

## EIOPA: Q&A (marzec 2021 r.)

### Question ID: 2270

- **Question:**

Does Article 30 IDD, and especially Article 30(1) IDD, apply to pre-23 February 2018 contracts, particular where any ongoing advice is given and therefore the periodic suitability provision will apply?

- **EIOPA's Answer:**

The answer to this question is provided by the European Commission.

Article 30 of the Directive 2016/97/EU (Insurance Distribution Directive – IDD) 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. This can, for instance, happen in cases where the insurance intermediary or insurance undertaking provides advice on the switching of underlying investment assets in an existing contract (see Article 9(7) of Delegated Regulation (EU) 2017/2359).

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### Question ID: 2269

- **Question:**

Will the national competent authority obligation to request information on conflicts of interest be applied retrospectively [in case that the intermediary is already registered]?

- **EIOPA's Answer:**

The answer to this question is provided by the European Commission.

Article 3(6) first subparagraph of the Directive 2016/97/EU (Insurance Distribution Directive – IDD) lists the information that will be requested “as a condition of registration” of insurance, reinsurance and ancillary insurance intermediaries. On the basis of this provision, national competent authorities are not obliged to actively request this information retrospectively, i.e. with respect to intermediaries which are already registered. However, since IDD is only intended as minimum harmonisation, Member States are free to provide stricter rules, obliging their competent authorities to request the information also from registered intermediaries. In any event, Article 3(6) second subparagraph IDD provides that intermediaries have to inform the competent authorities without undue delay of any change in the information provided under this paragraph. As from entry into application of the national provisions implementing the IDD, this obligation applies to all intermediaries, including those registered before the entry into application of the IDD.

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## Question ID: 2268

- **Question:**

Can a manufacturer be held responsible for consumer detriment if the product oversight and governance (POG) arrangements were adequate?

- **EIOPA's Answer:**

The answer to this question is provided by the European Commission.

Article 4(3) of the Delegated Regulation (EU) 2017/2358 (DA 2017/2358) provides that “the product approval process (POG) shall: (a) ensure that the design of insurance products meets the following criteria: (i) it takes into account the objectives, interests and characteristics of customers; (ii) it does not adversely affect customers; (iii) it prevents or mitigates customer detriment;”. Following recital 1 of DA 2017/2358, the fact that a further specification of the requirements of Article 25 IDD are set out in the form of Regulation “ensures a coherent framework for all market operators and is the best possible guarantee for [...] an appropriate standard of consumer protection”. The manufacturer’s compliance with Article 25(1) of the Directive 2016/97/EU (Insurance Distribution Directive - IDD) and the provisions of the DA 2017/2358, will not exclude the possibility that the manufacturer will be held responsible. In such a case, the manufacturer’s civil liability is a matter for national law and non-

compliance with the product oversight and governance provisions might be a relevant factor for a court to take into account.

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## Question ID: 2267

- **Question:**

Is product testing required for existing products? Is product review required for existing products?

- **EIOPA's Answer:**

The answer to this question is provided by the European Commission.

Both questions concern the application of the product oversight and governance rules set out in Article 25 of the Directive 2016/97/EU (Insurance Distribution Directive – IDD) to existing products (i.e. products which are already in the market at the date of application of the relevant national legislation transposing the IDD). Article 25(1) IDD provides that insurance undertakings, as well as intermediaries which manufacture any insurance product for sale to customers, shall maintain, operate and review a process for the approval for (1) each insurance product, or (2) significant adaptation of an existing insurance product before it is marketed or distributed to customers. The different requirements of Article 25 IDD are specified in more detail in the Delegated Regulation (EU) 2017/2358 (see, in particular, Article 6 on product testing and Article 7 on product monitoring and review). According to Article 4(1) of the Delegated Regulation (EU) 2017/2358, manufacturers have to maintain, operate and review a product approval process “for newly developed insurance products and for “significant adaptations of existing insurance products”. It follows that existing insurance products are only covered by the requirements of Article 25 IDD if they are subject to “significant adaptations”. For product which continue to be marketed without significant adaptations, manufacturers therefore do not have to comply with the product oversight and governance requirements. This applies to product testing and product review as the review is explicitly mentioned in Article 25(1) IDD as an element of the product approval process.

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## Question ID: 2266

- **Question:**

What could constitute a “significant adaptation of an existing product”?

- **EIOPA’s Answer:**

The answer to this question is provided by the European Commission.

Article 25(1) of the Directive 2016/97/EU (Insurance Distribution Directive – IDD) provides that “insurance undertakings, as well as intermediaries which manufacture any insurance product for sale to customers” have to apply a process for “for the approval of each insurance product, or significant adaptations of an existing insurance product [...]”. This means that manufacturers have to comply with the product governance requirements not only when they launch a newly developed insurance product but also when they significantly adapt one of their existing insurance products (see also Article 4(1) of the Delegated Regulation (EU) 2017/2358). An adaptation of an existing insurance product 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. An important criterion consists in the question whether the adaptation of the insurance product changes the compatibility of the product with regard to the target market and requires an adaptation of the target market. For example, the adaptation of the price and cost structure to inflation may be considered insignificant, whereas a price/cost increase which substantially impacts the return of an insurance-based investment product should be considered significant as this increase changes the return expectations of the insurance-based investment product.

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## Question ID: 2265

- **Question:**

Do the product oversight and governance (POG) requirements in Article 25 of the IDD apply to any insurance product independent from the question for how many customers the insurance product has been designed?

- **EIOPA's Answer:**

The answer to this question is provided by the European Commission.

According to Article 25(1) of the Directive 2016/97/EU (Insurance Distribution Directive - IDD), "insurance undertakings, as well as intermediaries which manufacture any insurance product for sale to customers" are obliged to comply with the product oversight and governance requirements set out in this provision for each insurance product. The obligation applies therefore to all kinds of insurance products. The article contains no elements that could justify an exclusion of "tailor-made" products designed for one customer or very few customers. This result is further confirmed by the explicit statement in recital 1 of the Delegated Regulation (EU) 2017/2351 that the product oversight and governance requirements set out in Article 25 IDD should apply to all insurance products "irrespective of the type of product and of the requirements applicable at the point of sale". However, the second subparagraph of Article 25(1) IDD specifies that "the product approval process shall be proportionate and appropriate to the nature of the insurance product".

The Delegated Regulation (EU) 2017/2351 states further in recital 2 that "product oversight and governance measures should be chosen and applied in a proportionate and appropriate manner, depending on the complexity of the product and the degree to which publicly available information can be obtained, taking into account the nature of the insurance product and the risk of consumer detriment related to it, the characteristics of the target market and the nature, scale and complexity of the relevant business of the manufacturer or distributor". An insurance undertaking or intermediary that manufactures a "tailor-made" product would therefore have to 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.

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## Question ID: 2264

- **Question:**

Article 15 of the Delegated Regulation (EU) 2017/2359 requires that the customer's knowledge and experience of a product must be assessed before a distributor can provide a product in accordance with Article 30(2) IDD. How is it expected that their knowledge and experience is assessed? Furthermore, how should be understood the phrase "experience in the investment field relevant to the specific type of product or service" of Article 30(1) IDD?

- **EIOPA's Answer:**

The answer to this question is provided by the European Commission.

Article 30(2) of the Directive 2016/97/EU (Insurance Distribution Directive - IDD) deals with assessment of appropriateness which has to be applied in cases where the customer has, in accordance with the applicable national law, waived the right to obtain full advice. In such cases, an insurance intermediary or insurance undertaking asks the customer or potential 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 or demanded to enable the insurance intermediary or the insurance undertaking to assess whether the insurance service or product envisaged is appropriate for the customer. Article 15 of the Delegated Regulation (EU) 2017/2359 (DA 2017/2359) requires that "insurance intermediaries or insurance undertakings shall determine whether the customer has the necessary knowledge and experience in order to understand the risks involved in relation to the service or product proposed or demanded".

Article 17 DA 2017/2359 provides a list of the information to be obtained by insurance intermediaries and insurance undertakings in order to be able to assess the customer's or potential customer's knowledge and experience in the relevant investment field following the requirement of Article 15 DA 2017/2359 and Article 30(1) and (2) IDD.

These are:

- (a) the types of service, transaction, insurance-based investment product or financial instrument with which the customer or potential customer is familiar;
- (b) 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;
- (c) the level of education, and profession or relevant former profession of the customer or potential customer. The IDD or DA 2017/2359 does not contain comprehensive rules on how this information has to be collected or assessed. It is left to insurance intermediaries and insurance undertakings to

organise the process of assessment in a way that allows it to determine with reasonable certainty that the product envisaged is appropriate for the customer.

The phrase “experience in the investment field relevant to the specific type of product or service” in Article 30(1) and (2) IDD 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. It follows that the relevant experience does not necessarily have to be acquired in transactions with the specific type of product or service, as long as the customer has knowledge and experience with the broader “investment field” to which the product belongs.

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## Question ID: 1760

- **Question:**

IDD, is this applicable for captives – could you outline the reasons why and where this is noted in the Directive?.

Have some European regulators specifically removed Captives from the scope of this Directive in their transposition.

There is confusion in industry here and its application to reinsurance and captives.

One opinion is that it applies to captives as Re/Insurance undertakings and therefore re/insurance distributors as customers includes consumers and commercial entities, and on this basis the management/directors of captives would be required to comply with Reg 20 i.e. F&P & CPD requirements. However the Central Bank have discretion to adjust its requirements where appropriate in respect of knowledge and ability.

Another opinion is that the following exemption mostly applies and so most not captured Information exemptions and flexibility clause

35. (1) An insurance distributor carrying out distribution activities in relation to the insurance of large risks is not required to provide the information required under Regulations 31, 32 and 34. ‘Large risks’ as defined in the Solvency II Directive include: marine, aviation, transport classes and contracts with

commercial policyholder of certain size (more than 250 employees, with turnover of more than €12.8m or balance sheet over €6.2m).

The Central Bank of Ireland won't provide any comment on its application. Is it a case that we might need to lobby to have captives removed from scop/exemption for captives with the Central Bank of Ireland, has any other EU country done similar?

- **EIOPA's Answer:**

The answer to this question is provided by the European Commission.

Following Article 1(1) of the Directive (EU) 2016/97 (Insurance Distribution Directive – IDD) the directive lays down rules concerning the taking-up and pursuit of the activities of insurance and reinsurance distribution in the EU. According to Article 1(2) IDD the directive applies to any natural or legal person established in a Member State involved in the distribution of insurance and reinsurance products.

Article 22(1), first subparagraph IDD provides that the information referred to in Articles 18, 19 and 20 IDD need not be provided when the insurance distributors carries out distribution activities in relation to the insurance of large risks<sup>1</sup>. Furthermore, Article 25 IDD does not apply to insurance products, which consist of the insurance of large risks. Besides these rules, Article 22(1), second subparagraph IDD gives Member States the option to decide that the information referred to Articles 29 and 30 IDD need not to be provided to a professional client as defined in point (10) of Article 4(1) of Directive (EU) 2014/65. As results from Article 1 IDD, reinsurance activities are, in principle, covered by the Directive, unless specific provisions refer explicitly to insurance activities. The IDD makes no reference to the concept of captive insurance nor does it provide specific requirements for captive insurance undertakings. This means that the legislator did not have the intention to make any distinction between insurance undertakings and captive insurance undertakings on the one hand and reinsurance undertakings and captive reinsurance undertakings on the other hand. Consequently, the provisions of the IDD apply fully to captive insurance and reinsurance undertakings. Article 30(2) IDD deals with the assessment of appropriateness, which has to be applied in cases where the customer has, in accordance with the applicable national law, waived the right to obtain full advice. In such cases, an insurance intermediary or insurance undertaking asks the customer or potential 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 or demanded to enable the insurance intermediary or the insurance undertaking to assess whether the insurance service or product envisaged is appropriate for the customer.

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