

KATARZYNA MALINOWSKA

## Insurance transparency and protection regime under the Insurance Distribution Directive

*“In short, we hope that this Directive will help intermediaries to compete in a fair market, to sell services more easily across borders and build relationships with their clients on the basis of transparency and trust.”*

Lord Hill, Commissioner for the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, at BIPAR mid-term meetings, January 2015<sup>1</sup>

*On 20 January 2016, after a long, four-year legislation process, the Council of the European Union and the European Parliament officially adopted the Insurance Distribution Directive No EU 2016/97. The aims of the IDD were to improve regulation in the insurance market, create more opportunities for cross-border activity, establish the conditions necessary for fair competition between distributors of insurance products, and above all, to strengthen consumer protection. The whole philosophy of the regulation has been significantly changed, by encompassing not only the insurance intermediation, but all the forms of insurance distribution, including the direct sale carried out by the insurers. The protective goals of the IDD are now to be performed mainly by tightening the rules on the information and advice provided by insurance distributors. The author's goal is to present the transparency regime, which has been raised up in the IDD to the role of one of the main principles governing insurance distribution. The analysis carried out in the article presents the IDD provisions in the perspective of its transparency aspect in order to show that the key aspects of the new protection regime can all be understood as an advanced transparency principle not limited to informational duties, but extending also to such issues as product governance, conflict of interests and remuneration rules. The article mentions also the efforts of the Polish national legislator with respect to the implementation of the IDD as well as the outcome of the current legislation status.*

**Keywords:** transparency, insurance distribution, insurance intermediation, directive, IDD.

---

1. See BIPAR website: <http://www.bipar.eu/en/page/idd>.

## Outline

On 20 January 2016, after a long, four-year legislative process, the Council of the European Union and the European Parliament officially adopted Directive EU 2016/97 on Insurance Distribution, known as the “Insurance Distribution Directive” (IDD). As announced at the time, the purposes of the IDD were to improve regulation in the insurance market, create more opportunities for cross-border activity, establish the conditions necessary for fair competition between distributors of insurance products, and above all, to **strengthen consumer protection**.<sup>2</sup> As regards the latter aspect, a particular focus was placed on the distribution of insurance-based investment products. First and foremost, however, the Directive indicates a change in the philosophy of regulatory approach, as it applies not only to insurance intermediation services but also covers all forms of insurance distribution, including **direct sales carried out by insurers**. The IDD’s preamble explicitly mentions that “consumers should benefit from the same level of protection despite the differences between distribution channels”. It was therefore concluded that “in order to guarantee that the same level of protection applies, and that the consumer can benefit from comparable standards, in particular in the area of the disclosure of information, a level playing field between distributors is essential” (Recital 6 of the preamble). Those goals were said to be unachievable under the existing regime of the Insurance Mediation Directive due to the fact that the European insurance market remained very fragmented, despite the formally existing harmonisation and the existing single passport systems for insurers and intermediaries. The hope for a new beginning appeared when a consensus was reached on the measures of a new directive.

These protective goals of the IDD, proclaimed by its creators from the outset of the legislative process and discussed throughout that process, are now to be performed mainly **by tightening the rules on the information and advice provided by insurance distributors**, even though it is rather obvious that the meaning of transparency cannot be reduced to informational duties but also concerns a plethora of other factors. Transparency has assumed the role of one of key principles governing insurance distribution and is to be ensured on many various levels regulated by the IDD.<sup>3</sup> This general statement certainly needs an in-depth analysis. The purpose of this article is to present provisions of the Insurance Distribution Directive from the transparency perspective, and to demonstrate that the key aspects of the new protection regime proposed under the IDD can all be understood as implementing the concept of elevated transparency, which is not limited to informational duties but encompasses rules applying to product governance, conflicts of interest and

2. Though it applies to all types of policyholders, in large risks insurance, some of the obligations may be not implemented by the member states, in particular the information duties may be limited.

3. See more in K. Malinowska, *Transparentność w umowie ubezpieczenia – przemiana zasady najwyższego zaufania w prawo do informacji*, in: *Informacja w prawie ubezpieczeń gospodarczych*, eds. B. Gnela, M. Szaraniec, Lex a Wolters Kluwer business, Warszawa 2015, pp. 34 and M. Wandt, *Transparency as a general principle of insurance law*, presented at World Congress of AIDA, Rome 2014; Wang, Hsin-Chun, *E-commerce and Distribution of Insurance Products: A Few Suggestions for an Appropriate Regulatory Infrastructure*, [in:] *The “Dematerialized” Insurance: Distance Selling and Cyber Risks from an International Perspective*, eds. P. Marano, I. Rokas, P. Kochenburger, Springer 2016; Such a conclusion can be drawn also from other pieces of European legislation, such as Directive 2013/11/EU on alternative dispute resolution for consumer disputes OJ L165/63 [hereinafter the CADR Directive] and Regulation 524/2013 on online dispute resolution for consumer disputes OJ L165/1 [hereinafter the ODR Regulation] P. Cortés, *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford 2016.

remuneration. The article also intends to show the Polish legislator's efforts to implement the IDD as well as current **outcomes** of domestic legislative works.

## 1. The facts about the IDD

The IDD entered into force on 22 February 2016, with all EU Member States being required to transpose the directive into their national laws by 23 February 2018. An additional transitional provision for intermediaries registered under the previous regulation included in the Insurance Mediation Directive (Directive 2002/92/EC, "IMD") provides that IMD-registered intermediaries must comply with the relevant national provisions implementing the IDD by 23 February 2019. A review of the IDD is expected to be carried out five years after the Directive's effective date, i.e. by 23 February 2021.

The IDD does not just merely update the IMD, but also significantly changes the scope and applicability of the IMD.<sup>4</sup> A key point of the IDD, having a major influence on the directive's significance for the whole insurance market, is an extension of its scope of application. After IDD's implementation, the intermediation regime will transform into the distribution regime. **While the IMD applies only to intermediaries**, the new distribution regime will include not only all the **sellers of insurance products, including insurers that offer their products directly to customers, but also the ancillary intermediaries<sup>5</sup>** (for whom, if a Member State so decides, insurers may be required to assume greater responsibility) and such distribution channels that were not included at all in the previous regulatory regime. Such channels are, for instance, **comparison websites, which are now included in the definition of "distribution" and defined in Article 2 para. 1 [1] IDD** as the providers of "information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media, and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract when the customer is able to directly or indirectly conclude an insurance contract using a website or other media". Such an extension of the scope is clearly an attempt to level the playing field between direct and indirect distribution of insurance<sup>6</sup> and to ensure the transparency of rules of distribution and, in particular, those applying to remuneration earned by particular distributors.

**The IDD establishes very narrow exclusions from the scope of its application.** They are either direct exclusions of the IDD's application (extending to certain activities of ancillary intermediaries)

---

4. It also repeals the IMD 1.5 (IMD as amended by MiFID II) by releasing the Member States from the obligation to implement the IMD 1.5.

5. Ancillary intermediaries must meet three conditions to avoid full regulation, including that the insurance products concerned must not cover life assurance or liability risks, unless that cover complements a product or service that the intermediary provides as the principal professional activity. Ancillary providers will be excluded from the regulation entirely where the insurance is complementary to the goods or services supplied by any provider, as long as that insurance covers the risk of breakdown, loss of or damage to the goods, or non-use of the service, or damage to or loss of baggage and other risks linked to travel booked with that provider; and where the amount of the premium for the insurance product does not exceed €600. In circumstances where the insurance is complementary to the good or service and the duration of that service is equal to or less than three months, the amount of the premium paid per person should not exceed €200.

6. As reported by experts in the field, the implementation of the IDD will result in covering about 98% of the market, compared to about 48% of the market covered by the IMD.

or a consequence of the directive's narrower definition of insurance distribution, which includes only: (1) the provision of information on an incidental basis to a customer in the context of another professional activity, if the provider does not take any additional steps to assist the customer in concluding or performing an insurance contract; (2) the management of claims of an insurer on a professional basis, loss adjusting and the expert appraisal of claims; or (3) the mere provision of data and information on potential policyholders to insurance intermediaries or insurers, or of information about insurance products or an insurance intermediary or insurer to potential policyholders, if the provider does not take any additional steps to assist the customer in concluding an insurance contract [Article 2.2].<sup>7</sup>

In addition to the above-described extension of the scope of the directive's application, the other key changes to the IMD regime include conduct of business and registration requirements,<sup>8</sup> a new conflict of interest regulation including the disclosure of remuneration, an adequacy analysis of the insurance product, a minimum standard of professional knowledge and continuous professional development, product governance, etc. The entire regulatory framework is based on extensive information requirements established to ensure cross-sectoral consistency (also with the MiFID II regime).

Just as the IMD, the IDD is only a "minimum harmonisation" directive, which means that Member States, when transposing the directive into national law, are entitled to maintain or introduce more stringent provisions in order to protect customers, provided that such provisions are consistent with EU law, including the IDD (known as "gold plating") (recital No (3)). This rule also poses a danger that a certain form of fragmentation, despite being a *persona non grata* under the IMD, may remain in place. Even the substantial number of new requirements of the IDD (that have been worked out as a difficult compromise) might discourage Member States from tightening the conditions of pursuing distribution of insurance products. Given the above, the new regulatory regime cannot guarantee the uniformization of the European insurance distribution system, especially with respect to remuneration.<sup>9</sup> On the other hand, the principle of proportionality and subsidiarity should mitigate the above risk, at least to some extent. The principle of proportionality while being a general implementation principle has been directly expressed in several provisions of the IDD (e.g. recital No (17), with respect to the establishment of "appropriate and proportionate conditions applicable to the different types of distribution").

Another important difference between the IDD and the IMD is that the IDD grants the European Commission delegated powers to specify various regulatory requirements of the IDD. The delegated powers include measures of product oversight and governance arrangements, management of conflicts of interest, inducements, as well as assessments of suitability, appropriateness and reporting. The Commission is thereby entitled to supplement or amend the non-essential elements of the IDD by issuing Delegated Acts. The Delegated Acts are expected to be adopted in 2017, several months before the expiry of the deadline for the national implementation of the new directive, which is currently underway in Member States, which is expected to cause problems for Member

7. B. Mrozowska-Bartkiewicz, *Jakie zmiany dla polskiego rynku ubezpieczeń przyniesie Dyrektywa w sprawie dystrybucji ubezpieczeń*, „Wiadomości Ubezpieczeniowe” 2/2016, p. 114–115.

8. In this respect, the simplified procedure for cross-border entry by intermediaries into EU insurance markets and single electronic public register containing records of all intermediaries that have notified the intent to carry out cross-border business should be taken into account.

9. In the latter case, there are some examples, such as Finland, Denmark, Slovakia, that introduced restrictive remuneration regime, even before the IDD was enacted.

States. EIOPA has also started working on technical standards (e.g. a format of the Product Information Document) and on other Level 3 measures.

## 2. Transparency as the primary tool of consumer protection under the IDD

As mentioned at the outset of this article, transparency in insurance distribution cannot be reduced to the traditional concept of insurance terms being clear, legible and doubtless. A much broader perspective, covering different aspects of the distribution process and not only the wording of the insurance terms, must be taken. The starting point of this new approach to transparency should be the scope of IDD's application (direct and indirect distribution), where policyholders are provided with a service of the same quality and on comparable financial terms regardless of the distribution channel they choose. Therefore, the broad scope of IDD's application, as presented in section 2 above, should be acknowledged as a fundamental reflection of the transparency principle. Consequently, transparency is also visible in other, more specific, provisions of the IDD. The most important issues related to transparency will be looked at in more detail below. These are information duties, conflicts of interest, the regulation of remuneration systems adopted by insurers, cross-selling and level of professional competencies of insurance distributors.

### 2.1. Information duties

Information duties are the most obvious area of insurance distribution where transparency should be ensured. A proper discharge of information duties contributes to the better transparency of insurance terms, i.e. the content of an insurance product (although insurance is legally classified as a service rather than strictly a "product")<sup>10</sup>. The IDD very precisely defines the scope of information duties, entities obliged to perform these duties as well as the manner in which information duties must be performed.<sup>11</sup>

Firstly, the IDD introduces general rules in this respect, obliging insurance distributors to "always act honestly, fairly and professionally in accordance with the best interests of customers". It has also been expressly provided that all information must be "fair, clear and not misleading". Although such rules are usually already present in the most of national legislation, quite often they only govern the way insurance terms are presented and the content of such terms, while the approach under the IDD is to apply these rules to the entire distribution process.<sup>12</sup>

---

10. See more in: M. Dreher, *Die Versicherung Als Rechtsprodukt, Die Privatversicherung Und Ihre Rechtliche Gestaltung*, J.C.B. Mohr (Paul Siebeck), Tübingen 1991, where the insurance product has been defined as the terms and conditions of the insurance contract.

11. Extensively on this subject M. Szaraniec, *Działalność gospodarcza pośredników Ubezpieczeniowych*, Difin 2017, p. 181 et subsq.

12. The provisions of the IDD visibly go beyond the scope of some national legislations concerning the loyalty requirements in agency relations, such as in the Polish Civil Code, obliging the parties to the agency agreement to act honestly and in a loyal manner to the other party of the agreement. The IDD extends this duty in front of the customers. This needs a general change in approach to the loyalty obligation, as the interests of the customer and not the contracting party principal are to prevail (see article 760, according to which, 'either of the parties shall be obliged to remain loyal to the other party').

Secondly, the IDD attempts to unify the requirements for the pre-contractual disclosure of information by insurance distributors such as, including, but not limited to, name and legal form, address and registration information. Notwithstanding obvious differences between different types of distributors (insurers, intermediaries or ancillary insurance intermediaries), all insurance distributors should provide the required information about themselves in good time before the conclusion of an insurance contract. Such information includes information about the firm, the basis of its operations, and complaints procedures.

**Another aspect of information duties are the rules on advice.** It must be transparent to a customer whether or not a distributor provides advice and what type of advice is provided (see Article 20 of the IDD). Advice should be provided on the basis of a fair and personalised analysis. If advice is provided, a customer must be provided with a personalised recommendation. It must be mentioned that the rules on advice are not specific to any particular type of intermediary and that under Article 20 IDD the relevant provisions of the IDD may also apply to insurers (“Where advice is provided prior to the conclusion of any specific contract, the insurance distributor shall provide the customer with a personalised recommendation explaining why a particular product would best meet the customer’s demands and needs”). Although personal recommendation advice may arguably be given only by an intermediary, it may also be provided by a tied intermediary.

While the latter type of advice is not obligatory, the former must be provided by all distributors for all types of insurance. This rule is expressly established in Article 20 IDD, which provides that “prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision”. In addition, it must be stressed that “any contract proposed shall be consistent with the customer’s insurance demands and needs”. The above type of advice is also called “the assessment of suitability” and is a key consumer protection obligation. It ensures the complete transparency of an insurance product in the context of the product’s suitability for a given policyholder’s situation. In addition, distributors providing advice in the form of “suitable personal recommendations” regarding insurance-based investment products and their suitability, should assess the customer’s knowledge and experience, financial situation and investment objectives.

The IDD laid down the obligation to prepare a *product information document* for all types of insurance. The scope of this obligation is not limited only to PRIIPs, which had already been covered by Regulation No 1286/2014. The requirement established in the IDD is of a general nature as regards its scope of application and recipients although it contains very specific rules concerning the content and form of the product information document (e.g. it should be delivered to a customer before the conclusion of an insurance contract, on paper or another durable medium [Article 23 IDD]). Templates of such documents will be provided by EIOPA.

The above comments show that even most basic information duties have become very complex and multileveled, all these measures being implemented in an attempt to maintain the transparency of the insurance distribution process and insurance products.

## 2.2. Conflicts of interest

Without a doubt, the framework for the management of conflicts of interest in insurance distribution gained a new face in the IDD. A conflict of interest is typically described as a situation where an insurer's or intermediary's own interest prevails over that of a customer. Since such conflicts most often relate to remuneration or another type of financial gain, they need to be separately tackled by the European legislator. The IDD introduced new rules to enforce the transparency of remuneration in response to the risk of a less-than-favourable treatment of customers' interests in this area. The new rules are claimed to offer sufficient protection to the interests of customers but Member States are free to gold plate their own transparency provisions or even introduce a prohibition on the receipt of fees, commissions or non-monetary benefits received by distributors from third parties (see Article 19 IDD). The concept introduced by the IDD embeds the requirement for insurance distributors to take appropriate steps to identify any conflicts of interest between themselves and customers, to maintain and/or operate administrative arrangements meant to prevent conflicts of interest, and to disclose the nature or source of any such conflicts before the conclusion of an insurance contract.

As mentioned above, remuneration obtained by insurance distributors is an important aspect of the management of conflicts of interest. A payment of such remuneration is deemed to pose a risk of creating a conflict of interest, and as such has been made subject to extensive information duties. **Distributors are required to identify other sources of potential conflicts of interest by their own means. The legislator identified remuneration as one of such sources.** Consequently, insurance intermediaries must establish fully transparent rules governing remuneration and inform customers what type of remuneration is received in relation to an insurance contract, namely whether, in relation to the insurance contract, the intermediary works on the basis of a fee paid by the customer, a commission included in the insurance premium, or receives an economic benefit of any kind offered or given in connection with the insurance contract, or a combination of any of the above. Where a fee is directly payable by a customer, intermediaries must reveal the amount of the fee or, where this is not possible, the method for calculating the fee (Article 19 IDD). Insurers are also obliged to inform customers, in good time before the conclusion of an insurance contract, about the remuneration received by insurers' employees in relation to the insurance contract. According to IDD requirements on the disclosure of remuneration information applicable to ancillary insurance intermediaries, such intermediaries must inform customers about the nature of the remuneration received in relation to an insurance contract.

The importance of the transparency of remuneration has also been stressed in the EIOPA's technical advice on conflicts of interest. The advice provides for situations in which the existence of conflicts of interest should be assumed, i.e. where an insurer (or its employee) makes a gain or loss at the expense of a customer, where there is a financial or other incentive (inducement<sup>13</sup>)

---

13. The term 'inducement' is understood as any 'fee, commission or non-monetary benefit' that is paid in connection with the distribution of an insurance-based investment product, or an 'ancillary service to or by any party except the customer, or a person on behalf of the customer.' It has been decided by EIOPA, that inducement mean only fees or commissions as well as non-monetary benefits paid by or to third parties only, but not in relation to internal payments (e.g. fees paid by the customer or internal payments to employees of insurance distributors).

to favour the interests of a particular customer, where an insurer may receive a benefit (from a person other than a customer) in relation to insurance activities provided to the customer, where an insurer is involved in the management or development of an insurance-based investment product. EIOPA's technical advice sets out a number of guidelines relating to the instances of a "high risk" of a detrimental impact, for example, if the value of an inducement is "disproportionate or excessive" and where the inducement is entirely (or mainly) paid upfront upon the conclusion of an insurance contract. Among the above, many experts point to the significance of regulations concerning inducements. The ambiguous meaning of the term "inducement" and its potentially detrimental impact on consumers' interests became a focal point during the IDD's adoption and is now further analysed in the course of the technical advice process. It is rightly claimed that an inducement may obscure the transparency of the costs of remuneration. Therefore, one of the measures introduced in the technical advice is a set of criteria which constitute "examples of circumstances where a fee, commission or non-monetary benefit may generally be regarded as having a detrimental effect on the quality of the relevant service to the customer".<sup>14</sup> This measure is correlated with the IDD (two-step) measures that require insurance distributors (1) to identify all inducements paid in connection with the distribution of insurance products, and subsequently (2) to establish adequate procedures to assess whether the inducements have a detrimental impact as well as specific organisational measures as outlined below aiming to address the risks of customer detriment caused by the payment of inducements. EIOPA also emphasised that "the assessment that a specific inducement or inducement scheme has a detrimental impact on the quality of the relevant service, cannot be counterbalanced by any kind of organisational measure or procedure taken in accordance with the general rules on the management of conflict of interest".

In addition to being bound by the transparency requirements, distributors are prohibited from remunerating or assessing the performance of their employees in a way that conflicts with the distributor's duty to act in a customer's best interests. This means that no remuneration should be awarded to a distributor as an incentive to offer a customer a product other than the product that best satisfies the customer's needs.

---

14. "Insurance undertakings and insurance intermediaries shall, in particular, take into consideration the following criteria in order to assess whether inducements or inducement schemes increase the risk of detrimental impact: a) the inducement or inducement scheme encourages the insurance intermediary or insurance undertaking carrying out distribution activities to offer or recommend a product or service to a customer when the insurance intermediary or insurance undertaking could, from the outset, propose a different available product or service which would better meet the customer's needs; b) the inducement or inducement scheme is solely or predominantly based on quantitative commercial criteria and does not take into account appropriate qualitative criteria, reflecting compliance with the applicable regulations, fair treatment of customers and the quality of services provided to customers; c) the value of the inducement is disproportionate when considered against the value of the product and the services provided in relation to the product; d) the inducement is entirely or mainly paid upfront when the product is sold without any appropriate refunding mechanism if the product lapses or is surrendered at an early stage; e) the inducement scheme does not provide for an appropriate refunding mechanism if the product lapses or is surrendered at an early stage; f) if the inducement scheme entails any form of variable or contingent threshold or any other kind of value accelerator which is unlocked by attaining a sales target based on volume or value of sales." P. 69; available at: [https://eiopa.europa.eu/Publications/Reports/EIOPA%20Final\\_Report\\_on\\_IDD\\_Technical%20Advice.pdf](https://eiopa.europa.eu/Publications/Reports/EIOPA%20Final_Report_on_IDD_Technical%20Advice.pdf)



However, remuneration is not the only source of conflicts of interest identified under the IDD: the Directive maintains the IMD requirement for the transparency of other types of inter-distributor relations, such as capital or personal ties. Intermediaries are thus required to give notice of any direct or indirect links to an insurer (of 10% of more) and disclose any exclusive distribution agreements with insurers.

### 2.3. Cross-selling

Another aspect of transparency is the (in)famous cross-selling, which has become omnipresent in different types of financial services (banking and insurance services in particular). Cross-selling practices may be detrimental to customers, often not even aware that a bundle of products or services has been added to the one they originally chose. The IDD addressed the problem of cross-selling twofold. First, the Directive introduced a limitation on bundle offerings in a single contract,<sup>15</sup> and second, imposed a transparency obligation to inform customers about whether it is possible to buy a bundle's components separately. If so, an insurance distributor must provide an adequate description of the different components of an agreement or package, along with separate evidence of the costs and charges associated with each component. These provisions are in general consistent with the MiFID II regulation. The EIOPA guidelines on cross-selling will play an important role in this respect, providing clarification on when an offering is deemed "cross-selling" within the meaning of the IDD and, if this is the case, whether IDD rules would still apply to the goods or services distributed with ancillary insurance.

### 2.4. Cross-border services

Simplification of cross-border activity is crucial for improving policyholders' situation in the EU. The cross-border insurance business is also an area where the transparency principle needs to be robustly enforced. To attain this goal, each of the Member States will establish a "single information point" providing members of the public with easy access to their registers of insurance, reinsurance and ancillary intermediaries. EIOPA, on its part, will set up a website to coordinate the operations of single information points created at the national level. Although cross-border services are a wider subject, going far beyond product transparency, they clearly involve the transparency in the field of intermediaries' activity across Europe. The obligation of Member States to publicly notify the "general good" rules serves the same purpose.<sup>16</sup>

### 2.5. Professional requirements

The new regime created by the IDD introduces stricter and more specific professional requirements. Although there is no direct link between transparency and the professionalism of insurance distributors, a high level of professional expertise is necessary to ensure the proper operation

---

15. The distributor must offer customers an opportunity to purchase the component goods and services separately. There are exemptions only for ancillary services that are investment services, certain credit agreements or payment accounts

16. According to the jurisprudence and some national laws, the 'general good' fields include consumer protection, social order, the prevention of fraud and the protection of intellectual property

of the above-described transparency regulations. For this very reason, the IDD introduced improved and unified professional requirements for insurance distributors, and in particular those concerning the level of professional expertise. For example, in accordance with the Directive, distributors must complete at least 15 class hours of professional training and development per year. The training received should be appropriate for the nature of the products sold, the type of and role performed by a given insurance or reinsurance distributor and the activity carried out by the distributor. The above rules seem to be linked directly with the elevated requirements concerning the transparency of insurance products and the process of their distribution. That is also why the IDD upgraded the status of the business of insurance intermediaries to the provision of professional advice, as opposed to “ordinary” sales. The same requirements have been set for employees of insurers, which certainly adds to the transparency of insurance contracts and the process of their conclusion.

## 2.6. Product governance

Another aspect of the IDD regulation, however of a more general nature, which is also (albeit indirectly) related to the transparency of insurance services, is the product governance regime. The product governance rules have been imposed on the manufacturers of insurance products (basically, insurers) but, depending on the national insurance culture, can also apply to intermediaries, especially brokers. Such entities are obliged to maintain, operate and review a process for the approval of each insurance product, or significant adaptations of an existing insurance product, before it is marketed or distributed to customers, the process being proportionate and appropriate to the nature of the insurance product (Article 25 IDD). In particular, these processes must identify the target market for each product and the risks for that target market, ensuring that all relevant risks to the identified target market are assessed and that the intended distribution strategy is consistent with the identified target market. Reasonable steps must also be taken to ensure that the insurance product is distributed to the identified target market. All these requirements arguably add to the transparency of insurance products and their consistency with the needs of the market and those of an average customer.

EIOPA's technical advice issued in this respect recommends imposition of additional requirements in this area: manufacturers of insurance products should carry out product testing before a product is brought to the market (and before changes to an existing product are introduced) as well as operate a scheme of ongoing product monitoring once the product enters distribution and select appropriate distribution channels for the product's target market to ensure that product information is clear, precise and up to date.<sup>17</sup>

---

17. The EIOPA technical advice has been preceded by the Preparatory Guidelines on Product Oversight and Governance (POG) arrangements for manufacturers and distributors of insurance products issued dated 18 March 2016 (EIOPA-BoS-16-071), which already included most of the issues to be covered by the technical advice in accordance with the article 25 IDD. See more: Final Report on Consultation Paper no. 16/006 on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, p. 29; available at: [https://eiopa.europa.eu/Publications/Reports/EIOPA%20Final\\_Report\\_on\\_IDD\\_Technical%20Advice.pdf](https://eiopa.europa.eu/Publications/Reports/EIOPA%20Final_Report_on_IDD_Technical%20Advice.pdf)

## 2.7. Insurance-based investment products

The IDD imposes additional requirements on the distribution of insurance-based investment products. Most of the requirements are also related to transparency. In addition to the general rules on the management of conflicts of interest and provision of precontractual information, the obligations imposed on distributors include the duty to provide customers with risk warnings regarding a proposed product or investment strategy. Moreover, in offering advice distributors must provide information on a periodic assessment of suitability of insurance product.

From the perspective of transparency, particular attention should be given to the obligation to inform a customer about all costs and related charges. Distributors must provide all information about the distribution of an insurance-based investment product, along with the cost of advice where relevant. They are also obliged to inform customers about the cost of the insurance-based investment product recommended or marketed and the payment method, as well notify customers whether the cost includes any third-party payments. This information should be revealed in aggregated form so that the customer is able to understand the overall cost as well as the cumulative effect on the return of the investment. At a customer's request, an itemised breakdown of the costs and charges must be provided. Where applicable, this information should be provided to a customer on a regular basis, at least annually during the life cycle of an investment (Article 29 sec.1 IDD). The requirement for transparency is ensured by the obligation to provide the above information in a comprehensible form, in a manner that allows customers, or prospective customers, to reasonably understand the nature of and risks associated with the offered insurance-based investment product, and consequently to take investment decisions on an informed basis.

In addition to imposing the above elevated obligations, the IDD explicitly allows Member States to impose stricter requirements on distributors in respect of information duties and remuneration. "In particular, Member States may additionally prohibit or further restrict the offer or acceptance of fees, commissions or non-monetary benefits from third parties in relation to the provision of insurance advice. Stricter requirements may include requiring any such fees, commissions or non-monetary benefits to be returned to the clients or offset against fees paid by the client."

## 3. Implementation of the IDD into Polish law *versus* transparency

The implementation of the IDD into domestic legal systems raises a substantial number of concerns, which seems to be increasing as the implementation date approaches. The main reason for such concerns is the scope of the Directive's application, which covers not only intermediaries but also insurers. A major dilemma faced by national legislators is how to adapt the concepts of the IDD to "real-life" laws in a way compatible with *both* the Directive's wording *and* the legal culture of a given country. In the case of Poland, the directive introduces an array of new notions, unknown to the local legal tradition, for example, the concept of "selling or distributing insurance products" instead of "concluding insurance contracts", which makes the implementation even more difficult task.

Nevertheless, once the final version of the IDD was adopted, it became clear that transforming concepts of EU law into detailed provisions of Polish domestic law would require the vast knowledge

of both rules of lawmaking and the Polish insurance market (and the stage of its development). Such knowledge must be applied in a way that can contribute to a sustainable evolution of the market and bring benefits to policyholders. In this context, one needs to remember that there is still a substantial disparity between the Polish insurance market and its Western counterparts. In particular, the “Old Europe” has long acknowledged the professional status of intermediaries as a recognised professional group whereas this group is still building its status in Poland, especially in the field of advanced insurance advisory services. Moreover, one must take into account the lower awareness of Polish insureds and the need to ensure the high professional standard of insurance intermediaries, who must be considered not only sellers but also advisors.

As far as the transparency principle is concerned, the Polish insurance market can be characterised as governed by regulations that provide a surprisingly high level of protection to policyholders. The strict division of intermediaries into brokers and agents seems to well serve the purpose of maintaining transparency (and especially managing conflicts of interest), as Polish law leaves little room for doubt on whose behalf an intermediary acts and whose interests represent in the insurance distribution process. A properly shaped information policy prevents situations in which a broker’s remuneration is paid by an insurer. Given the underdeveloped insurance culture and low awareness of policyholders in Poland, any regulation more stringent than the IDD’s rules on remuneration would most probably force the entire broker profession off the market.

In any case, some of the transparency requirements arising out of Solvency II and MiFID have already been implemented into the Polish legal system, mostly in the area of life insurance. In this way, Polish insurance distributors slowly adjust to the reality of the IDD and MiFID II, which introduce partially correlated rules governing insurance-based investment products.

## Conclusions

The analysis carried out in this article shows that the IDD strive to protect the interests of European policyholders principally by establishing additional (mostly informative) obligations for distributors. At the same time, the Directive avoids putting excessive restrictions on the distribution business as such. Therefore, instead of imposing limitations on an entity’s eligibility to engage in insurance distribution activity (or restrictions as to the form in which this activity may be carried out), the European legislator has successfully focused on developing measures to protect the transparency of insurance products and services, and on increasing transparency across the full spectrum of insurance distribution channels. Because of this approach, the principle of transparency gained a new dimension. Under the IDD, transparency means more than the obligation to draft terms and conditions of insurance in a certain way; it is also a principle guiding the organisation of distribution activities and the entire distribution process.

## References

Cortés P., *The New Regulatory Framework for Consumer Dispute Resolution* [in:] *The New Regulatory Framework for Consumer Dispute Resolution*, ed. P. Cortes, Oxford University Press 2016

- Dreher M, *Die Versicherung Als Rechtsprodukt, Die Privatversicherung Und Ihre Rechtliche Gestaltung*, J.C.B. Mohr [Paul Siebeck], Tübingen 1991
- Malinowska K., *Transparentność w umowie ubezpieczenia – przemiana zasady najwyższego zaufania w prawo do informacji* [in:] *Informacja w prawie ubezpieczeń gospodarczych*, eds. B. Gnela, M. Szaraniec, Lex a Wolters Kluwer business, Warszawa 2015
- Szaraniec M., *Działalność gospodarcza pośredników ubezpieczeniowych*, Difin Warszawa 2017
- Mrozowska- Bartkiewicz B., *Jakie zmiany dla polskiego rynku ubezpieczeń przyniesie Dyrektywa w sprawie dystrybucji ubezpieczeń?*, „Wiadomości Ubezpieczeniowe”, 2/2016
- Wandt M., *Transparency as a general principle of insurance law*, presented at World Congress of AIDA, Rome 2014
- Wang, Hsin-Chun, *E-commerce and Distribution of Insurance Products: A Few Suggestions for an Appropriate Regulatory Infrastructure*, in: *The “Dematerialized” Insurance: Distance Selling and Cyber Risks from an International Perspective*, eds. P. Marano, I. Rokas, P. Kochenburger, Springer 2016

## Transparentność ubezpieczeniowa i reżim ochrony na gruncie Dyrektywy o Dystrybucji Ubezpieczeń

20 stycznia 2016 roku, po długim czteroletnim procesie legislacyjnym, Rada UE i Parlament Europejski oficjalnie przyjęły dyrektywę o dystrybucji ubezpieczeń nr EU 2016/97. Celem dyrektywy jest poprawa regulacji rynku ubezpieczeniowego, stworzenia więcej szans na rozwój działalności transgranicznej, stworzenie warunków niezbędnych dla uczciwej konkurencji pomiędzy dystrybutorami produktów ubezpieczeniowych, lecz przede wszystkim wzmocnienia ochrony konsumenta. Zmianie uległa cała filozofia regulacji, poprzez objęcie nią nie tylko pośrednictwa ubezpieczeniowego, lecz wszelkich form dystrybucji ubezpieczeń, w tym sprzedaż bezpośrednią prowadzoną przez ubezpieczycieli. Ochronne cele dyrektywy mają być teraz wykonane przez bardziej restrykcyjne normy w zakresie obowiązków informacyjnych i porady udzielanej przez dystrybutorów. Celem autorki jest pokazanie reżimu transparentności, który został w dyrektywie podniesiony do rangi jednej z najważniejszych zasad rządzących dystrybucją ubezpieczeniową. Analiza przeprowadzona w artykule dotyczy postanowień dyrektywy w perspektywie zasady transparentności, w celu pokazania, że podstawowe aspekty nowego reżimu ochronnego mogą być rozumiane właśnie jako zaawansowana zasada transparentności, nie ograniczona do obowiązków informacyjnych, lecz rozciągnięta na takie kwestie jak zarządzanie produktem, konflikt interesów i zasady wynagradzania. Artykuł porusza także kwestie wysiłków polskiego ustawodawcy w zakresie implementacji przepisów dyrektywy do polskiego porządku prawnego oraz stan prac w tym zakresie.

**Słowa kluczowe:** transparentność, dystrybucja ubezpieczeń, pośrednictwo ubezpieczeniowe, dyrektywa, IDD.

**DR KATARZYNA MALINOWSKA** – Lecturer at Kozmiński University, Warsaw; partner BMSP Law Office.

