

The Insurance Distribution Directive: a sheep in wolf's clothing?



Once upon a time there was the Insurance Mediation Directive (Directive 2002/92/EC) (“IMD”). This was intended to harmonise and impose throughout the European Union a basic standard for the law relating to, and the conduct of those operating, the sale of insurance products.

As time has gone by it has become apparent (at any rate to those responsible for such things in Brussels) that the IMD did not go far enough. So was born the Insurance Distribution Directive (Directive 2016/97) (“the IDD”).

The EU, and regulation itself nowadays, being what it is, one Directive is not enough. A Directive after all has to be implemented. Accordingly, there is not one wolf (or, as I will argue, sheep in wolf's clothing) but a veritable wolfpack. Beside the IDD there are:

1. The IDD IPID Regulation (2017/1469) (a Commission Implementing Regulation governing the “Insurance Product Information Document”);
2. The IDD POG Delegated Regulation on “Product Oversight and Governance” arrangements (2017/2358);
3. The IDD IBIP Delegated Regulation on “Insurance-Based Investment Products” (2017/2359); and
4. The Final EIOPA (European Insurance and Occupational Pensions Authority) Guidelines on IBIPs.

Not to be outdone, the FCA (Financial Conduct Authority) issued three consultation papers on implementing this thicket of EU directives and regulations, which gave rise to three Policy Statements.

The result is over 1000 pages of legislative documentation updating EU, and hence British, regulation of insurance sales (“the IDD legislation”). The documentation was so substantial that its original implementation date was pushed back (in most EU countries, anyway, including the UK) from February 2018 to 1 October 2018.

What does it actually mean on the ground?

The FCA has indicated that it considers that its previous Responsibilities of Providers and Distributors for the Fair Treatment of Customers, and Insurance Conduct of Business Sourcebook already, broadly, cover what might generally be called the IDD requirements. The FCA has been criticised in the past for “gold plating” EU legislation. Here, that means that the UK is noticeably better prepared than many other EU

countries for the IDD legislation, so that fewer practical changes are required – at any rate in theory. But as we all know, in theory, theory and practice are the same; in practice, they aren't. Particularly in the commercial risks field some are having to scramble to meet the new requirements.

It is, however, important to notice certain challenges created by the new regime. Of course this will not be exhaustive and I can only designate the areas which I think advice and change may be required.

First, the overarching principle of the legislation is the distributors "must always act honestly, fairly and professionally in accordance with the best interest of customers". So far, so uncontroversial. As ever, the devil lies in the detail.

'Large risks' are exempt from most of the requirements. Large risks are defined by Solvency II to include marine, aviation and transport classes, as well as contracts with commercial policyholders. 'Commercial policyholders' are in turn defined as those with more than 250 employees, turnover of more than €12.8 million or balance sheets larger than €6.2 million

Product Oversight and Governance (POG)

The POG requirements apply to anyone who manufactures insurance products. Manufacturers are required to identify their target markets, undertake analysis of their products and review those products to see how they perform in practice and what potential problems there may be for consumers. This will involve monitoring their distribution, ensuring that distributors of their products have all appropriate information and reviewing both the distributors' and the products' performance and suitability.

The reciprocal of this duty is that the intermediaries/distributors must themselves acquire relevant knowledge about the product manufacturers' approval processes and the target market to which each product is to be distributed as well as all other appropriate information to enable them properly, within the IDD legislation, to distribute products.

Insurance Product Information Document (IPID)

As part of this, distributors (including manufacturers when they distribute directly) must (only) offer their customers products which meet their 'demands and needs'. While the ancient regime did require that customers be provided with a "statement of demands and needs", this has been a 'standard' document. The IDD legislation requires a more granular approach to individual customers. Besides its direct implications as between distributors and customers, this indirectly imposes an obligation on distributors and manufacturers to ensure that the distribution agreements ensure that distributors (can) offer the correct products to customers.

Insurance distributors must provide all (non-life) customers who are 'consumers' with an IPID in good time before the contract is actually sold/signed off. It must provide certain standard, prescribed data. There are of course implicit questions as to when that is best done.

There remains a distinction between products sold without advice and with advice. In the case of products sold with advice, a personalised statement is needed to show how the product being sold actually meets the customer's 'demands and needs'.

Insurance-Based Investment Products (IBIP)

It is in the IBIP field that the FCA has gone furthest. It has extended the MiFID II requirements to IBIPs so far as concerns information provision as to costs and charges, warnings about risk, suitability requirements and assessments, appropriateness assessments for non-advice sales and above all to require that inducements must be designed to enhance the quality of the service. These must be provided "in good time" before conclusion of the contract. A distinction must be made between complex and non-complex IBIPs. There is an exemption for professional clients who do not require a suitability statement.

Staff knowledge and capability

Finally, the IDD legislation brings in knowledge and capability requirements for staff involved in all aspects of the insurance process. The minimum knowledge criteria cover not just product coverage, but also the claims process and insurance regulation. The minimum is 15 hours of CPD annually.

The nature of the CPD can vary with the importance and responsibility of the persons job but minimum requirements will apply even to call centre operatives undertaking non-advice sales. Employees do not need a specific qualification but the level of CPD and training are made available to them is of course relevant when certifying employees under the FCA's "significant harm" requirements.

Again, the FCA believes that most of these requirements are already being met under the current Training and Competence Sourcebook. Where the current requirements are more robust than those of the IDD legislation they will be retained. Perhaps the most important aspect is the need to maintain appropriate records to demonstrate compliance with the requirements.

Ancillary Insurance Intermediaries (AII)

There is some focus on the role of AII. AII are firms/people (i) whose principal professional activity is not insurance distribution, (ii) who only distribute insurance products complementary to a good or service, and (iii) where the products do not cover life insurance or liability risks **unless** that complements the good or

service which is the primary professional activity. Alls are outside the IDD legislation except for IBIPS and unless they are “in scope”, when they must comply with the training and competence, IPID and remuneration disclosure requirements.

CPB comment

As this note demonstrates, with a legislative basis of over 1000 pages, it is possible to write a lot without saying a great deal; one has to be so general. The IDD legislation also again demonstrates the difficulty for smaller firms in keeping up with the increasing burden of regulation in the insurance sector. However, all those who were already up-to-date with the requirements of the old regime have encouragingly less to do to meet the requirements of the new one.



Bill Perry
Senior Counsel

T: 0203 697 1901
M: 07887 645261
E: bill.perry@cpblaw.com

“This information has been prepared by Carter Perry Bailey LLP as a general guide only and does not constitute advice on any specific matter. We recommend that you seek professional advice before taking action. No liability can be accepted by us for any action taken or not as a result of this information, Carter Perry Bailey LLP is a limited liability partnership registered in England and Wales, registered number OC344698 and is authorised and regulated by the Solicitors Regulation Authority. A list of members is available for inspection at the registered office 10 Lloyd’s Avenue, London, EC3N 3AJ.”