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Selected remarks on policyholders protection in the draft of Polish act on insurance distribution

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Abstract. The purpose of this paper is to introduce certain new solutions in field of policyholders protection drafted by Polish legislators in the process of IDD implementation (in B2C and B2B transactions). By the end of February 2018, the Insurance Distribution Act is to enter into force, fundamentally reshaping Polish insurance law. The Insurance Distribution Act draft includes a multitude of provisions aimed at improving and broadening legal mechanisms guaranteeing the rights and obligations of insurance customers. However, the current contents of the Insurance Distribution Act draft already raise doubts whether the legislative techniques are accurate and precise. The authors focus on the solutions chosen in the Insurance Distribution Act draft that constitute new quality for Polish policyholders, including consumers. This is preceded by overall remarks on the draft itself as well as the current state of insurance legislation in Poland and the notion of a consumer.

Keywords: IDD, implementation, insurance distribution, Polish law.
JEL Codes: G22, K12, K220.

1. Introduction

At present, the regulations that provide consumer protection in insurance in Poland are scattered across several legal acts. We may divide these provisions into two groups. The first consists of solutions common to all B2C (business to consumer) relations such as regulation of unfair contractual terms (included in Art. 385^1-385^3 of the Polish Civil Code - CC), the 2014 Consumer Rights Act (CRA) or the 2015 Act on the handling of complaints by financial market organizations and on the Financial Ombudsman [Complaints Act; see more: Kowalewski, Ziemiak, Marszelewski 2015, pp. 3-16], which applies to all natural persons, including consumers. The second is entirely devoted to all insurance contracts – that would be the legal framework

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embodied mainly in the 2015 Insurance and Reinsurance Activity Act [IRAA], the 2003 Act on Insurance Mediation (IMA) as well as art. 805 and subsequent articles of CC. Hence *de lege lata* there is no uniform set of rules governing policyholder protection in insurance in Polish law.

Since June 2016, Polish Government has still been working on implementation of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (IDD). First public consultations with financial intuitions, insurers, etc. took place at the end of 2016 and early 2017. On July 19th, 2017 the Council of Ministers published the fourth version (dated July 17th, 2017) of the Insurance Distribution Act draft (DIDA), as an official government proposal. It must be noted that according to recital 3 of the IDD preamble, the directive is aimed at minimum harmonization. This gives EU Member States a wide range of possible legislative techniques. Unfortunately, Polish legislators decided to act as if IDD required maximum harmonization. As a result, DIDA is in large a "*copy*" of IDD, sometimes literally rewritten. This means that DIDA i.e. introduces completely new vocabulary and legal terms network (e.g. insurance distributor, insurance distribution, insurance product or ancillary insurance agent) unfamiliar to IRAA. It is worth noting that such terms as "*insurance product*" were never used by Polish legislators and are almost impossible to match with the insurance contract regulations in Article 805-834 of the CC. Moreover, DIDA – in Art. 109 – is to revoke IMA, which has been a constitution for operations of insurance brokers and agents in Poland and, despite its certain flaws, which allowed those professions to flourish (on December 31st, 2015 there were 33,124 insurance agents and 1,276 insurance brokers operating in Poland; their participation in the conclusion of non-life insurance contracts was estimated at almost 80% [Lisowski, Zieniewicz 2015, p. 337]). This division into agents and brokers was common on the Polish market since the 1930s [Statutory instrument of the President of the Republic of Poland of 24 October 1934 on insurance mediation]. DIDA disrupts this by introducing the term "*distributor*" (insurance or reinsurance) which encompasses also insurance companies (hitherto regulated by IRAA, outside the scope of insurance mediation). Hence, such a legislative concept was already criticized in Polish doctrine [Maśniak, Malinowska 2017, p. 31]. Yet it is almost certain that DIDA will enter into force as shaped by Ministry of Finance and Development (which is very resistant to numerous changes proposals in DIDA as suggested by participants in public consultations) – the date of entry, as set out in DIDA Article 105, is February 28th, 2018. Starting that day, the Polish insurance market will operate in entirely new legal surroundings – this obviously concerns also consumers.

IDD to some extent is a consumer-oriented act [see more: Malinowska 2016, p. 90; Mrozowska-Bartkiewicz 2016, pp. 112-113; Zoń 2016, pp. 21-22]. In other words, it aims to enhance consumer protection; however, strengthening the position of all policyholders and insured (including B2B transactions) is a universal goal of IDD. As a result, some of its provisions are only applicable in B2C relationships. We can pinpoint at least several IDD goals in this scope, such as:

– consumers should benefit from the same level of protection, despite the differences between distribution channels;
– protection of consumers requires an extension of the scope of legal mechanisms guaranteeing such protection to all sales of insurance products;
– the level of consumer protection should be raised in relation to Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, in order to reduce the need for varying national measures;
– to ensure consistent harmonisation and adequate protection of consumers across the EU.

To sum up – as stated in recital 16 of the IDD preamble – there is a benefit to consumers if insurance products are distributed through different channels and through intermediaries with different forms of cooperation with insurance companies, provided that they are required to apply similar rules to consumer protection. DIDA mentions the term "*consumer*" only twice, and only by reference to CRA. DIDA – as set out in IDD – uses the term "*customer*", in order not to limit the scope of transposition. As a result, the scope of protection reaches far beyond B2C insurance contracts. Consequently, after DIDA enters into force, new solutions will affect not only consumers as defined in Art. 22^1 of CC (as they are aimed at wide protection of all customers, including consumers). This is another example of the kind of solution that involves the Polish insurance market, after the Complaints Act was passed. Hence, we can acknowledge that Polish law has entered the stage of what is called *consumer-protection-oriented-thinking,* where the insured are protected uniformly, without regard to their status as consumers or entrepreneurs [Heiss 2011, pp. 346-348].

Regardless of the abovementioned doubts, DIDA will introduce a multitude of new means for insurers counterparties protection, encompassing consumers. The next part of this paper is devoted to analysis of the chosen solutions, considered by the authors as most important. It must be noted that we are still operating under a draft, which may be subjected to further changes. Hence the remarks presented here are general in character.

2. Notion of a consumer in insurance

The notion "*customer*" is legally defined in Art. 22^1 of CC and means any natural person who performs acts in law with an entrepreneur, said acts not being directly connected with his economic or professional activity. Such an approach, combined with subjective and objective criteria, provides the required versatility, as it relates to the economic role of an individual at a specific time and certain situation. As a result, the discussed person in one situation may be regarded as a consumer (even when it is one-time activity) and – in another – no longer appear in this role [Sokołowski 2012, pp. 114-116]. The analysed provision introduces the requirement of direct connection between the act in law and the professional activity of an individual. As a result, the consumer is also the person who carries out activity in question,

only for indirect purpose of his economic or professional activity [Haberko 2007, p. 98]. In literature, it is noted that a consumer's act in law usually has to satisfy own, personal, family, householders', friends' or household needs [Nazaruk 2014, p. 97].

A consequence of qualifying a person as a consumer is the ability to apply adequate legal regulation, which is dedicated to protection of such entities and leads to levelling of the playing field between them and entrepreneurs. In Poland – like in other European countries – this regulation is dispersed in numerous legal acts. For example, in CC among the legal norms related to strengthening consumer's position are: the possibility to avoid, in some cases, of being bound by certain provisions of the contract, which not have been individually agreed with the consumer (Art. 385^1), the possibility of examining certain contractual provisions in the context of their inadmissibility (Art. 385^3), the general rule of the interpretation of ambiguous provisions for the benefit of a consumer (Art. 385, par. 2) or the obligation – in some cases – to deliver the model form (general terms and conditions) to the consumer before concluding the contract (Art. 384, par. 1). The above requirements do not apply to economic operators, as there is no need to equalize existing organizational or economic disparities. As a result, the differentiation between protection of consumer and professional contract parties should be pointed out.

Turning to insurance-related issues, in each case, the party to a contract is the insurer. This entity provides insurance coverage and has *ius contrahendi* in the scope of such activities. The insurer may only be an entrepreneur (insurance establishment) pursuing insurance activity exclusively in the form of joint-stock company, a mutual insurance society or a European company (Art. 805, par. 1 of CC and Art. 6, par. 1 of IRAA). Considering that, the subjective criterion – mentioned in the context of definition of a consumer – is always fulfilled, if the party to the insurance contract is an individual. Such an entity receives consumer status, if the insurance contract is not directly connected to the person's economic or professional activity. Therefore, taking into account the objective criterion, consumer insurance contracts concern risks related to the private sphere of activity of insured persons, or the risks in which there is a merger of the private zone and economic (professional) zone, but not only of the latter. An example of the above may be home insurance, even if one of its rooms is used for professional activity.

A certain extension of the things in question takes place when individuals enter into an insurance contract directly related to their economic or professional activity. In such cases, some measures of consumer protection have been granted (Art. 805, par. 4 of CC). This protection consists in applying appropriate regulations concerning determination that provisions of contract model forms are inadmissible (Art. 385^1-385^3 of CC). However, mentioned persons do not become consumers in the meaning of Art. 22^1 of CC, *ergo* other measures of discussed protection do not apply to them [Krajewski 2016, p. 74].

3. Consumer protection in DIDA – selected solutions

3.1. Notion of a customer

At first it must be noted that IDD (and consequently DIDA) has to be interpreted in the broader context of financial services purchaser protection next to such instruments as Regulation 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) or 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 (MIFID II, which EU member states must implement in 2018). This recent EU legislative trend is based on the assumption that said purchaser protection concerns not only consumers, but is also devoted to other entities. For example, MIFID II introduces two main categories of clients, i.e. retail and professional as well as separate and distinct category for a limited range of businesses (eligible counterparties). Different levels of regulatory protection are attached to each category. Retail clients are afforded the most regulatory protection. On the other hand, professional clients are considered to be more experienced, knowledgeable and sophisticated. Consequently, pursuant to Art. 22 of IDD, if the distributor carries out distribution activities in relation to the insurance of large risks, some information obligations are waived. Also, rules concerning product oversight and governance requirements shall not apply to insurance products which consist of the insurance of large risks (Art. 25, par. 4 of the abovementioned act).

Insurance purchaser protection in EU legislation has a long history[2]. Its detailed description would exceed the scope of this paper. Nevertheless, most recent directives, e.g. SOLVENCY II [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] are also aimed at upgrading the standards of policyholder and beneficiary protection – according to recital 16 of the SOLVENCY II preamble, this is the main objective of insurance and reinsurance regulation and supervision. As previously mentioned, DIDA presents similar, if not identical, approach.

DIDA – within the scope of its regulation – neither uses the notion of a "*consumer*" nor refers to other laws related to consumer protection (except irrelevant side issues). Instead, according to this act, a purchaser of an insurance product is named a customer. Pursuant to Art. 4, par. 1, p. 10a of DIDA, in the case of an insurance contract, a customer is an entity who is looking for an insurance coverage, policyholder or the insured. Because there is no distinction, the term "*customer*" shall mean both natural and legal persons.

[2] Starting with the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance and ending with Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance as well as Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance.

The relation between the definition of a customer on the grounds of DIDA and the – discussed above – notion of a consumer is that every consumer can be considered as a customer (in the meaning of DIDA), but not every customer can be considered as a consumer. The later obviously, benefits from the protection provided by all the consumer laws.

The conditions for recognition as a customer are objective in nature, and are related to the status of an entity in the context of an expected or concluded contract. In such a case, it is not relevant whether the customer is a natural or legal person, or whether the contract has any connection with his or her economic or professional activity. In conclusion, it must be stated that the scope entities considered as customers within the meaning of Art. 4, par. 1, p. 10a of DIDA is broader, and applies to the whole circulation, without distinction between B2B and B2C.

The IDD does not contain a definition of the customer. At the same time – despite the repeatedly highlighted importance of consumer protection – it uses a broader notion (customer) to determine the purchaser of an insurance product. Hence, it is therefore reasonable that DIDA is not limited only to consumer part of insurance market.

3.2. Insurance distribution activity – relation to insurance activity and insurance mediation

Currently, aspects related to sale or insurance intermediary under the applicable law are not perceived through the prism of distribution. This notion will be new in the context of Polish legislation devoted to the discussed issues.

According to Art. 5, par. 1 of DIDA, insurance distribution means activity performed exclusively by the insurance distributor – consisting, among others, of:

– advising on, proposing, or carrying out other preparatory works leading to the conclusion of insurance contracts;
– concluding insurance contracts on behalf of the insurance companies, on behalf of or for the benefit of customer or directly through the insurance company;
– providing assistance in the administering and performance of insurance contracts, including indemnity and benefit cases.

Moreover, distribution is also considered as providing information on insurance contracts by price comparison websites, which develop an insurance product ranking list on the basis of customer selected criteria, when the customer is able to directly or indirectly conclude an insurance contract through the website or other media (Art. 5, par. 2 of DIDA).

Within the scope of the notion of "*insurance distribution*", Polish legislators decided to distinguish activity named "*insurance mediation*", which means conducting insurance distribution by insurance intermediaries (Art. 4, p. 13 of DIDA).

The distribution of insurance can be compared with existing, under Polish law, concepts of insurance activity and insurance mediation. The first of these means performance of insurance acts in connection with insurance coverage offered

and provided against the risk of occurrence of effects of any fortuitous events (Art. 4, par. 1 of IRAA). A catalogue of insurance acts is contained in Art. 4, par. 7 – 9 of IRAA. In simplification, it can be stated that these are acts performed by an insurance company and related to – broadly understood – activity on the market, like conclusion of insurance contracts, calculation of premiums, risk evaluation, indemnity payments or, in some cases, determination of the value of damages and the scope of indemnities.

On the other hand, it is worth noting that things look different due to of relation between insurance distribution and insurance mediation. Pursuant to the law in force, the second term refers to performance – by an intermediary and for remuneration – of actual activities or legal activities connected with conclusion or performance of insurance contracts (Art. 2, par. 1 of IMA). Insurance mediation in the meaning of IMA does not include direct sales of insurance products by insurance companies.

New to the Polish insurance mediation market is a legal reference to the abovementioned price comparison websites (Art. 5, par. 2 of DIDA), which are often used by customers looking for insurance products 'via internet'. Because of the fact that, in such cases, we have to deal with *expressis verbis* distribution, this circumstance will result in strengthening customer protection, especially in the area of improving the quality of information on the websites. That notwithstanding, we have to keep in mind that the main role of comparison websites is only to present the eligible offers, *ergo* possible conclusion of the contract is already taking place with involvement of the distributor (*primo* insurance companies). Despite general rules dedicated to insurance distributors, DIDA does not introduce any particular standards dedicated to this distribution channel.

To summarize, the scope of the notion of insurance distribution includes the current model of insurance mediation and also direct sales of insurance. The very fact of modification of the mediation formula in favour of distribution does not seem to be significant from the consumer protection's point of view, especially that, except for ancillary insurance agents, insurance distributors will remain entities (brokers, agents and insurance establishments), who deal with mediation and selling insurance products under current legal regulation. A strong connection with the formula of insurance mediation is also visible on the basis of – the previously mentioned – distinction of such activities within the field of insurance distribution. The applied approach, which maintains the existing intermediary division into brokers and agents, shall not affect the general purposes and assumptions of IDD [Mrozowska-Bartkiewicz 2016, p. 121].

3.3. General guidelines for operations of insurance distributors

Art. 8, par. 1 of DIDA imposes – on distributors – an obligation to conduct insurance distribution in an honest, fair and professional way, in accordance with the best interests of their customers. This provision is an implementation of Art. 17 of IDD which embodies, references contained in the directive's preamble to

fairness (recitals 46 and 47) or broadly understood professional and honest conduct (e.g. recitals 28, 33 and 44). Furthermore, Art. 8, par. 3 of DIDA introduces a general stipulation requiring distributors to provide all the information (including advertising and marketing materials) in a fair, clear and not misleading way, and in the language of the European Union Member State where the insurance contract is concluded unless the parties agreed differently.

There is no identical solution in the legal acts concerning insurance mediation in Poland. Simultaneously, pursuant to Art. 8 of IMA, insurance agents shall perform their activity with good customs and due diligence with the consideration of the professional nature of that activity. In case of insurance brokers – according to Art. 26, par. 1 of IMA – they are obliged, among other things, to carry out activity with respect to the interests of the parties to an insurance contract. It is worth noting that Art. 4a, par. 1 p. 2 of the IMA provides that every insurance intermediary (i.e. agent or broker) is obliged to provide information in a clear, appropriate and understandable manner.

The projected legal regulation, due to the literal wording of the operating guidelines for distributors and its versatility, deserves a positive assessment from a consumer protection point of view. On the other hand, it can be said that – depending on the distribution channel – new provisions fall within the scope of the general clause regarding good customs, the general rules of CC on the conclusion of contracts, and other regulations concerning, for example, unfair advertising or non-binding, internal codes of ethics (*primo* Insurance Brokers' Code of Professional Conduct). That notwithstanding, the authors believe, that putting so much emphasis on presented issues in DIDA, deserves approval.

3.4. New information duties and customer (consumer) demands-and-needs tests

Issues related to equipping customers with the appropriate information about a purchased insurance product, as well as the necessity of its adaptation to his needs are an important part of DIDA. Moreover, these requirements are also significant in the context of reduction harmful insurance sales practices, including misselling and misapprehension of insurance coverage.

One of the obligations imposed on distributors is the requirement to define the demands and needs (on the basis of information obtained from the customer) and provide them in a comprehensive form with objective information about the insurance contract, to allow the customer to make an informed decision (Art. 9, par. 1 of DIDA). Such information shall take into account the complexity of the proposed contract and the type of customer (Art. 9, par. 2 of DIDA), be free of charge, provided on paper, formulated in a clear, honest and not misleading way (Art. 10, par. 1 of this regulation) and also meet the customer's demands and needs (Art. 9, par. 3 of DIDA).

A significant novelty in relation to the Polish legal order is is an obligation stated in Art. 9, par. 4 of DIDA to provide a standardised document containing insurance

product information. This only applies to the risks listed in Division II of the Annex to IRAA (which covers some personal and property insurance). Pursuant to Art. 9, par. 5 of DIDA, the discussed document should meet certain editorial requirements (e.g. being short and standing alone, being appropriate and not misleading, containing an appropriate title or, if originally produced in colour, not less comprehensive in the event of printing or photocopying in black and white). Moreover, it also shall incorporate contents, as specified in Art. 9, par. 6 of DIDA, including – among others – information about the type and group of insurance, a brief summary of the insurance coverage, in particular the main risks and insured sum, the means of premium payment and duration of payments, the main exclusions from liability of the insurance company, the obligations of parties during the term of the contract or the means of terminating the contract.

The scope of the information obligations imposed by DIDA on insurance agents extends current regulation, primarily in terms of the need to inform customers about the nature of remuneration received in relation to a proposed insurance contract or the possibility of lodging a complaint or to settle a dispute out of court. Furthermore – in the case of life insurance, where capital fund related to the insurance, as well as life insurance in which the insurance establishment's benefit shall be fixed based on specific indices or other base values – the agent is obliged to inform the customer about the distribution cost index and the agent's commission cost index. Similarly, to the above, the information obligations imposed on insurance brokers have been formulated and extended.

Implementation of common, insurance distribution category including insurance companies which, so far, were outside the scope of Polish regulation dedicated to mediation, has resulted in the imposition of an information obligation on these entities as well. In effect, according to Art. 25 of DIDA, the insurance company – before conclusion of an insurance contract – is obliged to provide the following information: business name, address of its seat and, as in the case of intermediaries, the nature of remuneration received by persons performing activities in the field of distribution on behalf of the insurance company, the possibility of lodging a complaint or to settle a dispute out of court and also, the level of indexes of distribution and commission costs of such persons in the context of the mentioned types of life insurance contracts.

A specific obligation to provide information takes place on the basis of cross-selling. This relates, especially, to the situation when an insurance contract is offered together with an ancillary product or service which is not insurance. In such cases, the distributor is obliged to inform the customer whether there is a possibility of concluding each contract separately. If this is acceptable, the distributor shall provide a description of the individual contracts, forming together a package, as well as a separate statement of the costs and charges of each contract (Art. 12, par. 1 of DIDA). In certain situations, the information obligation is subject to additional extension (Art. 12, par. 2 of this act).

These obligations in the area of information provision, as well as the customer demands-and-needs tests which can yield better adaptation of insurance product,

have an undoubtedly pro-consumer nature. New information duties and, associated with them, rules on advice are very important areas ensuring the transparency of distributing insurance. Such transparency, consisting also of other measures like, for example, cross-selling rules or – discussed in a later section – avoiding conflicts of interest, can be considered as an important (primary) tool of consumer protection [see more: Malinowska 2016, pp. 93-99].

Simultaneously, worth reflecting on is whether all of the new solutions are needed in such dimensions. The fact that consumers are aware of certain issues related to the distributor's remuneration, or – in case of some life insurance contracts – indices of distribution and commission costs, may not necessarily contribute to strengthening their position. The need for additional preparation – provided in Art. 9, par. 4 of DIDA – of a document that essentially repeats the insurance contract [Zoń 2016, p. 27], including extensive and multipage general terms and conditions [see more: Więcko-Tułowiecka 2013], may result in the consumer being discouraged from becoming acquainted with all the information concerning the concluded contract [see more: Marszelewski, Piątkowski 2016, pp. 122-124; Zoń 2016, p. 28]. Last but not least, in the context of IDD implementation, it has been noted that adopting extensive information obligations concerning the insurance distributor is not desirable. This is due to the transparently established Polish intermediary division in which a broker acts exclusively on behalf of a customer and an agent exclusively on behalf of one (or more) insurance companies [Zoń 2016, p. 26].

Analysing – in the presented field the implementation of IDD into the Polish legal order, it might be worth considering whether in order to reach its objectives all of the new provisions (*primo* Art. 9, par. 4 of DIDA) shall be "*mechanically*" translated into existing regulation. It is possible that too broad a scope of information obligations may cause the opposite of the intended results.

3.5. Avoiding conflicts of interest

Issues concerning avoiding conflicts of interest are one of the most important matters raised by the European legislation [see more: Mrozowska-Bartkiewicz 2016, pp. 117-118]. According to recital 39 of the IDD preamble, the expanding range of activities that many insurance intermediaries and companies carry out simultaneously has increased the potential for conflicts of interest between those different activities and the interests of their customers. It is therefore necessary to provide rules to ensure that such conflicts of interest do not adversely affect the interests of customers. General rules in this area are embodied in Art. 17.3 (not expressly), 19 (remuneration and disclosure duties) and 27-28 (additional requirements in relation to insurance-based investment products) of IDD [see more: Malinowska 2016, pp. 95-97].

IMA includes no provisions that would deal with conflicts of interest concerning agents and brokers. Yet different organizations of insurance intermediaries in Poland have recognised the need to deal with the problem in their internal regulations. As regards brokers for example, the Polish Association of Insurance and

Reinsurance Brokers has adopted a Code of Ethics (a soft law instrument binding only to Association members) which encompasses a universal rule that concerns said conflicts – point I.3 of the Code states that brokers should perform their profession in a way that is free from outside influence and pressure, prejudices and conflicts of interest, having a legitimate goal in mind which is the best interests of their customers. IRAA on the other hand uses the term "*conflicts of interest*" only when it comes to placement of insurers funds (Art. 276, par. 5) and supervision of insurers concentration in financial groups (Art. 401, par. 6).

The provision from which we can derive a general obligation to avoid conflicts of interest is Art. 8 par. 1. of DIDA – it obliges insurance distributors to perform their activities fairly, honestly and professionally, in line with the best interests of customers. Nevertheless, DIDA addresses the problem expressly in article 17, in the range of life insurance linked to insurance capital funds or life insurance in which the insurer object of performance is established on the basis of certain indices or other values (indicated in group 3 of I division of appendix to IRAA). As it is in IDD, DIDA puts pressure on those specific types of contracts, in which conflicts of interest are more likely to occur than in other forms of insurance. Firstly, insurance distributors are obliged to establish organizational arrangements in order to prevent conflicts of interest and negative impact on customers interests. If such arrangements are not sufficient to prevent conflicts of interest, customers must be informed about the source or character of the conflict (especially if a distributor's remuneration is dependent on the volume of insurance contracts entered into by involvement). Said information ought to be delivered to customers on a durable medium and should take into account the type of customer. Secondly, insurance agents, brokers and insurance companies must take actions to identify conflicts of interest between them, including between members of boards of directors, proxies and employees or any related persons and their customers, or also among the customers themselves, that arise in the course of distribution activities. Analogical solutions addressed to insurers that conclude insurance contracts indicated in group 3 of I division of the appendix to IRAA shall be added to IRAA when DIDA enters into force (new Art. 24a and 24b).

Partially, the problem of conflicts of interests is also addressed in article 8, par. 2 of DIDA, which requires that the means of remunerating insurance distributors (and individuals involved in such distribution, e.g. insurers' employees) cannot be contrary to the best interests of customers, in order to avoid misselling practices. Finally, provisions that concern disclosure of certain information by agents and brokers (Art. 24 and 34 of DIDA) – just as provided in article 19 of IDD – are set to serve a vital role in avoiding conflicts of interest.

3.6. DIDA relation to Complaints Act

Pursuant to Art. 2, p. 2 of the Complaints Act, a complaint is a statement addressed to a financial market organisation by its customer, in which the customer submits

their reservations regarding services provided by the financial market organisation. The notion of a customer includes, among others, natural persons who are parties to insurance contracts (policyholders), whereas financial market organisations are different entities, including domestic and foreign insurance companies.

As we can see, the current regulation concerning complaints pertains only solutions between the customer (purchaser of insurance product) and the insurance company. Art. 100, p.1a of DIDA will amend the Complaints Act and extend the scope of the term "*financial market organisation customer*"– a natural person, who is a customer of an insurance broker, insurance agent or ancillary insurance agent – on performing activities (within the same insurance division in the meaning of the Annex to IRAA) on behalf of more than one insurance company, on issues not related to insurance coverage. The consequence of the above is the extension of the scope of entities to which complaints can be submitted, to brokers, agents and ancillary insurance agents.

On adoption of DIDA, consumers – in addition to the admissibility of submitting a complaint directly to insurance companies – will be also entitled to lodge a complaint against intermediaries, but, as mentioned, only on issues not related to insurance coverage. Such complaints may concern, broadly understood, insurance distribution services. Submitting the complaint obliges a financial market organisation to consider it and to respond to the customer (Art. 5, par. 1 of Complaints Act). The response should be given, in principle, no later than 30 days from the date the complaint is received (Art. 6 and 7 of the discussed regulation). In case of failure to respond within this period, a complaint will be deemed accepted, as requested by the customer (Art. 8 of Complaints Act).

In conclusion, it needs to be emphasized that consumers will receive a new measure to protect their interests. The Polish Complaints Act – although it is not without flaws [see more: Kowalewski, Ziemiak, Marszelewski 2015] – may, at least to a certain extent, contribute to improvement of the quality of consumer services in the area of insurance intermediaries.

3.7. New duties of insurance agents

In accordance with Article 19 of IDD, in good time before the conclusion of insurance contract, insurance intermediaries shall provide customers with a set of information. This is one of the regulations ensuring transparency of distributors' operations and the already discussed conflicts of interests. DIDA divides said disclosure duties as regards agents (Art. 24) and brokers (Art. 34). Currently in IMA, Art. 13 lays down just a few disclosure duties of agents towards customers, i.e.:

– the duty to exhibit its mandate to act on behalf of insurer;
– the duty to inform whether an agent is performing activities as an agent of one insurer or as the so-called multi-agent;
– the duty to inform about the name under which the agent operates and the address of the registered office, entry into the register of insurance intermediaries and

how to check that entry in the register, shares held by the agent in an insurance company which entitles to at least 10% of votes at the general meeting or the meeting of shareholders and, in the case of an insurance agent, which is a legal entity, about the shares of the insurance agent held by an insurance company;
– the duty to keep secret all information concerning customers.

Article 24 of DIDA shall expand the obligations of agents and ancillary insurance agents in the discussed scope. Firstly, agents will have to inform whether they are acting as "*proper*" or "*ancillary*" ones. Secondly, it will be necessary to inform the customer of nature of remuneration received in connection with proposed conclusion of an insurance contract (or insurance guarantee), in particular whether the agent receives:
– a fee paid directly by the customer;
– a commission of any kind included in amount of insurance premium;
– another type of remuneration;
– remuneration, which is a combination of the types of remuneration referred to above.

Thirdly, agents shall inform customers of the possibility to file a complaint or to commence extrajudicial dispute resolution. Fourthly – but only in the range of life insurance linked to insurance capital funds or life insurance in which the insurer object of performance is established on the basis of certain indices or other values – agents must inform customers about the distribution cost index and the commission ratio of the proposed contract (if the agent is remunerated directly by the customer, about the amount of remuneration – and if this is impossible – with the method of its calculation).

According to Art. 10 par. 1 of DIDA, the analysed information ought to be delivered to customers in hard-copy form, free of charge and in the official language of the EU Member State where insurance contract or insurance guarantee is concluded (or in another language upon which the contracting parties have agreed). However, DIDA also allows delivery on durable medium or by website if certain requirements are met (e.g. delivery on durable medium is permitted if the customer was given a choice between such a medium and hard-copy form). If the information is delivered by means of distance communication, the rules set out in chapter 1 and 5 of CRA shall apply – as the application of CRA is not expressly limited by DIDA to consumers, we can assume that CRA provisions in this scope will be used in B2B relations as well. Yet the obligation to provide the customer with said information does not apply to large risk insurance contracts (article 11 of DIDA).

As previously mentioned, new disclosure duties of insurance brokers – similar to those imposed upon agents – shall be set out in Article 34 of DIDA.

3.8. New powers of Financial Supervision Commission

DIDA shall establish a range of new powers for the Financial Supervision Commission (FSC), which is a centralised regulatory body on the Polish financial

market, responsible for e.g. insurance, banking, stock exchange or pension funds. The scope of this extended supervision is set out in Art. 64 and 65 of DIDA, according to which FSC shall supervise the performance of insurance distribution and reinsurance distribution activities and shall monitor the insurance products market, offered on and from Polish territory.

New provisions establish an obligation for FSC to cooperate with the European Insurance and Occupational Pensions Authority (EIOPA) in e.g. exchange of information on insurance distributors or dealing with those insurance distributors who do not abide by the rules and regulations of EU Member States in cross-border relations.

The Articles from 70 to 80 are entirely devoted to control proceedings (inspection) which may be initiated by FSC towards agents, brokers and insurers. The subject of such control is quite broad – it can be the issue of the conformity of their activities with the law (e.g. agents and insurers) or financial status (brokers). During such control – as was in many ways similarly stated in IRAA and IMA – FSC may require access to venues of operations, documents [and their copies] or even interview persons performing insurance distribution. A protocol is prepared from the inspection. Within 14 days of the date of delivery, an inspected entity may submit written observations and remarks to such a protocol (and its contents) to FSC.

Article 11 of IDD requires the publication of the so-called "*general good rules*". According to Article 4 point 23 of DIDA "*general good rules*" are basic legal rules for performance of insurance and reinsurance distribution in the territory of an EU Member State intended for entities interested in performance of such distribution (by a branch or otherwise than by branch) within the freedom to provide services on territory of this EU Member State and having its registered office or place of residence in another EU Member State. It will be FSC's task to publish on its website [www.knf.gov.pl] said general good rules.

Finally, DIDA shall provide a well-developed package of sanctions that may be imposed by FSC on insurance distributors. These will include:

– a ban on cooperation by an insurer with an insurance agent, if such agent shall perform insurance distribution in breach of law (or immediate cancellation of the agency contract concluded with the agent);
– imposing financial penalties – with reference to Art. 362 of IRAA – on insurers (as well as members of their boards of directors and proxies) and agents;
– imposing financial penalties on insurance and reinsurance brokers;
– in scope of life insurance linked to insurance capital funds or life insurance in which the insurer object of performance is established on the basis of certain indices or other values – e.g. issue a public statement indicating person or entity responsible for the breach and the nature of the breach, order to stop the violation and refrain from its repetition or remove the insurance broker or agent from register of intermediaries.

All of abovementioned sanctions shall be imposed by means of an FSC decision, with the possibility to appeal to the Voivodeship Administrative Court. What is

important, FSC shall immediately publish on its website information on final decisions to impose such sanctions [including the name of the punished entity, the reasons for imposing sanctions and the type of sanctions].

4. Summary

Reading of DIDA yields mixed feelings. On one hand – despite its general character, encompassing both B2B and B2C transactions – DIDA may contribute towards boosting the level of consumer protection. On the other, DIDA is on the verge of "*information overload*", meaning multiplication of new disclosure duties that can have a reverse result than expected – consumers may be flooded with different information and remedies, with no clear key how to deal with them. Especially that in general, the Polish insurance market under current legislation is perceived as providing a surprisingly high level of protection to policyholders [Malinowska 2016, p. 100].

Moreover, DIDA creates a completely new legal framework and substantially alters current regulations (in scope of e.g. terminology, insurance mediation, etc.). It is possible that this will lead to difficulties in applying DIDA, especially at the early stages of its validity. Finally, it is regrettable that Polish legislators remained somehow deaf to the postulates of insurance communities such as brokers associations (which requested settlement of the status of insurance broker as a profession of public trust).

References

Act of 23 April 1964 the Civil Code (consolidated text: Journal of Laws of 2017, item 459 as amended).

Act of 22 May 2003 on insurance mediation (consolidated text: Journal of Laws of 2016, item 2077 as amended).

Act of 30 May 2014 on Consumer Rights (consolidated text: Journal of Laws of 2017, item 683).

Act of 11 September 2015 on insurance and reinsurance activity (consolidated text: Journal of Laws of 2017, item 1170 as amended).

Act of 5 August 2015 on handling of complaints by financial market organizations and on the Financial Ombudsman (consolidated text: Journal of Laws of 2016, item 892 as amended).

Civil Code. Commentary [Kodeks cywilny. Komentarz], Kidyba A. (Ed.), 2012, LEX a Wolters Kluwer business, (in Polish).

Civil Code. Commentary [Kodeks cywilny. Komentarz], Ciszewski J. (Ed.), 2014, LexisNexis, (in Polish).

Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC.

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).

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.

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

First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance.

Haberko J., 2007, *Consumer sales contract concluded off-premises* [Umowa sprzedaży konsumenckiej zawarta poza lokalem przedsiębiorstwa], „Przegląd Sądowy", 3, pp. 98-114 (in Polish).

Heiss H., 2011, *Insurance Contract Law Between Business Law and Consumer Protection,* [in:] Brown K.B, Snyder D.V. (Eds.), 2011, General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé, Springer Science & Business Media.

Insurance Distribution Draft Act, the fourth version, dated July 17th 2017.

Kowalewski E., Ziemiak M.P., Marszelewski M., 2015, *Complaints Act 2015 – a New Measure of Customer Protection on the Polish Insurance Market*, „Wiadomości Ubezpieczeniowe", 4, pp. 3-16.

Krajewski M., 2016, Insurance Contract. Art. 805-834 KC. *Commentary* [Umowa ubezpieczenia. Art. 805-834 KC. Komentarz], C.H. Beck (in Polish).

Lisowski J., Zieniewicz M., 2015, *Changes in the Agency Channel on the Insurance Market in Poland* [Zmiany w kanale agencyjnym na rynku ubezpieczeniowym w Polsce], „Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia", vol. XLIX, 4, pp. 335-345 (in Polish).

Malinowska K., 2016, *Insurance transparency and protection regime under the Insurance Distribution Directive*, „Wiadomości Ubezpieczeniowe", 4, pp. 89-101.

Marszelewski M., Piątkowski P., 2016, *The impact of insurance distribution directive on domestic insurance intermediary market. Selected issues* [Wpływ dyrektywy w sprawie dystrybucji ubezpieczeń na krajowy rynek pośrednictwa ubezpieczeniowego. Zagadnienia wybrane], „Studia Iuridica Toruniensia", vol. 19, pp. 111-135 (in Polish).

Maśniak D., Malinowska K., 2017, *Distribution Activities in a New Regime of Concluding Insurance Contracts – Selected Aspects of the Implementation of Directive 2016/97 on Insurance Distribution* [Czynności dystrybucyjne w nowym reżimie zawierania umów ubezpieczenia – wybrane aspekty implementacji dyrektywy nr 2016/97 w sprawie dystrybucji ubezpieczeń], „Prawo Asekuracyjne", 2 (91), pp. 13-31 (in Polish).

Mrozowska-Bartkiewicz B., 2016, *What changes will the Directive on insurance distribution bring to the Polish insurance market?* [Jakie zmiany dla polskiego rynku ubezpieczeń przyniesie Dyrektywa w sprawie dystrybucji ubezpieczeń?], „Wiadomości Ubezpieczeniowe", 2, pp. 111-123 (in Polish).

Regulation 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).

Więcko-Tułowiecka M., 2013, *Consumer protection in insurance – a need or a whim?* [Ochrona konsumenta w ubezpieczeniach – potrzeba czy fanaberia?], „Monitor Ubezpieczeniowy", 53, pp. 22-24 (in Polish).

Zoń Ł., 2016, *Implementation of the Insurance Distribution Directive and Brokerage Practice – de lege ferenda notes* [Implementacja dyrektywy o dystrybucji ubezpieczeń a praktyka działalności brokerskiej – uwagi de lege ferenda], „Prawo Asekuracyjne", 2 (87), pp. 21-32 (in Polish).

Abbreviations

CC – Act of 23 April 1964 the Civil Code, Complaints Act – Act of 5 August 2015 on handling of complaints by financial market organizations and on the Financial Ombudsman, CRA – Act of 30 May 2014 on Consumer Rights, DIDA – Insurance Distribution Draft Act, IDD – Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, IMA – Act of 22 May 2003 on insurance mediation, IRAA – Act of 11 September 2015 on insurance and reinsurance activity, MIFID II – 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, SOLVENCY II – 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.