

Comments Template on Consultation Paper on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive		Deadline 3 October 2016 18:00 CET
Name of Company:	Insurance Europe	
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Reference	Comment	
General Comment	<p>Insurance Europe welcomes the opportunity to comment on EIOPA's draft technical advice on possible delegated acts under the Insurance Distribution Directive (IDD). It is crucial that the delegated acts that will be developed by the European Commission respect the framework that has been agreed by the co-legislators at Level 1. As such, we would like to provide our comments on EIOPA's draft technical advice to ensure not</p>	

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only that the delegated acts will be fully consistent with the IDD Level 1 text, but also to ensure that the proposed provisions lead to an effective improvement of consumer protection in insurance distribution and result in a proportionate approach in their application. With this in mind, we would like to make the following general remarks:

Product oversight and governance (POG)

- EIOPA should ensure that the POG requirements can be implemented at national level as efficiently as possible. Insurance Europe believes that for this to happen, EIOPA should recognise that existing national rules that pursue the same objectives and reflect the same principles as the ones EIOPA is putting forward in the technical advice, meet the POG requirements.
- The POG provisions should be better targeted to their objectives. To this end, a flexible product-specific approach to the determination of the target market would be welcomed.
- In particular, distributors should be able to sell outside of the target market where relevant, while there should be no requirement to specify a 'negative' target market.
- It should also be made explicitly clear that the POG proposals are not intended to lead to any price controls or detailed provisions on product design.

Conflicts of interest

- The rules on conflicts of interest need to take the insurance-specific characteristics of Insurance-Based Investment Products (IBIPs) more carefully into account.

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- Commission-based remuneration should not in itself be viewed as a conflict of interest.

Inducements

- There is no overarching ban on commissions under the IDD. The co-legislators instead opted to ensure that the possibility for such a ban remains as an option for member states. EIOPA must therefore avoid introducing rules that will give rise to a de facto ban on commissions. By specifying a broad list of inducements that are considered to pose a high risk of a detrimental impact on the quality of the service to the customer, EIOPA is in effect undermining the content of the IDD Level 1 text.

Assessment of suitability and appropriateness

- The cumulative list of high-level criteria to assess non-complex insurance-based investment products will result in a de facto ban on execution-only products. All products are deemed complex under the list besides products with a unit-linked investment element. This approach would seriously undermine the explicit member state option in the IDD that permits the execution-only sale of non-complex IBIPs.

Reporting to customers

- Any provisions for distributors regarding organisational arrangements, documentation and reporting requirements must be developed in a proportionate manner to avoid placing a disproportionate and unjustified administrative burden on distributors. These provisions should have a clear

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	<p>proven benefit to the customer to be justified.</p> <p><u>Timing / implementation</u></p> <ul style="list-style-type: none"> ▪ It is extremely important that the overall process for finalising the delegated acts is completed as soon as possible. Many of the requirements will require significant changes to current business models and organisational structures, which will take time and significant costs to implement. Companies must therefore be left with sufficient time following the confirmation of the final Level 2 measures to effectively prepare and prevent additional and unnecessary costs. 	
Question 1	<p>It is not possible to provide an estimate of the costs and benefits of the possible changes outlined in the consultation paper since the current policy proposals are not final yet.</p> <p>No definite implementation plans can be put in place by insurance companies until they have legal certainty over the content of the final text of the possible delegated acts.</p> <p>Recommendation: It is crucial that the delegated acts are finalised as soon as possible to allow an effective preparatory period for companies and prevent additional unnecessary costs, while at the same time ensuring effective protection and clarity for consumers.</p>	
Question 2	<p><u>Price control / added value</u></p> <p>EIOPA continues to refer to the concept of value of the product (as in the online survey on the technical advice from January 2016). In paragraph 48 of the analysis on</p>	

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page 20, when talking about conflicts of interest in the section on the establishment of distribution arrangements, EIOPA states that "[...] this might imply that distributors abstain from distributing specific insurance products for example in cases where they do not offer any added value to the customer, only a high commission to the distributor".

Moreover, in paragraph 2 of the draft technical advice on page 41, there is a reference to product costs and the assessment of whether the product offers added value to the customer. The value of the product (as well as the level of commission) is something that will be determined by the market. We are concerned that references to this concept could effectively result in a subjective evaluation of insurance products by supervisory authorities and the introduction of a form of price control. It should be noted that the supervisory authorities are not entitled to introduce price-control mechanisms under Article 21 of the Solvency II Directive.

Prices do not depend on the nature or the complexity of the product but on a number of factors, such as the estimated risks and guarantees chosen by the customer. The continued reference to the value of the product is not consistent with Article 25 of the Level 1 IDD text on POG and goes much further than the general principle set out therein. The aim of the product approval process is to ensure that insurance products meet the needs of the target market, as stated in recital 55, which should be properly taken into account here.

Recommendation: EIOPA should avoid proposing measures that restrict competition, by interfering with companies' internal pricing mechanisms.

Principle of proportionality

POG arrangements must also be proportionate to the level of complexity and the risks

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related to the products, as well as the nature, scale and complexity of the relevant business of the regulated entity. This requirement is enshrined in Article 25(1) paragraph 2 of IDD, which requires the product approval process to be proportionate and appropriate to the nature of the insurance product.

It is important to bear in mind the diversity and wide range of insurance products, which means that the POG requirements would not be expected to apply in the same way to all products. These differences need to be respected in order, for example, to avoid introducing requirements for all insurance products that are more suited to the investment world.

Recommendation: It is important that the principle of proportionality has been introduced in the policy proposals (eg paragraph 2, page 21 and paragraph 28, page 25). However, in its final report on the public consultation on preparatory guidelines on POG from 6 April 2016, EIOPA further elaborated on this principle in paragraph 1.4 on page 25 and paragraph 1.40 on page 34 of the explanatory text. These paragraphs should be reintroduced in the draft technical advice to provide clarity.

Target market

Product risk is negligible for most insurance policies sold on a mass-market basis, and many of these products have proven beneficial in the market for years. The majority of these products (including non-life products such as home and motor insurance) are developed for the purpose of covering a particular risk. The persons affected by the risk thus form the natural target group.

Recommendation: Undertakings should therefore have sufficient discretion to define the target market. In any case, the target market definition should not restrict customer choice when a product matches their demands and needs even if they are

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not in the pre-defined target market, irrespective of the nature of the insurance product.

Retroactive application of POG

There should not be any retroactive application of the proposed POG requirements. Companies would be overstrained if they were obliged to establish new POG arrangements for each of their existing products. These arrangements should only apply to newly designed products that are brought to market, or products that are 'significantly changed' and proposed to customers after the implementation date of these provisions. This would also ensure consistency with Article 25 of the IDD.

This clarification was included in EIOPA's final preparatory guidelines on POG in paragraph 1.17 of page 17 and the final paragraph of page 65, and should be re-introduced in the final draft advice.

Recommendation: In order to enhance legal clarity, EIOPA's policy proposal should be reworded to ensure that there is no retroactive application of the POG requirements unless products are significantly changed.

Documentation requirements

It is unclear how the increased documentation requirements for both manufacturers and distributors in connection with the POG arrangements will benefit the consumer. We are concerned that the introduction of further documentation requirements will trigger price-raising because of increased administrative burdens. Moreover, the lack of flexibility at the level of documentation requirements will most likely affect smaller companies more than larger companies.

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Recommendation: EIOPA's policy proposals should explicitly introduce POG documentation requirements that are proportionate to the nature, scale and complexity of the business of the distributor. Additionally, EIOPA should reintroduce paragraph 1.1 on page 25 of its final report on the preparatory guidelines on POG in the policy proposals, where it states that the establishment of POG arrangements does not necessarily mean that new or fully separate arrangements are drafted; it can be sufficient to refer to existing documents where these contain the relevant information and just record additional information if and insofar as this is necessary.

Review period

Any changes to a product that are made on the basis of a review should only affect the further distribution of the product. The framework for making any amendments to existing contracts is provided through national contract law.

New products and online distribution

The high level of detail in the policy proposals would eventually restrict the introduction of new products and the creation of new trends, thus endangering the freedom of enterprise.

A growing number of customers prefer to buy insurance online. In its consultation paper on automated advice, the Joint Committee of the ESAs concludes that online distribution channels will probably gain importance in the coming years.

Recommendation: EIOPA must ensure that POG requirements should work well for both the online and offline environment. This would enable the industry to respond quickly with new products in the market.

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Distribution channels

In its draft technical advice, EIOPA does not pay enough attention to the differences between distribution channels, despite the explicit mandate received from the Commission. For example, tied agents and brokers operate in different frameworks with different levels of cooperation with the insurance company involved. These differences are not sufficiently reflected in the draft technical advice.

Considering that the distribution landscape can differ significantly from one member state to another, EIOPA should allow the POG requirements to be complemented at national level for the different types of distributors.

Recommendation: EIOPA should allow for a pragmatic and proportionate application of the POG requirements at national level.

Question 3

It would not be useful or necessary for any further arrangements to be introduced. However, as mentioned in the response to Q.2, the current level of detail is disproportionate and in need of modification.

Question 4

It is not possible to provide an estimate of the costs and benefits of the possible changes outlined in the consultation paper since the current policy proposals are not final yet.

No definite implementation plans can be put in place by insurance companies until they have legal certainty over the content of the final text of the possible delegated acts.

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Recommendation: It is crucial that the delegated acts are finalised as soon as possible to allow an effective preparatory period for companies and prevent additional costs, while at the same time ensuring effective protection and clarity for consumers.

Question 5

It is positive that EIOPA's proposed high-level principles recognise that intermediaries who are involved in product design and development can be regarded as manufacturers. It is also positive that this holds where intermediaries design the coverage, the target market, the terms and conditions etc, of an insurance product for a customer or a specific group of customers.

However, when an intermediary defines or changes the main elements of an insurance product, including the coverage, the target market, the terms etc, and asks the insurance undertaking to offer this product, the intermediary must be subject to the same product oversight and governance requirements as insurance undertakings are when manufacturing insurance products. In this situation, the intermediary goes further than specifying the demands and needs of the individual customer or group of customers and getting quotes/proposals from insurance undertakings.

If the POG obligations do not apply in cases where the intermediary is the manufacturer of the product, there would be an implicit obligation on insurance undertakings to supervise intermediaries who are involved in the design and manufacture of a product.

The insurance undertaking covering the risk remains fully responsible to the customer for the contractual obligations resulting from the insurance product but should not assume administrative responsibility vis-à-vis the supervisor for non-compliance with the POG procedures.

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	<p>Recommendation: Paragraphs 13 and 14 of page 29 of the analysis should therefore be deleted. Additionally, EIOPA should ensure that in its policy proposals the product manufacturer is responsible for complying with the POG requirements, regardless of whether it is the insurance undertaking or intermediary.</p>	
Question 6	<p>In the case of independent intermediaries, it is not possible for an insurer to actively monitor if (i) the distributor respects the POG arrangements and (ii) the product is sold correctly to the target market.</p> <p>Recommendation: The proactive monitoring of compliance with the POG arrangements by distributors should be carried out by the national supervisory authority and not the manufacturer (insurer) involved. EIOPA's final advice should clarify that a manufacturer is not required to share its entire product approval process with a distributor, but only the relevant information on the product and identified target market. This is in line with paragraph 5 of Article 25(1) of the IDD Level 1 text.</p>	
Question 7	<p><u>Target market definition</u></p> <p>The target market should be defined in a broad way by the manufacturer. We agree with EIOPA that (i) the target market describes a group of customers at a broader and more abstract level and (ii) differs from the individual assessment of the adequacy of an insurance product for a specific customer.</p> <p>The requirement to use detailed personal factors such as knowledge and experience, the financial situation and objectives of the customers that EIOPA refers to in paragraph 2 on page 33 are in contrast with the broad and abstract group of customers.</p>	

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The identification of a broad target market by the manufacturer should enable the distributor to understand to whom the product is meant to be sold. This serves as a first filter (at product level) to highlight that the product may not be designed for customers outside of the identified target market. However, it is the distributor involved who, based on the analysis of the customer's demands and needs, is best placed to determine if that particular product is aligned with that specific customer's needs (customer level).

Recommendation: The target market should be able to be defined as broadly as possible. A too narrow definition of the target market entails the risk of excluding some consumers, even though the product would meet their needs. This could lead to unjustified discrimination or a refusal to sell.

Sales outside the target market

As EIOPA acknowledges, all products differ and therefore the granularity of the target market can differ depending on the complexity and nature of the product. A rigid delineation of a target market at the level of product design would lead to the exclusion of numerous customers from suitable insurance coverage. If customers do not form part of the target group, for any one of a number of reasons, they could be refused coverage even though the product still meets their individual need for protection. The distributor has to be able to deviate from the pre-set target group if this is justifiable in a particular case.

The approach taken by the EBA in its guidelines on POG is to allow distributors to sell products outside of the target market defined by the manufacturer provided they are able to justify doing so. In order to ensure a consistent and coherent approach, the same principle should apply here. This would leave sufficient flexibility to the

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distributor where the product is suitable/appropriate for the customer.

Recommendations:

- EIOPA should introduce paragraphs 52 and 53 of the analysis on pages 20 -21 into the final technical advice as well, stating that it generally remains possible to sell products outside of the intended target market, provided that it is justified in that particular situation (for instance when the distributor involved decides on the basis of the demands and needs analysis that the product fits that specific customer’s needs).
- The final technical advice should not impose any duties on manufacturers to supervise or be held responsible for the actions of third party distributors who sell outside of the target market. Third party distributors would therefore remain responsible for meeting the required standards for distribution and determining whether sales remain suitable/ appropriate.

Negative target market

It is not necessary to include provisions on a ‘negative’ target market (ie identifying groups of customers for whom the product is typically not compatible). For many products, trying to clearly define the negative target group or specifying it in an exhaustive way might prove extremely difficult. More importantly, such a provision is not contained in the Level 1 text of the IDD.

Question 8

Review and monitoring mechanisms

Review and monitoring mechanisms should be in place for responding to any signals received from the market that the product may no longer meet the interests,

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objectives and characteristics of the identified target market. The manufacturer should have in place a strategy for appropriately responding to feedback from the target market, which will also include information received from distributors.

Furthermore, any changes to a product that are made on the basis of a review should only affect the further distribution of the product. The framework for making any amendments to existing contracts is provided through national contract law.

Recommendation: EIOPA should not prescribe any defined intervals for the review process. To keep this review process as effective and efficient as possible, and to ensure that the principle of proportionality is taken into account, there should be a link between the stability of the product and the need to conduct a review. The more stable the product, the less need there is to conduct a review. Moreover, any minimum interval should be determined by the manufacturer. A review should only be carried out on an individual basis.

Exchange of information between manufacturers and intermediaries

Manufacturers and intermediaries should inform each other about relevant results of their reviews. However, additional obligations to coordinate these reviews and to make written agreements are neither feasible nor required under the IDD Level 1 text. They would require brokers to make arrangements with a multitude of manufacturers, adapting to very heterogeneous review timetables. An obligation to coordinate reviews is only appropriate if the intermediary and insurance company are also manufacturers.

Neither IDD nor Solvency II require the manufacturer to provide the intermediary with information for assessing whether the product offers added value for the customer, as proposed by EIOPA in pages 40-41 of the consultation paper. In any case, it is not

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clear what information would fall under the scope of this requirement.

Moreover, the “bare minimum” information to be obtained by the distributor should not include the fair value of insurance products or lead to any requirement to provide information to distributors about the internal pricing mechanisms of companies. This would effectively lead to price control, as mentioned in the response to Q.2.

Recommendation: For the POG provisions to be beneficial, it is vital that they are efficient and avoid unnecessary bureaucracy and costs. It is neither necessary nor feasible to specify the relevant information in a written agreement. For example, paragraph 6 on page 38 of EIOPA’s draft technical advice states that the manufacturer and distributor shall have appropriate written agreements in place in order to coordinate their reviews. This will increase the workload for both manufacturers and distributors. Any decision on the timing and frequency of such reviews should be left to the companies themselves.

In addition, as the approach is based on the principle of proportionality in paragraph 10 of the analysis on page 40, an explicit recognition of this principle should be introduced in the actual policy proposal itself and not only in the analysis.

Question 9

Conflicts of interest requirements

It is positive that the requirement under Article 27 of the IDD acknowledges that intermediaries shall take steps to prevent conflicts of interest from adversely affecting the interests of customers. However, Article 27 also requires these arrangements to be proportionate to the activities performed, the products sold and the type of distributor. This is also reflected in the European Commission’s request for technical advice.

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Recommendation: There is not a need for further specification of the regulatory requirements on conflicts of interest. On the contrary, the proposed level of detail required is already disproportionate and in need of modification.

EIOPA should not prescribe the steps to be taken in order to address and manage conflicts of interest in detail. This needs to be adapted to the characteristics, structure and activity of the entity involved.

Moreover, EIOPA should not go beyond what is necessary to comply with Article 28(4) of the IDD, calling for the definition of steps to identify and manage conflicts of interests that might be reasonably expected to be taken. The criteria established to determine the types of conflicts of interests that may damage the interests of customers must also be appropriate.

Types of conflict of interest

Not all types of conflicts of interest have the potential of causing detriment directly to consumers.

For example, in some member states, if an intermediary is involved in developing a product together with an insurance undertaking it can often actually create positive outcomes for consumers. The intermediary knows the market very well and can incorporate knowledge of consumer demands and needs into the design of the product.

Additionally, different types of distribution channels might present different risks of conflicts of interest. For instance, the impact of an independent intermediated channel on customers is different to the potential conflict of interest that might arise for direct

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selling or exclusive/tied agents and any proposed requirements must recognise this fact.

Recommendation: EIOPA’s final technical advice should focus on conflicts of interests that are demonstrated as being detrimental to consumers, taking into consideration the extent of potential damage as well. EIOPA should recognise that different types of distribution channels may also have a diverse impact on customers.

Identification of conflicts of interests

The four distinctive situations identified in paragraph 2 on page 45 of the draft technical advice should not always be considered to cause conflicts of interests without the possibility of rebuttal or mitigating measures. The wording “shall at least be assumed” implies that there is a conflict of interests whenever any of these situations occurs.

It is important to bear in mind that the identification of conflicts of interest is simply an initial step in the process and that insurers will take additional steps to manage and mitigate any conflicts of interest.

Recommendation: In its final technical advice EIOPA should clarify that conflicts of interest “may occur” instead of “shall at least be assumed” in situations included under paragraph 2 of the draft technical advice on page 45.

Paragraph 2(a) on page 45 of the draft technical advice should also be clarified, stipulating that the remuneration of distributors does not generally qualify as “financial gain at the expense of the customer”. Distributors have a right to be properly

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remunerated for their services.

Moreover, paragraph 2(b) on page 45 may conflict with the basic principles of insurance laid down in prudential regulation. They are already appropriately addressed in conduct of business regulation on page 26 of the final report on public consultation on preparatory guidelines on POG.

More specifically, with regard to paragraph 2(c) on page 45, the payment of commissions from insurers to distributors does not necessarily give rise to a conflict of interests. It is crucial to neither favour nor hinder specific models of distribution, as the framework that exists is the result of countries' market dynamics and local consumer demands and preferences.

Finally, we are concerned with paragraph 2(d) on page 45 of the draft technical advice. We believe it would be far too general to say that any involvement could constitute a conflict of interest. Instead it should be clarified that only a qualified, substantial involvement may lead to a conflict of interest.

Recommendation: We therefore propose an alignment with the POG text on page 29 of the consultation paper and suggest that the paragraph should read: "the insurance intermediary, persons working in an insurance undertaking responsible for the distribution of insurance-based investment products or linked person are substantially involved in the management or development of the insurance based-investment products, in particular the main elements of an insurance product, such as the coverage, premium, costs, risks, target market or compensation and guarantee rights of the insurance product".

The goal of these requirements should be to set suitable and proportionate provisions, taking into account distribution channel characteristics. This will guarantee a

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corresponding adequate level of protection for consumers and recognise that a diverse distribution framework is of value to the market and the customer.

Looking at the distribution of investment products throughout Europe, in certain countries independent advisers are the prevailing channel, in some countries it is banks and post offices, while in others it is tied agents. Direct (including web-based) channels are also increasing in volume.

Even if a certain channel prevails in a single country, in most countries there are more than one channel and on the whole Europe has a diverse framework of distribution models. This is positive for consumers, as it gives them the possibility to select and use the channel that they wish from a range of options.

Recommendation: The following implementation measures could be performed on the basis of compliance management systems to identify and mitigate the risk of potential conflicts of interest:

- Internal policy on the management of conflicts of interest
- Internal review of remuneration and incentive systems according to the company's guidelines on compliance
- Assessment of the complaints about conflicts of interest, based on an internal complaint management system.

However, it should be ensured that any such measures are adapted and appropriate to the characteristics, structure and activity of the entity involved.

Periodical review and record keeping

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The organisational provisions for the documentation of conflicts of interest under paragraph 9(b) on page 47 require distributors to record a huge and unnecessary amount of detail. It is possible to use the adopted measures to record existing conflicts of interest running contrary to the interests of the customer. However, requiring distributors to draw up a list of conflicts of interest that might possibly arise in the future, while keeping up their on-going services, is disproportionate.

Customers purchasing insurance-based investment products have various options at their disposal to adapt their product over the course of several decades. In this process, they can rely on the support of distributors. However, distributors are not able to predict all potential conflicts of interest that might arise following the multitude of (often unpredictable) customer decisions, taking into account every conceivable element of their personal situation.

Moreover, it is unclear who would benefit from such a list. Customers would not have any advantage from receiving a list of potential conflicts of interest that might possibly arise in the future, but which have no basis so far. Instead, distributors would be overly burdened with excessive documentation requirements.

The insurance arrangement is based on the relationship between customer and insurer (and potentially intermediary) – the purchasing behaviour of other customers is irrelevant for that relationship. It is therefore unclear why EIOPA assumes that there are horizontal conflicts of interest between different customers, as is the case with transaction deals in direct capital markets. High demand for an insurance-based investment product (as in the example of a conflict of interest cited by EIOPA in paragraph 6 of the analysis on page 44) affects neither the price nor the type of products offered by the distributor to the individual customer, who obtains the

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	<p>identical product without suffering any disadvantages due to the high demand.</p> <p>Recital 57 of the IDD states that in order to ensure that any inducement does not have a detrimental impact, the insurance distributor should develop arrangements and procedures relating to conflicts of interest. In other words, under the IDD, where these procedures properly identify, prevent and manage conflicts of interest including those resulting from inducements, the latter should be presumed as not having a detrimental impact on the quality of the service.</p>	
<p>Question 10</p>	<p>Greater recognition is required of the need to take into account the principle of proportionality within the draft technical advice itself. Many distributors of insurance products are small and medium sized enterprises and in some cases are run by one self-employed individual. This person does not have the available resources to carry out different activities, so any measures developed should not give rise to an onerous regulatory burden for SMEs.</p> <p>National regulators are best placed to assess proportionality, as they will already be closely monitoring the risk management approach in the firms they supervise. They will also be better placed to take account of the extensive variation in legal forms and in corporate governance regimes and practices.</p> <p>In many member states, SMEs are involved in the distribution of insurance products. A lot of them are managed by one person. A two person management requirement, for example, as used in asset management to handle conflicts of interest, would put a heavy burden on the market and force SMEs to cooperate with other SMEs or just stop their business.</p> <p>Recommendation: The mandate that EIOPA has received from the European Commission requires EIOPA to pay particular attention to the practical implementation</p>	

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	<p>of the proportionality requirement in its technical advice. This should be included as part of the technical advice itself and does not require EIOPA to develop separate policy instruments to elaborate the principle of proportionality in the field of conflicts of interest.</p>	
<p>Question 11</p>	<p>It is positive that EIOPA intends to take a high-level principle approach towards the criteria to determine whether an inducement has a detrimental impact on the relevant service to the customer. However, in order to evaluate whether or not an inducement can be considered to have a detrimental impact on the quality of the service, it is necessary to take a holistic approach and to look at the context of the overall situation.</p> <p>This includes consideration of the relationship between customer and distributor in all its complexity (advisory process, contract conclusion, advisory and general customer services during the contract period, support by the distributor after a claims event). The focus should not be on the individual point of sale alone: as Article 29(5) IDD rightly states, the delegated act should take into account the various different types of services, the frequency of transactions and the type of product.</p> <p>However, the proposed methodology seems to contain contradictions on this point. On the one hand, EIOPA states that inducements should be judged by means of an overall assessment, which could take into consideration risk-reducing factors paragraph 17 on page 52 of the draft technical advice.</p> <p>On the other hand, paragraph 18 of the analysis on page 53 states that risk-reducing practices cannot be used to legitimate practices which are considered to be detrimental from the outset, with an explicit reference to the inducements listed in paragraph 4 of the draft technical advice.</p>	

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This means that none of the inducements listed in paragraph 4 can be countered with risk-reducing factors; therefore the list is considered to be a de facto 'blacklist'. This is further evidenced by the reference on page 132 of the consultation paper to the benefits for customers of the preferred policy option (Policy Option 3), which states that it will no longer be possible for insurance undertakings and insurance intermediaries to pay or receive certain inducements which entail a high risk of detrimental impact on the quality of the service provided to customers. EIOPA also refers to this as a distinctive list of inducements that are not acceptable.

The combination of a broad blacklist with no proper possibility to take into account risk-reducing factors stands in direct contrast with the idea of an overall, holistic assessment.

Benefits which are provided in connection with the distribution of an insurance-based investment product should not be perceived as being inherently negative, particularly as they often can be provided as a reward for quality of service, rather than being simply sales-driven.

Moreover, the general offering of an inducement or benefit that conforms to the market norm should not be considered as giving rise to a detrimental impact on the quality of the service, particularly as the distributor is required to ensure that the products they offer are in line with the customer's demands and needs, as well as carrying out an assessment of suitability/appropriateness in the case of insurance-based investment products.

Recital 57 of the IDD states that in order to ensure that any inducement does not have a detrimental impact, the insurance distributor should develop arrangements and procedures relating to conflicts of interest. In other words, under the IDD, where

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these procedures properly identify, prevent and manage conflicts of interest including those resulting from inducements, the latter should be presumed as not having a detrimental impact on the quality of the service.

Definition of inducement

Recommendation: The definition of an inducement in paragraph 1 of the draft technical advice on page 54 should be amended to better reflect the content of paragraphs 3 and 4 of the analysis on page 50. The present definition is inconsistent with the explanations given by EIOPA and the European Commission mandate as it refers to “any party” rather than “any *third* party”. An explicit clarification is needed in the definition that employees and tied agents are not considered as third parties for the purposes of these provisions.

Concept of “third party”

The MiFID Implementing Directive does not consider specific persons involved in distribution, like an employee or a tied agent of the firm, as a third party in relation to the investment firm. In other words, an employee or a tied agent acts in the name and on behalf of the firm and substantially constitutes a single entity within the firm.

In fact, MiFID employees involved in distribution are bound to the firm through the employment contract and are subject to the power and control of the firm. They act on behalf of the firm and, as a result, the firm is by statute liable for their actions. Employees form a single economic and operating entity within the firm – without the employees, the firm could not perform any activity and vice versa, employees could not act without the relationship with the firm.

For the same reasons, employees and tied agents of the insurance undertaking cannot

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be considered as a "third party" for the purposes of inducements and remuneration under IDD. In fact, this would imply that in the case of distribution through employees of the undertaking, the employees should be considered as "third parties" in relation to the insurance undertaking, which is legally untenable and fundamentally illogical.

It is clear that the framework for inducements mainly refers to the relationship between intermediaries and third parties. The framework for inducements would, therefore, apply to insurance companies when they distribute insurance investment products through "third parties", given the fact that not every channel or person involved in the distribution process can be defined in this way.

This is acknowledged by EIOPA to a certain extent in paragraph 4 on page 50, where it states that internal payments (eg fees by paid by the customer or internal payments to employees of insurance distributors) are excluded from the technical advice.

Recommendation: EIOPA must further specify that tied agents also do not fall under the technical advice due to the nature of their relationship with the insurance undertaking.

Question 12

Further types of inducements do not need to be added to those listed in the draft technical advice, which as mentioned in the response to Q.9 already runs the risk of undermining existing commission-based distribution models.

Question 13

The types of inducements that are listed in paragraph 4(b) to (d) of the draft technical advice do not necessarily have a high risk of leading to a detrimental impact. This should not result in imposing a de facto ban on commissions. As already mentioned in the response to Q.11, EIOPA refers to a distinctive list of inducements that are not acceptable and that it will no longer be possible to pay or receive certain inducements which entail a high risk of detrimental impact on the quality of the service provided to

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customers. This would not be in line with the provisions of the level 1 text of the IDD.

A detrimental impact on the quality of service cannot be determined solely on the basis of a particular model for calculating benefits or payment methods. A holistic approach is needed that takes into account the context of the overall situation, including the long-term customer relationship.

Recommendation: The main criterion for the overall assessment of inducements should be the one in paragraph 4(a) on page 54 of the draft technical advice stating that there is a high risk of a detrimental impact on the quality of the relevant service to the customer when the inducement encourages the insurance intermediary or insurance undertaking carrying out distribution activities to offer or recommend a product or service to a customer when from the outset a different product or service available within the distributor's portfolio exists which would better meet the customers' needs.

Question 14

As already mentioned in the response to Q.13, the proposed list of types of inducements would effectively result in imposing a de facto ban on commissions.

Recommendation: Rather than using a 'blacklist', the following arrangements can also be used by insurance companies to monitor the services offered to customers:

- a) Product lapse analyses,
- b) Customer satisfaction surveys,
- c) Sales quality monitoring.

Documenting the assessment of inducements

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	<p>With regard to the proposed organisational requirements, there is an issue with the wording of paragraph 8 on page 55 that refers to documenting the assessment of each inducement in a durable medium.</p> <p>Recommendation: EIOPA must provide clarification in the final technical advice that paragraph 8 refers to documenting the inducement scheme itself rather than each individual inducement, which would create a considerable and unjustified administrative burden.</p>	
Question 15	<p>The high-level principle approach regarding the specification of the suitability and appropriateness test is positive and in line with the requirements set out in the Level 1 text of the IDD.</p> <p>Advice and the assessment of suitability require individual consideration of each customer by the distributor. Her/his investment objectives, financial situation, as well as knowledge and experience, cannot be determined by reference to general questions on the customer's personal life, such as his/her level of education or profession. Instead, it requires sufficient flexibility for distributors to meet the individual requirements of each customer's situation and his/her need for advice. The draft technical advice therefore needs to carefully consider the relevance of the respective information to be assessed in suitability and appropriateness tests and follow a proportionate approach.</p> <p><u>Scope of suitability test</u></p> <p>The suitability test under Art. 30(1) IDD is aimed at the sale of insurance-based investment products. It does not intend to cover any ongoing advice or administration of ongoing insurance-based investment products, without the distributor informing the</p>	

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customer that it will carry out an ongoing suitability assessment under Art. 30(5) of the IDD. A corresponding clarification is needed regarding the content in paragraph 8 of the analysis on page 62.

Provision of customer information

According to paragraph 10 of the draft technical advice on page 65, EIOPA does not allow the distributor to provide any recommendation where the customer does not provide sufficient information for the suitability test in the advisory process. However, it should be noted and respected that customers are not always willing to give personal information on every aspect required.

According to the Level 1 text of the IDD, distributors are still allowed to sell IBIPs in cases where the customer is unwilling to share certain information with the distributor, despite the fact that the latter is obliged to request it.

Recommendation: EIOPA must provide clarification that in cases where customers deliberately withhold information under Art. 30(1) IDD, distributors may continue with the advisory and sales process after providing and documenting a risk warning to the customer (Art. 30(2) IDD). This clarification is needed because in some member states, eg Germany and France, intermediaries are not allowed to sell insurance products without giving prior advice.

Switching embedded investments

Paragraph 12 of the draft advice on page 65 puts too much emphasis on costs. There are other reasons why it could be better for a customer to switch his embedded investments. For example, a customer might prefer investments that pursue social or environmental objectives for ethical reasons, or upheaval in a particular sector that

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	<p>makes market shares temporarily volatile may lead certain risk averse customers to divest due to the uncertainty.</p> <p>Recommendation: The last part of the paragraph should be deleted: “When providing advice that involves switching embedded investments, either by selling an embedded element and buying another or by exercising a right to make a change in regard to an existing embedded element, the insurance intermediary or insurance undertaking shall collect the necessary information on the customer’s existing investments and the recommended new investments and shall undertake an analysis of the costs and benefits of the switch, such that they are reasonably able to demonstrate that the benefits of switching are greater than the costs.”</p>	
Question 16	<p>The risk tolerance for advice regarding insurance-based investment products should be determined by means of the subjective preferences of the customer, as this cannot be objectively observed by the distributor. The customer has to express his/her personal willingness to bear a risk (potential loss of the investment) to the distributor. For example, there are customers who have the financial capacity to bear risks, but are very risk-averse.</p> <p><u>Type of customer</u></p> <p>EIOPA does not include any reference to the type of customer (retail or professional) in its draft technical advice. Article 30(6)(c) of the IDD explicitly requests this to be taken into account. Distributors will therefore be able to consider this when applying the legal restrictions “where relevant” or “necessary”.</p> <p>Recommendation: EIOPA should confirm this assessment under paragraph 10(b) of the analysis on page 62, where there is reference to the MiFID II definition of</p>	

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	professional clients and its relation with the IDD.	
Question 17	Article 30(1) of the IDD already specifies the necessary information to obtain for an assessment: information regarding the customer's or potential customer's knowledge and experience in the investment field relevant to the specific type of product or service; the person's financial situation including that person's ability to bear losses; and the person's investment objectives, including the person's risk tolerance, so as to enable the insurance intermediary or the insurance undertaking to recommend to the customer or potential customer the insurance-based investment products that are suitable for the person and that they are in accordance with that person's risk tolerance and ability to bear losses.	
Question 18	<p>EIOPA should not suggest introducing further specification and guidance in a separate policy instrument on the relationship between the demands and needs test and the suitability/appropriateness assessment. This would go beyond the provisions of the Level 1 text of the IDD and the relevant European Commission mandate for technical advice, transforming what should be understood as a general principle into prescriptive and potentially restrictive requirements.</p> <p>EIOPA already notes in paragraph 12 on page 63 that its technical advice should be limited to the information to be obtained under the suitability/appropriateness assessment only, and not the demands and needs test.</p>	
Question 19	The cumulative list of high-level criteria in the draft technical advice poses a serious concern. This exhaustive list will result in a de facto ban on execution-only sales, as all products are deemed complex besides products with a unit-linked investment element under paragraphs 5 and 6 on pages 68-69 of the analysis.	

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This approach would seriously undermine the explicit member state option in the IDD to allow for the execution-only sales of non-complex IBIPs, as well as interfere with the consumer's choice of whether or not to seek advice. Insurance Europe is therefore opposed to the inclusion of such a list in the draft technical advice.

Complex products in the sense of MiFID II include factors that would make it difficult for the client to understand the risks involved. Examples of these products are investments in derivatives, contracts of difference, structured notes or asset backed securities. They involve investment strategies with complex derivative instruments, non-transparent exposure to several market risks and/or credit risks.

The focus should be on factors that make it difficult for the client to understand the risks involved when assessing the complexity of insurance-based investment products, as EIOPA rightly points out in paragraph 3 of the analysis on page 68. In any case, the insurance products can be considered non-complex if they do not incorporate a structure which makes it difficult for the customer to understand the risks involved.

It is also true that suitable high-level criteria capable of general application could be developed at European level and specified by member states having regard to their specific statutory regimes.

It should be noted that in their core business, insurers use professional actuarial methods to determine their obligations and many financial instruments to match them. Insurance-based investment products primarily reduce the consumer's risk exposure, for example by providing certain guarantees which offer a greater level of protection to consumers, cushioning them from the volatility of the market. These products are therefore non-complex in the sense of paragraph 3 of the analysis on page 68 (no look-through regarding complexity, only the product itself should be

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	<p>viewed when assessing complexity for consumers).</p> <p>Criterion (e) on page 71 is overly broad compared to the corresponding MiFID 2 criterion (point (d) on page 68), which states that "it does not incorporate a clause, condition or trigger that could fundamentally alter the nature or risk of the investment or pay out profile, such as investments that incorporate a right to convert the instrument into a different investment".</p> <p>EIOPA's proposed criterion (e) expands the scope considerably, by wrongly putting switching clauses on the same level as converting rights. This is inaccurate, as switching takes place in the contractual sphere, while converting does not. Switching does not alter the characteristics of the product, but merely places the investment in another investment option within the same product.</p> <p>Criterion (h) of the draft technical advice would pose a serious issue if it would not allow the customer the possibility to change the beneficiary. Beneficiary clauses do not influence the performance or return of the product. This criterion even undermines the right of a customer to alter a product based on their particular needs and ignores the fact that modifiable beneficiary clauses are in the interests of customers as they enable them to keep control over the beneficiary of their investments.</p> <p>Recommendation: In addition to the above, EIOPA should amend the incorrect references to MiFID II (Directive 2014/65/EU) in paragraph 1 on page 71. The correct references should be to Article 25(4)(a) and Article 30(3)(a)(ii) of Directive (EU) 2016/97 (IDD).</p>	
Question 20	It is true that insurance products can be considered non-complex if they do not incorporate a structure which makes it difficult for the customer to understand the risks involved. Products that reduce the risk for consumers should therefore be seen	

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	as non-complex. This includes products with guarantees or other security mechanisms (no look-through regarding complexity, only the product itself should be viewed when assessing complexity for consumers) and products with non-significant investments in complex MiFID instruments.	
Question 21	<p>It is not clear why EIOPA assumes that sub-point (i) of point (a) of paragraph 3 of Article 30 is intended to capture the majority of non-complex products. Sub-point (i) of point (a) of paragraph 3 of Article 30 is merely the straightforward and direct link between MiFID and IDD. This point, therefore, only captures insurance products that are closely related to funds such as unit-linked insurance products. Sub-point (i) of point (a) of paragraph 3 of Article 30 does not capture the vast majority of insurance products that primarily reduce consumers' risk exposure by, for example, providing certain guarantees that offer a greater level of protection to consumers, cushioning them from the volatility of the market.</p> <p>Products that reduce the risk for consumers should be seen as non-complex, such as products with guarantees or other security mechanisms (no look-through regarding complexity, only the product itself should be viewed when assessing complexity for consumers) and products with non-significant investment in complex MiFID instruments.</p>	
Question 22	<p>The proposed high-level criteria seem to be acceptable in general. A positive example is the recognition that obligations should not overload the customer with additional information, and insurance undertakings and intermediaries should not be faced with administrative burdens in paragraph 9 of the analysis on page 76. However, there are still several clarifications needed with regard to certain proposals.</p> <p>Recommendations:</p>	

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- It appears that paragraph 16(b) aims to ensure that insurance intermediaries or undertakings keep the relevant records at the disposal of the competent authorities in order to enable them to detect failures regarding the suitability assessment. Those records should allow the competent authorities to examine if the necessary assessments took place and if the advice given was in line with the outcome of those assessments. EIOPA should clarify this in the technical advice, as the current paragraph is too vague.
- Paragraph 17(a) should be clarified to explain that any periodic recording of the changes in the suitability assessment is only necessary in cases where the distributor has explicitly informed the customer that it will carry out this periodic suitability assessment, in line with Article 30(5) subparagraph 4 of the IDD.
- With regard to paragraph 17(b), the recording obligation should not extend beyond the event that it intends to record. The suitability statement specifies the advice given and therefore states the product which has been recommended. The delegated act should not introduce a disproportionate obligation to additionally record a multitude of product types and any changes to them. A clarification is needed to explain that the distributor complies with their obligations under paragraph 17(b) by archiving the suitability statement.

Paragraph 17(b) refers to a customer's risk profile. In insurance, there is no automatic link between a customer's profile and certain products. These practices are more common in the banking sector, but not in the insurance sector. Furthermore, the IDD does not require distributors to draw up investment risk profiles.

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	<ul style="list-style-type: none"> • Agreements with respect to the rights and obligations of the parties are subject to national contract law. EIOPA's technical advice must not contradict the respective regulations. 	
Question 23	As mentioned in the response to Q.22, paragraph 17(b) refers to a customer's risk profile. In insurance, there is no automatic link between a customer's profile and certain products. These practices are more common in the banking sector, but not in the insurance sector. Furthermore, the IDD does not require distributors to draw up investment risk profiles.	
Question 24	<p>According to paragraph 9 on page 87 of the draft technical advice, distributors have to provide customers with a periodic statement on the services provided and transactions undertaken. This statement can be provided by means of an online platform.</p> <p>It is important that digital platforms are considered by EIOPA, but counterproductive that distributors need to have evidence that the customer has actually accessed the information at least once during the relevant reporting period. This is not required under the IDD, which only contains an information obligation for distributors and does not oblige them to check if their customers read/access the information.</p> <p>Paragraph 2 of the draft technical advice on page 85 states that "<i>the insurance intermediary or insurance undertaking shall draw the customer's attention to, and shall include in the suitability statement information on whether the recommendation is likely to require the customer to <u>seek a periodic review</u> of their arrangements</i>".</p> <p>Recommendation: EIOPA must provide clarification in the final advice that the distributor involved can decide if they provide periodic assessments of suitability or not (as set out in Article 30(5) IDD). Where the distributor provides ongoing advice,</p>	

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they should determine the triggers for such periodic assessments and not the customer.

The information set out in paragraph 8 of the draft technical advice on page 86 will result in a duplication of the information that is already required under Article 185(5) of the Solvency II Directive. In addition, many of the newly added requirements are extremely unclear and seem to be copied across from fund concepts, without careful adaptation to the features of insurance-based investment products.

Recommendation: Where Solvency II already sets out information requirements covering the same issues, then these requirements should be deemed to be met. Potential inconsistencies in the wording of the delegated acts would otherwise lead to legal uncertainty and further ambiguities for customers, insurance undertakings and intermediaries.

For example, according to Solvency II, during the term of the contract, information on surrender value and the extent to which it is guaranteed only have to be given in case of a change in the policy conditions or amendment of the law applicable to the contract (Article 185(5), Article 185(3)(f)). However, the wording of point (e) of paragraph 8 could be understood as a mandatory periodic information requirement on surrender value without regard to any such changes.

Finally, it is not appropriate to require a review of the suitability statement and recommendations annually, as insurers' long-term products do not change on a day-to-day basis.

Question 25

It is positive that EIOPA has made efforts to take account of the specific nature of insurance-based investment products. However, paragraph 8(h) and (j) of the draft technical advice are requirements that are only suitable for pure fund concepts. They

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	should not be applied for insurance-based investment products.	
Question 26	All stakeholders (consumers, distributors and manufacturers alike) require a clear understanding as soon as possible concerning the rules that are to be observed in the distribution of insurance products in the future. Further work at Level 3 would delay and complicate the implementation of these rules.	