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How to distribute insurance products in the current regulatory environment

CLIFFORD CHANCE

- New RDR rules in force ban payments of commission on advised sales of investment products; IMDII proposals include additional disclosure and suitability requirements across all distribution (both advised and non-advised) of both protection and investment insurance products.
- Firms should have reviewed existing and future distribution arrangements in the context of RDR but should also consider the potential impact of IMDII.
- We consider the different distribution methods being adopted by firms and the key regulatory issues raised.
- We also review the potential impact of the European proposals across the UK, France, Germany, Italy and Spain.

Introduction

2013 marked the culmination of the FSA's Retail Distribution Review ("**RDR**") in the UK with new rules significantly changing the way retail investment products are marketed and sold. The new rules ban commission on advised sales of retail investment products and impose a requirement on advisors to charge clients directly for services provided for those products.

But before the impact of the RDR can be properly felt there are more changes in the pipeline, with the proposed revision of the Insurance Mediation Directive ("**IMDII**") and the proposed EU regulation of key information documents for investment products (the "**PRIPS Regulation**").

The current draft of the IMDII published by the European Commission imposes requirements on all intermediaries (both in relation to advised sales and non-advised sales) to disclose their remuneration arrangements for both life (investment and pure protection) and (albeit with a 5 year derogation) general products. There will be a requirement that in the process of non-advised sales of investment products customers are asked questions and are warned if the product may not be suitable. Advisors offering independent advice on life investment products must include in their assessment products of providers other than those with whom they have close links and there will be an outright ban on commission from third parties when they provide the relevant services.

With such changes both in place and in train, product providers and distributors should have reviewed their existing structures including methods of distributing products and charging structures and should also consider new ways of distribution.

Part 1 of this briefing looks at the rules relevant to distribution under RDR and currently proposed under IMDII and the PRIPS Regulation. Part 2 considers some of the methods and structures that have been used and may be used in future to distribute products in the UK and the regulatory obstacles that need to be navigated. Finally, in Part 3 we consider the potential impact of the current version of IMDII and the PRIPS Regulation across Europe.

Part 1

RDR

In our Client Briefing in April 2010 we examined the new RDR regime in the UK and the implications of the FSA's rules for firms. In our Client Briefing in December 2011 we examined the impact of the final rules. The RDR aims to ensure that:

- consumers are offered a transparent and fair charging system for the advice they receive

- consumers are clear about the service they receive
- consumers receive advice from highly respected professionals

Whilst the RDR has a variety of implications it is the first of these aims that will have the biggest impact on how insurers have traditionally distributed "retail investment" products (in the context of insurance, being essentially long-term insurance contracts other than pure protection policies and long term care insurance contracts). The RDR rules prohibit the payment of commission by product providers to distributors on advised sales and require advisors to agree with clients a charge for their services. With these changes there is a risk that many retail customers (in particular, those falling in the 'mass affluent' segment) will not be prepared to pay for advice and will not purchase products through advisor channels.

IMDII

In Europe, the European Commission ("**Commission**") published its proposal for IMDII in the summer of 2012. The proposal is principally intended to enhance further consumer protection in the insurance sector by increasing common standards across insurance sales and ensuring proper advice throughout the EEA.[1]

IMDII also captures the Commission's wider proposals to harmonise selling practices across all investment products by incorporating rules into IMDII, relevant only to insurance investment products, which broadly follows the approach taken in the proposals for a revision of MiFID[2] ("**MiFID II**") and a revision of UCITS IV[3] ("**UCITS V**").

It should be noted that the draft IMDII referenced in this briefing is the first draft proposal published by the Commission on the amendment to the Insurance Mediation Directive and it remains to be negotiated in the European Parliament. In December 2012, the Committee on Economic and Monetary Affairs of the Parliament (ECON) published a draft proposal which would water down, among other things, the proposed new rules on disclosure of commissions for non-investment insurance products and the ban on commission for independent intermediaries advising on investment insurance products, citing the possible negative market consequences and differences between insurance and other investment products (and that therefore insurance products should be treated differently to the proposals under MIFID II/UCITS V). These draft ECON proposals follow from the criticism received from EEA member states on IMDII, which we provide some details in Part 3. The ECON proposals, once finalised, will be reviewed in Parliament in May 2013 after which amendments to the Commission's proposals may be made.

From the UK's perspective, RDR and the Commission's proposed regime in IMDII/MiFID II/UCITS V provides a broadly similar regime for the sales of investment products. There are, however, areas of difference between the regimes. Many of the conduct of business requirements in RDR relate to advised sales to "retail clients" (which excludes certain professional and sophisticated clients) whereas the current version of IMDII applies to both advised and non-advised sales with "customers" which will include professional customers. The ban on commission is also wider in the UK as it applies to all personal recommendations, irrespective of whether the intermediary is independent, whereas only "independent" sales attract a ban on commissions under the current version of IMDII.

Remuneration and disclosure

The current draft of IMDII introduces rules to minimise more effectively the risk of conflicts of interest, including rules mandating the disclosure of remuneration by intermediaries. Intermediaries of life insurance will be required to disclose their remuneration arrangements to customers (including any fee or commission) along with the basis on which such remuneration is calculated. Intermediaries of non-life insurance will be able to derogate from the disclosure requirements in relation to such products for five years, as long as information on fees and commissions are provided to customers on request (and such a right of request is notified to the customers).[4]

In addition, both intermediaries and insurers will be required to inform customers about the nature and basis of the calculation of bonuses paid to their employees for

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1 The Commission noted in its press release that it envisaged that IMDII would be adopted during 2013 (the EU Parliament and Council must agree to it first) and enter into force in 2015. Latest estimates suggest the revisions may be adopted during 2014 with an entry into force in 2016.

2 The Markets in Financial Instruments Directive (2004/39/EC)

3 The Undertakings for Collective Investment in Transferrable Securities Directive IV (2009/65/EC)

4 The Commission will set out further detail on the disclosure regime for remuneration for both sellers of insurance and non-insurance products under subordinate "level 2" measures, responsibility and authority for which is set out in IMDII ("delegated acts").

distributing insurance products. Therefore an insurer paying bonuses to its staff directly selling insurance will not avoid commission disclosure.

There is, however, some flexibility in the proposals for remuneration disclosure, which will also apply to the information disclosure obligations in IMDII more generally. There is firstly an additional exemption (to the existing exemptions for large risks and reinsurance intermediaries) for insurance mediation with professional customers and secondly, IMDII proposes to allow firms to derogate from disclosure requirements to each customer by publishing the information on a website where appropriate and providing the link to the customer. Note, however, that there is no such derogation for the requirement for insurers and intermediaries to inform customers of variable remuneration arrangements for its sales staff.

Life insurance investment products

New requirements would apply to life insurance products with investment elements, covering sales standards, conflicts of interest and a ban on commission for independent advice, which mirror the MiFID II and UCITS V proposals. The requirements will apply to insurers and intermediaries selling policies which involve an investment element (defined as having a return dependent on fluctuations in reference values (e.g. an index) or values of investments not directly purchased by the investor). Therefore this will capture with-profits business and all investment policies whether or not life-insurance related.

Conflicts of Interest

The current requirements set out in IMDII will provide an additional duty to avoid conflicts and take additional measures to disclose conflicts where the existing disclosure requirements, applicable to the sale of all insurance products (set out above in relation to remuneration), do not prevent the risk of damage to consumer interests. This may result in heightened levels of disclosure in most cases since the disclosure requirements for insurance products generally do not include a requirement to prevent consumer detriment, only to disclose information.

Independent advice

The major changes proposed by the Commission (although less significant in the UK in the context of the RDR rules) relating to sales of investment products by insurers and intermediaries acting on an independent basis are (i) the requirement for independent advisors to have assessed a diversified range of product providers not limited to products issued or provided by entities with close links with the intermediary and (ii) the outright ban on the acceptance of any commission (or other monetary benefit) from a third party in relation to the provision of its services to customers.

Appropriate sales

Finally, a requirement is proposed for advisors in relation to insurance investment products to obtain all relevant information from the customers to advise appropriately on what is suitable for the investor. However, in non-advised sales, the insurer or intermediary must request information about the customer's knowledge and expertise in the relevant field of investments and then make an assessment on whether the investment is appropriate for the investor and warn the customer if the product is not appropriate (or let the customer know if there has not been sufficient information provided to assess whether the investment is appropriate). This proposal adds potentially quite an onerous obligation on non-advising and non-independent sellers of investment products to provide a tailored service to each customer and know what is not "appropriate" for different types of investors.

Other matters relevant for distribution under IMDII

- The scope of regulation is proposed to be extended to all sellers of insurance or reinsurance products, including insurance companies which sell directly to consumers.

- The inconsistent interpretation of what constitutes "introducing" across the EEA may no longer be an issue as "introducing" has been removed in the proposals as a required insurance mediation activity from an EEA perspective[5]. Firms wishing to stay outside the regulatory perimeter may only want to introduce customers to intermediaries, although they will have to check whether some other requirements need to be fulfilled in the relevant Member States. For example, in Spain "introducing" is currently an activity which can be carried out by the so called 'external assistants' to an intermediary but such assistants must fulfil certain requirements.
- "Advising on" a contract of insurance has been added in the definition of insurance mediation with "advice" defined as the provision of a personal recommendation to a customer.
- Finally, special information requirements may apply where suppliers adopt the practice of bundling products together; the customer will have to be informed that it is possible to buy the two products separately.

PRIPS Regulation

The PRIPS Regulation will make it compulsory for insurance investment products to be sold along with a key information document (a "**KID**"). The aim is to make it easier to compare offers and thus improve competition between professionals while at the same time protecting the consumer. The KID will be a standardised free standing document provided to investors; the underwriter will have the obligation to prepare and maintain the KID and the distributor will have the obligation to provide the KID free of charge. The content will have to be clear, fair and not misleading but at the same time jargon free and as concise as possible for consumers. Detailed content requirements will be captured in subordinate legislation but the KID will basically set out the main features of the product and information on its risks to investors as well as costs and possible rewards (including past performance where appropriate). Therefore on top of the IMDII proposals, insurers and intermediaries of investment products should be aware of the PRIPS Regulation which will have direct effect in Member States upon entry into force.

[5] The Directive remains a minimum harmonisation regime and may therefore result in certain Member States retaining "introducing" as a regulated activity.

Part 2

Methods of distributing products

The new RDR rules and the proposed changes under IMDII and the PRIPS Regulation are likely to have a significant impact on the insurance industry. Insurers who have not done so already will have to consider radically restructuring existing distribution methods and/or pursuing new distribution opportunities more rigorously. Some of the methods we have seen being used in the wake of the RDR rule changes which will also need to be considered in the context of IMDII and the PRIPS Regulation have included:

- restructuring traditional advised sales distribution/ bancassurance arrangements so as to: (a) focus on high end customers; (b) provide more cost effective advice that would appeal to 'mass affluent' customers; and/or (c) structure advisor charging to be more 'customer friendly';
- focussing on direct customer sales which do not involve providing advice; and/or
- seeking new distribution partners or existing ones for a greater range of products, including white labelling of products for partners with particularly strong brand recognition or making greater use of aggregator/price comparison websites.

Advised sales through traditional distribution/ bancassurance model

Investment products

One of the likely consequences of having to agree advisor charges with customers up-front for investment products under RDR is that many customers will not be prepared to pay the charges necessary to make advised sales viable. An 'advice gap' may emerge where people need investment products but are not prepared to pay for the advice. As a result, some product providers and distributors have started looking at either moving away from the traditional advised sales distribution arrangements or focussing on high net worth individuals (where higher charges may be more easily justified).

Nevertheless, there is evidence that a significant number of people will not feel comfortable buying financial products without some assistance even if they are not prepared to pay for it. A number of providers have looked either to create more efficient propositions where lower advisor charges can be incurred through simplified advice (based on streamlined automated, process driven advice) or to offer more 'customer friendly' charging structures (such as paying fees that reflect a percentage of the investment and/or that are charged over time rather than on inception of the product).

Simplified advice

The FSA has issued guidance on simplified advice and firms will be expected to take care in constructing automated simplified advice services – ensuring that suitably qualified professionals are involved at the right stages of the process and that customers have numerous drop-out points where it becomes clear that no products will be suitable (e.g. because of levels of debt).

Furthermore, firms will also have to ensure that simplified advice provided through automated systems that are managed by intermediaries or outsourcers do not fall on the wrong side of regulation such that non-authorised entities are deemed to be conducting regulated activities and that authorised entities are seen to be conducting activities outside of their permissions.

Charging structures

Consumers may find that a charging structure where the advisor fee is taken out of their investment, either at inception or over time, may be more palatable. These structures will need to reflect value to a customer relative to the potential returns on the product. On-going advisors fees are also only permitted under the new rules in certain circumstances (such as where there is an on-going service provided or a regular payment made by the consumer) and may result in adverse tax consequences for consumers.

Commission for introductions

Whether using automated simplified advice, a more cost effective advice based proposition or more customer friendly charging structures, the RDR rules still pose issues for distribution arrangements.

Under the new rules a product provider cannot pay commission/remuneration in relation to a 'personal recommendation' (being, broadly, advice to an individual that is presented as suitable for that person or based on a consideration of the circumstances of that person). A party that makes a personal recommendation must be remunerated through advisor charges. As a result, if a distributor (such as a bank in a bancassurance arrangement) makes a personal recommendation, it cannot accept commission from the product provider. If the product provider makes the personal recommendation, it must ensure that the distributor does not receive remuneration of any kind other than advisor charges.

The effect of this is that distribution arrangements for investment products need to be carefully structured to ensure the distributor is able to share the advisor charges paid by the customer and that any charge for effecting an introduction included in the advisor charge is reasonable.

Use of platforms

In our Client Briefing in December 2011 we discussed how the RDR would include new rules on platforms and on how advisors should use them. In June 2012 the FSA also published a consultation paper proposing that platforms should not be funded by payments from product providers and should be paid through explicit charges agreed with the customer (whether that is through an advised sale or through non-advised direct to customer platforms). Whilst the FSA is not looking to implement these changes until 31 December 2013, providers and distributors will need to take this into account when distributing products through both advised and non-advised channels.

Non-investment insurance products

The proposed IMDII does not go as far as RDR in relation to banning commission on all advised sales of investment products but it will bring in new rules requiring disclosure of commissions/fees for sales of both life and non-life products and for both advised and non-advised sales. Whilst there are derogations from these for non-life products for 5 years any long-term distribution arrangement will need to factor these issues into the structure.

Direct sales

Whilst simplified advice models or more client friendly charging structures may look to plug the advice gap, some customers may feel confident enough to research investment options and products themselves and then look to purchase directly from product providers or via platforms.

Save in relation to the points discussed above where a platform is involved in a non-advised sale, from the point of view of RDR, direct sales avoid the difficult issues involved in the ban on commission for advised sales. However, the current version of IMDII and PRIPS will potentially impose further regulatory burdens on insurers including the requirement to disclose remuneration of staff to customers and the requirement to provide a KID.

Most critically for direct non-advised sales of investment products is the requirement under IMDII to request information on the customer's knowledge and experience, make an assessment on whether the investment is appropriate for the investor and warn the customer if the product is not appropriate. Whilst the final rules may include some exceptions to this rule, the current proposals could have significant practical implications for direct sales and may require key questions to be incorporated into the process.

As the regulation at the point of sale increases, insurers may wish to take the opportunity to assess their sales processes to ensure that they are compliant with current regulation and consider how they will need to adapt to the additional requirements that IMDII and the PRIPS Regulation may impose. As discussed above, one issue that should be considered is the extent to which intermediaries or outsourcers are involved in both sales and administration of products and ensuring that any non-regulated entities are not deemed to be conducting regulated insurance mediation activities (such as arranging deals in insurance, entering into contracts of insurance as agent etc.) or that authorised intermediaries are not acting outside their permissions. With the increasing use of online sales care should be taken to ensure the relevant regulated entities are involved at the correct stage of the process.

New players and aggregator sales

Some customers may be overwhelmed by the choice of investment products and, whilst they may be willing to do some research into the types of product available, they may opt to buy simple products (with potentially lower fees) from recognised brands. Clearly this benefits insurers that have strong brand recognition/loyalty but also offers opportunities for insurers to establish distribution arrangements with brands that do not offer investment products of their own and could distribute products for the insurer (e.g. M&S, Amazon etc.).

Similarly, whilst there is a perception that price comparison websites have generally only been successful selling motor insurance products, there is also scope to develop sales of other non-investment and investment products through these websites. This is particularly the case where customers start to focus on simpler investment products that are more easily compared (e.g. tracker products with smaller fees).

However, whilst the new RDR rules only apply to advised sales, IMDII is likely to impact on any new distribution arrangements and on sales through aggregators. The Commission has expressly stated that IMDII should apply to certain price comparison websites. Furthermore, the FSA has been focused on the potential impacts on consumers of comparison websites due to concerns that such sites have not paid sufficient regard to regulatory compliance. The impact of IMDII is therefore that there will be increased conduct of business rules applying to aggregators including a requirement, initially only for life insurance, to actively disclose commissions and, for general insurance, to provide details of commission structures on request.

Firms that deal with comparison websites should be aware of the increasing legal requirements on such sites, given the increased regulatory focus and the widespread use of commission based structures for distribution. Furthermore, in the context of investment products, firms should take care when dealing with these sites that the questions asked by the sites do not amount to a personal recommendation and, if they do, that commission is not paid.

Part 3

The European Perspective

The new RDR rules currently only apply to EEA firms that have a branch in the UK. However, following implementation of IMDII, the Financial Conduct Authority may take the opportunity to extend the scope of the RDR rules to cover EEA firms that passport by way of services into the UK as well.

In any event European insurers may wish to look to the practices adopted in the UK following RDR in preparation for implementation of IMDII and the PRIPS Regulation.

Germany

Certain of the proposals under IMDII may have a considerable impact on the structure of the German insurance intermediaries' market, thus forcing intermediaries to change their business and remuneration model and leading to a consolidation of the market.

The main causes of concern for German insurance intermediaries are the duty of disclosure of commissions and the ban on the acceptance of commissions for independent advisors.

Disclosure of commissions

A duty of life insurers to disclose the amount of the execution and distribution costs calculated into the premium of life insurance contracts was introduced in Germany when the German Insurance Contract Act (*Versicherungsvertragsgesetz*) was overhauled in 2008. However, the German legislator has so far abstained from prescribing disclosure of the commission paid to the intermediary involved. It was feared that such disclosure would cause customers to attempt to negotiate with intermediaries to receive a share of the commission. The resulting price competition was considered to endanger the existence in particular of small intermediaries and to disadvantage customers with low market power such as small enterprises and consumers. The passing on of part of their commission by insurance intermediaries to their customers was so far prohibited in Germany. However, in October 2011, the Frankfurt Administrative Court (*Verwaltungsgericht Frankfurt*) held this prohibition to be invalid. The German Federal Financial Services Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**") is currently analysing whether the prohibition to pass on commissions should be maintained, which would be supported by the insurance industry.

In accordance with a transparency initiative of the German Insurance Association (*Gesamtverband der deutschen Versicherungswirtschaft*, "**GDV**") some German insurers voluntarily disclose the reduction in yield (*Gesamtkostenquote*, "**RIY**") of their life insurance products. The RIY reflects the annual reduction of the yield of the product by execution and distribution costs, current costs as well as investment-related costs. The disclosure of the RIY allows for a better comparability of the costs and benefits of life insurance products, thereby protecting the customers' interests without the need to disclose the exact amount of the commission.

Ban on acceptance of commissions by independent advisors

The proposed ban on the acceptance of commissions for independent advisors in connection with insurance investment products may have a considerable impact on German insurance brokers (*Versicherungsmakler*) in the life insurance market. German insurance brokers act on the basis of a broker agreement with their customer and are subject to the fiduciary duty to protect their customers' interests. They are also generally obliged to base their advice on a sufficient number of insurance products offered in the market by a sufficient number of insurance companies. Based on their fiduciary duties, the independence of the brokers' advice has generally not been doubted although they are customarily remunerated by a commission paid by the insurance company (as opposed to a fee from their customers). The ban on the acceptance of commissions by insurance intermediaries who inform their customers that insurance advice is provided on an independent basis may mean for German insurance brokers that they either have to become (dependent) insurance agents, appointed by one or more insurance companies, or insurance advisors that are currently not allowed to solicit insurance contracts who are being paid by their customers. The fact that this applies only in connection with insurance investment products further complicates the situation as an insurance intermediary can be registered only as a broker, an agent or an advisor.

Although the alternative of insurance advice paid for by customers as opposed to commission-based intermediary services is discussed as a means to avoid conflicts of interest of the intermediaries, it has not gained a considerable market share in Germany yet. Most German insurers do not offer net tariffs and intermediaries have not developed fee concepts yet, whereas customers are not willing to pay fees in an amount that would cover the costs of intermediaries. Certain advantages of the commission model would also not apply to fee-based insurance advice. Whereas commissions are due only if an insurance contract is concluded and needs to be paid back by intermediaries if the insurance policy is cancelled; customers would have to pay agreed fees for advice irrespective of whether they conclude an insurance contract or cancel it later. In addition, the fact that commissions are calculated on a lump sum basis protects customers from high fees in case they need advice in connection with numerous or complicated claims. Whereas German stakeholders were relieved that the Commission does not suggest the prohibition of commission payments entirely, as previously intended, it appears that at least for insurance brokers active in the life insurance market, it will be difficult to maintain their traditional business model.

Extension of scope of IMD to insurance companies

Whereas German insurance companies are already subject to extensive information duties as well as a general duty of advice under the German Insurance Contract Act, the proposed standards for the sale of insurance investment products exceed the current requirements in particular as regards distance sales. Whereas no duty of advice applies to this distribution channel of German insurance companies currently, in all cases where no advice is given (as set out above) IMDII will impose an additional appropriateness test to the duty of insurance companies and intermediaries.

Obligation to provide KID under the PRIPS Regulation

Since 2008, German insurers have been obliged to provide their customers with a product information sheet (*Produktinformationsblatt*) which is subject to similar standards as the KID. German insurers are concerned that the introduction of the KID may lead to conflicting requirements, further increase the amount of documents to be provided and confuse customers rather than inform them. Whether these concerns are justified will depend on the required content of the KID as further specified in level 2 measures and an alignment of German law to avoid inconsistent requirements.

Spain

Both Spanish insurance intermediaries and insurers have been generally critical of some of the key issues of the proposal. Insurance companies have also questioned the timing for such a substantial regulatory development when the insurance sector is involved in Solvency II which will also have an impact on insurance distribution.

Disclosure of remuneration

As it is the case in other of the European jurisdictions, the regime for disclosure of remuneration is probably the most relevant cause of concern. Commissions are generally used to remunerate all intermediaries in Spain and so far there has never been an obligation to disclose commissions under any circumstances (e.g. clients do not have the right to request disclosure). All the main players have expressed their rejection of the disclosure of remuneration and have also shared their concern that the proposed regime may result in further confusion for the client, specially as regards commoditized products. Therefore, the main players support the amendments proposed by the European Parliament to the IMDII proposal whereby disclosure of remuneration would no longer be mandatory.

Ban on commissions

In relation to remuneration, another issue of concern is the proposed ban on commissions for independent intermediaries in insurance investment products. As is the case in Germany and France, it has been criticised by independent intermediaries associations who claim that such ban may result in a service available only for an elite which is willing to pay fees and it has been also welcomed that the European Parliament has proposed eliminating this ban.

Pre-contractual disclosures

Another relevant topic is the impact of all pre-contractual disclosures and MiFID inspired rules that, as of today, are not applicable to Spanish intermediaries or insurance companies. Certain players have already raised their concerns about (i) an excessive formalism in the distribution of insurance that may not necessarily result in a better situation for consumers and (ii) a necessary proportionality when applying these new requirements in certain cases.

Tied practices

Regarding the new rules which allow bundling practices but not tying practices it should be noted that, currently, tied sales of insurance products with other products or services are not expressly prohibited under insurance regulations. In addition, recent banking provisions have reinforced the duties of pre-contractual information regarding the tied sale of banking services and other services (including insurance), although without prohibiting them.

Thus, the Spanish insurance mediation law would have to be amended to include the prohibition of tied sales of insurance and non-insurance products and services. In this regard, it must be borne in mind that IMDII's proposed general prohibition of tied sales may raise relevant issues regarding insurance products that are currently distributed with certain services in order to make them more attractive to the client. Therefore, the impact of such a general prohibition of tied sales is an issue of concern for insurers which are once again in line with the European Parliament's proposal to eliminate this prohibition.

Scope

As the tendency of the current version of IMDII is to capture all distributors within its scope in its aim of ensuring a level playing field for all participants involved, it remains to be seen what the impact of such regulation will be on some of the players that are currently not considered intermediaries. For example:

- The so-called external advisor assistant to an intermediary ("*auxiliar asesor*"), which is not currently an intermediary, but rather, a person acting for an intermediary that, amongst other activities, can (i) attract clientele for the intermediary (ii) carry out certain ancillary administrative functions; and (iii) provide certain advice in relation to an insurance contract subject to the supervision of the intermediary, may end up having to be converted into a type of intermediary. The fact that the new definition of mediation included in IMDII encompasses "advising" may also produce this effect. If so, it might end up being considered a type of tied agent under the new definition which includes intermediaries who work for other intermediaries.
- Other players of the Spanish market such as underwriting agencies ("*agencias de suscripción*") may also end up being regulated as a type of insurance intermediary. Underwriting agencies are regulated entities which act on behalf of EEA insurers to underwrite insurance transactions in Spain (for example, the Spanish coverholders of Lloyd's market) but which are not currently considered insurance intermediaries.
- The elimination of the existing "de minimis" exemption for insurance policies sold ancillary to the sale of services would oblige certain players to become intermediaries or, depending on the scope of activities to be carried out, to act as external assistants to an intermediary.

Non-advised sales

In addition, IMDII acknowledges the possibility of carrying out advised or non advised sales. The concept of non advised sales is not expressly stated in the Spanish insurance mediation Law (as opposed to other Member States as the UK). On the contrary advising is considered inherent to insurance mediation and that it is an obligation which does not affect independent intermediaries alone. Therefore, the inclusion of non-advised sales may require certain adjustments of the Spanish legislation, which are difficult to accurately anticipate at such an early stage.

Overall, the Spanish mediation law will have to be significantly amended to include these and other issues to make it compliant with the current version of IMDII, which would definitely be an "extensive overhaul" of the Spanish insurance distribution market. A new, more cumbersome, regulatory regime may also result in a higher concentration of the very atomised Spanish intermediation market, made up of close to 100,000 intermediaries (out of which around 3,000 are insurance brokers).

France

French intermediaries, whether independent or not, are very critical of some of the key proposals in IMDII.

Disclosure of Commissions

The main cause of concern are the rules on disclosure of remuneration. Independent intermediaries who provide advice on the basis of a fair analysis of the market are already required to provide, upon a professional client's request, the amount of any remuneration paid by the insurer in relation to insurance policies the premium of which exceeds Euro 20,000. However, the attempt to generalize the rule to the retail business and, as regards life insurance, to require that detailed information be provided to customers without their asking for it, might lead to distortion of competition between intermediaries and insurers because transparency requirements applying to the latter are far from equivalent.

Ban on Commissions

Another topic that is debated is the proposed ban on commission for independent advice, because, as noted in Spain and Germany, it may result in independent advice being accessible to an elite group of wealthy people only, for whom there would be an overall economic interest for advisors to provide their services.

Pre-Contractual Disclosures

Insurers and intermediaries are already familiar with the suitability and appropriateness test because they have, since 2010, been subject to a MiFID-inspired test with regard to the duty to provide advice when selling life policies with a surrender value, "capitalisation" products and some occupational pension schemes. However, the IMDII proposal provides for more detailed and stringent requirements, some of which might be difficult to implement in relation to the most basic products should IMDII not apply the principle of proportionality.

Pre-contractual disclosure for life insurance products is governed in France by an extreme formalism that does not appear to be a favourable context for the PRIPs Regulation in France. Although requirements for standardised pre-contractual disclosure have been recently reformed, new rules proved unable to reverse a trend of case law, particularly favourable to policyholders acting in bad faith, that has deeply affected legal certainty in the life insurance market over the last years. Consequently, although the initiative was warmly welcomed by the French authorities, it is likely that it will receive mixed reactions from other French stakeholders. In addition, the proposed definition of those products that will fall within the scope of the Regulation does not allow all uncertainties to be removed, as the dividing lines between the various categories are sometimes not clear-cut given a certain flexibility in structuring the products.

Italy

The current version of IMDII does not appear to entail significant changes under an Italian legal and regulatory standpoint as a significant number of the proposed provisions are consistent with the regulatory provisions enacted in the past by both the Italian legislator and the competent regulator (the *Istituto di Vigilanza sulle Assicurazioni*, "**IVASS**").

Pre-contractual information

Nevertheless, and as regards pre-contractual information, the main changes likely to have a significant impact in Italy, if confirmed in the final text of the IMDII, should stem from the key aspects of the proposed rules mandating the disclosure to customers by intermediaries and insurers of an additional set of information. These include (i) whether or not any type of advice is provided about the insurance products sold, (ii) whether the intermediary is acting for and on behalf of the insurer or the customer, (iii) the amount of (or the basis for calculation) of any remuneration received by the intermediary, and (iv) the nature, the amount (or the basis of the calculation) of any variable remuneration received by any employee of the intermediaries and insurers for distributing and managing the insurance products. This will require the existing IVASS regulations to be revised in order to ensure a full compliance with the deeper level of information required by IMDII.

Bundling insurance and non-insurance products

The proposed rules for bundling (insurance and non-insurance) products together, along with the guidelines to be issued, will need to be compared with a similar newly introduced regime by the Italian Government concerning insurance product bundled with ancillary banking services.

Life insurance products

The proposals concerning life insurance products with investment elements appear to be in concrete terms very much in line with the existing provisions adopted by the Italian competent regulators. For instance, MiFID-oriented duties – already applicable in Italy – for insurers and intermediaries included in the IMDII already apply to the distribution of the products in question with respect to, amongst others, suitability and appropriateness tests and conflict of interests regime.

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C H A N C E

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