertaking (the principal) is not to be considered as holding ongoing responsibility for the acts and omissions of an AII appointed and registered by an insurance agent on behalf of the insurance undertaking.

In addition, in relation to the enrolment process of AIIs, it was also pointed out that in view of the fact that some AIIs may be exempt from the requirement of enrolment, an authorised undertaking seeking to enrol a potential AII may encounter difficulties in determining whether such AII is already registered in the company register of another authorised undertaking.

MFSA's Position: The MFSA would like to point out that in the case of TIIs, as required in the Application found in Insurance Intermediaries Rule 17 of 2007, an authorised insurance undertaking is required to sign the application for enrolment of TIIs, even though this may be done through an insurance agent. The same approach will be adopted in the case of AIIs.

Moreover, the MFSA is of the view that the information as to whether an AII is already registered in the Company Register of another authorised undertaking may be obtained by the authorised undertaking requesting this information directly from the potential AII during the registration process. Moreover, it is to be noted that in terms of the new Application, an AII enrolled in the Ancillary Insurance Intermediaries List who would be in the process of a new enrolment would be required to disclose to the MFSA, where applicable, any current appointments it would have. In addition, it is to be noted that for the purposes of enrolment of AIIs, the MFSA intends to insert in the Insurance Distribution Rules similar requirements to those laid down in relation to TIIs in article 5 of Insurance Intermediaries 16 of 2007, so that

the non-disclosure of required information would automatically result in the striking of the name of the person off the Ancillary Insurance Intermediaries List.

2.9.3 Appointments of AIIs by Insurance Brokers

Industry comment: An industry participant was of the view that the the IDA is to be amended to reflect the possible appointment of an AII by an insurance broker. It was further argued that restricting the possibility of appointments of AIIs to be made only by insurance undertakings and insurance agents, is considered discriminatory. Reference was made to Article 3(1) of the IDD, which gives '*insurance intermediaries'* the opportunity to appoint an AII to act under its responsibility. It is suggested that allowing the appointment of AIIs by an insurance broker would render the market more accessible, especially since currently insurance brokers are also not permitted to appoint TIIs, unlike insurance agents.

MFSA's Position: In terms of Article 3(1) of the IDD[1], Member States may stipulate that the insurance undertaking or other intermediary are to be responsible for ensuring that AIIs meet the conditions for registration and that such undertaking or other intermediary registers such AIIs. Even though the IDD is a minimum harmonisation Directive, in so far as *"insurance intermediaries"* are concerned, the provisions of the IDD do not specifically distinguish between different categories of insurance intermediaries and the proposed IDA retains the current categorisation of insurance and reinsurance intermediaries.

Following representations from the market, the MFSA has decided to introduce the possibility of having an AII appointed by an insurance broker, subject to certain conditions. In this regard, the MFSA is minded to issue draft Insurance Distribution Rules containing the requirements to be complied with by an insurance broker appointing an AII.

2.10 Conduct of Business

2.10.1 Article 20(1) of the Insurance Distribution Directive

***Industry comment*:** Clarification is sought as to the applicability of Article 20(1), third sub-paragraph of the IDD. Some market participants understand that the said provision is to be considered as applicable only in the case of insurance-based investment products ("IBIPs"), and not to other products, in particular general business products and pure protection policies. The sale will always be subject to a "demands and needs" assessment and thus, in their view the concept of advice or otherwise should be strictly limited to IBIPs and in this respect, it was also

[1] 3rd, 4th and 5th sub-paragraph: *"Without prejudice to the first subparagraph, Member States may stipulate that insurance and reinsurance undertakings and intermediaries and other bodies may cooperate with the competent authorities in registering insurance and reinsurance and ancillary insurance intermediaries and in the application of the requirements laid down in Article 10.*

In particular, insurance, reinsurance and ancillary insurance intermediaries may be registered by an insurance or reinsurance undertaking, insurance or reinsurance intermediary, or by an association of insurance or reinsurance undertakings, or insurance or reinsurance intermediaries, under the supervision of a competent authority.

An insurance or reinsurance intermediary or an ancillary insurance intermediary may act under the responsibility of an insurance or reinsurance undertaking or another intermediary. In such a case, Member States may stipulate that the insurance or reinsurance undertaking or other intermediary shall be responsible for ensuring that the insurance or reinsurance intermediary or ancillary insurance intermediary meets the conditions for registration, including the conditions set out in point (c) of the first subparagraph of paragraph 6."

noted that Article 30(1) of the IDD makes specific direct reference to Article 20(1). It is suggested that the applicability of the said article needs to be specified in the Conduct of Business Rulebook.

MFSA's Position: The MFSA confirms that, at this point, the approach taken by the Authority is that the requirement to provide advice applies only in the context of IBIPs.

2.10.2 Article 30(3) IDD of the Insurance Distribution Directive

***Industry comment*:** Clarification is sought as to the interpretation of Article 30(3) of the Insurance Distribution Directive as some industry respondents consider that such interpretation would impinge on their manner of distribution. Article 30(2) of the IDD requires sales where no advice is given to be carried out subject to an *"Appropriateness Test"* and Article 30(3) permits Member States to derogate from the requirement of carrying out such test, provided that all the conditions listed therein are satisfied. It was noted that in the MFSA Circular of the 6th February 2017, it was stated that the MFSA intends to exercise the derogation pursuant to the said Article. In this respect, these respondents are of the view that this would allow the distribution of non-complex IBIPS, which meet the necessary criteria, to be carried out on an execution-only basis and that notwithstanding such derogation, it would still be permissible for an insurance distributor to sell non-complex products subject to an appropriateness test, if such distributor opts to do so. Therefore, confirmation is sought as to whether distributors can sell IBIPs on a non-advisory basis, but may always opt to subject IBIPs to the Appropriateness Test, irrespective of their complexity.

In addition, confirmation was sought as to whether all categories of distributors will be permitted to carry out the appropriateness tests, since in their view if restrictions were to be placed, it would have an adverse impact on the ability of current distributors to sell products.

MFSA's Position: The MFSA intends to adopt the derogation allowing for non-complex IBIPs to be sold on an execution only basis (i.e. without the necessity of an appropriateness test) subject to certain conditions established in the IDD and transposed in the Conduct of Business Rulebook. However, there is no objection, in the cases where distributors would want to go beyond what is required by the rules and actually apply an appropriateness test also in cases where the IBIP which is being sold is non-complex. It is to be pointed out that, all distributors authorised to sell IBIPs will be permitted (actually required in certain cases) to carry out appropriateness tests.

3. Main Comments received on the proposed amendments to the IBA and the MFSA's position

3.1 Definition of *"advertisement"*

Industry Comment: An industry respondent was of the view that the current definition of "*advertisement"* in article 2(1) of the IBA required further alignment to the definition as proposed in the glossary of terms of the Conduct Business Rulebook. Another market participant was of the view that the proposed definition of *"advertisement"* was too long and thus, suggested that the examples of different types of advertisements are to be removed, since, for

the purposes of defining *"advertisement"*, a generic reference to *"any form or medium of marketing activity or communication"* would be sufficient.

MFSA's Position: The MFSA amended the definition of "advertisement" to align it with the definition contained in the Conduct of Business Rulebook.

3.2 Data Protection and Record-Keeping Requirements

Industry Comment: Some industry respondents noted that the General Data Protection Regulation[2], which will be applicable with effect from 25th May 2018, introduces the right to be forgotten that may be exercised by data subjects. The market expressed concerns that this will significantly reduce the strength of consent as a legal basis for data controllers and processors to process and store personal data. Consequently reliance by an insurance undertaking on consent as a ground upon which it stores data which is important for the undertaking's underwriting purposes, will be weakened.

For this reason, these respondents suggested that record keeping requirements are introduced in the IBA and IDA, in the case of general business, so as to enable an insurance undertaking to process data on the ground of *"compliance with a legal obligation"*, in line with the General Data Protection Regulation. In the case of insurance undertakings which carry on long-term business of insurance, these are already subject to requirements in terms of AML/CFT Implementing Procedures which currently impose record-keeping requirements for a period of 5 years following the termination of the business relationship with their clients.

MFSA's Position: After due consideration of the comments received and following consultation with the Data Protection Commissioner, the MFSA is minded to introduce, where relevant, a five year retention period in the insurance legislation. However, it needs to be pointed out that notwithstanding any record-keeping requirements, the processing of personal data is still to be carried out in compliance with the requirements of the General Data Protection Regulation.

4. The proposed Insurance Distribution (Exemption) Regulations, 2017

In so far as the proposed amendments to the proposed Insurance Distribution (Exemption) Regulations, 2017 are concerned, no issues were raised by the insurance market.

5. Way Forward

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

The transposition exercise of the IDD will necessitate amendments to the regulations issued under the IIA and IBA. As part of the said exercise, amendments will also be carried out to the current insurance intermediaries rules and new rules will be issued under the IDA. In this respect, the MFSA will introduce new requirements in accordance with the IDD and will also align the current insurance intermediaries rules with the terminology and the requirements of the IDD, which will be reproduced in the Chapters of a new single Insurance Distribution Rulebook. A consultation document relating to the said rules will be issued shortly.

Contacts

Any queries or requests for clarifications in respect of the above should be addressed by email on ipsu@mfsa.com.mt.

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