

# Implementing IDD across the EU—first findings and the way forward

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**Abstract** The Insurance Distribution Directive might be dysfunctional in substantial areas of the insurance value chain, ranging from product development to after-sale services. Practical examples are fundamental conflicts with Solvency II, confusion of distribution and claims management, disproportionate complexity for B2B, one-size-fits-all for insurance and investment products, barriers to existing customers, disruption of the digital customer journey, and a monoculture of group insurance contracts. This article provides for a preliminary analysis and identifies potential issues for review at a later stage.

**Keywords** Insurance · European Union · Distribution

## 1 Introduction

Founded in 1824, Vienna Insurance Group serves more than 20 million retail and corporate customers through life and general insurance undertakings in 25 countries, among them 14 Member States of the European Union: Austria, Bulgaria, Croatia, Czech Republic, Estonia, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. This article is based on empirical evidence from implementing the Insurance Distribution Directive<sup>1</sup> in these countries.

<sup>1</sup>Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution [2016] OJ L 26/19, hereinafter referred to as ‘IDD’.

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The complete set of IDD provisions was available in the Official Journal of the European Union by 21 December 2017. This was effectively leaving the insurance industry with only two months of implementation time—instead of two years—until the original application date 23 February 2018. Therefore, the European Commission proposed a seven-month delay.<sup>2</sup> Finally insurance undertakings and insurance intermediaries in the European Union have to apply the IDD from 1 October 2018.<sup>3</sup>

The implementation of new regulation requires substantial resources next to daily business—all the more, predictability and legal certainty are key. Taking into account the nature of the multi-level legislation process,<sup>4</sup> future Union acts should provide for

- a) separate implementation and application dates of the basic legal act (Level 1) and
- b) at least a one-year-period between entry into force and application of Delegated Acts (Level 2)

in order to ensure that all relevant legal provisions on European and national level are available in good time to all stakeholders.

## 2 First findings

The current version of the IDD and consequently its national implementations, applications, and enforcements might be dysfunctional for the following reasons: fundamental conflicts with Solvency II (see Sect. 2.1), confusion of distribution and claims management (see Sect. 2.2), disproportionate complexity for B2B (see Sect. 2.3), one-size-fits-all for insurance and investment products (Sect. 2.4), barriers to existing customers (see Sect. 2.5), disruption of the digital customer journey (Sect. 2.6), and a monoculture of group insurance contracts (see Sect. 2.7).

A clear point of attention relates to the interaction of the IDD with other key pieces of legislation, such as: the Directives ‘Solvency II’,<sup>5</sup> ‘Distance Marketing’,<sup>6</sup> and ‘E-

<sup>2</sup>This delay was published in the Official Journal of the European Union a month after the original application date, followed by the delay of the Delegated Acts another month later, cf. Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2016/97 as regards the date of application of Member States’ transposition measures, COM(2017) 792 final, 20.12.2017 and Commission Delegated Regulation (EU) 2018/541 of 20 December 2017 amending Delegated Regulation (EU) 2017/2358 and Delegated Regulation (EU) 2017/2359 as regards their dates of application [2018] OJ L 90/59.

<sup>3</sup>Directive (EU) 2018/411 of the European Parliament and of the Council of 14 March 2018 amending Directive (EU) 2016/97 as regards the date of application of Member States’ transposition measures [2018] OJ L 76/28, Art. 1 para. 1.

<sup>4</sup>Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Arts. 288–290.

<sup>5</sup>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) [2009] OJ L 335/1, hereinafter referred to as ‘Solvency II’.

<sup>6</sup>Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L 271/16, hereinafter referred to as ‘DMD’.

Commerce’<sup>7</sup> as well as the Regulations ‘PRIIPs’<sup>8</sup> and ‘Rome I’.<sup>9</sup>

## 2.1 Fundamental conflicts with Solvency II

The basic principles of insurance are solidarity and risk pooling.<sup>10</sup> Accordingly, the main objective of insurance regulation is the adequate protection of policyholders, *i.e.* the community of insured.<sup>11</sup> Unlike other financial sectors, the interests of insurance customers comprise individual and collective interests which need to be duly balanced. Therefore, insurers are required to monitor their portfolio mix from an aggregate perspective. In further consequence it is essential for insurers to influence this portfolio mix, *e.g.* by targeting specific groups of customers through distribution.

However, neither Level 1 nor Level 2 of the IDD reflects the basic principles of insurance. Quite the contrary, the IDD essentially requires distributors to focus exclusively on their new customers.<sup>12</sup> Favouring the interest of a group of customers—like the community of insured—potentially even satisfies the criterion of a conflict of interest.<sup>13</sup>

In a worst case scenario the current version of the IDD forces insurers to choose between compliance with Solvency II or IDD. In order to restore consistency between prudential and conduct of business regulation, the ‘best interests of the customers’ have to comprise both, individual and collective policyholder interests which need to be duly balanced. This reflects the insurers’ fiduciary duties towards their customers.

## 2.2 Confusion of distribution and claims management

Which group of persons is affected by the IDD? In 2012 the European Commission proposed to include ‘claims management activities by and for insurance undertakings’ into the IDD.<sup>14</sup> However, the European legislator decided to explicitly exclude them.<sup>15</sup>

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<sup>7</sup>Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1, hereinafter referred to as ‘E-Commerce’.

<sup>8</sup>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) [2014] OJ L 352/1, hereinafter referred to as ‘PRIIPs’.

<sup>9</sup>Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, hereinafter referred to as ‘Rome I’.

<sup>10</sup>EIOPA acknowledged their importance for product oversight and governance as well as for conflicts of interest; cf. EIOPA Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, EIOPA 17/048, 1.2.2017, p. 13 and 36.

<sup>11</sup>Solvency II, Recital 16 and Art. 41(1).

<sup>12</sup>IDD, Art. 17(1).

<sup>13</sup>Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products [2017] OJ L 341/8, Art. 3(2)(b), hereinafter referred to as ‘IBIPs DA’.

<sup>14</sup>Proposal for a Directive of the European Parliament and of the Council on insurance mediation COM/2012/0360 final, 3.7.2012, (‘IMD II’), p. 7.

<sup>15</sup>IDD, Recitals 14 and 31, Art. 2(2)(b).

A source of confusion is the definition of ‘insurance distribution’ that builds on the definition of ‘insurance mediation’ from 2002. This definition includes the term ‘assisting in the administration and performance of such contracts, in particular in the event of a claim.’<sup>16</sup> It followed the hybrid logic that the same insurance intermediary involved in the conclusion of the insurance contract should also be able to assist the customer in the event of a claim.

However, in the context of an insurance undertaking, distribution and claims management activities are typically carried out by separate units. As the IDD now includes insurance undertakings, the hybrid logic from 2002 cannot be applied one-to-one. It is the IDD’s main objective and subject matter to cover distribution activities, not the maximum of the insurer’s own employees.<sup>17</sup>

### 2.3 Disproportionate complexity for B2B

Since 2002, Union law separates B2C from B2B financial services in the case of distance selling.<sup>18</sup> By contrast, the IDD follows the long-standing separation of large and mass risks.<sup>19</sup> This logic was adopted by European law in 1973—at a time where consumer protection law was poorly developed because products and prices were subject to control.<sup>20</sup>

However, 45 years later differences between B2B and B2C contracts have significantly emerged in a liberalised Single Insurance Market.<sup>21</sup> Today’s market reality could be reflected by introducing the notion of a ‘consumer’, i.e. any natural person who is acting for purposes which are outside his trade, business, craft or profession.<sup>22</sup> This would reduce the disproportionate complexity for B2B resulting from a multitude of sets of requirements (see Sect. 2.3.1) and resolve the particular case of Insurance Product Information Documents (see Sect. 2.3.2).

<sup>16</sup>Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation [2003] OJ L 9/3, Art. 2(3), hereinafter referred to as ‘IMD’.

<sup>17</sup>IDD, Recital 2.

<sup>18</sup>DMD.

<sup>19</sup>Solvency II, Art. 13(27) and Annex I and II.

<sup>20</sup>First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1973] OJ L 228/3.

<sup>21</sup>In 1992 the so-called “third generation” of Insurance Directives created the Single Insurance Market and abolished product and price controls; cf. Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) and Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive).

<sup>22</sup>Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304/64, Art. 2(1); IDD Art. 22(1) only provides for a Member State option to exempt a professional client as defined in point (10) of Article 4(1) of Directive 2014/65/EU from the requirements applicable to insurance-based investment products.

### 2.3.1 Sets of requirements applicable to B2B

The dominating objective of the IDD was to establish the same level of consumer protection across all distribution channels.<sup>23</sup> However, lacking a separation of B2C and B2B, the inclusion of insurance undertakings into the IDD produces a series of collateral effects resulting in up to five different sets of requirements for the distribution of B2B insurance contracts (Table 1).

**Table 1** Sets of requirements for B2B insurance contracts; (✓) = restricted applicability

IDD Requirement	a	b	c	d	e
	B2B Large risks	B2B Mass risks	B2B Tailor-made	B2B Insurance	B2B Reinsurance
Basic/continuous training	✓	✓	✓	✓	✓
POG		✓	(✓)	(✓)	
IPID		✓		✓	
Information and advice		✓		(✓)	
Conflicts of interest		✓	✓	✓	
Inducements	✓	✓	✓	✓	
Cross-selling	(✓)	(✓)	(✓)	(✓)	

#### a) *B2B contracts on large risks*

Union law grants contractual freedom for insurance contracts covering large risks and reinsurance contracts.<sup>24</sup> However, the IDD restricts this contractual freedom between equal partners by imposing consumer protection rules in the area of professional and organisational requirements, remuneration and conflicts of interest.<sup>25</sup>

#### b) *B2B contracts on mass risks*

Depending on quantitative criteria of the customer, certain large risks can qualify as mass risks.<sup>26</sup> In case the customer does not exceed a certain size, the contracting parties are confronted with restrictions of their private autonomy.

#### c) *Tailor-made B2B contracts*

Consumer protection rules are typically created for the distribution of standard products, not for tailor-made contracts. However, in case tailor-made contracts<sup>27</sup> cover mass risks, also consumer protection rules have to be applied.

<sup>23</sup>IDD, Recitals 6–8.

<sup>24</sup>Rome I, Art. 3 and Art. 7(1) and (2).

<sup>25</sup>IDD, Art. 10 and 17(2) and (3).

<sup>26</sup>Solvency II, Art. 13(27)(c): the policyholder of motor, property, general liability or financial loss insurance exceeds the limits of at least two of the following criteria: (i) a balance-sheet total of EUR 6.2 million; (ii) a net turnover of EUR 12.8 million; (iii) an average number of 250 employees during the financial year.

<sup>27</sup>Tailor-made contracts are designed at the request of a single customer, who determines essential features and main elements, including its coverage, price, costs, risk, target market and compensation and guarantee rights, cf. Commission Delegated Regulation (EU) 2017/2358 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to product oversight and governance requirements for insurance undertakings and insurance distributors [2017] OJ L 341/1, Art. 3.

d) *B2B contracts between (re-) insurers*

A further collateral effect of the extended IDD scope is its potential application to contracts between insurers, such as fronting, co- or reinsurance. It is even more difficult to see why contracts between partners even following the same business should be covered by a directive whose primary objective is consumer protection.

### 2.3.2 Insurance Product Information Document (IPID)

B2B insurance contracts are characterised by diversity and complexity. By contrast, the pre-contractual IPID has to be standardised and non-personalised. It shall enable the ‘customer’ to take an informed decision and to compare different insurance products.<sup>28</sup> The use of the notion ‘customer’ implies that the IPID may also have to be used for B2B.

Considering the limitation to a regular maximum of two sides of A4 paper when printed,<sup>29</sup> the granularity of the IPID will be fairly limited in a B2B context. There are several good reasons to reserve the IPID for consumers:

- a) The European legislator explicitly required only consumer testing prior to the draft implementing technical standards.<sup>30</sup>
- b) EIOPA issued an editable template for the Insurance Product Information Document in all official languages of the EU on its website, stating that ‘consumers will benefit from a simple, standardised insurance product information document (IPID), which aims to provide clearer information on non-life insurance products, so that consumers can make more informed decisions.’<sup>31</sup>
- c) The IDD implementation in Germany specifies that the IPID is addressed to customers that are consumers.<sup>32</sup>
- d) The IPID counterpart for insurance-based investment products—the Key Information Document (KID)—follows the same policy objective and is applicable to retail investors, i.e. consumers, while corporate business like occupational pension schemes are exempted.<sup>33</sup>
- e) B2B contracts can qualify as tailor-made contracts that are individually designed at the request of a single customer. This prevents any ex-ante drawing up of a pre-contractual, standardised and non-personalised IPID.

As outlined above, introducing the notion of a ‘consumer’ and exempting B2B would restore the functionality of the IDD.

<sup>28</sup>IDD, Art. 20(5)–(9).

<sup>29</sup>Commission Implementing Regulation (EU) 2017/1469 of 11 August 2017 laying down a standardised presentation format for the insurance product information document [2017] OJ L 209/19, Art. 3.

<sup>30</sup>IDD, Art. 20(9).

<sup>31</sup>EIOPA, Editable Template for the Insurance Product Information Document (IPID), Date of access: 18 May 2018, [https://eiopa.europa.eu/Pages/Supervision/Insurance/Editable-Template-for-the-Insurance-Product-Information-Document-\(IPID\).aspx](https://eiopa.europa.eu/Pages/Supervision/Insurance/Editable-Template-for-the-Insurance-Product-Information-Document-(IPID).aspx).

<sup>32</sup>Verordnung über Informationspflichten bei Versicherungsverträgen, BGBl. I S. 225 (06.03.2018), Sect. 4(1).

<sup>33</sup>PRIIPs, Art. 2(2)(f) and Art. 4(6).

## 2.4 One-size-fits-all for insurance and investment products

EU financial services regulation is increasingly cross-sectoral. Taking MiFID II as a benchmark,<sup>34</sup> the IDD introduces additional requirements for insurance-based investment products.<sup>35</sup> However, equivalent consumer protection levels across different sectors showing different characteristics must not result in identical rules.

Therefore, the European Commission is already required to review the IDD by taking into account the specific characteristics of insurance-based investment products.<sup>36</sup> The collective asset ownership (see Sect. 2.4.1) and the long term orientation (see Sect. 2.4.2) are important differentiators of life insurance contracts and retail investment products (Table 2).

**Table 2** Differences between life insurance contracts and retail investment products

Differentiator	Life insurance contract	Retail investment product
Asset ownership	Insurer	Customer
Risk and cost exposure	Collective	Individual
Balance of Capital Market and Biometric Risk	Yes	No
Owner of the timing risk	Insurer	Customer
Definition of the holding period	Ex ante	Ex post
Customer intervention during contract period	Restricted	Open
Exit option	Restricted	Open

### 2.4.1 Collective asset ownership

Retail investors individually purchase units or shares. By contrast, policyholders typically do not acquire the underlying assets of their life insurance contract but a contractual right towards the insurance undertaking. This contractual right materialises upon occurrence of the insured event such as death, disability, and longevity. The ownership of the underlying assets is held by the insurance undertaking which protects policyholders from the ‘timing risk’, *i.e.* when to buy and to sell.

By concluding an insurance contract, the policyholder joins the community of insured, sharing all risks and costs based on the principles of solidarity and risk pooling. The policyholder’s capital market and biometric risk—which are independent from each other—is pooled and coordinated by the insurance undertaking. As a result policyholders receive twin benefits from investment and insurance protection under a single integrated contract.

<sup>34</sup>IDD, Recital 10 and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L 173/349, hereinafter referred to as ‘MiFID II’.

<sup>35</sup>Member States show a tendency to apply the notion of insurance-based investment products to a wider range of life insurance contracts, including unit-linked life insurance contracts and so-called participating (or with profits) life insurance contracts.

<sup>36</sup>IDD, Art. 41(2).

### 2.4.2 Long term orientation

The holding period of retail investment products is defined *ex post* and comprises often only a few years, including the option to exit at any time. By contrast, the holding period of life insurance contracts is defined *ex ante* and usually comprises several decades with restricted exit options. The long term orientation of life insurance is further underlined by the fact that customer intervention during the contract period is usually fairly limited, and contractual option(s) such as lump-sum payment or annuities can be exercised typically only at maturity.

Notwithstanding the differences outlined above, the IDD reflects an individual and short term approach:

a) *Correlation between product distribution and dealing on own account*

Potential conflicts of interest shall be assessed by taking into account whether the insurance distributor ‘is likely to make a financial gain, or avoid a financial loss, to the potential detriment of the customer.’<sup>37</sup> This provision has been copied from MiFID II that was drafted for investment firms.<sup>38</sup> In contrast to the distribution of retail investment products, there is typically no correlation between the profit/loss made by the policyholder and the profit/loss made by the insurer. Therefore, it deserves further scrutiny whether, and how, this conflict of interest situation should be upheld in an insurance context.

b) *Periodic assessments*

Insurance distributors shall inform their customers whether a periodic assessment of the suitability of the insurance-based investment products will be carried out.<sup>39</sup> Also, this provision has been copied from MiFID II.<sup>40</sup> However, life insurance contracts are characterised by a long term orientation that precludes short-term customer intervention. Quite the contrary, *ex post* changes to insurance contracts, such as surrender or withdrawal, mostly imply disadvantages with regards to costs and fiscal treatment. In the customer’s best interest, the stable, long term character of life insurance should not be undermined by artificial volatility caused by short-term customer intervention.

c) *Periodic reports*

At least annually, the customer has to be informed about any ‘transactions’ that have been undertaken on his behalf.<sup>41</sup> This provision was also reproduced from MiFID II.<sup>42</sup> In MiFID II it refers to the execution of client orders relating to units

<sup>37</sup>IBIPs DA, Art. 3(2)(a).

<sup>38</sup>Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2017] OJ L 87/1, Art. 33(a), hereinafter referred to as ‘MiFID II DA’.

<sup>39</sup>IDD, Art. 29(1)(a).

<sup>40</sup>Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349, Art. 24(4)(a)(iii), hereinafter referred to as ‘MiFID II’.

<sup>41</sup>IDD, Art. 30(5) and IBIPs DA, Art. 18.

<sup>42</sup>MiFID II, Art. 25(8) and MiFID II DA, Art. 60.



or shares. In an insurance context, the wording ‘on behalf’ seems unsuitable as any investment activity by insurers is typically carried out on behalf of the entire community of insured. In the insurance sector, this issue could be resolved by specifying that this provision only applies to ‘transactions made upon explicit request of the individual customer.’

## 2.5 Barriers to existing customers

Since 2002, Union law provides for a distinct treatment of existing and new customers for distance selling of consumer financial services.<sup>43</sup> Contrary to that, the IDD does not consider whether the contracting parties build on a customer relationship. In order to avoid that every customer is treated like a new customer, amendments for upselling (see Sect. 2.5.1) and contract renewals (see Sect. 2.5.2) are required.

### 2.5.1 Upselling

Customers and distributors who agreed on an initial insurance contract should not be forced to repeat the entire distribution procedure within a one-year-period. Following the Distance Marketing Directive, successive operations such as upselling, *i.e.* taking out top-up or follow-on policies, should be limited to documentation and be exempt from requirements such as disclosures, demands and needs, suitability or appropriateness tests.

### 2.5.2 Contract renewals

Repeated business, with the same customer, would be blocked when imposing a restart of the distribution procedure for renewals. Furthermore, several Member States permit tacit contract renewals. Therefore, contract renewals without significant changes, *i.e.* adjustments on the basis of predefined parameters, should also be limited to documentation.

## 2.6 Disruption of the digital customer journey

Since 2000, Union law requires the removal of obstacles for the use of electronic contracts.<sup>44</sup> In order to be digital-friendly, amendments to the IDD are required with regard to paper form (see Sect. 2.6.1) and the provision of the Insurance Product Information Document (see Sect. 2.6.2).

### 2.6.1 Paper form

The IDD applies to all insurance distributors, including automated advisory tools. The default paper requirement prevents any digital customer journey.<sup>45</sup> In order to be able

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<sup>43</sup>DMD, Art. 1(2).

<sup>44</sup>E-Commerce, Art. 9(1).

<sup>45</sup>IDD, Art. 23(1)(a).

to digitally transform the advisory and selling processes, any paper requirement for the compulsory provision of information should be avoided. The more recent legislative proposal on a pan-European Personal Pension Product (PEPP) already supports the electronic provision of all documents and information as a default option.<sup>46</sup>

### 2.6.2 *Provision of the Insurance Product Information Document (IPID)*

The Insurance Product Information Document shall allow the customer to make an informed decision.<sup>47</sup> This requirement refers, on the one hand, to the granularity of the IPID and, on the other hand, to the point in time, when the customer actually receives it. Unlike the Key Information Document (KID), there is no obligation to publish the IPID on the provider's website.<sup>48</sup> Unless the IPID is published voluntarily on the provider's website, the customer would receive it for the first time during the online advisory and sales process. Any disruption or delay, in the form of required cooling-off periods or switches between websites would significantly disrupt the digital customer journey and should be ruled out.

## 2.7 Monoculture of group insurance contracts

Insurance contract law remains predominantly non-harmonised on European level.<sup>49</sup> Deviating from this, the IDD addresses group insurance contracts by referring to one particular form.<sup>50</sup>

However, the widespread diversity of group insurance contracts in the European Union cannot be narrowed down to one particular form (see Sect. 2.7.1). In addition the difference is explained between group insurance contracts and framework agreements as these two legal instruments tend to be confused with each other (see Sect. 2.7.2).

### 2.7.1 *Group insurance contracts*

Group insurance contracts deliver increased benefits to the community of insured:

- a) Extent of cover: Insureds benefit from terms and conditions that might not be available to them on an individual basis

<sup>46</sup>Proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product (PEPP), COM/2017/0343 final, Art. 21.

<sup>47</sup>IDD, Art. 20(4).

<sup>48</sup>PRIIPs, Art. 5(1).

<sup>49</sup>European Commission—Directorate-General for Justice: Final Report of the Commission Expert Group on European Insurance Contract Law, 2014.

<sup>50</sup>Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products, Art. 13; group insurance contracts on insurance-based investment products where individuals cannot take an individual decision to join.

- b) Discounts: Group policyholders have a greater bargaining power than individuals; additionally economies of scale through lower administrative cost and better claims ratio translate into lower rates; occasionally the group policyholder co-finances the premium payment
- c) Financial inclusion: Group insurance contracts provide access to protection for individuals who might probably be excluded otherwise due to the risk they represent

The European landscape of group insurance contracts is highly diversified with regard to group policyholders, classes of insurance and the community of insured (Table 3).

**Table 3** Typical examples of group insurance contracts

Group policyholder	Class of insurance	Community of insured
employer	private health and pension	employees
bus operator	passenger accident	passengers
automobile club	legal expense	members
credit institution	credit default	borrowers
student association	accident and liability	members
concert organiser	accident	visitors
camping club	liability	travel groups
car sharing company	motor third party liability	customers
mountain club	accident	members
hunting club	hunting liability	members, staff, guests

Across jurisdictions, group insurance contracts share the following criteria:

- a) Parties to the insurance contract: A natural or legal person agrees with the distributor on the terms and conditions and concludes a single insurance contract in its own name. The European legislator clarified that the group policyholder is the insurer's customer, not another insurance distributor.<sup>51</sup> The group insurance contract contains a predefined profile of eligible insureds that have something in common, other than obtaining insurance. At a later stage, eligible individuals join the community of insured, either via opt-in or opt-out. The insureds are no party to the insurance contract; occasionally the insureds are not even known by name to the insurer, *e.g.* in the case of family members.
- b) Premium payment: The premium is typically paid wholly or partially, directly or indirectly, by the group policyholder. In particular, employers offer subsidies to the premium that may range from 1 to 100 %.
- c) Claims payment: Although the insureds do not have a policy with the insurer, the benefits of the policy will normally flow to the individual, rather than to the group policyholder. In cases where the insureds are unknown to the insurer, indemnification is paid to the group policyholder.

<sup>51</sup>IDD, Recital 49.

### 2.7.2 Framework agreements

Group insurance contracts have to be differentiated from framework agreements between legal persons and insurers that define the general terms and conditions under which individual insurance contracts may be concluded between individuals and the insurer in their own name and on their own account. Effectively framework agreements are ‘contracts about insurance contracts’, but no insurance contracts. As such they do not fall under the definition of insurance distribution.<sup>52</sup> A typical example would be a framework agreement of a national bar association on individual contracts for lawyer’s professional indemnity insurance.

## 3 The way forward

Against its policy objective to reduce the fragmentation of the Single Insurance Market,<sup>53</sup> the divergent implementation, application and enforcement of the IDD might actually result in further market barriers. In the medium term, the instrument of a regulation<sup>54</sup> with opening clauses to accommodate Member States—instead of a directive—might be the logical next step, in particular for the review (see Sect. 3.2).

### 3.1 Sustainability

IDD compliance will remain a moving target; seven months before the start of the IDD application the European Commission already announced first changes.<sup>55</sup> In the future insurance distributors shall contribute to reorienting the financial system towards sustainability. Therefore, customer’s sustainability preferences, such as environmental, social and governance factors (ESG), shall be taken into account when giving advice on insurance-based investment products.<sup>56</sup> This upcoming requirement for insurance distributors will create interaction with the Key Information Document already requiring disclosures on environmental or social objectives targeted by the insurance-based investment product.<sup>57</sup>

### 3.2 Review

Until 2021, the European Commission is required to review the IDD.<sup>58</sup> Any amendments must support the sound functioning of insurance distribution *de iure* and *de facto*.

<sup>52</sup>IDD, Art. 2(1).

<sup>53</sup>IDD, Recital 36.

<sup>54</sup>Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Art. 288.

<sup>55</sup>Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth, COM/2018/097 final, 8.3.2018, Action 4.

<sup>56</sup>Commission Delegated Regulation (EU) .../... amending Delegated Regulation (EU) 2017/2359 with regard to environmental, social and governance preferences in the distribution of insurance-based investment products, Ares(2018)2681527, published on 24.5.2018.

<sup>57</sup>PRIIPs, Art. 8(3)(c)(ii).

<sup>58</sup>IDD, Art. 41(1)–(3).

Amendments to the IDD may therefore consider the following points:

1. Rebalancing individual and collective policyholder interests by specifying ‘customer interests’ (see Sect. 2.1)
2. Preventing spill-over effects from distribution regulation to other parts of the insurance value chain such as policy administration or claims management (see Sect. 2.2)
3. Refocusing consumer protection on B2C insurance contracts by exempting B2B insurance contracts, thus following the regulatory approach for distance marketing of financial services<sup>59</sup> (see Sect. 2.3)
4. Restating the collective and long term character of insurance-based investment products when addressing equivalence between policyholder and retail investor protection (see Sect. 2.4)
5. Removing barriers to existing customers through exemptions of upselling and contract renewals within a one-year-period (see Sect. 2.5)
6. Establishing electronic communication as the default option (see Sect. 2.6)
7. Safeguarding the benefits for the community of insured resulting from the diversity of group insurance contracts (see Sect. 2.7)

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<sup>59</sup>DMD.