Position Paper

of the German Insurance Association

on the

Joint Committee Consultation Paper on guidelines for cross-selling practices

Gesamtverband der Deutschen Versicherungswirtschaft e. V.

German Insurance Association

Wilhelmstraße 43 / 43 G, 10117 Berlin
P.O. Box 08 02 64, 10002 Berlin
Phone: +49 30 2020-5233
Fax: +49 30 2020-6233

51, rue Montoyer
B - 1000 Brussels
Phone: +32 2 28247-36
Fax: +32 2 28247-39
ID Number 6437280268-55

Contact:
Silja Fischer
Legal Affairs
E-mail: s.fischer@gdv.de

Lenka Dzurendová
European Office

E-Mail: l.dzurendova@gdv.de

www.gdv.de

Executive summary and general comments

The insurance industry is in favour of **appropriate transparency in cross-selling practices**. Information on the prices of the components available separately from the (same) provider as well as on whether the purchase is optional is important in this context. The present guidelines applying across sectors and regulatory frameworks, however, are not the right instrument for this purpose and are not necessary.

It is not for the supervisors to make a fundamental decision in this context but for the legislator. The discussions on the recast of the Insurance Mediation Directive (IMD2) including special provisions on cross-selling practices are in progress. Moreover, the guidelines address a large number of issues which are not specific to cross-selling practices. Subject to some basic concerns in terms of legal competences, the challenge arising from the approach to address different provisions together at the level of guidelines is also to achieve **consistency with several European laws** in practice[1]. In any case, the adoption of IMD2 is to be awaited and, as noted in the Consultation Paper[2], the guidelines are to be adjusted to the directive's final version.

The provisions on the **breakdown of costs** in Guideline 1 are inappropriate and are not in line with already existing provisions. It should be clarified that the disclosure of the costs covers only additional costs that are not included in the price. Provisions on the **remuneration** (Guideline 10) can only be stipulated at Level 1. The provision stipulated in Guideline 11 No. 29 regarding cancellation is ambiguous. Moreover, clarification is needed with respect to the **scope of application**. Individual insurance products which offer protection against several risks, so-called multi-risk policies, do not constitute a package and should be explicitly excluded from the scope of application. In general, combinations made up solely of insurance products should only be subject to separate, component-specific information requirements provided that the individual components are actually made available separately by the provider. This creates the required transparency.

[1] The Discussion Paper also recognizes the necessity of consistency, in principle, cf. Background (section 2), No. 10, p. 8 et seq.
[2] Cf. Background (section 2), No. 5, p. 7 et seq.

Question 1: Do you agree with the general description of what constitutes the practice of cross-selling?

1. Cross-selling

- **Scope of application/definitions and provisions need to be aligned to each other**

The explanations provided under the title “What is cross-selling” (p. 9, 10), in particular, influence the eventually relevant scope of application as well as the definitions (p. 19 - 21). A discussion which does not refer to specific provisions, however, is only of limited use. Scope of application, definitions and provisions need to be aligned to each other in order to ensure an appropriate and adequate regulation. This has also been demonstrated by the still ongoing, controversial debates in course of the IMD recast. A large number of product combinations – as well as different legal provisions – have to be considered in the context of this cross-regulatory approach.

- **Individual insurance products which provide protection against several risks do not constitute a package**

Individual insurance products which provide protection against several risks (so-called multi-risk policies) do not constitute a package. This should be made explicitly clear in the scope of application (under No. 1 / No. 4). This approach corresponds to the Council’s as well as to the European Parliament’s position on IMD2 (Council: Article 21(4), recital 41a at the end; EP: second sentence of Article 21(1), Article 2(20)). An artificial splitting of products is to be rejected. The Discussion Paper presents some important approaches in this context, but it is not sufficiently clear. It is clarified under No. 4 (p. 19) that the guidelines are not intended to prevent the offering of products that constitute an inherent or indivisible package which cannot by its nature be offered separately because the components are a fully integrated part of the package. The restriction “cannot by its nature”, however, might be misunderstood. Moreover, the clarification provided in footnote 7, which exemplifies “certain” multi-risk insurance policies, is too vague. The kinds of risks that an insurance policy covers is based on a decision on product design, which takes account of various aspects (market needs, risk calculation including the avoidance of adverse selection, tradition, and administrative burden). For example, a household insurance often covers such risks as fire, storm, tap water, etc.. Individual policies, for example for tap water, are usually only offered in the commer-

cial sector. The extent of coverage offered is based on a company's individual decision, which probably bears in mind market needs / feasibility / administrative burden. A first indication of the risks a single product may include can be gained from Annex I and II to Directive Solvency II (2009/138/EC). However it may well be that an insurance product covers risks from different classes of insurance.

- **Component-specific information requirements, only in case components are available separately from the provider**

In principle, combinations made up solely of insurance components should only be subject to separate, component-specific information requirements provided that the components are indeed available separately from the particular provider. This way, the consumer will be informed about the actually existing offer. An obligation to provide information on the products of competitors would be inappropriate and would be contrary to the principles of competition. Moreover, it would require that any forms of products available on the market are known and that there is always a common (European) understanding about when a product is actually a product and when a product package. Different market conditions and traditions as well as product developments show a mixed picture.

- Example of different market conditions and traditions: *In Germany combined residential building and household insurance policies are generally designed as pure non-life insurance. In Spain and England, in contrast, insurance coverage which combines non-life and third-party liability components is common.*

- Example of product development: *In the early 2000s in Germany accident insurances designed for the elderly were developed, which combine the insurance on a fixed sum basis from the traditional accident insurance with assistance services (e.g. in the form of care services, menu and cleaning services in the event of an accident). Recently single insurers started to offer a mere assistance insurance cover.*

If several proposals for the conclusion of legally independent insurance contracts are covered in one proposal form this of course does not affect the separate availability and corresponding information requirements.

- **Categorization of tying and bundling practices**

The benefit of any categorization of tying and bundling practices (No. 6, p. 21), in contrast, is questionable and less important with respect to the specification of provisions. Moreover, it is neither used in the text of the Council nor in the text of the European Parliament on IMD2 with respect to the actual information requirements. Furthermore, against the background of different sectoral definitions, using these terms is unlikely to provide clarity.

- **Clarification as to whether the provisions only apply to combinations of financial services**

Clarity on the scope of application is also required in general. It should be explicitly clarified in the guidelines whether the provisions – as provided for on p. 10, No. 4 of the Consultation Paper – shall only apply to combinations of financial services/products.

2. Other scopes of application/definitions

The provisions refer to “customers”. IMD2, in contrast, provides for provisions which apply with regard to all customers and provisions that apply only with regard to non-professional customers (cf. Article 19(1) COM / Council / EP). Final decision on what shall apply to the actual provision on cross-selling practices in IMD2 has not yet been made. Moreover, the guidelines address many issues which go beyond the provisions on cross-selling practices. Consistency with the scope of application of IMD2 should also be secured in this context. It will also have to be considered what requirements or exceptions apply to ancillary intermediaries.

Question 2: Do you agree with the identified potential benefits of cross-selling practices?

Yes, we agree. When several risks are jointly covered, potential benefits might also include the prevention of gaps in coverage. Another advantage of combining of several components may consist in the availability of coverage in the first place as a potential adverse selection for the individual components of insurance could be avoided.

Question 3: Do you agree with the identified potential detriment associated with cross-selling practices?

It is true that consumers are likely to have to handle a larger amount of information when being offered several products and that a transparent display of information is, therefore, particularly important. However, it is to be noted that with respect to many of the aspects listed, general provisions which also apply to the individual components in case of cross-selling have already been established. The transparency of prices and costs, in particular, is a fundamental issue. In this regard we also point to the comments on the individual guidelines.

With regard to the assumption stipulated in the second sentence of No. 2, according to which cross-selling may distort or limit customer choice, we would like to point out that many optional additional products in fact extend the choice of the consumer.

With respect to No. 4(a) it is to be considered that, in terms of comprehensibility, it might be reasonable to provide information on possible ancillary products only during the sales process.

Question 4: Please comment on each of the five examples in paragraph 13, clearly indicating the number of the example to which your comment(s) relate.

The listing of potential detriments is only of limited use. A discussion of the existing – general – provisions is required in addition in this context.

Example 1
We do not know about any providers in Germany which offer products together in a package where the price of the offer is higher than the price of each component separately. It is expected that packages will usually offer a price advantage and individual components are cheaper in a package than when purchased separately. We strongly support transparency regarding the prices of individual components available from the provider. In addition to cost effects combinations can avoid adverse selection for the individual components.

Example 2
Misleading the customers by way of providing inaccurate information is obviously not permissible.

Example 3
The legal consequences of cancellation rights depend on contract law. The example does not reveal whether detriments are expected with regard to the compliance with contract law or with regard to the contract law itself.

Example 4
Directive 2002/65/EC on distance marketing of consumer financial services explicitly prohibits stipulation of a penalty if the right of withdrawal provided for under Art. 6 para 1, 7 is exercised. Beyond that Directive 93/13/EC protects consumers against unfair contract terms, which are not binding for the consumer. Under German law (§ 309 no. 6 German Civil Code [BGB]) a provision in standard business terms by which the user is entitled to payment of a contractual penalty in the event that the other party to the contract rescinds from the contract is ineffective. The question of appropriate acquisition fees, etc. is not specific to cross-selling.

Example 5
This is a matter of adequate information and advice. Article 12(3) of IMD1 is applicable in this context. With regard to the product design it is to be taken into account that it is not possible to customize the coverage of products in a way that would always perfectly reflect the specific need of each individual customer. It is up to the market forces to determine the most appropriate of the combinations available. Due to the diversity of coverage offered in a competitive market, which in part follow different concepts (such as covering causes or effects of damages), the coverage contracted by individual customers could partially overlap. To avoid any kind of overlap in any case would require an immoderate standardization of products or risk gaps in coverage. Both would not meet the customer needs. Similarly, there may be product components which a customer may not need, however, where a separate exclusion would be prohibitively expensive. Both aspects of over-coverage (overlapping and surplus coverage) should be permitted below an acceptable materiality threshold. Further a right to divide products into parts, neither initially nor later (compare comments on question 11) should not be derived from these aspects.

Question 5: Please comment on the proposed guidelines 1 and 5 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

Guideline 1

No. 13: Providing information on separate prices of components available separately creates transparency

Providing information on the prices or premiums of the package and of the components available separately is the right approach. We strongly support the explicit stipulation of such an obligation in IMD2. However, it must be made clear that the obligation to provide customers with separate prices for the individual components only applies if the components are also available separately from the respective provider. Notional prices do not provide any value added. In addition, the freedom of choice of provider, whether to offer components separately or not, must be maintained.

The Guideline could be amended as follows:

"[…] customers are provided with the price of both the package and of its component products~~.~~, if these are available separately from the same provider."

No. 14: Clarification that this refers to additional costs not included in the price; Special rules for the disclosure of costs would not be appropriate and should be deleted completely.

It should be clarified explicitly in the guidelines that the disclosure of costs covers only additional costs that are not included in the indicated price[3]. The provisions on cross-selling practices discussed within the scope of IMD2 do not provide for such a breakdown of costs included in the premium. The European Parliament has even completely refrained from using the misleading term "costs" in this context. Whether and to what extent the disclosure and breakdown of the costs of a product is reasonable is not a special issue of cross-selling practices but it is a fundamental issue which must comply with the general provisions at Level 1. The provisions exceed the provisions already existing at Level 1 by far. In the case of insurance

[3] So far this is stated explicitly only in the summary, see pp. 15, no. 5.

products which are not connected with a savings element, customers focus solely on the premium to be paid in relation to the insurance cover granted. The costs thus incurred have already been included in the insurance premium (cf. information on the total price under Article 3(1)(2)(b) of Directive 2002/65/EC). With respect to insurance products with a savings element, appropriate European provisions on the disclosure of costs factored into the premium are still being discussed and developed. It is not comprehensible why separate provisions on cross-selling practices shall apply in this context. Special rules would have to be firmly rejected.

Guideline 5: No legal uncertainty as a result of vague, additional information requirements

The provision to inform on “other relevant features” is vague. Moreover, it is not provided for in the proposals on cross-selling practices in IMD2. In this context, too, only the general Level 1 provisions can be relevant. Of course, the relevant characteristics of the financial service have to be described (Article 3(1)No.2(a) “a description of the main characteristics of the financial service”). If additional information has to be provided, it should be specified with a clear reference to the respective Level 1 provision.

The objective of information on the interaction of risks is not clear in the insurance context and should be deleted. The term “risk” has a different meaning in this context as compared to the investment sector. The objective of insurance products is to provide cover against risks, which is not being impaired through cross-selling. Provisions on pure investment products must not be applied to insurance products without further consideration. The restriction “where relevant” does not provide the required clarity in this context.

Question 6: Please comment on the proposed guidelines 2, 3, 4 and 6 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

With regard to the content of information: Here, too, the comments on Question 5 on information provided on costs and "other relevant features" apply.

We generally agree with the provisions on the "manner" in which information shall be provided and would like to point out in detail:

- We generally support the provision of information in good time (Guideline 2 No. 15, Guideline 6 No. 20).

- Misleading and distorting display of information (Guideline 4 No. 18, Guideline 6 No. 21) is to be rejected. It has already been prohibited pursuant to Article 6(1)(b) and (1)(d), Article 5(1) and (4) of the Unfair Commercial Practices Directive (2005/29/EC). It is questionable whether more detailed provisions beyond that are required. Individual companies are not able to guarantee a sector-wide consistent display (cf. "prevents meaningful comparison" under No. 18 at the end). Moreover, there are doubts as to whether the rigid provision of "equal prominence" (Guideline 3 No. 17) and "same prominence and weight" (Guideline 6 No. 20) of information will always comply with the actual need for information. If the additional product is ancillary compared to the main product, in particular, wrong weighting might result. "Hidden costs" (cf. Guideline 3 Example 2) are to be strongly rejected. However, it should be allowed in the course of a sales process to first provide information on the principal product and then on any optional additional products.

- With a view to subsequent translation, we would like to point out with respect to the term "accurate" (Guideline 3 No. 16) that the term "richtig" should be used in the German translation. (Different translations in Article 79 of Directive 2009/65/EC and Article 6 of Regulation 1286/2014).

- The provision on "simplified or jargon-free language" (Guideline 3 No. 16, Guideline 6 No. 20) should be deleted or at least be modi-

fied. It is very important to the German Insurance Association that the provisions are comprehensible. However, there should always be an adequate balance between comprehensibility and legal certainty. It cannot be assumed that it will always be possible to totally refrain from using technical terms in this context. However, respective technical terms can be explained to improve comprehensibility, for instance.

Question 7: Please comment on the proposed guideline 7 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

Guideline 7: Optionality of components needs to be transparent

No. 22 An obligation to provide information on the components available separately from the provider is to be strongly supported. It has been discussed within the scope of IMD2 and should be explicitly stipulated there. Here, too, it can only refer to the separate availability of components from the same provider. The provision might therefore be amended as follows for the purpose of increasing clarity:

"[…] firms which distribute bundled or tied packages should ensure that their customers are properly informed whether it is possible to purchase the component products separately from them" […].

The provisions on the display of information stipulated under No. 23 and No. 24 are reasonable and important.

Question 8: Please comment on the proposed guideline 8 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

Guideline 8: Separate provisions on suitability / advice are not required

Separate provisions on suitability/providing advice are not required. Provisions on the demands and needs as well as suitability and appropriate-

ness are the key issues of the Insurance Mediation Directive and are not specific to cross-selling practices. Within the scope of IMD2, suitability and appropriateness are only addressed in the context of investment products. Here, the overall package is to be considered, as already today intermediaries should review during the advisory process whether each product meets the demands and needs of the customer pursuant to the provisions of IMD1. Special rules are misleading if they imply that each package is an ideal package that always has to meet the demands of the customer 100 percent. Moreover, in this context, too, the benchmark for any intervention by supervision should be collective consumer protection.

Question 9: Please comment on the proposed guidelines 9 and 10 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

Guideline 9: IMD has already addressed the issue of training

The Insurance Mediation Directive has already addressed the important issue of training. Duplication may give rise to contradictions and conflicts of competences.

Guideline 10: Requirements on the remuneration of distribution activities can only be stipulated at Level 1

Guideline 10 should be deleted. The requirements on the remuneration of insurance distribution activities are a major issue of the recast of IMD2 and can only be stipulated there. The final drafting has not yet been determined.

Question 10: Please comment on the proposed guideline 11 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.

Guideline 11: Right of cancellation only in compliance with the conditions under which components are available separately from the provider

Special rules for withdrawal and post-sale cancellation rights and on how they apply to packages are fundamental contractual provisions that have to be stipulated by law. Accordingly, it has already been stipulated in Article 6(7) of Directive 2002/65/EC (Directive concerning the distance marketing of consumer financial services) for “attached contracts” and in Article 14(4) of Directive 2008/48/EC (Consumer Credit Directive) for an ancillary service relating to the credit agreement that the exercise of the right of withdrawal also applies to these contracts.

Irrespective of the above, the provisions require further clarification: in principle, “separation/splitting” shall only be allowed if the provider also offers the other components as a separate product. Consumers cannot ultimately expect better treatment than if they had only purchased one product of the package right from the beginning.

The question arises of what the actual objective of No. 29 is. If it is only to make clear that cancellation rights within the meaning of No. 28 shall not be linked to disproportionate penalties, there should be no further specifications. Purely for precautionary reasons we would like to point out that providing a general right of choice of the consumer to split package components that are not offered separately is not compatible with the freedom to design products. This freedom is not limited to rejecting impossible arrangements but it also protects the choice between different possible arrangements. An intervention would require that the combination is principally inappropriate. The proposal of imposing a general obligation to offer individual components also separately has neither been supported by the Council in its General Approach on IMD2 nor by the legislator in MiFID2, which we approve of. In the event that additional products are being tailored to a certain basic product, an obligation to offer components separately might result in the fact that, de facto, a new product would have to be developed.

Question 11: Please provide any specific evidence or data that would further inform the analysis of the likely cost and benefit impacts of the guidelines.

-

Annex: Basic concerns in terms of legal competences

There is no adequate legal basis for the envisaged provisions. Articles 16 of the ESA Regulations confer tasks on the ESA but are not enabling provisions and, without a basic legal act on cross-selling, they do not provide a sufficient legal base. The recast of MiFID provides for ESMA to prepare, in cooperation with EBA and EIOPA, guidelines on cross-selling practices. Only product combinations with an investment service, however, are cross-selling practices within the meaning of MiFID (cf. legal definition stipulated in Article 4(42)). The present approach goes far beyond that. Provisions and enabling power in IMD2 are pending. The provisions stipulated in the Directive on credit agreements for consumers relating to residential immovable property and in the Payment Accounts Directive do not provide for any empowerment for guidelines. Moreover guidelines should establish consistent supervisory practices and ensure common application of Union law. In principle, it is not the function of guidelines to harmonize diverging legal provisions or to stipulate requirements going beyond that.

Berlin, 20 March 2015