

**Comments Template on
Consultation Paper on the proposal for 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**

**Deadline
28 April 2017
18:00 CET**

Name of Company:	German Insurance Association (GDV)	
Disclosure of comments:	EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential. Please indicate if your comments on this CP should be treated as confidential, by deleting the word Public in the column to the right and by inserting the word Confidential.	Public
<p>Please follow the following instructions for filling in the template:</p> <ul style="list-style-type: none"> ⇒ <u>Do not change the numbering</u> in the column "reference"; if you change numbering, your comment cannot be processed by our IT tool ⇒ Leave the last column <u>empty</u>. ⇒ Please fill in your comment in the relevant row. If you have <u>no comment</u> on a paragraph or a cell, keep the row <u>empty</u>. ⇒ Our IT tool does not allow processing of comments which do not refer to the specific numbers below. <p>Please send the completed template, in Word Format, to CP-17-001@eiopa.europa.eu.</p> <p>Our IT tool does not allow processing of any other formats.</p> <p>The numbering of the questions refers to the Consultation Paper on the proposal for 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</p>		
Reference	Comment	
General Comments	<u>Criteria should be high level and in line with minimum harmonisation aim of IDD</u> The German insurers agree that complex products should not be sold without the	

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appropriateness test required by Article 30 (2) IDD. We would like to point out that some product features might be uncommon in one Member State but they can be typical and well-known to customers in another market instead. Therefore, we support that EIOPA envisages only high-level criteria for non-complex products, so that products that are well-known for consumers in some markets are not wrongly deemed complex. We also welcome that EIOPA acknowledges IDD's minimum harmonisation aim as well as the fact that for execution-only sales national competent authorities may maintain or introduce additional more stringent national provisions in this area in order to protect consumers accordingly.

Level playing field between UCITS funds and collective investment should be ensured
 We would like to stress that Article 30(3)(a)(i) is supposed to address products which provide only direct investment exposure to the financial instruments deemed non-complex under Directive 2014/65/EU. These are investments where consumers make an investment choice themselves and where the investment exposure is, therefore, not absorbed by the expertise of a professional investor who is subject to supervisory regulation.

Products where the investment is done by the insurer who is subject to a very strong prudent person principle should, therefore, fall into the scope of Guideline 1. Otherwise investment products covered by MiFID II would receive a preferential treatment compared to insurance products. Furthermore, the current provisions would also influence the investment of insurers, e.g. impede the investment in alternative investments such as infrastructure. This would go beyond the scope of a Directive on distribution of insurance products. We fear that consumers' access to insurance products and long-term investments will be limited, including products with profit participation, and would put such instruments at a clear disadvantage to comparable financial instruments without any insurance aspects.

Thus, absolute care has to be taken in order to avoid postulating principles (by means of Level 3 guidelines) which may leave products that are well-established in the

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relevant European insurance markets – such as life-insurance products with profit participation – as being deemed complex under IDD.

Finally, the principles stated in the consultation paper’s guidelines have to be scrutinised thoroughly, to avoid the erroneous classification of such products as complex.

The delegated act should take into account changes in the guidelines
 Furthermore, the GDV strongly supports that EIOPA will take into account any differences between the delegated acts which are currently being finalised by the European Commission and EIOPA’s technical advice, prior to finalising these Guidelines. In our view, it is of utmost importance that a consistent approach between Level 2 and Level 3 is taken so that products that are readily understood by consumers are not wrongly deemed complex. Moreover, although we understand that the division between products that fall under Article 30(3)(a)(i) and those that fall under Article 30(3)(a)(ii) stems from the IDD Level 1 text, we support that EIOPA is taking a generalised approach to capture the properties of all insurance-based investment products (IBIPs).

Broader relevance of complexity should be taken into account
 Moreover, the question of complexity of IBIPs is of a great relevance. Not only does it play a role in a so-called “execution-only” distribution of IBIPs, but it is also relevant in other fields. For example, according to the newly amended PRIIPs RTS complex products will also receive a comprehension alert. Moreover, also the POG rules newly introduced in the IDD currently depend on the complexity of an IBIP.

Question 1

The GDV does not agree with EIOPA that IBIPs are “often complicated and difficult to understand for consumers”. Most of the products invest either in a collective pool with profit participation or in units of funds. Both mechanisms have been common in the German market for a long time and are well-known to the consumers. Also other features of an insurance contract such as maturity payment, surrender value or death benefits have been used for decades and are usually common and familiar to

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consumers.

GDV welcomes that a consistent approach should be applied across different financial sectors so that a level playing field is achieved. However, German insurers fear that EIOPAs comparison is not always correct. For example, the investment in non-structured UCITS funds is deemed non-complex under MiFID II (see Example 1 on page 32) even if the respective UCITS funds invest in derivatives. In case of IBIPs, where the customer does not make an investment selection (e.g. a traditional life insurance product with profit participation) and the insurer invests in some derivatives, such a product will be automatically regarded as complex, unless surrender and maturity value are guaranteed.

Article 30(3)(a)(i) is supposed to address products which provide only direct investment exposure to the financial instruments deemed non-complex under Directive 2014/65/EU. These are investments where consumers make an investment choice themselves and where the investment exposure is, therefore, not absorbed by the expertise of a professional investor who is subject to supervisory regulation. Products where the investment is done by the insurer who is subject to a very strong prudent person principle should, therefore, also fall into the scope of Guideline 1.

Insurance undertakings are obliged under the Solvency II regime to invest all their assets in accordance with the prudent person principle, for which there are a number of qualitative requirements. Under the prudent person principle insurers may only invest in assets the risks of which they can properly identify, measure, monitor, manage and control. They have to ensure that their corresponding obligations can be fulfilled at all times. So they have to choose carefully the type, scope and quality of the coverage and have to act in the best interests of the policyholders. In addition, all assets must be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole. According to the EIOPA Guidelines on System of Governance undertakings have to establish an investment risk management policy, in which the undertakings have to establish the level of security that they are

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aiming for with regard to the whole portfolio of assets and outline how they plan to achieve this. The insurer has to explain in this investment risk management policy that the undertaking assesses the financial market environment and takes this into consideration accordingly. In addition, insurers must prepare an internal schedule of investments, which should contain quantitative limits for investments and exposures, including sovereign exposures. The financial market environment has to be understood in terms of both general conditions as well as current developments and regulatory changes. Even these few examples of the requirements which insurers have to fulfil when engaging in investment activity show clearly, that the asset allocation of insurers is very strictly regulated.

To ensure a proper level playing field, it is necessary that **investments made and managed by the insurers are not deemed complex** (currently, this is only provided for products that guarantee the sum of paid in contributions minus legitimate costs at all times, as in EIOPA-17/048, page 77 criterion (a)). The proposed wording would inevitably lead to investment restrictions on insurers: in order to offer non-complex products insurers would refrain from investing in e.g. long-term investments such as infrastructure and other alternative investments which do not fall within non-complex MiFID instruments. Such a restriction of the investment horizon in turn would make it more difficult to ensure the security, quality, liquidity and profitability of the portfolio as a whole. Furthermore, consumers would not benefit from yields of long-term investments. Thus, such collective investments of insurers should also be addressed as investment according to Article 30(3)(a)(i).

Finally, German insurance urge EIOPA to treat complexity in a much broader context. Not only does it play a role in a so-called "execution-only" distribution of IBIPs, but it is also relevant in other fields. For example, according to the PRIIPs Regulation complex products will receive a comprehension alert. Moreover, also the product oversight and governance rules in the IDD currently depend on the complexity of an IBIP.

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Question 2	<p>The GDV urges EIOPA to treat complexity in a much broader context than the mere question of execution-only sales of these products. Other possibly more far-reaching consequences should be taken into consideration. For example, complex IBIPs will automatically be labelled with a comprehension alert under PRIIPs Regulation. However, the PRIIPs Regulation originally had a much narrower scope for the comprehension alert that was supposed to include products which cannot be sufficiently clearly described through the PRIIPs KID. Furthermore the complexity of products is a factor with regard to the extent of the obligations proposed by the technical advice on product oversight and governance.</p>	
Question 3	<p>We believe that products where the customer does not make an investment selection with regard to individual financial instruments, but where the investment is done by the insurer who is subject to a very strong prudent person principle fall into the scope of Article 30(3)(a)(i). This article is supposed to address products which provide only direct investment exposure to the financial instruments deemed non-complex under Directive 2014/65/EU. These are investments where consumers make an investment choice themselves and where the investment exposure is, therefore, not absorbed by the expertise of a professional investor who is subject to supervisory regulation. In such cases the financial instruments invested into by the insurer shall not be taken into account since the overall investment ensures that there are no hidden risks for consumers. This is also the case for UCITS which on one hand may invest in complex instruments such as derivatives but on the other hand are still regarded as non-complex due to the overarching structure. Otherwise investment products covered by MiFID II would receive a preferential treatment compared to insurance products.</p> <p>In addition, this would inevitably lead to investment restriction on insurers: in order to offer non-complex products insurers would refrain from investing in e.g. long-term investments such as infrastructure and other alternative Investments which do not fall within non-complex MiFID instruments. Such a restriction of the investment horizon in turn would make it more difficult to ensure the security, quality, liquidity and profitability of the portfolio as a whole. Thus, the collective investments of an insurer should per se not be deemed complex.</p>	

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We do not agree with EIOPA’s assessment in the explanatory text to Guideline 1 (number 2.14). Article 30(3)(a)(i) is supposed to address products which provide only direct investment exposure to the financial instruments deemed non-complex under Directive 2014/65/EU. These are investments where consumers make an investment choice themselves and where the investment exposure is, therefore, not absorbed by the expertise of a professional investor who is subject to supervisory regulation. Products where the customer does not make an investment selection with regard to individual financial instruments, but where the investment is done by the insurer who is subject to a very strong prudent person principle should, therefore, fall into the scope of Guideline 1. In such cases the financial instruments invested into by the insurer should not be taken into account if the overall investment ensures that there are no hidden risks for consumers. This is also the case for UCITS which on one hand may invest in complex instruments such as derivatives but on the other hand are still regarded as non-complex due to the overarching structure. Therefore, the statement in number 2.14 of the explanatory text should be restricted to those cases where the provider is not subject to the prudent person principle under Solvency II. Otherwise investment products covered by MiFID would receive a preferential treatment compared to insurance products. Furthermore, the current provisions would also influence the investment of insurers, e.g. impede the investment in alternative investments such as infrastructure. This would go beyond the scope of a Directive on distribution of insurance products.

Furthermore, EIOPA notes itself that products with profit participation benefit consumers. Gabriel Bernardino says in his speech at the Finanstilsynet Conference: “Pensions when the guarantees disappear” from 9 March 2017: “Products could allow the pooling of investments with the smoothing of returns across members of the pool, so that all members benefit from average long-term returns of the fund and are protected from extremely negative outcomes in stressed market situations.” We fear that consumer’s access to insurance products and long-term investments will be limited, including products with profit participation, and puts such instruments at a clear disadvantage to comparable financial instruments without any insurance aspects.

Question 4

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Finally, we suggest that criterion (c) should specify the ESMA Guidelines in question (Guidelines dated 4 February 2016, ESMA/2015/1787). A dynamic reference to any future Guidelines which ESMA may adopt on this issue would risk introducing rules which are not in line with insurance specific characteristics or regulation.

We support that EIOPA thoroughly investigates different features of IBIPs that might lead to unexpected hidden risks for consumers. However, particularly in view of life insurance products with profit participation it should be duly taken into account that some Member States have implemented rules that protect consumers' interests. For example, in Germany there are provisions on actuarial calculation of the surrender value of IBIPs. They ensure that consumer receives the correct value of his assets in case of an early surrender by demanding that the surrender fees are included in the terms of the individual insurance contract, that their extent is explained to the consumer and that their amount is appropriate. Detailed rules also exist for allocation of the surpluses to consumers. Calculations made by the insurer on the basis of these rules are subject to the scrutiny of the supervisory authorities as well as to judicial review if a consumer chooses to take legal action. Therefore, EIOPA should clarify in its Guidelines that rules that follow (legal) provisions that ensure a high level of consumer protection should not lead to products being deemed complex.

In our view the following changes are necessary:

Guideline 2, paragraph 3, (a) to (c): We strongly suggest that the respective subcriteria (i) to (iii) of criteria (a) to (c) in Point 3 of Guideline 2 should be conclusive and not only conceived as examples of other possible cases of complexity. With a view to the very broad wording of criteria (a), (b) and (c) (without regard to the respective subcriteria), the aim of achieving legal certainty for manufacturers, distributors and consumers alike will otherwise not be achieved. For example the material content of Point 3 (a) of Guideline 2 is limited to the tautology that a product is complex if there are complex mechanisms that determine its pay-out value. EIOPA should bear in mind that the Guidelines can be amended at any time in the future, should the criteria

Question 5

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prove not to be sufficient.

Guideline 2, paragraph 3(a)(i): We would like to draw EIOPA’s attention to the fact that products which offer guarantees almost always provide for a surplus participation of the policyholders. We strongly support EIOPA’s view, as expressed in the Technical Advice under IDD and reaffirmed in the Consultation Paper, that guarantees are valuable for the customer and should therefore not automatically be penalised by the label of complexity. To ensure high levels of consumer protection, the profit participation is strongly regulated and follows prescribed legal rules (under German law for example Section 153 Insurance Contract Act (VVG); Sections 139 and 140 Insurance Supervision Act (VAG); Sections 6, 7 and 8 Minimum Allocation Regulation (MindZV)). Some rules set by the legislator may in some cases appear complex, but they solely serve best possible consumer protection and should not lead to products being deemed complex.

The following change is necessary:
 (i) *the maturity or surrender value or pay out upon death is dependent on **profit participation which is not subject to policyholder protection regulation or variables arbitrarily set by the insurance undertaking, the effects of which are difficult for the customer to understand;***

Guideline 2, paragraph 3(a)(ii): We do not understand why this criterion is relevant for insurers. We assume that the criterion is not aimed at the mechanisms which form the basis of any collective investment: Mr. Bernardino described such products as a candidate for PEPP, which cannot be seen as complex (“Products could allow the pooling of investments with the smoothing of returns across members of the pool, so that all members benefit from average long-term returns of the fund and are protected from extremely negative outcomes in stressed market situations.”), see our comments on question 4. Neither are unit-linked products captured by this criterion.

→ *This criterion should be deleted.*

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Guideline 2, paragraph 3 (a) (iii): The point that “the maturity or surrender value or pay-out upon death may vary frequently or markedly at different points of time over the duration of the contract either because certain pre-determined threshold conditions are met or because certain time-points are reached” could be interpreted as deeming products with profit participation complex, when they for example guarantee to pay a final bonus on maturity. If contractual dates are clear to the customer at outset, this would not seem to be a feature that would be difficult to understand. In any case, we do not understand how this criterion is relevant for insurers.

→ This point should be deleted.

Guideline 2, paragraph 3 (b): We do not understand why this criterion is necessary. All IBIPs will fall in the scope of the PRIIPs Regulation and, therefore, will provide a KID that describes all the costs included in the product through the disclosure of total costs and the Reduction in Yield (RIY). In particular, the RIY is a new concept that was thoroughly investigated in the consumer testing and is able to present the cost impact in a clear and comprehensive way.

→ This criterion should be deleted.

Guideline 2, paragraph 3 (c): We understand that EIOPA wishes to keep the surrender fees as simple as possible. However, a too simplistic reference value would not always be fair towards consumers. For example, a fair processing fee of surrender a contract would result in a fixed monetary sum. However, the loss of liquidity premium is fairly measured as a percentage of the investment. Thus, a combination of the in 3(c) mentioned quantities should also be allowed.

→ Therefore, the criterion should be amended in the following way

(c) There are surrender fees that are difficult for the customer to understand,

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*including where the cost of redeeming the insurance-based investment product before maturity does not satisfy one **or the combination** of the following conditions:*

- (i) it is a fixed sum;*
- (ii) it is a fixed sum for each year or other specified time period remaining until the maturity of the contract;*
- (iii) it is a fixed percentage of the amount of premiums paid or another amount that can be understood by the customer;*
- (iv) it is a compensation for paying also the part of the surrender value which is greater than the death benefit at the time of surrender.*

In our view, there is little reason why e.g. a non-structured UCITS fund (which is deemed non-complex under MiFID II) shall be deemed non-complex whereas a life insurance product with profit participation – a product family offered in many European countries – shall be deemed complex only due to the presumably lacking but required investment guarantee and because the respective general (cover) assets were not held in a UCITS wrapper although the insurer’s general assets aim at (collectively) protecting retail customers in a very similar way as required for UCITS funds.

We believe that products where the customer does not make an investment selection with regard to individual financial instruments, but where the investment is done by the insurer who is subject to a very strong prudent person principle fall into the scope Article 30(3)(a)(i). This article is supposed to address products which provide only direct investment exposure to the financial instruments deemed non-complex under Directive 2014/65/EU. These are investments where consumers make an investment choice themselves and where the investment exposure is, therefore, not absorbed by the expertise of a professional investor who is subject to supervisory regulation. In such cases the financial instruments invested into by the insurer should not be taken into account if the overall investment ensures that there are no hidden risks for consumers. This is also the case for UCITS which on one hand may invest in complex

Question 6

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	instruments such as derivatives but on the other hand are still regarded as non-complex due to the overarching structure. Otherwise investment products covered by MiFID would receive a preferential treatment compared to insurance products.	
Question 7		
	<p>Example 9: In our view, product described in example 9 should not be considered to be complex due to extensive regulation, in particular the prudent person principle. Otherwise this would inevitably lead to investment restriction on insurers: in order to offer non-complex products insurers would refrain from investing in e.g. long-term investments such as infrastructure and other alternative investments which do not fall within non-complex MiFID instruments. Such a restriction of the investment horizon in turn would make it more difficult to ensure the security, quality, liquidity and profitability of the portfolio as a whole. Thus, such collective investments of insurers should per se not be deemed complex.</p> <p>Examples 10 and 11: We do not understand why a product which includes a guarantee without any profit participation would be considered as non-complex (provided it does not have any other structures which make it difficult for the customer to understand the risks involved), while the same product with profit participation (which grants consumers higher returns) might be seen as complex. It should be avoided that by setting too restrictive criteria incentive might arise to exclude profit participation.</p>	
Question 8		
	<p>In our view, there is no reason why an insurance company's general (cover) assets in which retail investor does not invest directly should be regarded to be generally more complex than their UCITS funds counterpart. According to EIOPA's current interpretation this is due to the fact that insurers also invest in assets that, for example, do not fall under the MiFID II, such as many long-term investments. The current text creates an unlevelled playing field between fund managers and insurers.</p> <p>The GDV strongly supports that EIOPA will take into account any differences between the Delegated Act which are currently being finalised by the European Commission and EIOPA's technical advice, prior to finalising these Guidelines. In our view, it is of</p>	
Question 9		

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utmost importance that a consistent approach between Level 2 and Level 3 is taken so that products that are readily understood by consumers are not wrongly deemed complex.

Finally, the question of complexity of IBIPs is of a great relevance. Not only does it play a role in a so-called "execution-only" distribution of IBIPs, but it is also relevant in other fields. For example, according to the newly amended PRIIPs RTS complex products will also receive a comprehension alert.