



EIOPA-17/651
04 October 2017

**Guidelines under the Insurance
Distribution Directive on Insurance-
based investment products that
incorporate a structure which makes it
difficult for the customer to understand
the risks involved**

Introduction

- 1.1. According to Article 16 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (hereinafter "EIOPA Regulation")¹ and to Article 30(7) and Article 30(8) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (hereinafter "the IDD")², EIOPA is issuing Guidelines both on the assessment of insurance-based investment products that incorporate a structure which makes it difficult for the customer to understand the risk involved as referred to in Article 30(3)(a)(i) of the IDD, and for the assessment of insurance-based investment products being classified as non-complex for the purpose of Article 30(3)(a)(ii) of the IDD considering that this classification is also based on the assessment of whether the product incorporates a structure, which makes it difficult for the customer to understand the risks involved.
- 1.2. In accordance with paragraphs 1 and 2 of Article 30 of the IDD, an assessment of the suitability or appropriateness of an insurance-based investment product for the customer by the insurance intermediary or insurance undertaking is generally required as part of the sale of an insurance-based investment product. Article 30(3) of the IDD allows Member States to derogate from these obligations and not require either a suitability or appropriateness test to be conducted during the distribution of an insurance-based investment product where various conditions are satisfied. This type of sale is often referred to as "execution-only" as a transaction is merely executed without any advice or assessment of the customer's personal situation. However, in accordance with Article 20(1) of the IDD, it is still necessary for the insurance distributor to specify the demands and needs of the customer.
- 1.3. One of the conditions specified in Article 30(3) of the IDD to determine whether an insurance-based investment product can be distributed as an execution-only sale relates to the complexity of the insurance-based investment product. This assessment is based on the nature of the financial instruments to which an insurance-based investment product provides investment exposure, as well as the structure of the insurance contract with the customer (Article 30(3)(a) of the IDD). In accordance with paragraphs 7 and 8 of Article 30 of the IDD, EIOPA is empowered to develop Guidelines concerning both the assessment of complexity and non-complexity.
- 1.4. The complexity of the financial instruments to which the insurance-based investment product provides investment exposure depends on the provisions given by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast) (hereinafter "MiFID II")³. Under Article 30(3)(a) of the IDD a distinction is made between, on the one hand, those insurance-based investment products which provide investment exposure to financial instruments deemed non-complex under MiFID II and, on the other hand, other non-complex insurance-based investment products.

¹ OJ L 331, 15.12.2010, p. 48-83.

² OJ L 26, 2.2.2016, p. 19.

³ OJ L 173, 12.6.2014, p. 349.

- 1.5. These Guidelines cover the assessment of all types of insurance-based investment products. Despite the distinction made between points (i) and (ii) of Article 30(3)(a) of the IDD, it is important to ensure that only those insurance-based investment products for which the risks can be readily understood by the customer are able to be sold via execution-only. The Guidelines principally address the issue of the identification of contractual structures or features which can make it difficult for the customer to understand the risks involved in an insurance-based investment product. However, they also concern a number of other issues relevant to the assessment of the complexity of insurance-based investment products.
- 1.6. In view of the minimum harmonisation aim of the IDD, as well as the fact that, for execution-only sales specifically, customers do not benefit from the protection of some of the relevant conduct of business rules, national competent authorities may maintain or introduce more stringent national provisions in this area in order to protect consumers.
- 1.7. During the development of the Guidelines, EIOPA has taken into account other relevant regulatory requirements in the area of conduct of business standards, namely Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)⁴.
- 1.8. In addition, EIOPA has considered the work by ESMA⁵ on the assessment of financial instruments incorporating a structure which makes it difficult for the client to understand the risks involved. This reflects the importance, as stated in recital 56 of the IDD, of avoiding regulatory arbitrage, whilst at the same time also taking into consideration the specific nature of insurance contracts.
- 1.9. These Guidelines are addressed to national competent authorities within a Member State that has chosen to exercise the derogation in the first subparagraph of Article 30(3) of the IDD. Notwithstanding the fact that specific provisions describe obligations to be met by insurance undertakings and intermediaries, this document is not to be read as imposing any direct requirements upon those financial institutions. Financial institutions are required to comply with the supervisory or regulatory framework applied by their national competent authority.
- 1.10. For the purpose of these Guidelines, the following definition has been developed:
 - "Execution-only sale" refers to the distribution of an insurance-based investment products in accordance with Article 30(3) of the IDD.
- 1.11. If not defined in these Guidelines, the terms have the meaning defined in the legal acts referred to in the introduction.
- 1.12. The Guidelines shall apply from the date of publication of the translated versions.

⁴ OJ L 352, 9.12.2014, p. 1.

⁵ See for example the empowerment in Article 25(10) of MiFID II based upon which ESMA has issued [Guidelines](#) on complex debt instruments and structured deposits.

Section 1: Requirements that apply to contracts which only provide investment exposure to financial instruments deemed non-complex under MiFID II (Article 30(3)(a)(i) of the IDD)

Guideline 1 – Investment exposure

- 1.13 The insurance intermediary or insurance undertaking should ensure that the insurance-based investment product only provides investment exposure to the financial instruments deemed non-complex under Directive 2014/65/EU. Such non-complex financial instruments include only the following instruments:
- (a) those identified in Article 25(4)(a) of MiFID II;
 - (b) those satisfying the criteria in Article 57 of Commission Delegated Regulation (EU) 2017/565 supplementing Directive 2014/65/EU as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive;
 - (c) those not deemed to be complex in accordance with ESMA Guidelines on complex debt instruments and structured deposits⁶.

Guideline 2 – Contractual features concerning changes to the nature of the contract and the ability to surrender the insurance-based investment product

- 1.14. Where the contract contains any of the following features, the insurance undertaking or insurance intermediary should deem it as incorporating a structure which makes it difficult to understand the risks involved:
- (a) it incorporates a clause, condition or trigger that allows the insurance undertaking to materially alter the nature, risk or pay out profile of the insurance-based investment product;
 - (b) there are not options to surrender or otherwise realise the insurance-based investment product at a value that is available to the customer;
 - (c) there are explicit or implicit charges which have the effect that, even though there are, technically, options to surrender the insurance-based investment product, doing so may cause unreasonable detriment to the customer, because the charges are disproportionate to the cost to the insurance undertaking of the surrender.

Guideline 3 – Contractual features concerning the determination of the maturity or surrender value or pay out upon death

- 1.15. The insurance intermediary or insurance undertaking should assess the effects of the mechanisms that determine the maturity or surrender value or pay out upon death and whether these make it difficult for the customer to understand the risks involved, unless these mechanisms are based directly on national laws aimed specifically at safeguarding the interests of customers.
- 1.16. As part of the assessment, where the contract contains any of the features listed below, the insurance undertaking or insurance intermediary should deem it as incorporating a structure which makes it difficult for the customer to understand the risks involved:

⁶ Dated 4 February 2016 (ESMA/2015/1787)

- (a) the maturity or surrender value or pay out upon death is dependent on variables set by the insurance undertaking, the effects of which are difficult for the customer to understand;
- (b) the maturity or surrender value or pay out upon death is based on different types of investment exposures or strategies the combined effect of which are difficult for the customer to understand;
- (c) the maturity or surrender value or pay out upon death may vary frequently or markedly at different points of time over the duration of the contract either because certain pre-determined threshold conditions are met or because certain time-points are reached. This does not include changes in the maturity or surrender value or pay out upon death due to the payment of discretionary bonuses;
- (d) there is a guaranteed maturity or surrender value or pay out upon death that is subject to conditions or time limitations the effects of which are difficult for the customer to understand. This does not include changes in the guaranteed maturity or surrender value or pay out upon death due to the payment of discretionary bonuses.

Guideline 4 – Contractual features concerning the costs

- 1.17. As part of the assessment of whether the contract incorporates a structure which makes it difficult for the customer to understand the risks involved, the insurance intermediary or insurance undertaking should assess whether the costs are not likely to be readily understood by the customer, in particular the conditions under which the costs can change significantly during the duration of the contract, including based on the performance of the investment.
- 1.18. Where the costs are based directly on national laws aimed specifically at safeguarding the interests of customers, they should not be deemed as incorporating a structure which makes it difficult for the customer to understand the risks involved.

Guideline 5 – Contractual features concerning the beneficiary of the insurance contract

- 1.19. Where there are contractual provisions allowing the customer to use a non-standard wording to define the person receiving the benefits at the end of the contractual relationship (beneficiary clause) which can lead to difficulties to identify the beneficiary and may result in difficulties for the beneficiary to effectively receive the pay out when the policyholder dies, the insurance intermediary or insurance undertaking should deem it as incorporating a structure which makes it difficult for the customer to understand the risks involved.

Section 2: Requirements that apply to 'other non-complex insurance-based investment products' (Article 30(3)(a)(ii) of the IDD)

Guideline 6 – Contractual features concerning the determination of the maturity or surrender value or pay out upon death

- 1.20. The insurance intermediary or insurance undertaking should assess the effects of the mechanisms that determine the maturity or surrender value or pay out upon death and whether these make it difficult for the customer to understand the risks involved, unless these mechanisms are based directly on national laws aimed specifically at safeguarding the interests of customers.
- 1.21. As part of the assessment, where the contract contains any of the following features, the insurance undertaking or insurance intermediary should deem it as incorporating a structure which makes it difficult for the customer to understand the risks involved:
- (a) the maturity or surrender value or pay out upon death is dependent on variables set by the insurance undertaking, the effects of which are difficult for the customer to understand;
 - (b) the maturity or surrender value or pay out upon death is based on different types of investment exposures or strategies the combined effect of which are difficult for the customer to understand;
 - (c) the maturity or surrender value or pay out upon death may vary frequently or markedly at different points of time over the duration of the contract either because certain pre-determined threshold conditions are met or because certain time-points are reached. This does not include changes in the maturity or surrender value or pay out on death due to the payment of discretionary bonuses;
 - (c) there is a guaranteed maturity or surrender value or pay out upon death that is subject to conditions or time limitations the effects of which are difficult for the customer to understand. This does not include changes in the guaranteed maturity or surrender value or pay out upon death due to the payment of discretionary bonuses.

Guideline 7 – Contractual features concerning the costs

- 1.22. As part of the assessment of whether the contract incorporates a structure which makes it difficult for the customer to understand the risks involved, the insurance intermediary or insurance undertaking should assess whether the costs are not likely to be readily understood by the customer, in particular the conditions under which the costs can change significantly during the duration of the contract, including based on the performance of the investment.
- 1.23. Where the costs are based directly on national laws aimed specifically at safeguarding the interests of customers, they should not be deemed as incorporating a structure which makes it difficult for the customer to understand the risks involved.

Guideline 8 – Contractual features concerning the beneficiary of the insurance contract

- 1.24. Where there are contractual provisions allowing the customer to use a non-standard wording to define the person receiving the benefits at the end of the contractual relationship (beneficiary clause) which can lead to difficulties to identify the beneficiary and may result in difficulties for the beneficiary to effectively receive the pay out when the policyholder dies, the insurance intermediary or insurance undertaking should deem it as incorporating a structure which makes it difficult for the customer to understand the risks involved.

Compliance and Reporting Rules

- 1.25. This document contains Guidelines issued under Article 16 of the EIOPA Regulation. In accordance with Article 16(3) of the EIOPA Regulation, competent authorities and financial institutions shall make every effort to comply with guidelines and recommendations.
- 1.26. Competent authorities that comply or intend to comply with these Guidelines should incorporate them into their regulatory or supervisory framework in an appropriate manner.
- 1.27. Competent authorities shall confirm to EIOPA whether they comply or intend to comply with these Guidelines, with reasons for non-compliance, within two months after the issuance of the translated versions.
- 1.28. In the absence of a response by this deadline, competent authorities will be considered as non-compliant to the reporting and reported as such.
- 1.29. Competent authorities within a Member State that has not chosen to exercise the derogation in the first sub paragraph of Article 30(3) of the IDD, are not required to report to EIOPA.

Final Provision on Reviews

- 1.30. The present Guidelines shall be subject to a review by EIOPA and updated periodically in accordance with paragraphs 7 and 8 of Article 30 of the IDD.