

IVASS AND CONSOB LAUNCH CONSULTATION WITH THE MARKET ON THE IMPLEMENTATION OF THE INSURANCE DISTRIBUTION DIRECTIVE

In implementation of Directive (EU) No. 2016/97 of 20 January 2016 (“**IDD**”), on 23 September 2019 IVASS has launched the public consultations of two draft regulations, regarding respectively:

- (i) requirements for the governance and oversight over insurance products (so called “**POG**”) (Consultation document No. 1/2019);
- (ii) additional requirements for the distribution of insurance-based investment products (so called “**IBIPs**”) (Consultation document No. 2/2019).

On the same date, with respect to aspects falling under its competence, Consob has in turn launched the public consultation of a document containing amendments to the Intermediaries Regulation with regard to information obligations and rules of conduct for the distribution of IBIPs (Consultation document Intermediaries Regulation).

As also pointed out by the involved supervisory Authorities, the review and integration of the regulatory provisions concerned by the above mentioned Consultation documents aim, *inter alia*, at ensuring uniformity of the rules applicable to the distribution of IBIPs **regardless of the distribution channel used**.

Any observation, comment and proposal may be submitted within **31 October 2019**.

The date of entering into force of the relevant amendments and integrations under public consultation is **30 March 2020** for the IVASS provisions and **1 April 2020** for the Consob provision.

Below is a summary of the main regulatory changes set forth by the aforementioned consultation documents.

1. IVASS – Consultation document No. 1/2019

Consultation document No. 1/2019 sets forth the draft IVASS Regulation introducing POG provisions necessary in order to increase the effectiveness of existing national and European rules as well as to align the regulatory provisions with the new framework, in particular with reference to IBIPs.

Such document, among other things:

- identifies (i) the tasks and **responsibilities of the corporate bodies** involved in the process of approving and distributing insurance products, as well as (ii) the tasks of the compliance function with respect to the rules of the manufacturer and the intermediaries registered in section D of the Register of Insurance Intermediaries (“**RII**”); the latter will in particular be called to draft an annual report in relation to the controls carried on the correct definition of the target market and on the distribution strategy, as well as on the correctness and efficacy of the distribution mechanisms, highlighting the relevant criticalities (if any);
- regulates the **approval process of the insurance products**, identifying precise obligations for the **producer**, who shall, on the one hand, identify in detail the target

market of an insurance product and the categories of subjects to whom the product cannot be distributed, as well as, on the other hand, adopt the appropriate measures to ensure that such product is distributed to the identified target market;

- regulates the distribution of insurance products, by grading – in application of the proportionality principle – the obligations of the intermediaries registered in the different sections of the RII involved in the distribution activity;
- defines information flows between the insurance companies acting as manufacturer and the distributors; and
- provides for specific provisions for product approval and distribution processes relating to IBIPs.

2. IVASS – Consultation document No. 2/2019

Consultation document No. 2/2019 contains references to the provisions of Delegated Regulation (EU) No. 2017/2359 (“**IBIP Delegated Regulation**”), as well as to the provisions of Delegated Regulation (EU) No. 2017/565 (supplementing the MiFID II Directive) on the organizational requirements of investment firms, with reference to independent advice.

Said Consultation document also illustrates the proposed amendments to certain IVASS Regulations with the aim of introducing provisions on the distribution of IBIPs along with the further amendments necessary to coordinate and align the relevant framework **for all distribution channels and all insurance products**.

Such consultation document regulates five areas, each dedicated to the introduction of amendments to certain IVASS Regulations, including IVASS Regulation no. 40 and 41 of 2 August 2018.

The main amendments, which will certainly entail various material implications for operators, are those relating to the rules of conduct for the distribution of IBIPs, as set forth by art. 4 of the Consultation document no. 2/2019.

In such respect, the following should be highlighted:

- **the mandatory advice (*consulenza obbligatoria*)** regime for the sale of IBIPs products other than non-complex ones under the IBIPs Delegate Regulation.

The IBIP Delegated Regulation (art. 16) provides for the criteria to be met in order to identify non-complex IBIPs. Such criteria include, *inter alia*, (i) the presence of contractually guaranteed minimum maturity value which is at least the amount paid by the customer after deduction of legitimate costs; (ii) the presence of options to surrender or otherwise realise the IBIP a value that is available to the customer; and (iii) the fact that the IBIP does not incorporate a structure which makes it difficult for the customer to understand the risks involved.

In order to identify the applicable regime and, subsequently, whether an advice is required, it will be therefore necessary to firstly identify whether a product is complex or not.

In case of IBIP requiring mandatory advice, should the distributor deem that such product is not consistent with the insurance demands and needs of the policyholder,

not adequate for the policyholder or prospective policyholder, or should the distributor not having obtained from the latter the necessary information, **the distributor is bound to refrain from distributing the product, also in case of reverse solicitation by the policyholder.**

In consideration of the variety and scope of the criteria to be taken into account to the purposes above and the level of diffusion of product (e.g., multiramo products) characterized by the combination of different types of coverages, the classification of products commercialized to the purpose of the relevant inclusion into the definition of "non-complex products" – with the related effects – will certainly be one of the fields into which operators will need to focus more and which will have the material effects over the distribution process.

Furthermore, should the above briefly mentioned conditions be present, various distributors shall be bound to provide an additional service – i.e., the advice service, through the provision of personalized recommendation to the client, which, where based on an impersonal and unbiased analysis, shall be founded on a sufficient number of insurance contracts available on the market. The provision of such service will certainly entail a number of impacts, mainly from an operational standpoint – e.g., with respect to the integration of existing distribution processes (also as a consequence of the duty to provide certain additional pre-contractual information required pursuant to the new art. 68 of Consultation document no. 2/2019) and to the training (mainly with reference to the so called "traditional" distributors networks) – and as a consequence of the related implementation costs.

In such respect, the timing set forth for the entering into force of the new provisions will hopefully be sufficient in order to allow distributors to gradually and efficiently comply with the revised framework.

- provisions aimed at regulating in detail the "Rules of conduct for the distribution of IBIPs".

In this regard, in particular, with reference to **inducements**, in line with the provisions of the MiFID II regulatory framework:

- general principles and conditions for eligibility of inducements applicable to intermediaries and insurance companies are identified (e.g., aim of **improving the quality** of the insurance distribution business; ineligibility of the inducement if the provision of services to the customer is distorted or adversely affected by the inducement itself).

Furthermore, the provision setting forth general principles relating to inducements, if on the hand has almost the same content of the corresponding one set forth by the MiFID II (as per the current Consob Intermediaries Regulation), on the other hand appears to a certain extent deviate from it in the formulation of paragraph 3 of the new art. 68-sexies.

In fact, such provision, differently from the corresponding one set forth by the said Directive as well as by the current Consob Intermediaries Regulation, does not provide for an exemplification of the "*inducements or inducements schemes which allow the carrying out of the insurance distribution activity or are necessary to such purpose*" (see art. 52, para. 3, of the Consob Intermediaries Regulation,

where, in line with MifiD II, reference is made to “*payment or benefits [...], such as custodial, regulation and exchange fees, compulsory withdrawals or legal fees*”).

A clarification on the scope of such provision, also following the conclusion of the consultation procedure, could certainly be useful, along with an exemplification of inducements and inducement schemes which could fall into relevant scope of application.

- the existence, nature and amount of the **inducements** (or, where the amount cannot be ascertained, the method of calculating such amount) **shall be clearly communicated to the client**, in a complete, accurate and comprehensible manner, prior to the distribution of an IBIP; by way of example, in case of ongoing inducements, the relevant amount received or paid shall be communicated to policyholders at least once a year (whereas minor non-monetary benefits may be described in a generic manner);
 - the activity of **registration** by intermediaries of inducements received in relation to any payment or benefit received from or paid to third parties is regulated; and
 - in the case of the provision by intermediaries of **advice on an independent basis**, the admissibility of non-monetary inducements is regulated (allowing only minor non-monetary benefits); intermediaries providing such services shall also be bound to draft and implement a **policy** in order to ensure that remunerations, commissions or non-monetary benefits paid or provided to third parties, or from anyone acting on their behalf, is assigned or transferred to each single policyholder.
- Of relevance for the related potential implications – moreover operational ones – are also the proposed amendments to art. 25 of IVASS Regulation no. 41/2018 regarding the annual account statement relating to IBIPs (“*Documento unico di rendicontazione*”), to which the relevant provisions applicable to unit-linked products are extended. To such purpose, new provisions also set forth the duty for the company to collect from the intermediary in charge of the distribution all the necessary information to be provided to the client in relation to costs and fees linked to the distribution activity through specific and separate indication thereof.

Also in such respect, operators are therefore called to adopt further safeguards and mechanisms which allow a continuing and detailed exchange of information with their distributors, as well as a stronger transparency vis-à-vis clients in relation to costs linked to the distribution activity.

3. Consob – Consultation document Intermediaries Regulation

The Consultation document Intermediaries Regulation contains amendments to the Consob Intermediaries Regulation in relation to rules of conduct and disclosure requirements to which intermediaries to whom the relevant framework is addressed (including **banks, investment firms**, Poste Italiane) shall comply with when distributing IBIPs.

More specifically, the proposed amendments consist in a complete rewriting of Book IX of the Intermediaries Regulation, in order to complete, for the aspects falling within Consob's competence and in line with the provisions of IVASS regulations, the regulatory framework related to the implementation of the IDD.

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To such purpose:

- as to **mandatory advice**, the duty to provide advice in the distribution of IBIPs, with the exception of non-complex products, is also set forth in such draft provision;
- as regards **inducements**, in line, as anticipated, with the relevant provisions set forth by the MiFID II framework, inducements shall be admissible only when they increase the quality of the insurance distribution activity and do not prejudice the duty of the intermediary to act in the interest of the client (identifying, among other things, the conditions under which the provision of investment research in relation to IBIPs by third parties is not considered as an inducement);
- as to the **POG** framework applicable to IBIPs, intermediaries shall identify a target market as well as a negative target market for the IBIPs that they intend to distribute; without prejudice to the ban on distributing IBIPs to clients falling within the **negative target market**, the distributor may distribute IBIPs to clients not falling within the relevant identified target market, provided that such products are consistent with the insurance demands and needs of the client as well as suitable and adequate to them.

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The Department of Financial Intermediaries Regulation of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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