

FSC Newsletter

Insurance Mediation Directive

The Insurance Mediation Directive (IMD) covers the regulation of insurance and reinsurance intermediaries and brings closer together the various provisions across the EU regarding registration of intermediaries and the professional requirements for these. In addition, under the Directive intermediaries will be able to 'passport' into other EU member states under the freedom of establishment and the freedom to provide services. The IMD has been implemented in Gibraltar via The Financial Services (Insurance Mediation) (Amendment) Ordinance 2004 which was passed in the House of Assembly on 22 December 2004 and becomes effective on 15 January 2005. This Ordinance implements the requirements of the IMD in full and essentially amends the Financial Services Ordinance 1989 (FSO89) with the inclusion of a new Part V(A) as well as defining what constitutes mediation.

Definition of mediation

'Insurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.

The effect of one of the changes to the FSO89 is to replace the definition of 'insurance broking' in Section 3 of Schedule 3 with the following definition for 'insurance and reinsurance mediation':

"3(1) Carrying out, for remuneration, any one or more of the following activities—

- (a) introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance or reinsurance;*
- (b) concluding contracts of insurance or reinsurance;*
- (c) assisting in the administration and performance of contracts of insurance or reinsurance, in particular in the event of a claim.*

(2) However, the following activities shall not be considered as insurance or reinsurance mediation—

- (a) the activities detailed in subparagraphs 3(1)(a) to (c) when undertaken by an insurance or reinsurance undertaking or an employee of an insurance or reinsurance undertaking who is acting under the responsibility of the insurance or reinsurance undertaking;*
 - (b) the provision of information on an incidental basis in the context of another professional activity provided that the purpose of the activity is not to assist the customer in concluding or performing an insurance or reinsurance contract;*
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- (c) *claims management, expert appraisal of claims or loss adjusting on behalf of an insurance or reinsurance undertaking.*

(3) *Paragraph 3(1) does not apply to—*

- (a) *persons providing mediation services for insurance contracts where the mediation concerned meets all of the conditions of subparagraphs (i) to (vi)—*
- (i) *the insurance contract only requires knowledge of the insurance cover that is provided;*
 - (ii) *the insurance contract is not a life assurance contract;*
 - (iii) *the insurance contract does not cover any liability risks;*
 - (iv) *the principal professional activity of the person is other than insurance mediation;*
 - (v) *the insurance is complementary to the product or service supplied by any provider, where such insurance covers—*
 - (aa) *the risk of breakdown, loss of or damage to goods supplied by that provider, or*
 - (bb) *damage to or loss of baggage and other risks linked to the travel booked with that provider, even if the insurance covers life assurance or liability risks, provided that the cover is ancillary to the main cover for the risks linked to that travel; and*
 - (vi) *the amount of the annual premium does not exceed EUR 500 (or sterling equivalent) and the total duration of the insurance contract, including any renewals, does not exceed five years; and*
- (b) *insurance and reinsurance mediation services provided in relation to risks and commitments located outside the EEA”*

These changes will be of relevance, inter alia, to:

- (1) insurance brokers/agents;
- (2) insurance intermediaries;
- (3) financial advisers; and
- (4) other persons involved in the sale and administration of contracts of insurance, even where these activities may be secondary to their main business.

What constitutes “carrying out, for remuneration”?

Carrying out insurance or reinsurance mediation activities for remuneration covers a spectrum of activities where some form of pecuniary or economic advantage is received as a result. It is also recognised that a person is carrying on a licensable activity if he is doing so by way of business. Therefore where a person is carrying out mediation activities by way of business i.e. broking, providing financial advice about insurance-related products, acting as agent for an insurer etc, clearly that person would also be considered to be carrying out licensable activities.

The table below describes various factors and provides guidance on whether person “A” is carrying on mediation activities ‘for remuneration’ or by ‘way of business’.

‘For Remuneration’

Factor	Indicators that “A” does <u>not</u> carry on activities “for remuneration”	Indicators that “A” does carry on activities “for remuneration”
<p>Direct remuneration, whether received from the customer or the insurer/ broker (cash or benefits in kind such as tickets for concerts, a reduction in other insurance premiums, a remission of a debt or any other benefit capable of being measured in money’s worth)</p>	<p>“A” does not receive any direct remuneration specifically identified as a reward for his carrying on insurance mediation activities.</p>	<p>“A” receives direct remuneration specifically identified as being a reward for providing insurance mediation services.</p>
<p>Indirect remuneration (such as any form of economic benefit as may be explicitly or implicitly agreed between “A” and the insurer/broker or “A”’s customer – including, for example, through the acceptance of “A”’s terms and conditions or mutual recognition of the economic benefit that is likely to accrue to “A”). An indirect economic benefit can include expectation of making a profit of some kind as a result of carrying on insurance mediation activities as part of other services.</p>	<p>“A” does not obtain any form of indirect remuneration through an economic benefit other than one which is not likely to have a material effect on “A”’s ability to make a profit from his other activities.</p>	<p>“A” obtains an economic benefit that: (a) is explicitly or implicitly agreed between “A” and the insurer/ broker or “A”’s customer; and (b) has the potential to go beyond mere cost recovery through fees or other benefits received for providing a package of services that includes insurance mediation activities but where no particular part of the fees is attributable to insurance mediation activities. This could include where insurance mediation activities are likely to:</p> <ul style="list-style-type: none"> • play a material part in the success of “A”’s other business activities or in “A”’s ability to make a profit from them; or • provide “A” with a materially increased opportunity to provide other goods or services; or • be a major selling point for “A”’s other business activities; or • be essential for “A” to provide other goods or services. <p>“A” charges his customers a greater amount for other goods or services than would be the case if “A” were not also carrying on insurance mediation activities for those customers and this:</p> <ul style="list-style-type: none"> • is explicitly or implicitly agreed between “A” and the insurer/ broker or

- “A”’s customer; and
- has the potential to go beyond mere cost recovery.

Recovery of costs

“A” receives no benefits of any kind (direct or indirect) in respect of his insurance mediation activities beyond the reimbursement of his actual costs incurred in carrying on the activity (including receipt by “A” of a sum equal to the insurance premium that “A” is to pass on to the insurer or broker)

“A” receives benefits of any kind (direct or indirect) in respect of his insurance mediation activities which go beyond the reimbursement of his actual costs incurred in carrying on the activity.

‘By way of business’

Factor

Indicators that “A” does not carry on activities “by way of business”

Indicators that “A” does carry on activities “by way of business”

Regularity/ frequency

Involvement is one-off or infrequent (for instance, once or twice a year) provided that the transaction(s) is not of such size and importance that it is essential to the success of “A”’s other business activities. Transactions do not result from formal arrangements (for instance, occasional involvement purely as a result of an unsolicited approach).

Involvement is frequent (for instance, once a week). Involvement is infrequent but the transactions are of such size or importance that they are essential to the success of “A”’s other business activities. “A” has formal arrangements which envisage transactions taking place on a regular basis over time (whether or not such transactions turn out in practice to be regular).

Holding out

“A” does not hold himself out as providing a professional service that includes insurance mediation activities (by professional is meant not the services of a layman).

“A” holds himself out as providing a professional service that includes insurance mediation activities.

Relevance to other activities/ business

Insurance mediation activities:

- have no relevance to “A”’s other activities; or
- have some relevance but could easily be ceased without causing “A” any difficulty in carrying on his main activities; or
- would be unlikely to result in a material reduction in income from “A”’s main

Insurance mediation activities:

- are essential to “A” in carrying on his main activities; or
- would cause a material disruption to “A” carrying on his main activities if ceased; or
- would be likely to reduce “A”’s income by a material amount.

activities if ceased

Commercial benefit	<p>“A” receives no direct or indirect pecuniary or economic benefit. “A” is a layman and acting in that capacity. “A” would not obtain materially less income from his main activities if they did not include insurance mediation activities.</p>	<p>“A” receives a direct or indirect pecuniary or economic benefit from carrying on insurance mediation activities – such as a fee, a benefit in kind or the likelihood of materially enhanced sales of other goods or services that “A” provides. “A” would obtain materially less income from his main activities if they did not include insurance mediation activities.</p>
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What is ‘introducing’ and when does it constitute a licensable activity?

	Type of introduction	Licence required
1	Introductions are purely for the purpose of the provision of independent advice – Introducer is completely indifferent to whether or not transactions take place after advice has been given.	No
2	Introduction is one-off or otherwise not part of pre-existing ongoing arrangements that envisage such introduction being made.	No
3	Introducer is not indifferent to whether or not transactions take place after advice has been given (for example, because he expects to receive a percentage of the commission), and introductions specifically relate to contracts of insurance.	Yes

When is a recommendation a licensable activity?

Recommendation	Licensable activity?
I recommend you take the A Insurance Company Ltd’s motor insurance policy	Yes
I recommend that you take out the C Insurance Company Ltd’s life insurance policy	Yes
I recommend that you do not take out the A Insurance Company Ltd’s motor insurance policy	Yes

Recommendation	Licensable activity?
I recommend that you do not take out the C Insurance Company Ltd's life insurance policy	Yes
I recommend that you take out either the A Insurance Company Ltd's motor insurance policy or the B Insurance Company Ltd's motor insurance policy	Yes
I recommend that you take out either the C Insurance Company Ltd's life insurance policy or the D Insurance Company Ltd's life insurance policy	Yes
I recommend that you take out (or do not take out) insurance with A Insurance Company Ltd's	Possibly (depending on whether or not the circumstances relating to the recommendation, including the range of possible products, is such that this amounts to an implied recommendation of a particular policy)
I recommend that you take out (or do not take out) contents insurance	No, unless a specific insurance policy is implied by the context or where the recommendation is being made as part of a fuller assessment of the requirements of the client
I recommend that you take out (or do not take out) life insurance	No, unless a specific insurance policy is implied by the context or where the recommendation is being made as part of a fuller assessment of the requirements of the client

What type of activities are regulated?

Type of activity	Is it a regulated activity?
MARKETING AND EFFECTING INTRODUCTIONS	
Passive display of information – for example, medical insurance brochures in doctor's surgery (whether or not remuneration is received for display)	No – if merely displaying the information.
Recommending a broker/insurance undertaking and providing customer with contact details (whether by phone, fax, e-mail, face-to-face or any other means of communication)	No – if all the intermediary does is supply information to the customer. Yes – if there is an implied recommendation to a particular policy.

Type of activity	Is it a regulated activity?
Providing an insurance undertaking/ broker with contact details of customer	Yes – when undertaken in the context of regular or ongoing arrangements for introducing customers.
Marketing on behalf of insurance undertaking to intermediaries only (for example, broker consultants)	Yes – this amounts to work preparatory to the conclusion of contracts of insurance.
Telemarketing services (that is, companies specialising in marketing an insurance undertaking's products/services to prospective customers)	Yes – this amounts to introducing and/or other work preparatory to the conclusion of contracts of insurance.

PRE-PURCHASE DISCUSSIONS WITH CUSTOMERS AND ADVICE

Discussion with client about need for insurance generally/ need to take out a particular type of insurance	Yes – if forms part of wider activities e.g. assessing requirements of a client and providing advice accordingly.
Advising on the level of cover needed	Yes – if forms part of wider activities e.g. assessing requirements of a client and providing advice accordingly.
Pre-purchase questioning in the context of filtered sales (intermediary asks a series of questions and then suggests several policies which suit the answers given)	Yes.
Explanation of the terms of a particular policy or comparison of the terms of different policies	Possibly. In certain circumstances this could involve an element of investment advice. Where the information is provided by a professional (e.g. lawyer, accountant) in the course of a profession this would not be considered a regulated activity.
Advising that a customer take out a particular policy	Yes – This amounts to advice on the merits of a particular policy.
Advising that a customer does not take out a particular policy.	Yes – This amounts to advice on the merits of a particular policy.
Advice by journalists in newspapers, broadcasts etc.	Generally, no.
Giving advice to a customer in relation to his buying a consumer product, where insurance is a compulsory secondary purchase and/or a benefit that comes with buying the product	Not necessarily but depends on the circumstances – Where the advice relates specifically to the merits of the consumer product, it is possible that references to the accompanying insurance may be

Type of activity**Is it a regulated activity?**

seen to be information and not advice. If however, the advice relates, in part, to the merits of the insurance element then it may be a regulated activity.

ASSISTING CUSTOMERS WITH COMPLETING/SENDING APPLICATION FORMS

Providing information to customer who fills in application form

Possibly – This could amount to carrying out work preparatory to the conclusion of a contract of insurance.

Helping a potential policyholder fill in an application form

Yes - This amounts to carrying out work preparatory to the conclusion of a contract of insurance.

Receiving completed proposal forms for checking and forwarding to an insurance undertaking (for example, an administration outsourcing service provider that receives and processes proposal forms)

Yes - This amounts to carrying out work preparatory to the conclusion of a contract of insurance.

Assisting in completion of proposal form and sending to insurance undertaking

Yes - This amounts to carrying out work preparatory to the conclusion of a contract of insurance.

NEGOTIATING AND CONCLUDING CONTRACTS OF INSURANCE

Negotiating terms of policy on behalf of customer with the insurance undertaking

Yes.

Negotiating terms of policy on behalf of insurance undertaking with the customer and signing proposal form on his behalf

Yes.

Agreeing, on behalf of a prospective policyholder, to buy a policy

Yes.

Providing compulsory insurance as a secondary purchase

Yes.

COLLECTION OF PREMIUMS

Collection of cheque for premium from the

Yes - if forms part of wider activity. The mere

Type of activity	Is it a regulated activity?
customer at the pre–contract stage	collection/receipt of premiums from the customer is unlikely to require regulation.
Collection of premiums at post–contract stage	No - The mere collection/receipt of premiums from policyholders, is unlikely to require regulation, without more, to amount to assisting in the administration and performance of a contract of insurance.

ASSISTING POLICYHOLDER WITH MAKING A CLAIM

Merely providing information to the insured to help him complete a claim form.	No – of itself, this is unlikely to amount to assisting in the administration but not to the performance of a contract of insurance.
Completion of claim form on behalf of insured	Potentially – this activity could amount to assisting in the administration and performance of a contract of insurance if the assistance provided in filling in a claims form is material to whether the performance of the contractual obligation to notify a claim takes place.
Notification of claim to insurance undertaking and helping negotiate its settlement on the policyholder’s behalf	Yes. – this activity amounts to assisting in the administration and performance of a contract of insurance.

ASSISTING INSURANCE UNDERTAKING WITH CLAIMS BY POLICYHOLDERS

Negotiation of settlement of claims on behalf of an insurance undertaking	No – claims management on behalf of an insurance undertaking does not amount to assisting in the administration of a contract of insurance (see section 3(2)(c) of Schedule 3 of the FSO89).
Providing information to an insurance undertaking in connection with its investigation or assessment of a claim	No – this activity does not amount to assisting in the administration and performance of a contract of insurance.
Loss adjusters and claims management services (for example, by administration outsourcing providers)	No – claims management and loss adjusting on behalf of an insurance undertaking does not amount to assisting in the administration of a contract of insurance (see section 3(2)(c) of Schedule 3 of the FSO89).
Providing an expert appraisal of a claim	No – expert appraisal of claims on behalf of an insurance undertaking does not amount to assisting in the administration of a contract of insurance (see section 3(2)(c) of Schedule 3 of the FSO89).

Type of activity

Jeweller repairs customer's jewellery pursuant to a policy which permits the jeweller to carry out repairs

Is it a regulated activity?

No. – this activity amount to managing claims on behalf of an insurance undertaking and is excluded (see section 3(2)(c) of Schedule 3 of the FSO89).

Requirements

The IMD sets a number of professional requirements, which include defined levels of professional indemnity cover and capital, as well as setting out the type of information which an intermediary must provide to a customer. These are set out below:

PII

An insurance or reinsurance intermediary shall be required to hold professional indemnity insurance covering the whole territory of the EEA, or some other comparable guarantee against liability arising from professional negligence, for at least €1,000,000 (or sterling equivalent) applying to each claim and in aggregate €1,500,000 (or sterling equivalent) per year for all claims. The exception to this where this is already provided to the intermediary by an insurance provider, reinsurance provider or other provider because (a) the insurance or reinsurance intermediary is acting for, or empowered to act for, the provider, or (b) the provider has taken on full responsibility for the intermediary's actions.

This means that each intermediary must have in place protection which, as a minimum, includes the above levels of cover.

Financial Resources

An insurance or reinsurance intermediary shall be required to have financial capacity amounting to 4% of the sum of annual premiums (i.e. annual income in the form of net commission and fee income) received, subject to a minimum of €15,000 (or sterling equivalent).

This means that each intermediary must have, as a minimum, financial resources of €15,000. The measure of these financial resources shall be the Net Asset figure in the intermediary's balance sheet.

Net Assets means total assets of any type less total liabilities of any type except for:

- (1) intangible fixed assets
- (2) related party balances (e.g. shareholders and/or directors and/or associated companies) unless in the ordinary course of business, with outstanding balances being settled under normal commercial terms.

Customer Monies

An insurance or reinsurance intermediary must ensure that customers' money is only transferred via strictly segregated client accounts and that these accounts shall not be used to reimburse other creditors in the event of bankruptcy. It must also ensure that money paid by the customer is treated as having been paid to the insurance provider, whereas money paid by the insurance provider to the intermediary is not treated as having been paid to the customer until the customer actually receives it.

Part 5 of The Financial Services (Accounting & Financial) Regulations already requires that customer money is properly segregated and maintained in 'customer money' accounts which have been properly designated as such.

Information for customers

Prior to the conclusion of any initial insurance contract, and, if necessary, upon amendment or renewal of the same contract, an insurance intermediary shall provide each customer with at least the following information:

- (a) the name of the intermediary and its address;
- (b) details of its licence from the Financial Services Commission and how customers can verify this;

- (c) whether the intermediary has a holding, direct or indirect, representing more than 10% of the voting rights or of the capital in a particular insurance company;
- (d) whether a given insurance company or parent of a given insurance company has a holding, direct or indirect, representing more than 10% of the voting rights or of the capital in the insurance intermediary; and
- (e) how and where customers and other interested parties may make complaints i.e. at the Consumer Protection Office of the Government, or such other person or entity as the Minister responsible for Financial Service designates.

In addition, an insurance intermediary shall also inform each customer, whether –

- (i) the advice provided is based on a fair analysis; or
- (ii) whether the intermediary is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance companies, and in that case, shall provide, at the customer's request, the names of those insurance companies; or
- (iii) whether the intermediary is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance companies but is not able to provide advice based on a fair analysis, and in that case, shall provide, at the customer's request, the names of the insurance companies with which the intermediary may and does conduct business.

In the cases of (ii) and (iii) above, the intermediary shall also inform the customer that he has the right to request the names of the insurance companies concerned.

Where the insurance intermediary informs customers that the advice provided is based on a fair analysis, the intermediary is obliged to give that advice on the basis of an analysis of a sufficiently large number of insurance contracts available on the market, to enable the intermediary to make a recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer's needs.

Prior to the conclusion of any specific contract, the insurance intermediary shall at least specify, in particular on the basis of information provided by customers, the demands and the needs of each customer as well as the underlying reasons for any advice given to each customer on a given insurance product, according to the complexity of the insurance contract being proposed.

This means that the intermediary must provide each customer with a 'reason why' letter or suitability report as set out in Newsletter 2 of 2004 "Dealing with Advising Clients – Best Market Practice". This must be issued on paper or on any other durable medium available and accessible to the customer; in a clear and accurate manner, comprehensible to the customer; and in English or any other language agreed by the parties and before the customer actually enters into the contract. The sole exception to this is where information is provided orally to the customer because the customer has specifically requested this or where immediate cover is necessary. In these cases, the intermediary shall provide the customer with a 'reason why' letter or suitability report immediately after the conclusion of the insurance contract.

Providing insurance mediation in other EEA states – "passporting"

Intermediaries who wishes to provide services or open an establishment in another EEA state must notify the Financial Services Commission of this using the prescribed notification forms. Upon receipt of this, together with confirmation that the intermediary meets the requirements of the IMD, the Financial Services Commission shall, within one month, pass on the notification to the competent authority in the host state.

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