

On 23 March 2021 EIOPA published a series of Questions & Answers regarding the legal interpretation of certain provisions of the Insurance Distribution Directive (Directive (EU) 2016/97, hereinafter the “IDD”) and its implementing measures. The answers were provided by the European Commission.

In particular, the Questions & Answers focused on the:

Appropriateness Assessment:

In regard to art. 15 of the Delegated Regulation (EU) 2017/2359 (“Delegated Regulation”), it was asked to the European Commission how the distributor should assess the knowledge and experience of a customer on products, and how the phrase “experience in the investment field relevant to the specific type of product or service” of Article 30(1) IDD should be understood.

The European Commission replied that, in cases where the customer has waived the right to obtain full advice, the intermediary or the insurance undertaking should ask the customer to provide information regarding his or her knowledge and experience in the investment field relevant to the specific type of product or service offered, in order to assess whether the product or service is appropriate for the customer.

Article 17 of the Delegated Regulation provides a list of information that intermediaries or insurance undertakings should obtain by the customer in order to assess his or her knowledge and experience on the product or service:

- the types of service, transaction, insurance-based investment product or financial instrument with which the customer or potential customer is familiar;
- the nature, number, value and frequency of the customer's or potential customer's transactions in insurance-based investment products or financial instruments and the period over which they have been carried out;
- the level of education, and profession or relevant former profession of the customer or potential customer.

As to the phrase of Article 30(1), it should be understood as first person effects or influence gained through involvement in or exposure to the investment field relevant to the specific type of product or service.

1. Product Oversight & Governance requirements:

On Product Oversight and Governance (“POG”) requirements pursuant to art. 25 of the IDD, it was asked whether they apply to any product independent from the question for how many customers the insurance product has been designed.

The European Commission underlined that art. 25 of the IDD applies to all insurance undertakings and intermediaries which manufacture any insurance product for sale to customers, and there is no explicit exclusion of “tailor-made” products.

Moreover, in accordance with recital 1 of the Delegated Regulation, article 25 should apply to all insurance products “irrespective of the type of product and of the requirements applicable at the point of sale”, and that the product approval should always be proportionate and appropriate to the nature of the insurance product.

Therefore, any “tailor-made” product should comply with the product oversight and governance requirements set out in Article 25 IDD in a manner that is proportionate to and appropriate for the specific character of that insurance product.

Significant adaptation of an existing product:

In replying what constitutes a “significant adaptation of an existing product”, the European Commission stated that it may concern essential features of the product, such as the risk coverage, the price and costs of the insurance product, the risks resulting from the underlying investments of an insurance-based investment product, a change to the target market identified by the insurance manufacturer, and possible compensation and guarantee rights for the benefit of the customers. Whether the adaptation is “significant” has to be primarily assessed from the perspective of the average customer.

Product testing and product review for existing products:

In replying whether testing and product review are required for existing products, the European Commission confirmed that, pursuant to art. 25(1) of the IDD and art. 4(1) of the Delegated Regulation, for products which continue to be marketed without significant adaptations, manufacturers do not have to comply with the product oversight and governance requirements; however, if the products are subject to significant adaptation, they shall be reviewed and tested before being marketed or distributed to customers.

Manufacturer’s responsibility for adequate Product Oversight & Governance:

It was asked to the European Commission whether a manufacturer can be held responsible for consumer detriment even if the POG arrangements were adequate.

The European Commission answered that a manufacturer should ensure that the products approval process and the design of insurance products should always take into account the objectives, interests and characteristics of customers, it should not adversely affect them, and it should prevent or mitigate customer detriment pursuant to art. 4(3) of the Delegated Regulation.

Moreover, the Delegated Regulation provides also that all market operators should guarantee an appropriate standard for customers protection.

Therefore, it is not excluded that a manufacturer might be held responsible for consumer’s detriment.

Organisational requirements:

One of the queries was whether national competent authority obligation to request information on conflicts of interest should be applied retrospectively.

In this regard, art. 3(6), first subparagraph of the IDD lists the information that will be requested “as a condition of registration” of insurance, reinsurance and ancillary insurance intermediaries, however national competent authorities are not obliged to actively request this information retrospectively with respect to intermediaries which are already registered.

Nevertheless, the second paragraph of the abovementioned art. 3(6) of the IDD provides that intermediaries have to inform the competent authorities without undue delay of any change in the information provided under this paragraph.

Application of the IDD in case of providing advice regarding existing contracts:

In replying whether art. 30, in particular art. 30(1) of the IDD applies to pre-23 February 2018 contracts, the European Commission stated that such article shall apply only from the date that the Directive entered into application in the Member State in question. However, if after the entry into application of the IDD, new advice (advice as defined in Article 2(1) point 15 IDD) is provided under an existing contract, Article 30 IDD will apply, even if the contract has been concluded before the entry into application of the IDD.

Application of the IDD to captive insurance undertakings:

It was asked to the European Commission whether the IDD applies to captives. The European Commission stated that according to art. 1(2) of the IDD, the directive applies to any natural or legal person established in a Member State involved in the distribution of insurance and reinsurance products, and since in the IDD there is no reference to the concept of captive insurance and there is no specific requirement for captive insurance undertaking, it must be interpreted that the provisions fully apply to captive insurance and reinsurance undertakings.