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Diplomová práce

Vedoucí diplomové práce: prof. JUDr. PhDr. Michal Tomášek, DrSc.

Katedra evropského práva

Datum vypracování práce (uzavření rukopisu): 28.05.2018

CHARLES UNIVERSITY

Faculty of Law

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Comparative analysis of client´s protection in banking and insurance services within the EU

Master's thesis

Master's thesis supervisor: prof. JUDr. PhDr. Michal Tomášek, DrSc.

Department of European Union Law

Date of completion (manuscript closure): 28.05.2018

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Poděkování

Na tomto místě bych ráda poděkovala svému vedoucímu diplomové práce, prof. JUDr. PhDr. Michalu Tomáškovi, DrSc. za ochotu vést mou diplomovou práci, odborné rady a cenné připomínky při jejím vypracování. Dále bych chtěla poděkovat své rodině za podporu v průběhu mého studia.

Acknowledgment

Hereby I would like to thank to my master's thesis supervisor, prof. JUDr. PhDr. Michal Tomášek, DrSc. for supervising my master's thesis, his expert advice and valuable insights. Furthermore, I would like to thank to my family for supporting me during my studies.

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Introduction

Insurance and banking services represent the core financial services. Financial services belong to European Union's top areas of interest since their providers are often active in multiple Member States and they have the potential to influence the interconnected EU economy. Consumer protection in the EU is generally formed of certain measures and areas of regulation which are believed to empower consumers who are contracting with entrepreneurs. Consumer protection in insurance and banking businesses are structured very similarly because they both belong to financial services working on similar principles.

According to the World Bank[1] there are the following areas of measures that secure protection of consumers in the financial services business – consumer protection institutions, disclosure and sales practices, customer account handling and maintenance (management), privacy and data protection, dispute resolution mechanisms, guarantee and compensation schemes, financial literacy and consumer empowerment, competition among the credit providers. In this thesis, we focus on the pre-contractual and contractual relationship between the consumer and the financial services institution and between the consumer and the intermediary. These are mainly disclosure and sales practices, customer account management and dispute resolution mechanisms. Beside the areas listed by the World Bank, the author identifies other typical measures occurring in consumer protection legislation – transparency and information disclosure, forbidden clauses in contracts, rules of conduct and internal policies for entrepreneurs, out-of-court redress and promotion of financial literacy among consumers. In the thesis we closely examine the extent of application of these measures in banking and insurance law in the EU.

[1] Good Practices for Financial Consumer Protection. World Bank [online]. 2012 [cit. 2017-09-29]. Available from: http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1339624653091/8703882-1339624678024/8703850-1340026711043/8710076-1340026729001/FinConsumerProtection_GoodPractices_FINAL.pdf

Pre-contractual and contractual protection of consumers is subject mainly to three directives – Insurance Distribution Directive[2] for insurance law and Consumer Credit Directive[3] and Mortgage Credit Directive[4] for banking law. Insurance Distribution Directive shall be transposed into national laws in 2018 so this topic is current and relevant as of the time of writing this thesis. In the first part of this work we analyse and assess insurance law, mainly empowerment of consumers by provisions of Insurance Distribution Directive, but we also compare Insurance Distribution Directive with previous legislation which is still in force by the time of closing this work. In the second part we analyse and assess banking law and compare Consumer Credit Directive and Mortgage Credit Directive and their contribution to consumer protection. In the third part, we compare all three directives in general as well as in selected topics. Finally, we evaluate the approach to consumer protection, consumers and balance between efficient economy and protected consumers.

This work reflects legislation as of 28 May 2018.

[2] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast).
[3] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.
[4] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

1. Insurance law

1.1 Introduction

If we look at the regulation from consumers‘ point of view the most direct way how to protect customer (before, during and shortly after entering into a contract) is thru the distribution requirements. The less direct way which can be still very efficient is to impose obligations on distributors regarding their qualities and handling manners when selling the insurance product. The insurance product and services themselves are highly important, therefore they are subject to regulation as well. All these topics are subject to Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (hereinafter Insurance Distribution Directive or IDD), whereas a very specific rules regarding Key Information Document for insurance-based investment products is contained in the 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).

From the direct ways we come to rather indirect ways such as demands on qualities of the insurance undertakings, e.g. internal governance, risk management. The most significant and influential regulation is the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (hereinafter Solvency II).

There is a huge number of laws which can affect insurance business with bigger or smaller impact. Association of British Insurers (hereinafter also ABI) has conducted an extensive and in-depth analysis of EU law which is applicable to insurance undertakings in the UK. According to the analysis, there are 80 pieces of legislation which are effective or will come into force before 2019[5]. However, the work of ABI did include many laws which are not directly linked to insurance business itself but

[5] ASSOCIATION OF BRITISH INSURER'S. In: *EU Legislation Mapping Exercise: EU Exit* [online]. [cit. 2017-04-25]. Available at: https://www.abi.org.uk/globalassets/sitecore/files/documents/publications/public/2016/eu-exit/eu-exit---eu-legislation-mapping-publication.pdf

affect large amount of industries, such as legislation on data protection[6] or accounting and taxation. In this work we will discuss more closely law which is designed particularly for insurance.

1.1.1 Historical development

Distribution is an essential part of consumer protection regardless the business area concerned, so the first attempts to ensure level playing field in insurance distribution has emerged already in the 1970s in the form of Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities. The directive formed very general obligations for Member States for requirements which they can impose on insurance intermediaries and obligations to accept certificates from different Member States.

However, the actual protection of the client was introduced first in 1990s with the 92/48/EEC: Commission Recommendation of 18 December 1991 on insurance intermediaries. Whereas the Council Directive 77/92/EC has outlined only formal requirements for qualification acceptance and market admission based in other Member State's law or decisions, the Commission Recommendation of 18 December 1991 already drafted the first requirements for insurance intermediaries, since it was desirable to introduce them in order to secure minimum level of qualification and knowledge across the European Communities[7]. The Council Recommendation did not only establish the common demand regarding knowledge but also to obtain indemnity insurance. Furthermore, also the good reputation demand was anchored as well as duty for Member States to establish a register and competent authority for supervision. The document advises the Member States to enforce the rules with sanctions.

[7] Recitals of the 92/48/EEC: Commission Recommendation of 18 December 1991 on insurance intermediaries,

The provision of the Council Recommendation were rather general (and therefore left a big space for Member State's consideration) and could not support common market efficiently enough[8], which subsequently led to need for further harmonization rules. The complex legislation which aimed to give a common framework for some important parts of insurance distribution was the Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (hereinafter Insurance Mediation Directive or IMD). The IMD became applicable on 15 January 2003, the Member States had to transpose it until 15 January 2005. However, the provisions of the Insurance Mediation Directive left a big discretion area for the Member States so that the transposition was done in each country differently leaving some blank spaces[9]. In addition, building up common market in insurance was seen as insufficiently supported by the IMD[10].

At the same time as the impact assessment was conducted, revision of several related legislations was planned and being prepared, namely Markets in Financial Instruments Directive (MiFID II)[11] and the directive which regulates the risk-based approach to capitalisation and supervision of insurance undertakings (Solvency II)[12]. Therefore, it became logical to revise and amend insurance mediation law as well.

Initially the aim was targeted to create IMD recast rather than a completely new act. However, one of the key changes was widening the scope of the directive so that it would include nearly all distribution channels, not only intermediaries. For this reason the original Insurance Mediation Directive recast was transformed into Insurance

[8] Opinion Of The Economic And Social Committee On The "Proposal For A Directive Of The European Parliament And Of The Council On Insurance Mediation", Point 1.2
[9] Explanatory Memorandum to the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on insurance mediation (recast), point 1
[10] CEIOPS' Report On The Implementation Of The Insurance Mediation Directive's Key Provisions. P. 25. In: CEIOPS. *CEIOPS-DOC-09/07* [online]. March 2007 [cit. 2017-04-25].
[11] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
[12] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

Distribution Directive to have a more accurate name. IDD became effective on 22 February 2016 and should be transposed until 1 July 2018[13].

1.2 Insurance Distribution Directive

The main impact area of Insurance Distribution Directive can be divided into seven groups: scope of the legislation, requirements on products themselves, disclosure and documentation, sales process, remuneration, requirements on distributors and freedom to provide services, new requirements for insurance-based investment products.

1.2.1 Scope

As was already mentioned above, IDD is applicable to more cases of insurance distribution than IMD. Article 1 (1) of Insurance Distribution Directive states: *This Directive lays down rules concerning the taking-up and pursuit of the activities of insurance and reinsurance distribution in the Union.* While Article 1 (1) of Insurance Mediation Directive states: *This Directive lays down rules for the taking-up and pursuit of the activities of insurance and reinsurance mediation by natural and legal persons which are established in a Member State or which wish to become established there.* Neglecting the reformulation of geographical applicability, the important change has been by replacing the word "mediation" with word "distribution". In order to see what the real impact of this replacement is, we need to check the definitions provisions in both directives. The difference is that so called comparison platforms[14] have been included in the scope of IDD.

Even though this amendment will affect the comparison platforms significantly, from larger point of view, it is not as essential as the change in negative delimitation in the scope of both directives. Firstly, some products under certain circumstances do not fall

[13] Originally, the transposition date was set on 23 February 2018 but was postponed by Directive (EU) 2018/411 of the European Parliament and of the Council of 14 March 2018 amending Directive (EU) 2016/97 as regards the date of application of Member States' transposition measures

[14] *Defined in Article 2 (1) second part, IDD which states: including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media.*

under the scope of any of the directives.[15]. Secondly, omitting provision of Article 1 (3) of IMD in the IDD has caused that the IDD is applicable also to insurance undertakings and their employees. Exemption of employees of insurance undertakings from IMD application was subject to ECJ decision[16]: Employees of insurance undertakings not operating on behalf and within the relationship to their employer (i.e. insurance undertaking) could not pursue activities of insurance mediation unless fulfilling professional requirement under IMD. If such employees operate within the relationship with their employers, IMD does not apply to them.

The question is how big the impact on consumer protection will be. Allegedly, the market share covered by IDD will be 98% compared to 48% by IMD[17]. However, the numbers of affected clients vary from country to country as for instance in Croatia direct writers hold 70% of the market in non-life insurance counted by premiums sold, nearly 50% in Finland, around 35% in France and Malta, but only approximately 5% in Denmark, Italy, Portugal and Turkey.[18] Figures for life insurance are less favourable for direct writers as the biggest market share is in Croatia again and takes about 45% followed by Netherlands and Slovakia with 35%, while Denmark, Malta and Portugal stand on the other end of the scale with 3% of direct writers' market share[19].

Such big differences in impact area based on the Member States must necessarily lead to unequal level of consumer protection across the European Union, therefore the author regards the extension of scope to insurance undertakings as a positive step forward in clients' protection. Furthermore, equalizing of regulatory requirements for majority of the market has positive effect on competition and support building common market and can bring advantages for the clients in the end as well.

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[15] See Article 1 (3), IDD and Article 1 (2), IMD.
[16] Judgment of 17 October 2013, *Simvoulio tis Epikratias*, C-555/11, EU:C:2013:668, para. 32
[17] *The Insurance Distribution Directive: changes to the regulation of insurance intermediaries in the EU* [online]. February 2016 [cit. 2017-04-24]. Available at: https://www.out-law.com/en/topics/insurance/insurance-brokers-and-intermediaries/the-insurance-distribution-directive-changes-to-the-regulation-of-insurance-intermediaries-in-the-eu/
[18] INSURANCE EUROPE. *European Insurance In Figures: 2015 data* [online]. P. 44. December 2016 [cit. 2018-04-26]. Available at: https://www.insuranceeurope.eu/sites/default/files/attachments/European%20Insurance%20in%20Figures%20-%202015%20data.pdf .
[19] Ibid., p. 43

Another change in scope concerns ancillary insurance intermediaries. Ancillary insurance intermediaries distribute insurance complementary to goods or service, do so for remuneration but not as their principal activity and they must not distribute certain types of insurance products. Recital 8, IDD provides examples of ancillary insurance intermediaries as travel agents or car rental companies. Originally ancillary insurance intermediaries have been exempted from the scope of Insurance Mediation Directive[20], now Insurance Distribution Directive shall apply to them too with less strict regime. Member States can introduce lighter knowledge requirements with regard to the products sold by ancillary intermediaries. On the other hand, ancillary intermediaries need to have indemnity insurance, its limits are however not set precisely and left to Member States' consideration[21]. Ancillary intermediaries must comply with some information disclosure requirements and conflict of interest measures. Such setup can lead us to the idea that the legislator contemplated the possible impact on business and compared the possible advantages for clients with burdens imposed on intermediaries who carry out the activity only as ancillary and kept the requirements which are able to help client directly but which do not oppress the ancillary intermediary significantly.

We shall not omit to discuss negative scope definition of IDD, provided in Article 2 (2) and explained in Recitals 12-15, which exclude certain activities from the scope of the directive. Excluded activities are: provision of data or information on potential policyholders to insurance distributors without actual contract conclusion, vice versa information provision about insurance or reinsurance products without assisting with contract conclusion (e.g. comparison websites which does only compare and inform but not provide policy, that means they do not conclude contracts). Furthermore, certain activities in management of claims are also excluded – loss adjusting or claims appraisals. Last, incidental information in the context of another professional activity provision without assisting with contract conclusion (e.g. tax experts, lawyers or accountants).

[20] E.g. Recital 13 of IMD
[21] Cp. Article 10 (4) and (5)

1.2.2 Products

Insurance Distribution Directive introduces in Article 25 new set of requirements regarding product oversight and governance (POG). These rules are applicable both to insurance undertakings and insurance intermediaries when they manufacture an insurance product, some of the rules (regarding knowledge and information on the product) are applicable to the distributors who do not manufacture the product. Commission is empowered to adopt delegated acts to further specify the requirements in Article 25, IDD.

Commission invited European Insurance and Occupational Pension Authority (EIOPA) to provide technical advice on the delegated acts according to Article 25, IDD[22]. EIOPA firstly published preparatory technical guidelines on product oversight and governance[23], opened public consultation and later amended the guidelines and released joint report on all the delegated acts according to IDD[24].

The above elaborated technical advice served as a basis for Commission Regulation[25] (referred to also as 'Product Governance Commission Regulation'). Its two main chapters provide requirements for insurance manufacturers and insurance distributors. The first group of requirements begin with product approval process which shall ensure that products are designated and maintained in a way which ensures consumer's benefit, mainly by taking into account consumer's interest, objectives and characteristics and by preventing conflict of interest. Closely linked to these objectives

[22] GUERSENT, Olivier. Request For EIOPA To Provide Technical Advice On Possible Delegated Acts Concerning The Insurance Distribution Directive. 2016. [cit. 2017-04-26]. Available at: https://eiopa.europa.eu/Publications/Requests%20for%20advice/I-EIOPA-2016-073%20COM%20Letter%20IDD%20%28GBE%29.pdf.

[23] EIOPA. Final Report On Public Consultation On Preparatory Technical Guidelines On Product Oversight And Governance Arrangements By Insurance Undertakings And Insurance Distributors. In: EIOPA-BoS-16/071, [online] 2016, 6 April 2016 [cit. 2017-04-26]. Available at: https://eiopa.europa.eu/publications/reports/final%20report%20on%20pog%20guidelines.pdf.

[24] EIOPA. Consultation Paper On Technical Advice On Possible Delegated Acts Concerning The Insurance Distribution Directive. In: *EIOPA-CP-16/006* [online]. 2016, 4 July 2016 [cit. 2017-04-26]. Available at: https://eiopa.europa.eu/Publications/Consultations/EIOPA-CP-16-006_Consultation_Paper_on_IDD_delegated_acts.pdf.

[25] Commission Delegated Regulation (EU) 2017/2358 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to product oversight and governance requirements for insurance undertakings and insurance distributors.

is defining target market for the product, the process is outlined in Article 5 of the Product Governance Commission Regulation. Manufacturers need to assess the financial literacy of and information available to the target market group. The product shall be tested before its release to market and then constantly monitored throughout its whole existence, its suitability for target individuals shall be re-assessed. Potential detriments on consumers shall be prevented and, when not possible, at least mitigated. Events which have influence on the state of insurance product can include changes in laws, technology or market. The need to re-assess the product depends on its nature.[26] Last, insurance manufacturers are liable also for selection and monitoring of distribution channels and also provide necessary information to them, which shall ensure understanding and knowledge of the insurance product and its target market (including both positive and negative definition). Compliance with manufacturer's obligations shall be documented, beside that Product oversight and governance policy shall be adopted in every manufacturing entity.

Distributor's obligations under the Product Governance Commission Regulation correspond with the manufacturer's obligations in terms of customer's protection. Distributors shall adopt arrangements for product distributions in order to mitigate possible consumer's detriment, manage conflict of interest and provide services suitable for the specific customer. Distributors shall inform the manufacturers about any discrepancies between (target market) consumer's interest and the product characteristics. These obligations require that reliable and regular communication channels work between the distributor and manufacturer. The distributor shall also monitor and adapt the distribution process when it does not meet the requirement according to the Product Governance Commission Regulation.

It needs to be emphasized that product oversight and governance requirements are not matter of one-time review but they require constant process of monitoring and procedures evaluating. The manufacturers and distributors need to flexibly react on issues arising from the market and its development.

[26] Article 6 and 7, Product Governance Commission Regulation.

The setup of the product oversight and governance provisions shall ensure that consumer's interests are protected and supported at two stages – not only during insurance product distribution but already in the process of product development. That means that the responsibility lies with both distributor and the manufacturer[27].

As the above stated facts suggest, Article 25, IDD impact significantly both the insurance undertakings and insurance intermediaries. Therefore, we should ask ourselves if the required measures can effectively enhance the level of client's protection.

The aim to determine the target market and create tailor made product for a certain group of people seems legitimate. But would not a reasonable company set up target clients when developing a new product? Is not meeting client's needs the main purpose of trade (in broad sense) and the basic principle why the exchange among people works? Nowadays the offered products, solutions and services are so sophisticated that it is difficult for an ordinary person to understand them completely, especially when considering the wide range of products which a person needs, that is why presenting target customers can be helpful. On the other hand, Insurance Distribution Directive does not protect only consumers as natural person but all customers in insurance business. Is there then the need to protect other enterprises? Insurance of large risks is exempted from the Article 25, IDD, however it does not have to be always large risk which a company needs to insure but it can be often a risk which is outside of ordinary business for the company, such as car fleet insurance. If respectable insurance companies conduct target market evaluation, the regulation does not oppress them too much with such requirements (the only extra activity would be the obligation to have and provide documentation in such case). If a business does not conduct target market evaluation, is it worth protection? Furthermore, such measures can contribute to single market building as businesses in some countries, where the competition among insurance undertakings is not very strong, must comply with same rules as anywhere

[27] CAPPIELLO, Antonella. Technology and the Insurance Industry: Re-configuring the Competitive Landscape. Springer, 2018. P. 22. ISBN 3319747126.

in the European Union. POG requirements may have significant impact on certain policies with saving elements because their target market cannot be defined as the whole retail market as it is now[28].

The need to observe and take remedial actions can, according to author's opinion, contribute significantly to the protection of consumers as it is based on real issues and concerns also individual cases.

The obligations on information provided to distributors and selection of suitable channels are also in the best interest of the manufacturer as it may harm its good repute. Above all, the distributor is the one who shall notice issues with consumers as soon as they occur and inform the manufacturer so that it can reflect it in the product development[29]. Having efficient manufacturing process but malfunctioning distribution circumvent the purpose of the POG requirements.

The only extra requirement which could be regarded as unnecessary burden is the compulsory documentation because the insurance undertakings and distributors would normally not maintain extensive record on their steps when doing activities under POG. The author thinks that Product Governance Commission Regulation does not require unreasonable level of administrative measures – for insurance manufacturers, it is product oversight and governance policy, which shall be a standard guideline with insurance undertakings; for insurance distributors, it is written document with insurance distribution requirements. Both groups shall duly document compliance with Product Governance Commission Regulation, such requirement is only natural and cannot be regarded excessive or unreasonable.

1.2.3 Disclosure and documentation

The legislation in force - Insurance Mediation Directive contains rules on information disclosure[30]. The rules regulate the time, form and content of the information.

[28] Ibid., p. 22-23.
[29] Ibid., p.23.
[30] Chapter III, IMD.

Insurance Distribution Directive takes over the existing requirements, divide them into several articles and further elaborates them.

Regarding timing the information shall be provided "…*in good time before the conclusion of an insurance contract…"*[31] Exceptionally, for the cases, when providing the information prior to contract conclusion is not possible due to well-founded objective (sales over telephone call), the distributor must do so immediately afterwards[32].

According to Article 23, IDD the information must be in paper form (or on durable medium or on website, if the customer has given their consent and other defined requirements have been met), written in a for customer understandable manner, in one of European Union's official languages and the information must be provided free of charge. Prioritization of paper form is apparent from Article 23 (3), IDD, which states that the customer can always request free paper copy. Such setup is understandable because many European citizens are not able to work with digital content or they are not at least comfortable with digital forms of information provision. In the author's opinion, IDD chose right option with forms of information provisions even though we may question its practicality in the upcoming years when digitalization will progress and IDD shall still be in force.

The content of the information can be divided based on its nature into general information, conflict of interest and transparency disclosure and product information document.

General information according to Article 18, IDD shall be provided to customer with information about the person of the distributor (irrespective of whether it is an insurance intermediary or an insurance undertaking), whether the distributor provides advice, also information about possibility of complaints and out-of-court redress according to Articles 14 and 15. Insurance intermediary shall provide information

[31] See Article 18 (a) and (b), Article 19 (1) and (4), compare Article 20 (4), Article 23 (7), IDD.
[32] See Article 23 (7), IDD.

about his or her professional registration and whether he or she *"…is representing the customer or is acting for and on behalf of the customer or of the insurance undertaking."*

Pursuant to Article 19, IDD possible conflict of interest shall be disclosed to the customer in a way that the distributor informs them about his or her holdings (10% or more percent) in the insurance undertaking whose product is in question or if the insurance undertaking has holding in the insurance intermediary's company. In relation to the contract in question the distributor must disclose whether he or she does or does not give advice based on a fair and personal analysis and whether he or she acts exclusively for one or more insurance undertakings and if this can have impact on the advice given.

Insurance Product Information Document (IPID) is a new tool for information form simplification and is compulsory only for non-life insurance products as stated in Article 20 (5)[33] . Commission, based on EIOPA draft, adopted IPID implementing regulation[34], which contains instruction for creating IPID and template of the document. It corresponds with the requirements outlined in Article 20 (7), IDD on the information quality and form written in the IPID. The requirements traditionally aim to make the document "consumer friendly" (e.g. short, understandable, accurate, not-misleading, legible). Summarizing the essential aspects of insurance policy in an easily comprehensible way may be very helpful for customers. On the other hand, it introduces risks that consumers may confuse IPID for the actual contract and be negatively surprised by the information which is not contained in IPID but is important feature of the contract. Some distributors may even abuse this possibility and draft IPID and contract in a misleading way.

However, in order to ease the detriment caused by the disclosure obligation provisions to the insurance distributors and insurance undertakings and to address the customers

[33] For life insurance product, PRIIPs regulation introduces Key Information Document.
[34] Commission Implementing Regulation (EU) 2017/1469 of 11 August 2017 laying down a standardised presentation format for the insurance product information document.

who really need such information, majority of the disclosure provisions are not applicable to insurance of large risks[35].

Insurance distribution directive newly introduces requirements (in form of obligations to Member States to ensure them) which are general principles on conduct rules for insurance distributors, who must act *"...honestly, fairly and professionally in accordance with the best interests of their customers."* Member States shall also guarantee quality of client's communication related to insurance distribution as the communication must be fair, clear and not misleading. Additionally, the distributors must ensure that marketing communication can be easily identified as such.

As we have seen, the regulation of information and their disclosure are quite extensive. Does it affect rather quantity or quality? Does the regulation bring the desirable effect on customer's protection?

The demands on suitable timing and form of the provided information provided are not very revolutionary in the field of consumer protection[36], it might though be quite helpful for customers who are not consumers but who can use the regulation's advantages too.

The more interesting part of the regulation is the one on content of the information provided. General information about the insurance distributor and the insurance undertaking are usually given to customer without legal requirement, on the other hand it might be helpful to argue with legal requirement in case of dispute. Information about the possibility to raise complaint and where and about the possibility to resolve potential disputes are definitely very useful to the customer as not everyone might be aware of them. The complaints and alternative dispute resolution shall serve to a

[35] Article 22, IDD.

[36] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts and Directive 2011/83/EU Of The European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

purpose of protecting one self's rights without fear of lengthy and costly process before court[37]. The alternative dispute resolution mechanism shall also support building of single market in the European Union as it enables fast and efficient resolution of cross-border disputes. However, the obligation to inform customers about complaints and out-of-court redress must be evaluated as positive but does not guarantee that the customers will take action to enforce their rights and that they will succeed. Of course, this cannot be realistically achieved by any legislation.

Informing the customer whether the insurance distributor provide advice on the product is quite questionable. According to the author, customers may pay attention to the real meaning of what the insurance intermediary is telling them – specifically, consumers may realize, thanks to the written notice, whether the 'opinions' of the intermediary are really independent recommendations or if it only sound like them but in fact only promote certain products. On the other hand, it is likely that most of the customers would not contemplate real meaning of the information whether advice is being given and skip it while studying all other provided information., In addition, many distributors may be quite manipulative speakers and may persuade consumers that they are skilled advisors providing elaborated recommendations while not giving advice at all. The restriction in Article 17 (1), IDD could not prevent this as it is difficult to prove manipulation and makes sense to raise the objection only in case of dispute.

Disclosure of conflict of interest relates to relationship of ownership kind between an intermediary and an insurance undertaking and to advice on basis of fair and personal analysis. The author seriously doubts whether ordinary consumers contemplate property interests of their counterparties when closing an insurance contract. We need to consider the insurance premium and other costs of the contract for the customer as playing more important role in the decision making. It is likely that the consumers would be more cautious in case of life insurance or expensive non-life insurance but it is unlikely that they would give attention to information about the relationship of the

[37] Recital 4 of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

insurance intermediary and insurance undertaking. On the other hand, an experienced businessperson could take this into account but the cases are limited as insurance of large risks is exempt from the disclosure obligation. Therefore, the author cannot say with certainty whether the obligation is beneficial for the consumer.

Insurance product information document is a new element in insurance distribution as it has not been part of the Insurance Mediation Directive. Considering all advantages and disadvantages of it, it seems to be a positive change. The obligation to create and distribute IPID cannot burden the product manufacturer and distributor in significant way while it can ease seeking for information from the client's side. For a client who wants to make informed decision and contemplate diligently entering into insurance contract it can provide essential support.

The requirement of a consumer-friendly form is complementary to the above stated measures on information disclosure. Receiving information which are hardly understandable even for an experienced professional would not support customer in making informed decision. If there was no provision regulating the language and format of the information, preparing complicated and illegible documents would be possibly *in fraudem legis* as it serves to circumvent the purpose of the legislation.

Provisions regarding conduct rules for insurance distributors are very general and difficult to evaluate as they are only basis and command for Member States to adopt legislation which shall ensure fair dealing. What seems apparent even now is that it would be very problematic to draft regulation which could fulfil the requirements. The author sees more potential of the conduct rules as supportive arguments in case of dispute. They shall also serve as prevention - for licencing and inspections of supervising authorities. Rules of conduct can contribute to ethical behaviour on insurance market but the determination to abide with them must arise from the company itself, a forced compliance cannot work.

To sum up the information disclosure part, the requirements and rules are generally able to support and ease decision making of a customer when the customer is willing

to contemplate the contract diligently. The provisions can be very beneficial to customers with financial literacy and some level of experience but would not probably help to everyone.

1.2.4 Sales process

The part on sales process examines the conditions for advised and non-advised sales and rules on cross-selling and bundled products.

To distinguish between advised and non-advised sales, we shall define what "giving advice" means. Advice is given when the insurance distributor recommends individually based on his or her personal opinion regardless whether it happens from his or her own initiative or because the client asked for the advice. The distributor shall always (both when giving and not giving advice) delimitate the demands and needs of the individual customer considering the information provided by the customer. The insurance distributor shall then inform the customer about main characteristics of the specific insurance product. The provided information should be objective and given in an intelligible way. The consecutive contract must meet the demands and needs of the customer. If the insurance distributor gives advice, it must be in a form of personalised recommendation explaining why this particular product meets the customer's requirement best. All the above stated must correspond with the specialities of the offered insurance product, especially its complexity and parameters.

Article 20 (3), IDD contains one more provision regulating advised sales: '*Where an insurance intermediary informs the customer that it gives its advice on the basis of a fair and personal analysis, it shall give that advice on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make a personal recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer's needs.'* What a fair and personal analysis really means is not very clear in this context, the preamble of Insurance Distribution Directive does not give us insight as its Recital 47 states that each case must be regarded individually based on the evaluation of each customer's needs and the market situation. Member States can however impose

additional requirements such as providing advice in all sales and not only in some of them.

Providing advice (specifically the fact whether advice was provided) can affect also duties of insurance providers in some jurisdictions. Insurance undertakings may be obliged to warn customers when there are gaps in insurance policy, unless the customer has discussed the insurance policy with insurance broker who shall give him or her advice, including potential gaps[38].

In case of tied insurance intermediaries, it might be more difficult to ascertain whether he or she can compare sufficient number of insurance policies when he or she distributes products of one or only a few insurers. The author believes that tied insurance intermediaries need to consider sufficient number of insurance policies in their scope. In case they are not able to do so, e.g. because they offer very limited range of insurance products, they shall not declare that they provide independent advice. Especially for insurance intermediaries tied to only one insurer, providing independent advice is hardly possible, unless the specific insure offers more insurance policies which cover sufficient proportion of the market or is exclusive provider of that certain insurance product (which might be applicable for non-traditional and unusual types of insurance policies).

To conclude the topic of advised and non-advised sales, the author must state that the provisions of IDD are so general that they shall be deemed as guidance and support for supervising bodies rather than ultimate requirements.

Insurance Distribution Directive newly introduces rules on cross-selling and bundled products. The main change is the obligation for insurance distributors to inform customers about bundled product, about the possibility to buy the bundled products separately and the restrictions for creating bundled products. IDD also authorizes

[38] PREPARED BY THE PROJECT GROUP RESTATEMENT OF EUROPEAN INSURANCE CONTRACT LAW a EDITED BY JÜRGEN BASEDOW ... [ET AL.]. *Principles of European Insurance contract law (PEICL)*. Munich: Sellier European Law Publishers, 2009. P. 96-97. ISBN 3866530692.

EIOPA to provide guidelines *'…for the assessment and the supervision of cross-selling practices indicating situations in which cross-selling practices are not compliant with the obligations laid down in Article 17.'* (Article 24 (4), IDD). However, EIOPA has not published the prospective guidelines until April 2018. IDD also leaves a possibility to Member States to adopt stricter rules on the topic and abolish providing services in which insurance plays an ancillary role and which might be detrimental to customers. The detriment must be demonstrated though.

1.2.5 Remuneration

Insurance Distribution Directive introduces new rules on remuneration and its disclosure to customers. The objective is to provide them with information about type of remuneration and information indicating the level of independence to an insurance undertaking and to a specific product too. It is essential to emphasize that the remuneration disclosure is mandatory not only for insurance intermediaries but also for insurance undertakings, those are also required to inform customers about the nature of remuneration their employees are given. Such measures shall preserve the market balance.[39]

Secondly, the rules on remuneration as well as insurance undertakings remuneration policies must not hinder the aim to provide impartial advice (in a broader sense) to the customers to follow the requirements on fair, clear and not misleading distribution. *Remuneration based on sales targets should not provide an incentive to recommend a particular product to the customer*[40].

IDD rules on disclosure related to remuneration are contained in Article 19 as provisions regarding conflict of interest and transparency. We have already discussed these issues partially in the part on disclosure and documentation, however not in relation to remuneration. IDD requires the intermediaries to inform their customers about nature of remuneration which can be in form of fee, commission or other kind of remuneration or combination of these types. Fee means a payment made directly by

[39] IDD rec. 40, 41
[40] IDD, rec. 46

the customer while a commission is paid by the insurance provider to insurance intermediary as remuneration for conclusion of the insurance contract, for customers it means they pay it indirectly as a (hidden) percentage of the insurance premium which makes the premium more expensive.. Other types of remuneration are a residual category which shall cover any economic benefit arising from insurance contract conclusion. On the other hand, insurance undertakings must inform only about the nature of remuneration of their employees. The requirements on insurance intermediaries in these matters are coming directly from the IDD while the requirements on insurance undertaking are expressed in the form, that member states shall ensure that they are fulfilled. Member states are expected to do so by means of requirements on individual remuneration policies of insurance undertakings[41]. Customers must be informed about amount of fee to be paid and also about other payments which are to be paid after the contract conclusion (with exception of premiums and scheduled payments). All the necessary disclosure must take place good time before contract conclusion. Furthermore, Member States can limit or prohibit the acceptance of any kind of benefits provided from third parties in connection to insurance products distribution[42].

Finally, it is not possible to give clear answer to the question of overall contribution of remuneration disclosure to customer's protection. Surely it can help to create a clearer view on the behaviour of the insurance distributor and on the reason why certain product is being offered. On the other hand, the expected benefit is always limited by level of financial literacy and interest of an ordinary customer.

1.2.6 Professional requirements

Provisions of Article 10, IDD contain tasks imposed upon Member States to ensure certain level of professional skills both for insurance intermediaries and insurance undertakings and their employees. Insurance Mediation Directive has already outlined main obligations regarding professional skills, however the rules were more general

[41] Ibid.
[42] IDD, Article 22 (3).

than those required by IDD and they were applicable only to insurance intermediaries while IDD covers also insurance undertakings and their employees.

IDD preserves the obligation introduced by IMD to have appropriate knowledge and abilities but goes further. Insurance distributors shall maintain their skills by taking annual trainings. Member States shall create their own rules on insurance distributors' knowledge and performance improvement or at least maintaining while they shall require at least 15 hours of professional training each year. Member States can also require certificate as evidence of the completion of the training. IDD (and IMD too) does not impose these requirements on all natural persons working for an insurance undertaking, it only required some of the management as well as employees working in insurance distribution to be compliant. IDD specifies the minimum professional knowledge and competence requirements in Annex I. It outlines three categories based on the product type: non-life insurance products, insurance-based investment products and life insurance products. While some of the requirements are common for all categories[43], some of them reflects the specifics of the relevant product[44].

Another professional requirement imposed upon insurance distributors under IDD is being of good repute. Good repute is linked to clean criminal record (for offences related to insurance and financial services) and to bankruptcy (unless rehabilitated). Insurance distributors are allowed to check criminal records of their employees and insurance intermediaries (in accordance with rules on intermediaries' registration).

Closely linked to the professional requirements outlined above is registration procedures since all insurance (also ancillary) intermediaries shall be registered according to Article 3, IDD. Insurance intermediaries shall obtain the registration only

[43] I.e. necessary knowledge of the product, terms and conditions, minimum knowledge of complaints handling, assessing customer needs, business ethics standards, minimum financial competency.
[44] I.e. minimum knowledge of claims handling, ancillary risks covered for non-life insurance products, minimum necessary knowledge of investment options, financial risks borne by the policyholders, organisation and benefits guaranteed by the pension system for insurance-based investment products, minimum necessary knowledge of organisation and benefits guaranteed by the pension system of the relevant Member State, insurance and other relevant financial services markets for the life insurance products.

if they meet certain professional requirements[45] Registration was part of IMD in quite similar extent as is now in IDD (we can date it even more further to the past as it was one of the objective of the Commission Recommendation 92/48/EEC of 18 December 1991 on insurance intermediaries).

Purpose of this registration is outlined in the recitals[46] of both directives. One of them is to enhance the mobility inside the EU (and therefore support freedom to provide services and freedom of establishment). The above shall be attained i.a. by the obligation to register only in the home Member State without need to do so in every Member State where services are provided. However, answer to the question where registration of insurance intermediaries, in case of cross-border activity, shall take place (whether in the home Member State or in the hosting one) was not clear. Approach of Basel Committee on Banking Supervision prevailed and the Member State where the insurance intermediary is authorised oversights also the activities in other Member States. Given the limited powers to restrict entry of the host Member State it was naturally necessary to harmonise the law across the EU to minimum standards. This follows the development of authorisation and supervision rights of states – at first, host countries were those who allowed entry into market (deciding based solely on nationality was forbidden), insurance intermediaries established in a Member State could operate in another Member State without need to authorize. Finally, as the merge of the two previous scenarios, intermediaries authorised in a Member State could entry the market in another Member State without further authorization[47].

The other purpose of registration is to improve consumer protection within the common market. This shall be achieved by means of exchange of information among national authorities responsible for registration of insurance intermediaries. The information exchange rule assumes that insurance intermediaries are active in more than one country. The question is what percentage of insurance intermediaries is active

[45] Recital 18 in fine, IDD.
[46] Recitals 20 and 34, IDD, Recital 8 and 15, IMD.
[47] LOWRY, John and P.J. RAWLINGS. Insurance Law: Cases and Materials. London: Bloomsbury Publishing, 2004. Chapter 2.7. ISBN 1782253459, 9781782253457.

in more than one country. Since no exact data on the percentage exist we have to make deductions. One of them is the assumption that rather large insurance intermediaries are active in more EU countries. The existing researches on the percentage of large intermediaries and their clients' portfolio indicates the following: Firstly, large insurance brokers do not cover very high market share[48]. Secondly, large insurance brokers provide services to big companies while small insurance intermediaries deal with small and medium enterprises[49]. Such setup leads to conclusion that the regulation of insurance intermediaries' registration does not particularly protects the clients who need it most – consumers.

IDD take a stance of minimum harmonisation in the area of registration as it only foresees the desired state of protection and rather outlines specific rules on the national registers and special cases[50]. Member States implementing law will have a big impact and can bring significant differences into insurance law in the EU.

The provisions on registration clearly follow the purpose to control the quality of insurance intermediaries by setting conditions for registration, e.g. fulfilment of professional requirements[51], disclosure of closely linked persons or shareholders with more than 10% share in the intermediary[52]. The role of the register to pre-emptively forbid unreliable persons from activity.

1.2.7 Insurance-based investment products

Insurance mediation directive did not content special regulation of insurance-based investment products (IBIPs). Under light of revision of legislation on Market in Financial Instruments Directive and Packaged Retail Investment Products Regulation,

[48] Insurance Intermediaries in Europe: Report to BIPAR [online].P. 1032 [cit. 2017-07-04]. Available at: https://www.draudimas.com/allpics/Insurance%20Intermediaries%20in%20Europe%202010%20Report.pdf,
[49] Ibid., p. 9
[50] Cp. Article 3 (1) (6-9), (2), (3), (4), IDD.
[51] Cp. Article 3 (4) (4), IDD.
[52] Cp. Article 3 (6), IDD.

revision of IMD needed to comply with the requirements imposed on products with investment elements[53].

Provision of Article 2 (17), IDD contains definition of IBIPs: …'*an insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations…'* then follows negative definition of the product which could be summarized in this way: life insurance product which is not payable only in case of death or complete incapacity, pension product serving only as an income in retirement, occupational pension scheme or pension product, compulsory pension product with employer's financial contribution. To sum up, IBIP is no mere insurance product but a capital investment disguised in an insurance product, e.g. unit-linked insurance plan.[54]

Insurance Distribution Directive regulates provision of insurance-based investment products in Chapter IV which introduces additional requirements regarding conflict of interest and its prevention, information to customers, assessment of suitability and appropriateness and reporting to customers. However, these rules are applicable only to two types of distribution – insurance intermediaries and insurance undertakings. It needs to be emphasized that all the requirements are additional to the general ones which are applicable to majority of insurance products, this means the general requirements must be fulfilled as well.

Conflict of Interest

The issue of conflict of interest arises mainly from the various activities which an insurance undertaking or intermediary does and the range of client it has. Insurance distribution directive foresees two types of measures which shall contribute to avoid conflict of interest – prevention and reaction to an existing conflict of interest by informing the affected clients. The legislation is conceived so that prevention is

[53] Explanatory Memorandum to the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on insurance mediation (recast), point 1.2

[54] DARLEDER, Peter et. al. Handbuch zum deutschen und europäischen Bank- und Kapitalmarktrecht. 3., erw. Aufl. 2014. Berlin: Springer Berlin, 2014. P. 259. ISBN 9783642450501.

important and essential part of the solution, while informing the clients shall serve only as an emergency option[55]. Not all conflict of interest cases can be avoided, so that the desired state is to treat conflicts of interests fairly, such an approach was taken e.g. in the UK before IDD was even published[56].

Prevention of detrimental effect of conflict of interest on clients can be ensured, pursuant to Article 27, IDD, by different measures such as organizational and administrative arrangements. According to EIOPA's Draft Technical Advice[57] the insurance undertaking or intermediary in question shall firstly identify the possible conflicts of interest (what kind and where it may arise), secondly it shall create conflict of interest policy.

The Draft Technical Advice explains firstly what is conflict of interest (when interest of the insurance undertaking or intermediary is related to insurance distribution activities and is different from the customer's one), who might happen to be in it (employees, managers, persons linked to the enterprise) and when it requires attention (when it may have negative impact on the services provided to the customer). Secondly, EIOPA indicates examples of situations which shall be always deemed as those with conflict of interest (gain profit, avoid loss; incentive to prefer someone's interests; benefit related to the provided service received from someone else than the customer; employees in insurance distribution are involved in IBIPs development).

According to EIOPA, the conflict of interest policy shall identify the situations of possible conflict of interest regarding the individual position of the insurance undertaking or intermediary and the group it may be involved in (such as concern or other related companies). The need for proportionality is highly emphasized but no indication or guidance for proportionality are given. However, EIOPA asks market

[55] EIOPA. Consultation Paper on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive [online]. , 171, [cit. 2017-07-09]. Available at: https://eiopa.europa.eu/Publications/Consultations/EIOPA-CP-16-006_Consultation_Paper_on_IDD_delegated_acts.pdf, p. 44 (para. 5)

[56] EDITED BY JULIAN BURLING and Kevin LAZARUS. Research Handbook on International Insurance Law and Regulation. Cheltenham: Edward Elgar Pub, 2012. P. 368. ISBN 1849807892.

[57] Ibid., p. 45-47

participants for information whether more detailed guidance is needed[58]. Furthermore, the insurance undertaking or intermediary shall explain which circumstances can be decisive for the question whether the conflict of interest may have negative effect on the customer and the services provided to him or her. As the next step the insurance undertaking or intermediary shall specify the procedures and measures which shall prevent any damages suffered by a client due to conflict of interest. The procedures and measures shall be proportionate and appropriate considering the size (also potential enterprise group membership) and type of business undertaken by the enterprise. EIOPA gives examples what shall be done in order to prevent detrimental impact on clients – dividing information channels within the company and among its employees, independent supervision of persons possibly situated in conflict of interest, remuneration and involvement of certain persons in insurance distribution. If all these measures and procedures fail to ensure fair dealing with the customer's interest, EIOPA prescribes that the insurance undertaking or intermediary shall come with other possibilities how to control the conflict of interest. EIOPA however does not offer any examples and leaves this question without answer for creativity of individual companies. Prescription of other measures than the "basic ones" is linked to the premise that informing customers about the possible conflict of interest is per se insufficient to prevent the possible damages. EIOPA partly overtook in its draft technical advice the requirements of Article 28 (3), IDD, and further elaborated it. When informing the customers about the risk of conflict of interest the insurance intermediary or undertaking shall provide the information on durable medium. The customer shall be informed about the nature of the conflict of interest impending and about the measures and procedure which the insurance undertaking or intermediary has taken to avoid the risk or to mitigate it. Additionally, it must be stated – if it is the case - that all the steps were not sufficient and that the risks persist so that the customer must decide about the insurance distribution knowing about the conflict of interest. Insurance undertakings and intermediaries shall review their policies and also maintain a list of occurred and impending conflict of interest and report this its senior management at least annually.

[58] Ibid., p. 44-45, para. 7

The author does not agree with EIOPA's strategy. The author suggests that prevention of conflict of interest shall be divided into several sections: creating conflict of interest policy which establishes theoretical measures and approach to the issue and organizational and practical measures. Conflict of interest policy shall be understood both as a description of the measures taken to prevent detrimental effect on clients and as a guide for the employees and management of the company how to work and deal with the situations. The policy as a guidebook shall therefore outline the examples of conflict of interest situations as well as general definition of the situation, examples of correct reaction to the situation, to-do list, basic principles etc. The organizational measures are generally very similar like those suggested by EIOPA in its Draft Technical Advice. On the other hand, the author does not share EIOPA's opinion that all the suggested examples must necessarily establish conflict of interest, tagging them as such may hinder their occurrence even though they might be beneficial for the customers (such as communication between the product development department and distribution as the distributors best know what the customers are asking for). To conclude, the author is not very optimistic about the efficiency of the system of control and prevention of conflict of interest. It may work in a bigger company where structure and hierarchy is necessary and the need for good repute is essential, but a small insurance intermediary (e.g. self-employed intermediary) can easily avoid fulfilment of the rules and even preparing such policy and conflict of interests list can be quite onerous for them and can be a useless administrative burden. This problem does not need to arise at all if the rule of proportionality of the arrangements according to the size and nature of business prescribes very low standards for such intermediaries, but it may not be the case as we don't have exact rules available yet. The above stated issues repeatedly arise throughout the whole Insurance Distribution Directive as it is written for large insurance undertakings and intermediaries even though these are not the main type of insurance intermediaries who serve consumers, the group of customers who shall be protected most.

Insurance Distribution Directive introduces also information obligation as part of the enhanced protection of IBIPs clients. According to Article 29 (1), IDD a client who received advice shall be provided with information whether their investment plan and

suitability of the product will be reassessed periodically pursuant to Article 30, IDD. Furthermore, the distributor shall warn the customer about specific risks and guide them in respect of proposed investment strategies. The insurance distributor is also obliged to provide information on the costs of the IBIPs and its distribution (fee for advice) and payment method. Costs for distribution and costs which are not linked to the investment risk itself shall be provided in aggregated form (or the opposite – specific costs of each item if the customer wish so). The aim of this requirement is to provide overview of the costs and charges and see the potential rentability of the investment product.

Under the Article 29, IDD which is called Information to customers we can find also rules on incentives. These rules are in close connection to issue of conflict of interest which we discussed above. Incentive means any fee, commission or non-monetary payment and it shall not be provided when it may be detrimental to the costumer's interest or circumvent the requirement for insurance distributors to act in the best interest for the customer.

1.3 Conclusion

Looking back at the core areas of customer protection in financial services, we shall now identify those which play the most significant role in insurance distribution in the EU. IDD focuses on disclosure and sales practices, prescribing disclosure of information about the insurance policies, insurance distributors and their relations to insurance undertakings and also about the main aspects of the service they are providing to the client in that particular case. Registration of insurance intermediaries plays one of the main roles in the law as it belongs to classic customer protection mechanisms.

Rules of conduct and internal policies both within the insurance undertaking and insurance intermediary are very important as well. Product oversight and governance is closely linked to this area. It represents interesting and new approach to consumer protection as it covers the whole lifecycle of insurance policy and shall serve as

prevention of consumer's detriment. It also deepens the relationship between insurance provider and distributor.

IDD is quite progressive legal regulation which has potential to help consumers significantly. It also evens the playing field in terms of regulated subjects – its scope covers now nearly all distribution channels - and the protected subject as it provides protection not only to consumers but also to customers who are not consumers with exemption of large risks insurance in some cases.

Weak point of IDD is promoting financial literacy among customers was not incorporated into the directive. It is very complicated area for any law but it is so important that it deserves attention at any time when it is possible to focus on it.

2. Banking law

2.1 Introduction

Client's protection in banking law is determined by the objective of responsible lending which can include prevention of over-indebtedness, financial inclusion and also other measures. Responsible lending is of broad interest globally and countries take different approaches to secure it. As we already mentioned before, according to World Bank[59] there are areas of measures to secure protection of consumers in financial services business – consumer protection institutions, disclosure and sales practices, customer account handling and maintenance (management), privacy and data protection, dispute resolution mechanisms, guarantee and compensation schemes (for the case of financial distress of the credit provider), financial literacy and consumer empowerment, competition (among the credit providers). In this part we will closely look at the measures which were adopted in the EU in the banking field, more precisely in credit business.

European legislation on client's protection in financial services is formed basically of Consumer Credit Directive[60] (hereinafter 'CCD'), Payment Services Directive[61], Mortgage Credit Directive[62] (hereinafter 'MCD') and also Directive on distance marketing of consumer financial services[63]. Payment services are out of scope of this work as they do not immediately have impact on financial situation of consumers, we shall focus now on Consumer Credit Directive and Mortgage Credit Directive. Distant

[59] Good Practices for Financial Consumer Protection. World Bank [online]. 2012 [cit. 2017-09-29]. Available from: http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1339624653091/8703882-1339624678024/8703850-1340026711043/8710076-1340026729001/FinConsumerProtection_GoodPractices_FINAL.pdf

[60] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

[61] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features

[62] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010

[63] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

marketing of consumer financial services is rather supportive to the consumer protection, so it is not primary topic of this work.

2.1.1 Historical development

The first pieces of legislation on consumer credit on the European level were two directives, one determining the conditions for credit providers[64] and one outlining the minimum harmonization provisions regarding consumer credit[65]. By the time of introduction of the directives the need for approximation of laws in the area of financial services became more urgent and was logical outcome of the approximation tendencies[66] in 1980s which followed after the European Court of Justice decision Cassis de Dijon[67], howsoever concerning very different product than credit, and the previous directive concerning business of credit institutions[68]. The first consumer credit directive was formed mainly by information duties, rules concerning contract such as its conclusion, form, termination, content, annual percentage rate of charge, rules on advertising (mainly its content), assignment of claims from credit agreement, special rules on credit agreements for goods or services supply[69]. We will further discuss these topics when analyzing the second Consumer Credit Directive. Purpose of the first directive was to support common market, it was also the reason why it was possible to introduce the directive[70].

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[64] Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC

[65] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit

[66] NUGENT, Neill. *The Government and Politics of the European Union*. 8. Springer, 2017, 512 p. 348ISBN 1137454105, 9781137454102,.

[67] Judgment of the Court of 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, C 120/78, EU:C:1979:42

[68] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions

[69] HOFFMANN, Markus. *Die Reform der Verbraucherkredit-Richtlinie (87/102/EWG): Eine Darstellung und Würdigung der Entwürfe für eine neue Verbraucherkredit-Richtlinie unter besonderer Berücksichtigung des deutschen und englischen Rechts: Schriften zum Europäischen und Internationalen Privat-, Bank- und Wirtschaftsrecht – Band 20*. Walter de Gruyter, 2007. P. 21. ISBN 3110914476, 9783110914474.

[70] European Commission's competence was based on Treaty establishing the European Economic Community and related instruments, 1957, Mar. 25, Article 94.

The final text of the directive was a compromise reached after years of discussions, which was mirrored in the minimum level of harmonization contained in the provisions[71]. The fact, that the directive is a result of compromise, is illustrated by the calculation of annual percentage rate of charge which had been initially left in discretion of Member States (Article 1 (2)(e)). The calculation methods were added firstly by the amendment introduced by Council Directive 90/88/EEC of 22 February 1990. Council Directive of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (87/102/EEC) amended again mainly the calculation of annual percentage rate of charge[72]. Transposition into national law was made differently in each Member State and as result the level of harmonization remained low and also Member States reacted differently to new phenomena occurring during years which required regulation, so consumers as well as credit providers could not expect similar laws in other Member States which prevented cross-border activities (may it be taking credit or pursuing business abroad)[73].

The first Consumer Credit Directive was designed for financial services environment of 1980s, it could not stand new trends and technologies which appeared in the next 20 years – more consumers were taking credit, absolute amount of money increased and common use of internet changed the process of taking credit (such as finding information online or distant conclusion of contract)[74]. After several years of discussions (commencing 2002 with European Commission Proposal[75] continuing with amended proposal in 2004[76] and modified proposal in 2005[77]). Final version of

[71] ČIKARA, Emilia. *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien die Umsetzung der Richtlinie 87/102/EWG und Richtlinie 2008/48/EG in das deutsche, österreichische und kroatische Verbraucherkreditrecht.* Wien: Lit Verlag Münster, 2010. P. 63. ISBN 36-435-0109-9.
[72] WÖSTHOFF, Philipp. *Die Verbraucherkreditrichtlinie 2008/48/EG und deren Umsetzung ins deutsche Recht.* Frankfurt am Main: Peter Lang, c2011. P. 24. ISBN 3631605943.
[73] ČIKARA, ref. 71, p. 64
[74] WÖSTHOFF, ref. 72, p. 35
[75] COM (2002) 443: Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers
[76] COM (2004) 747: Amended Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers repealing Directive 87/102/EC and modifying Directive 93/13/EC
[77] COM (2005) 473

the directive was adopted on 23 April 2008, entered into force 20 days after publication (that is 21 June 2008) and was to be transposed into national laws by 12 May 2010.

Mortgage credit was (in fact still is) excluded from scope of consumer credit directives. The reason why it was exempted from the Consumer Credit Directive of 1987 was that national level of consumer protection was sufficient (i.e. the minimum standards set by CCD were fulfilled) and regulation on European level could not support common market aims. Later the main initiatives concerning mortgage credit were focused on pre-contractual information which shall support consumers when comparing offers from borrowers and also vice versa borrowers when assessing their local and also foreign competitors[78]. In 2001 Voluntary Code of Conduct for Pre-contractual Information for Home Loans (hereinafter also the 'Code') was adopted by Commission. By the time it became effective (i.e. 30 September 2002) already 3600 institutions signed it up[79]. The Code was non-binding and was accepted in form of agreement, furthermore there were shortcomings due to missing compliance check mechanisms. However European Standardised Information Sheet (ESIS) which played the main role in pre-contractual information duties in the Code became later part of the new Mortgage Credit Directive.[80]

Commission released White Paper of 18 December 2007 on the Integration of EU Mortgage Credit Markets presented by the Commission[81]. The White Paper outlined several objectives which could be summarized as bringing more diversity and options in house loans and consequential strengthening of consumers' confidence. The objectives shall be achieved mainly by creating real common market and strengthening the competition among borrowers. The White Paper was published 6 years before

[78] LUNDE, Jens and Christine WHITEHEAD. *Milestones in European Housing Finance: Real Estate Issues*. John Wiley, 2016. P. 418. ISBN 1118929446.
[79] *Housing loans: more than 3 600 institutions have signed up to the European Code of Conduct, promising to keep customers better informed* [online]. 2002, 1 October 2002, [cit. 2017-10-10]. Available at: http://europa.eu/rapid/press-release_IP-02-1397_en.htm?locale=cs
[80] LUNDE and WHITEHEAD ref. 78, p. 418
[81] COM (2007) 807

Commission adopted the final piece of legislation – Mortgage Credit Directive (MCD)[82].

2.2 Consumer Credit Directive and Mortgage Credit Directive

As the history and background of CCD and MCD were briefly outlined we shall move on to evaluation of certain areas of the legislation. Content of the directives can be divided into several groups: scope, pre-contractual information and advertising, information concerning credit agreements, rights concerning credit agreements, annual percentage rate of charge, creditors and credit intermediaries, dispute resolution, creditworthiness assessment and advisory services.

2.2.1 Scope

CCD shall apply generally to credit agreements with certain exceptions – mortgage credit agreements, credit agreements to acquire right in land or building, credits with total amount of credit less than 200 EUR or more than 75 000 EUR, leasing agreements without obligation to purchase the object, overdraft facilities (typically credit cards), credits with no charges or credits with lower than average charges provided by employer, credit agreements with consumer's liability limited to security deposited to creditor, deferred payments granted free of charge and then some special cases.

The exceptions related to mortgage credit and credit to acquire right in land or building left space for Mortgage Credit Directive and special regulation introduced by it. It is quite questionable for the author why such credit agreements were exempted from the application of the directive when MCD requires even more advanced protection of the consumer. High importance of mortgage credit for consumers was emphasized in the past so the author would find it reasonable to include mortgage credit into newly introduced directive at least until mortgage credit legislation was released and became effective. Exemption of credits lower than 200 EUR and higher than 75 000 EUR raises some concerns too. Firstly, laying down absolute amount of money causes

[82] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

inequality among Member States and their citizens. While in rich Member State with high average salaries credit of 200 EUR does not affect an average consumer as much as it does affect an average consumer with significantly lower salary in less rich Member State. Prescribing absolute numbers is standard in European legislation and also in national legislations but it does not justify the inequality in provided protection. Setting fair thresholds for CCD application can be quite complicated but the author suggests leaving some discretion to Member State to choose the decisive amount of money themselves. The directive can on the other hand provide binding mechanism for setting it, e.g. based on average salary, average amount of money being borrowed etc. Of course, the creditors wishing to offer credits in different Member States would have to check the threshold in the respective Member State which may hinder the objective of common market but according to the author it is more important to protect the consumer than the creditor. Exemption of micro credits themselves (without defining them precisely) deems the author legitimate as compliance with CCD provision might cause additional charges and prevent parties to enter into credit agreement. The threshold for microcredits though must be set in compliance with real economic situation of consumers and specifics of the relevant market as was mentioned above. In relation with the exception in Article 2 (2) (j), CCD, which states that *credit agreements which relate to the deferred payment, free of charge, of an existing debt* are outside of the scope of the directive, we shall mention a recent ECJ decision[83]. It was ruled that deferred payment of existing debt is not made free of charge when the consumer is required to pay interests and costs which were not originally part of the credit agreement (but incurred because the consumer was due with payment). Deferred payment and rescheduling were offered by a debt collection agency acting on behalf of creditor.

Mortgage Credit Directive shall apply to *credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on residential immovable property or secured by a right related to residential*

[83] Judgment of the Court of 8 December 2016, Verein für Konsumenteninformation v INKO, Inkasso GmbH, Case C-127/15, EU:C:2016:934.

immovable property[84] and also to *credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building*[85]. The Directive shall not apply to similar scenarios as CCD (e.g. employee credit, overdraft facility, credits with no or limited charges) and also to two specific cases - where the credit is provided in exchange for share of sale price of the pledged property (mainly investment cases); and where the repayment depends on fulfilment of condition (event which occurs in consumer's life) defined by the Member State unless the consumer breaches the contract. The author sees some potential issues in the scope of the directive which are stemming from the diversity and specifics of each Member State's market with housing loans. Housing loans are often subject to national politics and are likely to be influenced by state's interventions which can even lead to very specific financial products. It might therefore be complicated to define accurately the conditions for MCD application. The Member States can include their own specific case into transposing law, on the other hand they may not. Either cause uncertainty for credit providers and therefore obstruct common market.

2.2.2 Pre-contractual information and advertising

Advertising

Consumer Credit Directive requires that Article 4, related to advertising, shall apply only to cases when the advertised credit agreements are presented with indication of cost of the credit or interest rate. In this case the advertisement shall contain information in form of representative example about total cost of credit, total amount of credit, annual percentage rate of charge (except of credits provided as overdraft facility) and, if applicable, duration of the credit agreement, total amount payable and the number of instalments, for credits related to purchase of certain service or goods (deferred payments) cash price and the amount of any advance payment. If the consumer must enter into ancillary service contract (mainly insurance), the obligation must be stated too. The information above need to be provided in clear, concise and prominent way and means of representative example shall serve to this purpose.

[84] Article 3 (2) (a) (i), MCD.
[85] Article 3 (2) (a) (ii), MCD.

Mortgage Credit Directive follows the requirements introduced in the CCD – scope of application is identic, information must be again provided in clear, concise and prominent way by means of a representative example (under MCD also easily legible and clearly audible) and the same kind of information must be provided except of those naturally inapplicable for mortgage credit, that is the information related to credit agreements concluded for purposes of goods or services supply, information about compulsory ancillary service. In addition, pursuant to MCD the advertisement shall include also identification of the creditor (or credit intermediary), the information whether mortgage security is needed and where applicable warning about possible change of exchange rate for credit agreements affected by currency rates.

Interesting question arises with the term 'by means of representative example' – while CCD does not provide any specification at what it is, MCD instructs Member States to adopt criteria for determining it[86]. For example, the UK legislation foresees that representative shall mean an example of agreement which would be concluded based on the advertisement and advertised APRC shall be charged to majority of the customers[87]. The author thinks that it is highly important to abide with the purpose of representative example (and therefore define them in legislation) such as case study of typical customer for certain product and not a perfect one as such may lead to very misleading statements albeit still compliant with law. Another interesting problem is caused by the narrow scope of application of advertising rules. The thought behind its narrow construction is probably, beside leaving space for national legislation[88], to avoid excessive burden for commercials if all the information would need to be published in all cases. On the other hand, these uneven requirements lead to advertisements which do not indicate interest rate or total cost of credit and rather promote the credit offers in different way[89]. It can be subject to discussion whether

[86] Article 11 (3), MCD.
[87] *Business Essentials - Company and Commercial Law Course*. BPP Learning Media, 2015. P. 199. ISBN 1472735056.
[88] Rec. 37, MCD
[89] HOWELLS, Geraint, Christian TWIGG-FLESNER a Thomas WILHELMSSON. *Rethinking EU Consumer Law: Markets and the Law*. Routledge, 2017. ISBN 9781351675321. Chapter 6 Consumer and Mortgage Credit, Advertising

advertisements which make impression that borrowing money is easy and safe of any risks and which encourages irresponsible lending, shall be regulated or not.

Pre-contractual information

Pre-contractual information shall serve as first mean to warn consumer before entering into contract and to provide data for thorough comparison of different offers. Consumer Credit Directive distinguish between credit agreements and credit agreements in the form of overdraft facility. Information to be provided in the latter case is adapted to the specific nature of the service. Both categories have though most of the obligation in common. The information shall be provided in good time before the consumer is obliged to any performance and shall be provided on durable medium by means of Standard European Consumer Credit Information form which is enclosed in Annex II to the directive. There are five categories of information to be provided according to Article 5, CCD – identity and contact details of the creditor/credit intermediary, description of the main features of the credit product, costs of the credit, other important legal aspects and additional information in the case of distance marketing of financial services.

For purposes of this work it is rather pointless to elaborate all the information into detail. We shall focus on the potency of pre-contractual information to help consumers. The initial idea is that informed consumers can best decide what contract they want to enter into. It also strengthens the principle of autonomy of will and preserves the free market without restrictions. What is more, it is easier to find compromise for full harmonization information rules than for other protective measures[90]. The consumer can make free decision based on their preferences may it be low costs, possibility of early repayment or absence of security. Creditors on the other hand cannot conceal certain information so easily and their previous misleading advertisement or behaviour would be confronted with clear information provided in the form. All these advantages are based on the assumption that the consumer reads and understands the provided information. Both shall be supported by legibility of the form and its standardization

[90] HOWELLS, Geraint. The Potential and Limits of Consumer Empowerment by Information. *Journal of Law and Society*. 2005, 32(3), 349-370. ISSN 0263-323X.

(laying down same forms with different offers enables less complicated comparison). The consumer must know however meaning of used terms and their consequences. It is hardly imaginable to draft legislation which would secure consumer's full understanding or full protection while preserving free contracting.

Above mentioned views apply for dealings face to face with enough time to contemplate the offer. For cases of distant marketing requested by the consumer, the consumer shall obtain full pre-contractual information immediately after concluding the contract[91]. In addition, when concluding credit agreement in telephone communication the consumer shall be informed already during the communication about the total amount of credit and conditions for drawdown, duration of the credit agreement, good or service and its cash price for credits in form of deferred payments, information about borrowing rate and payments. Providing these categories of information is only logical as the consumers can hardly take in and contemplate more than main features of the credit unless they are experts in certain fields. Obligation to provide customer with certain facts does not hinder the possibility to provide also other information or for the consumer to ask for them.

Mortgage Credit Directive also enumerates in Article 13 what information must be exactly provided to the consumer at all times on durable medium. Following the categorization of the pre-contractual information set in ESIS (in Annex II) we can divide them into these groups: information about the lender and where applicable also about the credit intermediary, main features of the loan, interest rate and other costs, frequency and number of payments, amount of each instalment, where applicable illustrative repayment table, additional obligations, possibility of early repayment, flexible features, other rights of the borrower, complaints, non-compliance with the commitments linked to the loan: consequences for the borrower, additional information where applicable and information about supervising authority. The amount of information is huge, completed ESIS would be several pages long. An ordinary consumer may have problems to distinguish between essential and less important features of the loan, taking into account the individuality of each case.

[91] Article 5 (3), CCD.

Financial literacy plays therefore important role in the helpfulness of such extensive amount of information.

Furthermore, MCD requires in Article 14 credit intermediaries to provide, upon information given by the customer about his or her financial needs and situation, personalised pre-contractual information which must be in any case in form of ESIS which is set out in Annex II and can serve to comparison of credit offers. The pre-contractual information shall be given on durable medium and before the consumer is bound by any credit agreement or offer. However, Member States have certain discretion with limits set in MCD regarding reflection period. Reflection period must be at least 7 days long and can be either constructed as period during which consumer can withdraw the contract or the consumer can accept the offer which must be in any case binding on the side of the offeror.

Quite controversial in the author's opinion is the provision[92] enabling Member States to introduce legislation forbidding acceptation of the offer for up to 10 days. Pre-contractual information shall serve as an instrument for making informed decision for consumers as they can easily compare offers. Reflection period strengthens the purpose of pre-contractual information by leaving enough time for consumers to contemplate. None of these instruments interfere with consumers' autonomy of will as ban of accepting offer before cooling-off period has elapsed. The consumer can have very good reasons why to accept an offer without waiting several days. E.g.- time pressure not to miss profitable deal etc. On the other hand, it is possible that creditors and credit intermediaries would find a way how to make consumers decide fast and under pressure (e.g. discounts or additional services free of charge when entering into the contract before certain date).

To conclude the topic of pre-contractual information, we shall examine a popular trick made by creditors which lies basically in reversing the burden of proof by letting consumers sign a clause stating that the consumer acknowledges that he or she

[92] Article 14 (6), MCD.

obtained all required information. This practice was subject to ECJ ruling[93] where the court found that reversal of burden of proof is not compliant with Articles 5 and 8, CCD, because consumer is not able to prove that he or she did not receive sufficient pre-contractual information. Such constellation would undermine the consumer rights conferred by CCD. The author shares the opinion and reasons laid in the judgment as enabling such a simple reversal of burden of proof would completely circumvent the objective of the legislation, i.e. strengthening the position of consumers.

2.2.3 Information concerning credit agreements

While pre-contractual information aims to provide complete information for the consumer to make an informed decision, information concerning credit agreements serve, beside information function, for interpreting the credit agreement and for case of dispute. Consumer Credit Directive contains in Article 10 extensive enumerative list of information to be included in credit agreement. Those are basic information about the contract and credit, costs and charges related to it, payment information, specifics for credit agreements with capital amortization, additional services costs and rights linked to it, consequences of late payment, whether sureties or insurance are required, right of withdrawal (if existent), information about early repayment, contract termination procedure. Credit agreements in form of overdraft facility are regulated also by some special provisions as we have seen by pre-contractual information. According to Article 11, CCD the consumer shall be informed about changes in the borrowing rate before such changes are effective, however it might be stipulated between the parties that such change is only to be announced publicly if it is subject to periodical changes in reference rate which is base for the borrowing rate.

Mortgage Credit Directive does not regulate the content of mortgage credit agreements in terms of information. It only instructs that changes in the borrowing rate shall be announced[94], the rules are very similar to those in CCD.

[93] Judgment of 18 December 2014, C-449/13, EU:C:2014:2464, para. 29-32
[94] Article 27, MCD.

In respect of information to be contained in credit agreements, we must not omit to mention ECJ decision[95] where the court stated that the information does not need to be contained in a single document so that a cross-reference in credit agreement to another document (which is also provided to the consumer in form of paper or another durable medium) is sufficient. The court emphasizes the condition that the information must be written in clear and concise manner in order to ensure customer's full comprehension with his/her rights and obligations. Furthermore, it is left for national law to provide that all documents bearing the necessary contract information must be signed[96]. In the same case it was also ruled that: *'a credit agreement need not indicate the specific date on which every payment to be made by the consumer falls due, provided that the terms of the agreement allow the consumer to ascertain the dates of those payments without difficulty and with certainty.[97]'* On the other hand Member States must not impose obligation which requires amortization table in a credit agreement to state the proportion of each instalment used for repayment of the capital[98]. The reason for this restriction may be, according to the author, the goal to ensure same level of harmonization throughout the EU. However, the author holds that such an obligation, imposed already under the CCD, would be beneficial in terms of certainty, clarity and dispute resolution. To conclude, the court ruled that penalties for not including all the required information into the contract must be proportionate so that the penalty of credit being interest and charge free cannot stand the requirement of proportionality when the breach of the information obligation does not cause consumer's unawareness of his or her obligations under the agreement[99]. In this case omitting to include annual percentage rate of charge, number and frequency of payments etc. in the contractual information is deemed to be such a severe breach of law that Member States can impose the penalty of interest-free and cost-free credit[100]. The author shares this position towards penalties.

[95] Judgment of 9 November 2016, C-42/15, EU:C:2016:842, para.. 30, 31, 33, 34, 45
[96] Ibid., paragraph 45.
[97] Ibid., paragraph 50.
[98] Ibid., paragraphs 55-59.
[99] Ibid., paragraphs 62 and 72.
[100] Ibid., paragraph 70, 71 and 73.

2.2.4 Rights concerning credit agreements

Consumer Credit Directive in Chapter IV regulates expressively, beside contractual information and information about borrowing rate, obligations related to credits in form of overdraft facility and overrunning, open-end credit agreements, rights of withdrawal, linked credit agreements, early repayment and assignment of rights.

Obligations in connection with credit agreement in form of overdraft facility concern information duty which is similar to the contractual information obligations for other types of credits. Credit in form of overrunning (overrunning is an agreed or tacitly accepted overdraft[101]) is linked also to information duty with lesser extent (information about overrunning, amount involved, borrowing rate and penalties, charges or interest on arrears).

Special rights concerning open-end credit agreements cover termination of the contract. The consumer can terminate the contract free of charge at any time, notice period applies when stipulated in the contract but must not exceed one month. On the contrary the creditor can terminate the contract only if agreed in the credit agreement (with termination notice on paper or on another durable medium) and the notice period must be at least two months long. The above mentioned rules apply to standard termination, CCD covers also cases of termination of the right to draw down from the open-end credit. This can be pursued only if agreed in the credit agreement and under objective reasons, the consumer must be informed before or right after the termination unless such information notice is not compliant with Member State's law or public policy or security (typically crime prevention or investigation).

Right to withdraw from the credit agreement

Withdrawal right is one of the strongest instrument for consumer and as such it was construed under CCD to leave little discretion power to Member States to adopt their own rules.

[101] Article 3 (d), (e), CCD.

The default setting, contained in Article 14 (1), CCD, is 14 days period during which the consumer can contemplate the credit agreement and withdraw from it. The period begins either with conclusion of the contract or in the moment when the consumer receives full contractual information depending on which date comes later. Paragraph 2 contains exception for linked credit agreements where Member States already before CCD had become effective adopted legislation prohibiting immediate disposal of linked credit but after specific period. In that case Member States can adopt exceptionally legislation allowing to reduce the withdrawal right period to the specific period but only upon explicit request of the consumer. According to the author such setting can be problematic as what shall be understood under explicit request – clause contained in general terms and conditions or separate annex to the agreement stating for example: 'hereby I pronounce that I explicitly requested that I reduce the period during which I am entitled to withdraw from the credit agreement.' Or is a completely separate request needed? Even if we ignore this issue, question of profitability for the consumer arises. This provision favors creditors and relies on the fact that the consumer already had enough time to withdraw from the contract. As we already discussed above, the whole concept of postponed availability of the credit is at least complicated.

The obligations linked to the execution of the right to withdraw are outlined in Article 14 (3), CCD. Firstly, the consumer must notify the creditor of withdrawing from the contract, the period is deemed preserved also by dispatching the notification before the deadline expires. The notification shall be made in such way that it can be proven according to national law. These requirements are standard in consumer protection law. Secondly, the consumer is obliged to repay the capital and the accrued interest calculated according to borrowing rate for the number of days elapsed between the repayment and dispatch of withdrawal notice. The creditor is entitled solely to the compensation of non-returnable charges paid to any public administrative body. The author regards this provision to be well-founded as it preserves balance between rights of both creditor and consumer. A consumer who is obliged to pay interest according to borrowing rate and payments made to public administrative bodies cannot misuse taking credit free of charge. Creditor cannot make profit on high charges related to

administration of the credit. Article 14 (4) CCD also prescribes that withdrawal from credit agreement is also always applied to ancillary services.

Similar scenario concerns linked credit agreements – if the consumer exercises his or her right which is guaranteed under Community law to withdraw from a contract for the supply of goods or services, credit agreements to fund such contracts are ineffective as well. This provision is, according to the author, reasonable because it would hamper consumer protection if he or she is guaranteed withdrawal right (for the contract for supply of goods or services) but exercising it would mean he or she has an extra credit which is now of no use. On the other hand, provision of Article 15 (2), CCD might be controversial stating that creditor can be held liable if the supplier breaches his or her duties related to the supply of goods or services and the consumer pursued remedies against him unsuccessfully. The extent and conditions for remedies against creditor shall be determined by Member States. The author sees the most significant issue in the fact that one person is held liable for breaches of contract without being contracting party. The creditor cannot fully affect supplier's behaviour so he or she shall not be made responsible for supplier's actions. Furthermore, the creditor is not professional in the area of the to be supplied goods or services and therefore might not possess enough expertise to assess the alleged breaches and claimed remedies. Finally, the creditor is not able to provide remedies without cooperation with the supplier or if necessary the creditor needs to engage substitute supplier. On contrary, the reason for the discussed rule is to make creditors consider with whom they cooperate (to cooperate only with reliable suppliers). Secondly, the creditors have more power over the suppliers than consumers to make them fulfil their obligations from the supply contract. Additionally, consumers might trust a certain supplier because of his cooperation with renown credit provider. As there are pros and contras for creditor's liability it is essential to assess national law for the details – the extent of creditor's liability can provide important element of consumer protection or can bring significant complications for creditors.

Early repayment

Right of early repayment surely belongs to the most important consumer rights in CCD as well as MCD. This right enables consumers to fully discharge their obligations under credit agreement and thereby cut the costs of the credit as they shall be cut off interest rate and the costs for the remaining duration of the credit. Both directives guarantee the right and some of its essential aspects but also protect the creditor from unjustified losses and abuse of rights from the side of the consumers.

CCD contains in Article 16 quite concrete rules for early repayment. For example, the creditor can seek compensation for costs arisen from the early repayment. However, such compensation is limited to 1% of the amount of credit repaid early when the repayment takes place more than one year before the termination date according to the credit agreement, for early repayment taking place less than one year before due date, the limit is 0,5% of the early repaid amount. The compensation shall not be claimed in the case that the early repayment is covered by insurance, overdraft facilities and if '*the repayment falls within the period for which the borrowing rate is not fixed.'* Member States can adopt their own rules regarding compensation limits. However, the compensation must not be higher than the interest the consumer would have paid if the early repayment had not taken place.

In the author's opinion, these rules guarantee the essence of the early repayment advantage for consumers. Making the credit more expensive when repaying before the due date used to be common practice for creditors and it used to be their way to secure certain level of profit, however it made the consumers unable to unbind themselves from useless credit and made them less flexible when coping with their finance, therefore are the provisions very beneficial for consumers. There remains a risk that Member States can prescribe different (higher) compensation limits and paralyze the provisions of CCD.

MCD (Article 25) is on contrary less prescriptive than CCD. According to recital 66, MCD the mortgage credit market is very heterogenous throughout the EU which is why a large space for Member States' discretion was procured. Firstly, Member States must adopt legislation which secures early repayment rights to consumers. Secondly,

it is left to Member States to introduce special conditions for early repayment, MCD foresees e.g. limitations as to time and circumstances of execution, justified compensation (never a sanction) up to the amount of financial losses incurred. Member States can also restrict early repayment in times for which borrowing rate is fixed only for cases of consumer's legitimate interest, such legitimate interest may be divorce or unemployment according to Recital 66, MCD. Finally, MCD contains also general obligation for the creditors to provide sufficient information (e.g. implications for the consumer and used assumptions) regarding the early repayment to the consumer.

Assignment of rights

If the creditor assigns rights from the credit agreement to a third party, the consumer's defences against the creditor shall be applicable also against the assignee, including set-off if possible under national law. The consumer has also right to be informed about the assignment unless the creditor continues to service the contract.

These rights for consumers do not guarantee necessarily anything new for the consumers as such rules often apply in civil law across the EU, e.g. in German civil law the debtor (in our case the consumer) need to be informed about the assignment and can apply his or her defences which he or she would have had against the original creditor in the moment of assignment[102]. Similar legal regulations are applied in Austria[103] and the Czech Republic[104]. As redundant as this provision might seem, it does not do any harm and can contribute to ensuring higher level of harmonisation and level playing field across the EU.

2.2.5 Annual percentage rate of charge

We will briefly discuss the regulation of Annual percentage rate of charge (APRC) in Consumer Credit Directive and Mortgage Credit Directive in order not to skip an important topic, however its core issues arise mostly from mathematical aspects rather than legal. Related provisions have never been disputed as to the formula.

[102] Germany. Act of 18 August 1896 Civil Code, as amended, sections 402 and 404 respectively.
[103] Austria. Act No. 946/1811 Federal Law Gazette, General Civil Code, as amended, section 1386.
[104] Czech Republic. Act No. 89/2012 Coll., Civil Code, as amended, section 1884 (1).

APRC can serve as an essential mean to compare credit offers because it represents one of the key factors in customer's decision making – the price. It is also easy to compare APRC among several offers. These considerations[105] led to unification of APRC mathematical formula and its anchoring in CCD and MCD. Article 19, CCD contains the most important assumptions which regulate the input data for APRC. Additional assumptions are set out in Part II of Annex I, they shall be applied if necessary. Shall the assumptions not suffice to calculate the APRC or shall they be outdated, Commission is entitled to adopt additional assumptions enabling the correct calculation of APRC. Article 17 and Part II of the Annex I, MCD contains similar assumptions and their application rules to CCD but the assumptions are tailored for the specifics of mortgage credits.

2.2.6 Creditors and credit intermediaries

CCD regulates creditors and credit intermediaries differently, but neither of them is extensively regulated. The control of creditors is entrusted to the Member States and their national law under the condition, that the creditors are '*supervised by a body or authority independent from financial institutions. This shall be without prejudice to Directive 2006/48/EC.*'[106] Even though the directive shall not be applied to all creditors in the sense of CCD, large number of them are regulated by the Directive 2006/48/EC (namely those creditors who are institutions receiving deposits from the public and granting credit for its own account[107]). The requirements imposed upon credit institutions are mostly concerning capital requirements, risk management, leading personnel, process of authorization etc. However, direct impact on consumer credit is not captured in the directive. In the author's opinion, the minimum (or rather zero) level of harmonization is corresponding with other areas of regulation contained in CCD. Furthermore, Member States usually allow only the institutions regulated

[105] Rec. 43, CCD.
[106] Article 20, CDD.
[107] Article 4 (1) (a), Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), which was repealed by Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

under the Directive 2006/48/EC to provide credit, the conditions remain similar in major EU countries[108].

Regarding credit intermediaries CCD leaves it to Member States to adopt legislation ensuring that credit intermediaries disclose fees payable by the consumer for the services of credit intermediary both to the consumer (in that case the information must be on a durable medium) and the creditor (to be able to include it in the APRC). The credit intermediary must also disclose his or her relation to creditors, whether he or she is independent broker or exclusive representative of some creditors.

Mortgage Credit Directive in Chapter 11 contains more detailed provisions on credit intermediaries and appointed representatives. Provision of Article 29, MCD regulates the admission of credit intermediaries – credit intermediaries shall always need to be registered and allowed to provide services by the competent authority of their home Member State[109]. In order to be admitted, credit intermediaries need to meet certain requirements and fulfil them on ongoing basis[110]. These requirements include indemnity insurance or similar guarantee against liability arising from professional negligence (Commission can adopt based on EBA's draft regulatory technical standards), good repute of the credit intermediary if natural person, if legal person then good repute of its leading personnel (good repute means particularly being subject to no police record related to financial activities or against property and not being declared bankrupt) and requirements concerning knowledge of and competency in credit agreements. Professional knowledge is further elaborated in Annex III, which contains categories of knowledge and competency forming the minimum level and also suggests to Member States dividing the knowledge and competence to qualification and experience and also introducing different requirements for creditors, credit intermediaries and appointed representatives.

[108] VANDONE, Daniela. *Consumer credit in Europe risks and opportunities of a dynamic industry*. Heidelberg: Physica-Verlag, 2009. P.118. ISBN 37-908-2101-2.
[109] Article 29 (1), MCD.
[110] Article 29 (2). MCD.

Credit intermediaries under MCD shall be registered in national registers which must be up to date and online[111]. The information to be entered into the register concern persons responsible for intermediation (managers and upon Member State's discretion also client-facing staff), information about the basis for providing services in the Member State (freedom of establishment or freedom to provide services) and information whether the credit intermediary is tied or not (if he or she is tied, name of the tying creditor, alternatively of tying credit intermediary in case of appointed representative). MCD also set requirements for headquarters and registered address of the credit intermediaries[112], the aim of this provision is to prevent credit intermediaries to register in the Member State with most favourable legislation. Member States shall establish single information point for easy access to national registers.

Provisions of Articles 30 and 31, MCD enable Member States to adopt legislation facilitating less strict rules for credit intermediaries tied only to one creditor and for appointed representatives. Credit intermediaries tied to only one creditor may be admitted through the creditor provided that the creditor is liable for the conduct of the intermediary and monitor his or her compliance with requirements concerning indemnity insurance, good repute and professional knowledge and competence. Appointed representatives, i.e. a person performing activities analogous to ones of credit intermediary on behalf of and under responsibility of one credit intermediary, are subject to similar rules as tied credit intermediaries, the responsible person in their case is the credit intermediary who appointed them, unless he or she is tied to one creditor, then it is the creditor. Appointed representatives need to be enlisted with the appointing credit intermediary in the register.

Cross-border activities of credit intermediaries are anticipated by Article 32, MCD. Credit intermediaries admitted in one Member States can provide services in another Member States based on the admission in the home Member State. Credit intermediaries willing to provide services in another Member States for the first time must notify its home regulating authority, which then notify the regulating authority

[111] Article 29 (4). MCD.
[112] Article 29 (5), MCD.

in the Member State concerned in order to allow it to enter necessary information into the register in the concerned Member State. This shall happen within one-month time so that credit intermediary may start the business one month after notifying its regulating authority. It needs to be said that freedom of establishment and freedom to provide services cannot serve to circumvent national law prohibiting appointed representatives (i.e. they cannot be active in Member States which do not allow them to operate) and non-credit institutions to operate (i.e. credit intermediaries cannot offer credits provided by non-credit institution). Consumer Credit Directive does not expressively regulate cross-border activities and passporting which is impractical and confusing given the quite elaborate rules in MCD.

MCD in its Article 33 anticipates also the possibility to withdraw from admission in cases of renouncement, inactivity, admission based on false or misleading statements, missing fulfilment of the requirements, infringement with MCD provisions and also in cases foreseen by national law. Home regulating authorities shall erase the credit intermediary from its register and also notify authorities in other Member States, where the credit intermediary carried out services based on freedom of establishment and freedom to provide services.

We shall also briefly outline supervision of credit intermediaries and appointed representatives as provided in Article 34, MCD. It is the responsibility of the home Member States to secure primary supervision of the credit intermediaries as well as appointed representatives. Host Member States (i.e. where credit intermediary has its branch) are competent to pursue supervision of compliance with MCD provisions affecting consumers. Firstly, when detecting breach of MCD the competent authorities in the host Member State need to request remedies from the credit intermediary in breach. If the credit intermediary does not take the necessary action, the host Member State can take action to fix the situation but must inform the home Member State about the action taken, which can, in case of dissent, seek assistance with EBA. In matter different from those directly impeding consumers, host Member State shall first notify the competent authorities for the home Member States which shall take appropriate action. If it fails to fix the problem within one month, the host Member State can take

all appropriate action necessary to protect consumers or seek assistance with EBA. The author finds these provisions very reasonable as the host Member States can take action only in cases where consumers' interests are threatened while they shall not interfere in cases where consumers are not directly involved so that they do not meddle in areas of regulation which shall be responsibility of home Member State. It is difficult to find balance between the interest of the home and host Member States as home Member States might be reluctant to take appropriate action when it is needed (albeit obliged to cooperate according to Article 36, MCD) while host Member States might tend to restrain credit intermediaries from other Member States to carry on business in their territory and effectively hinder common market and cross-border activity.

To conclude, we need to mention ECJ decision[113] declaring, that *'…a debt collection agency which concludes, on behalf of a lender, a rescheduling agreement for an unpaid credit, but which acts as a credit intermediary only in an ancillary capacity, which is for the referring court to determine, must be regarded as being a 'credit intermediary' within the meaning of Article 3(f)…'*

2.6.7 Dispute resolution

CCD in Article 21 promotes, in correspondence with current tendencies, out-of-court dispute resolution. National law shall enable effective alternative dispute resolution mechanisms while using existing bodies which shall cooperate in cases of cross-border dispute to resolve quickly. Nearly identical provision is to be found in Article 39, MCD. Out-of-court dispute resolution shall be beneficial for the consumer[114] as it is less formalistic, costly and complicated, mainly in case of cross-border disputes.[115] FIN-NET, a network of national organisations responsible for settling consumers' complaints in the area of financial services out of court, stated in its report[116] that in

[113] Judgment of 8 December 2016, C-127/15, EU:C:2016:934, para. 53.
[114] Recital 77, MCD suggests so by encouraging Member States to adopt rules which ensures the choice of dispute resolution depends on the consumer and creditors or credit intermediaries cannot avoid alternative dispute resolution when consumer chooses it.
[115] VANDONE Ref. 108. P.123.
[116] European Commission, Directorate General for Financial Stability, Financial Services and Capital Markets Union. *FIN-NET Activity Report 2016*. Brussels, December 2017. P.5.

2016 its members handled 2571 cross-border disputes, 1202 from banking sector and 592 from insurance sector, which is less than the total number of handled cases in the previous years (being 4195 in 2015, 3514 in 2014) while the numbers for banking sector remained similar averaging between 1200-1300)[117]. Quite interestingly, the numbers do not rise, even though consumers tend to be more self-assured, less worried to solve their dispute and despite the aims to strengthen common market in the EU.

2.6.8 Creditworthiness assessment

Creditworthiness assessment is one of the central goals of Mortgage Credit Directive as reaction to real estate bubble, consequential Global Economic Crisis of 2008 and one of its causes – irresponsible behaviour of market participants[118]. Creditworthiness assessment shall be the tool to prevent granting credit based on the current value of the property and speculative value in the future or based on the difference between the amount of mortgage credit and the value of the property (i.e. lump sum paid by the lender not from the mortgage).[119] Certain exception is preserved for mortgage credit granted for property renovation.[120] Instead, the decisive factor shall be the ability of the lender to repay the mortgage credit based on his or her circumstances.[121]

Pursuant to Recital 55, MCD *'all necessary and relevant factors that could influence a consumer's ability to repay the credit'* shall be considered. That means also fluctuation of consumer's income during his or her life or inclusion of income from renting out the property in cases of buy-to-let agreements[122]. Creditors shall respect the outcome of creditworthiness assessment – if it turns out that the consumer will be unable to meet his or her obligations under the credit agreement, the mortgage credit shall not be granted. On the other hand, even positive result of creditworthiness

[117] European Commission, Directorate General for Financial Stability, Financial Services and Capital Markets Union. *FIN-NET Activity Report 2015*. Brussels, October 2016. P.5.
[118] Recital 4, MCD.
[119] DE GIOIA-CARABELLESE, Pierre. *The Directive on the Credit Agreements for Consumers relating to Residential Immovable Property (Directive 2014/17):* a Regulatory Explanation and a Private Law Analysis. European Business Law Review. 2016. ISSN 0959-6941. P.43
[120] Article 18 (3), MCD.
[121] HAENTJENS, Matthias and DE GIOIA-CARABELLESE, Pierre. *European Banking and Financial Law*. Oxford: Routledge, 2015. P.72-73. ISBN 1317483073.
[122] Recital 56, MCD.

assessment does not oblige the creditor to enter into contract with the consumer.[123] Once the creditor concludes credit agreement with the consumer, the creditor cannot withdraw from the agreement, terminate or alter it because of incorrectly conducted creditworthiness assessment, unless the consumer provides false information (but this must be also stated by national law)[124]. This shall be without prejudice to private contract law.[125] How shall we interpret the provision? There are several possibilities for private contract law to allow termination or alteration of contract may it be due to error, change in circumstances, etc. The author would suggest that the creditor must not bespeak in the credit agreement that the contract is invalid or that it is possible to terminate it if the creditworthiness assessment was conducted incorrectly. However, if the incorrectness was so significant or the circumstances of the case would provide base for withdrawal, termination or alternation according to national private contract law, MCD would not hamper the creditor to use it.

Credit databases are another big topic for creditworthiness assessment – creditors can consult databases for purposes of creditworthiness assessment and default risk analysis, but they must not abuse them in commercial negotiations[126]. The consumer must be also informed that database is to be consulted and when the credit is not granted based on that consultation[127].

Property valuation is essential part of creditworthiness assessment and also of the whole process of credit agreement conclusion. MCD foresees that property valuation standards shall be available in Member States and are based on reliable international standards developed by one of the specified committees[128]. Creditors need to adhere to the standards or ensure that third party independent appraisers are compliant with them, unless these are regulated and monitored by Member States[129]. Both external and internal appraisers must be professionally competent and sufficiently independent

[123] Recital 57, MCD.
[124] Article 18 (4), MCD.
[125] Recital 58, MCD.
[126] Recital 59, MCD.
[127] Article 18 (5) (b) (c), MCD.
[128] Recital 26, MCD.
[129] Article 19 (1), MCD.

for the credit underwriting process so that their valuation is fair. It must be also recorded on durable medium kept by the creditor[130].

Consumer information necessary to conduct creditworthiness assessment shall be obtained from various sources, both internal and external, including consumer and his information disclosure to credit intermediaries. The information shall be verified accordingly.[131] Creditors shall specify to the consumers at the pre-contractual phase what information and what evidence to support it shall be submitted and at what point. No more information than actually needed can be required.[132] Creditors shall use various data regarding consumer's monetary situation – income (expected significant future increase of income shall not be relied to unless sufficient evidence is provided)[133], obligations and non-discretionary expenditures[134]. Member States shall ensure that consumers are aware of the consequences of providing incorrect, incomplete or no information.[135]

Consumer Credit Directive also contains basic rules on creditworthiness assessment in Article 8, however they are far less detailed than provisions of MCD, due to the lack of risk of credits granted because of expected increase in price of the property. However, responsible lending needs to be promoted and secured pursuant to Recital 26, CCD. Risks similar to those in MCD can also arise in credits regulated by CCD, e.g. credits secured by a pledge which price is expected to increase significantly over the duration of the credit, but such cases are rather exceptional and cannot influence the market so significantly as happened with mortgage credit. CCD therefore only provides that creditworthiness of the consumer shall be assessed based on sufficient information, may they be given by the consumer or originate from database consultation. Database consultation can remain compulsory for creditors in Member States where the preceding legislation provided so. Shall the amount of credit increase

[130] Article 19 (2), MCD.
[131] Article 20 (1), MCD.
[132] Article 20 (3), MCD.
[133] EBA. *EBA guidelines on creditworthiness assessment: Final report on guidelines on creditworthiness assessment EBA/GL/2015/11* [online]. In: . 19. 8. 2015 [cit. 2018-04-02]. Guideline 4.
[134] Ibid., para. 5.1.
[135] Article 20 (4), MCD.

significantly after conclusion of the credit agreement, the creditor needs to reassess consumer's creditworthiness.

In connection with provisions of CCD on creditworthiness assessment, we shall not omit to mention ECJ decision[136] where the court stated that if the creditor fails to conduct creditworthiness assessment, the sanctions for it shall be deterrent pursuant to Article 23, CCD. In the handled case, French law prevented the creditor from obtaining contractual interests but not statutory, which were paradoxically higher, therefore beneficial for the creditor who breached his obligations. ECJ ruled that Article 23, CCD shall forbid national law to impose sanctions which would not be deterring to the creditor as applying them would be advantageous for the creditor[137]. Another ECJ decision[138] stated that reversing burden of proof for obligations of creditor regarding creditworthiness assessment is forbidden, so that the consumer must not be the one who proves that the creditworthiness assessment was not conducted.

Creditworthiness assessment can also prevent consumers in their aims to obtain housing loan even though they will not be able to repay it. Consumers tend to regard real estate investments as secure despite of the market volatility, which is present especially outside of prime locations. It is complicated to prove if new requirements of creditworthiness assessment introduced in MCD contributed to drop in percent of defaulted mortgage credit. It depends on more factors such as central banks requirements on loan to value, phase of economic cycle, situation on local real estate markets etc. Next economic crises will show best if the real estate bubble known from the economic crises of 2008 will blow up again or not. At the moment, the author would say that the creditworthiness assessment is rather helpful for consumer protection even though it was not intended so at first.

[136] Judgment of 27 March 2014, LCL Le Crédit Lyonnais SA v Fesih Kalhan, C-565/12, EU:C:2014:190.
[137] Ibid., paragraph 55.
[138] Judgment of 18 December 2014, C-449/13, EU:C:2014:2464.

2.6.9 Advisory services

The terms advice and advisors are, according to Recital 63, MCD, considered seriously by consumers in the sense that the best options for them are being offered to them. Therefore, Member States can regulate the usage of these terms, especially when proclaimed that the advice is independent. Mortgage Credit Directive in Chapter 8 imposes to Member States to transpose in national legislation basic standards for advisory services. It needs to be noted that Consumer Credit Directive does not regulate advisory services.

Firstly, the consumer must be explicitly informed if advisory services are being or can be provided[139]. Consumers shall be also provided with information similar to pre-contractual information regarding recommendation, specifically the range of products in offer – credit intermediary's own product range or whole market product range, and fee payable for advisory services[140]. In order to provide advisory services, credit intermediaries shall obtain all relevant information from the consumer to be able to assess all the consumer's personal and financial circumstances to consider suitable credits and recommend one or more of them. The credit intermediary who is tied need to consider sufficient amount of offers of his or her product range and non-tied credit intermediary need to consider sufficient number of products on the market. As we often encounter in MCD and CCD, the provided recommendation shall be on durable medium. [141] Consumers shall be informed whether the recommended products reflect the whole market or only the products in the credit intermediary's portfolio[142].

Secondly, as already mentioned above, Member States can regulate usage of terms advice and advisory services. They can even prohibit these words when the 'advice' shall be given by creditors, tied credit intermediaries or appointed representatives of them. If Member States adopt such strict legislation, it is only logical, as 'advisors' who cannot consider the majority of the market, cannot possibly provide advice as they do not consider all the options. On the other hand, for advice to qualify as independent,

[139] Article 22 (1), MCD.
[140] Article 22 (2), MCD.
[141] Article 22 (3), MCD.
[142] Recital 64, MCD.

sufficient share of credit agreements must be considered and the credit intermediary must not be remunerated for advisory services by one or more creditors, unless they represent majority of the market. These rules do not hinder Member States in adopting stricter rules.[143]

To conclude, it needs to be stated that advisory services shall be provided only by creditors, credit intermediaries or appointed representatives.[144] In the above text, when it was referred about credit intermediaries, creditors and appointed representatives were meant too. MCD also contains provision about 'last moment warning' – when entering into a credit agreement may put the consumer in risk, the credit intermediary shall warn the consumer. However, including this provision is upon Member State's discretion.[145]

In the author's opinion provisions of MCD concerning advisory services, only reflect common sense and 'normal' state of things – advice needs to be personalised, otherwise it would be a common guideline, it must consider as many options as possible, otherwise it may be incorrect advice because of shortcomings in the spectrum of offers. Independent advice cannot be independent, if the advisor's remuneration depends on the creditor.

2.3 Conclusion

In the beginning, we said there were several key areas for consumer protection according to World Bank – consumer protection institutions, disclosure and sales practices, customer account handling and maintenance, privacy and data protection, dispute resolution mechanisms, guarantee and compensation schemes, financial literacy and consumer empowerment.

The two pieces of legislation we focused on in this part, CCD and MCD, cover mainly disclosure and sales practices, customer account management and dispute resolution.

[143] Article 22 (4), MCD.
[144] Article 22 (6), MCD.
[145] Article 22 (5), MCD.

The core of the directives lies in pre-contractual information, contractual information and rights arising from credit agreements, big impact is seen also in credit intermediaries and their behaviour, so they are extensively regulated. Dispute resolution is outlined in few provisions as left for Member States to deal with the requirements. Regarding the other key areas, European law regulates some of them in different pieces of legislation – privacy and data protection, compensation schemes and prudential regulation. However, the directives focus mainly on regulating the service providers in all cases (creditors, credit intermediaries or even data processors), a lot of administrative requirements are imposed upon them which is on one hand necessary, on the other not so efficient as the protagonists remain consumers. More efforts shall be put into financial literacy and consumer empowerment as it could prevent over-indebtedness and unfair handling.

3. Comparison

Previous parts described and analysed the chosen legislation of consumer protection in Insurance and Banking services. Now we shall determine the similarities and differences in both fields.

Before we start the comparison, we shall stop to think about the concept of consumer in the terms of 'who is regarded as typical or average consumer'. Average consumer shall be 'reasonably well-informed, reasonably observant and circumspect'. A consumer who is not as described, is seen as vulnerable and atypical but who, in reality, is the average consumer. The law chooses not to protect vulnerable consumers, howsoever typical, because it might obstruct business flow[146]. Most of the measures count with capable consumers which is an alibistic approach but may be also necessary. The old principle of '*vigilantibus iura*' leads us to the thought that you can provide protection and help to someone who can and wants to be helped to.

3.1 General comparison

If we look systematically at the topics discussed in previous parts, some of them can be compared in matters of insurance and banking, but some of them are linked strongly to banking or insurance business that they cannot be subject to comparison, e.g. APRC and early repayment. Some of the rules in one field can seem unrelated to the other field but if we regard them in bigger picture, connections and parallels can be found, such as creditworthiness assessment and determining target customers.

Insurance distribution and consumer credit (including mortgage credit) differentiate in the risk which is regarded as the most significant one for the consumers – in insurance distribution, the legislation mostly regulates the insurance distributors, so those who sell the products and in consumer credit law the biggest risk is seen in the product itself. This difference arises from the use case of the products, because in insurance services the customers receive added value in mitigating risks or eliminating them while in credit services the customers receive immediate money without need to wait

[146] Howells, ref. 90, p. 359.

to save them themselves and postpone the consumption. The results of the situation when the customers enter into detrimental agreements, differ in the fact, that for insurance products, the detriment can but does not have to occur because the insured incident may or may not happen, while for credits, the probability of detriment occurrence are significantly higher.

3.2 Selected topics

3.2.1 Contract clauses

Direct interference in form of forbidding certain contract clauses and prescribing content of contracts is a rare approach in European law[147] because it undermines the free will in contracting, if we can even speak of free will in today's mass production of contracts, which are to be taken or left by consumers without any power to influence their content. Member States also prefer to preserve their national contract law without alterations from European legislation[148]. The different consequences, impact on the consumer and economy may be the reason why the legislator chose to incorporate provisions regulating the content of credit agreements but not insurance agreements. Also the fact, that IDD regulates not only consumer contract but generally insurance contracts in the insurance distribution framework, might have played a role. CCD and MCD guarantee the right of withdrawal and early repayment. The consumers might not be able to negotiate such important clauses without legal requirements. IDD contains no provisions comparable to these, although we may imagine that right of withdrawal and premature termination of the contract could be incorporated. The author does not regard them necessary in the case of insurance contract as need for insurance policy usually lasts for longer periods of time and is not subject to frequent changes.

Risk sharing is another quite interesting concept in rigid contract clause. Its use has been found in linked credit agreements[149] where the credit is dependent on the contract

[147] We may find EU law which outlines prohibited clauses, such as Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, but generally legislators avoid direct interference.
[148] WEATHERILL, Stephen. *EU Consumer Law and Policy: Elgar European Law Series*. Edwar Elgar Publishing, 2013. P. 145. ISBN 0857936980.
[149] Article 15, CCD.

for supply of goods or services and the creditor is jointly liable for supply of goods. No such provision can be found in IDD even though insurance policies are often offered together with goods (e.g. warranty insurance or transportation insurance). Even though the author sees the joint liability in linked credit agreements as problematic, she believes it would be fair to include such a provision in insurance law too. Insurance policies are certainly less costly than credits for goods purchase and they are of less significance to the agreement conclusion but still some of them might be important part of the contract for goods purchase such as those of prolonged warranty for electronics. Withdrawal from such contract shall, according to the author, mean withdrawal from the insurance contract too as it is useless to have insurance for goods which is not in possession of the consumer.

3.2.2 Information disclosure

All three directives contain very detailed provisions on information disclosure – regarding what categories of information, when and how shall be disclosed. IDD focuses mainly on information linked to insurance distributors and less to insurance contracts, that is why the relevant information shall be disclosed prior to contract conclusion. MCD contains both pre-contractual and contractual information, majority of them related to the credit agreement and just some to credit intermediaries. CDD is limited to information related to the contract and omits information about credit intermediaries. The outlined differences among the directives reflect their main interests and aims. All of the directives introduce information forms[150] which shall simplify comparing different products by well-arranged forms.

Information forms can be helpful and support the importance of information but we must not forget that consumer's ability to use them fully is limited by certain tendencies in human thinking and behaviour: limited ability to understand and process information, self-serving interpretations, over- (and under-) optimism, warnings with less impact (preferring current smaller profit to future higher cost), presentation and

[150] Insurance Product Information Document, Standard European Consumer Credit Information form and European Standardised Information Sheet.

marketing.[151] In terms of credit (and sometimes insurance) products, another particular risk is imposing additional costs for consumer behaviour such as late payment which do not have to stand out from the disclosed information in the same way like extremely high APRC[152]. The maximum number of pieces of information to absorb by average person is seven, but the amount of information according to all three directives is much bigger which can lead, despite the standardized information forms, to information overloading[153]. The author therefore suggests highlighting the most important information or creating special section in the information forms bringing the most important information.

3.2.3 Professional requirements

IDD and MCD contain very similar rules on freedom to provide services and freedom of establishment – the rights and obligations of the intermediaries, host and home Member States. Regarding the requirements of knowledge, skills, repute, indemnity insurance and others, MCD and IDD do not differ significantly. They however take different approach to some groups of intermediaries – MCD contains less strict rules for credit intermediaries tied to only one creditor and appointed representatives as they do not have to register and fulfil professional requirements because creditors or credit intermediaries are responsible for their actions and omissions. On the other hand, ancillary insurance intermediaries can operate in 'milder' regime thanks to the fact that insurance distribution is not their primary occupation. According to the author, it is quite interesting, that credit intermediaries tied to one creditor may be practically operating in very similar way to employees of insurance undertaking but are regulated differently. Certainly, insurance intermediaries might be interested in appointing representatives but IDD does not foresee that. Vice versa, ancillary credit intermediaries could exist too but not regulated, respectively regulated as regular intermediaries. CCD contain no professional requirements for credit intermediaries, it only outlines information to be disclosed to consumers in connection to them. That is quite remarkable because intermediaries' regulation became essential part of consumer

[151] Howells, ref. 90, p. 359-361.
[152] Ibid., p.362.
[153] Ibid., p. 363.

protection and also unified registration in the EU contributes to execution of freedom of establishment and freedom to provide services. Credit intermediaries intermediate consumer credit in 29% of cases[154] which does not leave space for speculation of redundance of such regulation.

3.2.4 Advisory services

CCD does not regulate advisory services at all, IDD to some extent and MCD contains most detailed and strictest rules. IDD and MCD both requires that customers are informed whether they are being given advice or not and the advice shall be based on personal recommendation and the intermediaries shall consider sufficient number of products. IDD provides less strict regime for insurance product without investment elements while stricter regime is applied for IBIPs and is similar to the one under MCD. On the other hand, MCD provides big discretion area for Member States to introduce further restrictions. It is quite interesting that MCD contains elaborated rules while IDD does not, even though the core of the directive lies in the intermediation. For ordinary insurance, it may be understandable but for IBIPs it is not as such products are also very important for consumers.

3.2.5 Remuneration

Insurance Distribution Directive contains more detailed and stricter remuneration rules than MCD (CCD does not regulate remuneration at all). The reason is, according to the author, that recommending unsuitable insurance policies is easier and therefore more likely to happen than recommending unsuitable credits. The most important features of a credit agreement are the amount of credit, annual percentage rate of charge (total cost of credit) and default penalties, which can be compared easier than different insurance policies, where the customer needs to consider at least the insured risk, limits, premiums and exemptions from the policy. Recommending unsuitable policy for which the insurance distributor receive higher commission is therefore more likely to happen in insurance contracts and that is why it is more important for

[154] EUROPE ECONOMICS. Study on Credit Intermediaries in the Internal Market [online]. 15 January 2009, p. 193 [cit. 2018-04-22]. Available at: http://ec.europa.eu/internal_market/finservices-retail/docs/credit/credit_intermediaries_report_en.pdf

insurance law to introduce fair rules for remuneration[155] and its disclosure[156]. MCD regulates remuneration of credit intermediaries both for consumer protection[157] and in the sense of risk management and economy welfare[158], meaning the creditors shall not undergo inadequate risk, consumer protection does not play the main role. The author thinks that CCD (and partly MCD) should emphasize more consumer protection by introducing rules on remuneration disclosure and remuneration calculation because it may help the consumers in decision making and would not impose oppressive burden upon the credit intermediaries.

3.2.6 Conflict of interest

CCD does not contain any provision on conflict of interest while MCD regulates it directly only by providing that remuneration policies shall be drafted in such way that they avoid conflict of interest[159]. Otherwise it expects conflict of interest to be solved by disclosing certain information according to Recitals 22, 31, 47. IDD anticipates more elaborated measures to avoid it in connection with IBIPs. Generally, it is natural that especially insurance undertakings may encounter situations when they shall represent both parties (or are one of the party) but such a situation may happen also in connection with mortgage credit (e.g. two neighbouring properties whose owners seek mortgage credit with the same creditor). Consumers may apply for credit with different creditor therefore they may avoid detriment while customers of certain undertaking may be more threatened by conflict of interest arising when the insurance policy shall be executed. Therefore, the author understands different approaches for each of the directives.

3.2.7 Cross-selling, tying and bundling practices

CCD does not regulate tying and bundling practices. MCD allow bundling (products can be purchased together or separately) but forbid tying (products can be purchased only in package) unless tying is beneficial to the customer or the tied product is

[155] Article 17, IDD.
[156] Article 19 (1) (d) and (e), IDD.
[157] Article 7 (4), MCD.
[158] Article 7 (3), MCD.
[159] Recital 31, Article 7 (3) (b), MCD.

insurance policy. MCD anticipates even certain scenarios for bundling practices. IDD takes very different approach as it emphasizes information disclosure to the customer – possibility of purchasing the products separately, differences when purchased together and separately. Tying is forbidden for non-insurance products except of investment. The author finds the provision of IDD better as it emphasizes information of customer and explaining the differences between packages and separate products while defining the boundaries of cross-selling. MCD lacks information disclosure, which the author finds important – the customer should be aware of possibilities and their costs. The anticipated scenarios for bundling practices might be too casuistic.

3.2.8 Dispute resolution

All three directives provide that out-of-court dispute resolution shall be established. Some Member States established or will establish single institution to provide out-of-court redress.

3.2.9 Assessment of suitability of the product for the customer

MCD and IDD both anticipate that suitability of certain product shall be assessed when providing advisory services. Beside that, IDD provides that the product oversight and governance process shall contain also defining target market. MCD prescribes creditworthiness assessment. The two processes are very different but both of them carry features of suitability assessment. POG abstractly defines the future customers while creditworthiness assessment examines whether certain customer is eligible for mortgage credit with specific features. Both processes can contribute to overall consumer protection by eliminating consumers' wrong choices and represent boundaries even though creditworthiness assessment serve primarily as protection from irresponsible lending from the side of creditors.

3.3 Conclusion

In the above outlined areas, we saw that MCD and IDD regulate similar topics in similar ways using similar tools to ensure consumer protection. Their approaches usually differ slightly which can be due to the products in question and current interests, trends and aims of legislators. CCD contains only some of the rules and not

so in detail as the other directives. MCD is the most complex legislation and it is due to the role of mortgage credit in the economy, society and life of consumers. IDD is less strict and detailed but covers more areas than CCD, probably because it is 8 years younger than CCD and regulates also IBIPs which generally require more attention than simple everyday consumer credits. We need to emphasize the facts, that CCD omits regulating credit intermediaries and that IDD protects not only consumers but all customers, sometimes with exemption of insurance of large risks.

Conclusion

In this thesis, we examined the three main pieces of legislation in the EU regulating pre-contractual and contractual protection of consumers. We identified the key areas of protection and the means to achieve it. The main means and measures are very similar in insurance and banking law in general but contain minor differences. Information disclosure plays the main role in consumer protection, but it is limited by consumer and his or her knowledge and willingness to engage with it. The legislators rarely forbid certain provisions from contracts because it would interfere with free contracting will, nevertheless such measures are very effective. Rules of conduct and internal policies are only supportive measures and can play a more important role in internal controls rather than in the relationship with consumer. Out-of-court redress was introduced in both insurance and banking law and consumers make use of it, however it plays a supportive role only because exercise of rights can be achieved with standard methods of dispute resolution as well. Financial literacy of consumers appears in the legislation as a mere declaration because it does not belong to the objectives of this kind of legislation to ensure consumer's education, because systematic measures and processes to support it throughout the EU are needed.

All the consumer protection measures are limited by the consumers – their knowledge, experience and willingness to exercise their rights. Another boundary in consumer protection is the fact that legal regulation shall not hinder effective working of economy, circumvent progress and impose unnecessary administrative burden. In the end excessive consumer protection could decrease consumers' welfare because they benefit from innovation and progress in financial services which can be limited by the excessive protection.

Financial services law is largely influenced by the state of economy and trends in the times of legislation adoption – the more recent the more detailed and consumer empowering. Another determining element is the effect of the sector on the economy – mortgage credits can significantly affect it, therefore it is the most regulated area. In other words, consumer credit law is highly influenced by the fact that over-

indebtedness harms not only the consumers themselves but also the economy and social welfare (together with politics).

Seznam zkratek/List of abbreviations

APRC	Annual percentage rate of charge
CCD	Consumer Credit Directive
Cp.	Compare
e.g.	For example
EBA	European Banking Authority
EIOPA	European Insurance and Occupational Pensions Authority
i.e.	That is
IBIPs	Insurance-based investment products
IDD	Insurance Distribution Directive
IMD	Insurance Mediation Directive
IPID	Insurance Product Information Sheet
MCD	Mortgage Credit Directive
POG	Product oversight governance

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Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, cited as 'MCD' or 'Mortgage Credit Directive'

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Directive (EU) 2018/411 of the European Parliament and of the Council of 14 March 2018 amending Directive (EU) 2016/97 as regards the date of application of Member States' transposition measures

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Srovnávací analýza ochrany klienta bankovních a pojišťovacích služeb v EU

Abstrakt

Cílem práce je srovnat prostředky ochrany spotřebitele a její úroveň napříč Evropskou unií při poskytovaní pojistných a bankovních služeb. Výchozí tezí práce je předpoklad, že prostředky ochrany jsou v obou sektorech velmi podobné, neboť patří mezi finanční služby, které jsou regulovány podobným způsobem. První část práce se věnuje analýze Směrnice o distribuci pojištění, zkoumá její přínos pro ochranu spotřebitele a také ji z tohoto hlediska porovnává se Směrnicí o zprostředkování pojištění, která je platnou a účinnou v době uzavření manuskriptu práce. Druhá část práce se zabývá analýzou a srovnáním evropského práva týkajícího se spotřebitelských úvěrů, konkrétně Směrnice o smlouvách o spotřebitelském úvěru a Směrnice o smlouvách o spotřebitelském úvěru na nemovitosti určené k bydlení. Obě směrnice jsou porovnány z hlediska aplikovaných prostředků ochrany spotřebitele a toho, jak ochranu spotřebitele zajišťují celkově. Třetí část práce se věnuje srovnání právní úpravy, která byla zkoumána v předchozích dvou částech, dále také zdůvodňuje rozdíly v přístupech k ochraně spotřebitele zvolených v jednotlivých směrnicích a jejich zaměření na jednotlivé oblasti. Výsledkem provedené analýzy je to, že prostředky ochrany spotřebitele jsou v bankovnictví a pojišťovnictví velmi podobné, vyskytují se ovšem i zásadní rozdíly plynoucí z podstaty poskytovaných služeb. Nejpropracovanější směrnicí, která zajišťuje nejvyšší úroveň ochrany spotřebitele je Směrnice o spotřebitelském úvěru na nemovitosti určené k bydlení, a to patrně z toho důvodu, že úvěr na nemovitosti určené k bydlení hraje velmi důležitou roli v životě spotřebitele, ale i v ekonomice. Směrnice o distribuci pojištění nabízí vyšší stupeň ochrany spotřebitele než Směrnice o smlouvách o spotřebitelském úvěru. Důvodem je pravděpodobně to, že Směrnice o distribuci pojištění byla přijata o 8 let později a upravuje nejen pojišťovací smlouvy, ale i distributory pojištění, zatímco Směrnice o smlouvách o spotřebitelském úvěru zprostředkovatele úvěru neupravuje. K rozdílné úrovni ochrany spotřebitele přispívá také fakt, že hlavní cíle všech tří směrnic jsou rozdílné – Směrnice o smlouvách o spotřebitelském úvěru se zaměřuje téměř výhradně na úvěrové smlouvy, Směrnice o

smlouvách o spotřebitelském úvěru na nemovitosti určené k bydlení upravuje nejen úvěrové smlouvy, ale i zprostředkovatele úvěru, zatímco Směrnice o distribuci pojištění se zabývá hlavně distributory pojištění, pojistnými smlouvami však pouze omezeně.

Comparative analysis of client´s protection in banking and insurance services within the EU

Abstract

The objective of this thesis is to compare measures of consumer protection and its level in insurance and banking services in the EU. The premise is that the measures are very similar because both areas are subject to financial services law and as such they are similarly regulated. The first part of this work analyses and examines Insurance Distribution Directive and its contribution to consumer protection. The thesis compares Insurance Distribution Directive with Insurance Mediation Directive which is the legislation in force as of the time of writing this thesis. The second part of the thesis analyses, examines and compares Consumer Credit Directive and Mortgage Credit Directive and their contribution to consumer protection. The third part of the thesis compares the two previous parts and describes the reasons for different approaches taken in the researched legislation. The result of the analysis is that the measures taken for consumer protection are indeed very similar with differences originating from the nature of the services. The most elaborated directive which ensures the highest level of consumer protection is Mortgage Credit Directive and it is due to the significance of mortgage credit for lives of consumers and for the economy. Insurance Distribution Directive offers higher level of consumer protection than Consumer Credit Directive which is probably due to the fact that it was adopted more recently and that it regulates to large extent not only insurance contracts, but also insurance distributors. Consumer Credit Directive omits regulation of credit intermediaries. Another factor causing different level of consumer protection is that the main objectives of the regulation are different – for Consumer Credit Directives, the main objective is contract for credit, for Mortgage Credit Directive, the main objective is contract for mortgage credit but also credit intermediaries while Insurance Distribution Directive mainly regulates the insurance distributors.

Klíčová slova/ Key words

Klíčová slova:

Směrnice o distribuci pojištění

Směrnice o spotřebitelském úvěru

Směrnice o spotřebitelském úvěru na nemovitosti určené k bydlení

Key words:

Insurance Distribution Directive

Consumer Credit Directive

Mortgage Credit Directive