

Steptoe & Johnson LLP note for BIPAR Early or late implementation and application of IDD: legal consequences

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INTRODUCTION

Originally, Member States were required to implement the Insurance Distribution Directive (IDD) - a “Level 1” text - into national law by 23 February 2018 and to apply it from that date.

The EU co-legislators have agreed to postpone the deadlines for implementation and application of the IDD, as follows:

- By 1 July 2018, the Member States must implement the IDD into their national laws. By that date, the Member States have to adopt and publish their national law measures necessary to comply with the IDD;
- As for the application date, the Member States have to apply the national rules from 1 October 2018 at the latest.

The IDD also provides for two “Delegated Regulations¹” – “Level 2” texts. The application date of these Delegated Regulations has also been amended. They will apply “*from the date from which Member States are to apply the measures [necessary to comply with the IDD]*”.

In other words, the two IDD Delegated Regulations will apply from 1 October 2018.

EARLY IMPLEMENTATION AND APPLICATION OF THE IDD

Insurance intermediaries carrying on cross-border activities throughout the EU must take into account possible early implementation and application of the IDD in certain Member States (for example, Germany).

IDD (Level 1 text)

The postponement of the IDD application date to 1 October 2018 does not prevent individual Member States from applying the national rules implementing the IDD before the 1 October deadline.

If a Member State decides to implement and apply the national implementing rules before 1 October, insurance intermediaries pursuing activities in that Member State (the host Member State) on a freedom of services or establishment basis will need to comply with the IDD-based national provisions even before the 1 October application deadline.

In this case, an insurance intermediary will be subject to the host Member State conduct-of-business and information requirements, as well as to any host Member State rules that go beyond the IDD requirements (the general good rules).

IDD Delegated Regulations (Level 2 texts)

The Level 2 texts are regulations: they apply directly in Member States, *i.e.* without any implementing national rules. They can therefore only apply from the specific date of application set out in the text of the regulations.

The postponed application date of the two IDD Delegated Regulations is the date from which Member States have to apply the national rules implementing the IDD, *i.e.* 1 October 2018.

¹ The two IDD Delegated Regulations further specify the product oversight and governance requirements, and the information and conduct-of-business requirements applicable to distribution of “insurance-based investment products” (IBIPs).

Therefore, even if a Member State chooses to implement and apply the IDD before the application deadline, the IDD Delegated Regulations will only apply from 1 October.

LATE IMPLEMENTATION AND APPLICATION OF THE IDD

An insurance intermediary may also face situations where the intermediary's home Member State or the host Member State(s) in which the intermediary pursues cross-border activities fail to implement the IDD by 1 July or to apply it by 1 October.

IDD (Level 1 text)

From the implementation deadline of 1 July, the IDD will have the so-called "vertical direct effect". This means that, if a Member State does not implement the IDD by 1 July, insurance intermediaries and other persons (for example, customers) will have the right to enforce certain IDD provisions against the State or a public authority in the State in a court of a Member State.

To be enforceable, an IDD provision must meet a number of requirements set by the case law of the European Court: the relevant provision has to be clear and precise, unconditional and cannot give the Member States substantial discretion in its application.

Generally, even if a Member State fails to implement the IDD by the 1 July deadline, an insurance intermediary or other natural or legal person will not be able to rely on the IDD provisions in actions against other persons (there is no so-called "horizontal direct effect").

The IDD provisions may still affect intermediaries' relations with other private parties since the courts of the Member States will have to interpret the existing national legislation as far as possible in a manner that is consistent with provisions of the IDD.

IDD Delegated Regulations (Level 2 texts)

In principle, the two IDD Delegated Regulations will apply from 1 October 2018.

However, the IDD Delegated Regulations are non-legislative acts that supplement the IDD rules. Therefore, if a Member State does not adopt any national rules to implement the IDD, there will be no national rules to be supplemented by the IDD Delegated Regulations.

That said, from 1 October the two Delegated Regulations will apply to any enforcement actions in Member State courts.

ORIGINAL IMPLEMENTATION DATE AND PUBLICATION OF THE POSTPONEMENT

The "quick fix" directive postponing the IDD implementation and application dates was not adopted and published in the Official Journal of the EU by 23 February 2018. However, that directive provides for a retroactive application from 23 February.

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