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The Global Relevance of the EU Single Market on Insurance after the Insurance Distribution Directive (IDD)

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**THE GLOBAL RELEVANCE OF THE EU SINGLE MARKET ON
INSURANCE AFTER THE INSURANCE DISTRIBUTION
DIRECTIVE (IDD)**

Pierpaolo Marano

Abstract: The amount of insurance premiums collected within the European Union (“EU”) places the market among the world leaders. Although insurance regulation is still partly national, the EU’s effort to introduce harmonized rules between the Member States has intensified since the financial crisis. This essay intends to highlight the global relevance assumed by the regulatory framework of the EU. The introduced rules arise from the principles established internationally and, in turn, influence these principles. Thus, the EU regulatory framework on insurance is relevant to understand the potential evolution of the international standards on insurance. The main objective of the insurance regulation and supervision of the EU is to protect the policy holders which is the focus of our analysis. Therefore, this study examines the recent Insurance Distribution Directive (“IDD”) salient features in light of the overall regulatory framework governing the insurance business in the EU. In addition, this study also tests the resilience of new rules regarding the COVID-19 pandemic and digital transformation, which were not at the core of the IDD.

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**I. INTRODUCTION. SETTING THE SCENE: THE GLOBAL RELEVANCE OF
THE EU SINGLE MARKET ON INSURANCE.**

Swiss Re's 2020 world insurance study demonstrated the economic importance that insurance distribution plays worldwide.¹ It reported that the total amount of collected insurance premiums equaled a staggering \$6.3 trillion dollars in 2019, equivalent to around 7.2% of the global GDP.² The insurance premiums collected in Europe equaled 31.6% of the global amount, 32.4% in Asia-Pacific, and 30.8% in North America (the U.S. alone is about 28%).³

The data also reveals the significant role played by the insurance sector in the economy of the EU⁴ and highlights the importance of the EU insurance market in the global panorama.⁵ The magnitude of the EU insurance market strongly suggests that a study of EU regulations can reveal significant trends in the global regulation of insurance in terms of weakness, strengths, and direction.⁶

On January 20, 2016, the EU adopted the Directive 2016/97 on insurance distribution,⁷ the most recent important EU insurance market development. The IDD replaced Directive 2002/92/EC of December 9, 2002, on insurance mediation ("IMD").⁸ The IDD is

*The author would like to thank Leo Martinez and Margarida Lima Rego for helpful comments to the article. The usual disclaimer applies.

¹ See SWISS RE INST., *World Insurance: Riding Out the 2020 Pandemic Storm*, 4 SIGMA 8 (2020), https://www.swissre.com/dam/jcr:05ba8605-48d3-40b6-bb79-b891cbd11c36/sigma4_2020_en.pdf.

² *Id.*

³ *Statistics-Key Facts*, INSURANCE EUR., <https://www.insuranceeurope.eu/statistics> (last visited July 10, 2021).

⁴ See EUROPEAN SYSTEMIC RISK BD., *The Role of the Insurance Sector in the Economy*, annex 1 REPORT ON SYSTEMIC RISKS IN THE EU INSURANCE SECTOR 8 (2015), https://www.esrb.europa.eu/pub/pdf/reports/2015-12-16_esrb_report_annex_1.pdf (providing empirical evidence).

⁵ See INSURANCE EUR., *supra* note 3.

⁶ Brexit reduced the EU's share in the global insurance market as the UK was the most significant national market within the EU, making up 5.2% of the market in 2019. SWISS RE INST., *supra* note 1, at 10. However, given the UK's influence on insurance rules adopted by the EU, the rules regarding insurance distribution should not diverge between the EU and the UK, at least in the interim.

⁷ Council Directive 2016/97 of January 20, 2016, on Insurance Distribution, 2016 O.J. (L 26) (EU). According to art. 2(1)(1):

Insurance distributions "means the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media.

Id. at art. 2(1)(1).

⁸ Insurance mediation is: "the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim." Council Directive 2002/92/EC of December 9, 2002, on Insurance Mediation, art. 2(3) 2002 O.J. (L 9) 5. However, the above standard set forth that "[t]hese activities when undertaken by an insurance undertaking or an employee of an insurance

the last step in harmonizing insurance rules in the EU, which complements the set of rules introduced under Directive 2009/138/EC of November 25, 2009, on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II).⁹

The IDD concerns the manufacture and distribution of both life insurance and non-life insurance.¹⁰ This Directive aims to harmonize national rules and reinsurance regulation consistent with the primary objective of insurance, and protection of policyholders in the EU.¹¹ The IDD's rules pertain to insurers and intermediaries' organization and the conduct of business towards customers.¹² These rules take advantage of the experiences in the most important national markets in the EU, where the UK, France, Germany, and Italy together rank among the ten largest insurance markets worldwide.¹³ This diversity of experiences allows the EU policymakers to set rules with the dual objective of preventing the recurrence or occurrence of events detrimental to the policyholder, respectively, in the same national markets or the other markets within the EU.¹⁴

The insurance market has no European supervisor – unlike the eurozone banks which are supervised by the European Central Bank.¹⁵ Nonetheless, a European System of Authorities (“ESAs”) has been established for financial services,¹⁶ including the European Insurance and Occupational Pensions Authority (“EIOPA”).¹⁷ The EIOPA contributes to enhancing customer protection, and supervisory convergence from Member State's insurance

undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.”; *id.*

⁹ See generally Council Directive 2009/138/EC of November 25, 2009, on the Taking-Up and Pursuit of the Business of Insurance and Reinsurance (Solvency II), 2009 O.J. (L 335) 1.

¹⁰ See *Background on: Insurance accounting*, INS. INFO.INST., <https://www.iii.org/article/background-on-insurance-accounting> (last visited Sept. 29, 2021). (highlighting the insurance industry in the EU is divided into life/non-life, rather than life/annuities and property/casualty as is standard in the United States. The insurance industry in the EU is divided into life/non-life, rather than life/annuities and property/casualty as is standard in the United States.)

¹¹ Council Directive 2009/138/EC, *supra* note 9 at (16). The term “beneficiary” is intended to cover any natural or legal persons entitled to a right under an insurance contract.

¹² See Kyriaki Noussia, *The IDD and Its Impact on the Life Insurance Industry*, SPRINGERLINK (Nov. 13, 2020), https://link.springer.com/chapter/10.1007/978-3-030-52738-9_4#citeas. (noting the IDD does not concern the insurance contract, which is regulated by national laws.)

¹³ SWISS RE INST., *supra* note 1, at 10.

¹⁴ See AIDA Europe Research Series on Insurance and Regulation, Vol. 3, *Insurance Distribution Directive: A Legal Analysis*, SPRINGER (Oct. 3, 2021), https://library.oapen.org/bitstream/handle/20.500.12657/43280/2021_Book_InsuranceDistributionDirective.pdf?sequence=1.

¹⁵ See Adam Hayes, European Central Bank (ECB), INVESTOPEDIA (last visited Sept. 29, 2021), <https://www.investopedia.com/terms/e/europeancentralbank.asp>; *contra* European Insurance and Occupational Pensions Authority (EIOPA), EUROPA.EU, https://europa.eu/european-union/about-eu/agencies/eiopa_en (last visited Sept. 29, 2021).

¹⁶ See Veerle Colaert, *European Banking, Securities, and Insurance Law: Cutting Through Sectoral Lines?*, 59 COMMON MKT L. REV., 1579–1616 (2015); see also LUCIA QUAGLIA, THE EUROPEAN UNION AND GLOBAL FINANCIAL REGULATION (2014); see also Willem Pieter de Groen & Klaudia Zielińska, *European Supervisory Authorities still playing second fiddle to national financial regulators*, CEPS Publications (Mar. 14, 2018), http://aei.pitt.edu/93604/1/WPdGand_KZ_ESAs.pdf; see also Niamh Moloney, *EU Financial Market Regulation After the Global Financial Crisis: “More Europe” or More Risks?*, 47 COMMON MKT L. REV. 1317–1383 (2010).

¹⁷ EIOPA, <https://www.eiopa.europa.eu/> (last visited October 1, 2021).

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Authorities.¹⁸ Therefore, the EIOPA supports the IDD's ultimate aim to strengthen the EU single insurance market where insurers, intermediaries, and policyholders may, respectively, distribute or purchase insurance products regardless of the Member State in which they are based or reside.¹⁹ The IDD also authorized the Commission to adopt Delegated Acts supplementing the IDD's rules on product governance, insurance-based investment products, and pre-contractual information.²⁰ The IDD favors a more accentuated harmonization in these areas rather than the minimum harmonization that IDD still claims to pursue.²¹ Thus, European standards' pervasiveness and granularity reduce the room for national regulators' maneuvers and increase the existence of the same rules in all Member states.²² However, the increasing granularity of the IDD must be linked to the principle of proportionality.²³ Under this principle, a measure adopted by EU institutions must not exceed the limits of what is appropriate and necessary to achieve the objectives pursued by the legislation in question.²⁴

The significance of these rules goes beyond the strengthening of the EU single market on insurance products.²⁵ The IDD complies with the international principles on insurance, including those on intermediaries and the conduct of insurance business adopted by the International Association of Insurance Supervisors ("IAIS").²⁶ The EU traditionally

¹⁸ Council Regulation 1094/2010 of November 24, 2010, on Establishing the European Insurance and Occupational Pensions Authority (EIOPA), art. 1(6)(f)(g) 2010 O.J. (L 331) 48.

¹⁹ Insurance is a "service" and falls within the scope of the Treaty on the Functioning of the European Union (TFEU) that prohibits restrictions on the provisions of services between Member States. Treaty on the Functioning of the European Union, art. 56, 2010 O.J. (C 38); see also DAVID CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 738 (4th ed. 2019) (regarding the meaning of "service"); see also VASSILIS HATZOPOULOS, REGULATING SERVICES IN THE EUROPEAN UNION (2012) (regarding the free movement of services).

²⁰ See Commission Delegated Regulation (EU) 2021/1257 of April 21, 2021, https://ec.europa.eu/finance/docs/level-2-measures/idd-delegated-act-2021-2614_en.pdf (last visited Sept. 27, 2021).

²¹ *Id.*

²² *Id.*

²³ Commission Delegated Regulation (EU) 2021/1257 of April 21, 2021, amending Delegated Regulations (EU) 2017/2358 (EU) 2017/2359 as regards the integration of sustainability factors, risks and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors and into the rules on conduct of business and investment advice for insurance-based investment products.

²⁴ TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 137 (2nd ed. 2006). (The principle of proportionality works, thanks to Article 54 [of the] TFEU, as a device on hand by the EU judge to pin down the margin of discretion of the EU legislator.) The proportionality principle "requires that a measure does not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by it, recourse is had to least onerous measure, and the disadvantages caused are not disproportionate to the aim pursued." CHALMERS, *supra* note 14, at 261 (pointing out the difference between the principle of proportionality and the principle of protection against arbitrary or disproportionate intervention).

²⁵ See generally EDPS Guidelines on Assessing the Proportionality of Measures that Limit the Fundamental Rights to Privacy and to the Protection of Personal Data, EUROPEAN DATA PROTECTION SUPERVISOR, https://edps.europa.eu/sites/edp/files/publication/19-12-19_edps_proportionality_guidelines_en.pdf (last visited Sept. 28, 2021).

²⁶ See Ian Tower, *The Quality of Regulation and Supervision*, in THE FUTURE OF INSURANCE REGULATION AND SUPERVISION: A GLOBAL PERSPECTIVE 78–79 (Patrick M. Liedtke & Jan Monkiewicz eds. 2011); see also Bradley Kading & Leila Madeiros, *Insurance Regulation: Recognition, Equivalence and International Standards*, in THE FUTURE OF INSURANCE REGULATION AND SUPERVISION: A GLOBAL PERSPECTIVE 391–94 (Patrick M. Liedtke & Jan Monkiewicz, eds., 2011) (for the role played by IAIS); see generally Peter Braumüller & Alexander Warzilek, *The IAIS Multilateral Memorandum of Understanding: An Important Tool*

influences the interpretation of these principles due to its role played at IAIS.²⁷ Therefore, the innovations affecting the EU insurance regulation are susceptible to becoming a reference point for the IAIS and, through it, for the other legal systems.²⁸ Due to this mutual influence between the EU and IAIS, some academic essays have already approached the IDD to compare its rules with what is (or is not) provided in other non-EU legal systems.²⁹

This essay analyzes the basic principles of manufacturing and distributing insurance products to customers introduced under the IDD.³⁰ The goal is to understand how those principles fit into the overall EU regulatory framework on insurance and, ultimately, to identify the building blocks of the EU single market for insurance customers. This essay's global relevance consists of outlining the extension of the harmonized rules achieved in an insurance market intended to be a single market where the national supervisory authorities still have supervision, and national rules that can be adopted.³¹

The paper proceeds as follows: Section 2 highlights the objectives of the harmonization process concerning the distribution of insurance products in the EU over time; Section 3 focuses on the role the Commission and EIOPA play to implement the IDD and on

for Cooperation and Information Exchange between Insurance Supervisors, in GLOBAL PERSPECTIVE ON INSURANCE TODAY 153–60 (Cecelia Kempler, Michel Flamée, Charles Yang & Paul Windels eds., 2010).

²⁷ See QUAGLIA, *supra* note 16, at 77.

²⁸ See generally Niamh Moloney, *International Financial Governance, the EU, and Brexit: The "Agencification" of EU Financial Governance and the Implications*, 17 EUROPEAN BUS. ORG. L. REV. 451 (2016). (In general, the EU's regulatory capacity has been identified as of central importance to its degree of influence on international financial governance.); see also Abraham Newman & David Bach, *The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation*, 17 J. OF EUROPEAN PUB. POL'Y 430 (2014); see also Jan Wouters, Sven van Kerckhoven & Jed Odermatt, *The EU at the G20 and the G20's Impact on the EU*, in THE EU'S ROLE IN GLOBAL GOVERNANCE: THE LEGAL DIMENSION 259 (Bart Van Vooren, Steven Blockmans & Jan Wouters eds., 2013); see also Elliot Posner, *Is a European Approach to Financial Regulation Emerging From the Crisis?*, in GLOBAL FINANCE IN CRISIS: THE POLITICS OF INTERNATIONAL REGULATORY CHANGE 108 (Eric Helleiner, Stefano Pagliari & Hubert Zimmerman eds., 2009). See also Alasdair R. Young, *The European Union as a Global Regulator? Context and Comparison*, 22 J. OF EUROPEAN PUB. POL'Y 1233 (2015).

²⁹ See Leo Martinez & Pierpaolo Marano, *The EU New Rules on Insurance Customer/Policyholder Protection Viewed Against the NAIC Model Acts*, GLOBAL JURIST (2020), <https://www.degruyter.com/document/doi/10.1515/gj-2019-0039/html>; see also Samantha Huneberg, *Insurance Distribution Directive: What Can the Insurance Distribution Directive "Offer" to the South African Microinsurance Model?*, in INSURANCE DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS 219 (Pierpaolo Marano & Kyriaki Nossia eds., 2020); see also Kathleen M. Defever, *Insurance Distribution Directive: Enactment of Chapter VII of the Insurance Distribution Directive: What Can Member States Learn from the Enforcement Failure of the United States?*, INSURANCE DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS 197 (Pierpaolo Marano & Kyriaki Nossia eds., 2020); see also Kathleen M. Defever, *Comparative Analysis of European Union and the United States Insurance Law Systems – With Emphasis on Consumer Protection Law* 10 EUROPEAN J. OF COM. CONT. L. 9 (2018); see also Annette Hofmann, Julia K. Neumann & David Pooser, *Plea for Uniform Regulation and Challenges of Implementing the New Insurance Distribution Directive*, 43 GENEVA PAPERS RISK & INS.: ISSUES & PRACTICE 740 (2018).

³⁰ See Marano, *supra* note 29 (for a detailed analysis of the IDD rules); see also Thomas Köhne & Christoph Brömmelmeyer, *The New Insurance Distribution Regulation in the EU – A Critical Assessment from a Legal and Economic Perspective*, 43 GENEVA PAPERS RISK & INS.: ISSUES & PRACTICE 704 (2018); see also Hofmann, et al., *supra* note 29; see also Dieter Pscheidl, *Implementing IDD Across the EU – First Findings and the Way Forward*, 19 ERA FORUM 211 (2018).

³¹ See Hofmann, et al., *supra* 29 at 748 (for an examination of the various challenges of transposing the IDD rules into national law in Germany, France, the UK, Spain, and Italy).

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the limits placed on regulatory interventions by the principle of proportionality; Section 4 analyses the IDD rules' essential features, including the derivation of these rules to those introduced by MiFID II on financial products; Section 5 tests the IDD's resilience in the face of COVID-19 pandemic and InsurTech, both of which stress the IDD in unforeseeable or inadequately considered ways. Lastly, Section 6 provides final remarks.

**II. THE PATH OF EU LAW TOWARDS THE REGULATION OF INSURANCE
DISTRIBUTION.**

The IDD is the endpoint of a legislative process concerning the harmonization of the rules of the Member States dating back over time.³² The IDD's innovation is that it makes the transition from the rules on certain insurance intermediaries to the rules on insurance distribution regardless of the entities that carry it out.³³ This transition also marked a progressive extension of the regulatory intervention area, changing in line with the changed objectives pursued by regulation over time.³⁴ The material that follows traces this evolution.

The starting point of the harmonization process is Directive 77/92/EEC of December 13, 1976 on measures to facilitate cross-border activities, customarily described in the Member States as related to brokers,³⁵ agents,³⁶ and sub-agents,³⁷ who were the insurance

³² *Insurance Distribution Directive*, FINANCIAL CONDUCT AUTHORITY (Jul. 26, 2021), <https://www.fca.org.uk/firms/insurance-distribution-directive>.

³³ *See id.*

³⁴ *See id.*

³⁵ Council Directive 77/92/EEC of December 13, 1976, on Measures to Facilitate the Effective Exercise of Freedom of Establishment and Freedom to Provide Services in Respect of the Activities of Insurance Agents and Brokers, art. 2(1)(a) 1976 O.J. (L 26).

Article 2(1)(a) states:

Professional activities of persons who, acting with complete freedom as to their choice of undertaking, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carry out work preparatory to the conclusion of contracts of insurance or reinsurance and, where appropriate, assist in the administration and performance of such contracts, in particular in the event of a claim.

³⁶ *Id.*

Article 2(1)(b) states:

Professional activities of persons instructed under one or more contracts or empowered to act in the name and on behalf of, or solely on behalf of, one or more insurance undertakings in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding, contracts of insurance, or in assisting in the administration and performance of such contracts, in particular in the event of a claim.

³⁷ *Id.*

Article 2(1)(c) states:

Activities of persons other those referred to in (a) and (b) who, acting on behalf of such brokers and agents, among other things carry out introductory work, introduce insurance contracts or collect premiums, provided that no insurance commitments towards or on the part of the public are given as part of these operations.

intermediaries operating in almost all the Member States.³⁸ The Directive is designed to avoid undue constraint on the nationals of Member States wherein the taking up of the activities of an agent and broker are not subject to any conditions.³⁹ Predictably, the Member States adopted divergent provisions on the requirements to be qualified as an agent or broker under national laws, and the Directive failed to introduce mutual recognition of the respective qualifications.⁴⁰

Directive 2002/92/EC on insurance mediation repealed Directive 77/92/EE.⁴¹ An activity-based approach replaced the previous intermediary-based approach.⁴² The change in the approach was necessary to apply the rules to the new insurance distribution channels (e.g., banks).⁴³

The IMD introduced the definition of insurance mediation,⁴⁴ and qualified all the persons carrying out this activity as insurance intermediaries.⁴⁵ Insurance intermediaries were required to be registered with a competent national authority,⁴⁶ and insurance undertakings were required to use the (re)insurance mediation services only of registered (re)insurance intermediaries.⁴⁷ Registration required the possession of appropriate knowledge and ability, as determined by the home Member State of the intermediary.⁴⁸ Such registration allowed authorized and registered insurance intermediaries in a Member State to apply to their supervisory authority to operate in another Member State under FOE and/or FOS regimes.⁴⁹

³⁸ Council Directive 77/92/EEC of December 13, 1976, on Measures to Facilitate the Effective Exercise of Freedom of Establishment and Freedom to Provide Services in Respect of the Activities of Insurance Agents and Brokers, 1976 O.J. (L 26).

³⁹ See *id.* at 5. Member States were requested to consider as sufficient qualification for taking up the activities in question in host Member States that have rules governing the taking up of such activities, the fact that the activity has been pursued in the Member State whence the foreign national comes for a reasonable and sufficiently recent time. This request should ensure that the person concerned possesses professional knowledge equivalent to that required of the host Member State's nationals in cases where previous training is not required. *Id.* at (6).

⁴⁰ Commission Recommendation 92/48/EEC of December 18, 1991, on Insurance Intermediaries, 1991 O.J. (L 19) 32. Provisions requiring professional skills and financial capabilities were introduced later for agents and brokers. *Id.* Recommendation 92/48/EEC urged the Member States to adopt national rules providing for the professionalism and integrity requirements of the intermediaries, as well as the possession of an insurance cover for professional liability or an equivalent guarantee and, limited to the brokers, of sufficient financial capacity. Therefore, Recommendation 92/48/EEC added customer protection to the goal of promoting cross-border operations of agents and brokers, but the used regulatory tool – the Recommendation – lacked the binding force to the Member States.

⁴¹ Directive 2002/92/EC of the European Parliament and of the Council of December 9, 2002, on Insurance Mediation, 2002 O.J. (L 9) 3 [hereinafter IMD].

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.* at art. 2–4.

⁴⁵ *Id.*

⁴⁶ See *id.* at art. 1.

⁴⁷ See *id.* at art. 5.

⁴⁸ See *id.* at art. 1.

⁴⁹ *Id.*; see Köhne, *supra* note 30, at 713 (outlining of both the heterogeneous market conditions of the various European insurance markets and the diversity of distribution regulation, which has emerged in the individual member states despite the IMD). Köhne and Brömmelmeyer also predict a heterogeneous distribution regulation will continue to prevail even with the implementation of the IDD.

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Furthermore, the IMD exempted from its scope some persons who carry out insurance mediation as an ancillary activity under certain conditions.⁵⁰

In addition to facilitating cross-border activity, the IMD aimed to increase customers' protection.⁵¹ The IMD pursued this objective by strengthening safeguards concerning the relationship between intermediary and customer at the point of sale.⁵² The IMD applies to all customers and for all life and non-life insurance risks, except to customers for insurance contracts covering the so-called large risks,⁵³ while reinsurance was basically outside the scope of the IMD.⁵⁴

The financial crisis of 2007/2008 forced regulators to rebuild customers' trust in financial services, including insurance.⁵⁵ As a result, the Commission published a proposal for

⁵⁰ See IMD at arts. 2–3. Member States can maintain national regulations on specific categories of intermediaries. *Id.* at arts. 3–4. Nevertheless, the IMD did not prevent insurance distribution forms other than those carried out through agents, brokers, or bancassurance operators. *Id.* at arts. 9, 11.

⁵¹ IMD, *supra* note 44, at arts. 9–11.

⁵² See *id.* at art. 3. In addition to the professional requirements that are required for intermediaries to be registered, the harmonization of rules addressed to customer protection concerned:

- (i) The content and conditions of the information concerning the insurance contract, proposed or being executed (see Articles 12 and 13 of IMD). In the case of telephone selling, however, the prior information is given to the customer in accordance with the provisions of the Directive 2002/65/EC on the distance marketing of consumer financial services, including those of insurance. See *id.* at art. 3.
- (ii) The ability of intermediaries to transfer premiums to an insurance undertaking or amounts of insurance benefit or a rebate of the premium to the insured. See *id.*
- (iii) The duty of the insurance intermediary to specify, before the conclusion of any specific contract and based on the information provided by the client, the requests and needs of that client as well as the reasons behind any advice given to the client on a given insurance product. These details will have to be modulated according to the complexity of the proposed insurance contract (see Article 12(3) of IMD).

Moreover, IMD requested the Member States to provide rules on complaints about insurance and reinsurance intermediaries to encourage the setting-up of appropriate and effective complaints and redress procedures for the out-of-court settlement of disputes between insurance intermediaries and customers, to provide for appropriate sanctions, and to exchange information between Member States.

⁵³ See *id.* at art. 8 (referring to the risks listed under art. 5(d) of Council Directive 73/239/EEC).

⁵⁴ *Id.*; see also Pierpaolo Marano, *Reinsurance Intermediaries: A Comparison of the EU and US Regulatory Approach*, 35 GENEVA PAPERS RISK & INS.: ISSUES & PRACTICE 213 (2010). (noting how the review of the IMD should not have meant that reinsurance intermediaries were subject to the same rules applicable to insurance intermediaries, but regulators should be more sensitive to the costs on insurers and insured that spring from the practices of the reinsurance market.)

⁵⁵ *Id.* at 139.; Directive 2009/138/EC requested Commission to put forward a proposal for the revision of IMD. Council Directive 2009/138/EC, *supra* note 9. (Solvency II changed the risk profile of the insurance undertaking vis-à-vis the policyholder; thus, it required the IMD revision to consider the consequences of Solvency II for the policyholders. Moreover, the Market in Financial Instruments Directive (MiFID) revision aimed at increasing the customer protection standards for financial products); see also Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014, on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU 2014 O.J. (L 173) 349. ("The selling practices of life insurance products with investment elements should have been regulated similarly to ensure cross-sectorial consistency."); see also Nic De Maesschalck, *The Insurance Distribution Directive: What Does It Change for Intermediaries and for Others?*, in INS. REGUL. EUROPEAN UNION: SOLVENCY II & BEYOND 60 (Pierpaolo Marano & Michele Siri eds., 2017). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Sector Inquiry*

a recast of the IMD on July 3, 2012 as part of the “consumer retail legislative package.”⁵⁶ The objectives of the recast (“IMD2”) were substantially in line with those pursued by the IMD, consisting of easier trading across borders and better consumer protection.⁵⁷ The IDD is the result of the recast proposal of the IMD, almost six years after such a proposal.⁵⁸

The political choice beyond the IDD is to move from regulation on insurance intermediaries to insurance distribution regulation.⁵⁹ As a result, insurance intermediaries are no longer the regulatory intervention’s focal point. Instead, the insurance distribution is the focal point of the new rules, including the distribution, carried out by insurers. Thus, the Directive’s name changed to IDD from IMD.⁶⁰ The IDD aims to advance cross-border operations, increase customer protection, and strive for coherent financial services regulation.⁶¹ The objectives of the IDD appear to be identical to those of the IMD2, emphasizing the need to provide coherent regulations of insurance products with investment elements and financial products.⁶² However, three Commission Delegated Regulations have complemented the IDD.⁶³ Also, EIOPA plays a significant role in promoting consistent interpretation and supervision of the new rules.⁶⁴ Therefore, the IDD fits into a regulatory framework different from the framework that regulated the IMD implementation in the

Under Article 17 of Regulation (EC) No 1/2003 on Business Insurance, COM (2007) 556 final (Sept. 26, 2007) (A request for revision of the IMD also came from the Communication concerning the sector inquiry on business insurance. The inquiry was promoted by the Commission and provided indications of potential market failure in respect to insurance brokerage to be evaluated in the revision of the IMD).

⁵⁶ See De Maesschalck, *supra* note 36, at 62. This package included information requirement proposals relating to packaged retail investment products (“PRIIPS”), and proposals for defining the duties and tasks of depositaries of undertakings for collective investment in transferable securities (“UCITS”) and remuneration policy for UCITS fund managers (the proposed “UCITS V” directive) and remuneration policy for UCITS fund managers (the proposed “UCITS V” directive).

⁵⁷ *Id.* (noting the revision of IMD1 has three sets of objectives: general, specific, and operational); see also *Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Insurance Mediation*, COM (2012) 360 final (July 3, 2012). The general objectives are the project’s overall goals: consumer protection, undistorted competition, and market integration.

⁵⁸ Council Directive 2016/97, *supra* note 7 (“Member States had to enforce the laws, regulations, and administrative provisions necessary to comply with the[IDD] by 23 February 2018.”).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Council Directive 2016/97, *supra* note 7.

⁶² See De Maesschalck, *supra* note 55, at 61.

⁶³ Commission Regulation 2017/2358 of Sept. 21, 2017, Supplementing Council Directive 2016/97 With Regard to Product Oversight and Governance Requirements for Insurance Undertakings and Insurance Distributors, 2017 O.J. (L 341) 1; Commission Regulation 2017/1469 of Aug. 11, 2017 Laying Down a Standardised Presentation Format for the Insurance Product Information Document, 2017 O.J. (L 209) 19; Commission Regulation 2017/653 of Mar. 8, 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 2017 O.J. (L 100) 1.

⁶⁴ See EIOPA, EIOPA IDD SINGLE RULEBOOK USER GUIDE 2 (2021), https://eiopa.europa.eu/sites/default/files/rulebook/eiopa_idd_single_rulebook_user_guide_ext.docx (showing that EIOPA’s IDD Single Rulebook is meant to promote the consistent application of the IDD regulatory framework).

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Member States.⁶⁵ This regulatory framework is likely to affect how Member States will implement and supervise the IDD's rules and principles.⁶⁶ Next, Section 3 analyzes this overall regulatory framework. The analysis allows us to fully appreciate the key features of the IDD, which are examined below in Section 4.

III. THE LEGAL FRAMEWORK "BEYOND" THE IMPLEMENTATION OF THE IDD.

In recent years, the EU pursued harmonization process by using an approach in which legislation concentrates on laying down general standards, leaving European agencies to work these out in detail.⁶⁷ Legislative powers are granted to the Commission, and a ESAs has been established for financial services,⁶⁸ including EIOPA for insurance.⁶⁹ These innovations should: (i) provide greater uniformity to the application and interpretation of EU rules by setting out in greater detail its implications, and (ii) speed up the updating process of the detailed rules, at least those issued by the Commission.⁷⁰

The IDD mirrors this new approach by setting forth general principles and some detailed minimum harmonization rules.⁷¹ In addition, three Commission Delegated Regulations provide detailed rules complementing those of the IDD on the addressed issues.⁷² This multi-level structure allows the introduction of more rules with greater granularity than the IMD.⁷³ Some of these rules are likely to be quickly updated, and EIOPA can promote their

⁶⁵ See PIERPAOLO MARANO & KYRIAKI NOUSSIA, AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION VOLUME 3, 19 (2021) (ebook) (stating that the IDD brought a vital change to the framework established by the IMD in that it divides the oversight powers between the home and host Member States competent authorities over insurance intermediaries who are passporting in the EU).

⁶⁶ See generally EIOPA, FINAL REPORT ON CONSULTATION PAPER NO. 16/006 ON TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE INSURANCE DISTRIBUTION DIRECTIVE 21(2017), https://register.eiopa.europa.eu/Publications/Reports/EIOPA%20Final_Report_on_IDD_Technical%20Advice.pdf (showing that while EIOPA provides advice in building a regulatory framework, Member States have discretion to implement the IDD).

⁶⁷ CHALMERS ET AL., *supra* note 19, at 646.

⁶⁸ See Jakob Schemmel, *Regulating European Financial Markets Between Crisis and Brexit*, 28 J. FIN. REGUL. & COMPLIANCE 503 (2019); Colaert, *supra* note 16, at 1579; Moloney, *supra* note 16, at 1317.

⁶⁹ *European Insurance and Occupational Pensions Authority (EIOPA)*, EUR. UNION, https://europa.eu/european-union/about-eu/agencies/eiopa_en (last visited Sept. 30, 2021).

⁷⁰ *European Insurance and Occupational Authority*, 21/033, 2021 O.J 1, 18; *European Insurance and Occupational Authority*, 21/033, 2021 O.J 1, 38; *European Insurance and Occupational Authority*, 21/033, 2021 O.J 1, 40.

⁷¹ *European Commission*, AGEPLATFORM EUROPE, <https://www.age-platform.eu/european-commission> (last visited Sept. 28, 2021).

⁷² Flupke van den Bogard & Daniel Nevzat, *European Commission Adopts Legislative and Regulatory Package on Sustainable Finance*, NORTON ROSE FULBRIGHT, (Apr. 22, 2021), <https://www.regulationtomorrow.com/eu/european-commission-adopts-legislative-and-regulatory-package-on-sustainable-finance/>.

⁷³ *Revised Insurance Mediation Directive*, NORTON ROSE FULBRIGHT, <https://www.nortonrosefulbright.com/fr-mo/knowledge/publications/7096d28c/revised-insurance-mediation-directive> (Last visited, Sept. 28, 2021).

uniform interpretation and application by the national supervisory and regulatory authorities.⁷⁴

The greater granularity of the new rules should enhance the legal certainty,⁷⁵ and implement an overarching bias favoring more convergence of the Member States' laws.⁷⁶ In contrast, the European legislation generally prefers categories and concepts of an economic nature rather than a legal origin.⁷⁷ This economic language may be vague, lending itself to a plurality of meanings when it is to be implemented in legal language and concepts.⁷⁸ Ultimately, the resulting regime may not provide sufficient guidance to the decision-maker or judge.⁷⁹

Finally, more detailed and extensive new rules render compliance with the principle of proportionality that is fundamental to the EU law more relevant.⁸⁰ In general terms, proportionality pertains to the drafting of the EU and the Member States' laws⁸¹ concerning how to regulate best ("the content and form") the matter of interest.⁸² When it is possible to choose between several appropriate measures, the least onerous one must be used, and the disadvantages caused must not be disproportionate to the objectives pursued.⁸³

EU insurance regulation mentions this principle considering the characteristics of the application of its provisions.⁸⁴ The IDD and Solvency II provide that the principle of proportionality is applied "both for the requirements imposed on insurance and reinsurance

⁷⁴ See generally Elizabeth Howell, *EU Agencification and the Rise of ESMA: Are Its Governance Arrangements Fit for Purpose?* 78 CAMBRIDGE L.J. 324 (2019).

⁷⁵ See Sarah Arras & Jan Beyers, *Access to European Union Agencies: Usual Suspects or Balanced Interest Representation in Open and Closed Consultations?* 58 J. COMMON MKT STUD. 836 (2019). (A role in elaborating these rules is also played by the stakeholders, who are represented in EIOPA and, in general, in the European agencies.); see also Ixchel Pérez Durán, *Interest Group Representation in the Formal Design of European Union Agencies*, 12 REGUL. & GOVERNANCE 238 (2018).

⁷⁶ *Background Document on the Consultation Paper on the Opinion on the 2020 review of Solvency II: Impact Assessment*, at 127, BoS (2019), 19/452 (Oct. 15, 2019).

⁷⁷ See Lydia Velliscig, *Season 3: Product Governance. Rethinking Retail Customer Protection in the EU Insurance Market*, 18 GLOBAL JURIST 6 (2018) (where the author outlines how the terminology is then referred to "products, distribution, packaged products, prudential regulation based on purely economic concepts, and now to product oversight and governance arrangements").

⁷⁸ Jörg S. Haas, et. al., *Economic and Fiscal Policy Coordination After the Crisis: Is the European Semester Promoting More or Less State Intervention*, J. EUROPEAN INTEGRATION, Mar. 29, 2020, at 327.

⁷⁹ European Union, *Joint Practice Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation*, 5-41, 2015.

⁸⁰ See Rudolf Geiger, *Commentary to Article 5 TEU*, in EUROPEAN UNION TREATIES: A COMMENTARY 40 (Rudolf Geiger, Daniel Erasmus-Khan, Markus Kotzur & C.H. Beck eds., 2015); MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* 10, 32 (2013); MATTHIAS KLATT & MORITZ MEISTER, *THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY* (2012); AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 23 (2012); Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law* 16 Eur. L.J. 158 (2010); NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* (1996).

⁸¹ Takis Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 66 (Evelyn Ellis ed., 1999).

⁸² Consolidated Version of the Treaty on European Union art. 5(4), Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

⁸³ Aurelien Portuese, *Principle of Proportionality as Principle of Economic Efficiency* 19 EUR. L.J. 623 (2013).

⁸⁴ See Matthias Scherer & Gerhard Stahl, *The Standard Formula of Solvency II: A Critical Discussion*, 11 EUROPEAN ACTUARIAL JOURNAL, 3-20 (2020).

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companies and for the exercise of supervisory powers.”⁸⁵ It concerns all interested parties, including supervisory authorities, and applies as a matter of principle and not as a matter of exception.⁸⁶ Thus, the evaluation of rules and supervisory activities based on the principle of proportionality requires taking into account their nature, scale, and complexity of the risks inherent in the business (Solvency II), in the activities performed, the insurance products sold and the type/size of the distributor (IDD).⁸⁷

The principle of proportionality is not limited to the EU law; it is imposed on the Member States and their supervisory authorities.⁸⁸ Though some Member States adopt provisions beyond what is required by the European standards to be implemented, a concept colorfully referred to as gold plating, the principle of proportionality still applies to these purely national rules.⁸⁹ The Commission listed for the insurance sector several cumulative (but not definitive) conditions for a general good rule to be valid under the EU law that the CJEU has developed over the years.⁹⁰ The IDD heightened the relevance of the proportionality principle for national laws providing that “the administration burden stemming from general good provisions should be proportionate with regard to consumer protection.”⁹¹ This rule is an additional condition related to the insurance sector.⁹² Although the IDD rules are addressed to all distributors, compliance costs could be too great for small and medium-sized intermediaries relative to the benefits realized by customers.⁹³ The Member States must comply with this rule when implementing IDD’s rules and “gold plating” the national laws.⁹⁴

⁸⁵ Council Directive 2016/97, *supra* note 7 (which replicated the provision of Solvency II (19)).

⁸⁶ Karel van Hulle states: “this means, for instance, that a supervisory authority may. Not adopt an attitude of always requiring the strictest interpretation, putting the burden of proof on undertakings to show such strict interpretation is in their case disproportionate.” KAREL VAN HULLE, SOLVENCY REQUIREMENTS FOR EU INSURERS: SOLVENCY II IS GOOD FOR YOU 172 (2019).

⁸⁷ See Pierpaolo Marano, *Sources and Tools of the Insurance Regulation in the European Union*, in INSURANCE REGULATION IN THE EUROPEAN UNION: SOLVENCY II AND BEYOND 14 (Pierpaolo Marano & Michele Siri eds., 2017); see also Gabriel Bernardino, Chairman of Euro. Ins. & Occupational Pensions Auth. at 2nd IVASS Conference: Solvency II and Small and Medium-sized Insurers in Rome (Mar. 3, 2017), https://www.eiopa.europa.eu/content/building-common-supervisory-culture_en.

⁸⁸ See Council Directive 2018/958 of June 28, 2018, on A Proportionality Test Before Adoption of New Regulation of Professions, art. 1-2, 2018 O.J. (L 173) (EU).

⁸⁹ See Noussia, *supra* note 12.

⁹⁰ See Commission Interpretative Communication Freedom to Provide Services and the General Good in the Insurance Sector, 2000 O.J. (C 43) 5. Based on this list, a general good rule must govern a matter which has not been harmonized at the EU level: the rule must pursue an objective of the general good, it must be non-discriminatory, objectively necessary, proportionate to the objective pursued, and it is not safeguarded by the rules of the provider’s home Member States.

⁹¹ Council Directive 2016/97, *supra* note 7.

⁹² See *id.*; Isabelle Audigier, *Insurance Distribution Directive and Cross-Border Activities by Insurance Intermediaries*, in INSURANCE DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS 16 (Pierpaolo Marano; Kyriaki Noussia eds., 2020).

⁹³ See Council Directive 2016/97, *supra* note 7.

⁹⁴ Audigier, *supra* note 92. (“One could wonder whether this criterion could be interpreted as a limitation of the IDD general good rules, meaning that these rules can only aim at protecting consumer and therefore can’t be applied to professional clients/SMES or in relation to large risks.”)

Supervisory authorities comply with the principle of proportionality when carrying out their activities, and interpretations of the rules invoking this principle to conform the rules to the interests set up by the European legislator are allowed.⁹⁵ EIOPA is expected to play a key role in promoting this principle among national authorities.⁹⁶ To achieve its tasks,⁹⁷ EIOPA can issue legally binding rules (hard law)⁹⁸ under the “comply or explain” mechanism.⁹⁹ However, EIOPA can issue non-binding rules requiring competent national authorities to state their reasons for compliance or non-compliance.¹⁰⁰ These non-binding rules (soft law) call regulated entities to have certain behaviors in the insurance market regardless of a sanction in case of non-compliance.¹⁰¹ The tasks of the Authority include the enhancing of customer protection and the consistent application of the EU law from national supervisory authorities.¹⁰² They both meet the IDD scope and EIOPA has already adopted guidelines and recommendations to promote markets’ safety, soundness and convergence of

⁹⁵ *Id.*; “The principle of proportionality is not meant to allow any entity to be exempt from its legal obligations but only to allow for their proportionate application. It needs to be clear that principle of proportionality is not the same as disapplication of rules.” EUR. INS. & OCCUPATIONAL PENSIONS AUTH., REPORT ON BEST PRACTICES ON LICENSING REQUIREMENTS, PEER-TO-PEER INSURANCE AND THE PRINCIPLE OF PROPORTIONALITY IN AN INSURTECH CONTEXT 20 (2019). Also, the EIOPA adds: “The principle of proportionality is a safeguard against the unlimited use of legislative and administrative powers, according to which an administrative authority may only act to exactly the extent that is needed to achieve its objectives.”

⁹⁶ See EUR. INS. & OCCUPATIONAL PENSIONS AUTH.

⁹⁷ Regulation 1094/2010 establishing EIOPA attributed such Authority with several tasks, including among other things to contribute (i) to enhancing customer protection (ii) to the establishment of high-quality common regulatory and supervisory standards and practices (iii) to the consistent application of legally binding EU acts on (re)insurance business, in particular by contributing to a common supervisory culture, ensuring consistent, efficient, and practical application of the legally binding EU acts applying to (re)insurance undertakings and insurance intermediaries. Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 Establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and Repealing Commission Decision 2009/79/EC, 2010 O.J. (L 331) 48.

⁹⁸ See Regulation (EU) No 1094/2010 of the European Parliament and of the Council of November 24, 2010 Establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and Repealing Commission Decision 2009/79/EC 2010 O.J. (L 331) 48. Furthermore, Regulation 1286/2014 enabled EIOPA to monitor the market for insurance-based investment products, which are marketed, distributed, or sold in the Union and provided EIOPA with product intervention powers to temporarily prohibit or restrict in the Union (i) the marketing, distribution, or sale of certain insurance-based investment products or insurance-based investment products with certain specified features; or (ii) a type of financial activity or practice of an insurance or reinsurance undertaking. 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), arts. 15–16, 2014 O.J. (L 352) 1.

⁹⁹ EIOPA can issue guidelines and recommendations under the “comply or explain” mechanism in Article 16 of EIOPA’s statute and develop both draft regulatory technical standards to be submitted to the European Commission and draft implementing technical standards in the specific cases referred to in Article 15 of EIOPA’s statute. Regulation (EU) 1094/2010 of the European Parliament and of the Council of November 24, 2010 Establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and Repealing Commission Decision 2009/79/EC, art. 15–16, 2010 O.J. (L 331) 48.

¹⁰⁰ See Council Regulation 1094/2010, *supra* note 18.

¹⁰¹ Therefore, they do not coincide with those constituting an organization. For example, a supervisory authority is sometimes defined as public law. Marano, *supra* note 53, at 12.

¹⁰² See Council Regulation 1094/2010, *supra* note 18.

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regulatory practice on the IDD.¹⁰³ Greater harmonization of distribution rules and market practice convergence will inspire better opportunities for EIOPA's interventions on both hard law and soft law.¹⁰⁴

The IDD's flexibility due to the multilevel structure allows the Commission to update Delegated Regulations.¹⁰⁵ The EIOPA powers could be suitable for enhancing the interpretation of the IDD rules on an ongoing basis.¹⁰⁶ The general principles for distributors introduced by the IDD favor adopting business conduct rules by EIOPA, regardless of whether they are hard law or soft law.¹⁰⁷ The breadth of meanings attributable to these principles allows them to be adapted over time to market practices.¹⁰⁸ However, the IDD stressed that the Parliament and the Council could not be excluded from policy choices on the IDD when it comes to drafting regulatory, implementing technical standards and providing a convergent interpretation of the IDD across the EU.¹⁰⁹ Thus, European and national authorities/regulators are challenged in managing the described regulatory flexibility (i) without going beyond the political decisions enshrined in the IDD and (ii) in compliance with the principle of proportionality.¹¹⁰

IV. IDD RULES' ESSENTIAL FEATURES.

Two objectives pursued by the IDD are increasing customer protection across the EU and the cross-border insurance business.¹¹¹ The previous Section 3 drafted the legal framework beyond the implementation of the IDD, which should favor the achievement of these objectives. This Section 4 analyzes the essential features of the rules introduced to

¹⁰³ Council Regulation 2019/2175, art. 1, 2019 O.J. (L 334) 16 (EU).

¹⁰⁴ *Id.* at 2.

¹⁰⁵ Council Directive 2016/97, *supra* note 7, at 49.

¹⁰⁶ EUR. INS. & OCCUPATIONAL PENSIONS AUTH., FINAL REPORT ON CONSULTATION PAPER NO. 16/006 ON TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE INSURANCE DISTRIBUTION DIRECTIVE 34 (2017)(stating that the EIOPA has concluded that the general principles are consistent with IDD, and they can be used to further explain requirements under the IDD) [hereinafter Technical Advice on Possible Delegated Acts Concerning the Insurance Distribution Directive].

¹⁰⁷ PIERPAOLO MARANO, *The Contribution of Product Oversight and Governance (POG) to the Single Market: A Set of Rules on the Organization for the Business Conduct*, in INSURANCE DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS 61 (Pierpaolo Marano & Kyriaki Nossia eds., 2020) (ebook).

¹⁰⁸ Council Directive 2016/97, *supra* note 7, at 19.

¹⁰⁹ *Id.*

¹¹⁰ Marano, *supra* note 107, at 55, 56 ("The IDD extended the set of rules on the proper operation of the insurance (and reinsurance) business and POG is a crucial component of this political choice."); See TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE INSURANCE DISTRIBUTION DIRECTIVE, *supra* note 106 at 81, 82 (inquiring if the principle of proportionality to insurance products and undertakings are difficult and presenting options of the principle's application).

¹¹¹ See Survey on the Application of the Insurance Distribution Directive (IDD), EUR. INS. & OCCUPATIONAL PENSIONS AUTH., *Survey on the application of the Insurance Distribution Directive* (Feb. 1, 2021), https://www.eiopa.europa.eu/content/survey-application-of-insurance-distribution-directive-idd_en (summarizing a questionnaire sent out to insurance brokers and listing key takeaways and conclusory remarks on customer protections and cross-border insurance, *inter alia*).

achieve the IDD's purposes aforementioned.¹¹² The analysis identifies the persons that the IDD intends to protect, and it outlines how the IDD wants to satisfy such a need for protection. In the case of cross-border insurance business, the analysis explores how to achieve customer protection in the absence of a single European insurance supervisor.

A. The need for protection and the people to protect.

The identification of protected people under the IDD is quite complex as there are several layers of protection to consider.¹¹³ The overarching principle is that the protection rules are graduated based on the nature of the risk and not the characteristics of the protected persons.¹¹⁴ Thus, the protection concerns all customers regardless of their characteristics, i.e., whether a consumer or a company,¹¹⁵ or nationality, if the risks are in the EU.¹¹⁶ The relationships between distributors and these customers must always comply with the general principle providing that distributors act honestly, fairly, and professionally according to the best interests of their customers.¹¹⁷ Member States cannot depart from this rule for any class of customers or risks.¹¹⁸

With this broad prescription in mind, there are myriad exceptions that turn on various factors, ranging from the means of insurance distribution to the nature of the insurance product itself.¹¹⁹ The non-exhaustive discussion of these exceptions below provides a flavor of the regulatory regime. Significantly, the rules on information duties concerning pre-contractual information, conflicts of interest, transparency, and advice do not apply to customers when distributing products concerning the insurance of large non-life insurance

¹¹² Regarding the structure, the IDD is organized in two parts: (i) registration and organizational requirements, including the chapter on cross-border operations and (ii) information requirements and conduct of business rules, including the chapter on additional requirements on insurance-based investment products. Council Directive 2016/97 of January 20, 2016, on Insurance Distribution, 2016 O.J. (L 26) (EU). A chapter on penalties for violating the corresponding rules and some final provisions complement the two parts. *Id.* While the first part refers to insurance intermediaries, the second part concerns all distributors of insurance products. *Id.* The three Commission Delegated Regulations, which have complemented the IDD, are all related to the distribution/distributors.

¹¹³ Council Directive 2016/97, *supra* note 7 (showing throughout the directive that consumers require varying aspects of protection).

¹¹⁴ See Pscheidl, *supra* note 30 (outlining how this approach introduces a disproportionate complexity for business-to-business insurance).

¹¹⁵ Council Directive 2016/97, *supra* note 7 (“Customer should mean the representative of a group of members who concludes an insurance contract on behalf of the group of members where the individual member cannot take an individual decision to join, such as a mandatory occupational pension arrangement. The representative of the group should, promptly after enrollment of the member in the group insurance, provide, where relevant, the insurance product information document and the distributor’s conduct of business information.”).

¹¹⁶ The IDD does not apply to insurance and reinsurance distribution activities concerning risks and commitments located outside the EU. *Id.* at art. 1(6). The customer who enters an insurance contract in a Member State to cover risks located outside the EU will receive protection if, and to the extent provided, by the law of such Member State; that is, the level of protection depends on national rules rather than the IDD. *Id.* In addition, these policyholders will receive protection depending on the laws of the Third Countries where the risks are located. *Id.*

¹¹⁷ *Id.* at art. 22(1).

¹¹⁸ Council Directive 2016/97, *supra* note 7, at 21.

¹¹⁹ *Id.* at 10.

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risks.¹²⁰ Distance marketing is covered by Directive 2002/65/EC of September 23, 2002 concerning the distance marketing of consumer financial services applies to insurance products marketed through means of distance communication.¹²¹

Other large risks are considered dependent on the customer's activity,¹²² or dimension.¹²³ However, since the IDD allows the Member States to adopt or maintain stricter national provisions, the Member States can extend these rules to customers of insurance covering large risk.¹²⁴

In the context of life insurance, additional information rules apply when distributing insurance-based investment products.¹²⁵ Customers qualified as retail investors are entitled to two layers of information: one addressed to the customer of all insurance products, and the additional information specific to insurance-based investment products.¹²⁶ However, Member States may provide that this additional information need not be provided to a professional client as defined in MiFID II.¹²⁷ With group insurance, distributors must establish and implement a policy as to who shall be subject to the suitability assessment - in case an insurance contract is concluded on behalf of a group of members and each individual member

¹²⁰ *Id.* at 12.

¹²¹ Article 2(e) of Directive 2002/65/EC provides that they are any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of service between those parties. 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, art. 2(e), 2002 O.J. (L 271) 16.

¹²² They are risks classified under Classes 14 (credit) and 15 (suretyship) where the policyholder is engaged professionally in an industrial or commercial activity, or in one of the liberal professions, and the risks relate to such activity. *See id.*

¹²³ They are risks classified under Classes 3 (land vehicles other than railway rolling stock), 8 (fire and natural forces), 9 (other damage to property), 10 (motor vehicle liability), 13 (general liability) and 16 (miscellaneous financial loss) insofar as the policy holder exceeds the limits of at least two of the following criteria: (a) a balance-sheet total of EUR 6.2 million (b) a net turnover, within the meaning of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, of EUR 12.8 million (c) an average number of 250 employees during the financial year. *See id.*

¹²⁴ *See* Council Directive 2016/97, *supra* note 7.

¹²⁵ *See* Council Directive 2002/65/EC of the European Parliament and of the Council of September 23, 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 O.J. (L 352) 2-13.

¹²⁶ *See id.*

¹²⁷ These clients are identified under Article 4(1)(1) of MiFID II. *See* 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, art. 4(1)(1), 2014 O.J. (L 173) 349. In order to be considered a professional client, the client must comply with the criteria set forth under Annex II of MiFID II. *See id.*

cannot take an individual decision to join.¹²⁸ Thus, some retail customers could fall outside the protection rules introduced under the IDD.¹²⁹

Member States in every case can condition sales on providing advice for any insurance product, or certain types of insurance products.¹³⁰ This advice consists of a personal recommendation to a customer, either upon their request or at the initiative of the insurance distributor, in respect of one or more insurance contracts.¹³¹ In such a case, the stricter national provisions must be satisfied by insurance distributors, including those operating on a cross-border basis when concluding insurance contracts with customers having their habitual residence or establishment in that Member State.¹³²

The framework of rules outlined so far contains further exceptions depending on the distribution channel or mean used for insurance distribution.¹³³ In particular, (i) some distribution channels do not need to comply with duties set forth under the IDD, and (ii) the distance marketing of insurance products must comply with additional rules when addressed to consumers.¹³⁴ This additional layer of regulation is discussed *infra*.

With exempted distribution channels, the IDD does not apply to ancillary insurance intermediaries that carry out insurance distribution activities if certain conditions are met.¹³⁵ The insurance undertaking or insurance intermediary carrying out the distribution activity through an ancillary insurance intermediary, who is exempted from the application of the IDD, must ensure certain information to customers are provided, and that appropriate and proportional arrangements are in place to comply with the general principles of business conduct.¹³⁶ The protection includes all customers dealing with these ancillary

¹²⁸ See Commission Delegated Regulation (EU) 2017/2359 of September 21, 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, 2017 O.J. (L 341) 8 (regarding information requirements and conduct of business rules applicable to the distribution of insurance-based investment products).

¹²⁹ Such a policy shall also contain rules on how that assessment will be done in practice, including from whom information about knowledge and experience, financial situation, and investment objectives shall be collected. *See id.*

¹³⁰ See Council Directive 2016/97, *supra* note 7. *See also id.*, at art. 29(3) (regarding insurance-based investment products). The latter rule also allows the Member States to prohibit or further restrict the offer or acceptance of fees, commissions, or non-monetary benefits from third parties in relation to the provision of insurance advice. *See id.* at art. 29(3)(1). Stricter requirements may include requiring any such fees, commissions, or non-monetary benefits to be returned to the clients or offset against fees paid by the client. *See id.* at art. (23)(2).

¹³¹ *See id.* at art. 2(15).

¹³² *See id.* at art. 22(2). *See also id.* at 30(3) (in case of insurance-based investment products).

¹³³ See Council Directive 2016/97 of Jan. 20, 2016, on Insurance Distribution, O.J. (L 26/19) 10, 12, 21, 24.

¹³⁴ *See id.* at art. 23(7) (in the case of telephone selling).

¹³⁵ According to Article 1(3) of the IDD all the following conditions must be met: (a) the insurance is complementary to the good or service supplied by a provider, where such insurance covers: (i) the risk of breakdown, loss of, or damage to, the good or the non-use of the service supplied by that provider; or (ii) damage to, or loss of, baggage and other risks linked to travel booked with that provider; (b) the amount of the premium paid for the insurance product does not exceed EUR 600 calculated on a pro rata annual basis; (c) by way of derogation from point (b), where the insurance is complementary to a service referred to in point (a) and the duration of that service is equal to, or less than, three months, the amount of the premium paid per person does not exceed EUR 200. *See id.* at art. 1(3).

¹³⁶ See Council Directive 2016/97 of January 20, 2016, on Insurance Distribution, art. 1(4), 2016 O.J. (L 26) (EU).

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intermediaries.¹³⁷ Still, the actual efficacy of such protection depends on how insurance undertakings or insurance intermediaries will ensure these ancillary intermediaries comply with the corresponding rules.¹³⁸

Distance marketing is covered by Directive 2002/65/EC of September 23, 2002, concerning that distance marketing of consumer financial services applies to insurance products marketed through means of distance communication.¹³⁹ This Directive sets the minimum standard for information to be given to *consumers* of financial services before a distance contract becomes binding on the consumer.¹⁴⁰ It also contains provisions for withdrawal (cancellation) rights from the contract during a cooling-off period and protections against the unsolicited supply of financial services, including insurance.¹⁴¹ However, these provisions refer to consumers (any natural person), who, in distance contracts covered by Directive 2002/65/EC, is acting for purposes outside his trade, business, or profession.¹⁴² Thus, a category of people – consumers – are selected within the broader class of customers as the beneficiaries of further protection rules.¹⁴³

Essentially, the EU legislation uses different criteria to identify the people to be protected: risks, activities, dimensions, group insurance, means of distance communication.¹⁴⁴ It is questionable if these criteria are still coherent and respond to the principle of proportionality.¹⁴⁵ Several aspects are open to criticism.¹⁴⁶

First, the growing importance of digital distribution and the spread of cross-selling practices raise the question of the criteria used to exclude ancillary insurance intermediaries from the IDD rules, including those of protection.¹⁴⁷ The criteria identified do not consider the scale of the distribution activity of such intermediaries, i.e., their capacity to reach many more customers than any single human distributor.¹⁴⁸ The administrative burdens on the ancillary insurance intermediaries are disproportionate when referring to a relatively small number of contracts with modest premiums.¹⁴⁹ However, carrying out the distribution activity with

¹³⁷ See Council Directive 2002/65/EC, *supra* note 125.

¹³⁸ See *id.*

¹³⁹ Article 2(e) of Directive 2002/65/EC provides that the means are those of which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of service between those parties. See Directive 2002/65/EC of the European Parliament and of the Council of September 23, 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, art. 2(e), 2002 O.J. (L 271) 16.

¹⁴⁰ Directive 2002/65/EC of the European Parliament and of the Council of September 23, 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 O.J. (L 271) 2-4.

¹⁴¹ See *id.*

¹⁴² See *id.* at 2(d).

¹⁴³ *Id.*

¹⁴⁴ Caroline Cauffman, *The Principle of Proportionality and European Contract Law*, Maastricht European Private Law Institute (Jan. 2013).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Tom Baker & Benedict G. C. Dellaert, *Regulating Robo Advice Across the Financial Services Industry*, U. PENN. INST. FOR LAW & ECON RESEARCH PAPER NO. 17-11, 30 (2018).

¹⁴⁸ See *id.* (noting the relevance of the scale for regulatory purposes).

¹⁴⁹ See Noussia, *supra* note 12.

means of distance communication allows the marketing of contracts with modest premiums to a potentially large number of customers.¹⁵⁰ The reference to the single contract or customer is not adequate to properly address the need for protection.¹⁵¹ The reference to the set of contracts or customers the individual intermediary can reach seems more appropriate.¹⁵² A threshold amount of premiums collected should be an additional criterion to those currently established for the exemption.¹⁵³ Exceeding this threshold implies the application of the protection rules.¹⁵⁴ The upcoming review of the IDD should deal with this proposal.

Second, unlike the protection afforded only to consumers in distance selling under Directive 2002/65/EC, the IDD increases the protection rules based mainly on the insured risks without distinguishing between consumers and other customers.¹⁵⁵ Therefore, consistency between IDD's choice and that of Directive 2002/65/EC, now dating back in time, should be checked and verified.¹⁵⁶

Third, the exclusion of professional clients of insurance-based investment products is made possible because such exclusion is left to the Member State's decision.¹⁵⁷ The opposite rule would seem more in line with the principle of proportionality.¹⁵⁸ The IDD's review should exclude these customers in principle unless the Member State can demonstrate that the national market's peculiarities justify the protection rules' extension.¹⁵⁹

Finally, group insurance contracts should be differentiated from distribution agreements between legal persons and insurers.¹⁶⁰ Although the insurance contract regulation is outside the scope of the IDD, the harmonization of the conditions required for group insurance not to constitute an insurance distribution appears necessary given the importance of such insurance.¹⁶¹

¹⁵⁰ Baker & Dellaert, *supra* note 147.

¹⁵¹ See Noussia, *supra* note 12.

¹⁵² Baker, *supra* note 147.

¹⁵³ Bravo J.M., *IDD and Distribution Risk Management*, INSURANCE DISTRIBUTION DIRECTIVE. AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION (Marano P., Noussia K. eds., vol 3. 2021), https://doi.org/10.1007/978-3-030-52738-9_14.

¹⁵⁴ *Id.*

¹⁵⁵ Viktoria Chatzara, *The Interplay Between the GDPR and the IDD*, INSURANCE DISTRIBUTION DIRECTIVE. AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION (Marano P., Noussia K. eds., vol 3. 2021), https://doi.org/10.1007/978-3-030-52738-9_14.

¹⁵⁶ *See id.*

¹⁵⁷ *See* Audigier, *supra* note 92.

¹⁵⁸ Marta Ostrowska, *Information Duties Stemming from the Insurance Distribution directive as an Example of Faulty Application of the Principle of Proportionality*, INSURANCE DISTRIBUTION DIRECTIVE. AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION (Marano P., Noussia K. eds., vol 3. 2021), https://doi.org/10.1007/978-3-030-52738-9_14.

¹⁵⁹ Michele Siri, *Insurance-Based Investment Products: Regulatory Responses and Policy Issues*, INSURANCE DISTRIBUTION DIRECTIVE. AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION (Marano P., Noussia K. eds., vol 3. 2021), https://doi.org/10.1007/978-3-030-52738-9_14.

¹⁶⁰ Pscheidl, *supra* note 30, at 216.

¹⁶¹ *See id.* at 214, 216.

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B. The dual direction of customer protection in the IDD and the “Mifidization” of the insurance regulation

IDD pursues customer protection following two directions: protection at the point of sale and protection at the product manufacturing/designing stage.¹⁶² Both are influenced by the “Mifidization” of the EU insurance regulation –the contamination of insurance rules by rules set out for financial products.¹⁶³

A beginning observation is that many IDD rules and principles are a “copy and paste” of those introduced by MiFID II.¹⁶⁴ Although aimed generally at financial products, the rules and principles apply to insurance-based investment products and all other products, including non-life insurance products.¹⁶⁵ They refer to the relationship between distributors and customers at the point of sale, which is the recipient of the protection’s rules since the IMD.¹⁶⁶ They also relate to product oversight and governance (POG), which is the new regulatory approach implemented to anticipate customers’ protection from the relationship at the point of sale to the products’ design.¹⁶⁷ The additional rules on insurance-based investment products (IBPs) are common to both approaches.¹⁶⁸ These rules mirror those for financial products set forth by MiFID II but almost paradoxically with some relevant difference (e.g., those concerning the regulation of inducements).¹⁶⁹

Importantly, the IDD establishes the general principle for distributors to act honestly, fairly, and professionally in accordance with the best interest of their customers, in addition to requiring a standardized pre-contractual information document to be delivered to customers.¹⁷⁰ The introduction of this general principle is likely to have manifold significance.¹⁷¹

¹⁶² PIERPAOLO MARANO, *The ‘Mifidization’: The Sunset of Life Insurance in the EU Regulation on Insurance?* in LIBER AMICORUM IN HONOUR OF JOANNIS ROKAS I (2017).

¹⁶³ See *id.*; see also Marano, *supra* note 87, at 10.

¹⁶⁴ MARANO, *supra* note 162, at 10.

¹⁶⁵ See *MiFID II & IDD: The Impact on Insurance Based Investment (“IBI”) Products*, CLIFFORD CHANCE (June 2016) <https://financialmarketstoolkit.cliffordchance.com/content/dam/cliffordchance/briefings/2016/06/mifid-ii-idd-the-impact-on-insurance-based-investment-ibi-products.pdf>.

¹⁶⁶ See *Insurance Distribution Directive: Frequently Asked Questions and Answers*, 1 GIB. FIN. SERV. COMM’N 6 (Apr. 10, 2018).

¹⁶⁷ See David Maria Marino, *Insurance Distribution Directive and product oversight and governance – new IVASS measures enacted*, LEXOLOGY (Oct. 6, 2020) <https://www.lexology.com/Commentary/insurance/italy/dla-piper/insurance-distribution-directive-and-product-oversight-and-governance-new-ivass-measures-enacted>.

¹⁶⁸ See Clifford Chance, *supra* note 165.

¹⁶⁹ See KYRIAKI NOUSSIA & MICHELE SIRI, *The Legal Regime and the Relevant Standards*, in DISTRIBUTION OF INSURANCE-BASED INVESTMENT PRODUCTS: THE EU REGULATION AND LIABILITIES 42 (Pierpaolo Marano & Ioannis Rokas eds., 2019).

¹⁷⁰ Kolding-Krøger et al. provide an empirical analysis of the pitfalls of the standardized pre-contractual information document to the customers for non-insurance products. CHRISTIAN BO KOLDING-KRØGER, AALYKKE HANSEN & AMELIE BROFELDT, *The Reality of the Promised Increase in Customer Protection Under the Insurance Distribution Directive*, in INSURANCE DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS 395 (Pierpaolo Marano & Kyriaki Nougssia eds., 2020). Furthermore, the compliance of information duties to the principle of proportionality is challenged by Marta Ostrowska. OSTROWSKA, *supra* note 158, at 31.

¹⁷¹ See Simon Cowling, *IPID and its impact on the UK Insurance Industry*, SCMESERVE (Nov. 23, 2017), <https://www.schemeserve.com/ipid-impact-uk-insurance-industry/>.

National laws already have general clauses –good faith and fairness– on the conduct required to conclude and execute contracts.¹⁷² Is the general principle introduced by the IDD mere repetition of these general clauses, or is it intended to have a context-specific effect? The answer inevitably depends on national legal cultures, and is essentially relevant in disputes between distributors and customers referred to the Courts.¹⁷³ Whatever the solution that will emerge in the Member States, the above general principle provides authorities with the flexibility in interpreting the regulation and adapt the rules to a changing market.¹⁷⁴ The general principle also allows national supervisors to develop a common language based on such principle and EIOPA to promote a convergent interpretation of European rules by these authorities.¹⁷⁵

On the other hand, the possibility of deriving detailed rules from the general principle or other general rules, such as those on POG, can generate uncertainty.¹⁷⁶ The supervised entities may not know *ex-ante* the behavior expected by the regulation, but they “discover” such behavior over time due to the interpretation of the principle by the authorities.¹⁷⁷ The boundary between the interpretation of an existing rule and creating a new rule through such interpretation can be fragile.¹⁷⁸

The general principle refers to the “best interest” of the customers.¹⁷⁹ The IDD copied the notion from MiFID, but its meaning is likely different for insurance products.¹⁸⁰

¹⁷² Catherine Pastrikos Kelly, *What You Should Know About the Implied Duty of Good Faith and Fair Dealing*, AMERICAN BAR ASSOCIATION (July 26, 2016), <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2016/duty-of-good-faith-fair-dealing/>.

¹⁷³ KOLDING-KROGER ET AL., *supra* note 170, at 328.

¹⁷⁴ *See id.*, at 130.

¹⁷⁵ *See A Common Supervisory Culture: Key Characteristics of High-Quality and Effective Supervision*, EIOPA 2 (2017).

¹⁷⁶ MARANO, *supra* note 107, at 55.

¹⁷⁷ *Reducing the Risk Of Policy Failure: Challenges For Regulatory Compliance*, Chapter 5, suggestions for results-oriented policy, at 55 (2000).

¹⁷⁸ EIOPA argues that the “value for money” is not defined in EU legislation. *See Consultation Paper on Framework to Address Value for Money Risk in the European Unit-Linked Market*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH., (Apr. 13, 2021), https://www.eiopa.europa.eu/content/consultation-framework-address-value-money-risk-european-unit-linked-market_en. The starting point of the following arguments is that “value for money” is not defined in EU legislation. Still, the outcome is that a new rule concerning the “value for money” could be introduced due to interpretation from the authorities. Indeed, the consultation paper states that “[w]hile value for money is not explicitly defined in EU legislation, the POG framework clearly highlights that product characteristics – which include costs – need to be tested to ensure they are aligned to the target market’s needs, objectives and characteristics, which also includes the target market’s ability to pay and bear losses. Despite value for money being entrenched in POG, there is a need for more harmonized guidance to implement POG requirements and address consumer detriment arising from products where the costs and charges are not proportionate to the benefits and hence where products do not offer value to the target market. This discussion paper explores the principles underlying this issue and suggest common language for future work in this area.” *Id.* at 1.6. Thus, the paper continues “EIOPA considers that products offer value for money where the costs and charges are proportionate to the benefits (i.e., investment performance, guarantees, coverage and services) to the identified target market and reasonable taking into account the expenses born by providers and in comparison to other comparable retail solutions on the market” *Id.* at 1.7. Moreover, “[t]his also means that the product delivers added value for the consumer given the costs and expected returns and assuming a reasonable holding period. To this end, products are expected to be reviewed and tested.” *Id.* at 1.8.

¹⁷⁹ Pierpaolo Marano, *Insurance Directive Distributive: A Legal Analysis*, 260 (Kyriaki Noussia ed., Vol. 3 2021).

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The notion of “best interest” must be interpreted considering the different interests of customers who purchase insurance.¹⁸¹ The products that transfer the risk to the insurance undertaking respond to customers’ interests other than those satisfied through products that allow making an investment whose risk is borne by the customer.¹⁸² The best interest of the customer who pays to transfer risk also depends on how much he intends to pay or the risk the insurance market is available to underwrite.¹⁸³ Therefore, insurance products, other than IBIPs, are likely to not fall into the scope of the reconstructions on the meaning of best interest proposed about financial products.¹⁸⁴ Identical principles in their formulation cannot abolish differences between insurance products and financial products.¹⁸⁵ The interpretation of these principles must consider the different nature and purposes of products that carry out an insurance transaction or an investment transaction.¹⁸⁶

Going further, the IDD aims to harmonize the pre-contractual behavior and the contract’s execution by providing protection at the point of sale.¹⁸⁷ The IDD improves the rules on conflicts of interest, remuneration, and transparency.¹⁸⁸

Also, customer protection pursued by introducing a principle-based approach to assessing products’ design,¹⁸⁹ except for products that cover large risks.¹⁹⁰ Manufacturers maintain, operate, and review a product approval process to enable competent authorities to supervise and assess whether the regulated entities comply with the regulatory requirements

¹⁸⁰ *Id.* at 66.

¹⁸¹ *Id.* at 162.

¹⁸² *Id.* at 171.

¹⁸³ *Id.* at 172.

¹⁸⁴ See Luca Enriques & Matteo Gargantini, *The Overarching Duty to Act in the Best Interest of the Client in MiFID II*, in REGULATION OF EU FINANCIAL MARKETS: MiFID II 85 (Danny Busch ed., 2017) (on the best interest of customers for financial products). See also Federico Della Negra, *MI FID II AND PRIVATE LAW: ENFORCING EU CONDUCT OF BUSINESS RULES 27* (2019). See also Pscheidl, *supra* note 30, at 213 (where the author outlines the “best interests of the customers have to comprise both individual and collective policyholder interests, which need to be duly balanced to restore consistency between prudential and conduct of business regulation.”); Wojciech Pás, *Ensuring the Customer’s Best Interest in the Polish Insurance Market*, in INSURANCE DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS, 167 (Pierpaolo Marano & Kyriaki Noussia eds., 2020).

¹⁸⁵ See Noussia, *supra* note 12, at 107.

¹⁸⁶ See *id.* at 106.; see generally Andrea Beltratti & Giuseppe Corvino, *Why are Insurance Companies Different? The Limits of Convergence Among Financial Institution*, GENEVA PAPERS 33, 373 (2008).

¹⁸⁷ Noussia, *supra* note 12, at 86.

¹⁸⁸ See Köhne et al., *supra* note 30, at 720 (for an assessment of the rules). See also Hofmann et al., *supra* note 29, at 744.

¹⁸⁹ See *EIOPA’s Approach to the Supervision of Product Oversight and Governance*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH. (Oct. 2020), https://www.eiopa.europa.eu/content/eiopa-approach-supervision-product-oversight-and-governance_en.

¹⁹⁰ Article 3(3) of Regulation 2017/2358 provides: “Personalisation of and adaptation of existing insurance products in the context of insurance distribution activities for individual customers, as well as the design of tailor-made contracts at the request of a single customer, shall not be considered manufacturing.” Commission Delegated Regulation (EU) 2017/2358 of September 21, 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, art. 3(3), 2017 O.J. (L 341) 1.

on product oversight and governance (POG),¹⁹¹ thus essentially promoting customer protection.¹⁹²

The set of rules on POG is an innovation compared to the past EU regulation on insurance.¹⁹³ POG requires manufacturers to consider the interests of their customers when developing and distributing insurance products and increases transparency to the supervisory authorities by improving their ability to understand and assess the process of manufacturing and distributing insurance products.¹⁹⁴ The new approach complements and does not replace the previous approach based on the assumption that adequate consumer protection would be achieved if sales processes were fair and product feature disclosure was transparent.¹⁹⁵

The idea behind introducing the set of rules on POG is a compromise between two opposing needs.¹⁹⁶ The insurance regulation of the EU is still consistent with the principle introduced with the Directive 92/49/EEC of June 18, 1992 (third non-life insurance Directive) and now set forth by Solvency II.¹⁹⁷ The Member States cannot adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums and forms, and other printed documents which an undertaking intends to use in its dealings with policyholders.¹⁹⁸ However, the IDD aims at anticipating customer protection at the design stage for product marketing because it enables supervisory authorities to have a clearer picture of the business processes behind the products marketed to customers and, therefore, prevent the marketing of products with a poor value to customers.¹⁹⁹

Although POG was developed for financial products broadly defined,²⁰⁰ the requested supervision is similar to the supervision arising from Solvency II.²⁰¹ They are both

¹⁹¹ The process must be set out in a written document ("product oversight and governance policy"), which is subject to prior approval by the manufacturers', administrative, management, or supervisory body, and is made available to the relevant staff. *Id.* at art. 4(2). That process contains measures and procedures for designing, monitoring, reviewing, and distributing insurance products and corrective actions for insurance products that are detrimental to customers. *Id.* at art. 4(1). The measures and procedures shall be proportionate to the level of complexity and risks related to the products and nature, scale, and complexity of the relevant business of the manufacturer. *Id.* at art. 4 (1).

¹⁹² See EUR. INS. & OCCUPATIONAL PENSIONS AUTH., Final Report on Consultation Paper No. 16/006 on Technical Advice on Possible Delegated Acts Concerning the Insurance Distribution Directive, 34 (2017).

¹⁹³ See Velliscig, *supra* note 77, at 3. (on the origins of the POG concept); see also Pierpaolo Marano, *The Product Oversight and Governance: Standards and Liabilities*, in DISTRIBUTION OF INSURANCE-BASED INVESTMENT PRODUCTS: THE EU REGULATION AND THE LIABILITIES 60 (Pierpaolo Marano & Ionnis Rokas eds., 2019).

¹⁹⁴ See Marano, *supra* note 193, at 65.

¹⁹⁵ See *id.* at 61.

¹⁹⁶ See *id.* at 68.

¹⁹⁷ See *id.* at 65.

¹⁹⁸ Recital (20) of Directive 92/49/EEC states: "Whereas the systems of supervision to be employed must meet the requirements of an integrated market but their employment may not constitute a prior condition for carrying on insurance business; whereas from this standpoint systems for the prior approval of policy conditions do not appear to be justified; whereas it is therefore necessary to provide for other systems better suited to the requirements of an internal market which enable every Member State to guarantee policyholders adequate protection." Council Directive 92/49/EEC of June 18, 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), (20), 1992 O.J. (L 228) 1.

¹⁹⁹ See Marano, *supra* note 193, at 65.

²⁰⁰ See Velliscig, *supra* note 77, at 3; see Marano, *supra* note 193, at 66.

²⁰¹ See Marano, *supra* note 193, at 65.

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based on a prospective and risk-based approach.²⁰² POG discloses to the supervisory authority the persons/units involved in the products' design and monitoring, how the products are manufactured, and the purposes pursued by the insurance undertakings.²⁰³ The advanced knowledge of these processes is functional to the early intervention by the authority if it realizes how the products or processes are likely to be detrimental to customers.²⁰⁴ Therefore, supervisory authorities are expected to change their approach to market conduct.²⁰⁵ They are required to prevent bias affecting customers rather than repressing the conduct that led to such bias.²⁰⁶

Lastly, the "Mifidization" of insurance regulation consists of introducing additional rules on insurance-based investment products.²⁰⁷ These products are often made available to customers as potential alternatives or substitutes to investment products subject to MiFID II.²⁰⁸ To deliver consistent investor protection and avoid the risk of regulatory arbitrage, aside from the business standards defined for all insurance products, these products are subject to specific standards aimed at addressing the investment element embedded in those products.²⁰⁹ Such specific standards include the provision of appropriate information, requirements for advice to be suitable, and restrictions on remuneration.²¹⁰

The consistency in the regulation of these insurance products with the financial products is also pursued with the adoption of Regulation (EU) No 1286/2014 of November 26, 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs Regulation).²¹¹ This Regulation introduced the Key Information Document (KID), which is a basic information leaflet on the essential features of packaged retail and insurance-based investment products (PRIIPs) made available to retail investors before any sale.²¹² In addition, the Commission issued the Delegated Regulation (EU) 2017/2359 of

²⁰² See *id.*

²⁰³ See MARANO, *supra* note 107.

²⁰⁴ See Eilis Ferran, *Regulatory Lessons from the Payment Protection Insurance Mis-Selling Scandal in the UK*, in 13 EUR. BUS. ORG. L. REV. 264 (2012) (on the intervention powers). See also Katica Tomic, *Product Intervention of Supervisory Authorities in Financial Services*, in GOVERNANCE AND REGULATIONS: CONTEMPORARY ISSUES 229–255 (Simon Grima & Pierpaolo Marano eds., 2018).

²⁰⁵ See Marano, *supra* note 193, at 65.

²⁰⁶ See *id.*, at 66.

²⁰⁷ See *Insurance Directive Distributive: A Legal Analysis*, in AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION 3, at 66 (Pierpaolo Marano & Kyriaki Nossia eds., 2021) [hereinafter *Insurance Directive Distributive*].

²⁰⁸ See *id.*

²⁰⁹ See *id.*, at 226.

²¹⁰ See Siri, *supra* note 159, at 114.

²¹¹ See *Insurance Directive Distributive*, *supra* note 207, at 283.

²¹² The KID is required to contain pre-contractual information to help the retail investor understand the features of the product and compare it with other products. Regulation (EU) No 1286/2014 of the European Parliament and of the Council of November 26, 2014 on Key Information Documents for Packaged Retail and Insurance-Based Investment Products (PRIIPs), (15), 2014 O.J. (L 352) 1. The KID includes comprehensive information on the product's objectives and how it will achieve them based on its risk-reward profile (including maximum possible loss), the assumptions on which this is based, on all costs to be directly or indirectly borne by the retail investor, and on the product's recommended holding period. See Siri, *supra* note 159, at art. 8. By capturing a wide variety of retail investments, PRIIPs seeks to ensure comparability across and within sectors and borders

September 21, 2017, supplementing information requirements and conduct of business rules applicable to the distribution of insurance-based investment products.²¹³ EIOPA also published Guidelines on insurance-based investment products that incorporate a new structure that is difficult for customers to understand the risks involved.²¹⁴

Although the EU regulatory framework deliberately pursues the consistency between insurance-based investment products and financial products, some differences are still in place.²¹⁵ The most relevant refers to the remuneration of intermediaries.²¹⁶ MiFID II allows the payment of any fee or commission, or any non-monetary benefit, only if they increase the quality of the service provided to the customer. The IDD is satisfied when remuneration does not worsen service without demanding an increase in quality.²¹⁷ Also, some Member States have exercised the IDD's discretions for the IBIPs, mainly to gold plate investor protection measures.²¹⁸ This uncoordinated approach undermines the single-market and calls for EIOPA to assist diverging Member States' interests and ensure transparency about the measures national authorities have taken in this respect.²¹⁹

C. Cross-border insurance business without a single supervisor

The absence of a European insurance supervisory authority is not necessarily an obstacle to achieving a single insurance market.²²⁰ Nonetheless, the hoped-for increase in cross-border operations raises the need to strengthen coordination between national authorities.²²¹ This coordination is pursued by the colleges of supervisors as regulated under

without imposing specific requirements concerning business models, product designs, or legal forms. *Id.* at art. 4(1).

²¹³ See Commission Delegated Regulation 2017/2359 of September 21, 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 O.J. (L 341) 8 [hereinafter 2017 O.J.].

²¹⁴ See *Guidelines Under the Insurance Distribution Directive on Insurance-Based Investment Products that Incorporate a Structure Which Makes It Difficult for the Customer to Understand the Risks Involved*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH. (Jan. 1, 2019), https://www.eiopa.europa.eu/content/guidelines-under-insurance-distribution-directive-insurance-based-investment-products_en.

²¹⁵ See Siri, *supra* note 159, at 132.

²¹⁶ See *Insurance Directive Distributive* *supra* note 207, at 93.

²¹⁷ See Council Directive 2016/97 of 20 January 2016 on Insurance Distribution, art. 29, 2016 O.J. (L 26). See also Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 349.

²¹⁸ See *Insurance Directive Distributive* *supra* note 207, at 91.

²¹⁹ See Siri, *supra* note 159, at 132.

²²⁰ See Nicolas Veron, *Charting the next steps for the EU financial supervisory architecture*, Policy Contribution Issue n°16, at 2 (Jun. 2017), <http://aei.pitt.edu/87796/1/PC-16-2017-1.pdf>; see also Christa Randzio-Plath, *Challenges and Perspectives for a Single Market for Financial Services in Europe*, *Intereconomics* 35, at 192 (July/Aug. 2000), <https://www.intereconomics.eu/pdf-download/year/2000/number/4/article/challenges-and-perspectives-for-a-single-market-for-financial-services-in-europe.html>.

²²¹ See *Obstacles to the European Single Market: Findings of the Single Market Observatory (SMO)*, European Economic and Social Committee, at 7, 8 (July 2012), https://www.eesc.europa.eu/sites/default/files/resources/docs/12_362_obstacles-to-the-sm_en_fin_250912.pdf.

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Solvency II,²²² but they refer essentially to the supervision of the financial situation of insurance companies.²²³

The introduction of the general principle for distributors to act honestly, fairly, and professionally in accordance with the best interest of their customers provides some flexibility to EIOPA to strengthen supervisory convergence between national supervisors.²²⁴ These authorities can elaborate common concepts based on such principles, which are detached from national principles and interpretations when they interact with each other and with EIOPA.²²⁵ Furthermore, PRIIPs Regulation attributes market monitoring duties and product intervention powers to the EIOPA and national supervisory authorities.²²⁶ If the standardized pre-contractual information document (KID) does not reflect the product's characteristics, the supervisory authority should exercise its power of intervention.²²⁷ EIOPA is empowered to intervene when national competent authority/authorities have not taken action to address the threat or the actions.²²⁸ A common supervisory culture would make this replacement intervention merely hypothetical.²²⁹ Timely intervention is positive for customer protection. It is also positive for supervisors because omission or delay in their intervention may give rise to a liability of the supervisor to policyholders.²³⁰

While an active common supervisory culture is important, a more coherent regulatory framework is still needed to create a single insurance market as well as ensuring uniform protection for customers.²³¹ In financial services including insurance, ESAs acknowledged that there is room for developing more detailed requirements on cooperation about business conduct and consumer protection matters.²³² The IDD aims to facilitate the

²²² See *Guidelines on the Operational Functioning of Colleges of Supervisors*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH. (Jun. 29, 2014), https://www.eiopa.europa.eu/content/guidelines-operational-functioning-colleges-supervisors_en.

²²³ See Angelo Borselli, *Insurance Group Supervision in the European Union*, in *INSURANCE REGULATION IN THE EUROPEAN UNION: SOLVENCY II AND BEYOND 202* (Pierpaolo Marano & Michele Siri eds., 2017). See also Monika Machler, *Evolution of Insurance Group Supervision*, in *GLOBAL PERSPECTIVE ON INSURANCE TODAY 111* (Cecilia Kempler, Michel Flamee, Charles Yang & Paul Windels eds., 2010).

²²⁴ *ESAS Publish Recommendations on the Supervision of Retail Financial Services Provided Across Borders*, EUR. BANKING AUTH., (July 9, 2019), <https://www.eba.europa.eu/esas-publish-recommendations-on-the-supervision-of-retail-financial-services-provided-across-borders>.

²²⁵ See Marano, *supra* note 53, at 70.

²²⁶ Regulation 1286/2014 of the European Parliament and of the Council of November 26, 2014, on Key Information Documents for Packaged Retail and Insurance-Based Investment Products (PRIIPs), arts. 15–17, 2014 O.J. (L 352) 1.

²²⁷ See *id.* at art. 24(1) (as referred to information required under arts. 8(3) and 10(1)).

²²⁸ See *id.* at art. 16(2)(c). See also Regulation 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a Pan-European Personal Pension Product (PEPP), art. 65(3)(c), 2019 O.J. (L 198) 1.

²²⁹ See *Common Supervisory Culture*, EUR. INS. AND OCCUPATIONAL PENSIONS AUTH., (last visited Oct. 6, 2021), https://www.eiopa.europa.eu/common-supervisory-culture_en.

²³⁰ See Marano, *supra* note 97, at 93.

²³¹ See *A COMMON SUPERVISORY CULTURE: Key characteristics of high-quality and effective supervision*, EUR. INS. AND OCCUPATIONAL PENSIONS AUTH., (last visited Oct. 7, 2021), https://www.eiopa.europa.eu/sites/default/files/publications/pdfs/a_common_supervisory_culture_0.pdf.

²³² See *ESAS Publish Recommendations on the Supervision of Retail Financial Services Provided Across Borders*, EUR. BANKING AUTH., (July 9, 2019), <https://www.eba.europa.eu/esas-publish-recommendations-on-the-supervision-of-retail-financial-services-provided-across-borders>

cross-border operation of insurance intermediaries, but the rules on cooperation between supervisory authorities do not seem particularly effective.²³³ Such deficiency has an effect on the supervision of cross-border activities of insurance intermediaries and insurance groups.²³⁴

The IDD brought an important change to the framework established by the IMD.²³⁵ The new rules allocate the oversight powers between the home and host Member States' competent authorities over insurance intermediaries who are pass-porting in the EU.²³⁶ Indeed, in the case of the establishment of a branch or a permanent presence in the territory of another Member State, the IDD introduced a new concept of the "*primary place of business*" into the insurance distribution sector; that is, "*the location from where the main business of an intermediary is managed.*"²³⁷ If the intermediary's primary place of business is in a Member State other than its home Member State, the relevant competent authority may then agree that the competent authority of the Member State of the primary place of business will act as if it were that of the home Member State.²³⁸ In such a situation, the competent authority of the primary place of business will oversee the intermediary's compliance with professional and organizational requirements and information and conduct of business rules.²³⁹ This competent authority will also have the right to impose sanctions against the intermediary in the case of non-compliance.²⁴⁰ EIOPA should clarify the meaning of this new concept (e.g., the meaning of "managed") to ensure that the Member States have the same understanding of such concept and that the division of competence is organized between the competent authorities when needed.²⁴¹

The IDD does not supplement the regulation on the colleges of supervisors, which Solvency II sets forth for the financial conditions of cross-border insurance groups.²⁴² As the main objective of supervision is the protection of policyholders and beneficiaries as stated by Solvency II (see Article 27), supervision of cross-border insurance groups should also focus on business conduct rules.²⁴³ The insurance distribution of subsidiaries in different Member States is influenced by their affiliation to the group if the distributed products are manufactured by the holding company located in another Member State.²⁴⁴

The set of rules on POG creates a link between manufacturing and distribution due to the flow of information between manufacturer and distributor.²⁴⁵ The supervisor must

²³³ See Audigier, *supra* note 92.

²³⁴ EUR. BANKING AUTH., *supra* note 232.

²³⁵ Audigier, *supra* note 92.

²³⁶ See *id.* at 19.

²³⁷ Council Directive 2016/97, *supra* note 7.

²³⁸ See Audigier, *supra* note 92.

²³⁹ *Id.*

²⁴⁰ *Id.* at 22.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Pierpaolo Marano & Michele Siri, *Cross-Border Insurance Groups: Toward a Comprehensive Supervision Under Solvency II*, 43 GENEVA PAPERS RISK & INS.: ISSUES & PRACTICE 607 (2018).

²⁴⁴ *Id.*

²⁴⁵ MARANO, *supra* note 107.

²⁴⁵ See Ferran, *supra* note 204.; See also Tomic, *supra* note 204, at 229–255.

²⁴⁵ See Marano, *supra* note 193, at 65.

²⁴⁵ See MARANO, *supra* note 107.

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assess this link as inappropriate distribution can prevent achieving the target market and manufacturing a product with poor value is detrimental to customers (and distributors).²⁴⁶ In this case, the insurer/manufacturer based in a Member State (A) distributes products in another Member State (B), the supervisory authority of the Member State of distribution (B) cannot supervise directly manufacturers located in State A.²⁴⁷ Distrust of common (i.e., coordinated) supervision on cross-border activities could generate gold plating.²⁴⁸ State B could require distributors who carry out the activity in State B to ensure manufacturers located in State A comply with the POG rules on manufacturers.²⁴⁹ State B's national rules that transfer to distributors of the State B the compliance with rules imposed on manufacturers by State A can fill a gap in the supervision on cross-border activities, but they are also a disincentive to such activities and, ultimately, inconsistent with IDD's aim.²⁵⁰ Therefore, effective and timely cooperation between authorities is necessary for compliance with the POG rules.²⁵¹ A convergent understanding of these rules amongst authorities would reduce the legal uncertainty for supervised entities and facilitate cross-border activities.²⁵²

V. THE RESILIENCE OF THE IDD

The Commission issued the draft proposal to reform the IMD in July 2012.²⁵³ The IDD was adopted on January 20, 2016 which required the Member States to implement the reform by February 23, 2018.²⁵⁴ Some issues were not clearly defined or even predictable when the IDD was drafted and approved following a three- and half-year legislative process.²⁵⁵ In particular, two world phenomena are likely to affect the EU Single Market for several years and, therefore, are both significant for testing the resilience of IDD.²⁵⁶ These phenomena are the COVID-19 pandemic and InsurTech.²⁵⁷ While the IDD does not directly

²⁴⁶ Chatzara, *supra* note 155.

²⁴⁷ See generally Noussia, *supra* note 12.

²⁴⁸ See Ismael Ahmad Fontán et. al, *Banking Supervision and Resolution in the EU, Effects on Small Host Countries in Central, Eastern and South Eastern Europe*, WORLD BANK GROUP, <https://thedocs.worldbank.org/en/doc/589991557325278014-0130022019/original/FinSACBREffectsonSmallHostCountriesEurope.pdf> (last visited Oct. 6, 2021).

²⁴⁹ See generally MARANO, *supra* note 107.

²⁵⁰ See Audigier, *supra* note 92, at 65.

²⁵¹ See EIOPA's *Approach to the Supervision of Product Oversight and Governance*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH. (Oct. 8, 2020), https://www.eiopa.europa.eu/content/eiopa-approach-supervision-product-oversight-and-governance_en. (This convergence would support authorities in complying with challenges to the supervisory approach arising from POG).

²⁵² See Marano, *supra* note 100, at 71.

²⁵³ IMD 2 – EU report and impact assessment, CMS LAW NOW, [https://www.cms-lawnow.com/-/media/files/regzone/reports/regzonepdfreports/imd2eureport-\(1\).pdf?rev=7da37cd2-02a2-40bf-bbdb-067e222b0280?cc_lang=en](https://www.cms-lawnow.com/-/media/files/regzone/reports/regzonepdfreports/imd2eureport-(1).pdf?rev=7da37cd2-02a2-40bf-bbdb-067e222b0280?cc_lang=en) (last visited Oct. 6, 2021).

²⁵⁴ See *Implementation of the Insurance Distribution Directive*, BaFin Federal Financial Supervisory Authority, https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/Jahresbericht2017/Kapitel4/Kapitel4_1/Kapitel4_1_4/kapitel4_1_4_node_en.html (last visited Oct. 6, 2021).

²⁵⁵ See Noussia, *supra* note 12.

²⁵⁶ See generally Audigier, *supra* note 92, at 65.

²⁵⁷ See generally *id.*

regulate the aforementioned phenomena, IDD rules apply to the industries affected by the phenomena, manufacturing and distribution of insurance products.²⁵⁸

A. The case of the COVID-19 pandemic

EIOPA has placed several measures to help insurance undertakings and intermediaries to focus on ensuring business continuity and serving their customers despite the COVID-19 pandemic.²⁵⁹ All measures are part of EIOPA's overall role to enhance supervisory convergence, strengthen consumer protection, and preserve financial stability.²⁶⁰ These measures include recommendations on supervisory flexibility regarding deadlines of supervisory reporting and public disclosure by insurers.²⁶¹ Also, the insurance sector's guidance set out EIOPA's expectations on how the Authority believes insurance undertakings and intermediaries should continue to act towards their customers and policyholders.²⁶² Particularly, the EIOPA issued a Call to action for insurers and intermediaries to mitigate the impact of Coronavirus/COVID-19 on consumers.²⁶³

EIOPA expects all market participants to continue to act in consumers' best interests throughout their relationship with the consumer.²⁶⁴ EIOPA's expectation "is in line with the requirements on policyholder protection set out in relevant legislation such as Directive 2016/97 on Insurance Distribution (IDD) and Directive 2009/138/EC (Solvency II Directive)".²⁶⁵

EIOPA asks the following of insurers and intermediaries:

- (a) Provide clear and timely information to consumers on contractual rights.²⁶⁶
- (b) Treat consumers fairly and be explicit in all communications.²⁶⁷

²⁵⁸ See generally MARANO, *supra* note 107.

²⁵⁹ See *COVID-19 Measures*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH., https://www.eiopa.europa.eu/browse/covid-19-measures_en. (last visited July 10, 2021).

²⁶⁰ See *EIOPA's Response to the Coronavirus Crisis: Interview with Gabriel Bernardino, Chairman of the European Insurance and Occupational Pensions Authority*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH., (Apr. 27, 2020), <https://www.eiopa.europa.eu/content/eiopas-response-coronavirus-crisis>.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ See *Call to Action for Insurers and Intermediaries to Mitigate the Impact of Coronavirus/COVID-19 on Consumers*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH., (Apr. 1, 2020), https://www.eiopa.europa.eu/content/call-action-insurers-and-intermediaries-mitigate-impact-coronaviruscovid-19-consumers_en.

²⁶⁴ *Id.*

²⁶⁵ See *id.*

²⁶⁶ See *id.* (However, EIOPA does not explicitly address the issue concerning the substantive coverage, i.e., are covid-related losses covered under standard property or business interruption policies? EIOPA merely states that inconsistent treatment of exclusions could lead to consumer detriment and broader reputational damage for the insurance sector. It is crucial in these times of distress and pressure that consumers understand and are aware of the scope of their cover, the exemptions that apply, and the impact of Coronavirus/COVID-19 on their insurance policies.)

²⁶⁷ See *id.* (EIOPA expects market participants to treat consumers fairly and be explicit in their communication with consumers. They should avoid vague terms that could be misinterpreted or lead to confusion. In their communications, market participants are also expected to consider how consumers may react to volatile

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- (c) Inform consumers about contingency measures that insurers and intermediaries are taking.²⁶⁸
- (d) Continue applying product oversight and governance (POG) requirements.²⁶⁹
- (e) Consider the interests of consumers and exercise flexibility in how they are treated, where reasonable and practicable.²⁷⁰

EIOPA did not issue the recommendations under the “comply or explain” procedure.²⁷¹ Thus, the recommendations are not mandatory to national supervisory authorities.²⁷² Nonetheless, the recommendations are based on the IDD’s general principle requiring distributors to act in the best interest of customers.²⁷³ As noted in Section IV, the general principle introduced under the IDD enables the construction of a “common language” between authorities, which is a preliminary step to achieving a common supervisory culture.²⁷⁴ Therefore, the non-binding recommendations that are based on a binding principle

markets to mitigate consumer detriment risks. All communications should be balanced and carefully calibrated.)

²⁶⁸ See *id.* (Consumers should also be informed about how these measures can impact their contractual relationship and services provided. Some examples of possible impacts, which should not be interpreted as exhaustive, include:

- (a) Continuity of services (e.g., moving services to online channels in greater extent)
- (b) Validity of insurance contracts (e.g., temporary automatic extension for the duration of the emergency)
- (c) Changes to the claim management procedures or other consumer services
- (d) Additional organizational arrangements to deal with consumer inquiries related to the Coronavirus/COVID-19 (e.g., publication of FAQs for consumers, contact details, helpline etc.).)

²⁶⁹ See *id.* (They shall apply POG requirements to consider the Coronavirus/COVID-19 outbreak, and where necessary, carry out a product review. Product reviews must aim to assess relevant impacts of the Coronavirus/COVID-19 outbreak on the main features of existing products to establish consistency with the needs, characteristics, and objectives of the identified target market, and if not, take relevant measures.

While insurers are encouraged to develop new products responding to insurance needs, they should adequately define the target market and assess how such products fit the target market’s needs, objectives, and characteristics.)

²⁷⁰ *Call to Action for Insurers and Intermediaries to Mitigate the Impact of Coronavirus/COVID-19 on Consumers*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH., (Apr. 1, 2020), https://www.eiopa.europa.eu/content/call-action-insurers-and-intermediaries-mitigate-impact-coronaviruscovid-19-consumers_en (showing that “[T]he current situation may call for flexibility in terms of processes and timeframes to allow consumers to retain essential coverage that would otherwise be lost.”).

²⁷¹ See *id.* (showing that EIOPA issued the recommendations under the foregoing mentioned Directives).

²⁷² See *Common Benchmarks*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH. (Jan. 21, 2020), https://www.eiopa.europa.eu/common-benchmarks_en (explaining that while EIOPA can issue recommendations and guidelines that are not legally binding, financial institutions and authorities should make efforts to comply with them).

²⁷³ EUR. INS. & OCCUPATIONAL PENSIONS AUTH., *TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE INS. DISTRIBUTIVE DIRECTIVE 3* (2017), https://www.eiopa.europa.eu/sites/default/files/publications/submissions/eiopa_technical_advice_on_the_idd.pdf.

²⁷⁴ PIERPAOLO MARANO, *THE CONTRIBUTION OF PROD. OVERSIGHT AND GOVERNANCE (POG) TO THE SINGLE MARKET: A SET OF RULES ON THE ORG. FOR THE BUS. CONDUCT*, in 3 *INS. DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS* 64, 70 (Pierpaolo Marano & Kyriaki Noussia eds., 2020).

are likely to be binding to supervised entities – insurers and distributors – if the national authorities decide to comply with these recommendations, i.e., with the interpretation of a general principle.²⁷⁵

On the other hand, the interpretation of general principles could raise other interpretation questions and even lead to the introduction of new rules, as noted earlier in Section 3.²⁷⁶ The recommendation to provide clear and timely information to consumers on contractual rights is related to contracts signed during the emergency period for the COVID-19 pandemic.²⁷⁷ It is unclear if it also requires distributors to contact their policyholders for earlier contracts.²⁷⁸ Moreover, a product review to assess the impact of the COVID-19 pandemic on existing products' main features would request a projections horizon that is somewhat uncertain at the moment.²⁷⁹ Also, EIOPA seems to address the lawmakers and perhaps the courts, rather than national supervisory authorities, when it claims that as a general principle, "imposing retroactive coverage of claims not envisaged within contracts could create material solvency risks and ultimately threaten policyholder protection" and market stability, therefore aggravating the financial and economic impacts of the current health crisis.²⁸⁰

B. The InsurTech.

The elaboration process of the IDD took place in parallel with the developments of new technologies' applications to insurance and therefore does not put Insurtech as the core of its rules.²⁸¹ Nonetheless, the IDD appears to be able to regulate many of the emerging legal issues concerning digital distribution models, and the most insidious regulatory challenge seems to consist of aligning the next regulation on digital transformation with the insurance sector's peculiarities.²⁸²

The IDD's ability to regulate digital distribution models is evident in several respects.²⁸³ To begin with, the commercial comparison websites are the oldest form of

²⁷⁵ See *id.* at 66, 70-71.

²⁷⁶ See EUR. INS. & OCCUPATIONAL PENSIONS AUTH., *supra* note 273.

²⁷⁷ *EIOPA Urges Insurers and Intermediaries to Continue to Take Actions to Mitigate the Impact of Coronavirus/COVID-19 on Consumers*, EUR. INS. & OCCUPATIONAL PENSIONS AUTH., (Apr. 1, 2020), https://www.eiopa.europa.eu/media/news/eiopa-urges-insurers-and-intermediaries-continue-take-actions-mitigate-impact-of_en.

²⁷⁸ See *id.* (showing that EIOPA's recommendation does not mention whether or not the same rules apply to contracts that were signed before the pandemic).

²⁷⁹ See EUR. INS. & OCCUPATIONAL PENSIONS AUTH., *supra* note 270.

²⁸⁰ EUR. INS. & OCCUPATIONAL PENSIONS AUTH., *supra* note 277.

²⁸¹ See VIKTORIA CHATZARA, FINTECH, INSURTECH, AND THE REGULATORS, in 1 INSURTECH: A LEGAL AND REGULATORY VIEW 3 (Pierpaolo Marano & Kyriaki Ntoussia eds., 2020) (explaining that several national and transnational organizations and authorities have approached InsurTech).

²⁸² See THE GENEVA ASSOC., REGUL. CONSIDERATIONS FOR DIG. INS. BUS. MODELS 9 (2021), https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/digitalinsurance_web.pdf (showing that regulators have to balance innovation with meeting insurance supervisory objectives).

²⁸³ See Directive 2016/97, of the Eur. Parliament and of the Council of January 20, 2016 on Ins. Distribution (Recast), 2016 O.J. (L 26) 19, 22-23, 25, 32, 43 (EU).

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distribution channel arising from InsurTech.²⁸⁴ The IDD does not provide any definition of comparison websites, but the distribution of insurance products includes the activities carried out by comparison websites.²⁸⁵ Entities performing the comparison can be qualified as insurance intermediaries or ancillary insurance intermediaries, both falling within the scope of the IDD.²⁸⁶ Moreover, the definition of insurance distribution refers to “websites or other media” and, therefore, includes both traditional comparison websites and the alternative models of comparison such as the price comparison apps for smartphones and the data analyzer services.²⁸⁷

EIOPA issued Good Practices on comparison websites before the IDD.²⁸⁸ These practices are expected to be adopted by the relevant market players voluntarily and may serve as a reference for further work by national competent authorities.²⁸⁹ They aim to promote transparency, simplicity, and fairness for Internet users in the market for online comparisons of insurance products.²⁹⁰ Although these practices predate the IDD, they complement the Directive’s general principles and standards, such as the duty of disclosure for insurance distributors, the principle of acting in the best interest, and cross-selling.²⁹¹

Another digital distribution model is peer-to-peer.²⁹² EIOPA promoted a survey among the national competent authorities to understand if and how to regulate peer-to-peer insurance.²⁹³ The analysis surveyed the three peer-to-peer models already operating in some of the Member States: the peer-to-peer broker model, the peer-to-peer insurance model, and the self-governing model.²⁹⁴ EIOPA concluded that peer-to-peer platforms operating under the broker model and the insurance model would be licensed as an insurance intermediary or

²⁸⁴ See JORGE BRAVO, *IDD AND DISTRIBUTION RISK MANAGEMENT*, in 3 *INS. DISTRIBUTION DIRECTIVE: A LEGAL ANALYSIS* 349, 350-352 (Pierpaolo Marano & Kyriaki Noussia eds., 2020).

²⁸⁵ See Directive 2016/97, of the European Parliament and of the Council of January 20, 2016 on Ins. Distribution (Recast), art. 2(1)(1), 2016 O.J. (L 26) (EU) (The definition of insurance distribution includes, among other things: “[T]he provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media.”).

²⁸⁶ PIERPAOLO MARANO, *NAVIGATING INSURTECH: THE DIGITAL INTERMEDIARIES OF INS. PROD. AND CUSTOMER PROT. IN THE EU*, 26 *MAASTRICHT J. OF EUR. & COMPAR. L.* 294, 298 (2019).

²⁸⁷ *Id.* at 300; see also PIERPAOLO MARANO, *THE EU REGUL. ON COMPARISON WEBSITES OF INS. PROD. in THE “DEMATERIALIZED” INS.: DISTANCE SELLING AND CYBER RISKS FROM AN INT’L PERSPECTIVE* 59, 75 (Pierpaolo Marano et al. eds., 2016).

²⁸⁸ See EUR. INS. & OCCUPATIONAL PENSIONS AUTH., *REPORT ON GOOD PRACTICES ON COMPARISON WEBSITES* 6 (2014), https://register.eiopa.europa.eu/Publications/Reports/Report_on_Good_Practices_on_Comparison_Websites.pdf (showing that EIOPA issued Good Practices in 2014, two years before the IDD).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ See Marano, *supra* note 286, at 300.

²⁹² See Jorge Miguel Bravo, *IDD and Distribution Risk Management*, in 3 *IDD AND DISTRIBUTION RISK MANAGEMENT*, 349, 355 (Pierpaolo Marano P. & Kyriaki Noussia eds., 2020), SpringerLink ERSILR.

²⁹³ See EUR. INS. & OCCUPATIONAL PENSIONS AUTH., *supra* note 95, at 25.

²⁹⁴ See Gian Paolo Clemente & Pierpaolo Marano, *The Broker Model for Peer-to-Peer Insurance: an analysis of its value*, in *GENEVA PAPERS ON RISK AND INSURANCE – ISSUES AND PRACTICE*, 457, 459 (2020).

insurance undertaking, respectively, and consequently follow all insurance regulations.²⁹⁵ In contrast, the IDD does not provide specific rules on the entities managing the self-governing activity, or the activity itself. Thus, EIOPA issued best practices addressed to such pure peer-to-peer insurance platform providers, which are not easy to classify under the current regulation as they operate under a self-governing model.²⁹⁶

Essentially, the IDD's rules should address the legal issues arising from two peer-to-peer models as the entities managing these models fall into the IDD scope.²⁹⁷ New rules should regulate the self-governing model as it falls outside insurance distribution, and rules should clarify that it is also unrelated to insurance distribution.²⁹⁸

Robo-advisers are the most recent digital insurance intermediaries.²⁹⁹ The IDD does not introduce specific rules for this activity.³⁰⁰ "Nevertheless, legal entities carrying out their activity through Robo-advice systems fall into the scope of the IDD in principle because they are distributing insurance products."³⁰¹ The IDD provides standards for both the intermediaries and the advice.³⁰² These standards also apply to those who are carrying out their activity through the provision of Robo-advice.³⁰³ The distributors' responsibility to perform the suitability assessment "shall not be reduced due to the fact that advice on insurance-based investment products is provided in whole or in part through an automated or semi-automated system."³⁰⁴ This principle is expressly established for the distribution of IBIPs.³⁰⁵ Therefore, no European standard establishes the application of this principle for the other life and non-life insurance products.³⁰⁶ However, national laws (and Courts) can extend such principle to all insurance products during implementing (or interpreting) the IDD into

²⁹⁵ See, EIOPA, *supra* note 95, at 26, 30.

²⁹⁶ *Id.* (The Report outlined that it is the matter of evaluating concrete business models and the outcome can be that it is also operating under insurance regulation, or it is outside of the regulation, e.g., more in the context of payments services, for instance.)

²⁹⁷ See Pierpaolo Marano, *supra* note 286, at 305; See Gian Paolo Clemente & Pierpaolo Marano, *supra* note 294, at 461; See also Marta Ostrowska & Michal P. Ziemiak, *The Concept of P2P Insurance: A Review of the Literature and EIOPA Report*, 1 PRAWO ASEKURACYJNE 43 (2020).

²⁹⁸ See Margarida Lima Rego & Joana Campos Carvalho, *Insurance in Today's Sharing Economy: New Challenges Ahead or a Return to the Origins of Insurance*, in INSURTECH: A LEGAL AND REGULATORY VIEW 42 (Pierpaolo Marano & Kyriaki Nossia eds., 2020).

²⁹⁹ See Jill E. Fisch, et al., *The Emergency of the Robo-Advisor*, in THE DISRUPTIVE IMPACT OF FINTECH ON RETIREMENT SYSTEMS, 13 (Julie Agnew & Olivia S. Mitchell Eds., 2019) (ebook) (showing the newness of robo-advisers).

³⁰⁰ See Marta Ostrowska & Maciej Balcerowski, *The Idea of Robotic Insurance Mediation in the Light of the European Union Law*, in 1 INSURTECH: A LEGAL AND REGULATORY VIEW 199, 203-204 (Pierpaolo Marano & Kyriaki Nossia eds., 2020).

³⁰¹ See Marano, *supra* note 286, at 299.

³⁰² See Council Directive 2016/97, arts. 2, 15, 18, 19, 20, 29-30, 2016 O.J. (L 26).

³⁰³ See Marta Ostrowska & Maciej Balcerowski, *supra* note 300, at 203.

³⁰⁴ See Commission Regulation 2017/2359, art. 12, 2017 O.J. (L 341) (Recital (10) provides the rationale for this rule: "since such systems are providing personal investment recommendations which should be based on a suitability assessment.").

³⁰⁵ *Id.*

³⁰⁶ See *id.* (establishing the suitability assessment principle for IBIPs but not explicitly mentioning other life and non-life insurance products); see, e.g., FCA Handbook, FIN. CONDUCT AUTH., <https://www.handbook.fca.org.uk/handbook/COBS/9A/2.html?date=2021-02-24> (last visited Nov. 8, 2021) (indicating that the IDD only establishes suitability assessment principle for IBIPs).

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national laws.³⁰⁷ In favor of extending this principle to all insurance products, it can be argued that the POG rules play an essential role in robot advice, as “manufacturers have to monitor how algorithms process their products when distributed by intermediaries that manufacturers have selected as adequate for distributing through this tool.”³⁰⁸ When insurance products are sold with advice, monitoring must be provided regardless of whether (i) the advice is provided in a “traditional” way or through automated or semi-automated systems and whether (ii) the products are insurance-based investment product or other life or non-life insurance products.³⁰⁹

IDD’s resilience requires to be evaluated within the EU regulatory framework on digital transformation.³¹⁰ The definition of this framework is still in progress and can only be given some light here.³¹¹

Europe’s digital transformation is one of the Commission’s six Political Priorities.³¹² The EU’s digital strategy falls within the digital transformation and aims to make this transformation work for people and businesses.³¹³ According to this strategy, “the Commission is determined to make this Europe’s ‘Digital Decade’...with a clear focus on data, technology, and infrastructure.”³¹⁴ The actions that should achieve this goal include the following:

- (a) The Digital Market Act,³¹⁵ which sets forth objective criteria for qualifying a large online platform as a “gatekeeper”, including those platforms providing online intermediation services, and establishes obligations for these gatekeepers, “do’s” and “don’ts” they must comply with their daily operations.³¹⁶

³⁰⁷ See Noussia, *supra* note 12, at 75-76, 80.

³⁰⁸ Marano, *supra* note 286, at 314.

³⁰⁹ See EUR. INS. AND OCCUPATIONAL PENSIONS AUTH., *EIOPA’s Approach to the Supervision of Product Oversight and Governance* 14-17 (2020).

³¹⁰ See Pierpaolo Marano, *Management of Distribution of Risks and Digital Transformation of Insurance Distribution – A Regulatory Gap in the IDD*, 8 RISKS 143, 143-144 (2021).

³¹¹ *Id.* at 151-152.

³¹² *A Europe Fit for the Digital Age*, EUROPEAN COMMISSION, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en (last visited Oct. 6, 2021).

³¹³ *Shaping Europe’s Digital Future – Questions and Answers*, EUROPEAN COMMISSION, (Feb. 19, 2020), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_264.

³¹⁴ *A Europe Fit for the Digital Age*, EUROPEAN COMMISSION, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en (last visited Oct. 6, 2021).

³¹⁵ *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020).

³¹⁶ EUR. COMM’N, *The Digital Markets Act: Ensuring Fair and Open Digital Markets*, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last visited Oct. 4, 2021).

- (b) The Digital Services Act,³¹⁷ which defines responsibilities and accountability for providers of intermediary services, particularly online platforms such as social media and marketplaces.³¹⁸
- (c) An EU strategic framework based on fundamental values aims to give citizens the confidence to accept AI-based solutions while encouraging businesses to develop them.³¹⁹
- (d) A European data strategy, to create a single market for data where data can flow freely within the EU and across the sectors, European rules, in particular privacy and data protection, as well as competition law, are fully respected, and the rules for access and use of data are fair, practical, and clear.³²⁰ Such a strategy led to the proposal of a Data Governance Act.³²¹

Europe's "Digital Decade", including cybersecurity³²² and E.Identities³²³ and coherent with the Regulation for business users of online intermediation services,³²⁴ runs parallel to the Digital Finance Package the European Commission adopted on September 24 2020 which included a digital finance strategy,³²⁵ and legislative proposals on crypto-assets,³²⁶ and digital resilience.³²⁷

³¹⁷ *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, COM (2020) 825 final (Dec. 15, 2020).

³¹⁸ EUR. COMM'N, *Shaping Europe's Digital Future*, <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> (last visited Oct. 4, 2021).

³¹⁹ European Commission Press Release IP/21/1682, *Europe fit for the Digital Age: Commission proposes new rules and actions for excellence and trust in Artificial Intelligence*

(Apr. 21, 2021); *Commission White Paper on Artificial Intelligence – a European Approach to Excellence and Trust*, COM (2020) 65 final (Feb. 19, 2020); *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Report on the Safety and Liability Implications of Artificial Intelligence, the Internet of Things and Robotics*, COM (2020) 64 final (Feb. 2, 2020).

³²⁰ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data*, COM (2020) 66 final (Feb. 19, 2020).

³²¹ See *Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act)*, COM (2020) 767 final (Nov. 25, 2020).

³²² *The EU's Cybersecurity Strategy in the Digital Decade*, EUR. COMM'N, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=JOIN:2020:18:FIN> (last visited July 10, 2021).

³²³ 2014 O.J. (L 257) 73.

³²⁴ 2019 O.J. (L 186) 57.

³²⁵ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU*, COM (2020) 591 final (Sept. 24, 2020). Based on the assumption that the economy's digital transformation has changed innovation and business models including in financial services, the digital finance strategy identified four priorities. The first priority is to tackle fragmentation in the Digital Single Market for financial services, thereby enabling European consumers to access cross-border services and help European financial firms' scale up their digital operations. The second priority is to ensure that the EU regulatory framework facilitates digital innovation in consumers' interest and market efficiency. The third priority is to create a European financial data space to promote data-driven innovation, building on the European data strategy, including enhanced access to

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Furthermore, ESAs worked on digitalization in financial services³²⁸, and EIOPA focused on insurance.³²⁹ Insurance undertakings and insurance intermediaries are included in the scope of the upcoming Regulation on digital operational resilience for the financial sector,³³⁰ which fills a gap of the IDD consisting in the lack of rules on outsourcing.³³¹ EIOPA set a Consultative Expert Group to advise EIOPA in developing a set of digital responsibility principles in insurance.³³² The principles of digital responsibility will address, from a fairness and ethical perspective, the use of new business models, technologies, and data sources in insurance.³³³ They should leverage other related cross-sectorial work developed in other international fora and, where necessary, adapt them to the insurance context.³³⁴ Thus, fairness and non-discrimination in the digital context should fall within the scope of the general principle under which distributors must always act honestly, fairly, and professionally in accordance with the best interests of their customers.³³⁵ Digital responsibility is likely to include transparency as insurance distributors are required to, “provide the customer with

data and data sharing within the financial sector. The fourth priority is to address new challenges and risks associated with digital transformation.

³²⁶ *Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and Amending Directive (EU) 2019/1937*, COM (2020) 593 final (Sept. 24, 2020).

³²⁷ *Proposal for a Regulation of the European Parliament and of the Council on Digital Operational Resilience for the Financial Sector and Amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014*, COM (2020) 595 final (Sept. 24, 2020).

³²⁸ See JOINT COMM. EUROPEAN SUPERVISORY AUTH., REPORT ON FINTECH: REGULATORY SANDBOXES AND INNOVATION HUBS (2019), https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf; See JOINT COMM. EUROPEAN SUPERVISORY AUTH., *Joint Advice of the European Supervisory Authorities to the European Commission on the Need for Legislative Improvements Relating to ICT Risk Management Requirements in the EU Financial Sector*, (Apr. 10, 2019), https://www.esma.europa.eu/sites/default/files/library/jc_2019_26_joint_esas_advice_on_ict_legislative_improvements.pdf.

³²⁹ See EIOPA REPORT, *supra* note 57. See also *Guidelines on Outsourcing Service Providers*, EIOPA (Feb. 6, 2020), https://www.eiopa.europa.eu/content/guidelines-outsourcing-cloud-service-providers_en; *Discussion Paper on (Re)Insurance Value Chain and New Business Models Arising from Digitalisation*, EIOPA (Jun. 10, 2020), https://www.eiopa.europa.eu/content/discussion-paper-reinsurance-value-chain-and-new-business-models-arising-digitalisation_en; *Open Insurance: Accessing and Sharing Insurance-Related Data*, EIOPA (Jan. 28, 2021), https://www.eiopa.europa.eu/content/open-insurance-accessing-and-sharing-insurance-related-data_en.

³³⁰ *Proposal for a Regulation of the European Parliament and of the Council on Digital Operational Resilience for the Financial Sector and Amending Regulations (EC) No 1060/2009, (EU) No 600/2014 and (EU) No 909/2014*, COM (2020) 595 final (Sept. 24, 2020).

³³¹ *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, COM (2020) 825 final (Dec. 15, 2020).

³³² *EIOPA Establishes Consultative Expert Group on Digital Ethics in Insurance*, EIOPA: NEWS (Sept. 17, 2019) https://www.eiopa.europa.eu/media/news/eiopa-establishes-consultative-expert-group-digital-ethics-insurance_en.

³³³ *Id.*

³³⁴ See EIOPA, CALL FOR EXPRESSION OF INTEREST: EIOPA CONSULTATIVE EXPERT GROUP ON DIGITAL ETHICS (July 4, 2019), https://www.eiopa.europa.eu/content/call-expression-interest-eiopa-consultative-expert-group-digital-ethics_en (showing the tasks of the Consultative Expert Group on digital ethics in insurance are set forth by EIOPA).

³³⁵ Council Directive 2016/97 of Jan. 20, 2016 on Insurance Distribution, art. 17, 2016 O.J. (L 26) (EU).

objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision.”³³⁶

In conclusion, IDD seems resilient to new technologies, although it could be slightly modified to be better adapted to new digital scenarios.³³⁷ The most challenging risk is that the IDD can lose its centrality in regulating insurance distribution, at least the digital one.³³⁸ A plurality of regulatory sources could regulate such distribution.³³⁹ The developments in the digital activities’ regulation should instead be adapted to the insurance business and included in the IDD.³⁴⁰ This approach would favor the harmonized implementation of insurance rules in the Member States because they would have to consider the regulatory intervention as a whole.³⁴¹ Digital insurance distribution can increase organizational requirements but does not cancel their connection with the conduct rules.³⁴² Moreover, POG requirements call to consider the evaluation of distribution of product as appropriate.³⁴³ Also, the principle of proportionality should avoid the costs of compliance with the requirements for carrying out insurance distribution in a digital environment which is fatal for small and medium-sized distributors.³⁴⁴

VI. FINAL REMARKS.

The protection of policyholders, insured persons, and beneficiaries is the main objective of regulation and supervision in the EU.³⁴⁵ The IDD is the last regulatory step in a process that aims to create an effective single insurance market, wherein the demand for and supply of insurance products is not limited to the borders of each Member States.³⁴⁶ The IDD aims to increase the customers protection if insurance products represent a real value for the target market, and qualified distributors professionally distribute these products and support customers in defining the best interest to satisfy.³⁴⁷

³³⁶ *Id.* at art. 20.

³³⁷ Pierpaolo Marano, *Management of Distribution Risks and Digital Transformation of Insurance Distribution—A Regulatory Gap in the IDD*, 9 RISKS 143 (2021).

³³⁸ *See id.*

³³⁹ *See id.*

³⁴⁰ *See id.*

³⁴¹ *See* Freyja van den Boom, *Regulating Telematics Insurance*, in INSURANCE DISTRIBUTION DIRECTIVE, AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION 255, 305-306 (Pierpaolo Marano & Kyriaki Noussia eds., 2021).

³⁴² *See id.*

³⁴³ Van den Boom, *supra* note 341.

³⁴⁴ *See* Marano, *supra* note 337.

³⁴⁵ Marano, *supra* note 337; Pierpaolo Marano, *The Contribution of Product Oversight and Governance (POG) to the Single Market: A Set of Organizational Rules for Business Conduct*, in INSURANCE DISTRIBUTION DIRECTIVE, AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION 55 (Pierpaolo Marano & Kyriaki Noussia eds., 2021).

³⁴⁶ Audigier, *supra* note 92, at 65.

³⁴⁷ *See* Marano, *supra* note 345, at 56.

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This path has distinguished one of the most important insurance markets globally for almost half a century.³⁴⁸ The process began with harmonizing rules in national legal systems, searching for common points between the existing national rules (the rules on intermediaries).³⁴⁹ The path continued with European rules that expanded national rules on insurance mediation and distribution.³⁵⁰ The process went as far as introducing rules unknown to almost all national legal systems (the set of rules on POG).³⁵¹ This sequence has intersected with the rules on financial products.³⁵²

The “Mifidization” of European insurance rules affects all insurance products, and it is not limited to the IBIPs.³⁵³ The IDD authorized the Commission to adopt Delegated Acts supplementing the IDD’s rules on product governance, insurance-based investment products, and pre-contractual information.³⁵⁴ Thus, the IDD selected areas where the harmonization is most pronounced: they all refer to customer protection.³⁵⁵

³⁴⁸ Anna Tarasiuk & Bartosz Wojno, *The Notion of “Employee” in the IDD: A Harmonized Interpretation Based on the EU Law*, in INSURANCE DISTRIBUTION DIRECTIVE. AIDA EUROPE RESEARCH SERIES ON INSURANCE LAW AND REGULATION 139, 140 (Pierpaolo Marano & Kyriaki Noussia eds., 2021).

³⁴⁹ *See id.*

³⁵⁰ *See id.*

³⁵¹ *See* Marano, *supra* note 345.

³⁵² *Id.* at 56.

³⁵³ *Id.* at 66.

³⁵⁴ *See* Noussia, *supra* note 12, at 95.

³⁵⁵ *See generally* Commission Regulation 2017/2359, 2017 J.O. (341) 8 (EU).