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 (Text with EEA relevance)

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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution[(1)], and in particular Articles 28(4), 29(4) and 30(6) thereof,

Whereas:

(1) Directive (EU) 2016/97 provides for a set of specific standards aimed at addressing insurance-based investment products, in addition to the conduct of business standards laid down for all insurance products.

(2) Directive (EU) 2016/97 empowers the Commission to adopt delegated acts to further specify criteria and practical details for the application of that specific set of rules. The relevant empowerments concern the rules on conflicts of interest, on inducements and on the assessment of suitability and appropriateness. To ensure the coherent application of the provisions adopted on the basis of those empowerments and to ensure that market participants and competent authorities as well as investors are provided with a comprehensive understanding and easy access to those provisions, it is desirable to include them in a single legal act. The form of a Regulation ensures a coherent framework for all market operators and is the best possible guarantee for a level playing field, uniform conditions of competition and an appropriate standard of consumer protection.

(3) The circumstances and situations to be taken into account for the purposes of determining the types of conflicts of interest which may damage the interests of customers or potential customers should cover cases where the insurance intermediary or insurance undertaking is likely to make a financial gain or avoid a financial loss to the detriment to the customer. However, in such situations, it should not be sufficient that the insurance intermediary or insurance undertaking may realise a benefit if this does not result specifically in a detrimental impact for the customer, or that one customer to whom the insurance intermediary or insurance undertaking owes a duty may make a

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gain or avoid a loss without there being a concomitant detrimental impact to another such customer.

(4) To avoid unnecessary administrative burdens while ensuring an appropriate level of customer protection, the organisational measures and procedures to manage conflicts of interest should be carefully adapted to the size and activities of the insurance intermediary or insurance undertaking and of the group to which they may belong, and to the risk of damage to the interests of the customer. A non-exhaustive list of possible measures and procedures should be laid down in order to give guidance to insurance intermediaries and insurance undertakings as regards the measures and procedures that should normally be taken into consideration to manage conflicts of interests. Because of the variety of business models the proposed measures and procedures might not be of relevance for all insurance intermediaries and insurance undertakings. They might, in particular, not be appropriate for small insurance intermediaries and their limited scope of business. In such cases, insurance intermediaries or insurance undertakings should be able to adopt alternative measures and procedures that are more suitable to ensure, in their particular situation, that the distribution activities are carried out in accordance with the best interest of the customer.

(5) While disclosure of specific conflicts of interest is required under Directive (EU) 2016/97, it should be a measure of last resort to be used only where the organisational and administrative arrangements are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of the customer will be prevented since over-reliance on disclosure may result in a lack of effective protection of the customer's interests. The disclosure of conflicts of interest by an insurance intermediary or an insurance undertaking cannot exempt it from the obligation to maintain and operate the organisational and administrative arrangements which are the most effective means of preventing damage to customers.

(6) To facilitate the practical implementation of the standards set by the Directive, the criteria for the assessment of inducements paid or received by insurance intermediaries and insurance undertakings should be set out in more detail. For this purpose, a non-exhaustive list of criteria deemed relevant for the assessment of a possible detrimental impact on the quality of the service to the customer should be provided as guidance to ensure an appropriate standard of customer protection.

(7) The suitability assessment set out in Article 30(1) of Directive (EU) 2016/97 and the appropriateness assessment set out in Article 30(2) of that Directive are different in scope with regard to the distribution activities to which they relate, and have different functions and characteristics. It is therefore necessary to clearly specify the standards and requirements to be complied with in obtaining the information required for each of those assessments and in conducting the assessments. It should also be clarified that the assessments of suitability and appropriateness are without prejudice to the obligation, for insurance intermediaries and insurance undertakings, to specify, prior to the conclusion of any insurance contract, on the basis of information obtained from the customer, the demands and needs of that customer.

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(8) The suitability assessment should be performed not only in relation to recommendations to buy an insurance-based investment product, but for all personal recommendations made during the life-time of that product, as such situations may imply advice on financial transactions which should be based on a thorough analysis of the knowledge and experience and the financial situation of the individual customer. The need for a suitability assessment is particularly strong as regards decisions to switch the underlying investment assets or to hold or sell an insurance-based investment product.

(9) Since the market exposure of insurance-based investment products depends largely on the choice of underlying investment assets, such a product may be unsuitable for the customer or potential customer due to the risks of those assets, the type or characteristics of the product or the frequency of switching of underlying investment assets. It might also be unsuitable where it would result in an unsuitable portfolio of underlying investments.

(10) Insurance intermediaries and insurance undertakings should remain responsible for performing suitability assessments where advice on insurance-based investment products is provided in whole or in part through an automated or semi-automated system since such systems are providing personal investment recommendations which should be based on a suitability assessment.

(11) To ensure an appropriate standard of advice with regard to the long-term development of the product, insurance intermediaries or insurance undertakings should include in the suitability statement, and draw customers' attention to, information on whether the recommended insurance-based investment products are likely to require the customer to seek a periodic review of their arrangement.

(12) As the assessment of appropriateness has, in principle, to be conducted in all cases where insurance-based investment products are sold without advice, insurance intermediaries and insurance undertakings should perform such an assessment in all situations where, in conformity with the applicable rules of national law, the customer requires a sale without advice and where the conditions of Article 30(3) of Directive (EU) 2016/97 are not met. In cases where a suitability assessment cannot be performed because the necessary information about the customer's financial situation and investment objectives cannot be obtained, the customer might agree, in conformity with the applicable rules of national law, to proceed with concluding the contract as a sale without advice. However, in order to ensure that the customer has the necessary knowledge and experience in order to understand the risks involved, an assessment of appropriateness should be required in such situations, unless the conditions of Article 30(3) of Directive (EU) 2016/97 are met.

(13) For the purposes of point (a)(ii) of Article 30(3) of Directive (EU) 2016/97, criteria should be set for the assessment of whether an insurance-based investment product that does not meet the conditions set out in point (a)(i) of Article 30(3) of Directive (EU) 2016/97 might nevertheless be considered a non-complex product. In that context, the provision of guarantees can play an important role. Where an insurance-based investment product provides a guarantee at maturity that covers at least the total amount paid by the customer, excluding legitimate costs, such guarantee limits significantly

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the extent to which the customer is exposed to market fluctuations. It may therefore be justified to consider such a product, subject to further conditions, as a non-complex product for the purposes of Article 30(3) of Directive (EU) 2016/97.

(14) Directive (EU) 2016/97 is aimed at minimum harmonisation and does therefore not preclude Member States from maintaining or introducing more stringent provisions in order to protect customers, provided that such provisions are consistent with Union law. Any provisions adopted by the Commission for the purposes of further specifying the requirements laid down in Directive (EU) 2016/97 should therefore be designed in a way that allows Member States to maintain stricter provisions in their national laws.

(15) In order to allow competent authorities and insurance professionals to adapt to the new requirements contained in this Regulation, the starting date of application of this Regulation should be aligned with the entry into application of the national measures transposing Directive (EU) 2016/97.

(16) The European Insurance and Occupational Pensions Authority, established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council[(2)], has been consulted for technical advice[(3)],

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

This Regulation shall apply to insurance distribution in relation to the sale of insurance-based investment products carried out by insurance intermediaries or insurance undertakings.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(1) ‘relevant person’ in relation to an insurance intermediary or insurance undertaking, means any of the following:

(a) a director, partner or equivalent, or manager of the intermediary or undertaking, where applicable;

(b) an employee of the insurance intermediary or insurance undertaking, as well as any other natural person whose services are placed at the disposal and under the control of the insurance intermediary or insurance undertaking and who is involved in the distribution of insurance-based investment products;

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(c) a natural person who is directly involved in the provision of services to the insurance intermediary or insurance undertaking under an outsourcing agreement for the purpose of the distribution by the intermediary or undertaking of insurance-based investment products;

(2) 'inducement' means any fee, commission, or any non-monetary benefit provided by or to such an intermediary or undertaking in connection with the distribution of an insurance-based investment product, to or by any party except the customer involved in the transaction in question or a person acting on behalf of that customer;

(3) 'inducement scheme' means a set of rules governing the payment of inducements, including the conditions under which the inducements are paid.

CHAPTER II

CONFLICTS OF INTEREST AND INDUCEMENTS

Article 3

Identification of conflicts of interest

1 For the purposes of identifying, in accordance with Article 28 of Directive (EU) 2016/97, the types of conflicts of interest that arise in the course of carrying out any insurance distribution activities related to insurance-based investment products and which entail a risk of damage to the interests of a customer, insurance intermediaries and insurance undertakings shall assess whether they, a relevant person or any person directly or indirectly linked to them by control, have an interest in the outcome of the insurance distribution activities, which meets the following criteria:

a it is distinct from the customer's or potential customer's interest in the outcome of the insurance distribution activities;

b it has the potential to influence the outcome of the distribution activities to the detriment of the customer.

Insurance intermediaries and insurance undertakings shall proceed in the same way for the purposes of identifying conflicts of interest between one customer and another.

2 For the purposes of the assessment pursuant to paragraph 1, insurance intermediaries and insurance undertakings shall take into account, by way of minimum criteria, the following situations:

a the insurance intermediary or insurance undertaking, a relevant person or any person directly or indirectly linked to them by control is likely to make a financial gain, or avoid a financial loss, to the potential detriment of the customer;

b the insurance intermediary or insurance undertaking, a relevant person or any person directly or indirectly linked to them by control has a financial or other incentive to favour the interest of another customer or group of customers over the interest of the customer;

c the insurance intermediary or insurance undertaking, a relevant person or any person directly or indirectly linked by control to an insurance intermediary or an insurance undertaking is substantially involved in the management or development of insurance-based investment products, in particular where such a person has an influence on the pricing of those products or their distribution costs.