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The Role of European Insurance and Occupational Pensions Authority in the Formation of Consumer Protection in Insurance Contracts

EIOPA is one of the three of European Supervisory Authorities. It plays an active role in the pro-consumer politics in insurance business. EIOPA's aim is to protect consumers from unfair and abusive business practices by identifying tangible risks at an early stage and to ensure that these risks are adequately tackled before fully materializing. EIOPA's approach is to promote the orderly functioning of markets resulting in a level playing field, healthy competitive and innovative environment, increased consumer confidence and guaranteeing financial stability. EIOPA has issued a large number of important documents, presenting its view on consumer politics in recent years. This article gives a short summary of the most significant actions of the European Supervision Authority in this field.

Keywords: EIOPA, consumer protection, soft law, guidelines, insurance activity.

1. General information on the role of EIOPA in the supervision of insurers and the protection of consumers

European Insurance and Occupational Pensions Authority was established by the European Union Regulation No. 1094/2010 in 2010¹ with an idea to strengthen European supervision of financial services after the financial crisis in 2007 and 2008. The crisis exposed shortcomings in the areas of cooperation, coordination, consistent application of Union law and trust between national supervisors and therefore a proposal of a European system of financial supervisors emerged, with an idea, that such a system should be comprised of three European Supervisory Authorities, one for the banking sector, one for the securities sector and one for the insurance and occupational pensions sector². As the main tasks of the Authorities the key competences were mentioned: legally binding mediation between national supervisors, adoption of binding supervisory standards, adoption of binding technical decisions applicable to individual institutions, oversight and coordination of colleges of supervisors, licensing and coordination of colleges of supervisors, as well as licensing and supervision of

¹ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, O.J. E.U. L 331/48, 15.12.2010.

² The high-level group on financial supervision in the EU Chaired by Jacques de Larosiere, Report, Brussels, February 25, 2009, p. 55.

specific EU-wide institutions. Consequently, numerous actions were taken. The European Council, in its conclusions of June 19th, 2009, confirmed that a European System of Financial Supervisors, comprising three new European Supervisory Authorities, should be established and a final Regulation concerning European Insurance and Occupational Pensions Authority was adopted in the late 2010.

Consumer protection has always been at the heart of EIOPA's activity described as a "key strategic priority"³ and this position has been confirmed during EIOPA's activities over the years. EIOPA states that consumer protection is at the center of its work through both prudential and conduct of business regulation and supervision. EIOPA describes its objective is to ensure that market players put in place sound governance mechanisms, have a robust solvency position and treat consumers fairly. The aim of EIOPA is to protect consumers from unfair and abusive business practices by identifying tangible risks at an early stage and to ensure that these risks are adequately tackled before fully materializing. EIOPA's approach is to promote the orderly functioning of markets resulting in a level playing field, healthy competitive and innovative environment, increased consumer confidence and guaranteeing financial stability. It is often emphasized by EIOPA that failures in consumer protection not only harm individual consumers, but may also have a wider prudential impact, posing a threat to the stability of the insurance sector. EIOPA is of the opinion that traditional approaches as regards the conduct of business regulation and supervision used to be focused on disclosure, selling practices and were following a more tick-box approach. Not only did this prove to be insufficient particularly in preventing mis-selling, but also created the foundation for a culture of formal compliance⁴. Therefore EIOPA – having in mind its statutory competence – puts consumer issues at a high level of priority and focuses on three strategic goals in this regard: transparency, simplicity, accessibility and fairness across the internal market for consumers, development of sound and prudent regulation supporting the European Union internal market and also the quality, efficiency and consistency of the supervision of European Union insurers and pension funds⁵. It is worth mentioning that EIOPA's objective "to protect the public interest" is understood that its consumer protection tasks involve exclusively collective and not individual consumer protection⁶.

³ See: G. Bernardino's speech at the European Consumer Protection Conference in Vienna, February 16, 2017 available at: <https://eiopa.europa.eu/Pages/News/Speech-by-Gabriel-Bernardino,-Chairman-of-EIOPA,-at-the-European-Consumer-Protection-Conference,-Vienna.aspx>

⁴ See above, p. 3.

⁵ Speech by G. Bernardino, Back to basics in consumer protection: a fair treatment, https://eiopa.europa.eu/Publications/Speeches%20and%20presentations/2014-06-27_Better_Finance_for_All.pdf

⁶ M. Dreher, *Treaties on Solvency II*, Springer 2015, p. 96.

2. EIOPA's guidelines on consumer protection issues

According to Article 16 of the Regulation No. 1094/2010 EIOPA shall, with a view to establishing consistent, efficient and effective supervisory practices within the European System of Financial Supervision (ESFS), and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions. The Authority shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations and analyze the related potential costs and benefits. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.

Since 2011 EIOPA has issued three important guidelines on consumer protection: Guidelines on Complaints-Handling by Insurance Intermediaries, Guidelines on Complaints-Handling by Insurance Undertakings and also Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors.

Guidelines on Complaints-Handling by Insurance Undertakings seems to be the document of the most importance to consumers. It was published in June 2012. According to these Guidelines competent authorities shall ensure that a "complaints management policy" is put in place by insurance undertakings. This policy should be defined and endorsed by the insurance undertaking's senior management, who shall also be responsible for its implementation and for monitoring compliance with it⁷. Complaints management policy is to be set out in a written document and is made available to all relevant staff of the insurance undertaking through an adequate internal channel. Insurance undertakings should appoint a complaints management function which enables complaints to be investigated fairly and possible conflicts of interest to be identified and mitigated. Competent authorities should ensure that insurance undertakings register, internally, complaints in accordance with national timing requirements in an appropriate manner. What is important, insurance undertakings shall provide information on complaints and complaints-handling to the competent national authorities or the ombudsman⁸. This data should cover the number of complaints received, differentiated according to their national criteria or own criteria, where relevant. Insurance undertakings shall analyze, on an on-going basis, complaints-handling data, to ensure that they identify and address any recurring or systemic problems, and potential legal and operational risks.

Insurance undertakings on request or when acknowledging receipt of a complaint, shall provide written information regarding their complaints-handling process. They shall also publish details of this process in an easily accessible manner, for example, in brochures, pamphlets, contractual

⁷ No. 1 – Guidelines on Complaints-Handling by Insurance Undertakings.

⁸ No. 6 – Guidelines on Complaints-Handling by Insurance Undertakings.

documents or via website⁹. The information on complaints-handling process shall be clear and provide accurate and up-to-date data about the process itself, which includes details of how to complain (e.g. the type of information to be provided by the complainant, the identity and contact details of the person or department to whom the complaint should be directed), the process that will be followed when handling a complaint (e.g. when the complaint will be acknowledged, indicative handling timelines, the availability of a competent authority, an ombudsman or alternative dispute resolution (ADR) mechanism, etc.). Insurance undertaking shall keep the complainant informed about further handling of the complaint. When providing a final decision that does not fully satisfy the complainant's demand (or any final decision, where national rules require it), it shall include a thorough explanation of the insurance undertaking's position on the complaint and set out the complainant's option to maintain the complaint, e.g. the availability of an ombudsman, ADR mechanism, national competent authorities, etc. Such decision should be provided in writing where national rules require it¹⁰.

It was obvious that not only insurance undertakings receive consumer complaints, therefore in November 2013 EIOPA published Guidelines on complaints-handling by insurance intermediaries¹¹. The Guidelines again apply to authorities competent for supervising complaints-handling by insurance intermediaries in their jurisdiction. This includes circumstances where the competent authority supervises complaints-handling under European Union and national law, by insurance intermediaries doing business in their jurisdiction under free provision of services or freedom of establishment. It is important that the Guidelines are read in conjunction with the Best Practices Report¹², which illustrates the scope of the Guidelines and the process for insurance intermediaries handling complaints. According to the Guidelines, competent authorities should ensure that insurance intermediaries put in place a complaints management policy set out in a written document. This policy should be defined and endorsed by the insurance intermediary's senior management, who should also be responsible for its implementation and for monitoring compliance with it¹³. Insurance intermediaries should have a complaints management function, which enables complaints to be investigated fairly and, with the exception of insurance intermediaries which are sole traders, possible conflicts of interest to

⁹ No. 6 – Guidelines on Complaints-Handling by Insurance Undertakings.

¹⁰ No. 7 – Guidelines on Complaints-Handling by Insurance Undertakings.

¹¹ https://eiopa.europa.eu/Publications/Guidelines/GLs_Complaints_Handling_Intermediaries_Original_EN.pdf#search=GLs%20Complaints%20Handling%20Intermediaries%20Original%20EN

¹² Best Practices Report is another important document produced by EIOPA in order to unify insurance intermediaries' activity in European Union. The Best Practices Report touches upon the complaints management policy and organization of the internal complaints management function. Report on Best Practice in Insurance Intermediaries in handling complaints, November 27, 2013. https://eiopa.europa.eu/Publications/Guidelines/EIOPA-BoS-13-171_Best-Practices-Report-on-complaints-handling-by-Insurance-Intermediaries.pdf

¹³ No. 2 – Guidelines on Complaints-Handling by Insurance Intermediaries.

be identified and mitigated¹⁴. There is also a requirement on registering¹⁴ and reporting on consumer complaints. The purpose of complaints-handling process is to analyze the causes of individual complaints so as to identify root causes common to types of complaints and also considering whether such root causes may also affect other processes or products, including those not directly complained of. Moreover, the purpose is to identify whether such root causes may also affect other processes or products, including those not directly complained of and obviously correcting such root causes.

According to the Guidelines, competent authorities should ensure that where a complaint is received by an insurance intermediary (for example, a tied insurance intermediary) for which another financial institution is responsible, and that insurance intermediary does not handle the complaint on behalf of that financial institution, the insurance intermediary should inform the complainant and direct the complaint to the relevant financial institution, where identifiable.

Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors were issued in March 2016. These Guidelines do not only aim to support competent authorities when implementing the IDD, but also to achieve cross-sectoral consistency. As the European Markets Supervisory Authority (ESMA)¹⁵ and the European Banking Authority (EBA)¹⁶ had earlier issued guidance on product oversight and governance arrangements, the Guidelines seek to ensure a level playing field in financial markets and prevent regulatory arbitrage. Due to their nature as preparatory Guidelines, it is not the intention of them to necessitate enforcement action by competent authorities if they become aware of practices which are not fully in line with the Guidelines, but to make competent authorities discuss with market participants possible ways for appropriate remedial action.

EIOPA will review the preparatory Guidelines once the delegated acts under the IDD have been adopted to assess to which extent a revision of the Guidelines is necessary. The product oversight and governance arrangements should be primarily considered as an implementation of the fundamental objective of insurance supervision, namely the protection of policyholders and beneficiaries as stated in Solvency II. The arrangements outlined in the Guidelines refer to internal processes, functions and strategies for designing and bringing products to the market, monitoring and reviewing them over their life cycle. The arrangements differ depending on whether the regulated entities are acting as manufacturers and/or distributors of insurance products and refer to steps such as identifying a target market for which the product is

¹⁴ No. 3 – Guidelines on Complaints-Handling by Insurance Intermediaries.

¹⁵ ESMA's technical advice to the European Commission on delegated acts to product oversight and governance arrangements in MiFID II: http://www.esma.europa.eu/system/files/2014-1569_final_report_esmas_technical_advice_to_the_commission_on_mifid_ii_and_mifir.pdf

¹⁶ EBA Guidelines on product oversight and governance arrangements for retail banking products: <http://www.eba.europa.eu/documents/10180/1141044/EBA-GL-2015-18+Guidelines+on+product+oversight+and+governance.pdf/d84c9682-4f0b-493a-af45-acbb79c75bfa>

considered appropriate, identifying market segments for which the product is not considered appropriate, carrying out product analysis to assess the expected product performance in different stressed scenarios, carrying out product reviews to check if the product performance may lead to customer detriment and, in case this occurs, take actions to change its characteristics and mitigate the detriment. The steps may also include identifying the relevant distribution channels taking into account the characteristics of the target market and of the product or verifying that distribution channels act in compliance with the manufacturer's product oversight and governance arrangements.

3. Analysis of EIOPA's Consumer Trends Reports

Pursuant to Article 9 point 1 (a) of the Regulation No. 1094/2010 EIOPA shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by collecting, analyzing and reporting on consumer trends. The term "consumer trend" is not defined in the Regulation. EIOPA therefore devised a working definition with a consumer trend meaning evolutions in consumer behavior in the insurance and pensions markets related to the relationship between consumers and undertakings (including intermediaries) that are significant in their impact or novelty¹⁷. The term "Trends" is understood in a broad sense – it means, for example, evolutions in volume, evolution in the way the relationship between customers and undertakings/intermediaries is determined, or also new insurance products and financial innovations that are being introduced into the market. The trend may have already been consolidated for a number of years, but it may also be only emerging and can potentially become significant in the future.

Collecting, analyzing and reporting on consumer trends is accomplished by publishing a Consumer Trends Report each year. The report is based on information from national authorities and stakeholders (including stakeholders' groups). It aims to assist EIOPA in the identification, prioritization and development of targeted policy proposals. EIOPA seeks to identify possible consumer protection issues arising from such trends. Although positive tendencies may also be presented in the report, the most common practice is to give information about negative issues arising from an industry's action. EIOPA has also developed a Methodology for producing a Consumer Trends Report¹⁸ on an annual basis that consists in the collection of quantitative and qualitative consumer information from EIOPA's Members as well as from stakeholders. There are certain limitations to the methodology and a number of national authorities were not able to provide input. Still the information gathered in the report is extensive and constitutes an important measure of consumers' issues in the European Union.

¹⁷ EIOPA Fifth Consumer Trends Report, December 16, 2016, p. 9.

¹⁸ EIOPA, Consumer Trends Methodology, November 2012. https://eiopa.europa.eu/Publications/Reports/2012-11_Methodology_on_collecting_consumer_trends.pdf

In the last report of December 16, 2016¹⁹ EIOPA observed many key developments in the insurance market. In the on-going context of low interest rates environment, new life insurance products with reduced or no guarantees, sometimes with a high degree of complexity, continue to be introduced into the market. Motor insurance complaints have also been mentioned in the report in the context of claims handling. However, EIOPA has gathered information that complaints in this field are decreasing. On the other hand, complaints related to terms and conditions are on the rise in some Member States. The report also states that “Big Data” and consumer analytics in motor insurance (black boxes), life and health insurance (wearable technology) and household insurance (geo-coding and connected houses), allow the accuracy of risk assessments to be improved and the development of more tailored products, yet the availability and affordability of insurance for some consumers could also be affected. In parallel to the increasing penetration of smartphones, Big Data analytics are increasingly turning to a mobile phone application-based approach, offering, among other things, the possibility to improve insurers’ relationships with their consumers, for instance by tailored selling and marketing campaigns or by expediting claims handling. EIOPA in its report also notices that travel insurance sales are increasing, but the number of related consumer complaints are also growing in several Member States.

The report analyzes trends in the personal and occupational pension sectors, as well. The development of pension-tracking systems and the provision of advice when planning for retirement are subject to a more detailed analysis. Moreover, given that the pensions sector is relatively stable where financial innovations and disruptive changes are often triggered by regulatory changes, it is common that some key trends persevere over the years. As a result of persistent low interest rates and aging populations, the trend in several Member States is moving towards Defined Contribution rather than Defined Benefit schemes, where individuals are commonly offered a greater choice of investment strategies in exchange for bearing investment risks²⁰. The liberalization of the pay-out phase introduced in several Member States offers new decumulation options to members and policyholders, although risks of poor outcomes may also arise (e.g. pension scams). However, it is noticeable that the number of complaints has remained relatively stable.

4. Other consumer protection tools

EIOPA is using a number of other tools to analyze consumer protection issues, such as thematic reviews to target specific financial activities or products causing consumer detriment or creating a barrier to the effective functioning of the market. Furthermore, EIOPA is gathering information on emerging risks

¹⁹ EIOPA Fifth Consumer Trends Report, December 16, 2016, https://eiopa.europa.eu/Publications/Reports/06.0._EIOPA-BoS-16-239%20-%20EIOPA%20Fifth%20Consumer%20Trends%20report%20-%20Clean%20after%20BoS.pdf

²⁰ EIOPA Fifth Consumer Trends Report, December 16, 2016, p. 8.

to consumer protection by using retail risk indicators to identify market areas that need to be monitored.

According to Article 9 point 2 of the Regulation No. 1094/2010 the Authority shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice. The Authority may also issue warnings in the event that a financial activity poses a serious threat to public interest. The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1 (2) or, if so required, in the case of an emergency situation.

To prevent from unfounded use of the powers described herein, EIOPA published procedures for issuing warnings, temporary prohibitions and restrictions²¹. The scope of these procedures is to establish rules for the issuing of warnings and temporary prohibitions and restrictions that may be adopted by the Board of Supervisors, with a view to ensuring a higher degree of legal certainty for any potential use of Article 9(3) and (5) of The Regulation. The procedure sets grounds for consultations, opinions and discussions before the issuing of warnings, prohibitions and restrictions.

Under the provisions of Article 29(1)(a) of Regulation (EU) No. 1094/2010 EIOPA shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union. This obligation is often fulfilled by expressing opinions on most typical issues for European consumers. So far, this tool has been used commonly by the European Supervision Authority and it seems to be an effective way of promoting good practices and a common approach to consumer politics around the Member States. EIOPA's opinions are a source of objective information directed to national authorities on the scope of European regulations as well as expectations on their implementation. Besides, the information provided in the opinion may be used by the industry or consumers themselves to understand the aims of regulations and obligations of the industry.

It is worth mentioning that in 2015 EIOPA issued an opinion on sales via the Internet²². According to EIOPA the digital insurance market of the future may create specific consumer detriment or increase, due to the nature of the Internet, the scale of difficulties that exist already in offline distribution. At the same time, consumers may derive benefits from online distribution. EIOPA has found consumer protection issues in a number of Member States, with re-

²¹ EIOPA procedures for issuing warnings, temporary prohibitions and restrictions, November 12, 2012, https://eiopa.europa.eu/Publications/Administrative/2012-11_EIOPA_procedures_for_issuing_warnings_for_publication.pdf

²² EIOPA Opinion on sales via the Internet of insurance and pension products, January 28, 2015, https://eiopa.europa.eu/Publications/Opinions/Opinion_on_sale_%20via_the_internet%28published%29.pdf

gard to online distribution. The Authority noted that consumers can find an abundance of information online²³. Furthermore, EIOPA identified issues where advice is required to be provided by national law or when so promoted, and the way insurance intermediaries or undertakings comply with their consequent duties when sales are conducted online. Distributors sometimes do not provide sufficient advice when distributing their products, or the information displayed is not fair enough. This may lead consumers to buy products that insufficiently meet their needs and requirements²⁴. This may lead to mis-selling and such practices are always carefully observed by EIOPA.

The problem of mis-selling was a cause of huge consumer detriment in the years 2006-2010, mainly because of the Payment Protection Insurance (PPI). This product had also been analyzed by EIOPA and an opinion was issued also in this regard²⁵. This opinion – apart from a statement of information – aimed at drawing Member States' attention to consumer protection issues regarding PPI products and therefore EIOPA recommended national authorities to explore their markets but also to report back to EIOPA with a view to decide on potential (further) investigation and any possible (further) supervisory and/or regulatory action at national level. This opinion influenced supervision activities around PPI products in Poland. For many years PPI products had not been analyzed by the Polish Supervision Authority but an obligation to report back to EIOPA on the situation in Poland directly affected the Polish market. Just after the publication of EIOPA's opinion – Polish Supervision Authority started its work on documents, such as good practices in the PPI sector.

5. Conclusions

The conduct of business supervision is highly fragmented in the European Union and Member States are at different stages of development as regards their approach to consumer protection. There is also a differentiation among the consumers in the European Union countries themselves – knowledge of rights, national situation of insurers, legal issues and experience in the past. Therefore, the EIOPA's task to ensure transparency, simplicity, accessibility and fairness across the internal market that provides good and right outcomes for consumers is really laborious. It is vital to guarantee that the European Union responds to the real problems and concerns of the European consumers as there has been significant reputational and financial damage as a result of consumer mis-selling events in the European Union. Consumers are source of income for the insurance industry, so consumer protection issues need not to be avoided or disregarded.

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²³ EIOPA Opinion on sales via the Internet of insurance and pension products, p. 3.

²⁴ EIOPA Opinion on sales via the Internet of insurance and pension products, p. 2.

²⁵ EIOPA Opinion on Payment Protection Insurance, June 28, 2013, https://eiopa.europa.eu/Publications/Opinions/EIOPA_PPI_opinion_2013-06-28.pdf

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