

Information Duties Stemming from the Insurance Distribution Directive as an Example of Faulty Application of the Principle of Proportionality

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1 Introduction

1.1 *The Argument*

IDD Directive has given rise to a number of difficult challenges for its implementation, among which numerous information duties imposed on all insurance distributors. Over the recent years, it can be observed that information duties became to the EU legislator a default ‘regulatory technique’ employed wherever the customer protection must have been strengthened. It is believed that they aspire to improve decisions customers make in their economic relationships and particularly to protect the inexperienced and marginally—literate from the industry professionals. Basically, the technique requires the insurance distributor to give the customer information which he may use to make better decisions and to keep the insurance distributor from abusing its superior position. Thanks to different information duties the customer is supposed to receive information for analyzing his choices critically and to choose optimally. Thus informed, he understands his choices well enough to make an intelligent decision about the insurance product he wants to purchase. This is a general reason justifying the need for transparency and information disclosures.

Information duties are ubiquitous. Not only are they introduced by IDD Directive, but they are also broadly employed by Solvency II Directive, PRIIPs Regulation, Distance Marketing Directive, MiFID, E-commerce Directive, General Data Protection Regulation to name just the major regulations governing the financial market.

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31

Undoubtedly, information duties address modern problem of customers who must face financial choices of many kinds while they are often not experienced enough to understand them. Eventually the customers conclude contracts they do not understand and cannot evaluate under terms they do not know. The reason why the EU legislator chose information duties as a technique that suits best to tackle the problem rests on a plausible assumption that when it comes to decision making, more information is better than less.¹

Although indeed information duties seem to be the right measure to tackle the problem, the academics and industry participants have for some time now been doubting that they accomplish their purpose.² To make things worse, it has been raised that not only do not they accomplish the purpose, but also create unnecessary negative effect. Such effect is called ‘information overload’ which might be as harmful as lack of information,³ to say the least. All these concerns give rise to specific questions: Is more information indeed better than less? If so, is there any limit to the amount of information where ‘more’ becomes ‘too much’? How does information affect customers’ choices in the financial market? How best to assess the utility of the information disclosed?

As the assumption—more information is better than less—does sound plausible but the reality does not seem to prove this assumption, the aim of this study is to demonstrate that the information duties, which the EU chose as a measure to tackle the problem of customer protection with is likely to be incompliant with the general principle of the EU law—principle of proportionality. Simultaneously, it should be underlined that the aim of this study is not to propose an alternative to the measure under scrutiny. The author believes that the information duties are necessary to maintain high level of customer protection, however, the following analysis raises doubts as to the way they are employed and therefore, it aspires to encourage legislators to take further steps to eventually tailor solutions to problems.

1.2 The Method

The study consists of three steps. The first one is to present the concept of the principle of proportionality which will facilitate to understand the rules of EU legislation and, most importantly, will give background for the core analysis of whether or not the information duties are proportional.

The second is to show the subject of analysis—an overview of the information duties introduced by IDD Directive, which will also serve to demonstrate how extensive and intensive the information to be provided is. The analysis is limited

¹Ben-Shahar and Schneider (2011), p. 650.

²E.g. Maśniak (2015), pp. 221–233; Jiang (2018), pp. 487–526; Kielholz and Nebel (2005), p. 36.

³Fung et al. (2008), p. 90.

to the information duties relevant for non-life insurance only. Moreover, the purpose of information disclosures will be addressed.

The last and the most important step is to address a question of whether the discussed information duties satisfy the requirements of proportionality principle and, consequently, whether they comply with the rules of high-quality legislation. To this end, so-called ‘proportionality test’ will be applied. As the verification of proportionality involves a variety of interdisciplinary knowledge, the author surveys the relevant literature.

This study joins the broad literature on the information in the insurance law and on the phenomenon of the ‘information overload’. Furthermore, it extends this literature by examining the problem from very different perspective—the EU legislation standards and policy efficiency.

2 Principle of Proportionality: What Does It Mean and How Do We Know It Is Respected?

The principle of proportionality is one of the general principles of the EU law which basically has two different scopes of application and meanings. The first one is partially stipulated in the Article 5(4) of TEU:⁴ ‘Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. It directly refers to the actions undertaken by the EU institutions which are verified in terms of their proportionality *ex ante* by the Regulatory Scrutiny Board and could be evaluated *ex post* by the European Court of Justice (‘ECJ’) within the judicial control of the validity of the EU measures. Besides the EU actions, proportionality is also applied to the legislative measures adopted at the national levels by the EU Member States. For the purposes of this study and further analysis, specific focus will be given only to the first approach, i.e. proportionality as an important requirement of EU legislation.

In order to prove that the information duties introduced by IDD Directive do not satisfy the requirements of the proportionality principle, the meaning of proportionality should be deciphered in the first place. Besides the above cited TEU provision, there is no other binding legal act which would provide for a clear definition of the principle of proportionality. Therefore, the modern understanding of proportionality mostly derives from the ECJ case law which was once summarized in famous case of National Farmer Union: ‘the principle of proportionality (. . .) requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be

⁴Treaty on European Union (OJ C 326, 26.10.2012, p. 13–390).

disproportionate to the aims pursued⁵. In other words, to safely claim that EU measure is proportional, the three requirements must be jointly met:

- i. EU measure is **suitable** (appropriate) to attain the desired objective;
- ii. EU measure is **necessary** to attain the desired objective;
- iii. disadvantages caused by adopting EU measure are acceptable compared to the benefits of the objective achieved (**proportionality *sensu stricto***).

Now, to consider the measure **suitable**, a causal link between that measure and the objective sought should be identified. The measure under review must be useful to attain properly the regulatory objective and it must not be out of proportion to that aim, which is well illustrated by the famous saying ‘one must not use a steamhammer to crack a nut’.⁶ The measure is **necessary** to attain the objective if the objective will not come about by itself and if the objective cannot be attained by other measures which are as useful and, at the same time, less harmful for other interests. Finally, in relation to **proportionality *sensu stricto***, proportionality requires that the measure—although it is recognized suitable and necessary, as compared with other possible measures—must nonetheless be abandoned, or replaced by another less appropriate measure, because of a substantial adverse impact on other interests, so much so that the advantages for which it is preferred over other measures are out of proportion to the harm caused to those other interests.⁷ Thus, it should be emphasized that proportionality *sensu stricto* is verified only if the measure was recognized both ‘suitable and necessary’ but the burden caused by that measure is more onerous than the benefits which are the added value of the regulatory measure.⁸

Interestingly, proportionality principle becomes of more and more interest within the insurance regulation. EIOPA has issued a report on the principle of proportionality⁹ in an insurtech context in which proportionality is indeed recognized as a principle applied throughout the EU law, including EU insurance law, both at the regulatory and supervisory level. However, a closer analysis of the report leads to the conclusion that proportionality addressed by EIOPA (‘insurance proportionality’) differs from proportionality principle discussed above (‘general proportionality’). The substantial difference regards appropriateness criterion (proportionality *sensu stricto*). Based on EIOPA report, appropriateness requires that the drawbacks of a measure are not totally disproportionate to the benefits it reaps in light of the nature,

⁵Judgement of the Court of 5 May 1998 In Case C-157/96, *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers’ Union, David Burnett and Sons Ltd, R.S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, Interstate Truck Rental Ltd, and Vian Exports Ltd*, ECR 1998, ECLI:EU:C:1998:191.

⁶See *R v. Goldstein* [1983] 1 WLR 151, p. 155.

⁷van Gerven (1999), p. 61.

⁸Craig (2012), p. 602.

⁹EIOPA, Report on best practices on licensing requirements, peer-to-peer insurance and the principle of proportionality in an insurtech context, Luxembourg: Publications Office of the European Union, 2019, p. 20.

scale and complexity of an undertaking's risk profile. In other words, a certain requirement is applied in a proportional manner if it is too burdensome for an undertaking to apply this requirement without relief. At the same time, while applying proportionality, the same level of customer protection has to be ensured.¹⁰ It seems thus that **insurance proportionality complements general proportionality** principle stipulated in the Article 5(4) of TEU and does not substitute it nor constitutes a different type of general proportionality. The author claims that complementary nature of insurance proportionality results from the fact that it is applicable when, as a result of balancing the benefits and damages of a certain measure, a significant burden for the undertaken has been identified but nevertheless accepted (i.e. balance is appropriate and therefore the measure is proportional within the meaning of general proportionality). Consequently, insurance proportionality serves to reduce the burden which has to be taken on in order to achieve the objective. While applying the insurance proportionality, it is assumed that a measure is proportional within the meaning of general proportionality. However, since this study focuses on the general proportionality, insurance proportionality will not be subject to further analysis.

Obviously, proportionality of a measure should be first analyzed at the stage of drafting legislation where, in fact, proportionality is applied as such. Results of such analysis should be included in the impact assessment report. The said report is subsequently verified by the Regulatory Scrutiny Board within the process of *ex ante* control which aims at doublechecking whether or not legislative proposals put by the European Commission comply with the principle of proportionality.¹¹ The so-called 'test of proportionality' has been developed by ECJ while dealing with disputes relating to incorrect application of proportionality. Longstanding application of the abovementioned test as well as its contribution to clarify the meaning of proportionality makes it reasonable to use this test for the purposes of this study.

3 Information Duties Set Out in the IDD

3.1 *What Stands Behind the Information Duties? Reasons for Implementation*

The policy of strengthening consumer protection on the insurance market being implemented over the recent years in the EU clearly refers to the works undertaken in

¹⁰Van Hulle (2019), p. 171.

¹¹Better regulation guidelines, Chapter III – Guidelines on impact assessment, available at: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en.

this area by G20 group¹² and is broadly consistent with its adopted model of protection. Obviously, what directly triggered taking radical steps towards improving consumer position on the financial markets in general was financial crisis of 2007–2010 which called into question an old belief in rationality of markets and financial institutions. It revealed that ‘no interference’ approach was not the best and the faith that the markets are effective enough when left to their own protection mechanisms has been completely destroyed. Also, since the consequences of financial crisis took its toll directly on the consumers, it has been noted that the paradigm of consumer’s rational choice¹³ simply did not work. The reasons are twofold. First, rational choice theory assumes an economic reality where disclosed information is transparent and understandable, while it is now clear that it is not always such.¹⁴ Second, making the market more transparent and giving the customers access to the market information is not enough to prevent them from irrational decisions often taken on the basis of e.g. their personal attitude, emotions,¹⁵ life circumstances, way of the product’s presentation¹⁶ or time of a day,¹⁷ instead of the given market information. In respect of insurance specifically, the behaviour of consumers is also based on subjective preferences. The decision of whether or not to take out insurance is closely related to the individual’s attitude towards the risk.¹⁸ Empirical studies proved that the average customer does not make a full use of all the received information¹⁹ as he does not have technical background²⁰ to understand modern financial products which often involve complex legal and economics mechanisms. High level financial and legal knowledge is actually required to make a sound choice.²¹

In the light of the above conclusions, it has been decided that the current customer protection regime focused mainly on **providing customer with information** should

¹²See e.g. G20 The Seoul Summit Document, G20 High Level Principles on Financial Consumer Protection, OECD, October 2011.

¹³According to the theory of rational choice it was assumed that, in principle, all the market participants are rational, and therefore are able to assess all the possible options by weighting their costs and benefits to eventually take economically justified decision which reflects best their preferences.

¹⁴Schwarz (2011), p. 98.

¹⁵On the influence of the emotions on the insurance choice see Kunreuther and Pauly (2018), pp. 335–355.

¹⁶On the influence of the insurance product’s presentation see Richter et al. (2019), p. 186.

¹⁷For more information on how decision making is differentiated depending on circumstances under which the decision is taken and on the individual itself see REP 632 A joint report from the Australian Securities and Investments Commission (ASIC) and the Dutch Authority for the Financial Markets (AFM): Disclosure: Why it shouldn’t be default. 14 October 2019, available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

¹⁸Loacker (2015), p. 20.

¹⁹Ben-Shahar and Schneider (2014), p. 3.

²⁰Ben-Shahar and Schneider (2011), pp. 649–749.

²¹Kim et al. (2013), p. 5.

be extended by measures which were to allow the customer to **understand the information** he was provided with.²² Improvement of financial education and methods of providing information within the sale process became a focal point of new customer protection model.

The need for strengthened consumer protection became even more urgent once the studies revealed household decision making is increasingly financialized which implies that financial stability no longer automatically just extend to concerns about the solvency and liquidity of banking institutions, but also extend to the financial stability of individual households.²³ Therefore, ineffective customer protection may jeopardize stabilization of the financial markets. Successful improvement of the current customer protection regime not only should be considered in the individual customers' interest but also in public interest.

Notwithstanding the lessons learnt from financial crisis, in particular the one which concludes that the mere provision of information is not most effective consumer protection measure, the disclosure and transparency measures were continued to be strengthened. This time, however, the emphasis was to be shifted from provision of 'mere market information' to provision of 'personally tailored information'. In other words, providers of financial services should additionally provide customers with the information on benefits and risks related to the product and, most importantly, while providing the information, the customer's financial goals, knowledge and experience should be taken into account. A prime example of such approach is IDD Directive²⁴ which introduces a considerable amount of information duties of different nature. Interestingly enough, the IDD information requirements are based on the information duties introduced earlier by MiFID II with respect to the financial instruments and investors protection. The purpose of MiFID II provisions is the same: protection of the investors against misselling of financial products as well as improving their investment choices.

3.2 Overview of the IDD's Information Duties Relevant for Non-Life Insurance

The information duties introduced by IDD Directive are primarily of precontractual nature and can be divided into the following categories:

- i. general information on the insurance distributor;
- ii. information on the insurance product;

²²Sovern (2010), p. 820f. The shift towards understanding of the information is also reflected in IDD Directive. See e.g. recital 42 of IDD Directive.

²³Bieri (2014), p. 7; Ring (2018), pp. 34–36.

²⁴Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)Text with EEA relevance, OJ L 26, 2.2.2016, pp. 19–59.

- iii. information on the complaints handling procedures, the out-of-court complaint and redress procedures;
- iv. identification of the customer's demands and needs and provision of advice or recommendation.²⁵

The first category—**general information on the insurance distributor**—consists of insurance distributors' obligations to provide the customer with the information which helps to identify the distributor and makes the customer aware of who is he concluding the contract with. With this respect the following disclosures should be made: (i) identity and address of the insurance distributor, (ii) whether it is an insurance intermediary or insurer, (iii) whether it provides advice about the insurance products sold, (iv) the register in which an insurance intermediary has been included and the means for verifying that it has been registered, (v) whether the intermediary is representing the customer or is acting for and on behalf of the insurer (Article 18 of IDD Directive).

Besides the information ensuring identification of the insurance distributor, the customer should be also informed on any circumstances which could potentially cause a conflict of interests affecting the way in which insurance distributor provides information or advice. To this end, the insurance intermediary is obliged to disclose the following information: (i) whether it has a holding, direct or indirect, representing 10% or more of the voting rights or of the capital in a given insurer or whether that insurer or its parent undertaking has such holding in the insurance intermediary; (ii) the nature of the remuneration it receives in relation to the insurance contract and, in certain cases, also the amount of the fee or the method of its calculation; (iii) in relation to the contracts proposed or advised upon, whether or not it gives advice on the basis of a fair and personal analysis and whether or not it is under a contractual obligation to conduct insurance distribution business exclusively with one or more insurers. If not, it is obliged to provide the names of those insurers with which it may and does conduct business (Article 19 of IDD Directive).

The second category pertains to **information on the insurance product**. Here, the relevant obligations are more complex and do not limit to provision of a mere information. Namely, the main focus is given to the way the information is provided. First and foremost, it should be objective and 'customer tailored' each time. '**Customer tailored' information** means that it is provided in a comprehensible form to allow the customer to make an informed decision. The exact way of presenting the information depends on the information obtained from the customer, complexity of the insurance product being proposed and the type of customer, which is determined by the general assessment of the customer's knowledge and experience (Article 20 sec. 1 and 2 of IDD Directive).²⁶

Secondly, besides the way of providing information should be each time adjusted to the personal type of customer, IDD Directive specifies the presentation methods as

²⁵The literature recognizes obligation to identify customer's demands and needs as a special type of information duty. See Szczepańska (2015), pp. 207, 208.

²⁶Pokrzywniak (2018), pp. 98, 99.

well. In relation to non-life insurance products,²⁷ the information should be provided by the way of a **standardised insurance product information document** ('IPID'). It is precisely stipulated what kind of information should IPID contains (Article 20 sec. 8 of IDD Directive) and how should it look like (Article 20 sec. 7 of IDD Directive and Implementing Regulation No. 2017/1469²⁸).

Additionally, certain information should be provided where an insurance product is offered together with an ancillary product or service which is not insurance (**cross-selling**). The customer should be informed whether or not it is possible to buy the different components separately (Article 24 of IDD Directive). Subsequently, depending on the situation, an adequate description of the different components, separate evidence of the costs and charges of each component, and in certain cases how interaction between the different components modifies the risk or the insurance coverage should be provided.

An important part of enhancing consumer protection plan is ensuring that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. To this end, financial services providers and authorised agents were obliged to have in place mechanisms for complaint handling and redress.²⁹ In this vein, to make customers aware of how to execute their rights, IDD Directive introduces an obligation to inform customers on the **complaints handling procedures, the out-of-court complaint and redress procedures** (Article 18 of IDD Directive).

As seen above, first three categories of information duties contribute to the customer protection mostly by providing customer with more information. Thus, it is reasonable to claim that they reinforce the old customer protection regime based only on market transparency and information disclosures. The last category though—**identification of the customer's demands and needs and provision of advice or recommendation**—seems to address the need for understanding the information provided and taking reasonable (informed and economically justified)

²⁷ Although the obligation to provide IPID regards only non-life products, the information provided with respect to life products should be still compliant with the requirements set out by the Article 20 sec. 1 and 2 of IDD Directive. In turn, a detailed way of providing information on insurance-based investment products in the form of KID (Key Information Document) has been included in Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, pp. 1–23) and Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents (OJ L 100, 12.4.2017, pp. 1–52).

²⁸ Commission Implementing Regulation (EU) 2017/1469 of 11 August 2017 laying down a standardised presentation format for the insurance product information document (Text with EEA relevance), OJ L 209, 12.8.2017, pp. 19–23.

²⁹ G20 High Level Principles on Financial Consumer Protection, OECD, October 2011, available at: <https://www.oecd.org/daf/fin/financial-markets/48892010.pdf> [visited: 12.07.2019], p. 7.

decision by the customer. The relevant obligations do not limit to mere provision of information but, more importantly, they make insurance distributors to process certain information for the customer. Namely, the insurance distributor should specify, on the basis of information obtained from the customer, the demands and needs of the customer and subsequently propose an insurance contract consistent with that demands and needs. Moreover, if an advice in respect of insurance contract is provided, 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 (Article 20 sec. 1 of IDD Directive). Wording of the discussed obligations seems to conclude that the liability and effort to ensure the desired 'understanding of information' has been attributed to the insurance distributors.

Finally, regardless content of the information, IDD Directive introduces a general rule due to which all the information provided should be fair, clear and not misleading, while marketing communications should always be clearly identifiable as such (Article 17 of IDD Directive).

4 Proportionality Test

The previous section has clarified that (i) effective **customer protection understood as making customer's decisions more reasonable and informed is a clear-cut objective**³⁰ of the EU's policy related to the financial markets and, (ii) in order to achieve this objective, the EU adopted certain **measures** among which **information duties** of different nature.

Once the objective and the measure have been identified, an attempt to verify whether or not the discussed measure is proportional can be made. The analysis presented below follows test of proportionality applied by the ECJ within the process of *ex post* control. In other words, first the author attempts to analyze whether the information duties introduced by IDD Directive (measure) are suitable and necessary to make customer's decisions more reasonable and informed (objective pursued by IDD Directive³¹). Subsequently, if the analysis results in confirming that the measure is both suitable and necessary, proportionality *sensu stricto* will be examined. For the sake of better presentation, the below analysis is summarized in the form of table. The table is inspired by the one used in the impact assessment reports which serve to analyze effectiveness and proportionality of the EU legislation.

³⁰It applies specifically to the IDD Directive. See: the European Commission, Commission Staff Working Document. Impact Assessment. Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Insurance Mediation, Strasbourg 3.7.2012, SWD (2012) 191 final, p. 27.

³¹See recitals 6, 7, 8, 10, 42, 44 of IDD Directive.

4.1 Are the Information Duties Introduced by the IDD Directive Suitable to Ensure the Customer's Protection?

To recap, the applied measure is deemed suitable only if it is possible to identify the **causal link between this measure and its objective** and if **the measure allows to achieve the intended objective**. A measure only fails to be suitable if it does not achieve any effect in relation to the intended objective or if it even hinders the achievement of that goal.³² Thus, partial realization of the purpose is enough. As it has been mentioned at the beginning, it is plausible to assume that more information is better than less. Manifestly, it is impossible for the customer to take a conscious and reasonable decision with respect to the insurance product he knows nothing about. Since the information is anything which reduces uncertainty, it is therefore desirable to provide it to the customer. The causal link between information duties has been already identified and discussed e.g. by OECD and EIOPA.³³ Furthermore, the causal link between the information received by the customer (particularly its clarity, non-ambiguity and completeness) and the customer's reasonability has been demonstrated.³⁴

In this case, suitability does not seem to be an issue. The above remarks supported with the institutional analysis should suffice to confirm that the broadly understood information duty constitutes a suitable measure to help customers take informed decisions and thereby to ensure customer protection.

4.2 Are the Information Duties Introduced by the IDD Directive Necessary to Ensure the Customer's Protection?

4.2.1 The Objective Will Not Come by Itself

To tackle the problem of necessity, it should be first clarified whether **the objective will not come about by itself**. Clearly, it cannot be reasonably expected that the customers will suddenly change the way they normally take the financial decisions if no steps will be taken in this respect. Furthermore, a lack of action at EU level not only would not achieve the objective but it could even result in an increase in the number of cases of misselling of insurance products and cases where consumers are

³²Wendland (2018), p. 335.

³³See e.g. G20 The Seoul Summit Document, p. 10, G20 High Level Principles on Financial Consumer Protection, OECD, October 2011, p. 6, EIOPA Consultation Paper on the proposal for Implementing Technical Standards on a standardised presentation format of the insurance product information document (EIOPA-CP-16/007), 2016.

³⁴Fras (2018), p. 191.

led to take undue risks.³⁵ This is, among others, why the concept of ‘legal information forcing’ has been introduced.³⁶

However, at this point, it should not be overlooked that as IDD Directive entered into force, numerous information duties have been already in place. The situation has been well illustrated by the European insurance and reinsurance federation—Insurance Europe which study demonstrates that besides IDD Directive’s information duties, over 100 of disclosure requirements exist under other insurance related regulations.³⁷ Interestingly, not only does the study prove the abundance of the information duties but it also shows that they duplicate to certain extend. Bearing this in mind, a fair question to ask is whether the objective in question would have come by the means of former information duties implemented prior to the current ones.³⁸ If so, were IDD Directive’s information duties necessary to achieve the objective? The author believes that the answer is negative, because the objective would have already been achieved. Following on from this argument, it could be assumed that IDD Directive’s information duties serve here to improve the objective—not to achieve it. However, if that is the case, they would risk contributing to the information overload (see subparagraph 4.2.3. below). Nevertheless, since no study on the effectiveness of the information duties implemented prior to the IDD Directive has been made, this line of thinking is purely speculative.

4.2.2 The Objective Cannot Be Achieved by Other Measure Which Is as Useful as Measure Applied and Less Harmful for Other Interests

The decision on whether the measure is necessary needs to be preceded with confirmation that the objective cannot be achieved by other measure which is as useful as measure applied and less harmful for other interests. In terms of enhancing the process of customer’s decision making within the financial market, a great potential has been attributed to **financial education**.³⁹ Certainly, it is recognized as a measure which is useful to help customers taking reasonable financial decisions.⁴⁰ It is believed that financial education improves financial literacy defined as a

³⁵Lack of information can also result in misallocation and adverse selection. See: Locker (2015), p. 57.

³⁶Locker (2015), p. 22 et seq.

³⁷A. Hilliard, Issues arising from the implementation of the IDD, 7th AIDA Europe Conference, Warsaw, 13 April 2018, presentation available at: <http://www.aida.org.uk/docs/Issues%20Arising%20from%20the%20Implementation%20of%20the%20IDD.pdf> [visited: 12.07.2019].

³⁸The author does not find any study which would evaluate the effectiveness of the information duties which have been in place so far.

³⁹See e.g. G20 Leaders’ Declaration, Sankt Petersburg 2013, pp. 19–20; 2014 Financial Inclusion Action Plan, 14 November 2014, p. 2. On financial education and its importance in the field of insurance see Xiao and Porto (2019), pp. 20–35.

⁴⁰Kim et al. (2013), p. 5.

combination of financial awareness, knowledge, skills, attitude and behaviors necessary to make sound financial decisions and ultimately achieve individual financial wellbeing.⁴¹ However, one could rightly note that, in contrast to information duties, it takes more time for financial education to achieve the objective. Possibly, this is the reason why financial education has been always considered supportive measure rather than the principal one.

If it is assumed that financial education is as useful as information duties, then the possible burdens that both measures bring should be compared. The comparison can be made with respect to costs each measure creates and their potential negative side effects. In terms of expenditures, it can be presumed that introduction and realization of financial education program would be more costly (though this should be subject to the economic analysis) and the burden of costs would be possibly shifted to the governments—not private entities. On the other hand, so far, no negative effect of financial education has been identified, while again, a major risk associated with information duties is information overload (see subparagraph 4.2.3. below).

4.2.3 Totality of Regulation

Whether or not the measure is necessary should be also verified from the perspective of totality of regulation which is believed to prevent from overlooking potential disproportion of the whole regulation while perfecting proportionality of particular provisions.⁴²

According to the literature on proportionality, **the necessary regulation cannot cause unnecessary negative effects.**⁴³ Considering the negative effects of specific single information duty, it would be probably hard to indicate one. However, taking into account the totality of regulation and all the information duties introduced the conclusions may change dramatically. Indeed, what may be considered here as **unnecessary negative effect is the risk of information overload.**

The information overload within the context of insurance services has been already addressed.⁴⁴ It arises when the information provided is too numerous and complex to handle effectively. In terms of its consequences, it can be expected to be as harmful as lack of information. Why is it such a serious problem now and what

⁴¹Atkinson and Messy (2012), p. 13.

⁴²Proportionality in Bank Regulation. A Report by the EBA Banking Stakeholder Group, p. 22. The aim of EBA Report is to offer alternative test of proportionality to improve application of proportionality in bank regulation. In this vein, ‘totality of regulation’ and ‘excess complexity’ have been proposed by the Banking Stakeholder Group of the European Banking Authority as an alternative criterion applied while assessing proportionality of bank regulation. Although the Report regards banking regulation, considerations presented therein may be equally applicable to the insurance regulation.

⁴³Leanerts and van Nuffel (1999), p. 108.

⁴⁴See e.g. Frank and Lamiraud (2009), pp. 550–562; Maśniak (2015), pp. 221–233; Kim et al. (2013), pp. 3–13.

might be the consequences of information overload? For one thing, the information age has off-loaded a great deal of the work previously done by professionals (e.g. insurance distributors, travel agents) onto all of the customers. A lot of service normally expected from companies has been transferred to the customer who, in order to render that service must receive, understand and process an unprecedented amount of information.⁴⁵ Beyond doing more work, i.e. dealing with continually increasing amount of information, the customers have to face more *changes* in information. This not only refers to e.g. insurance terms and conditions which may be subject to periodical amendments, but also to the form the information is provided in, e.g. IPID. Finally, living in a global economy exposes people not only to large amounts of information (the quantitative dimension) but also to information of very different types (the qualitative dimension),⁴⁶ which only adds to the difficulty of managing information received. The following situation may serve as an example of the above: a person seeking for non-life insurance coverage in Poland receives (i) **a full text of general terms and conditions** of insurance contract. These general terms and conditions are additionally accompanied with (ii) the **so-called “index”** in a form of table which is supposed to indicate the most important provisions of the GTC relevant for the customer to take an informed decision.⁴⁷ Currently, under IDD Directive the customer is also receiving (iii) **IPID**. Theoretically all these three documents contain the same information yet in a different form. Last but not least, in addition to this information regarding only non-life insurance product itself, the customer receives **information on the insurance distributor**. Information of different type and level of complexity, not to mention its amount.

The effects of information overload have been examined and the findings suggest that **too little information is no good, but so is too much**. In other words, the **customers** have finite limits for how much information they can absorb and process which leads to the fundamental conclusion that they **make faulty choices with more information**.⁴⁸ The literature confirms it by giving the example of the abovementioned index. Namely, it is claimed that instead of having better understanding of GTC, index makes customers confused and even more reluctant to read or understand GTC.⁴⁹ What additionally strengthens harmful effect of information

⁴⁵Illich (1981).

⁴⁶Overbye (2012), p. D3; Eppler and Mengis (2004), p. 5, 327.

⁴⁷Obligation to include index in the general terms and conditions results from the Article 17 of the Polish act of 11 September 2015 on insurance and reinsurance activity (Journal of Laws of 2019, item 381 as amended).

⁴⁸Not only decision quality and effectiveness are lowered due to information overload. Extensive analysis of the phenomenon shows a variety of negative effects, among which ignorance and high selectivity of information, loss of control over information, misinterpretation, loss of differentiation etc. See: Eppler and Mengis (2004), p. 5, 333; Jacoby (1977), pp. 569–573; Jacoby et al. (1974), pp. 33–42.

⁴⁹Krajewski (2017).

overload is the fact that people are unable to ignore information that is irrelevant or incomprehensible.⁵⁰

Having formulated the problem, the researchers started to search for the answer to the following question: how much information or complexity is optimal? Optimal complexity theory states that there is an inverted U function which can serve as a practical tool to assess the optimal amount of information needed to take a reasonable decision. The theory has been also proved empirically in a military exercise simulation.⁵¹ These results have been further developed in another theory of George A. Miller known as “Magical Number 7”⁵² which proves that human ability to process several information units at the same time is limited to 7 ± 2 units.

Another important study proves that the customer makes better decisions if he can choose which parameters to receive information about and how much.⁵³ It is justified by the fact that the customer can better choose information which is relevant to him but, most importantly, which he is best able to understand. *A contrario*, it results that the information which is irrelevant or incomprehensible causes information overload and interferes with making reasonable decision.

Finally, not only does information overload affect final result of decision-making, but primarily it tends to have negative impact on the already existing and processed information by eliminating it or by causing confusion.⁵⁴

The totality of information duties may be burdensome also from the insurance distributors’ perspective. Due to the recent surveys, the heavier regulation is perceived by the insurers as one of the greatest **entrepreneurial risk**.⁵⁵ Their main doubts arise over implementation costs and risk of compliance. The more numerous and complex is regulation, the higher is the risk.

4.2.4 Excess Complexity

Considering the problem through the totality of regulation (the quantitative dimension) encourages to assess necessity of the measure also through the prism of its complexity (the qualitative dimension). It should be determined **whether the measure is excessively and unnecessarily complex for the objectives** that are sought.⁵⁶ Is all the **content of information** provided to the customer under IDD Directive

⁵⁰Kahneman et al. (1982).

⁵¹For details on the military exercise simulation see: Streufert et al. (1965), p. 736.

⁵²G. A. Miller, The Magical Number Seven, Plus or Minus Two: Some Limits on our Capacity for Processing Information, *Psychological Review*, 63, pp. 81–97, available at: <http://psychclassics.yorku.ca/Miller/>.

⁵³Ariely (2000), pp. 233–248.

⁵⁴So called “information cannibalism”. See: Loacker (2015), p. 118.

⁵⁵Insurance Banana Skins 2019, The CSFI survey of the risks facing insurers, <https://www.pwc.com/gx/en/financial-services/assets/pdf/insurance-banana-skins-2019.pdf> [visited: 20.07.2019].

⁵⁶Proportionality in Bank Regulation, A Report by the EBA Banking Stakeholder Group, pp. 24, 25. See supra note 27.

indeed necessary for the customer to take fair decision? Would each customer be able to properly interpret and use the fact that an insurance intermediary has a holding representing 10% or more of the voting rights or of the capital in a given insurer? If disclosure of a particular information is intended to enhance the customer's ability to make decision, then his capacity to understand how the disclosed information is relevant to making decision becomes critical.⁵⁷

Due to the survey by the financial services regulators in the U.K. and U.S., the main problem of the financial services customers is not a lack of information—quite opposite: what creates customers' confusion is too much information of a complex nature.⁵⁸ Clearly, what serves transparency (e.g. the above information on holding) does not always enhance understanding and legibility.

Finally, the ability of coping with the sheer amount of data and drawing the right conclusions is questioned not only with respect to the customers but also to other market players and supervisors. It is believed that overly complex regulations which generate a false sense of thoroughness may result in being a real source of **systemic risk**. It is argued that disclosure of too much information could actually reduce the effectiveness of previous disclosures⁵⁹ and ultimately reduce transparency.⁶⁰

4.3 Is There an Appropriate Balance Between the Damage Suffered by the Customers (e.g. Consequences of the Information Overload) and Insurance Distributors (e.g. Costs) and the Benefit Obtained by Achieving Enhanced Customer Protection as a Consequence of Introducing the Information Duties?

Usually, when assessing proportionality of a measure, ECJ limits proportionality test to the test of suitability and necessity as they mostly give enough arguments to decide. Thus, the third test—proportionality *sensu stricto*—is used rarely. The same could happen also in this case. Previous paragraphs challenge information duties particularly as to their necessity in the sense of their amount and complexity. Following this, one could go a step further and claim that considering totality of regulation and the effects of information overload, information duties (as they are applied currently) cannot be recognized as necessary measure. Consequently, information duties do not result to be proportional and no need of proportionality *sensu stricto* test occurs.

⁵⁷Ben-Shahar and Schneider (2011), p. 743.

⁵⁸Diacon and Ennew (2001), p. 391.

⁵⁹Jiang (2018), p. 503.

⁶⁰Nebel (2004), p. 282.

Nevertheless, regardless the above possible assumption, it is worth to discuss at least one aspect of proportionality *sensu stricto*—the problem of **excessive burden** of the measure. With respect to the information duties, it seems that excessive burden could be considered in two situations: first—the negative effects of information overload (which have been already addressed) and second—costs. In terms of costs, a fair question to ask would be whether the expenditures made to adjust the insurance distributors' activity to the new requirements (information duties) are excessively burdensome for insurance distributors and especially for those who fall into small and medium-sized enterprises category.⁶¹ Although EIOPA settled out its first impressions of the impact and costs of introducing a standardized presentation format for the IPID,⁶² it is still hard to find a full costs assessment which would include all the newly introduced information duties.

5 Concluding Remarks

The above-presented test, modelled on the test of proportionality applied by the ECJ, examined proportionality of the information duties stemming from IDD Directive, relevant for non-life insurance only. The main result of the analysis is that **the measure (information duties) seems to be overused and thereby becomes disproportional**. Different empirical studies presented in this chapter support the thesis that the amount of information exceeds the insurance distributor's ability to describe it intelligibly and the customer's ability to understand it usefully. Consequently, information duties mostly fail to achieve the objective. The study also confirms previous academics' concerns about the necessity and expediency of the excessiveness of current insurance regulation in general.⁶³ On the side note, it is worth mentioning that the results of this study are likely to be even more evident if the study examines information duties relevant for life insurance, including investment based insurance products, as in this case IDD and other insurance regulation provide for additional number of even more complex information duties.

Summary of the above conducted test of proportionality has been also presented in the form of table which allows to grasp the whole picture (see Annex). The table identifies key elements of the test (i.e. objective, measures allowing to achieve the objective, benefits and detriments caused by each measure) in the first place. Having identified these elements, the table should be read as follows. First, a baseline

⁶¹The existing economic studies argue that the obligations relating to information entails substantial non-recurring and ongoing administrative expenditures not only for the distributors but also for the competent authorities of the member state and the customers themselves. See: Köhne and Brömmelmeyer (2018), p. 732.

⁶²EIOPA, Consultation Paper on the proposal for Implementing Technical Standards on a standardised presentation format of the insurance product information document, EIOPA-CP-16/007, 1 August 2016, pp. 28, 29.

⁶³Köhne and Brömmelmeyer (2018), p. 705.

scenario (measure No 0) is to prove that the objective will not come by itself and lack of action would only cause further detriments. Hence, an action is needed. Second, appropriateness of the measures No 1, 2 and 3 is assessed by comparing their benefits and detriments. As a result, it should be possible to tell whether the benefits of chosen measures outweigh its detriments. In order to do so, the benefits and detriments should be balanced, which may seem an impossible task. Namely, the biggest problem the balancing entails is to quantify both benefits and detriments. A certain value should be attributed to each benefit and detriment, taking account of the ultimate objective. Clearly, the subjectivity of this task only adds to its difficulty. For this reason, the table does not suggest any value and it is left to the reader to subjectively assess the overall balance.

Besides the balancing of benefits and detriments, each measure should be additionally assessed in terms of costs it generates. Cost effectiveness has been included in the table as a separate column, although, it could be rightly argued that costs constitute another detriment. Nevertheless, the costs have been separated for one major reason. Contrary to the abovementioned benefits and detriments, costs are quantifiable. Hence, it is possible to objectively compare costs generated by each measure. Here, the economic analysis may be of help. In fact, economic analysis should be an integral part of the test of proportionality as proportionality is believed to be more economical principle rather than legal one.⁶⁴ The table does take into account cost assessment factor, however, due to lack of the relevant information, the test cannot be recognized as completed in this part. Speaking of costs, it may be interesting to mention here the results of the study presented by the German government which recognized the 100 most costly information duties imposed by national law.⁶⁵ The study shows that the pre-contractual info duties are at 13th place, while the information to be provided during the duration of the insurance contract takes 8th place on the overall list. Noteworthy is also the fact that the study concerned only standardized information, which is considered cheaper than the individualized one.⁶⁶

Despite the part regarding cost effectiveness, the author tried to compare the benefits and detriments on the basis of the weight of the evidence (empirical studies) and the importance of each factor. The majority of detriments are empirically proven while the benefits, which were indicted in the IDD Directive's impact assessment, often seem to be purely intuitive. Although a fair cost-analysis is needed to complete the results of this test, the author argues that the overall analysis questions proportionality of information duties. The test proves that the information duties are suitable to attain the objective, however, the same is not true for the test of necessity. Furthermore, even if one assumes that there is an appropriate balance between the benefits and detriments, it is still impossible to accept proportionality of the EU measure as it does not fulfil all three requirements jointly, i.e. lack of necessity. The

⁶⁴See e.g. Portuese (2013).

⁶⁵BT-Drucks 16/6826 of 24.10.2007.

⁶⁶Loacker (2015), p. 44, 45.

author is aware that in order to successfully challenge the measure adopted by the EU, it needs to be *manifestly* inappropriate,⁶⁷ which information duty is surely not. Nevertheless, assuming that information duties do not comply with the principle of proportionality, the study would provide grounds to challenge the concept of disclosures and would serve as an incentive to revise totality of information duties included in the insurance regulation at both European and national level. For the potential process of revision, it is necessary to take into account the results of the insights from the neuroscience and behavioral economics which clearly show that it is next to impossible to fully control or influence the customer's decision making in a way that he or she would take only rational decisions. Bearing this in mind, the EU legislator would consider shifting from forcing further information requirements to searching for other measures which would improve the efficiency of information duties that are already in force—e.g. **financial education**. Benefiting from information duties naturally requires a certain willingness to read and understand the information provided. This, however, should not be taken for granted. Various studies have consistently found that consumers are often (apart from their difficulties in understanding the information provided) not willing to read the given material. In the insurance field this applies not only to general terms and conditions but also to rather short and clearly arranged documents like the key features documents.⁶⁸ One possible reason for which people are reluctant to read anything (even perfectly designed information) is that the insurance is unknown to majority of customers. **One is reluctant to a concept that he does not know nor understand.** Implementing financial education at the very beginning of basic education may serve as a tool to eliminate that reluctance and successfully improve the decision making of the next generation of customers.

Finally, the above analysis sheds some light on the quality of legislation. As it was depicted in the first paragraphs, the tendency to protect customer by 'feeding' him with more and more information of different forms and nature can be traced to the financial crisis of 2007–2010. This only proves the observance that 'catastrophes are probably the most important catalysts of new regulation'.⁶⁹ Having said this, it is also worth noting that a regulation which acts as a response to a market failure tends to be more severe in terms of quality and quantity. Bearing this in mind, it can be feared that growing adoption of transparency measures and information disclosures, including those introduced by the IDD Directive, result from political pressure, and a sense of duty to regulate rather than an in-depth search for the best measure preceded with a due impact assessment. If this is the case, it should not come as a surprise that the effectiveness or burden of information duties are rarely inquired. Even the available impact assessment report does not reflect much on the problem and proportionality of all the new information duties is rather taken for granted.

⁶⁷Tor-Inge Harbo (2015), p. 24.

⁶⁸Loacker (2015), p. 112.

⁶⁹Bardach and Kagan (2017), p. 23.

Annex I

TEST OF PROPORTIONALITY

PROBLEM: insurance coverage incompliant with customer's demands and needs → lack of the insurance coverage → negative influence on stabilization of financial market

MEASURE	OBJECTIVE		COST EFFECTIVENESS
	GENERAL OBJECTIVE: customer protection SPECIFIC OBJECTIVE: making customers' financial decisions more reasonable and informed by facilitating understanding the information and mechanisms		
	BENEFITS (EFFECTIVENESS)	DETRIMENTS (NEGATIVE EFFECTS)	
0 – Take no action (Baseline scenario) ⁷⁰	0	<ul style="list-style-type: none"> – identified problem will persist and could be aggravated by future market developments⁷¹ – increase in the number of cases of mis-selling of insurance products and cases where customers are led to take undue risks⁷² 	N/A
1 – Information disclosures (i), (ii), (iii)	+ enhanced trust to insurance distributors ⁷³ and higher transparency ⁷⁴ (i), (iii) + clarity with regard to the principle-agent	<ul style="list-style-type: none"> • INFORMATION OVERLOAD and its consequences: <ul style="list-style-type: none"> – increased confusion – decision effectiveness (accuracy and 	Potential system changes are needed to enable these disclosures. Yet it is estimated that the costs related to the

(continued)

⁷⁰The aim of the baseline scenario is to answer the question of whether the objective will come by itself and to explain how the current situation would evolve without additional regulatory intervention.

⁷¹European Commission, Commission Staff Working Document Executive Summary of The Impact Assessment Accompanying the document Proposal for the Directive of European Parliament and of the Council on Insurance Mediation (SWD/2012/0192 final), Strasbourg, 3.7.2012, pp. 24, 25.

⁷²Ibidem.

⁷³Ibidem p. 18.

⁷⁴Ibidem, p. 42.

TEST OF PROPORTIONALITY

	relationship, including how this may impact on advice ⁷⁵ (i) + facilitating comparison of insurance covers and prices ⁷⁶ (i), (ii) + improved understanding and identification of the most important pieces of policy information (comprehensibility) by introducing standard presentation of IPID ⁷⁷ (ii)	quality) lowered – increased difficulty in identification and selection of relevant information – loss of control over information – lack of critical evaluation and superficial analysis – loss of differentiation – higher time requirements for information handling • extension of sale process (iv) • administrative burden (compliance risk) • systemic risk • entrepreneurial risk	disclosures are not excessive. ⁷⁸ The initial analysis results in non-excessive costs. ⁷⁹
2 – Identification of the customer’s demands and needs and provision of advice or recommendation (iv)	+ enhanced customer’s choice, confidence and quality of service received + improved comparability of offers ⁸⁰ + improved understanding by customers of the services and products on offer ⁸¹		Subject to further cost analysis
3 – Financial education programs	+ improved financial literacy	0	Subject to further cost analysis

Source: Produced by the author

⁷⁵Ibidem, p. 42.

⁷⁶Ibidem, p. 42.

⁷⁷EIOPA, Final Report on Consultation Paper no. 16/007 on draft Implementing Technical Standards concerning a standardised presentation format for the Insurance Product Information Document of the Insurance Distribution Directive, EIOPA-BoS-17/055, 7 February 2017, p. 28. Interestingly, Poland has introduced similar measure prior to IPID (pl. skorowidz) which failed to achieve the objective.

⁷⁸Ibidem, pp. 45, 49.

⁷⁹Ibidem, pp. 30, 31.

⁸⁰European Commission, Commission Staff Working Document Executive Summary of The Impact Assessment Accompanying the document Proposal for the Directive of European Parliament and of the Council on Insurance Mediation (SWD/2012/0192 final), Strasbourg, 3.7.2012, p. 71.

⁸¹Ibidem, p. 71.

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