

BIPAR Update

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INSIDE THIS ISSUE

1. Collective redress - Adoption of the Directive
2. ESMA on supervisory priorities for NCAs and on fund managers having to improve readiness for future adverse shocks
3. EIOPA supervisory statement regarding registering or authorising IORPs
4. EIOPA interviews with Gabriel Bernardino and Fausto Parente
5. EIOPA Cross-Border Cooperation Platform: the Slovakian national supervisory authority has issued an interim measure to NOVIS prohibiting free disposal of its assets
6. ESMA publishes shortlist of candidates for position of Chair

1. Collective redress – Adoption of the Directive

On 24 November 2020, the European Parliament endorsed the new Directive on representative actions for the protection of the collective interests of consumers (the “[Collective Redress Directive](#)”). The Council’s approval of the text had preceded at the beginning of November.

The Collective Redress Directive is now deemed to have been formally adopted. It shall enter into force on the 20th day following that of its publication in the Official Journal of the EU. Member States will have 24 months from the entry into force of the Directive to transpose it into national law, as well as an additional 6 months to start applying these provisions.

The new rules introduce an EU-wide enforcement system of Union law establishing obligations for the protection of consumers. Consumers harmed by a trader (such as insurers or insurance intermediaries) who allegedly infringed specific EU legal acts (such as the IDD) set out in the Directive, can bring actions against the infringing trader collectively, represented by a qualified entity, e.g. consumer association. Such actions will seek to prohibit an illegal practice and/or compensation (injunction order & redress order respectively).

The Directive covers infringements of financial and insurance services legislation, including the IDD (Articles 17-24 and 28-30), MiFID II (Articles 24-29), PRIIPs, Solvency II, and GDPR (listed in Annex I of the proposed Directive).

The Directive distinguishes between qualified entities entitled to bring actions in the Member State where they have been designated (domestic representative actions) and those entitled to bring actions in any other member state (cross-border representative actions). For domestic actions a qualified entity will have to fulfil the criteria set out in the law of its Member State of designation, whereas for cross-border actions it will have to fulfil the harmonised criteria set out in the Directive.

The Directive also includes as safeguard the “loser pays” principle. Furthermore, with a view to avoiding conflicts of interest, it imposes on qualified entities a number of transparency requirements, in particular as regards their funding by third parties.

In its Communication on the New Consumer Agenda published on 13 November 2020, the European Commission states that it will assist Member States in the timely implementation and enforcement of the Collective Redress Directive (see also our mail sent on 17.11.2020). Please find also [attached a BIPAR Memo](#) as a summary of the provisions of the Collective Redress Directive and an overview of the possible consequences of these new rules on insurance and financial intermediaries.



Background

The Collective Redress Directive was presented in April 2018 by the European Commission and was agreed by EP negotiators and EU ministers in June 2020 (see also our mail sent on 10 August 2020). The Directive, which is part of the [New Deal for Consumers](#), comes as a response to a recent series of scandals related to breaches of consumers' rights by multinational companies. In some member states, consumers can already launch collective action in courts, but now this option will be available in all EU countries.



2. ESMA on supervisory priorities for NCAs and on fund managers having to improve readiness for future adverse shocks

On 13 November, the European Securities and Markets Authority (ESMA) issued two interesting press releases.

1. Costs & performance and data quality are new Union strategic supervisory priorities

Making use of its new convergence powers, ESMA has identified costs and performance for retail investment products and market data quality as strategic supervisory priorities for national competent authorities (NCAs), on which NCAs will undertake supervisory action, coordinated by ESMA, in 2021.

Regarding **costs and fees** charged by fund managers, ESMA's believes that the area of costs and performance is a key part of investor protection. ESMA considers that *“problems linked to cost and performance are multifaceted due to the lack of transparency and undue costs or differences observed in the application of certain MiFID requirements across Member States.*

Unfair and disproportionate costs and fees can increase investor detriment and affect investors' trust in financial markets. Investment firms and fund managers should have their clients' best interests at heart and ensure that costs and charges are reasonable and disclosed in a transparent and non-complex manner.”

Regarding **improving the quality of transparency data** reported under MiFIR, ESMA states that data is now a core element of securities markets regulation and a vital component of NCAs' data-driven approaches to supervision. A better understanding of the requirements by market participants could avoid poor and late reporting.



Steven Maijoor, ESMA Chair, said: *“The new powers represent an important part of the new supervisory convergence toolkit to address market risks that require specific attention and concerted supervisory action in the EU.” “The selection of costs and performance and data quality will ensure that risks and problems in these two areas are addressed simultaneously by NCAs across the European Union and thereby ensuring greater protection for investors and the orderly functioning of markets.”*

2. Fund managers to improve readiness for future adverse shocks

ESMA published a report on the preparedness of investment funds that have significant exposures to corporate debt and real estate assets, for potential future adverse liquidity and valuation shocks.

The exposed funds under review overall managed to adequately maintain their activities when facing redemption pressures and/or episodes of valuation uncertainty, and only a limited number suspended temporarily subscriptions and redemptions.

The report identifies 5 priority areas for action which would enhance the preparedness of these fund categories:

- ongoing supervision of the alignment of the funds’ investment strategy, liquidity profile and redemption policy;
- ongoing supervision of liquidity risk assessment;
- fund liquidity profile reporting;
- increase of the availability and use of Liquidity Management Tools;
- supervision of valuation processes in a context of valuation uncertainty.

ESMA will follow-up with NCAs in relation to priority areas 1, 2, and 5, in order to foster supervisory convergence amongst NCAs in the area of liquidity risk management and valuation in stressed market conditions.

Steven Maijoor, ESMA Chair, said: *“In the wake of COVID-19’s initial impact on markets, the EU investment fund industry faced a significant deterioration in liquidity in some segments of the fixed income markets as well as valuation uncertainty in the real estate sector. This coincided with large-scale investment outflows from investors.”*

“ESMA coordinated a supervisory exercise with national securities regulators involving collecting and analysing data on funds exposed to corporate debt and funds exposed to real estate. The exercise showed that the funds in question managed to respond adequately to redemption pressures. However, the work also revealed shortcomings that must be addressed in order to enhance funds’ preparedness to future shocks, and we have identified a number of priority areas that funds and supervisors should focus on to address potential liquidity risks in the fund sector. This will contribute to ensuring investor protection, orderly markets and financial stability.

“We also encourage swift proposals to amend the EU legislative framework to ensure that liquidity management tools are widely available to asset managers across the EU.”

3. EIOPA supervisory statement regarding registering or authorising IORPs

On 12 November 2020, EIOPA (the European Insurance and Occupational Pensions Authority) published a supervisory statement on the **sound supervisory practices for registering or authorising Institutions for Occupational Retirement Provision (IORPs)**, including the assessment of suitability for cross-border activities ([see attached](#)).

The main aim of this supervisory statement is to ensure that IORPs operating cross-border do this under prudent conditions, regardless of the different authorisation or registration regimes. There should be supervisory convergence of the currently divergent practices and the risks of supervisory arbitrage after the implementation of IORP II Directive should be avoided.

To facilitate cross-border activities, the prudential assessment should also be proportionate to the additional risks linked to conducting cross-border operations in relation to the main objective of prudential supervision.

EIOPA states that this will foster a level-playing field across the EU and ensure adequate protection of the members and beneficiaries.

4. EIOPA interviews with Gabriel Bernardino and Fausto Parente

EIOPA published two interesting interviews on its website this month (November 2020), with the EIOPA Chair (Gabriel Bernardino) and Executive Director (Fausto Parente).

The interview with **Gabriel Bernardino** deals with “**the Pan-European Personal Pension Product (PEPP), improved data harvesting and the organisation’s future projects**”. In the interview, Mr Bernardino replies amongst others to the question why the digital distribution of the PEPP could be key to its success. As part of his reply, he states that digital is important for EIOPA because it will help ensure that the PEPP will be cost-effective. *“We know that distribution costs and administrative costs have been one of the important elements in pension products’ poor returns, so we need to bring down these expenses. Digitalisation is a fundamental element of this and so our expectation is that costs can be reduced.”* In the interview, he also discusses EIOPA’s other upcoming (pension-related) projects and goals.

The interview can be found [here](#).

The interview with **Fausto Parente** deals with: “**EIOPA in 2021: more staff, more responsibilities**”. Mr Parente explains that this year and in the coming years attention has to be paid to the **pandemic crisis**, with EIOPA wanting to set up mitigating measures and contribute to the recovery of the European economy. He adds that *“For the time being, we have seen the insurance and pension sectors have been resilient to the crisis. But the longer it lasts, the more concerns may arise, so it’s key for us to monitor the implications and see if there is a need to act “*. Mr Parente also refers to the EIOPA **shared resilience solutions** paper published in July and specifies that EIOPA will contribute to any European Commission initiatives in this area: *“it fits well with the sustainable economic recovery plan of the Commission, and goes hand-in-hand with the green, digital and more resilient society that we consider as our future target.”*

With regard to helping relaunch the European economy, he refers to the launch of the **PEPP** and to **enhanced cooperation platforms**, which will ensure good quality supervision of undertakings with **cross-border** activity. He explains that when cross-border undertakings enter into difficulties there is a need for the home and host supervisors to work together, and this can be done easier under the aegis of EIOPA. *“We can close the gap between the different priorities of the supervisors and take a European perspective over the supervision that needs to be put in place.”*

Mr Parente also refers to the proposed Regulation on **digital operating resilience** for the EU financial services sector, which might bring additional tasks for the three European supervisory authorities.

He mentions EIOPA’s work on **digital ethics** which they plan to finalise early next year and where they want to come up with some principles on how to deal ethically with data, *“because we know that technological development can be beneficial for everybody, but if you have bias in the system, you may end up discriminating instead of being more inclusive”*.

Finally, regarding **Brexit**, Mr Parente says EIOPA is ready, and will continue to cooperate. The supervisory dialogue is set up and there is a quarterly discussion and more granular, technical dialogues as well. *“We need to treat the UK as a third country, but I am sure we will have a continued dialogue and good supervisory cooperation.”*

This interview can be found [here](#).

BIPAR is actively monitoring the issues mentioned above in the two interviews.

5. EIOPA Cross-Border Cooperation Platform: the Slovakian national supervisory authority has issued an interim measure to NOVIS prohibiting free disposal of its assets

The following information was published on the EIOPA website on 15 November. It is of interest to intermediaries distributing products of NOVIS (Slovak Life insurance company) and its policyholders. Besides its home market, NOVIS pursues life insurance activity through freedom of establishment in Austria, the Czech Republic and Germany and through freedom to provide services in Finland, Hungary, Iceland, Italy, Lithuania, Poland and Sweden.

“On 5 November 2020, Národná banka Slovenska (NBS), the Slovakian national supervisory authority, has issued an interim measure to NOVIS Insurance Company, NOVIS Versicherungsgesellschaft, NOVIS Compagnia di Assicurazioni, NOVIS Poist'ovňa a.s. (NOVIS) prohibiting free disposal of its assets.

The information, which might be of interest to NOVIS policyholders, is available on the [NBS website](#).



Background

In September, NBS already issued an [interim measure](#). More information is available [here](#).

NOVIS is a life insurance undertaking established in 2014 in Slovakia and supervised by the NBS. Besides its home market, NOVIS pursues life insurance activity through freedom of establishment in Austria, the Czech Republic and Germany and through freedom to provide services in Finland, Hungary, Iceland, Italy, Lithuania, Poland and Sweden.

In order to ensure the adequate protection of policyholders throughout the European Economic Area, EIOPA has been working closely with NBS and the other national competent authorities through its cooperation platform to address this issue in the operations of NOVIS, from both prudential and conduct of business perspective.”

6. ESMA publishes shortlist of candidates for position of Chair

On 26 November, ESMA published the following (alphabetical) shortlist of qualified candidates for the position of ESMA Chair, which it has sent to the Council of the EU and the European Parliament:

- Maria-Luis Albuquerque, former Minister of Finance, Portugal
- Carmine Di Noia, Commissioner of Commissione Nazionale per le Società e la Borsa (CONSOB), Italy
- Verena Ross, currently Executive Director of ESMA

The Council will appoint the Chair following confirmation by the Parliament.
The envisaged start date of the Incoming Chair is 1 April 2021.

