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A New European Market in Insurance Distribution

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Abstract The present work provides an approach to the main changes brought to the insurance market by the introduction of the Directive (EU) 2016/1997 of the European Parliament and of the Council of 20 January 2016, which comprises the recast of Directive 2002/92 on insurance mediation. The new Directive implements relevant changes with the paramount aim of reaching a harmonization of the different national provisions concerning insurance and reinsurance distribution of the EU, both on the application scope and on the insurance consumer protection.

Keywords: • insurance and reinsurance distribution • distribution channels • insured protection •

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1 Introduction: context of the reform

A new insurance distribution market is likely to be established in Europe in 2018. The publication of the Directive (EU) 2016/1997 of the European Parliament and of the Council of 20 January 2016 (IDD)[1] on insurance distribution, introduces considerable changes to the market, with the primary aim of raising the protection levels for insurance consumers in the European Union.

The financial turmoil we have seen in recent years has highlighted the importance of effectively being able to guarantee consumer protection in all the financial sectors and strengthen customer confidence. In this context, insurance distribution is a key factor of the financial market in general, and of the insurance sector in particular, which is why the European Union decided to revise Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (IMD I)[2].

The need to revise the IDM I was acknowledged during the control checks carried out by the European Commission from 2005–2008[3]. Various problems were found in the European market that justified the revision of the Mediation Directive. Extensive legislative disparity were revealed between the Member States, with insurance consumers paying the price for the legal uncertainty and lack of transparency. This situation has become even more complex in the context of the economic crisis seen over the last few years, which has given new relevance to consumer protection issues. This is true in all of the financial sectors, with no exception, including the insurance sector, in which products are sold that are not easy to understand for the average consumer who can easily misinterpret the risks, costs and characteristics of the insurance they take out. We must not forget that insurance intermediaries facilitate access to the market, helping insurance companies reach an extensive client base without incurring the costs of establishing a distribution network. They also are involved in the subsequent processing of claims. In addition, their function has also become crucial from the perspective of the insurance consumer. The complexity of the product they distribute and its technical nature means that, in many cases, the intermediaries have to assist insurance customers by identifying the risks that affect or may affect them, and otherwise advising them so as to help them make informed decisions about the risks they want to, or should, insure. In view of all this, the reform of this IDM I is consistent with other policies of the European Union, which aim to provide greater protection for consumers of financial services[4].

In this regard, the reform process began in 2012 with the drafting of a Proposed Directive of the European Parliament and of the Council on insurance mediation (IMD II)[5]. Upon the publication of the text of the proposed Directive a broad debate ensued, not without criticism from the different professional collectives (Girgado, 2013: 231, and Sierra, 2013: 291)[6] which can be seen in the more than 300 amendments that the draft text received (Sánchez, Cid, 2013: 29)[7]. Eventually, on 26 February 2014, a recast version of the Proposed Directive was published with the amendments approved by the European Parliament, with substantial alterations compared to the original text. Two years later the definitive text of the Insurance Distribution Directive (IDD) saw the light of day. The transposition period for the Member States was two years, up to 23 February 2018, establishing a transition period until 23 February 2019 for intermediaries already

registered under IMD I.

The text of the IDD underscores two interlinked fundamental objectives, namely: to achieve equal treatment between the different types or channels of distribution existing in the European Union. The scope of this first objective has a direct impact upon the underlying goal of the Directive, which brings up the second objective: to protect the insurance consumer or customer. All insurance consumers should have the same level of protection regardless of the differences existing between the distribution channels.

The key tool for achieving this objective is to provide the insurance customer with all of the correct information (Peñas, 2015: 275). In fact, information also is provided, as we will see, with the aim of protecting insured parties in the event of any conflict of interest that may occur.

Thus, the new text of the IDD takes an important step towards a greater level of consumer protection and integration in the market. In order to achieve these objectives, reforms were made for insurance and reinsurance intermediaries to enjoy the right of freedom of establishment and the freedom to provide services embodied in the TFEU. In particular, if the intermediaries were registered in their original Member State, they were able to undertake their activities in other Member States, thereby leading to the need to establish adequate notification procedures between the competent authorities of the Member States (Articles 4 to 9 IDD)[8].

However, as this is a minimum harmonisation directive, the Member States may apply stricter rulings to protect consumers, provided they are compatible with community legislation.

The changes resulting from the IDD will have a significant impact on the current "intermediation" set-up in insurance sales, so much so that the proposed regulations go beyond the limits of "mediation" in an attempt to offer comprehensive regulations for any type of insurance distribution, affecting not only insurance and reinsurance intermediaries, but also insurance and reinsurance companies.

Furthermore, it is worth mentioning that in order to achieve the proposed objectives, the IDD grants powers to the European Commission to adopt delegated acts concerning relevant issues such as: the control and governance of insurance products; the distribution of insurance-based investment products; the management of conflicts of interest; the conditions under which bonuses can be paid or received; and the suitability and appropriateness of the information given to customers (Article 38 IDD). With this in mind, the European Commission has already consulted the European Insurance and Occupational Pensions Authority (EIOPA), which published the results[9]. Therefore, in the immediate future, new developments from the European Commission will define the insurance distribution European market more specifically.

In this context, we consider it useful to give details of the most significant changes introduced by the IDD, as they are key for their future incorporation into the Member States. We must not lose sight of the fact that it is a particularly important reform in the

insurance sector, because insurance is an industry in which the sales initiatives are usually carried out by intermediaries. Therefore, the advice they give is essential for the correct functioning of the market (Bigot, Langé, 2009: 25, Cicchitti, 2005: 5). As with any other product, insurance needs to be correctly distributed even though the type of product launched on the market subjects it to special legal treatment. We must not forget that while insurance company activity is private, its activities are nevertheless monitored under intense public control, similar to that of other sectors of the Financial Market. In the financial system, and in the insurance sector in particular, this interventionism is justified by the requirement for consumer/insured party protection, as well as by the economic relevance of the subsector, given its capacity to impact the economy as a whole (Stiglitz, 2002: 4478 and Starita & Malafronte, 2014: 121)[10]. This control now extends to any form of distribution of insurance products and to a wide range of intermediaries who undertake this activity (indirect distribution) and to the insurance company itself (direct channel).

In the following pages we will pay particular attention to the main changes introduced by the European rule and to its impact on consumer protection. We will analyse the new concept of insurance distribution and the relevance of the obligation the insurance distributors have to inform their clients. With that aim, we also will focus on the difference between sales with information and sales with advice. We will review also the various mechanisms available to avoid conflicts of interest and the importance of the information on remuneration. Finally, we will discuss the particular case of insurance-based investment products.

2 Expansion and reformulation of the concept of mediation

The amendment of the scope of application is one of the big changes of the IDD. This is an issue that, from the first draft of the IDD to the current text, has undergone several alterations. These modifications have in some cases expanded, and in other cases reduced, the activities that will be included in the future IDD.

Therefore, the IDD affects not only the insurance intermediaries *estrictu sensu*[11], but also the sales of insurance contracts made by the insurance and reinsurance companies themselves without the intervention of an intermediary. The aim of this expansion is for the consumer to receive the same level of protection when buying a product directly from an insurance company as when buying through an insurance intermediary. This is not the case currently, as the IDM I, and the regulations of the Member States that have incorporated it, in general, only consider sales through intermediaries.

Accordingly, the concept of mediation, controlled up to now by legislation and European doctrine, has been expanded considerably. The change in the name of the IDD is more in keeping with its contents, as it must be applied to insurance distribution in all its different forms. The concept of distribution is broader than that of mediation and, therefore, is more in line with the contents of the future IDD. This expansion will not be easy to slot in with the rest of the insurance rulings. We must not forget that the relationship between insurance entities, policyholders and insured parties is regulated by the rules of Supervision and the contracting regulations of the different Member States, which already

establish the protection of insured parties in their relationships with insurance entities. Therefore, when the regulations in the Member States are amended in these terms, there needs to be sufficient coordination between the regulations[12].

Another new development of the IDD is that certain activities carried out via insurance or reinsurance search and comparison web sites are now considered as distribution. More specifically, those persons whose activities consist of providing information on one or more contracts of insurance in response to criteria selected by the customer, whether via a website or other media; or, providing the ranking of insurance products, or a discount on the price of an insurance contract when the customer is able to directly or indirectly conclude an insurance contract at the end of the process, will also now be subject to the control of the Member States as such persons will be considered insurance distributors. This includes any distribution activity that results, or may result, in a person taking out an insurance contract (Recital 12 IDD) (López Bustabad, 2015: 717, and Rokas, 2016: 3).

On the heels of this came the specification of circumstances in which the IDD is not applicable. First, it is not applicable to web sites managed by public authorities or consumer associations that that will not actually execute any contracts, but merely serve to provide comparative information about insurance products available on the market. Nor is it applicable to simple introduction activities consisting of providing information about potential policyholders to insurance or reinsurance intermediaries or companies, or information about insurance or reinsurance products or about an insurance or reinsurance company or intermediary to potential policyholders.

In short, in 2018 insurance comparators should be classified as distributors whenever the customer can directly or indirectly take out an insurance contract at the end of the insurance comparison process.

Additionally, those intermediaries that sell insurance contracts as an activity that is ancillary to the sale of services are not included in the scope of application of the Directive. In fact, the new text states clearly that it does not apply to intermediaries of "*complementary*" insurance who undertake insurance distribution, provided all the other circumstances listed in Article 1 (3) of the IDD are also met[13]. However, even in these cases when the IDD is not applicable, efforts are made to guarantee the protection of the insured party by imposing complementary insurance intermediation that ensures, among other things, that the customer receives information before taking out the contract. In particular, the customer must be supplied with the identity of the intermediary, along with its address and the procedures listed in Articles 17 and 24, taking into account the customer's requirements and needs before suggesting a contract. Additionally, the customer must be supplied with the document mentioned in Article 20, section 5 relating to the product information[14].

The new text also does away with one of the latest amendments incorporated by the Parliament in the text of February 2014, which included claims management carried out on a professional basis either by the actual insurance company or by intermediaries for insurance companies, as well as the activities of surveying and claim settlements. The

definitive text of the IDD excludes the professionals who undertake these activities from its scope of application.

The expansion of the scope of application of the Directive Proposal also led to a reformulation of the concept of mediation, so the new text no longer defines insurance mediation but rather "distribution" instead. More specifically, it defines "insurance distribution" (Article 2 (1) IDD) as *"*the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts*…"*. And as we have already mentioned, the new text also adds the activity of the so-called insurance comparators, that are considered to be insurance distributors for the purposes of the Directive, in circumstances when they directly or indirectly enable an insurance distributor or a customer to conclude an insurance contract[15].

It must be noted that as a result of an amendment introduced by the Parliament it was stated that the distribution of insurance products would also include investment life insurance, with IDD providing the regulations for this, although its text must be in line with the marketing requisites established by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, on markets in financial instruments (MIFID II) (Moloney, 2014: 341)[16].

Furthermore, and as a result of another amendment of the Committee on Economic and Monetary Affairs of the European Parliament, the so-called "cross-selling practices" (Article 24 IDD) are also included. "Cross-selling" refers to the sale of an insurance product together with another product within the same "package." Cross-selling is allowed, provided the customer is offered the possibility of buying the different products separately, with the same conditions currently regulated in the legislation on tied selling in consumer credit agreements. This does not affect the sale of insurance products that combine different types of coverage to offer more complex coverage in one single policy based on the risks to be covered (multi-risk policies)[17].

3 Protection of the insured party as the basis of the reform

3.1 Information and advice for the insured party

As with the derogated IMD I, the new IDD upholds the need to inform the consumer as the touchstone of protection for the insured party, although it does introduce some changes with the aim of achieving a greater level of protection (Peñas, 2013: 259).

Articles 17 to 25 of the IDD reformulate the requisites concerning information. These rulings are stricter than those established in Articles 12 and 13 of the IMD I. For a start, information requisites similar to those which until now applied to intermediaries are imposed on insurance companies that sell their products directly. Furthermore, Member States are instructed to make sure that in due time and, in all cases, before an insurance contract is concluded, distributors provide the customers with a range of information about different points. Therefore, insurance customers should still receive information about the professional category of the person selling them the insurance product, which

is why the professional register system remains in place. Obviously, insurance and reinsurance companies are not required to register as intermediaries, since they already should be registered as insurance entities in accordance with the supervision regulations. The declaration of activities simplified register that was regulated in the IDM II Proposal has been removed. This suppression was proposed in several amendments during the course of the parliamentary process. Additionally, the elimination of claims and surveys management as a distribution activity renders this register meaningless. Furthermore, the simplification of it was certainly questionable[18]. It is established that on its web site EIOPA will create a single electronic register, listing the insurance and reinsurance intermediaries that have declared their intention to practise cross-border activity. This single electronic register will serve as a gateway connecting up to the national registers.

Along with the registration requisites, the distributors must also meet the professionalism and expertise conditions, as they are required to undergo not only certain ongoing training regulated by the respective authorities, but also a series of integrity requisites. Taken together, these requirements ensure that intermediaries' professional expertise is in line with the level of complexity of the activity they carry out.

As we have stated, information is a key instrument in consumer protection, both for sales with advice and for those without. Consequently, in insurance product sales, the distributor must provide information based on the requirements and needs of each specific customer. This information must be comprehensible so the customer is able to make an informed decision. This requirement to specify the customer's needs and requirements should be set out in demands-and-needs test, providing the customer with standardised information. These documents should be drafted by the relevant insurance company or intermediary or, in the Member State concerned, by the insurance intermediary that manufactures the insurance product (Recitals 44 and 48 IDD).

As we will see below, there are two especially important circumstances where information must be provided: (i) the need to specify whether the intermediary is providing the customer with an advised sale; and, (ii) the type of remuneration the intermediary will receive for their intermediation.

Sales of insurance products that include advice, understood to be a personalised recommendation for the customer[19], means the distributor is obliged to increase the levels of information provided to the customer. The text of the IDD includes "advice" among its definitions, since customers depend more and more on personal recommendations when it comes to concluding an insurance contract. More specifically, advice is defined as "the provision of a personal recommendation to a customer, either upon their request or at the initiative of the insurance distributor, in respect of one or more insurance contracts" (Article 2 IDD).

The IDD tries to encourage advised sales, carried out correctly and objectively[20]. Firstly, to ensure that the advice given meets the obligations imposed on insurance intermediaries and companies, before the conclusion of an insurance contract the intermediary or company must inform the customer whether it provides advice about the insurance products sold (Article 18 IDD).

Secondly, the intermediary or insurance company offering an advised sale must provide the customer with an explanation of why the recommended product in question meets their needs. Objective and personal advice should be based on the analysis of a sufficient number of insurance contracts offered on the market. This will help insure that a recommendation regarding the appropriateness of an insurance contract that best suits the customer's needs is based on professional criteria.

It is essential for the customer to know the type of distributor with whom he is dealing and whether the advice being provided is based on objective and personal analysis. In order to assess whether the number of contracts and providers considered by the intermediary is sufficiently large to sufficiently provide for a fair and personal analysis that suits the customer's needs, appropriate consideration should be given to the number of providers in the market; the market share of those providers; the number of relevant insurance products available from each provider; and, the features of those products (Recitals 35 and 47 IDD).

For this reason, if the distributor operates exclusively for one or several insurance companies, the customer must be provided with the names of those companies. If the intermediary advises on the products of a large number of insurance companies, it must carry out objective and sufficiently extensive analysis of the products available on the market. All insurance intermediaries and companies must also explain the reasons upon which their advice is based.

In the definitive text of the IDD, therefore, the fact that advice is or is not provided becomes a key element of the information that must be supplied about the insurance company or intermediary, and its services. There is no doubt that specifying the advice the different types of intermediaries must provide forms a necessary basis for greater transparency, as, logically, the advice given by the actual insurance company, or its employees, or an exclusive agent who only advises on the products of a specific company or companies, will not be the same as the advice given by independent intermediaries, like brokers.

However, despite the significance of determining what type of insurance intermediary provides the service, the Directive still does not offer a clear and detailed definition of the different types of distributors.

3.2 Conflict of interest

The distributor, in addition to merely being honest and professional, should also consider the customer's best interests. We believe that this should be defined according to the type of intermediary, since an agent who acts for one single insurance company cannot be expected to defend the insurance customer's interests in the same way as an insurance broker who must clearly consider the interests of his customer/insured party.

The new IDD, following the mandate of the MiFID II Directive, tries to achieve consumer protection and transparency by way of the introduction of regulations that address the risk of a conflict of interest more effectively.

This is a problem that, until now, was considered to be resolved with the regulation of the obligations concerning the information and advice given by the intermediary, as established in Article 12 of the IMD I, and with the corresponding development, to a greater or lesser extent, of this precept undertaken by the Member States. Therefore, an explicit conflict of interest regulation was not considered necessary. Article 12 of the IMD I demanded not only the identification of the insurance intermediary, but also that the customer be informed, before concluding an insurance contract, of the intermediary's link with the insurance company or companies. It also required disclosure whether the advice was given based on an objective analysis of a sufficient number of insurance contracts available on the market. However, these requisites are apparently not sufficient to protect the customer, since the insurance intermediary often acts not only as an advisor for the insured party but also as a distribution channel for insurance companies. Under these circumstances, there is a clear risk of a potential conflict of interest between the impartiality of the mediator and its own commercial interests. Furthermore, Article 12 of the IMD I that obliges intermediaries to provide information to the customer has been incorporated in the different Member States to varying degrees meaning that in some states the information obligation is stricter than in others.

Various economic operators, and in particular the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS),[21] agree that it is useful to distinguish the information that should be provided when there is a possible conflict of interest as established in Article 12 of the IMD I.

In this regard, the new IDD introduces specific rulings to guarantee that any conflicts of interest are identified and effectively managed. Recital 39 of the IDD states: *"the expanding range of activities that many insurance intermediaries and undertakings carry on simultaneously has increased potential for conflicts of interest between those different activities and the interests of their customers. It is therefore necessary to provide for rules to ensure that such conflicts of interest do not adversely affect the interests of the customer".*

Obviously, the management system for conflicts of interest will depend on the nature, scale, size and complexity of the insurance intermediary's activity, respecting the principle of proportionality at all times. The MiFID must undoubtedly serve as a reference for this new regulation of the IDD, as it contains specific rules on the conflict of interest issue[22].

These regulations have had to be adapted to suit the insurance sector, which features, among other things, very small intermediary entities, which in many cases are individual persons. So firstly, there is the need to identify, prevent and disclose any conflicts of interest as an explicit obligation of all distributors. Further, the different types of intermediaries must be taken into account. Therefore, the agent must offer the products that are in the customer's best interests, but only from within the range of products offered by the insurance company for whom the agent works. This is in contradistinction to the insurance broker who does not act on behalf of an insurance company.

Conflicts of interest are linked to the connections the distributors have with the insurance

companies, and in particular with their remuneration policies. This reality forces the Member States to ensure that insurance distributors do not receive remuneration and do not pay their employees. This helps to prevent the conflict of self-dealing and to insure the distributor is fulfilling its duty to act in the best interests of its customers. Therefore, a distributor must not recommend a product to a customer simply because it will receive a bigger bonus to the detriment of other products that may suit the customer's needs better, even if this results in a lower level of remuneration for the distributor[23].

Lastly, it must be noted that the rules on the possible conflict of interest have a specific regulation when customers are offered insurance contracts that involve investment as possible alternatives or replacements for investment products subject to the MiFID. In fact, the IDD defines specific treatment for the distribution of this type of products, listing in its own chapter VI a series of additional requisites for protecting customers who purchase investment insurance.

3.3 Remuneration system

One of the issues that the reform of the IMD I raises again is the remuneration of intermediaries, as a way of offering information to the consumer, preventing conflicts of interest and achieving transparency in the insurance market.

However, in our opinion, it makes the same mistake again by not overhauling the remuneration system regulations, focusing on the remuneration of the broker who, as an intermediary who is independent of the insurance companies, poses the biggest problems.

Over the years, intermediaries' remuneration has been one of the most widely discussed issues, despite the fact that IMD I deemed it unnecessary to disclose information relating to the fees that mediators charge their customers[24].

In this regard, the specification of what information must be provided about the distributor's remuneration is one of the matters that has undergone the most changes since the publication of the IDM II draft in 2012.

Making a radical change to the existing regulations, the IDD draft, in the amended text of February 2014, incorporated Recital 31 that stated that *"in order to mitigate conflicts of interest between the seller and the buyer of an insurance product, sufficient information must be guaranteed concerning the remuneration of the insurance distributors"*. To prevent this requirement from being circumvented, resorting to a direct sale from the insurance company the IDD proposal established that "*these companies are also obliged to provide the customers with whom they deal directly by providing mediation services information about the remuneration they receive for the sale of insurance products*" (Recital 32)[25].

After successive changes in the wording, the final text of the IDD diminished the amount of information required to inform the customer of the remuneration received by the distributor. The IDD states that in the pre-contractual stage, consumers should be given clear information about the status of the distributors who sell insurance products and

about "*the type of remuneration which they receive*" (Recital 40). This information would reveal the relationship between the insurance company and the intermediary, if applicable, as well as the type of remuneration of the intermediaries. However, it does not require disclosure of the actual amount of remuneration and the definitive text of the IDD states that insurance distributors only need to disclose the type of remuneration received in relation to the insurance contracts they distribute.

We understand that this criterion should be defined based on the relationship of the distributor with the insurance contract it sells, so the following may be distinguished as possible types of remuneration:

- the distributor may work on the basis of a fee; that is, the remuneration is paid directly by the customer;
- the distributor may work on the basis of a commission of any kind; that is, the remuneration is included in the insurance premium;
- the remuneration may be based on any other type of remuneration, which may include an economic benefit of any kind offered or given in connection with the insurance contract;
- renumeration may be based on a combination of several systems (Article 19(1)(d) IDD).

The new draft states that in some cases additional information must be provided going beyond the simple disclosure of the type of remuneration. So, for example, where the fee is payable directly by the customer, the insurance intermediary shall inform the customer of the amount of the fee or, where that is not possible, of the method for calculating the fee (Article 19 (2) IDD).

In the case of direct sales, the insurance company must guarantee that the insurer informs the customer of the type of remuneration received by its employees in relation to the insurance contract.

Lastly, with regard to payments that do not comprise the current premiums and fees and that are made by the customer under the terms of the insurance contract after its conclusion, the insurance intermediary must also disclose the information relating to each of these payments.

The duty to disclose the remuneration contained in the previous amended text was much more comprehensive, even going so far as to state that the information about the remuneration should be provided in such a way that a comparison between intermediaries and direct insurers could be made.

In an effort to put an end to the lack of transparency, various professional collectives proposed that distributors should be obliged to disclose, "on request," not only the remuneration included in the premium of the insurance intermediary but also any subscription agency or power they may hold as representatives of the companies[26]. Unfortunately however, as we have seen above, this solution was not included in the definitive text of the IDD.

In our opinion, which we have explained in other papers (Quintáns, 2013: 553, and Quintáns, 2014: 351), this obligation should be treated differently depending on the type of intermediary selling the product. In the case of sales made directly by insurers, the fulfilment of this obligation does not appear to have much significance for the insurer, as it is normal that an employee receives a wage for the work carried out as a whole, and not just for selling insurance products. Therefore, disclosing the type of remuneration is surely completely irrelevant as a mechanism designed to protect the insured party. This obligation only makes sense in those cases in which the employee receives a commission for the products sold on top of normal wages.

Therefore, in cases of indirect distribution through intermediaries, it is essential to define the type of intermediary, because in the case of agents, they receive remuneration from the insurers on whose behalf they act, whether exclusively or as associated bancassurance operators or agents. Therefore, the type of remuneration they receive can be disclosed to the customer, although we do not believe this information affords the insured parties greater protection.

It makes more sense, unquestionably, to apply a stricter obligation regarding remuneration to the insurance broker sector, as brokers act on behalf of the insured party in the sale of products (Puyalto, 2015: 665).

In effect, in most cases brokers act as advisors for their customers and as a distribution channel for the insurer, often with the capacity to subscribe policies. It has been shown that this dual role is a potential source of a conflict of interest between the impartiality of the advice they give their customers and their own commercial interests in the sale of certain products. In this regard, the European Commission has revealed the existence of practices that lead brokers to steer companies towards specific insurers, which could potentially jeopardise fair competition in the insurance market[27]. Therefore, mixed remuneration, resulting from commissions from the insurance company, as well as fees from the customer, can lead to situations that damage the competition of the sector and are harmful for insurance consumers if full transparency is not in place. Full transparency requires that the customer be given information about the source and total amount of the remuneration received by the broker and whether that remuneration will come directly from the customer or from the insurance companies[28]. In view of all this, we believe that in these cases disclosing the type of remuneration may not be sufficient to detect and prevent possible conflicts of interest.

4 Additional requirements for consumer protection in investment insurance distribution

The growing complexity and the new design of insurance-based investment products means that consumers who purchase these products require an increased level of protection[29]. These products are offered as possible alternatives or replacements for investment products subject to the MiFID Directive. Therefore, the European Commission has decided to offer specific treatment for the distribution of these types of products, regulating in a special chapter VI - a series of additional requisites to protect customers buying investment insurance. This decision is also justified by EU Regulation

1286/2014 of the Parliament and of the Council, of 26 November 2014, on key information documents for packaged retail and insurance-based investment products.[30]

The Member States where this type of insurance is sold should ensure that the insurance companies or intermediaries selling these products to retail customers or giving advice on them, have an appropriate level of knowledge and competence in relation to the products offered. Community regulations even state the need for employees of the insurance intermediary or of the insurer to be given adequate time and resources to be able to provide all relevant information to customers about the products they provide (Recital 33 IDD).

With things as they stand, in order to coordinate the provisions of Regulation 1286/2014 with adequate protection for the insurance retail consumer, in the articles of the new IDD the Commission includes risk insurance as well as insurance with an investment element, to ensure that consumers are aware of the risks involved when they buy these types of insurance coverage. For these purposes, the IDD states that the producer must not only issue and publish the Key Information Document (KID) prior to selling these insurance-based packaged products[31], but they must also provide additional information to the insured part/investor. With regards this, the IDD includes a chapter titled: "*Additional requirements in relation to insurance-based investment products*". These precepts contain rulings on conflicts of interest aimed at adopting the necessary measures to detect, prevent, manage and disclose these conflicts to the customer before concluding an insurance contract and providing detailed information on a durable medium that enables the customer to make an informed decision with regards the insurance distribution activities in the context of which the conflict of interest arises (Article 28 IDD).

In this regard, the Commission is empowered to adopt delegated acts in accordance with Article 38 of the IDD, in order to define the types of conflicts and the steps that intermediaries and insurers should take to identify, prevent, manage and disclose conflicts of interest (Article 28(4) IDD).

The criterion is also specified to determine whether the advice is independent, and this criterion includes the obligation to regularly assess the products available on the market (Article 29 IDD).

The regulations establish how the suitability and appropriateness of a product should be assessed, and state that information should be obtained from the customer. In advised sales, the intermediary or company must obtain information regarding the customer's knowledge and experience in order to determine whether the product is appropriate for that customer. The customer's financial situation, including the capacity and ability to withstand losses, along with the customer's investment goals, must be assessed in order to determine whether the product is appropriate. When a product is not appropriate or suitable the customer should be informed accordingly. The seller shall also keep documentation about the conditions under which it provides its services to the customer and shall provide the customer with reports (Article 25).

The Commission is more demanding of the distributor selling insurance-based investment

products, in terms of the information it must provide to the consumer regarding costs and related charges, requiring it to disclose not only the cost of advice, if applicable, but also any payment relating to third parties (Article 29(1)(c) IDD).

5 Conclusion

The new IDD will introduce significant changes in the European insurance market with the aim of protecting the insurance consumer through better and more transparent disclosures by the insurance market. These are the most important milestones the Member States will have to face:

First, the application context is much broader and any insurance distributor, either direct or indirect, will be affected by the new regulation. The amendment of the scope of application is one of the big changes of the IDD. The Directive affects not only the insurance intermediaries *strictu sensu*, but also the sales of insurance contracts made by the insurance and reinsurance companies themselves without the intervention of an intermediary. The aim of this expansion is for the consumer to receive the same level of protection when purchasing a product directly from an insurance company as when purchasing through an insurance intermediary. This expansion will not be easy to harmonize with other insurance rulings. We must not forget that the relationship between insurance entities, policyholders and insured parties is regulated by the rules of Supervision and the contracting regulations of the different Member States, which already establish the protection of insured parties in their relationships with insurance entities.

On the other hand, those intermediaries that sell insurance contracts as an activity that is ancillary to the sale of services are not included in the scope of application of the IDD. In fact, the new text states clearly that it does not apply to intermediaries of "complementary" insurance who undertake insurance distribution, provided all the other circumstances listed in Article 1(3) of the IDD are also met.

Second, the fact that advice is or is not provided, becomes a key element of the information that must be supplied about the insurance company or intermediary and its services. There is no doubt that specifying the advice the different types of intermediaries must provide forms a necessary basis for greater transparency, as, logically, the advice given by the actual insurance company, or its employees, or an exclusive agent who only advises on the products of a specific company or companies, will not be the same as the advice given by independent intermediaries, like brokers.

However, despite the significance of determining what type of insurance intermediary provides the service, the Directive still does not offer a clear and detailed definition of the different types of distributors. We hope that the Member States, in transposing the Directive, will concretize this aspect. It would also be desirable for the distributor's remuneration to be properly communicated to the customer, especially in cases where the distributor represents the customer and not the insurer.

Finally, Member States must keep in mind the new dimension of the information which the distributor communicates to the customer as a means of avoiding conflicts of interest.

It is an aim of the new norms, to act in a preventive way avoiding any conflicts of interest between distributor and agent. Especially relevant will be the regulation of this matter when the product distributed has an investment component, in which case additional protection of the clients/insured is required. For that reason, The Member States where this type of insurance is sold, should ensure that the insurance companies or intermediaries selling these products to retail customers, or giving advice on them, have an appropriate level of knowledge and competence in relation to the products offered.

Notes

[1] OJ L 26, 2.2.2016, p. 19–59. As stated in the first Recital, it is a recast of Directive 2002/92/EC, to include a series of amendments designed to harmonize the different national provisions concerning insurance and reinsurance distribution.
[2] OJ L 9, 15.1.2003, p. 3–10.
[3] In 2009 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), which specifically called for the need to revise this Directive (OJ L 335, 17.12.2009, p.1–155). This revision process revealed the importance of considering the provisions of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID), which was in force at the time (OJ L 145, 30.4.2004, p. 1–44).
[4] Specifically, the reform falls within the request, made in November 2010, by the G-20 to the OECD, to the Financial Stability Board (FSB) and to other relevant international organisations for them to establish common principles in the financial services sector, in order to increase consumer protection. The draft of high level principles of the G-20 concerning consumer protection for financial matters highlights the need for proper regulation and/or supervision of the suppliers of financial services and the agents that deal directly with the consumers. According to these principles, consumers should always have comparable levels of protection.
[5] This Proposal was published on 3.7.2012 (COM (2012) 360).
[6] Particularly interesting is the opinion of the European Federation of Insurance Intermediaries (BIPAR) (http://www.bipar.eu/en/page/idd, last visited 3 Apr. 2017) and the MEDI (Monitoring European Distribution of Insurance) Report (web https://www.medi-site.fr/, last visited 31 Jan. 2017).
[7] The proposal received amendments from different committees: the Committee on Economic and Monetary Affairs, the Committee on Legal Affairs and the Committee on Internal Market and Consumer Protection.
[8] Therefore, the Member States need to establish a single information point that gives access to the intermediary register, and that links up with the competent authorities of each Member State and the European Insurance and Occupational Pensions Authority (EIOPA), which should create, update and publish an electronic database with the names of those who intend to operate in freedom of establishment or with freedom to provide services (Recital 24 IDD).
[9] Https://eiopa.europa.eu/Publications/Consultations/
EIOPA-CP-16-006_Consultation_Paper_on_IDD_delegated_acts.pdf
[10] The legislature considers both these reasons sufficient to strengthen and increase the interventionist powers of the Authorities.
[11] Furthermore, the IDD specifies the intermediaries to whom this regulation is applicable: agents, bancassurance brokers and operators, and also ancillary distributors (travel agencies and vehicle hire companies, unless they meet the conditions for exemption (Recital 8 IDD).
[12] The current coordination of contractual regulations and supervision regulations concerning protection for insured parties is insufficient, and along with this issue, we now have the need to coordinate them with the distribution regulations.
[13] These conditions are listed as follows: "*a) the insurance is complementary to the good or service supplied by a provider, where such insurance covers: i) the risk of breakdown, loss of, or damage to, the good or the non-use of the service supplied by that provider; or ii) damage to, or loss of, baggage and other risks linked to travel booked with that provider; b) the amount of the premium paid for the insurance product does not exceed EUR 600 calculated on a pro rata annual basis; c) by way of derogation from point (b), where the insurance is complementary to a service referred to in point (a) and the duration of that service is equal to, or less than, three months, the amount*

of the premium paid per person does not exceed EUR 200. In turn Article 2 (1) of the IDD defines 'ancillary insurance intermediary' as: "any natural or legal person, other than a credit institution or an investment firm as defined in points (1) and (2) of Article 4 (1) of Regulation (EU) n° 575/2013 of the European Parliament and of the Council, who, for remuneration, takes up or pursues the activity of insurance distribution on an ancillary basis, provided that all the following conditions are met: a) the principal professional activity of that natural or legal person is other than insurance distribution; b) the natural or legal person only distributes certain insurance products that are complementary to a good or service; c) the insurance products concerned do not cover life assurance or liability risks, unless that cover complements the good or service which the intermediary provides as its principal professional activity".

[14] This applies, for example, to travel insurance contracts sold by travel agencies or general insurance contracts sold by vehicle hire and lease companies that offer the option of buying the vehicle.

[15] This precept clarifies that the following shall: "*not be considered to constitute insurance distribution or reinsurance distribution: a) the provision of information on an incidental basis in the context of another professional activity where: the provider does not take any additional steps to assist in concluding or performing an insurance contract or the purpose of that activity is not to assist the customer in concluding or performing a reinsurance contract. b) the management of claims of an insurance undertaking or of a reinsurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims.*

c) the mere provision of data and information on potential policyholders to insurance intermediaries, reinsurance intermediaries, insurance undertakings or reinsurance undertakings where the provider does not take any additional steps to assist in the conclusion of an insurance or reinsurance contract;

d) the mere provision of information about insurance or reinsurance products, an insurance intermediary, a reinsurance intermediary, an insurance undertaking or a reinsurance undertaking to potential policyholders where the provider does not take any additional steps to assist in the conclusion of an insurance or reinsurance contract".

[16] OJ L 173, 12.6.2014, pp. 349–496.

[17] EIOPA and the national supervisory authorities can establish the guidelines for this type of sales.

[18] In this regard, the Committee on the Internal Market and Consumer Protection (IMCO) states *"in principle, intermediaries should be registered and something between registration and lack of registration should be avoided. It is also difficult to see that the procedure means any real simplification for the companies in question, given that the requirements in Article 8 have to be met"* .
(http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0085+0+DOC+XML+V0//EN, last visited 16 Jan. 2017). Amendments 278, 279 and 280 of the Committee on Economic and Monetary Affairs (ECON) were also established (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-504.392+01+DOC+PDF+V0//EN&language=EN, last visited 16 January 2017).

[19] In this way the new Proposal rectifies the omission in the previous texts of the IDM II that did not specify that the advice should be "personalised", as established in general for investment products. In any case, in our opinion it would be useful to highlight the difference between what is merely "providing information" and giving advice. Recommendation 221 of the ECON Committee also mentions this difference included in the definition of mediation when it states "*advisory activity should be considered a separate service aside from providing information and explanations about products"* (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-504.392+01+DOC+PDF+V0//EN&language=EN**,** last visited 16 Jan. 2017).

[20] Attention was given to the conclusions of the study on the quality of the advice offered throughout the EU (http://ec.europa.eu/consumers/rights/docs/investment_advice_study_en.pdf,

last visited 3 Apr. 2017)

[21] Advice to the European Commission on the revision of the Insurance Mediation Directive 2002/92/CE
https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/submissionstotheec/20101111-CEIOPS-Advice-on-IMD-Revision.pdf, last visited 16 Jan. 2017).

[22] The MiFID Directive has been the inspiration for the new insurance distribution regulations. In particular, this community Regulation states that investment services companies must have, as an organisational requisite, effective administrative and structural measures in place to prevent conflicts of interest as defined in its articles. If these measures are not sufficient, the companies must clearly disclose to the customer the general nature or the cause of the conflicts of interest before acting on the customer's behalf. Furthermore, these companies must have a clear conflicts of interest policy put down in writing and in keeping with the size and structure of the company and the nature, scale and complexity of its activity. A record must also be kept, listing the situations where there was the risk of a conflict of interest. The key element, therefore, of this system is to manage and prevent conflicts, not simply disclose their existence.

[23] In particular, Article 17 (3) of the IDD states explicitly that the Member States "*shall ensure that insurance distributors are not remunerated or do not remunerate or assess the performance of their employees in a way that conflicts with their duty to act in accordance with the best interests of their customers. In particular, an insurance distributor shall not make any arrangement by way of remuneration, sales targets or otherwise that could provide an incentive to itself or its employees to recommend a particular insurance product to a customer when the insurance distributor could offer a different insurance product which would better meet the customer's needs".*

[24] The inclusion of more detailed and transparent regulations concerning intermediaries' remuneration had been requested for years by some organisms like the European Consumer Organisation (BEUC). However, the European Commission decided not to include it, putting forward some rather unconvincing reasons, such as the fact that disclosing the amount of these fees to the customer would also reveal almost all the information concerning the relationship between the mediator and the insurance company. We must not forget that the Directive does not refer directly to the two main categories of insurance mediators existing in most European countries: agents and brokers. The argument given by the Commission about information on the fees charged by the mediator could make sense in the case of agents, but it cannot be upheld in the case of brokers.

[25] Both Recitals have been removed in the current IDD text.

[26] See the non-binding protocol on the insurance business, signed by the European Federation of Insurance Intermediaries (BIPAR) and the Federation of European Risk Management Associations (FERMA) on 23 November 2010 (Http://www.bipar.eu/en, last visited 31 Jan. 2017)

[27] In its research into this sector, the European Commission found that the so-called contingent commissions were not only present in many Member States in the past, but that it is not clear that they have been completed eradicated even now. Therefore, this is a problem which, from a substantive viewpoint, the current Directive has not managed to resolve, and, furthermore, there are significant differences between the different Member States. So, with things as they stand, one of the principal current debates revolves around whether these independent professionals can continue to receive commission from the insurers or should the same limits be applied to them as those applied to independent financial advisors allowing them to only receive professional fees from the customer. In this regard it must be stated that in cases of independent advisory services, the MiFID II prohibits the charging of commission, fees or any other monetary benefits paid or provided by a third party or by a person acting on behalf of a third party. However, the suppression of the commission applies to financial products, but not to insurance policies.

[28] This is a controversial issue, so much so that some Member States of Northern Europe have already seen in this option a way to make the broker's remuneration more transparent for

consumers. Between 2005 and 2008, Finland, Denmark and Norway prohibited companies from paying commission to intermediaries. However, this approach was flatly refused by many economic operators who consider the practice of receiving commission very firmly rooted in European markets, claiming that a change of this nature would be very costly for the sector.

[29]In recent years life insurance policies linked to real estate investment funds (known as Unit Linked Insurance Plans) have become increasingly common, marketed normally by credit and financial institutions through insurance companies and investment fund managers.

[30] OJ L 352, 9.12.2014, pp.1–23. These products known as PRIIPs (packaged retail and insurance-based investment products), as stated by the European Commission itself, need to improve the quality of the information given to customers interested in investing, "*because investment products are complex and it is difficult to compare them or fully understand the risks they entail; and the consequences of taking on unforeseen risks and bearing the subsequent losses can be devastating for the consumer, given that these investments are often the central element of a person's life savings".*

[31] Extensive analysis of this document was carried out by Willemaers, 2014.

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