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**The Implementation and Effects of the Insurance Distribution
Directive in Regards to Consumer Protection in the European Union**

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ABSTRACT

This paper examines the changes introduced to the insurance sector by the Insurance Distribution Directive which came into force in 2016. The focus is placed on the differing implementation processes and effects it has had on consumer protection in the insurance sector in the European Union. These are examined through studies on the implementation processes carried out in two Member States and the first findings noticed in these. The main research method is the qualitative method, basing on the academic literature regarding the matter. This is supported by presenting some quantitative data to increase the preciseness of the study when needed. The national differences found from their implementation measures are then evaluated more thoroughly by using comparative analysis. In the beginning, the research question is whether the results of the implementation of the Insurance Distribution Directive refers it to be an effective instrument to improve consumer protection, and whether it has proven its position as an effective instrument in enhancing consumer protection. As the discussions proceed further, it becomes more clear that the sector has its own specialties and the regulations of both EU origin and national regulations have multilayered effects on the full picture. In middle of all this, the Insurance Distribution Directive sets to a very special position.

Keywords: Insurance distribution, Consumer protection, Transparency

ABBREVIATIONS

EEA	European Economic Area
EU	European Union
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act
IBIPs	Insurance-based Investment Products
IDD	Insurance Distribution Directive
IMD	Insurance Mediation Directive
IPID	Insurance Product Information Document
KID	Key Information Document
OECD	Organization for European Economic Cooperation
PRA	Prudential Regulation Authority
PRIIPs	Packaged Retail Insurance-based Investment Products
RAO	Regulated Activities Order

INTRODUCTION

The Insurance Distribution Directive is a relatively new instrument that was implemented in 2018 in the Member States. It is currently one of the main regulative pieces in the insurance sector in the European Union. The Directive introduced several major changes to the field and if successful, it should affect widely on both predictability and consumer protection aspects, as well as on the obligations of the insurance service providers. Besides the very limited amount of studies conducted on the regulations of the insurance sector, there's a lack of comprehensive studies relating to the implementation of this Directive as well. This makes the research more needed but can also hinder the process of concluding it. Compiling this paper was a challenging endeavor and after doing a lot of reading it proved to be a general difficulty of other authors as well. In addition, there seemed to be quite a lot of inconsistencies in the available information, complicating the research even more.

This research aims to identify changes the Directive has brought to the insurance markets with the sidenote of other defining instruments of the field. The process of implementation will be examined, mainly focusing on cases of a few Member States and the first findings of these. This should provide an answer to the central research questions of this thesis, which are

- 1) How has the Insurance Distribution Directive affected consumer protection in the European Union?
- 2) Has it proven its position as an effective instrument to enhance consumer protection and has there been any issues in the implementation of the Directive?

The results should also clarify the confluence the Directive has had to insurance service providers' liabilities and provide a good overall understanding of the EU's insurance policies. The main research method used is qualitative research based on the available academic literature. Some quantitative data is also used to provide more precise statistical information. In the end, a comparative analysis is done in order to better examine the results regarding the implementation processes.

The first chapter presents the background of the European Union's insurance regulation and some of the prevalent trends in the field right now. The second part introduces the Insurance Distribution Directive and the main changes caused by it. In the third part, the implementation of these changes is studied through the examples of a few Member States. This will lead to a comparative analysis presented in the fourth part of this paper. Next, some of the expectations and possibilities for the

future of the Directive are pondered as well as the places for development. Lastly, the conclusion of the paper is concluded in the sixth part.

1. THE BACKGROUND OF THE EU INSURANCE REGULATION

The financial sector has traditionally been divided into three sectors; banking, investment, and insurance sector. Typically, each sector has been regulated separately but during the previous decades, this division has slowly been fading away. Nowadays, the cross-sectoral activities have become more common and the financial stability of the undertakings providing these financial services does not really vary based on the old sectoral lines.¹ The different treatment of distributors has sometimes led to confusing situations for the consumers because similar looking services and products could have been regulated under different rules. The EU regulations have tried to reduce this inconsistency by imposing similar standards disregarding the sectoral lines.² The development towards a more level-playing field of regulations can better respond to gaps in legislation but also the sector-specific cooperation is needed. The latter can enhance efficiency and observe more clearly the specific nature of each financial sector.³

One defining factor in recent history has been the financial crisis of 2008, which proved to be a turning point for European financial regulation. It exposed some underlying issues in the industry and as a result, a wide amount of new regulations have been passed since then. In order to balance the markets again and restore the trust of the people, a large scale reform had to be done in both supervisory, and regulatory sides of the whole financial sector.⁴ One issue was that financial instruments had become more and more complex, including insurance products and insurance-based investment products (IBIP), increasing the risk of misselling products.⁵

The EU's regulative framework is influenced by different transnational sources. After the financial crisis of 2008, a lot of influence was taken from the globalized response to the crisis and the way the delivery of this response was done in a cross-sectoral approach. Also, the political influence of the G-20 has increased greatly after the financial crisis. This is partly because, during the crisis, the G-20 formed into a "premier economic international forum", coordinating the activities of financial networks.⁶ Also, the Organization for Economic Cooperation and Development (OECD) has affected

¹ Marano, P., Siri, M. (2017). *Insurance Regulation in the European Union Solvency II and Beyond*. Milan, Italy: Palgrave Macmillan.

² Colaert, V., Busch, D., Incalza, T. (2019). *European Financial Regulation: Levelling the Cross-Sectoral Playing Field*. Oxford, United Kingdom. HART Publishing, Bloomsbury Publishing Plc., p. 3

³ Stancke, F., Hainz, J. (2016). EU Competition Rules in the Insurance Sector: A Different World in Change, *Journal of European Law & Practice*, Vol. 7(6), 420-427, p. 421

⁴ Supra note 1, p.5

⁵ Velliscig, L. (2017). Season 3: Product Governance. Rethinking Retail Customer Protection in the EU Insurance Market, *Global Jurist*, 18(1), p. 1

⁶ Supra note 1, p.7

through its Insurance and Private Pensions Committee. From European institutions, one influencing body has been the Joint Committee of the three financial authorities (the European Banking Authority, European Securities and Markets Authority, and European Insurance and Occupational Pensions Authority) which was created in 2010. This Committee acts as a forum organizing cooperation of the European authorities and aims to remove the cross-sectoral inconsistencies.⁷

In the aftermath of the financial crisis and in the need of new instruments, the preparation for the Solvency II Directive (2009/138/EC) was started. Amended by the Omnibus II Directive 2014/51/EU, it became fully applicable in January 2016. It replaced the decades' old Solvency I Directive which had proven to have structural weaknesses. The Solvency II changed the protection of policyholders to be the main objective of insurance regulation.⁸ Focused only on the insurance sector as its predecessor, it reformed the prudential rules of insurance and reinsurance undertakings with a risk-based approach in the center of it. The Solvency II sets requirements for capital solvency of the undertakings and establishes mechanisms of cooperation for the undertakings and supervisory authorities.⁹ These rules concern mainly the technical aspects of managing the insurance undertakings. Later, the Insurance Distribution Directive was created to fulfill some of the existing gaps of Solvency II by introducing new rules on business conducts to further improve consumer protection.¹⁰

Another major instrument created for the need to restore the market stability in the financial sector is the Markets in Financial Instruments Directive 2014/65/EU (MiFID II). It is one of the most comprehensive instruments in the financial sector and it is applied cross-sectorally. It is the baseline regulation of the financial sector providing retail client protection. The standards set in MiFID II on retail consumer protection were also widely followed in the process of concluding the Insurance Distribution Directive (IDD) in order to improve the coherence in cross-border and cross-sectoral activities.¹¹ The MiFID II is often referred to in connection with the 600/2014/EU Markets in Financial Instruments and amending Regulation (EU) No 648/2012, also known as the MiFIR. Although being separate instruments, these two are often talked interchangeably since they form a larger entity.¹² Again, the IDD was developed to be a complementary instrument for these already existing regulations but with the focus on the special nature of the insurance sector.

⁷ Supra note 1, p. 8

⁸ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009. Preamble point 17

⁹ Supra note 1, p.6

¹⁰ Ibid.

¹¹ Supra note 2, p. 7

¹² Ibid, p. 95

One instrument that managed to stay relevant through the financial crisis is the Insurance Mediation Directive 2002/92/EC (IMD). Introduced in 2002, it provided a major change to the European insurance regulation scheme at the time and led to a huge step towards harmonization in the sector. It set the objective to enable insurance and reinsurance intermediaries to exercise their right to freedom of establishment and the freedom to provide services.¹³ By diminishing obstacles of integration, it managed to improve consumer protection in the EU.¹⁴ After the financial crisis, the IMD became re-evaluated and was modified by the power provided by Article 91 of the MiFID II. The modifications focused on the additional requirements in the distribution of insurance-based investment products. The amended version became known as the so-called IMD 1.5.¹⁵ However, the modifications were not received with excitement, since the plan of publishing a whole new instrument, the IDD, was already expected. In 2016 the IDD repealed the IMD and its modifications. The IDD was made in the aftermath of the financial crisis and aimed to compliment the already existing instruments with the notion of the special nature of the insurance sector. The typical hardships in the sector have been, for example, the difficulties to make straightforward comparisons between national practices and rules, and greatly varying interpretations between the countries. Also, cross-border sales of insurance products require great expertise to manage the specialties of markets of different regions.¹⁶ Despite of the IDD being applicable only on the insurance, reinsurance, and IBIPs, the Directive has still sort of followed the trend of reducing the gap between the sectoral lines. The IDD has made the scope of application to concern a wider spectrum of actors compared to the previous rules laid by the IMD.¹⁷ It also adopts the standards of other regulative pieces of the financial sector. For example, the level of policyholder's protection under the IDD should be at the same level as investor protection rules set in the MiFID II and the PRIIPs¹⁸ regulation.¹⁹ Also, some rules concerning the distribution of financial products are now included in the regulations of the insurance sector as well.²⁰

¹³ Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 9, 15.1.2003

¹⁴ Supra note 5, p.4

¹⁵ Supra Note 1, p. 61

¹⁶ Supra note 2, p. 44

¹⁷ Ibid, p. 7

¹⁸ 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)

¹⁹ Supra note 5, p. 5

²⁰ Ibid.

2. INSURANCE DISTRIBUTION DIRECTIVE

2.1. Introduction of the Directive

Preparing the Insurance Distribution Directive (EU) 2016/97 was a four-year-long process. The Council of Europe signed it together with the European Parliament on 20 January 2016. It was published in the Official Journal of the EU on 2 February and was given a two-year implementation time, requiring it to be implemented by the 23 February 2018 by the latest.²¹ This time limit was however not successful and the implementation deadline got postponed to 1 October 2018.²² The Directive is for minimum harmonisation but it allows the Member States to require greater responsibility from the insurance service providers.²³ If the Member States wish to extend to more stringent rules, those should still remain consistent with the Directive and the Union's law in general.²⁴ As already mentioned, the Directive was made to be both compliant and complementary with the existing regulative framework, the most important ones being the Solvency II, the MiFID II, and the PRIIPs. Altogether, the Directive should strengthen the internal market²⁵ and create more opportunities for cross-border activities while ensuring fair competition in the field.²⁶

The ultimate objective of the Directive is to improve consumer protection throughout the insurance markets by increasing the harmonisation of regulations in the EU. This aim is even mentioned in the preamble of the Directive; 'Consumers should benefit from the same level of protection despite the differences between distribution channels.'²⁷ One key theme in achieving this is transparency.²⁸ Due to the aim being in enhancing consumer protection, some of the provisions are applied only in business to consumer relationships.²⁹ In order to avoid the new changes from becoming too burdensome for the small and medium-sized insurance service providers, the Directive uses the principle of proportionality. With this in mind, the administrative burden should always remain limited compared to the benefits of consumer protection.³⁰

²¹ Supra note 1, p. 62

²² Hofmann, A., Neumann, J.K. & Pooser. (2018). Plea for Uniform Regulation and Challenges of Implementing the New Insurance Distribution Directive. *Geneva Pap Risk Insur Issues Pract* (43), 740–769. p. 741

²³ Malinowska, K. (2016). The insurance transparency and protection regime under the Insurance Distribution Directive. *Wiadomości Ubezpieczeniowe*, 4, 89-101. p. 92

²⁴ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on Insurance Distribution

²⁵ Supra note 5, p. 4

²⁶ Supra note 5, p. 5

²⁷ Supra note 29

²⁸ Supra note 5, p. 1

²⁹ Directive (EU) 2016/97

³⁰ Ibid

To achieve its objectives, the Directive introduces several changes regarding different aspects of providing insurance services. First of all, it expands the application to cover a wider amount of distribution channels and products. Secondly, it sets greater responsibility for the distributors of insurance products to provide information to consumers. These disclosure obligations aim at informed decision making and reducing the asymmetry between professional market actors and retail clients.³¹ Thirdly, we are going to look at the principle of product oversight and governance created for tackling the issue of product misselling. This brought new obligations to the manufacturers of insurance products to only produce products that actually meet the needs of the consumers. New organizational rules were also set to govern the business conduct of the insurance distributors. These include registration obligations and professional requirements for the personnel of undertakings distributing the insurance products. This division to four subparagraphs should enable easy and logical reviewing of all the main changes.

2.2 Broadened scope of application

The Directive recognizes the need to expand the scope of application regarding both; the distributor of insurance products and the sold insurance products. Despite the insurance service provider or the nature of the insurance product, the consumer should be able to trust the same rules being applied to the situation.³² These changes are expected to improve predictability and the protection of the consumers effectively across the financial sectors. The scope of application is regulated in Article 1 of the Directive.

Retail insurance markets make a great part of the supply chain of the insurance sector and generally, this outsourcing holds bigger quality risk than internal production.³³ It makes sense that indirect sales of insurance products through intermediary actors were already regulated by the IMD. Now, the IDD has expanded this scope by purposely using the vague categorization of "distribution" of insurance products in its wordings. This enables including all channels of distribution of insurance products under the application of the Directive, disregarding the sector in which the market actor works at³⁴ and whether it is involved in direct or indirect sales. The Directive has also included ancillary intermediaries under its provisions. This refers to all other market actors, besides insurance undertakings or intermediaries, that provide insurance products complementary to their main

³¹ Supra note 5, p. 1

³² Supra note 1, p. 63

³³ Dominique-Ferreira, S. (2018). The key role played by intermediaries in the retail insurance distribution. *International Journal of Retail & Distribution Management*, 46(11/12), 1170-1192., p. 1171

³⁴ Directive (EU) 2016/97

businesses. The ancillary intermediaries are, for example, travel agents and car rental companies. The Directive has narrow exclusions for its applicability but for example, the ancillary intermediaries could have an exemption from it under certain conditions. Also, certain professionals providing general advice and information on insurance matters on an incidental basis while participating in other professional activities, as tax experts or lawyers could, are excluded from the application of the Directive. The emphasis is put on whether the intention is to help the consumer to conclude or fulfill an insurance or reinsurance contract.³⁵ Therefore, even comparison websites of insurance products may be the object of the regulation depending on their activities. The inclusion of different market actors under the Directive is a major change to the IMD, which only applied to the indirect sale of insurance products done by the intermediaries. Due to this change, the shift in the application has actually changed from the "intermediation regime" to the "distribution regime".³⁶

The expansion of the applicability is not only restricted to the providers of the insurance products. The expanded scope now also covers several insurance type instruments. The Directive is applicable to life insurance products, non-life insurance products, reinsurance products, and IBIPs as well.

2.3 Information disclosure obligations

The regulations for EU's insurance distribution can be divided into three Seasons describing the typical regulative means of each era. Information disclosure obligations represent the first Season and have been part of the regulative means ever since.³⁷ The point is that an asymmetry exists between the experts of markets who distribute the products and their retail clients. This imbalance should be diminished to the minimum by providing all the necessary information to the consumer.³⁸ The downside of this obligation could in some cases be the overload of information.³⁹

The informed purchase decision of consumer is in the center of this. Article 20 of the Directive requires a standardized Insurance Product Information Document (IPID) to be presented with all non-life insurance products. The IPID has to be a clear stand-alone document produced by the manufacturer of the insurance product, which clarifies the main points of the insurance product to the consumer in a precontractual basis.⁴⁰ Similar Key Information Document (KID) has already been in

³⁵ Directive (EU) 2016/97

³⁶ Supra note 23, p. 91

³⁷ Filipovic, N. (2018). Evolution of EU rules on insurance distribution. *European Insurance Law Review*, No. 4, 32

³⁸ Supra note 5, p.1

³⁹ Ibid

⁴⁰ Supra note 1, p. 65

use for structured deposits, packaged financial instruments, and insurance-based investment products by the PRIIPs.⁴¹

New conflict of interest regulation was also introduced, including disclosure obligations concerning remuneration practices of distributors. Since the remuneration practices of undertakings could affect on the recommendations of the intermediaries, the consumers should be provided with information regarding the nature of these remunerations. Again, the PRIIPs has already introduced similar provisions in a limited scope to insurance-based investment products. The consumer should also be notified whether the products being recommended for her are given on the basis of fair and personal analysis.⁴²

Rules on cross-selling are set in Article 24. If the insurance product is tied together with ancillary products or services other than insurance, the distributor has to provide information on whether these products could be purchased separately. The details on these products have to be available for the consumer. As a general rule, the main services and products should also be available for purchase individually, without the ancillary insurance product. With all packaged products, the distributor has to consider the needs of the consumer in relation to the insurance product which makes part of the package deal or agreement.⁴³

2.4 Product oversight and governance

Product oversight and governance represent Season 3 in regulative means of insurance distribution and retail consumer protection.⁴⁴ These new obligations set in Article 25 are directed at the manufacturers of insurance products. To avoid incompatible insurance products from circulating, the manufacturers have to conduct adequate analysis and product governance on the insurance products prior to their release but also while the products are marketed. The manufacturers need to examine the compatibilities of the insurance products for their identified target market before releasing these products.⁴⁵ The product approval process of each insurance product should include risk assessment and creation of a consistent distribution plan, which considers the identified target market. The products should also be reviewed once in a while after their release to ensure they still match the needs of the consumers.

⁴¹ Supra note 2, p. 7

⁴² Directive (EU) 2016/97

⁴³ Supra note 1, p. 69

⁴⁴ Supra note 5, p. 2

⁴⁵ Ibid, p. 1

Compared to the other changes introduced, product oversight and governance have taken the most influence from the MiFID II. This so-called "Mifidization" of the insurance sector should prevent arbitrage in regulations between non-life insurances, IBIPs, and financial instruments.⁴⁶ This should happen by preventing any inconsistencies being born between the sectoral lines.

2.5 Organisational and professional requirements

The Directive includes various different rules concerning business conduct and organisational requirements. These include general business conducts and registrational obligations, professional requirements and knowledge standards for the distributors, and rules for continuous training. The business conduct rules are part of the Season 2 of the regulative means, together with the information disclosure obligations.⁴⁷ The distributors and manufacturers should also act in accordance with the best interests of their customers.⁴⁸

Intermediaries who are natural persons have an obligation to be registered to the national authority of their professional residence. After once registered, there's no need to do that again in another Member State. This should ease the cross-border activities for distributors but it also highlights the importance of common professional qualifications and business conduct.⁴⁹

Intermediaries perform the majority of retail insurance sales and therefore they play a huge role in consumers' purchase decisions.⁵⁰ Hence, they must meet professional requirements set to their competence and capability. The Directive requires continuous training to be organized for the employees in order for them to sustain an adequate level of knowledge that matches the level of complexity of their profession.⁵¹ Now, the minimum requirement for the Continuing Professional Development training is 15 hours per year,⁵² taking into account the nature of the products sold and the role of that person in the distributing organization.⁵³ This is also a matter of consumer protection.

⁴⁶ Supra note 1, p. 10

⁴⁷ Supra note 5, p. 1

⁴⁸ Directive (EU) 2016/97

⁴⁹ Ibid

⁵⁰ Supra note 33, p. 1184

⁵¹ Directive (EU) 2016/97

⁵² Grzeszczak Robert, & Klemt Tomasz. (2019). Good regulation and the principle of economic freedom in the case of European Insurance Law. *Zbornik Radova Pravnog Fakulteta U Nišu*, 58(85), 275-292. p. 285

⁵³ Directive (EU) 2016/97

3. IMPLEMENTATION

As already mentioned, one of the main objectives is to harmonize the regulation of insurance, reinsurance, and IBIPs markets in the EU. If implemented effectively, it could also later lead to the harmonization of the EU contract law in regards to the financial services. One of the expectations towards the Directive is the harmonization of the standards concerning the supervisory authorities and their activities.⁵⁴

In the implementation process, it is important to reflect on the compatibility of the provisions with the existing civil law principles. Prior to the implementation, some have worried that the principles and standards introduced in the Directive would be too close to the already existing ones. This could lead to non-application of the Directive if the Member States only consider those as repetition and find them irrelevant.⁵⁵ However, this hypothesis seems a bit too simplified since it ignores the national differences of the Member States and their positions before the Directive. As the Directive is only for minimum harmonization it allows the Member States to set higher responsibilities for the insurance service providers than specifically mentioned in the Directive. This should mean that the national differences will remain even after the implementation and there are already references to that because some countries have already shown their intention to take the provisions further from the bare minimum level. In addition to the domestic differences on the implementation, the ever so common challenge of differentiating interpretations of rules will affect on preserving the characteristics of each state.

The following two countries, Poland and the United Kingdom were chosen for a closer look due to their different positions on the matter. Poland has struggled with fitting the provisions of the Directive together with its old national system while the UK has already included many of the Directive's rules to its national practices beforehand. Also, the upcoming BREXIT will affect the UK's policies and has created an interesting situation to study on. Although the UK has so far expressed its intentions to follow the provisions of the IDD even after leaving the EU, a sort of uncertainty does exist in the field. Together these countries should provide two different views on the matter.

⁵⁴ Supra note 1, p. 11

⁵⁵ Ibid

3.1 The example of Poland

Prior to the Directive, the Polish system of consumer protection in the insurance sector was very scattered across different legal instruments.⁵⁶ In practice, this meant a division to the main business-to-consumer solutions and to solutions applicable to all insurance contracts.⁵⁷ In general level, the insurance contracts are still governed under the Polish Civil Code and it is completed with several other instruments in order to answer the more specific aspects of the field. Similar dispersion to multiple legal sources also exists concerning the consumer protection rules.⁵⁸

After the financial crisis, the issue of declining trust of customers became more distinct, especially concerning the innovative life-saving products.⁵⁹ Investment based life insurance products are traditionally very popular in Poland and for example, in 2017, those made up 46 percent of all life insurance premiums.⁶⁰ Despite of their significant popularity in markets, customers have rated the products poorly and concerns regarding unfair market practices, misinforming of clients, and non-transparent product range has stayed topical issues.⁶¹ The distrust of consumers combined together with the old regulative model dating back to the 1930s⁶² led to the collapse in people's savings and pointed the crucial need for creating a new model for consumer protection.⁶³ For the implementation of the Directive, this has meant almost a maximum harmonisation of the Directive in Poland's case. Also, several provisions have even been developed further from the original rules stated in the Directive.⁶⁴

The Directive was mainly imposed through the Insurance Distribution Act which came into force at the beginning of October 2018.⁶⁵ Some amendments were also made through the Act on Insurance and Reinsurance Activity (2015), the Act on the Handling of Complaints by Financial Market

⁵⁶ Ziemiak, M. P., Marszelewski, M. (2017). Selected Remarks on Policyholders Protection in the Draft of Polish Act on Insurance Distribution, *Journal of Insurance, Financial Markets & Consumer Protection*, No. 25 (3/2017). p. 100

⁵⁷ Ibid.

⁵⁸ Ibid, p. 101

⁵⁹ Ostrowska-Dankiewicz, A. (2019). Consumer Protection Policy in the Polish Life Insurance Market in the Aspect of Current Legal Regulations. *Investment Management and Financial Innovations*, No. 16(4), 168-180. p. 168

⁶⁰ Ibid, p. 172

⁶¹ Ibid, p. 168

⁶² Supra note 56, p. 101

⁶³ Supra note 59, p. 168

⁶⁴ Ibid

⁶⁵ Cheng, L. Y., Dooley, A., Rhiel, J., Görden, A., Sánchez, J., Plana, A., Lacroix, F., Fort, G., Bieniada, M., Hajdamowicz, K., Kane, A., Kruger, J. (2018) Insurance distribution (EU, UK, Germany, Spain, France, Poland and US). p. 11. Available in [https://uk.practicallaw.thomsonreuters.com/w-017-7442?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-017-7442?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

Organizations and the Financial Ombudsman (2015), the Act on Insurance and Pension Supervision (2003), and the Act on Trading in Financial Instruments (2005).⁶⁶

Some typical issues mentioned in Polish consumers' complaints have been the problems regarding poorly conducted information disclosure duties. For example, in consumers' complaints, one of the most common issues is the amount of premiums together with different kinds of additional costs that the consumers have felt confused about.⁶⁷ Also, the amounts of benefits have been unclear for many. These show a tendency that the consumers have previously not been properly informed about the products and have not fully understood their actions.⁶⁸ The new information disclosure obligations stemming from the Directive should ease this situation and shorten the gap in knowledge between the service provider and the consumer. One of the new tools is the requirement to provide the standardized insurance product information document to the consumers.⁶⁹

Some of the provisions introduced in the Directive had already been included in the national rules with a limited scope before the Insurance Distribution Act. For example, the educational requirements now concern individuals engaging into "activities related to reinsurance or insurance distribution in an insurance or reinsurance company" while previously it was a requirement for intermediaries only.⁷⁰ In addition to this, the Act on Competition and Consumer Protection from 2007, amended in 2015⁷¹, introduced more stringent prohibitions for product misselling. It includes a prohibition to offer consumers any financial services for purchase that do not comply with the needs and requirements of the consumers. This should prevent entrepreneurs from unethical behavior in proposing financial products. Although becoming enforceable before the Directive, the provision stands in line with the organizational requirements of the Directive and the requirement for the distributors to "always act honestly, fairly and professionally in accordance with the best interests of their customers."⁷²

Polish insurance agents and their shareholders also have strict rules against holding shares of the capital company they practice brokerage activities in, as well as against any other relations that could

⁶⁶ Mrozowska-Bartkiewicz, B. (2017). Implementation of the IDD Directive into Polish Legal Regime – Selected Issues, *Prawo Asekuracyjne*, No. 4/2017 (93), 50-61. p. 50

⁶⁷ Supra note 56, p. 106

⁶⁸ Ibid

⁶⁹ Directive (EU) 2016/97 48

⁷⁰ Supra note 66, p. 54

⁷¹ OECD, (2019). Annual Report on Competition Policy Developments in Poland –2018 --.p. 8. Available in [https://one.oecd.org/document/DAF/COMP/AR\(2019\)27/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2019)27/en/pdf)

⁷² Directive (EU) 2016/97, Art. 17

hamper these expectations of professional conduct.⁷³ The impartiality of the service providers is highly expected. Part of the organizational requirements is also the suitability assessment. Here, the Polish system supports a more consumer-friendly environment compared to the Directive, by encouraging the companies to provide a voluntary periodic assessment of the suitability of their products to the consumers.⁷⁴

The Directive also affected on the duties of the supervising authorities. In Poland, this duty mainly used to belong to the insurance companies but the shift has been more towards the regulatory authority, the Polish Financial Supervision Authority. According to the old rule, the insurance companies hold the supervisory responsibilities over their agents and ancillary agents that act on their behalf and who they have a contractual relationships with.⁷⁵ Now, although the old rule is still in use, the Supervision Authority has received more responsibilities and could have supervisory powers over these insurance companies. This requires greater involvement from the Supervisory Authority to monitor the markets. In addition, the Supervisory Authority could examine situations in which branch engages in insurance distribution activities in Poland in the basis of freedom of establishment and especially if such a branch does not comply with the Polish law.⁷⁶ The authority could also get involved if noticing a breach of "pro-consumer provisions" in the activities of distributors and even impose administrative sanctions.⁷⁷

As already mentioned, the new changes shook the old national system and caused a reform of the field, which hasn't come without its challenges either. One ground-level issue was the new terms introduced in the Directive.⁷⁸ Terms like insurance product, insurance distribution, or insurance distributor were not used in the previous acts.⁷⁹ This has created inconsistencies with the national provisions, which has made it difficult to fit the new rules with the old national laws.

3.2 The example of the UK

Compared to Poland, the UK started from a very different position the implementation of the Directive. The UK's insurance market represents one of the biggest markets in Europe⁸⁰ and it has

⁷³ Supra note 65, p. 11

⁷⁴ Supra note 66, p. 93

⁷⁵ Ibid, p. 58

⁷⁶ Ibid, p. 56, 58

⁷⁷ Ibid, p. 59

⁷⁸ Supra note 56, p. 101

⁷⁹ Ibid

⁸⁰ Peleckiene, V., Peleckis, K., Dudzeviciute, G., Lapinskiene, G., (2017) Changes of Insurance Intermediaries Regulation in the EU Countries, Proceedings of the 2017 International Conference "ECONOMIC SCIENCE FOR RURAL DEVELOPMENT", No. 46, 135-141, p. 135

proved to be one of the most competitive ones for already decades.⁸¹ Prior to the Directive, the UK had also already unified the national laws to be very consistent with the EU law and the predecessor fo the Directive, the IMD. The national rules had for long imposed stricter standards compared to the requirements set in the IMD. Therefore, the reformations brought by the Directive didn't have such a shocking impact on the activities of the distributors. For example, the authorisation process of intermediaries will not be affected much by the Directive, since the national rules of the UK anyways require the intermediaries registered to another EEA country to apply for approval of the FCA before engaging in business activities in the UK.⁸²

The new rules of the IDD were implemented through the Insurance Distribution (Regulated Activities and Miscellaneous Amendments) Order 2018 which became applicable in October 2018.⁸³ It amended two national instruments, the Financial Services and Markets Act 2000 (FSMA) and Regulated Activities Order 2001 (RAO). In addition to these, the Financial Conduct Authority (FCA) amended its FCA Handbook which is a collection of the main regulative instruments of the UK. This Handbook is very well in line with the Directive.⁸⁴ Besides to the Handbook, the FCA has issued three consultation papers, three corresponding policy statements, and a Handbook Notice regarding the implementation of the Directive.⁸⁵ It has also published issues relating to the Directive's implementation and effects in its Quarterly Consultation Papers.⁸⁶

Nowadays, financial regulation in the UK is imposed through a twin peaks model. This reform was made after the financial crisis,⁸⁷ when the supervisory framework in the insurance sector got tightened and the national rules on prudential oversight were remodeled. This led to the creation of the twin peaks system.⁸⁸ Therefore, the FCA isn't the only body presenting changes to the national rules but does so in cooperation with the Prudential Regulatory Authority (PRA).⁸⁹ The PRA may also introduce changes to national policies but in this case, it stayed more in the back and only presented some minor changes.⁹⁰ The HM Treasury, representing the economic and finance ministry, has also

⁸¹ Hardwick, P., & Dou, W. (1998). The Competitiveness of EU Insurance Industries. *The Service Industries Journal*, 18(1), 39-53. p. 40

⁸² Supra note 65

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Nousia, KP. (2018). The Legal Framework Regarding the Distribution of Insurance-Based Investment Products: the EU and UK Approach, *Journal of International Banking Law and Regulation*, No. 4 (2018)

⁸⁶ Ibid

⁸⁷ Everson, M. (2015). Regulating the Insurance Sector, Moloney N., Ferran E, Payne J. (editors), Oxford handbook of insurance regulation. Oxford: Oxford University Press, p. 412

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Supra note 65

published its own consultation. In the consultation the ministry expressed the government's intent to carry through the implementation of the Directive despite of the upcoming BREXIT.⁹¹

The FCA has also given some proposals for the new national conducts. Because some of the national provisions are already advanced, it has suggested that whichever goes further and imposes stricter standards should be applied, the Directive or the existing national regulations.⁹² This shows the general consensus of the UK to use the Directive as a minimum harmonisation instrument.⁹³ Another thing is the possibility of an execution-only method for the sale of non-complex IBIPs. This has received different views from the Member States. In the execution-only method, the simple IBIPs could be sold with eased disclosure obligations for the seller since the nature of the products should not need a thorough explanation.

On 24 June 2016, the results of the BREXIT referendum were published, starting the process of leaving the EU.⁹⁴ The Great Repeal Bill passed by the government's decision will repeal the European Communities Act 1972⁹⁵ and remove the competence of the EU institutions to affect on the legislation in the UK. This will likely expose the current EU attributed rules to a reassessment in the UK and also affect on the access of the UK based insurance companies to the single market. In practice, there are two main options that both include some limitations. The first one is a single European passport. It provides so-called 'passporting rights' and provides financial institutions the freedom to provide services, and freedom of establishment within the Union. Usually, this means that businesses authorised in one EU or EEA Member State, automatically have a right to practice cross-border business activities across the EU and EEA, and may set up branches for that in other Member States as well.⁹⁶ Currently, no general single EU passport exists that would cover all financial services and across all the sectors.⁹⁷ In addition, the EU's passporting and 'mutual recognition arrangements' only apply to the EU and EEA based companies and their products. In case the UK stays as a member of either EU or EEA, the IDD provides extensive passporting rights to insurance and reinsurance intermediaries, and to ancillary insurance intermediaries.⁹⁸ However, if the UK won't preserve its passporting rights and is unsuccessful at negotiating new arrangements, the UK based companies

⁹¹ Supra note 84, p. 27

⁹² Ibid, p. 29

⁹³ Ibid

⁹⁴ Menon, A., Salter, J-P. (2016) Brexit: initial reflections, *International Affairs*, Vol. 92(6), p. 1

⁹⁵ Supra note 1, p. 81

⁹⁶ Cherednychenko, O. O. (2016). The UK's Potential Withdrawal from the EU and Single Market Access under EU Financial Services Legislation: In-Depth Analysis for the European Parliament Committee on Economic and Monetary Affairs (ECON). European Parliament Directorate-General for Internal Policies, p. 11

⁹⁷ Ibid

⁹⁸ Ibid, p. 26

could be treated as third-country companies. Another alternative is the third country equivalence regime. This is a mechanism providing access to the single market through single passport or through other means of mutual recognition. The access is usually conditioned and if the legal system of the third country at hand is understood as 'equivalent' to the EU system, the financial institutions from that third country will be treated similarly as the European ones.⁹⁹ Depending on how much the UK will preserve its EU attributable rules in its legal system, it could (in theory) be eligible as 'equivalent' to the EU's system. However, the third country equivalence regime is not as comprehensive as the passporting rights in providing free market access and in many areas of the financial services, this kind of regimes are completely non-existent.¹⁰⁰ As already mentioned, the Directive provides passporting rights for the financial institutions based on the EU and EEA but holds not corresponding third country rights.¹⁰¹ In conclusion, this means that there is no assurance for the UK based financial service providers that they could access the single markets after the BREXIT.

⁹⁹ Ibid, p. 14

¹⁰⁰ Ibid, p. 16

¹⁰¹ Ibid, p. 26

4. COMPARATIVE ANALYSIS

The two states were at very different starting points when starting the national implementations of the Directive. It is still early to make straightforward conclusions for the whole processes but some aspects can already be used for comparative evaluation, and some basic level assumptions can be made based on them.

One of the first choices the countries have had to make is the level of harmonisation chosen. Poland took the path of maximum harmonisation and in its premises the decision seems pretty obvious. The national system was already in the middle of reform and fitting the new provisions of the Directive to it would have been quite of a challenge. Hence, the new guidelines were taken from the Directive. One example of the maximum harmonisation could be the choice of words used in the Act on Insurance Distribution. The legislator has mainly used 'customer' instead of 'consumer' which enables a broader application of the Act.¹⁰² In the Directive itself, the words are used pretty much interchangeably although the context quite obviously refers to retail consumers. The UK, on the other hand, decided to go with the minimum harmonisation. Their national framework had just been remodeled and was already well in line with many of the rules of the Directive.¹⁰³ The FCA collected feedback from its suggestions and some opposition had arisen from the proposal to exceed the bare minimum requirements set in the Directive. Some felt that the FCA should remain using the existing rules and principles when possible even if those would not perfectly match with the wordings of the Directive.¹⁰⁴

In both countries, the national body or authority deciding on the implementation of the Directive was mainly the government using its legislative powers. In Poland, the process was pretty simple and relied on the government which decided to amend several national laws to get the expected outcome.¹⁰⁵ In the UK, the "ultimate impact on a business is subject to the FCA's approach to transposition of the IDD requirements."¹⁰⁶ Also, the PRA introduced some of its minor changes, and lot of proposals and consultation papers were published.¹⁰⁷ The significance of the different means of regulating is based on their status as legal sources and hence the effect they have when applied. Despite both countries have made amendments to their laws, the UK also presented more soft law

¹⁰² Supra note 54, p. 102

¹⁰³ Supra note 84, p. 9

¹⁰⁴ Financial Conduct Authority, (2017). Insurance Distribution Directive implementation – Feedback to CP17/7 and near-final rules, policy statement. p. 5. Available in <https://www.fca.org.uk/publication/policy/ps17-21.pdf>

¹⁰⁵ Supra note 66, p. 50

¹⁰⁶ Supra note 84, p. 5

¹⁰⁷ Supra note 65

instruments. Law, as a primary source, tends to indicate the expectations more clearly while the relevance and binding force of the consultations and proposals might be confusing to both consumers and companies. On the other hand, the end results of these countries will probably be relatively close to each other due to their different needs for the laws in the first place.

The Directive also stresses the importance of the national supervisory authority. This supervisory authority in the Polish insurance market is the Polish Financial Supervision Authority together with the self-governing institution of insurers known as the Polish Chamber of Insurers.¹⁰⁸ In the UK, the FCA is the authority responsible for authorising and supervising companies engaged in financial and insurance services.¹⁰⁹ To better respond to the consumers' needs both countries also have a special authority to help with consumer relations. In Poland, it is the Insurance Ombudsman (Financial Ombudsman) and in the UK the Financial Ombudsman Services. In addition to these, the Directive also has a general requirement to enforce processes handling all the complaints of the consumers. The out-of-court redress procedures should also be available to the consumers in accordance with the existing EU legislation.¹¹⁰

The countries have also had some challenges and issues both before the introduction of the Directive and after it. Before the Directive, the distrust of consumers in Poland was on the rise and the practices of product misselling and negligence of disclosure obligations had become common.¹¹¹ Since then, the Office of Competition and Consumer Protection has started a register of prohibited clauses to forcefully prevent the unethical practices of insurance and reinsurance distributors.¹¹² Nowadays, the Polish insurance market under the reformed legislation is viewed as providing a surprisingly high level of consumer protection to the policyholders.¹¹³ After the Directive was implemented through the changes to national legislation, the worry has turned more towards the possible information overload.¹¹⁴ Also, one of the most difficult challenges is still the materialization of fundamental principles requiring the distributors to "act honestly, reliably and professionally, in accordance with the best interests of their clients" and making sure that only the contracts in line with the client's needs are recommended.¹¹⁵ Similar issues with the information overload have not been recognized in

¹⁰⁸ *Supra* note 59, p. 172

¹⁰⁹ HM Treasury, (2018). Consultation outcome - Transposition of the Insurance Distribution Directive. Available in <https://www.gov.uk/government/consultations/transposition-of-the-insurance-distribution-directive/transposition-of-the-insurance-distribution-directive>

¹¹⁰ *Supra* note 104, p.12

¹¹¹ *Supra* note 59, p. 173

¹¹² *Ibid*, p. 175

¹¹³ *Supra* note 56, p. 114

¹¹⁴ *Supra* note 56, p. 114

¹¹⁵ *Supra* note 59, p. 176

the UK due to the relatively limited changes introduced to the national practices. In the FCA's feedback report, some respondents worried for the short time limit given for making the adjustments.¹¹⁶ Despite it has not been clearly mentioned, the same difficulty is likely to have existed in the Poland as well.

It is important to notice the national differences on the premises of each Member State already at the early stages of the implementation processes. This is necessary for all kinds of regulations but especially so in regards to fields like insurance sector, which has its special nature and is highly dependent on its local environment. Comparative analysis like this brings new information concerning the practical side of the implementation and its effects in the Member States. Examining these practical differences may improve the general understanding of laws in international level if the different actions and premises of the Member States are recognized. It may also enhance the knowledge of (legal) professionals and lead to unifying the mindsets of these professionals. One of the main objectives of the EU's internal market is to improve the cross-border sales between the European countries and succeeding in this requires knowledge of the markets in different states. The insurance and reinsurance companies as well as their lawyers, must know about the national differences when acting and entering into new markets. Good example of this would be the binding force of the different legal sources used in the implementation, for example, the law and mere recommendations. Also, when more information is received in the future, these comparisons can point to questions needing further assessment of regulations.

¹¹⁶ Supra note 104, p. 5

5. FUTURE PROSPECTS

While the importance of online sales increase, the need for coherent rules for the sake of the consumers also become more important. The Directive itself does not specifically set any standards for digital intermediaries but it also doesn't exclude the possibility of using its provisions on them.¹¹⁷ The e-distribution options and Fintech will probably be some of the most timely issues of discussion in the near future. In research concluded in Poland and Ukraine, the possibilities of the online sale was already recognised. While Ukraine is not an EU Member State at this point, the necessity of bringing their national legislations closer to the standards' of the EU regulations was noted in there as well, just as in Poland. The unified standards referred to improved possibilities on cross-border online sales.¹¹⁸

Online platforms are very cost-efficient distribution channels and hold many possibilities. For the consumers to turn to these online distribution channels more easily, they should trust that their purchase decision benefits them. So far, the distribution of insurance services through online channels has mainly focused on the simple standard insurance products, like travel insurance, and civil liability insurances of vehicle owners.¹¹⁹ Effective product oversight and governance by manufacturers could positively affect on this part and ease the online sale of insurance products. Together with proper information disclosure habits by the distributors of the insurance products, the consumers could find the purchases more convenient for them. For example, currently, the IBID is usually provided to the consumer at the time of the purchase since there is no obligation for the service providers to put it out to their website.¹²⁰ Putting this information available to the public in the service providers' websites could positively affect on the interest of the consumers and even lead to making purchase decisions. These are matters that the service providers can also improve themselves without any direct orders of law. New customs are constantly created and the situation will likely improve with time when the rules and practices will become consolidated.

It has also been noticed, that many financial innovations do not fit easily with the existing legal frameworks.¹²¹ These 'technology-enabled innovations' known as the FinTech, and its insurance-

¹¹⁷ Marano, P. (2019). Navigating InsurTech: The digital intermediaries of insurance products and customer protection in the EU, *Maastricht Journal of European and Comparative Law*, Vol. 26(2), 294-315, p.297

¹¹⁸ Jurij Klapkiv, Lyubov Klapkiv, & Nataliia Zarudna. (2018). ONLINE DISTRIBUTION OF INSURANCE OF CIVIL LIABILITY OF OWNERS OF VEHICLES, THE EXPERIENCE OF POLAND, OPPORTUNITIES OF UKRAINE. *Baltic Journal of Economic Studies*, 4(1), 195-201. p. 195

¹¹⁹ Ibid, p. 197

¹²⁰ Pscheidl, D. (2018). Implementing IDD across the EU—first findings and the way forward. *ERA Forum*, No. 19, 205–217, p. 214

¹²¹ Supra note 2, p. 68

specific sub-branch InsurTech, have suffered from the stiffness of the existing system towards the new ways of distribution. For example, according to Article 23, all the necessary information should be provided to the customer by paper on default. Other durable means may be used under certain circumstances but in the end, the consumer still has the right to require the paper form. The EU has committed to the technological neutrality principle in regards to its financial regulations and, for example, considers the automatic services equivalent to human-led ones.¹²² While this sets the same requirements for all the actors irrespective of used technologies, the different technological solutions may complicate the placement of activities under the old division of categories.¹²³ The uncertainty of applicability of laws on InsurTech may also leave gaps on the regulations, which can cause difficulties for affirming the level-playing field of regulations and also mess up with the consumer protection aspects.¹²⁴ Different countries have made their own decisions to respond to that, the UK, for example, has addressed the issue by creating ad hoc regulations when needed.¹²⁵

¹²² Supra note 2, p. 72

¹²³ Supra note 2, p. 73

¹²⁴ Supra note 2, p. 72

¹²⁵ Supra note 2, p.73

6. CONCLUSION

Any practical evidence on the matter is still a curiosity and the long-term effects of the Directive are unconfirmed at this point. The Directive should be reviewed by the EU Commission in early 2021 and hopefully, after that, there will be a better grasp of the effects the Directive has brought.¹²⁶ This thesis provides a preliminary introduction and examination of the first findings and some of the national differences. The two countries examined here have had completely different situations and approaches but in the big picture, they hold something in common. Both of them have the will and intension to improve their national regulative environments to enhance consumer protection and increase cross-border cooperation. The implementation processes will always be different for each country since their starting points differ from each other. Both of these countries have worked towards the common goals from the premises they have, and it seems to me that in the end, the results of their implementation measures are more unified than one could first imagine. To get to the same level of consumer protection and organizing the national rules to be in line with the common regulative framework has required a minimum harmonization from the other, and maximum from the other.

What comes to the research questions, the results seem to be more multilayered than first expected. The national authorities of both countries have worked hard to establish changes to their policies already before the Directive came into force and because some of the national rules have exceeded the expectations of the EU provisions, it becomes tricky to distinguish all the effects of the Directive from other measures imposed. However, the Directive presents a new era in insurance regulations. Fifteen years ago, before the financial crisis, the EU regulations and rules were considered a heavy burden and a threat to the development of the insurance sector.¹²⁷ Now, those seem more like a prerequisite to gain consumers' trust and to achieve working markets. Already based on this, we can expect that presenting this Directive has been the right choice, if not even a necessary one. As unsurprising as it might be to claim that more laws create a safer environment, in this case it might be the truth. Naturally, the laws are not enough but part of the solution is also stabilizing the common practices and models. Still, the laws tend to indicate the consensus and they are often the kickstart for development. The whole Insurance Distribution Directive aims to improve consumer protection through building trust towards insurance markets, and therefore, in itself, it has already made an effect.

¹²⁶ Supra note 22, p. 91

¹²⁷ Müller-Reichart, M. (2005) The EU insurance industry: Are we heading for an ideal single financial services market? Geneva Papers on Risk and Insurance: Issues and Practice, April 2005, Vol.30(2), pp.285-295. Here, p. 286-287

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