

Pierpaolo Marano · Ioannis Rokas  
Peter Kochenburger *Editors*

# The "Dematerialized" Insurance

Distance Selling and Cyber Risks from an  
International Perspective

 Springer

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from an International Perspective

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# Preface

Why “dematerialized” insurance? This is not a term traditionally used to define insurance, nor does it refer to a proposed grouping of existing risks or seek to further describe insurance operations. In short, it is external to the nature of insurance.

We chose this term to describe new, rapidly developing types of insurance relationships, where the point of sale and distribution methods, along with many of the risks themselves, lack the physicality that have characterized traditional insurance undertakings. Therefore, dematerialized insurance is essentially a terminology that examines the movement to online sales of insurance, the benefits and risks that accompany the vast collecting and use of data—big data and cyber risks—and the development and use of cyber insurance as a tool to address these risks.

This dematerialized world is made possible by information technology. Transactions and risks are increasingly characterized by the transition from individuals to data bits. Therefore, “dematerialized” appeared to be a term able to bring together and better describe a common feature to this “bits generation.”

Dematerialized markets are naturally intolerant to territorial limitations, whether of geography or political or jurisdictional boundaries. Therefore, as far as possible, this research has aimed to consider the transnational dimension of the risks and relationships that are defined as dematerialized.

“Dematerialization” examines relations between insurance undertakings and policyholders, both when realized through insurance intermediaries and directly between the insurance undertakings and the customer. Accordingly, the first two parts of the book are devoted to on-line distribution and distance selling, where the relationship between the parties involved is entrusted, in whole or in a large part, to technology rather than face-to-face interaction.

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The third part examines cyber risks, i.e. a range of specific risks that relate to online connectivity and information technology, including where computers and information systems are involved either as a primary tool or as a primary target.

Unfortunately, the dematerialized character assumed by these relationships and risks has not reduced insurance disputes, which are taking on even greater complexity. These disputes are increasingly transnational in nature because of the ease of access to information technologies, regardless of the location of the client and the insurance service provider. The legal issues that arise are treated in the last part.

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# Abbreviations

CIRC	China Insurance Regulatory Commission
COBS	Conduct of business sourcebook
CRL	Communications Research Laboratory
DFD	Distance selling of financial services directive
DIP	Distribution of insurance products
DMD	Directive 2002/65 concerning the distance marketing of consumer financial services
DPA	Data Protection Authority
EC	European Commission
ECD	Directive 2000/31 of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market
EIOPA	European Insurance and Occupational Pensions Authority
ENISA	European Network and Information Security Agency
EU	European Union
FCA	Financial Conduct Authority
FoE	Freedom of establishment
FoS	Freedom of services
FSA	Financial Services Authority
HDPA	Hellenic Data Protection Authority
IAIS	International Association of Insurance Supervisors
IC	Integrated circuit
ICO	Information Commissioner's Office
ICOB	Insurance conduct of business
ICSA	Institute of Chartered Secretaries and Administrators
ICT	Information and communications technology
IIM(s)	Internet insurance intermediary(ies)
IMD 1	Directive 2002/92 on insurance mediation
IMD 2	Proposal for a revision of IMD 1
JASRAC	Japanese Society for Rights of Authors, Composers and Publishers

JAXA	Japan Aerospace Exploration Agency
JNSA	Japan Network Security Association
MS(s)	Member State(s) of the EU
NICT	National Institute of Information and Communications
NSRI	Network Security Research Institute
PIL	Private international law
PRA	Prudential Regulation Authority
Rome I	Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
SAL	Security Architecture Laboratory
SEC	Securities and Exchange Commission
SFL	Security Fundamentals Laboratory
SHPAITNS	Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Society
SMEs	Small and medium-size enterprises
Solvency II	Directive 2009/138 on the taking-up and pursuit of business of the business of Insurance and Reinsurance (recast)
TAO	Telecommunications advancement organization technology
UECA	Uniform Electronic Commerce Act in Canada
UETA	Uniform Electronic Transactions Act in the US
UNCITRAL	United Nations Commission on International Trade Law

**Part I**  
**On-Line Distribution**

# European and International Online Distribution of Insurance Products

Ioannis Rokas

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**Abstract** This article does not aim to focus on the differences between the traditional and the relatively new concept of the online distribution of insurance products (**DIP**). It is rather an overview of the online DIP from a legal point of view, which -to a large extent- does not differ from the traditional (offline) one. It focuses, further, on the main EU law and principles which affect DIP and the balance between them which the EU secondary legislation has achieved so far. The new era which e-commerce has opened to the DIP within the EU and worldwide; the new complex

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insurance products, in particular those which include an investment element; and the increasing importance and priority which is given to the consumer protection in combination with the progress towards EU integration, have led to the emergence, in the EU, of a new legal environment for the DIP, as briefly analysed in this article.

## 1 Professional Insurance Intermediaries, the Distribution of Insurance Products and the Internet

### 1.1 General European Issues

#### 1.1.1 Overview

- a) The European **regulatory framework** on insuranceintermediation activities has undergone through **three stages** of development during the last decades, which coincided with the transitional period from traditional to online business transactions. The **first stage** commenced with the first insurance mediation Directive dated 1977,<sup>1</sup> for the purpose of facilitating the effective exercise of the freedom of establishment (**FoE**) and the freedom to provide services (**FoS**) in respect of the activities of the **profession of the insurance intermediaries (IIMs)**. The core of the Directive was to set the **minimum requirements** for the exercise of the activities of **insurance agents, subagents** and the **insurance brokers**, and it further provided rules to secure that certain professional requirements were satisfied. A certain issue was the recognition of certificates attesting the adequacy of professional requirements throughout the European Member States (**MSs**). At the time, when said legislation was introduced, **e-commerce** was not yet of consumer acceptance and use, something that happened for the first time during the following years.
- b) The **second stage** commenced in 2005 with the Insurance Mediation Directive 1 (**IMD 1**), which replaced the 1977 Directive.<sup>2</sup> Not only do the provisions of **IMD 1** consider the issue of **online intermediation activities**<sup>3</sup>, but also the

<sup>1</sup> Directive 1977/92/EEC of December 1976.

<sup>2</sup> IMD 1 has been implemented by the MSs in different ways since the implementation way was left to the national legislators' extended discretion.

<sup>3</sup> IMD 1 (recital no. 19) provides that a MS may introduce more stringent rules which may be imposed on IIMs, including the obligation of providing the set of information to the customer imposed by the Directive, independently of their place of residence where they are pursuing intermediation activities in its territory, provided that such provision complies with the e-commerce Directives and that the above set of information can be communicated in any durable medium available and accessible to the customer (art. 13 para. 1 a), whereas a durable medium is any instrument which enables the customer to store information addressed to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows for the unchanged reproduction of the information stored (art. 2 para. 12).



special secondary legislation on e-commerce (E-Commerce Directive—**ECD**) that was implemented in the meantime,<sup>4</sup> as well as the very comprehensive financial services **Distance Marketing Directive (DMD)**.<sup>5</sup>

- c) Lastly, the **third stage** commenced with **IMD 2, now named as “IDD”**,<sup>6</sup> which replaced **IMD 1**<sup>7</sup> and provides for further regulation of IIMs in order to promote e-commerce and guarantee a higher level of protection for the insured.<sup>8</sup>
- d) E-commerce in the modern society facilitated to an unprecedented extent the distance selling of goods and services. Distance marketing of financial services (including insurance products) has been promoted extensively within the framework of the internal market, so that recipients of such services can have access to the widest possible range of financial services.<sup>9</sup> To achieve that goal, the EU has reacted with regulations, in particular, on the level of consumer protection, e-commerce and freedom of services, including DIP.

## ***1.2 IMD 2, ECD and the EU Law on Information Duties to Customers in the Online Business***

- (a) **IMD 2** focused<sup>10</sup> on enhancing the protection of any customer by imposing an obligation on (re)insurance intermediaries to provide customers with a set of

<sup>4</sup> Directive 2000/31 of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, see Commission Communication on bringing e-commerce benefits to consumers, Com (2011) 942 final, SEC (2011) 1641 final.

<sup>5</sup> Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

<sup>6</sup> Com (2012) 360 final. The recast of the Directive, under the name “IDD”, has to be transposed into the national legislation of MSs by 22.2.2018.

<sup>7</sup> At the time this article was prepared, **IMD 2** was still a recast pending approval of the Parliament’s position on 1st reading by the European Council.

<sup>8</sup> The **IMD 2** introduced an online registration system consisting of one single registration form available on an Internet website, which shall allow the form to be completed directly online. The new European Insurance and Occupational Pensions Authority (**EIOPA**) will keep a single electronic register with records on (re)insurance intermediaries which have notified their intention to carry cross-border business (in the EU). This register shall have a hyperlink to each relevant competent authority in each MS, as well as links to be accessible from each MS’s competent authority website (art. 3 paras. 2 and 4). In addition, **IMD 2** provides that if the information that is to be provided under this Directive to policy holders is realised **by means of a website on the Internet**, special conditions should apply (art. 20 paras. 5–6).

<sup>9</sup> See Recital 3 of the **DMD**.

<sup>10</sup> For the rules which govern insurance intermediation, EU secondary legislation and related Regulations mentioned in this article equally apply to the remaining three countries of the European Economic Area (Norway, Iceland and Lichtenstein).

**information**<sup>11</sup>, which was previously not required, to such extent, by EU secondary legislation and, also, by the imposition of stricter professional requirements for the IIM and further aimed at facilitating cross-border business within the EU, including the provision of **online services**.

- (b) The IMD 2 protects even more<sup>12</sup> the insured by statutory rules, unless the insurance contract covers one or more “**large risks**” within the meaning of EU law<sup>13</sup>, as regards its rules which provide the obligation of granting information.

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<sup>11</sup> Art. 16 IMD 2 provides that prior to the conclusion of an insurance contract, the insurance intermediary (which according to IMD 2 includes not only the traditional work of them but also the tied intermediaries and the insurers when they proceed with direct sales, but not the claims managers and the loss adjusters, although their work is included within the insurance mediation activities covered by the Directive) shall make the following **disclosures (information)** to customers: (a) his **identity; address**, if he is **qualified** as an IIM; whether he provides any **advice on the product**; the procedure to register **complaints** against him and the **out-of-court complaint redress procedure**; the **register** in which he has been included and the means for verifying that he indeed is registered; and the very important information of whether the IIM is **representing the customer or acting on behalf of an insurance undertaking**. It is to be noted that **EU legislation does not find sufficient in this regard if the IIM is titled insurance agent or insurance broker, since agents do not always represent insurers and brokers often are dependent on insurers and partially represent them and not the insured**; (b) whether the IIM has a **holding of more than 10 % in the capital** of given insurance undertakings or a given insurance undertaking holds more than 10 % of the insurance intermediary’s capital (rules which aim to protect the insured from **conflict of interest** issues and enhance **transparency**), whether he gives **advice on the basis of a fair analysis**, whether he has a contractual obligation to conduct insurance **mediation exclusively with one or more insurance undertakings** and to provide the names of such undertakings and, in addition, to provide the names of the insurance undertakings with which he may or does conduct business for the cases where he is not contractually obliged to conduct mediation business exclusively with one or more insurers and does not give advice on the basis of fair analysis; (c) the nature of each **remuneration** (if it is based on a fee or commission or a combination thereof, the basis of calculations of all the fees or commissions, the amount of the commission based on the achievements of agreed targets, etc.). Correctly the opinion of Committee on Legal Affairs of the European Parliament, rapporteur K.H. Lehne, points out that the consumer should additionally be aware if any of the employees will receive a fee or a commission of any kind—21.3.2013, 2012/0175 COD).

<sup>12</sup> Insured’s level of protection under IMD 1 was due to upgrade since right after its implementation.

<sup>13</sup> According to the definition provided in Directive 2009/138 on the taking-up and pursuit of the business of Insurance and Reinsurance (**Solvency II**), the term **large risks** means (a) risks classified under classes 4, 5, 6, 7, 11 and 12 in Part A of Annex I (see directly below); (b) risks classified under classes 14 and 15 in Part A of Annex I, where the policy holder is engaged professionally in an industrial or commercial activity or in one of the liberal professions and the risks relate to such activity; (c) risks classified under classes 3, 8, 9, 10, 13 and 16 in Part A of Annex I in so far as the policy holder exceeds the limits of at least two of the following criteria: (i) a balance-sheet total of EUR 6.2 million; (ii) a net turnover, within the meaning of Fourth Directive 78/660 on the annual accounts of certain types of companies of EUR 12.8 million; (iii) an average number of 250 employees during the financial year. The first generation non-life Directives classifies in its Annex I the non-life insurance, among others, as follows: **3.** land vehicles (other than railway rolling stock), **4.** railway rolling stock, **5.** aircraft, **6.** ships, **7.** goods in transit, **8.** fire and natural forces, **9.** other damage to property, **10.** motor vehicle liability, **11.** aircraft liability, **12.** liability for ships, **13.** general liability, **14.** credit, **15.** suretyship, **16.** miscellaneous financial loss.

However, the MS can provide that said protection must also include large risks since it is a **minimum harmonisation Directive**. In addition, IMD 2 introduces **information obligations** on insurance undertakings as well.<sup>14</sup> It provides, further<sup>15</sup>, that insurers and/or IIMs have to inform customers, in case they declare to provide advice on the basis of a **fair analysis**, if that analysis is based on a sufficiently large number of insurance contracts available on the market to enable it to make a recommendation, in line with the professional criteria regarding the adequacy of an insurance contract in view of the customer's needs.<sup>16</sup> The question, though, remains: on which market? The EU internal market, the home MS market or the host MS market of the customer where the IIM provides its services on the basis of FoS? It rather seems that the market should be that of the host MS taking into consideration the required notification to the supervisory Authority before conducting business in another MS on a FoS basis. Furthermore, it provides the conditions under which the package of the **information** can be provided using a durable medium<sup>17</sup> other than paper or by means of a website. The customer must have been given a choice between information on paper or using a durable medium or by means of a website and, in addition, the customer must have chosen that other medium.

IMD 2 provides that all **information** to the customer may be provided by means of a **website**,<sup>18</sup> but only when it is personally addressed to the customer or the provision of the information is **appropriate** in the context of business conduct, and as long as the **customer has consented to receiving information** by means of a website, he has been notified electronically of the address of the website and the section of the website where the information can be accessed and, further, the local law secures that said **information remains accessible on the website for such period of time as the customers might reasonably need** to consult it. The appropriate provision of the information by the IIM and the insurer presupposes that **the customer has regular access to**

<sup>14</sup> The information provided for in IMD 2 (arts. 16–18) must be given by IIM (IMD 2, art. 16 para. a, art. 17 and art. 18), including insurance undertakings (IMD 2, art. 16 sec. b—but not reinsurance undertakings—art. 17 paras. 3–5 and art. 18), to all customers except those who are falling under **large risks** (IMD 2, art. 19 para. 1), including reinsurance mediation and insured which are credit institutions, insurance and reinsurance intermediaries and investment firms, other authorised or regulated financial institutions, insurance and reinsurance undertakings, collective investment schemes and management companies of such schemes, pension companies and management companies of such funds, commodity and commodity derivatives dealers, locals and other institutional investors (IMD 2, Annex I). The information includes the identity and the address of the insurance undertaking, whether or not they provide any type of advice about the insurance product, as well as the procedure to register complaints about insurance undertakings and about the out-of-court redress procedure (arts. 12 and 13).

<sup>15</sup> IMD 2, art. 18 para 3.

<sup>16</sup> The insurer and/or the IIM must also specify to the customer the underlying reasons for the advice they give to the customer on a specified insurance product (art. 18 para. 1 (b)).

<sup>17</sup> IMD 2, art. 20, para. 2 (a).

<sup>18</sup> IMD 2, art. 20, para. 2 (b), 5.

**the Internet.** In spite of the question of the burden of proof (which is to be governed by applicable procedural law), the provision by the customer of an e-mail address for the purpose of that business shall be regarded as such evidence.<sup>19</sup> It is a matter of interpretation what the term ‘appropriate’ indicates and what are its prerequisites.

- (c) **Information duties** are also introduced by statutory rules (a) under DMD, but only towards consumers and not customers who do not qualify as consumers,<sup>20</sup>

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<sup>19</sup> IMD 2 art. 20 para 6.

<sup>20</sup> Pursuant to DMD, art. 3, the service provider must ensure that in good time before the consumer is bound by any distance contract or offer, he shall be provided with information concerning (1) the **supplier** (it includes the identity and the main business, the geographical address at which it is established and any other geographical address relevant for the customer’s relations with it; the identity of its representative established in the consumer’s MS of residence and the geographical address relevant for the customer’s relations with the representative, if such representative exists; when the consumer’s dealings are with any professional other than the supplier, the identity of this professional, the capacity in which he is acting vis-à-vis the consumer and the geographical address relevant for the customer’s relations with this professional; where the supplier is registered in a trade or similar public register, the trade register in which the supplier is entered and his registration number), (2) the **financial service** (it includes description of the main characteristics of the financial service; the total price to be paid by the consumer to the supplier for the financial service, including all related fees, charges and expenses, and all taxes paid via the supplier, or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it; where relevant notice indicating that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed or whose price depends on fluctuations in the financial markets outside the supplier’s control and that historical performances are no indicators for future performances; notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him; any limitations of the period for which the information provided is valid; the arrangements for payment and for performance; any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged), (3) the **distance contract** (it includes the existence or absence of a right of withdrawal and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay, as well as the consequences of non-exercise of that right; the minimum duration of the distance contract in the case of financial services to be performed permanently or recurrently; information on any rights the parties may have to terminate the contract early or unilaterally by virtue of the terms of the distance contract, including any penalties imposed by the contract in such cases; practical instructions for exercising the right of withdrawal indicating, inter alia, the address to which the notification of a withdrawal should be sent; the MS or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract; any contractual clause on law applicable to the distance contract and/or on competent court; in which language, or languages, the contractual terms and conditions, and the prior information referred to herein are supplied, and furthermore in which language, or languages, the supplier, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract), (4) **redress** (i.e., whether or not there is an out-of-court complaint and redress mechanism for the consumer that is party to the distance contract and, if so, the methods for having access to it; the existence of guarantee funds or other compensation arrangements, not covered by Directive 94/19 on deposit guarantee schemes and Directive 97/9 on investor compensation schemes). Lastly, where there are provisions in the EU legislation governing financial services which contain prior information requirements additional to those listed above, these requirements shall continue to apply.

as well as (b) under ECD for all customers<sup>21</sup> affecting the service provider, i.e. the IIM. Pursuant to a regularly referred ECJ judgment (Bundesverband der Verbraucherzentralen),<sup>22</sup> an online **insurer** has to provide additional information, which will facilitate rapid communication in a direct and effective manner (not necessarily a telephone number). This finding applies to IIMs as well. The obligation to disclose, especially, the **telephone** number only upon a request by a customer may become of reduced significance when the IIM provides advice to the applicant for the insurance. According to the ECJ, the ECD, by giving access to electronic communication, does not mean that it

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<sup>21</sup> According to ECD, the service provider shall inform the recipients of the **service** and **competent authorities**, at least on **its name**, the **geographic address** at which he is established, details, including his **electronic mail address**, **where he is registered** in a trade or similar public register, the trade register in which he is entered and his registration number, or equivalent means of identification in that register, where the activity is subject to an **authorisation scheme**, the particulars of the **relevant supervisory Authority**, and as concerns the regulated professions, any **professional body** or similar institution with which the service provider is **registered**, the **professional title** and the MS where it has been granted, a reference to the applicable professional rules in the MS of establishment and the means to access them, where the service provider undertakes an activity that is subject to VAT, the identification number referred to in art. 22 (1) of the sixth Directive 1977/388 on the harmonisation of the laws of the MS relating to turnover taxes, a common system of value added tax. In addition, commercial communications which are part of, or constitute, an information society service must comply at least with the following conditions: the commercial communication shall be clearly identifiable as such; **the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable**; promotional offers, such as **discounts, premiums and gifts**, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously; promotional competitions or games, as established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously. With regard to the provision of information, ECD provides that (1) in addition to other information requirements established by EU law, the service provider must ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: the different technical steps to follow to conclude the contract, **whether or not the concluded contract will be filed by the service provider and whether it will be accessible**; **the technical means for identifying and correcting input errors prior to the placing of the order**; **the languages offered for the conclusion of the contract**; (2) except when otherwise agreed by parties who are not consumers, the service provider must indicate any relevant **codes of conduct** to which he subscribes and information on how those codes can be consulted electronically; (3) **contract terms and general conditions** provided to the recipient must be made available in a way that allows him to store and reproduce them. Points (1) and (2) above are inapplicable to contracts concluded exclusively by exchange of **electronic mail** or by equivalent individual communications.

<sup>22</sup> C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände—Verbraucherzentrale Bundesverband e.V. v. deutsche Internet Versicherungs AG* (see ECD, art. 5 (1) (c)). See also art. 6 (1) (c) of Directive 2011/83 (“Consumer Rights Directive”), which obliges any trader to provide the consumer with its geographical address, telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting.

intended to abolish other forms of non-electronic communication. Furthermore, the ECJ has ruled that the durable medium must ensure that the consumer receives the information in a way similar to paper so that he will be able to exercise his rights where necessary.<sup>23</sup>

Under IMD 2,<sup>24</sup> the information to be provided by the insurance intermediary to the customer shall be communicated on paper. It can also be communicated by using a **durable medium** other than paper or by means of a **website**. In the latter case, **a paper copy shall be offered to be provided to the customer upon request and free of charge**.

- (d) Transactions with the IIM can **affect information (disclosure) obligations of the applicant** during the pre-contractual period. The lack of personal contact should lead to a limited application of sanctions for breaches of such disclosure obligation. Online customers may be treated more leniently in this regard. Applicants' pre-contractual obligation to disclose circumstances of the risk should be restricted (by regulations)<sup>25</sup> to the obligation of answering to clear and unambiguous questions of the insurer, taking into consideration that they are being addressed online. In case the breach derives from unclear and ambiguous questions, soft or no sanctions should be imposed, as the case may be.
- (e) An important issue which emerges is whether insurers and IIMs alike must be obliged to provide **information about the insurance product**. IMD 2 provides that the IIM or the insurer must provide such information,<sup>26</sup> while Solvency II rules that the insurer must provide policyholders with a list of information, which partially is "information about the insurance products".<sup>27</sup> Thus, information which must be provided to customers by insurance undertakings are partially the same when the product is sold by an IIM, regardless of whether the sale is conducted by distance or not, while limited additional information is required when distribution is made online. The aim is the proper information of the insured regarding the status of the insurance undertaking and of the distributor, the necessary characteristics of the product in order to better understand it and to make a correct decision and the special rights of the consumer. Therefore, to the extent that the same information duties are imposed on both the insurer and the IIM, it is adequate if the customer is informed once. It is self-evident, however, that when such information is not provided either by the insurer or by the IIM, then neither of them may claim to be absolved of liability on the ground of the other's failure to fulfil the obligation to provide this information respectively.

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<sup>23</sup> Case C-49/2011, *Content Services Ltd v Bundesarbeitskammer* [2012] WLR (D), 195, 42.

<sup>24</sup> IMD 2, art. 20.

<sup>25</sup> It is a separate issue which piece of regulation could host such proposal.

<sup>26</sup> IMD 2, art. 18 para 4.

<sup>27</sup> Solvency II art. 183 para. 1 for non-life insurance, which, however, **applies only to cases where the policy holder is a natural person**, and art. 185 for life insurance.

- (f) Among the characteristics of IMD 2, as well as IMD 1, is that it focuses not on differentiations between the different types of intermediaries, but on the actual essence of intermediation, while the scope of intermediation activities is expanded by IMD 2 to include all persons involved with the sale of insurance contracts, with certain exceptions, and that it is structured in order to protect insurance customers dealing via the Internet. IMD 2 (and IMD 1) agree with DMD and also ECD, but, contrary to the IMDs, the ECD is a **maximum harmonisation** Directive, aiming to remove unnecessary obstacles to transactions over the Internet.

ECD is not an instrument to enhance the position of the consumer, but it nevertheless does not conflict with the highly prioritised consumer protection under EU law. Its goal is the promotion of e-commerce, including cross-border e-commerce. By strengthening IIM's professional requirements by MS legislation, which would result to the augmentation of impediments set to online cross-border transactions, the ECD has itself inserted such borders by setting the exceptions to the restrictions of the freedom to provide information society services from one MS to another (art. 3(4)), which include the reservations provided for in art. 52 of the Treaty for the Functioning of the EU (TFEU) regarding FoE and, in addition, consumer and investment protection measures.<sup>28</sup>

### ***1.3 From a Law on Intermediation to a Law on Sales of Insurance Products***

#### **1.3.1 Intermediaries Under EU Secondary Legislation**

- (a) Insurance intermediation as such has additional characteristics to those of mere direct sales, as is the case in particular of the intermediation activities of an independent broker. IMD 2 scope does not include the function of the intermediaries, unless it directly affects consumer protection. The European legislation which we examine here regulates professions only to the extent that their activity affects the interests of the insured during the distribution proceedings.<sup>29</sup> This, however, does not prevent national legislation from further categorizing traditional professions, e.g. whether a broker is totally independent or not independent at all in a case where an insurance undertaking participates in the broker's share capital, even with a 100 % share ownership, or whether a broker is contractually bound with insurance undertakings. This essentially means that if a MS does not allow an intermediary to present oneself as a broker while not being independent, this is contrary to EU law

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<sup>28</sup> See below Sect. 3.3.

<sup>29</sup> However, it recognises the categories of intermediaries who work in the EU; see IMD2, art. 6 para. 1(c).

as this issue is already exclusively regulated by the secondary EU law imposing an obligation to declare whether one is independent or not; it is contrary to FoE and FoS principles. It may be justified as a right deriving neither from the **MS general good provisions**<sup>30</sup> nor from the fact that IMD 2 enables MS to impose stricter rules since a potential prohibition of a dependent broker from working as a broker is not a matter of implementation of stricter rules. MSs can introduce stricter rules, particularly on professional requirements for the distributor of the insurance product; nevertheless, this is not possible for distributors that conduct business online, as far as the stricter rules go further than the four exceptions to the freedom to provide online services included in ECD. However, IMD 2 does not provide for an obligation on intermediaries to provide updated information to the customers throughout the duration of the contract. This is an obligation on insurers arising from Solvency II and on intermediaries arising from national laws of the MS. IMD 2, which aims to protect the insured during the distribution proceedings and not to regulate the overall obligations of insurance brokers and agents, does not include rules on this important issue.

- (b) The **contractual rights of IIMs** are not within the objectives of IMD 2 since its primary goal is to ensure the **qualitative requirements** for intermediaries and their obligations towards the insured. IMD 1 and IMD 2 regulation is introduced from the point of view of the **protection of the insured**. The rights of intermediaries towards the insurers and the insured do not fall within the scope of IMD 2.
- (c) IMD 2 includes within its framework the **tied intermediation**, i.e. the activity of any person who carries on intermediation for and on behalf of one or more insurance undertakings or intermediaries as far as insurance products are concerned.<sup>31</sup> Large business units, in particular credit institutions, commonly become tied intermediaries, among others, in order to take advantage of **the trust of their large clientele** that they enjoy at the existing level, for other financial products they sell. It is obvious that the reputation that big commercial brand names, especially **banks**, have and the trust they enjoy in the market place (as people rely on them for their savings!), as to the products they sell, is much higher than an average insurance intermediary enjoys. At the same

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<sup>30</sup> IMD 2, art. 9 requires MSs to **publish the general good rules** and requires EIOPA to **collect and publish information about such rules** (for an indicative exposition of the principles of general good in relation to the third generation insurance Directives, see the Commission's Interpretative Communication on FoS and the general good 2000/C43/03). See relevant national legal provisions at [www.eiopa.europa.eu](http://www.eiopa.europa.eu). For ECJ's interpretation of "general good", see Case C-577/11, *DKV Belgium SA v Association belge des consommateurs Test-Achats ASBL* [2013], not yet published, paragraph 28 and Case C-59/01, *Commission v Italy* [2003] ECR I-759, paragraph 38.

<sup>31</sup> Tied insurance intermediary must act under the full responsibility of insurance undertakings or insurance intermediaries, provided that the insurance intermediaries under whose responsibility the person acts do not themselves act under the responsibility of another insurance undertaking or intermediary (IMD 2, art. 2 para. 8).



time, the bank enjoys the privilege of dealing with its already existing large clientele.

- (d) A bank as a tied intermediary must provide customers with **information** in both offline and online transactions, while in the latter case the information is not deemed given if the consumer, in order to reach the information<sup>32</sup>, must make an effort at his own initiative pressing the button (“click”). Further, the intermediary must give information not only for the main financial (investment) product they sell<sup>33</sup>, but also for the ancillary insurance product.<sup>34</sup> In addition, in case that the ancillary product is an “**insurance investment product**”,<sup>35</sup> the tied intermediary must give the information which is provided for every insurance product and the additional information required by IMD 2 for the insurance investment products,<sup>36</sup> such as appropriate guidance and warnings of the risks associated with them. Lastly, as a tied intermediary, a bank which has created the main investment product must, according to PRIIPs Regulation,<sup>37</sup> provide a **key information document (KID)**, which is possible to be provided by means of a website, including at least 16 kinds of information (such as the type of investment; the term of investment, if known; any guarantee or capital protection provided; etc.).<sup>38</sup> The obligation to provide

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<sup>32</sup> According to the ECJ in *Content Services Ltd v Bundesarbeitskammer*, Case C-49/2011 [2012] WLR (D), 195, the Court defined the ways in which consumers that enter into distance contracts must receive the information required under EU law and specifically under Directive 97/97 (which was amended by DMD). Consumers must “receive” the necessary information, which means that they should be given the information **without any effort** on their part; therefore, according to ECJ, the fact that the customer is given the information on a web page only, which he can access by clicking on a link shown when the contract is concluded (hyperlink), means both that the customer has not “received” the information as well as that the latter has not been provided in a “durable medium” (for the definition of “durable medium”, see and art. 2(f) of DMD).

<sup>33</sup> See arts. 24–25 of Markets in Financial Instruments Directive (**MiFID 2**).

<sup>34</sup> See IMD 2, arts. 15–21. It is to be noted that the seller must also fulfil both the requirements provided for the sale of the main financial product as well as insurance product.

<sup>35</sup> As to the definition of insurance investment products, see art. 2 (a) of the Regulation on Packaged Retail Investment Products (**PRIIPs**), which provides that this Regulation does not apply to insurance products which do not offer a surrender value or where the surrender value is not wholly or partially exposed, directly or indirectly, to market fluctuations. This definition will clarify an open-until-now question: it was not clarified if the IIM should fulfil the requirements for all insurance products containing investment elements, for both simple and complicated products. Furthermore, it was disputed whether there exists a precise and adequate mechanism to trace the existence of the investment element.

<sup>36</sup> IMD 2, arts. 22–25.

<sup>37</sup> See below under Sect. 1.2.2.

<sup>38</sup> See PRIIPs, art. 8. The tied intermediary in his capacity as agent of the insurer must provide to the customer the information referring to any insurance product (IMD 2, arts. 15–20) and the additional information referring to the insurance investment products (IMD 2, arts. 23–25), and in addition, because the insurance investment product is an investment product according to PRIIPs, he must as a person selling investment products provide to the customer (PRIIPs art. 12) the key information document which must be prepared by the manufacturer of this product (PRIIPs, art. 5), who, in our case, is the insurer.

information varies. According to **ECD**, information has to be given to any category of customers; according to **IMD 2** and **PRIPs**, information is not necessary to be given to insureds against large risks; according to **Solvency II**,<sup>39</sup> information must be given only to natural persons; and according to **DMD**, it must be given only to consumers (i.e., policyholders who purchase insurance products for private use). Furthermore, no requirements are provided as to the information that has to be given to the insured in case the latter is not the policyholder. In other words, numerous cases of asymmetric information arise.

- (e) Furthermore, intermediation activities are carried by **employees of an insurance undertaking**, which may receive payment on a commission basis. **IMD 2** includes in its scope such employees, regardless of whether they are taking a commission out of policies concluded or not, since their involvement to the policy sale suffices in order for their work to be characterised as intermediation.<sup>40</sup>

**IMD 2** includes the work of the employees of an insurance undertaking who are involved in sales which fall within the meaning of insurance mediation activities in order, among others, to introduce the obligation on the MS to provide in its national legislation that such employees have adequate knowledge and ability, professional experience, etc. Higher requirements than those of **IMD 2**, which can be introduced by a MS for the employees of the insurer that provides intermediation services, can constrain the offline intermediation, while not the online, unless they are falling within the four exceptions provided by **ECD** (public policy, health, security, consumers and investor protection).<sup>41</sup>

- (f) The so-called **placement of risk between insurance undertakings** is an intermediation activity, without **IMD 2** mentioning it expressly. The Directive should, however, apply since the first insurer to whom the customer has applied for covering its risks proceeds with further placement to the other insurer and in doing so provides (regulated) insurance intermediation itself<sup>42</sup> being responsible towards the insured for granting the provided information. The placement should be provided under the responsibility of the seller, i.e. the insurer which the client has contacted.

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<sup>39</sup> Solvency II, art. 183.

<sup>40</sup> Sales which fall under the meaning of intermediation shall, however, include advising on carrying out other work **preparatory to the conclusion of insurance contracts** or concluding such contracts or assisting in the administration or performance of them (**IMD 2**, art. 2 para. 3).

<sup>41</sup> See below under Sect. 2.3.

<sup>42</sup> According to art. 2 paras. 3, 5, an insurance undertaking can provide insurance intermediation and in so far as this activity is considered to be insurance intermediation. We are of the opinion that this should be the case not only if they proceed with direct sales but also if they proceed with “placement”.

### 1.3.2 Marketing of Insurance Products with Investment Elements

For a long time, it has been a common practice for insurance undertakings to sell insurance products that combine investment elements, often with marginal or without transfer of risk (such as unit linked or management of group pension funds), or products which include few risk elements (assistance). Since the protection of all buyers of products sold by insurance undertakings became of high priority, it was important for the law to focus, in this respect, on products which affect consumers greatly, these primarily being insurance products with an investment element. Thus, as far as an insurance product can be classified as an investment product,<sup>43</sup> an extra set of **information** has to be given to the customers of online as well as of offline transactions according to PRIIPs.<sup>44</sup> PRIIPs lay down uniform rules on the format and content of the key information document to be drawn up by investment product undertakings (including insurance investment products) and uniform rules on the provision of this document to retail investors.<sup>45</sup> IMD 2 also introduces a set of rules regarding additional protection requirements in relation to insurance investment products, not exclusively of informative and consulting character,<sup>46</sup> or on suitability and appropriateness of the reporting to

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<sup>43</sup> See above footnote 35.

<sup>44</sup> Arts. 6–12 of Regulation 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

<sup>45</sup> The PRIIPs Regulation does not apply to UCITS (collective investment in transferable securities) until 31 December 2019. Directive 2009/65 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as amended provides for specific key investor information which must be given to investors.

<sup>46</sup> According to IMD 2 art. 24, insurance intermediaries/undertakings have the obligation to act **honestly, fairly and professionally** in accordance with the **best interests of their clients** when carrying out insurance mediation acts with/for customers and all **information** addressed by them shall be **fair, clear and not misleading**. Moreover, appropriate information shall be provided to (potential) customers about **(a) the insurance intermediary/undertaking and its services, (b) the insurance products and proposed investment strategies and (c) costs and associated charges**. This set of information shall enable the (potential) customers **to understand the nature and risks of the specific insurance product that is offered and take investment decisions on an informed basis**. When the insurance intermediaries/undertakings inform the customer that advice is provided on an independent basis, they **(a)** shall assess a sufficiently large number of insurance products available on the market and shall not be limited to insurance products issued/provided by entities with close links with the insurance intermediary/undertaking and **(b)** shall not accept/receive fees, commissions or any monetary benefits paid or provided by any third party in relation to the provision of the service to customers.

the customers,<sup>47</sup> but also on conflict of interests<sup>48</sup> of the distributors (insurers and intermediaries). A detailed reference is made to the online sales of insurance investment products. PRIIPs allow for publication of the KID by the investment product manufacturer by means of a website of its choice. All sets of additional information oblige equally both online and offline sellers.

Lastly, MiFID 2 introduced, among others, specific requirements for the sale of investment products.<sup>49</sup> Some MSs have introduced equal requirements for the distributors of insurance products with investment elements, however without achieving uniformity as to the definitions of this kind of insurance (such as whether they include only unit linked and not other kinds of insurance). This situation leads to a serious distortion of competition, in particular if distribution is conducted online. The EU law aims to resolve this issue with MiFID 2<sup>50</sup> in combination with PRIIPs and IMD 2.<sup>51</sup>

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<sup>47</sup> Pursuant to IMD 2, art. 25, the insurance intermediary/undertaking shall obtain the necessary information regarding the (potential) customer's **knowledge and experience** in the field relevant to the specific type of product or service, **financial situation, investment objectives** and provide the **suitable** products for the (potential) customer according to this information. Also, as far as sales where no advice is given is concerned, the insurance intermediary/undertaking shall obtain information concerning the (potential) customer's **knowledge and experience** in the investment field relevant to the specific type of product/service in order to enable the insurance intermediary/undertaking to assess whether the insurance service/product envisaged is **appropriate** for the customer. The (potential) customer should be **warned** when the product/service is considered as inappropriate. When the (potential) customer does not provide the above-mentioned information or provides insufficient information, the insurance intermediary/undertaking shall warn that it is not able to determine whether the service/product is appropriate. Moreover, the insurance intermediary/undertaking shall establish a **record** which includes document(s) that set out the rights and obligations of the parties and must send **adequate reports** to its customers and clarify how its advice meets their personal characteristics.

<sup>48</sup> IMD 2 art. 23 provides that insurance intermediaries/undertakings should take all appropriate steps to identify **conflicts of interest** between themselves, including their managers, employees, etc., and any other person directly or indirectly linked to them by control and their customers or between one customer and another that arises in the course of carrying on insurance mediation. If information duties according to art. 15, 16 and 17 are insufficient to prevent risks of damage to the interests of customers, the insurance intermediary/undertaking shall **clearly disclose the general nature or sources of conflicts of interest** to the customer before undertaking business on the customer's behalf.

<sup>49</sup> MiFID 1, arts. 24–26, 28 and 29.

<sup>50</sup> According to the explanatory memorandum of IMD 2, point 1, p. 2, the European Parliament requested this Directive to meet the **same consumer protection standards** as MiFID 2, as far as the insurance mediator sales insurance investment products are concerned. However, IMD 2 does not include all the content of the provisions of arts. 24–26 and 28 MiFID 2, which introduce protection standards for consumers. It is to be mentioned that the protected persons are the retailers, i.e. all customers, which are all those who are not insured against large risks (PRIIPs, art. 4 c) and not only the consumers.

<sup>51</sup> MiFID 2 does not apply to insurance intermediaries unless they are at the same time investment firms, e.g. the receipt and transfer order in relation to financial instruments (Annex I, section A (1)), but in this case it applies only to this activity. IMD 2 introduces extra consumer protection requirements for the insurance products which are according to PRIIPs insurance investment products.

### 1.3.3 Conclusion

In an attempt to ensure better protection for policyholders, the scope constantly becomes wider with every reformation attempt, which might allow us to say that it is apparently about to become wide enough to include non-intermediation activities, practically applying to insurance and insurance investment product sales in general.

## 2 The Impact of Electronic Commerce on the Distribution of Insurance Products

### 2.1 *E-Commerce and Insurance Intermediaries*

#### 2.1.1 E-Commerce Does Not Aim to Replace Insurance Intermediaries

The aim of e-commerce and its regulation by the ECD is to replace legal rules, which are possible to be replaced as not being set in order to safeguard superior principles such as consumer protection and as far as it presents satisfactory alternative proceedings without reducing the protection granted by the replaced rules. It aims to strengthen the proper functioning of the internal market of the EU by removing unnecessary **legal obstacles**. Its target is **not to replace the IIMs profession**. It merely constitutes a very useful tool for the business of both insurance undertakings and professional IIMs, as well as any other person engaged in the distribution of insurance products.

Particularly for some **simple insurance products**, such as motor third party liability (MTPL) insurance or other non-life and non-liability insurance products which do not require particular knowledge of the insurance coverage, there is very little need for the physical presence of an intermediary. Such products can be very effectively sold via the Internet.<sup>52</sup>

#### 2.1.2 E-Commerce Favours the Distribution of Simple Insurance Products

It is obvious that insurance undertakings are able to sell directly and, in particular, over the Internet some simple insurance products with low premium more easily than other, less simple products.<sup>53</sup> Thus, these products fall partially out of the

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<sup>52</sup> In the US in 2011, there was an increase of 6 % in MTPL policies being purchased online.

<sup>53</sup> IMD 2 does not apply to very simple insurance products which do not require knowledge of the cover, if the principal professional activity of the person who sells the product is not insurance mediation. This happens if the annual amount of premiums does not exceed €600, in which case the insurance is complementary to goods supplied by any provider and cover the risk of damage of these goods supplied by the provider.

regulated business of insurance mediation, and the seller does not need to fulfil the regulatory requirements.<sup>54</sup> E-commerce of very simple insurance products does not necessarily involve professional intermediaries since providers of these mediation services may become non-regulated providers as well.

In some countries, insurance undertakings increase direct sales via e-commerce more than insurance intermediaries, probably because insurance undertakings are more eager to adopt and promote online sales since, in that way, they not only facilitate their business, as is the case with IIMs as well, but also may cover the intermediation business more easily.

### 2.1.3 Comparison Websites

Aggregator websites and, in general, the different kinds of comparison websites,<sup>55</sup> i.e. companies that work with a large number of insurers and/or intermediaries for the purpose of bringing via their websites ‘aggregated’ sources in one single place, do not replace intermediaries. They rather help intermediaries bring online persons who look for ‘comparative shopping’. However, depending on the work carried out by the comparison websites, they can act as IIMs and consequently must satisfy the requirements set by the applicable law, in particular regarding the general information IIMs have to provide to customers, including proper **information** on issues of **conflict of interests** and **warnings** if they sell **insurance investment products**, and to protect the insured at the same level as required by all other distributors of insurance products.

The criteria which distinguish simple comparison websites from those which include the core of the work of an insurance intermediary and/or seller of insurance products have not yet been completely formed. If the visitor of the comparison website has the possibility to select insurance products based on price or features and to conclude the insurance contract or if he is diverted via a link to the insurer’s website and then buys the insurer’s products, the comparison website owner might qualify as providing intermediation,<sup>56</sup> in spite of the possible objection that a certain comparison website cannot be liable for the information transmitted, in case it falls within the restrictions of ECD. According to ECD restrictions, the online service provider is not liable for information transmitted on conditions that the provider (a) does not initiate the transmission, (b) does not select the receiver of the transmission and (c) does not select or modify the information contained in the transmission. There appears to be a contradiction in this regard since in case a

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<sup>54</sup> However in EU level, since IMDs 1 and 2 are Directives of minimum harmonisation, national MS law may regulate simple insurance products as well.

<sup>55</sup> See EIOPA (2014).

<sup>56</sup> See above Consultation Paper on Draft Report on Good Practices on Comparison Websites of EIOPA, and IMD 2, explanatory memorandum, point 14, p. 8.