Bundesrat **Document 389/12 (Decision)**
21 September 2012

Decision
of the Bundesrat

Proposal for a Directive of the European Parliament and the Council on insurance mediation (recast)
COM(2012) 360 final; BR document 12407/12

At its 900th meeting on 21 September 2012, in accordance with Articles 3 and 5 of the Law on Cooperation between the Federation and the *Länder* in European Union Affairs (EUZBLG), the Bundesrat adopted the following opinion:

1. The Bundesrat endorses the Commission's intention to revise the Insurance Mediation Directive in the light of the lessons learned from the financial crisis and to adapt it to a changed economic and technological environment.

2. The Bundesrat welcomes the submitted proposal as an important contribution to improved consumer protection. Close alignment with the Financial Market Directive ("MiFID II"; BR- Document 694/11) is bringing the G20's goal of a comparable sales standard for all financial products a step nearer.

3. It supports the Commission's objective of revising the Directive with a view to effectively improving regulation of the insurance market for private customers as regards undistorted competition, consumer protection and greater market integration.

4. The Bundesrat calls for the amendment made in Recital 15 (ex 14 IMD1), ensuring that in future it is solely the place of residence which is decisive in the case of natural persons, to be reviewed. This amendment would mean that, for instance, an insurance intermediary living in Austria but operating exclusively in Germany would be registered in the Austrian register of insurance intermediaries, thereby giving rise to issues such as which law to apply.

5. The Bundesrat takes the view that the extension of the Directive's scope to cover professional loss adjusters in Article 1 is unnecessary. These are usually agents of the insurance undertakings found to have been guilty of misconduct under civil law. Should this provision be retained, we would ask that a definition of the term be inserted in order to increase legal certainty and avoid ambiguities.

6. In the interests of legal clarity and certainty, the Bundesrat calls for an explanation of what exactly is meant by the term 'provision of data' referred to in Article 2(3)(b). There is, for instance, a need for clarification and delineation, in particular as regards comparison websites.

7. In the Bundesrat's opinion, the mediation of insurance contracts by reinsurance companies should be added to definition of reinsurance mediation in Article 2(6). This would make it clear that the business operations of such companies relating to direct

insurance also meet the supervisory requirements and are not subject to mediation requirements such as registration and professional liability. This clarification is necessary because the Proposal for a Directive at issue [hereinafter: the Proposal] alters the current system. While under IMD1 the sales operations of insurance and reinsurance undertakings were not covered by the Directive, these activities are now also to be encompassed by the term insurance mediation (see point 3.5 of the explanation for Article 1). Since a clear distinction is also drawn between insurance mediation on the one hand and reinsurance mediation on the other, there is a risk that 'cross-mediation' by reinsurance companies will no longer be considered permissible. This could result in a business activity being called into question even though it has long since been covered throughout the branch by the authorisation of reinsurance undertakings under the Reinsurance Directive 2005/68/EC and is recognised for supervisory purposes in § 7(3) of the German Insurance Supervision Act as an operation linked to reinsurance.

8. The Bundesrat takes the view that, for the sake of clarity, not only reinsurance undertakings but also employees of such undertakings should be expressly excluded from the definition of 'reinsurance intermediary' in Article 2(7). This would avoid employees of reinsurance undertakings being subject to additional supervisory obligations, even though the undertakings are already subject to supervision. Accordingly, the first subparagraph of Article 3(1), for instance, stipulates with regard to the registration of insurance intermediaries that insurance undertakings and their employees are exempt from the requirement to register.

9. The first subparagraph of Article 3(1) provides that insurance undertakings and their employees are not required to register their mediation activities again under this Directive. The Bundesrat calls for a corresponding exemption to be included also for reinsurance undertakings and their employees. Otherwise, such undertakings would need to register again not only for insurance mediation but also for reinsurance mediation.

10. The Bundesrat has concerns about the simplified registration procedure for intermediaries for whom insurance mediation is an ancillary activity. Registration does not strengthen consumer protection; rather, it may mislead consumers into thinking that the intermediary has been assessed by the authorities. The Bundesrat therefore calls for the current provision to be maintained.

11. It welcomes the approaches to defining the appropriate knowledge and ability for intermediaries, as well as the suitable criteria for determining the level of professional qualifications, experience and ability with regard to performing insurance mediation activities, contained in the Proposal. It also welcomes the planned continuing professional training measures. However, it believes that the high standard of professionalism and competence required should be ensured by a uniform testing procedure in so far as possible. In this context, the Bundesrat is sceptical of the plan to allow not just insurance undertakings but also insurance intermediaries to be authorised to verify that their own staff meet the eligibility criteria (fourth subparagraph of Article 8(1)).

12. The Bundesrat is in favour of reviewing the possibility afforded to the Member States of exempting insurance employees from key minimum eligibility criteria such as absence of a police record for a serious offence in the area of property or financial crime (third subparagraph of Article 8(2)). According to the Bundesrat, providing for this possibility of exemption should not jeopardise achievement of the Directive's objective that staff employed in the insurance sector must act honestly, fairly, professionally and in the best interests of their customers.

13. It is in favour of the provision made in Article 13 for a requirement for Member States to establish out-of-court settlement bodies in which insurance undertakings and intermediaries must participate, and welcomes the standard requirements for organising the procedure.

14. Article 13 of the Proposal dovetails with the EU legislation on out-of-court dispute resolution. Point (e) of the second sentence of Article 13(1), by providing for the possibility of accessing the procedure electronically, implements the objectives of the Proposal for a Regulation on online dispute resolution - COM (2011) 794 final.

Points (a) and (d) are linked to the provisions of the Proposal for a Directive on alternative dispute resolution - COM (2011) 793 final. Points (b), (c) and (f), however, go beyond the above-mentioned legislative proposals, since they relate to the impact of out-of-court settlements on the judicial enforcement of claims. They expand the scope far beyond that provided for in § 214 of the Insurance Contract Act (VVG), which does not contain any corresponding provisions.

Although the provisions of points (b) and (c) are useful and increase the appeal of out-of-court dispute resolution, their implementation would result in a special right applicable to insurance contracts which § 204 of the German Civil Code (BGB) does not stipulate in relation to other kinds of contract. This creates a discrepancy in particular in cases – such as actions challenging dismissal – where the use of mediation, for instance, does not lead to an interruption or extension of the period within which an action must be brought. The concept of out-of-court actions affecting actions brought before the courts should not remain specific to insurance contract law. Against this backdrop, the Bundesrat is in favour of a regulatory approach which avoids stand-alone solutions for specific types of contract and instead contains a common concept of the impact of out-of-court dispute resolution on actions brought before the courts.

15. Article 17 of the proposal for a Directive states that insurance intermediaries or sales staff of insurance undertakings and insurance intermediaries must in future be required to disclose the basis for calculation and exact amount of their remuneration or the amount of any variable remuneration.

The Bundesrat welcomes this move towards a more transparent obligation on the part of insurance intermediaries to provide information on remuneration (commissions) to consumers.

The disclosure of sales commissions helps reveal to customers potential conflicts of interest affecting insurance intermediaries and encourages them to undertake a critical comparison of products and providers. It also strengthens competition for particularly cost-efficient distribution and also facilitates the comparison between commission and fee-based advice services. The latter can therefore be more clearly perceived as a genuine market alternative.

16. A comparison of sales commissions is not enough in itself to determine the best and most cost-effective product. The sums payable may vary depending on the distribution channel, even though the corresponding total calculation of distribution costs does not change. In the case of direct sales by an undertaking's own staff, for instance, not only the variable costs but also the fixed components of remuneration are included pro rata in the calculation. Consequently, the most efficient product can only be identified by means of an overall comparison of all costs. The Bundesrat would therefore ask the Federal Government to check whether cost transparency should be extended to cover total acquisition costs, as well as other costs included in the calculation (e.g. administrative

costs), as already provided for in the case of certain insurance products through the Order on information disclosure obligations supplementing the Insurance Contracts Act (*Informationspflichtenverordnung zum Versicherungsvertragsgesetz* -VVG-InfoV).

17. However, the provision on the disclosure obligation on the part of the seller distinguishes between life insurance products and non-life insurance products. In the case of the second product category, for a transitional period of five years, remuneration only has to be disclosed on request (Article 17(2) of the Proposal). The explanation for the Proposal states in this regard that life products are closer to investment products and buying such a product constitutes a long-term investment. It further states that the remuneration for non-life products, on the other hand, is lower and the product involves fewer risks, and that customers can easily switch to a different product in an affordable manner (see BR-Document 389/12, p. 11). The Bundesrat takes the view that a comprehensive disclosure obligation should apply to both life and non-life insurance products. The distinction made in the Proposal is unconvincing. We see no objective reason why purchasers of non-life insurance products should only be compulsorily informed of the seller's remuneration after a transitional period of five years. Contrary to the comments in the explanation, there are insurance products other than life insurance which represent long-term decisions that can not easily be changed by consumers or can only be changed subject to considerable penalties. In this context, sickness insurance and incapacity insurance, which usually require a health check, could be cited by way of example.

In particular, it is not sufficient that in the area of non-life insurance products, e.g. sickness insurance, commissions are only to be disclosed if the customer so requests. The Bundesrat therefore considers that the points made in the explanation justifying the non-applicability of the five-year transitional period to life insurance (high rates of commission, expensive to change) are also largely applicable to the area of private sickness insurance. The five-year transitional period should therefore be deleted (Article 17(2)).

18. Article 20 regulates the manner in which consumers should be provided with the information referred to in Articles 16 to 18.

The Bundesrat requests that it be examined whether a provision in line with the rationale of Article 6 of the Rome I Regulation should be included in Article 20(1)(c) stipulating that the pre-contractual information referred to in Articles 16, 17 and 18 must, without fail, be provided in the official language of the Member State in which the service of the insurance intermediary or insurance undertaking is to be provided. In future, it should be possible - in addition to providing information in paper form or using a durable medium - to disclose information on a website. Paragraph 5 stipulates the following pre-conditions:

- the customer must have personalised access to the website; or

- the provision of information via a website must be appropriate in the context of the business conducted; and

- the customer must have consented to this method of providing information; and

- the customer has been notified electronically of the address of the website and the place on the website where the information can be accessed; and

- it must be ensured that the information remains accessible on the website for as long as the customer is likely to need to access it.

The Bundesrat would point out that the practical benefit of the proposal's provisions concerning the provision of information and disclosure of conflicts of interest and commissions will greatly depend on the manner in which this information is made available to consumers. The Bundesrat is concerned that the planned derogations to the requirement to provide information on paper (Article 20, paragraphs 2 to 5), in particular the option of providing information via a website, will undermine the objective of comprehensive and timely acquisition of all information relevant from the consumer's point of view to concluding a contract. The Bundesrat would ask that it be examined whether the derogation permitting information to be provided on a website should be dispensed with entirely.

The provision of information on a website is incompatible with one of the core aims of the Proposal. According to Recital 9 thereof, one of the key objectives is the effective protection of consumers to whom insurance contracts are sold.

This means, amongst other things, that before concluding, amending or extending a contract, consumers must have the opportunity to make an informed decision and thus to protect their interests in the event of dispute with the insurance intermediary. To this end, consumers must be in a position to reproduce the information provided without changes. However, this can only be the case where this information cannot be unilaterally changed by the insurance seller (see Directive 2002/92/EC: EFTA-Court GRUR Int 2010, 327, 332).

The conditions set out in Article 20(5) of the Proposal fail to meet these requirements. Firstly, it is not ensured that consumers even receive and take note of the information - which (also in the Commission's opinion) constitutes the basis on which they can make an informed decision - prior to concluding a contract. Furthermore, there is in particular no guarantee that the information will not be changed by the insurance intermediary over time. However, consumers must be able, especially in the event of dispute, to easily and confidently document which information was provided to them and to reproduce this information without modification. Consumers who access the information on a website cannot be sure that it is complete and unchanged, since they have not been informed of any additions and are unlikely to be in a position to make a comparison. The criterion of 'unchanged reproduction of information' is not included in Article 20(5).

19. While the Bundesrat endorses the customer information principles set out in the Proposal, it objects to the derogation for telephone sales, according to which information could also be provided immediately after entering into an insurance contract. The experience of consumer advice centres has shown that this marketing channel is the one most affected by dubious business practices. It should therefore be ensured that consumers are provided with all the necessary information in advance also where this marketing channel is concerned.

20. The Bundesrat welcomes the fact that additional customer protection requirements in accordance with Chapter VII are applied in the case of insurance investment products, thereby ensuring cross-sectoral coherence and a uniform consumer protection standard.

21. It notes that the distinction provided for in Article 24(5) between fee-based 'non-independent' and 'independent' insurance advice, for which it is prohibited to accept fees, commissions or any monetary benefits paid, can contribute to a considerable improvement in consumer protection. The corresponding obligation on the part of advising insurance intermediaries or an advising insurance undertaking brings any potential conflicts of interest to customers attention at an early stage and enables them to make a conscious decision in favour of or against the type of advice offered.

In view of the actual market situation, the Bundesrat recommends that advice be considered independent also where the insurance intermediary receives payment from the provider but discloses this information in full and passes it on to the customer.

22. It considers the requirements provided for in Article 24(5) for insurance advice to be provided on an independent basis to be inadequate to ensure the provision of advice tailored exclusively to the customer's concerns. The Proposal provides that insurance products provided by entities having close links with the insurance intermediary or insurance undertaking may be categorised as independent advice. However, since conflicts of interest to the detriment of the customer cannot be entirely ruled out in such cases, the Bundesrat recommends qualifying this kind of advice as non-independent.

23. It also points out that the practical benefit of the Proposal's provisions on independent advice will depend largely on how the information on whether advice is to be provided on an independent or non-independent basis is conveyed to the customer. The provisions in this respect should clarify that the customer must be informed in a timely manner prior to receiving the advice whether it is provided on an independent basis. With regard to the possibility stipulated in Article 24 of providing information in a standardised form, it should be ensured that the Proposal's objectives are not undermined by the fact that this reference to the nature of the advice is obscured in extensive contract documents preventing the customer taking note of it in a timely manner. The Bundesrat therefore suggests that it should be expressly stipulated that the information on the nature of the advice should be presented clearly and prominently on a separate document and that customers should be required to confirm that they have taken note of this information.

24. The Bundesrat has concerns about the arrangement in Articles 27 and 28(2)(a) of the Proposal in so far as these provide in most cases for the publication of an administrative pecuniary sanction indicating the natural or legal persons involved. It believes in particular that the publication requirements in Article 27 are too far-reaching. No differentiation is made according to the gravity of the infringement. It is also questionable whether such a provision serves any useful purpose, since anonymous statements are of limited value to consumers. Moreover, where insurance intermediaries commit the offences at issue, their licence can at any rate be revoked on the grounds of unreliability.

Quite apart from the fact that, for very good reasons, no recourse has yet been made under German law to such 'naming and shaming' (in view of the general personality right in conjunction with the principle of proportionality, this is only permissible under constitutional law under very strict conditions), such a provision would be completely at odds with the administrative offences provisions on disclosing information from fines procedures. §§ 49a, 49b of the Administrative Offences Act (*Ordnungswidrigkeitengesetz* - OWiG) refer in this regard to the relevant provisions of the Code of Criminal Procedure (*Strafprozessordnung* - StPO), according to which there is no *ex officio* provision of information to uninvolved private citizens. Under § 49b OWiG in conjunction with § 475(1) and (4) StPO private citizens may obtain information from files on request, provided that they can demonstrate a legitimate interest in doing so. Information must not be provided where the person concerned has a valid interest in the refusal of the request for information. The *ex officio* publication of the result of a fine procedure in such a way as to make it accessible to all and usually indicating the name of the person fined, except where disclosure of the name would 'cause disproportionate damage to the parties involved', would run counter to this balanced and proven system.

25. In the case of legal persons, Article 28(2)(e) of the Proposal provides for a pecuniary sanction based on the turnover of the person concerned. As far as we can ascertain, the only other such arrangement under German law up to now is provided for in the second sentence of § 81(4) of the Act against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB)).

Leaving aside the fact that simply basing fines on turnover without applying a maximum rate determined by the legislator may be incompatible with constitutional law (see Göhler, OWiG, 16. ed. 2012, § 17(48c)), the maximum fine that may be imposed on a legal person should not be set at 10% of the total annual turnover 'in the preceding business year'. This formulation does not make clear whether the business year preceding the offence and the decision by the authorities is meant or the year preceding the (last) judicial instance.

26. The Bundesrat also has concerns about Article 28(2)(f) of the Proposal, which provides that the maximum level of the penalty imposed on a natural person must be 'no lower than twice the amount of the benefit' derived from the infringement. Such a provision would confuse the issues of penalties and the confiscation of proceeds, and would run counter to the tried and tested system under German law which, through § 17(3) and (4) OwiG, makes a distinction between the penalising and confiscating parts of a fine; it should therefore be omitted. Given the maximum fine of EUR 5 million (in accordance with the second sentence of § 17(4) OwiG, plus the basic proceeds derived from the offence, where necessary), there is, moreover, no practical need for such a provision in relation to natural persons.

27. Article 29(2) of the proposal provides that EIOPA must issue guidelines on the types of administrative measures and sanctions and the level of administrative pecuniary sanctions. Article 16(3) of Regulation (EU) No 1094/2010 stipulates that the competent authorities must take all necessary steps to follow these guidelines. Should a competent authority fail to or intend not to comply with the guidelines, it must inform EIOPA stating its reasons within a period of two months. This fact and, under certain circumstances, also the reasons will then be published by EIOPA.

In so far as Article 29(2) of the proposal is also addressed to competent authorities and public prosecution offices involved in fine procedures, the provision should be rejected. There is no identifiable reason why the bodies in Germany responsible for prosecuting administrative offences should be held accountable to EIOPA with regard to penalty-related issues.

Above all, there are fundamental considerations weighing against such accountability: the current delineation of competences between the EU and the Member States as regards the prosecution of administrative (and criminal) offences in individual cases must be maintained. It is not the task of the EU and its authorities to influence by means of guidelines and recommendations the way the enforcement authorities in Germany interpret and apply the law in individual cases.

28. The Bundesrat is forwarding this opinion directly to the Commission.