

# The Insurance Distribution Directive

*A Handbook on Cross-Border Insurance Distribution  
by Insurance Intermediaries in the EU*

January 2019



## Foreword - BIPAR

The Insurance Distribution Directive<sup>1</sup> ("IDD") entered into force on 22 February 2016. It replaced the Insurance Mediation Directive ("IMD") from 1 October 2018.

The IDD changes how insurance intermediaries operate across the borders of the EU Member States<sup>2</sup>. One of the changes to the previous framework is particularly relevant to insurance intermediaries operating cross-border: the IDD clearly divides the oversight powers between Member State competent authorities over intermediaries which provide their services abroad on a freedom of services ("FOS") or freedom of establishment ("FOE")<sup>3</sup> basis. Details can be found in the handbook.

The IDD does not clarify **when** intermediaries are considered to be operating abroad on a FOS or FOE basis. The lack of clarity in the IDD on the triggering element of FOS (and, to a lesser extent, FOE) is significant since an intermediary operating under FOS or FOE:

- » has to comply with the general good rules of the host Member State, and these may result in stricter information and conduct of business requirements; and
- » is exposed to a varying degree of oversight and enforcement by the host Member State competent authority.

A September 2018 Decision of EIOPA's Board of Supervisors on the cooperation of national competent authorities with regard to the IDD (replacing the "Luxembourg Protocol") partly clarifies when an intermediary is likely to be pursuing cross-border activities, i.e. the triggering element.

Based on our own continuous work on this topic, we appreciate its importance for insurance intermediaries in the EU. EIOPA itself has noted increased cross-border activity in its December 2018 Evaluation of the Structure of Insurance Intermediaries Markets in Europe.

In order to provide insurance intermediaries with updated and practical information, we commissioned the Brussels office of Steptoe & Johnson LLP to draw up a handbook on Cross-Border Insurance Distribution by Insurance Intermediaries.

We thank the authors, Guy Soussan and Philip Woolfson, Partners, and Algirdas Semeta, Legal Consultant, for their fruitful work and Isabelle Audigier, BIPAR Legal Director, who led BIPAR participation in this work.



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<sup>1</sup> Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

<sup>2</sup> Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom (until 29 March 2019 inclusive). The IDD also applies to Iceland, Liechtenstein and Norway (together with the EU Member States, these three countries constitute the European Economic Area ("EEA")).

<sup>3</sup> Broadly, FOS means that the intermediary is established in its home Member State and provides services directly from there to another market, the host Member State; under FOE, the intermediary sets up a branch (or comparable structure) in the host Member State.

# Foreword - Steptoe & Johnson LLP

For many years, clients have been consulting Steptoe's Brussels office on EU legal and regulatory questions arising out of cross-border distribution of insurance; identifying when cross-border activity arises has been a recurrent question. Based on this experience, we have therefore been delighted to work with BIPAR on this handbook.

We have drafted this handbook to help intermediaries to determine whether they are pursuing cross-border insurance distribution activity under FOS (freedom of services) or FOE (freedom of establishment). To do so, this handbook:

- » explains how to identify cross-border FOS/FOE activity, including by analysing practical situations that may occur when distributing insurance contracts;
- » gives an overview of the Insurance Distribution Directive framework which applies to intermediaries operating under FOS/FOE; and
- » draws intermediaries' attention to certain selected matters that need to be taken into account when distributing insurance across borders.

This document is mainly focused on **distribution of direct non-life insurance**. It also only covers insurance distribution in the EU by insurance intermediaries established and registered in the EU.

## Who should read this document?

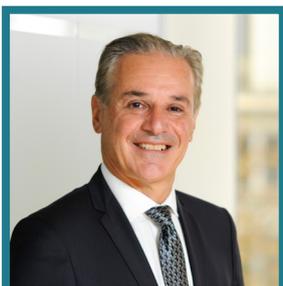
This document will be of interest to persons whose activity relates, in one way or another, to sales and/or administration of insurance contracts.

Insurance brokers, agents, and other persons who are currently registered as insurance intermediaries - in particular, their legal and compliance departments - should read this document in order to check whether they may be operating in another Member State on a FOS or FOE basis, and to ensure their activity complies with all relevant rules.

## After reading this document

This document is not exhaustive and is provided solely for general information purposes. It does not provide legal advice. It is based on the provisions and requirements of the IDD itself and other EU law sources.

If after reading this document, you consider that you may be pursuing insurance distribution activity in another Member State either of a FOS or FOE basis, you should seek legal advice relevant to your individual situation.



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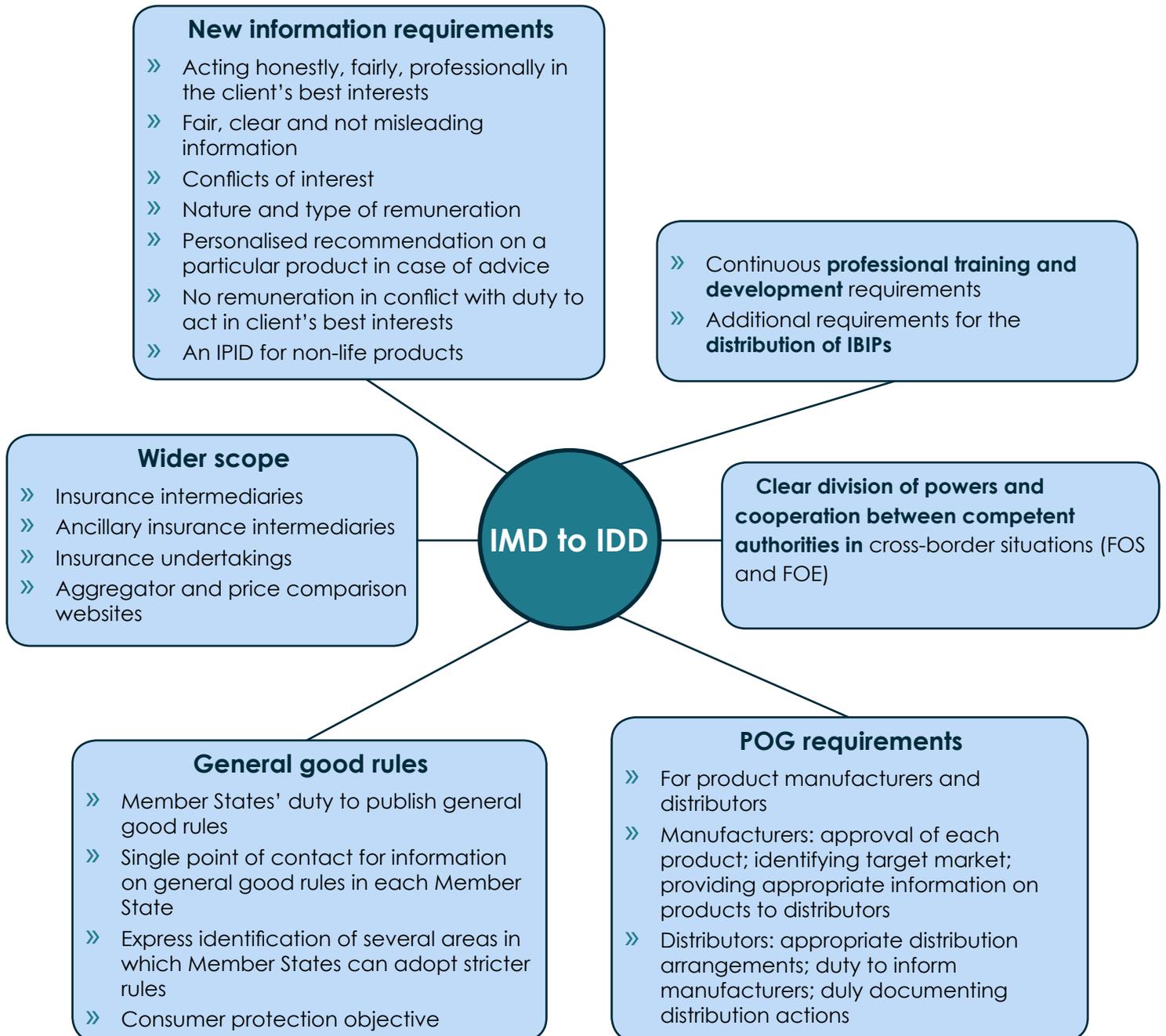


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# Contents

From IMD to IDD: key changes at a glance .....	5
Am I within the scope of the IDD? .....	6
Am I conducting cross-border business under FOS? .....	9
How to conduct cross-border business under FOS? .....	13
General good rules of the host Member State .....	14
Types of general good rules .....	15
Which authority will oversee my FOS business? .....	16
How to identify cross-border services? .....	18
Am I conducting cross-border business under FOE? .....	21
How to conduct cross-border business under FOE? .....	25
Which authority will oversee my FOE business? .....	26
Certain legal and tax questions in cross-border situations .....	27
List of abbreviations .....	29

# From IMD to IDD: key changes at a glance



# Am I within the scope of the IDD?

The IDD applies to various persons who undertake insurance distribution activity.

## “Insurance distribution”<sup>4</sup>

The following activities constitute insurance distribution:

- » advising on insurance contracts;
- » proposing insurance contracts;
- » carrying out work preparatory to the conclusion of insurance contracts;
- » concluding insurance contracts;
- » assisting in the administration and performance of insurance contracts, in particular in the event of a claim; or
- » when the customer is able to (indirectly) conclude an insurance contract using a website or other media:
  - providing information concerning insurance contracts in accordance with criteria selected by customers through a website or other media; or
  - compiling an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract.

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<sup>4</sup> Article 2(1)(1) of the IDD.

<sup>5</sup> Article 2(2) of the IDD.

## “Contract of insurance”

Insurance distribution comprises various activities relating to sale/performance/administration of contracts of insurance. If a product sold by an intermediary does not qualify as an insurance contract, the intermediary’s activity will not constitute insurance distribution. However, the intermediary may be conducting another regulated activity which requires a different licence/authorisation.

## Activities which do not constitute insurance distribution

The following activities are not insurance distribution<sup>5</sup>:

- » providing information on an incidental basis in the context of another professional activity (such as business of tax experts, accountants, lawyers, etc.);
- » only providing information (without taking any additional steps to assist in concluding an insurance contract):
  - on potential policyholders to intermediaries or insurers; or
  - to potential policyholders about insurance products, intermediaries or insurers (cf. “introducing”);
- » managing claims of an insurer on a professional basis; and
- » loss adjusting and expert appraisal of claims.

### IDD vs IMD

The IDD broadly applies to the same core activities as the IMD. However, there are two significant differences:

- » making introductions is not an insurance distribution activity; and
- » insurance distribution expressly covers several activities conducted through aggregator/price comparison websites.

### Types of insurance products

The IDD applies to distribution of:

- » Non-life insurance products;
- » Life insurance products; and
- » Insurance-based investment products (IBIPs).

### Persons pursuing insurance distribution

The following persons pursuing insurance distribution activity fall within the scope of the IDD:

- » insurance intermediaries;
- » ancillary insurance intermediaries; and
- » insurance undertakings.

### “Single licence” and “passport rights”

The IDD creates a “single licence” for insurance intermediaries and ancillary insurance intermediaries. The single licence means that, once an insurance intermediary/ancillary insurance intermediary is duly registered in its home Member State, it has the right to operate under FOS and FOE in other Member States (subject to the IDD notification procedure).

In contrast, although the IDD requirements apply to insurers pursuing insurance distribution, their single licence and passport rights derive from the Solvency II Directive, not the IDD.



# Insurance intermediaries vs ancillary insurance intermediaries



## Insurance intermediary

- » Person who carries out insurance distribution for remuneration

### Examples:

- » insurance broker
- » insurance agent
- » bancassurance operator
- » other person who assists policyholders in performing their contracts
- » person running aggregator/price comparison website (subject to conditions)
- » credit institutions and investment firms (where they distribute insurance)



## Ancillary insurance intermediary

- » carries out insurance distribution for remuneration on ancillary basis
- » principal professional activity is not insurance distribution
- » only distributes insurance products which complement a good/service
- » product does not provide life or liability cover (with exceptions)

### Examples:

- » travel agency
- » car rental company
- » car dealership
- » optician
- » dentist

# Am I conducting cross-border business under FOS?

FOS is one of the four “fundamental freedoms” of movement underpinning the EU’s Single Market. The notion of FOS has been extensively interpreted by the Court of Justice which has established several principles interpreting the basic EU concept.

## Cross-border character

FOS requires a cross-border element. The concept covers situations where the service provider and the recipient are established in different Member States and:

- » the service provider moves to another Member State to provide the service;
- » the recipient moves to the Member State of the provider to receive the service; or
- » the service is provided without the service provider or the recipient moving to another Member State.

## Purely national situations

FOS does not cover situations where all elements of an activity are confined to a single Member State.

## Temporary character

FOS is characterised by its temporary nature which is assessed on the basis of the duration, frequency, regularity and continuity of the activity:

- » temporary character does not prevent the service provider from having some form of infrastructure in the host Member State (for example, an office or consulting rooms) in so far as such infrastructure is necessary to provide the relevant services;
- » as such, providing services in another Member State over an extended period is not sufficient to mean that a person is established in that other Member State;
- » it is not possible to determine, in an abstract manner, the duration/ frequency beyond which the supply of a service in another Member State can no longer be regarded as FOS;
- » merely supplying identical/ similar services with a greater or lesser degree of frequency or regularity in another Member State without having an infrastructure there is not sufficient to mean a person as established in that other Member State (i.e. operating under FOE instead of FOS).

The temporary nature of activity is key when an intermediary provides services in the Member State of the client. The temporary character distinguishes FOS from FOE which implies an activity on a stable and continuous basis from an established professional base in another Member State.

The IDD expressly reflects this general EU law distinction between FOS and FOE: an intermediary will be operating under FOE if it establishes a permanent presence in another Member State which is equivalent to a branch<sup>6</sup>.

### Definition of FOS for IDD purposes

The Court of Justice is yet to interpret how the underlying principles in its settled case law apply to the insurance distribution activity. The IDD itself does not specify the “triggering element” of FOS either, i.e. when (and in which Member State) an intermediary is deemed to be pursuing insurance distribution activity on an FOS basis.

Absent any Court of Justice precedents or a legal definition in the IDD, the EIOPA's understanding of the FOS concept in the insurance distribution sector<sup>7</sup> provides the only authoritative clarification when and where an intermediary is carrying out cross-border business under FOS.

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<sup>6</sup> Article 6(1) of the IDD.

<sup>7</sup> Set out in Section 2.2.1 of the EIOPA Decision.

<sup>8</sup> Article 13(13), (14) of the Solvency II Directive.

According to EIOPA, an intermediary operates under FOS if it intends:

- » to provide a policyholder who is established in a Member State different from the one where the intermediary is registered, with an insurance contract; and
- » the insurance contract relates to a risk situated in a Member State different from the one where the intermediary is registered.

Under EIOPA's interpretation, an intermediary is not operating under FOS if the intermediary:

- » is registered in the same Member State as the policyholder's residence or establishment;
- » is registered in the same Member State where the risk is situated; or
- » has no intention to carry out cross-border business.

### Location of the risk

To identify the Member State in which the risk is situated, intermediaries should apply the rules of the Solvency II Directive<sup>8</sup>:

- » General rule: risk is situated in the Member State where the policyholder is habitually resident (natural person) or has establishment to which the insurance contract relates (corporate person);
- » Insurance relating to buildings/buildings and their contents: the Member State in which the property is situated;
- » Insurance relating to vehicles: the Member State of the registration; and
- » Travel/holiday insurance no longer than four months: the Member State where the policyholder took out the policy.

### FOS business of intermediaries vs insurers

In contrast to insurance intermediaries, an insurer is providing services under FOS if the risk/commitment is situated in another Member State<sup>9</sup>; the Member State of policyholder's residence or establishment is not a relevant factor. Therefore, an insurer may be operating under FOS in a host Member State, but a local intermediary distributing the products of that insurer in the host Member State will not be pursuing FOS business.

### Intention to do business under FOS

EIOPA's interpretation takes into account the intermediary's intention to conduct cross-border business<sup>10</sup>. An intermediary should only be deemed to be operating under FOS if it conscientiously decides to do so.

The following sample activities demonstrate that an intermediary has an intention to operate under FOS<sup>11</sup>:

- » actively marketing or providing insurance distribution services to a customer resident or established in another Member State;
- » actively seeking business from customers established in another Member State;
- » asking for meetings with customers established in another Member State and taking an initiative to organise such meetings;

- » giving/sending information on specific products, conditions, etc. to selected groups of customers established in a given country/in specific languages of some Member States, etc.; or
- » having a website which:
  - has specific marketing content and is available in languages other than the language of the Member State of the intermediary;
  - is addressed to a specific group of customers or customers in specific Member States; and
  - allows the customer to (indirectly) conclude an insurance contract using the website or other media.



<sup>9</sup> Under Article 13(9) of the Solvency II Directive, the host Member State, i.e. the Member State of the provision of services, is the Member State of the commitment (life insurance) or the Member State in which the risk is situated (non-life insurance).

<sup>10</sup> Article 4(1) of the IDD.

<sup>11</sup> Section 2.2.1 of the EIOPA Decision.

### Limits of EIOPA's interpretation

Intermediaries should be cautious in relying on the EIOPA understanding of FOS and bear in mind its potential limits.

EIOPA's interpretation has been agreed by the Member State CAs which are responsible for the implementation/application of the IDD. As such, the CAs should follow that interpretation for a number of matters relating to their cooperation, such as:

- » whether an intermediary has to notify its intention to operate under FOS;
- » in which Member State an intermediary is intending to pursue business under FOS;
- » division of powers between the home and the host Member State CAs; and
- » exchange of information between the home and the host Member State CAs in cross-border situations.

Consider an **example**:

- » A national implementation of the IDD may provide that local general good rules governing conduct of business apply to all insurance distributors, including foreign intermediaries operating in a Member State under FOS, if those distributors conclude insurance contracts with a client who is resident or established in that Member State.
- » In case of a dispute between a client and an intermediary, a local court may well rule that a foreign intermediary providing insurance distribution services to a local resident had to comply with the local general good requirements of that Member State even if the risk were situated in the Member State of the intermediary's registration.

# How to conduct cross-border business under FOS?

## Do I need to notify any authority?

Before starting business in another Member State for the first time, an intermediary must notify its home Member State CA of its intention to do so.

### Practical tip

The intermediary has to notify its intention to do business under FOS only in the Member State where the policyholder is resident or established<sup>12</sup>. Situation of the risk is not relevant in determining for which Member State(s) the intermediary has to make the FOS notification.

**Example:** A French intermediary intending to sell property insurance to Belgian clients in relation to their holiday homes in Portugal is only required to notify its intention to operate under FOS in Belgium (not Portugal).

## Content of the FOS notification<sup>13</sup>

The intermediary must provide the following information to its home Member State CA:

- » the name, address, and registration number of the intermediary;
- » the Member State(s) where the intermediary intends to operate under FOS;
- » the category of the intermediary (if applicable, also the name of the insurer which the intermediary represents);

- » the relevant classes of insurance which the intermediary intends to distribute.

## Procedure and timing<sup>14</sup>

Approximately within one month after making a complete notification to the home Member State CA, the intermediary will receive a written confirmation from the home Member State CA that the host Member State CA has received the FOS notification and that the intermediary may start its business in that host Member State.

The home Member State CA will also inform the intermediary where the intermediary can find the list of the relevant general good rules of the host Member State (or that the host Member State does not impose any general good requirements).

### Practical tip

The intermediary cannot start FOS insurance distribution activity in the host Member State prior to receiving written confirmation from its home Member State CA. However, the intermediary is not prevented from merely meeting prospective clients or making other preparations in the host Member State as long as those activities do not constitute insurance distribution.

<sup>12</sup> Section 2.2.1 of the EIOPA Decision.

<sup>13</sup> Article 4(1) of the IDD.

<sup>14</sup> Article 4(2) of the IDD; Section 2.2.3 of the EIOPA Decision.

## What rules apply when I do business under FOS?

When operating under FOS, the intermediary must comply with:

- » the minimum requirements of the IDD; and
- » the general good rules of the host Member State.

## Transparency of general good rules

Member State CAs must publish on their websites the general good rules that apply in the territory the relevant Member State. Links to the websites of each Member State CA should be available on EIOPA's website<sup>15</sup>. Each Member State must also designate a single point of contact for providing information on the general good rules.

### IDD vs IMD

Under the IMD, Member States had the right (but not an obligation) to publish the general good rules applicable in their territories.

## General good rules of the host Member State

It is crucial that intermediaries pursuing an activity of insurance distribution under FOS comply with the general good rules that apply in the host Member State.

General good rules are rules that all intermediaries are bound, as a matter of public policy, to follow, i.e. they cannot disregard or “contract out” of them.

A national general good rule must fulfil a number of cumulative conditions to be valid under the EU law<sup>16</sup>:

- » It must govern a matter which has not been harmonised at the EU level;
- » The rule must pursue an objective of the general good;
- » It must be non-discriminatory, objectively necessary and proportionate to the objective pursued; and
- » The general-good objective is not safeguarded by the rules of the provider's home Member State.

In addition, Member States are expressly required to ensure that the administrative burden stemming from their general good rules is proportionate to the consumer protection objective<sup>17</sup>.

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<sup>15</sup> The information on the applicable general good rules is available on the EIOPA website [here](#).

<sup>16</sup> Case C-55/94 *Gebhard*.

<sup>17</sup> Article 11(2) of the IDD.

## Types of general good rules

### The general good rules may relate to:

- » stricter rules in areas expressly mentioned in the IDD;
- » stricter rules relating to other matters covered by the IDD; and
- » matters that are not covered by the IDD.

### Stricter requirements expressly mentioned in the IDD:

- » information that an intermediary must provide to a client: for example, information about costs and charges relating to an insurance contract;
- » mandatory advice for sales of (certain types of) insurance products;
- » restriction/complete prohibition on receipt of third-party fees, commissions, or other (non)monetary benefits in relation to distribution of insurance products; for example, extending the remuneration requirements for IBIPs (Article 29(2) of the IDD) to other types of insurance products, including non-life insurance; and
- » prohibition on sale of insurance together with an ancillary service or non-insurance product, as part of a package/the same agreement (cf. "tied sales").

### Examples of stricter requirements in other areas covered by the IDD:

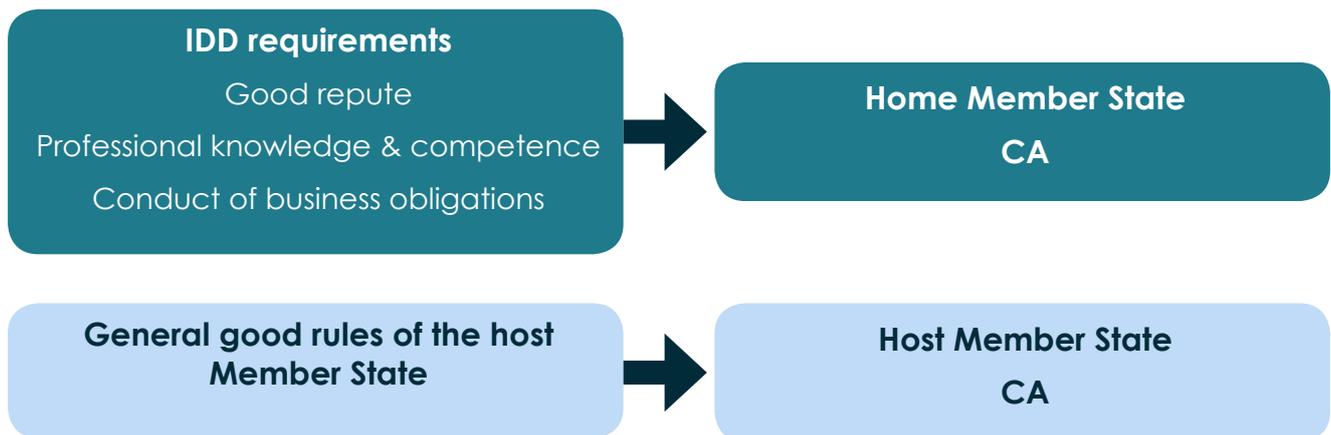
- » rules on client categorisation (retail vs professional clients) applicable to all types of insurance products;
- » extending the IBIPs record-keeping requirements (Article 30(4) of the IDD) to other types of insurance products.

### General good rules in areas not covered by the IDD:

- » requirement to retain records in relation to insurance distribution activity;
- » requirements in relation to advertising and marketing.

### Which authority will oversee my FOS business?

The IDD divides the competence between home and host Member State CAs for ensuring intermediary's compliance with the IDD requirements.



In the case of FOS business:

- » the home Member State CA oversees compliance with all IDD requirements; and
- » the host Member State CA can penalise failures to comply with the general good rules of the host Member State.

#### Cooperation between CAs<sup>18</sup>

If the host Member State CA considers that the intermediary operating under FOS is in breach of any IDD requirements, it will inform the home Member State CA. The home Member State CA should then take measures against the intermediary to remedy the breach.

#### Residual host Member State powers<sup>19</sup>

In exceptional situations, the host Member State CA can take measures against a foreign intermediary:

- » if the intermediary continues acting in a way that is detrimental to host Member State consumers or the orderly functioning of the host Member State (re)insurance market despite the measures taken by the home Member State CA (or where no measures have been taken);
- » in urgent cases, to prevent/penalise breaches by the intermediary in the host Member State where this is necessary to protect the rights of the consumers of the host Member State.

<sup>18</sup> Article 5(1) of the IDD; Section 3.2 of the EIOPA Decision.

<sup>19</sup> Article 5(2) and (3) of the IDD.

The host Member State CA has the right to prevent the intermediary from carrying out new business within the territory of the host Member State.

### Preventing circumvention of the host Member State rules<sup>20</sup>

The host Member State CA has the right to prevent a foreign intermediary from carrying out business in the host Member State if:

- » the intermediary's activity is entirely or principally directed towards the territory of the host Member State with the sole purpose of avoiding the legal rules which apply to intermediaries of the host Member State; and
- » the intermediary's activity seriously endangers the proper functioning of the (re)insurance market in the host Member State in terms of consumer protection.

### IDD vs IMD

Contrary to the IDD, the IMD did not properly divide competences between home and host Member State CAs. This has caused certain EU regulators (such as the UK's Financial Conduct Authority) to claim authority to take enforcement action against: (i) all intermediaries pursuing business in the UK (either on a FOS or FOE basis); and (ii) all activities of UK intermediaries operating in other Member States.

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<sup>20</sup> Article 9(2) of the IDD.

# How to identify cross-border services?

Intermediary	Policyholder	Risk	FOS?*
MS1	MS1	MS1	✗
MS1	MS1	MS2	✗
MS1	MS2	MS1	✗
MS1	MS2	MS2	✓
MS1	MS2	MS2, 3, 4...	✓

\*If an intermediary has an intention to operate under FOS (Section 2.2.1 of the EIOPA Decision)

## Practical illustrations

The above table summarises all cross-border situations which may arise when pursuing insurance distribution activity and how these situations should be treated under the EIOPA's interpretation of FOS for the IDD purposes. The practical examples below illustrate the cross-border situations which may arise.

### Purely national situations

**Scenario:** An intermediary with a registered office in the Netherlands intends to procure group dental insurance contracts for corporate clients established in the Netherlands. The group contracts will cover clients' employees that are seconded to a number of Member States.



**Outcome:** The intermediary is not operating under FOS. The policyholder is established and the risk is situated in the Member State where the intermediary is registered. The situation does not have cross-border element.

IM	PH	Risk	FOS?
MS1	MS1	MS1	✗

## Location of policyholder/risk: non-FOS situations

**Scenario:** An intermediary with a registered office in Belgium wishes to propose to a client who is resident in Luxembourg a fire insurance for the client's holiday home in Belgium.



**Outcome:** The intermediary is not operating under FOS. The policyholder is resident in a Member State other than the Member State where the intermediary is registered. However, the risk is situated in the Member State where the intermediary is registered.

IM	PH	Risk	FOS?
MS1	MS2	MS1	✗

**Scenario:** An intermediary having its registered office in Germany intends to procure for a client resident in Germany a property insurance to cover the client's holiday home in Austria.



**Outcome:** The intermediary is not operating under FOS. The risk to be covered is situated in another Member State, but the policyholder is resident in the Member State where the intermediary is registered.

IM	PH	Risk	FOS?
MS1	MS1	MS2	✗

## FOS situations

**Scenario:** A self-employed intermediary is resident in Spain. The intermediary proposes income protection insurance contracts and provides other insurance distribution services in relation to such contracts by phone and e-mail to clients who are consumers resident in Portugal.



**Outcome:** The intermediary is operating under FOS. The policyholders are resident and the risk to be covered is situated in a Member State other than the Member State where the intermediary is registered.

IM	PH	Risk	FOS?
MS1	MS2	MS2	✓

**Scenario:** An intermediary with a registered office in Italy holds meetings in the intermediary's Milan office with the representatives of corporate clients established in Luxembourg. During the meetings, the intermediary provides various insurance distribution services in relation to catastrophe insurance contracts covering the clients' plants in France.



**Outcome:** The intermediary is operating under FOS:

- » The policyholder is established in a Member State other than the Member State where the intermediary is registered (Luxembourg); and
- » The risk is situated in another Member State (France).

IM	PH	Risk	FOS?
MS1	MS2	MS3	✓

**Scenario:** A self-employed intermediary is resident in Germany. Three days a week, the intermediary travels to Poland and meets corporate clients established in Poland in order to provide various insurance distribution services relating to property insurance of clients' industrial facilities in Poland.



**Outcome:** The intermediary is operating under FOS:

- » The policyholder is established in a Member State other than the Member State where the intermediary is registered (Poland); and
- » The risk is situated in another Member State (Poland).

IM	PH	Risk	FOS?
MS1	MS2	MS2	✓



**FOS vs FOE:** As such, the fact that the intermediary frequently and regularly (three days per week) provides services in the host Member State does not mean that the intermediary should be deemed to operate under FOE, in particular if the intermediary does not have any infrastructure in the host Member State.

# Am I conducting cross-border business under FOE?

Compared to the FOS activity, it is generally less challenging to determine whether an intermediary is operating in another Member State on a FOE basis since an FOE activity has a clear cross-border element.

Two questions may cause some uncertainty:

- » has the intermediary actually established itself in the host Member State, in particular when the establishment does not take the “standard” form of a branch office?
- » is the intermediary operating in another Member State on an FOS or FOE basis, for example when an intermediary has some form of physical presence in the client’s Member State?

Distinguishing between FOS and FOE is not a purely theoretical exercise. It has the following consequences:

- » intermediaries need to provide a more detailed information to the home Member State CA when notifying their intention to operate on a FOE basis;
- » an intermediary operating on a FOE basis may find itself subject to stricter supervisory practices and culture of the host Member State CA; and
- » certain general good rules of the host Member State may apply only to intermediaries operating under FOE (and not under FOS).

## Notion of FOE for IDD purposes

An intermediary is operating under FOE in another Member State if that intermediary establishes:

- » a “branch” (defined as “an agency or a branch” located in a Member State other than the home Member State<sup>21</sup>); or
- » a “permanent presence” that is equivalent to a branch (unless the intermediary lawfully sets up the presence in another legal form).

### “Permanent presence”

The notion of permanent presence is not defined in the IDD, but, in line with the case law of the Court of Justice, one express example of permanent presence is when an intermediary has an office in the host Member State managed by:

- » the own staff of the intermediary; or
- » a person who is independent, but has permanent authority to act for the intermediary in the same way as an agency would.

### IDD definition of “host Member State”

Contrary to the definition in the Solvency II Directive, the IDD definition of the host Member State<sup>22</sup> refers to “a permanent presence or establishment” and does not expressly mention a branch. However, under EU law, the notion of “establishment” includes branches.

<sup>21</sup> Article 1(1)(12) of the IDD.

<sup>22</sup> Article 2(1)(11) of the IDD.

### Concepts of “branch” and “agency”

EU law does not define the terms “branch” and “agency”. However, the case law of the Court of Justice explains the features of the two concepts:

- » one of the essential features of a branch or an agency is that both are subject to the direction and control of the parent body<sup>23</sup>;
- » branch or agency implies a place of business that:
  - has the appearance of permanency, such as the extension of a parent body;
  - has its own management;
  - is materially equipped to negotiate business with third parties. The third parties know that there is a legal link with the parent body, but do not have to deal directly with such parent body and may transact business at the place of business constituting the extension<sup>24</sup>.

**Scenario:** An intermediary with a registered office in the Netherlands intends to sell liability insurance to German companies and plans to open a branch office in Germany.



**Outcome:** The intermediary will be operating in Germany on a FOE basis and must notify the Dutch CA before setting up the branch and starting business in Germany.

**Scenario:** An intermediary with a registered office in Poland rents an office space in Germany. The intermediary wishes to send several employees (sales team) to work in the German office for consecutive periods of one year. The seconded employees will be providing insurance distribution services to (potential) German clients and will have the authority to bind the intermediary. The intermediary's website and corporate letterhead provide contact information for the German office.



**Outcome:** The intermediary is likely to be deemed operating in Germany on a FOE basis. The intermediary's infrastructure in Germany goes beyond what is necessary to provide insurance distribution services in Germany on a FOS basis. The ongoing presence of the intermediary's employees in Germany over an extended period of time and the external presentation of the German office suggest that the intermediary is providing distribution services on a stable and continuous basis from an established professional base in Germany. Even if the intermediary does not set up the German office in the legal form of a branch or an agency, the intermediary is likely to be deemed to have a permanent presence in Germany that is equivalent to a branch.

The intermediary needs to notify its intention to carry on business under FOE before seconding employees and starting business in Germany.

<sup>23</sup>Case 14/76 De Bloos.

<sup>24</sup>Case 33/78 Somafer.

### Use of independent persons established in the host Member State

An independent commercial agent does not have the character of a branch or agency where<sup>25</sup>:

- » the agent's legal status leaves it basically free to arrange its own work and decide how much time to devote to the interests of the principal;
- » the principal may not prevent the agent from simultaneously representing several companies competing in the same industry sector; and
- » the agent merely transmits orders to the principal and is not involved in the terms or execution of those orders.

However, appointing an agent established in another Member State is likely to amount to an activity on a FOE basis where the agent<sup>26</sup>:

- » has a permanent mandate in relation to insurance distribution services;
- » is subject to management and control of the intermediary; and
- » is able to provide insurance distribution services on the intermediary's behalf.

**Scenario:** An intermediary with a registered office in Belgium wishes to appoint as its agent an independent intermediary (self-employed person) who is resident in Luxembourg. Under the terms of the agency agreement, the Luxembourg intermediary will work exclusively for the Belgian intermediary. The Luxembourg intermediary will be proposing insurance contracts to clients resident in Luxembourg on behalf of the Belgian intermediary. The agency agreement would be concluded for a period of three years.



**Outcome:** The Belgian intermediary is likely to be deemed operating in Luxembourg on a FOE basis. Although the Luxembourg intermediary is independent, the exclusive nature of the agency agreement suggests that the Luxembourg intermediary will spend all of its time working for the Belgian intermediary. The Luxembourg intermediary will be carrying on insurance distribution on behalf of the Belgian intermediary under long-term, continuous authority. Therefore, the Belgian intermediary is likely to be operating in Luxembourg on a stable and continuous basis from an established professional base.

<sup>25</sup> Case 139/80 *Blanckart & Willems*.

<sup>26</sup> On the basis of the interpretation provided in the Commission Interpretative Communication on freedom to provide services and the general good in the insurance sector (available [here](#); page 10).

**Scenario:** An intermediary with a registered office in Belgium has entered into cooperation agreements with a number of accountants established in Luxembourg. Under those cooperation agreements, the Luxembourg-based accountants would provide their Luxembourg-resident clients information about the Belgian intermediary.



**Outcome:** Irrespective of the terms of the cooperation agreements, the intermediary is not operating on a FOE basis simply because the Luxembourg-based accountants do not carry on any insurance distribution activity.

### Distinction between FOS and FOE

When an intermediary moves to another Member State to offer their services to client, the key difference between FOE and FOS is that:

- » in the case of FOE, the intermediary offers services on a stable and continuous basis from an established professional base in the Member State of destination. In other words, the intermediary must have a permanent (lasting) presence in the host Member State;
- » in the case of FOS, the intermediary is temporarily present in the Member State of destination to offer and provide services.

The FOS section ([page 9](#)) further explains the principles developed by the Court of Justice to distinguish between FOS and FOE.

**Scenario:** An intermediary with a registered office in Austria rents an office space in Italy. From time to time, intermediary's employees travel to Italy and use the office for meetings with (potential) clients who are resident in Italy. However, none of the intermediary's employees permanently work in that office and the intermediary's website does not provide any contact information for the Italian office.



**Outcome:** It is unlikely that the intermediary would be deemed to be operating in Italy on a FOE basis:

- » The mere fact that the intermediary has infrastructure (office space) in Italy does not mean that the intermediary has a permanent presence that is equivalent to a branch.
- » Given that the intermediary's employees only use the office space from time to time and that the intermediary does not present itself as having a professional base in Italy, suggests that the intermediary is not acting in Italy on a stable and continuous basis that characterises a branch (as defined in the IDD).

**However,** the intermediary is likely to be operating in Italy on a FOS basis.

# How to conduct cross-border business under FOE?

## Do I need to notify any authority?

As in the case of FOS business, an intermediary must notify its intention to pursue cross-border business under FOE to the home Member State CA.

### Difference between FOE and FOS notifications

Compared to the FOS notification, the intermediary is required to provide more information to the home Member State CA in its FOE notification. More importantly, the home Member State CA has the right to refuse the intermediary's notification and prevent the intermediary from pursuing cross-border business under FOE<sup>27</sup>.

## Content of the FOE notification<sup>28</sup>

The intermediary must provide the following information to the home Member State CA:

- » the name, address, and registration number of the intermediary;
- » the Member State where the intermediary plans to establish a branch;
- » the category of intermediary and, if applicable, the name of insurer that the intermediary represents;
- » the relevant classes of insurance that the intermediary intends to distribute;
- » an address in the host Member State where the intermediary holds relevant documents (usually, the branch address);
- » the name of the person responsible for managing the branch or other establishment in the host Member State.

## Procedure and timing<sup>29</sup>

The home Member State CA informs the intermediary that the host Member State CA has received the above information. The home Member State CA can refuse an intermediary's FOE notification on grounds of inadequacy of organizational structure or financial situation of that intermediary.

The intermediary should receive such confirmation from the home Member State CA approximately one month after providing the necessary information. The intermediary must then wait for one more month for a communication from its home Member State CA regarding the host Member State general good rules and the fact the intermediary can start business in the host Member State.

The intermediary can then establish a branch (or other form of permanent presence) and start its insurance distribution activity in the host Member State.

<sup>27</sup> Article 6(2) of the IDD.

<sup>28</sup> Article 6(1) of the IDD; Section 2.2.2 of the EIOPA Decision.

<sup>29</sup> Article 6(2) of the IDD; Section 2.2.2 of the EIOPA Decision.

### What rules apply when I do business under FOE?

Same as in the case of FOS operations, the intermediary must comply with:

- » minimum requirements of the IDD; and
- » the general good rules of the host Member State.

### Scope of the general good rules

Compared to the FOS business, an intermediary operating under FOE may be subject to more extensive general good requirements of the host Member State.

In addition to various general good requirements mentioned in the FOS section ([page 15](#)), general good rules in the areas of tax, accounting, social security, labour law, etc. may apply to intermediaries operating on a FOE basis.

### Which authority will oversee my FOE business?

- » The **host** Member State CA is responsible for ensuring the intermediary's branch that provides services in the host Member State complies with the IDD conduct of business and information requirements. The host Member State CA can take measures if the branch breaches these requirements<sup>30</sup>.
- » The **home** Member State CA is responsible for ensuring that the intermediary, including its establishment(s) in host Member State(s), complies with all other IDD requirements. In particular, the home Member State CA is responsible for enforcing IDD rules on good

repute, professional knowledge and competence. If the host Member State CA suspects any breaches of these requirements, it must inform the home Member State CA<sup>31</sup>.

#### “Primary place of business”<sup>32</sup>

The IDD introduces a new concept into the insurance distribution sector. The primary place of business is the location from where the main business of an intermediary is managed.

If the intermediary's primary place of business is in a Member State other than the home Member State, the relevant CAs may agree that the CA of the Member State of the primary place of business will act as if it were the home Member State CA.

In that case, the CA of the primary place of business will oversee the intermediary's compliance with:

- » the professional and organisational requirements; and
- » information and conduct of business rules.

That CA will also have the right to impose sanctions against the intermediary in case of non-compliance.

<sup>30</sup> Articles 7(2) and 8(1) of the IDD.

<sup>31</sup> Article 8 of the IDD; Section 3.2.2 of the EIOPA Decision.

<sup>32</sup> Articles 2(1)(14) and 7(1) of the IDD.

# Certain legal and tax questions in cross-border situations

## Which law governs the intermediary's contract/relationship with the client?

**Contracts with clients other than consumers:** The intermediary and the client are generally free to choose the law governing their contract<sup>33</sup>. If they do not choose the governing law, the contract between the intermediary and the client will be subject to the law of the country where the intermediary has its central administration if the intermediary is a legal/corporate person and the principal place of business if the intermediary is a natural person<sup>34</sup>.

**Contracts with clients who are consumers:** Generally, the law of the country where the consumer client has his habitual residence will govern the contract between the intermediary and the client<sup>35</sup>. The intermediary and the client can also agree that the contract is governed by a different law, but such choice cannot deprive the consumer of the protection which the customer enjoys under the mandatory law of the country of which he is a resident<sup>36</sup>.

**Intermediary's non-contractual obligations (tort):** If an intermediary does not fulfil information, advice, or other duties imposed by law, the resulting liability for damages will be determined and assessed under the law of the country in which the client is established (for a legal/corporate person) or has his habitual residence (for a natural person)<sup>37</sup>.

## Which court has jurisdiction in case of a dispute with the client?

**Disputes relating to breach of contract with a client other than a consumer:** An intermediary can sue the client in the courts of the Member State where that client is domiciled or at the place where the intermediary has provided, or should have provided, the insurance distribution services<sup>38</sup>.

A client can sue the intermediary in the courts of the Member State where the intermediary is domiciled or at the place where the intermediary has provided, or should have provided, the insurance distribution services<sup>39</sup>.

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<sup>33</sup> Article 3(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>34</sup> Article 4(1)(b) of Regulation (EC) No 593/2008.

<sup>35</sup> Article 6(1) of Regulation (EC) No 593/2008.

<sup>36</sup> Article 6(2) of Regulation (EC) No 593/2008.

<sup>37</sup> Articles 2(2) and 4 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

<sup>38</sup> Articles 4(1), 7(1)(b) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>39</sup> Articles 4(1), 7(1)(b) of Regulation (EU) No 1215/2012.

**Disputes relating to breach of contract with a client who is a consumer:** In order to protect the consumer, an intermediary can only sue the client in the courts of the Member State where that client is domiciled<sup>40</sup>. A clause in an agreement imposing the courts of the intermediary's country will be invalid.

A client can sue the intermediary in the courts of the Member State where the intermediary is domiciled, or where the client is domiciled<sup>41</sup>.

**Disputes relating to non-contractual matters (tort):** An intermediary can sue the client in the courts of the client's domicile and the client can sue the intermediary in the courts of the intermediary's domicile. The intermediary and the client can also sue each other in the courts of the place where the harmful event took place or may take place.

## Tax matters

**Income tax:** Generally, the intermediary's profits from cross-border insurance distribution services carried out on a FOS basis will be subject to taxation in the intermediary's home Member State. When the intermediary conducts cross-border business on a FOE basis, the profits attributable to the intermediary's branch would normally be taxed in the host Member State.

Within the EU, most of the treaties for the avoidance of double taxation ("double taxation agreements" or "DTAs") concluded by the Member States follow the OECD Model Convention. The OECD Model Convention includes provisions on taxation of "permanent establishments" under which non-resident company's

profits attributable to a permanent establishment are taxable in the country in which that permanent establishment is located. In the majority of cases, an intermediary operating on a FOE basis will have a permanent establishment in the host Member State. An intermediary having a permanent establishment in the host Member State will have to comply with the administrative requirements imposed by the tax authority of the host Member State (for example, registration, record-keeping and filing of accounts and tax returns).

In certain situations, intermediaries operating in the host Member State on a FOS basis may also be deemed to have a taxable permanent establishment in that host Member State.

**VAT:** Generally, the EU VAT Directive exempts from VAT insurance-related services performed by insurance brokers and insurance agents. Therefore, the insurance distribution services traditionally performed by insurance brokers and agents will not be subject to VAT<sup>42</sup>. However, intermediaries need to check whether the actual services that they provide to clients constitute insurance-related services.

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<sup>40</sup> Article 18(2) of Regulation (EU) No 1215/2012

<sup>41</sup> Article 18(1) of Regulation (EU) No 1215/2012.

<sup>42</sup> Article 135(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

## List of abbreviations

- » **CA:** competent authority
- » **Court of Justice:** the Court of Justice of the European Union
- » **EIOPA:** the European Insurance and Occupational Pensions Authority
- » **EIOPA Decision:** the Decision of the EIOPA Board of Supervisors of 28 September 2018 on the cooperation of the competent authorities of the Member States of the European Economic Area with regard to Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution
- » **FOE:** freedom of establishment
- » **FOS:** freedom of services
- » **IBIP:** insurance-based investment product
- » **IDD:** Insurance Distribution Directive, i.e. Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)
- » **IPID:** insurance product information document
- » **Solvency II Directive:** 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) (recast)

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