Comments Template on Consultation Paper on the proposal for Guidelines on product oversight & governance arrangements by insurance undertakings and insurance distributors		Deadline 29 January 2016
Name of Company:	INSURANCE EUROPE	
Disclosure of comments:	Please indicate if your comments should be treated as confidential:	Public

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The numbering of the questions refers to the Consultation Paper on the proposal for Guidelines on product oversight & governance arrangements by insurance undertakings and insurance distributors.

Reference	Comment	
General Comment	Insurance Europe supports effective product oversight and governance arrangements. However, we urge EIOPA not to pre-empt the outcome of EU law and to await the IDD delegated acts on POG to assess whether there is a need for guidelines in this area.	

	Guidelines serve the purpose of harmonising the supervision and application of Union law. They should therefore only be applied where they are required to fulfil this purpose and where they ensure consistent implementation and application of the provisions stipulated by EU law. Preparatory guidelines pre-empt the political discussions on Level 2 and limit the scope of discretion of the EC for Level 2 measures. The EIOPA Regulation does not provide for such anticipatory or preparatory guidelines. On the contrary, according to recital 25 of the EIOPA Regulation, the authority does not have the power to issue guidelines in areas covered by technical standards. With regard to the scope of this consultation paper, EIOPA invites respondents to focus their comments on the proposed guidelines for insurance distributors only, which are outlined in Chapter 2. However, Insurance Europe's submission to the consultation also contains certain points that are relevant for manufacturers, which it believes are paramount to the discussion on POG arrangements. In addition, the guidelines for distributors contained in Chapter 2 go beyond the requirements set out for distributors in Article 25 of the Level 1 IDD text, which simply provides that distributors must have in place adequate arrangements to obtain information on the product and the product approval process, including the identified target market of the insurance product. The proposed guidelines go beyond the Level 1 text by introducing further requirements for distributors, including on the role of management and documentation requirements.	

	Timing and procedure **The publication of the EIOPA preparatory guidelines ahead of the EC's delegated acts on POG is problematic, particularly as EIOPA envisages the publication of the final guidelines already in Q2 2016. This will mean that insurance undertakings and distributors risk having to adjust their internal processes and distribution strategies to the POG requirements on rather short notice. Furthermore, there is a risk that they will have to do this exercise again only a few months later in order to be aligned with the EC delegated act. This creates an unnecessary impact on the market and is not in the best interests of customers.** In addition, in paragraph 1.6 on page 8, EIOPA states that it will review the preparatory guidelines once the deadline for the implementation of IDD has passed to determine the extent to which a revision of the guidelines is necessary. Additional changes made within such a small timeframe will be a burden for the sector and impose unnecessary costs. EIOPA states in the consultation paper that the issuance of guidelines is justified to ensure competent authorities follow a consistent and convergent approach with respect to the implementation of IDD. It seems, however, that these "preparatory guidelines" will have the opposite effect, as much is left to the discretion of national competent authorities who are expected to already take steps prior to the implementation of IDD. Guidelines on POG should only be considered if, after the delegated act on POG is adopted, clear evidence shows a demonstrable need.	

	In paragraph 1.4 on page 7, EIOPA mentions that cross-sectoral consistency needs to be ensured in financial markets as the EBA and ESMA have already issued guidance on POG. However, the EBA has published guidelines that only apply from 3 January 2017, while ESMA has only provided technical advice to the EC on delegated acts on POG in the context of MiFID 2. Neither the EBA nor ESMA are proposing the introduction of any preparatory guidelines, and are instead awaiting the implementation of all the relevant Level 1 texts. Finally, despite the fact that the guidelines are only "preparatory" in nature, EIOPA still requires competent authorities to confirm whether they comply or intend to comply with the guidelines. It seems difficult to understand how preparatory guidelines aimed at supporting competent authorities when implementing IDD can be subject to a 'comply or explain' procedure, particularly as EIOPA also states that no enforcement actions should follow from practices that are not fully in line with the guidelines. We would welcome a recognition in the text of the guidelines themselves that no enforcement action is envisaged as part of these preparatory guidelines. **Proportionality** Product oversight and governance arrangements need to be proportionate to the level of complexity and the risks related to the products as well as the nature, scale and complexity of the relevant business of the regulated entity. Hence, Insurance Europe welcomes the fact that the principle of proportionality has been introduced in the explanatory texts in relation to guideline 2 of Chapter 1 (paragraph 1.9) and guideline	

	1 and 2 of Chapter 2 (paragraph 1.3). **However, we would further suggest that the principle is introduced into one or several guidelines where relevant, and not just in the explanatory text, as well as in a general introduction to the guidelines.** Insurance Europe believes that the scope of the guidelines is very broad, as on the one hand they apply to both life and non-life insurance products, and on the other they seem to apply to bespoke contracts with professional clients. It is important to bear in mind the diversity and wide range of insurance products, as a result of which the POG guidelines would not be expected to apply in the same way to all products. Indeed, on page 38 of the consultation paper (under policy issue 3), EIOPA acknowledges the need to avoid too burdensome processes for insurance business classes with lower risk and/or complexity. These differences need to be respected, and a case-by-case examination is recommended, in order to avoid introducing requirements for all insurance products that are more suited to the investment world. Product risk is minor for simple insurance policies sold on a mass-market basis. For example, many of these products have proven their benefit in the market for years, without giving rise to any of the criticisms put forward by EIOPA. Moreover, the majority of simple products (including non-life products such as home and motor insurance) are developed for the purpose of covering a particular risk. The persons affected by the risk thus form the natural target group. A more comprehensive target group analysis can be omitted in this context.	

Retroactive application

Insurance Europe is concerned at the potential retroactive application of these guidelines and believes that they should only apply to newly designed products that are put on the market after the publication of the guidelines. This is also consistent with the IDD text, which requires a product approval process for each insurance product "before it is marketed or distributed to customers" (Article 25(1)). However, paragraph 1.17 on page 10 suggests that competent authorities may wish to apply guideline 8 (product monitoring) and guideline 9 (remedial action) to products that are still being distributed or brought to market prior to the adoption of national measures. It is not at all clear how a manufacturer could comply with national measures adopting guideline 8 or guideline 9 in isolation and it is, for so-called preparatory guidelines, inappropriate to consider retroactive application. In any case, it would be more appropriate and logically sound to rephrase paragraph 1.17 as referring to compliance "for products brought to the market prior to that date **and** still being distributed, where they are significantly changed after the implementation date". Paragraph 1.29 on page 47 should also be deleted or adapted consequently.

We believe that insurers should be given flexibility in their product governance arrangements with respect to applying them to existing products as companies would be overstrained if they were obliged to develop new POG systems for each of these products. It should be noted that examining existing products under the target market criteria would be particularly burdensome in jurisdictions where advice is compulsory; compulsory advice aims to ensure that consumers are provided with the most suitable products, even when the consumer is outside the target market for the concerned

product.

EIOPA should instead consider a revised wording that would see the guidelines apply to newly designed products that are brought to market, or products that are 'significantly changed', after the implementation date of the guidelines. This would also be an appropriate clarification to make in light of the very short timeline EIOPA envisages for the implementation of its preparatory guidelines.

In any event, it should be stressed that it is already possible for supervisory authorities to intervene regarding existing products, where they are demonstrated to be problematic or pose a threat to consumers. Furthermore, insurance distributors are already required to analyse the customer's demands and needs.

Scope of remedial action

With respect to guideline 9 for manufacturers (remedial action), **it should be clarified that the framework for introducing any changes to existing contracts is set by national law. Indeed, this is a more general point of contract law that extends beyond the mere retroactive application of guidelines.** We agree that where a problem with a product becomes apparent after it is issued, the manufacturer should take remedial action as regards the further distribution of the product in question. However, we understand that this is meant as a preventative measure which relates to the further distribution of the product only and does not affect the contractual relationship between the manufacturer and customers who have already purchased the product. This contractual relationship remains subject to

	national laws. **No general price control** **It should be explicitly clarified that these provisions shall not lead to a general price control.** In a market based on fair competition, the decision as to whether a product is adequately priced is up to the customer who needs to be provided with transparent information for this purpose (see also our comments on Question 2).	
Question 1		
Question 2	An important aspect that should be taken into account by EIOPA is the interaction of these guidelines with other IDD provisions and delegated acts. For example, guideline 2 for both distributors and manufacturers refers to the proper management of conflicts of interest, which is an issue that is dealt with under specific IDD provisions, as well as delegated acts. In addition, guideline 2 on the objectives of the product distribution arrangements (as well as guideline 2 for manufacturers) refers to minimising customer detriment. However, the use of this term is quite vague and unclear from a practical perspective, and it does not feature anywhere in the relevant IDD provisions on POG. The key point should be to ensure that the objectives, interests and characteristics of customers are duly taken into account, rather than to introduce vague new duties on manufacturers and distributors. We have concerns that the wording of this guideline could have the	

	effect of hindering product innovation. In the insurance context in particular, there are numerous possibilities to tailor insurance cover according to the needs of consumers via terms and conditions, sub-limits, risk exclusions or inclusions etc. These conditions are not detrimental to consumers, but are essential in order to be able to provide affordable insurance cover as widely as possible. Given the ongoing disruption in markets, the nature of product testing (guideline 7 for manufacturers) should not hinder innovation. Product testing procedures should be short. Moreover, it should be made explicitly clear that nothing in the guidelines should be construed as leading toward any form of price control for insurance products. However, this consultation paper suggests in paragraph 1.25 of Guideline 7 (p. 45) that manufacturers should assess the adequacy of the price. Furthermore, in its online survey in preparation of the call for advice from the EC on the delegated acts under IDD, EIOPA has already hinted at the possibility of requiring manufacturers to ensure that products are fairly priced. However, the notion of a fair value price for insurance products is an inherently subjective one – where a product is not fairly priced, there will be no market for it as consumers will simply not purchase it. While the insurance industry supports the development of good products that bring value to customers, EIOPA should not consider interfering with companies' internal pricing mechanisms, as to do so would inevitably hamper competition. In the context of potential costs/negative impacts, special attention should be paid to the proportionality principle in respect of small businesses, and notably tied agents, who cannot meet the same level of formality as large companies (see comments on	

	proportionality in the General comment section).	
Question 3	We agree that the preparatory guidelines on product distribution arrangments for distributors should be distinct from those applicable to manufacturers and should focus on the necessary measures distributors should take in preparation of the distribution of insurance products. Furthermore, we believe that the guidelines for manufacturers should be applied to those intermediaries who are "de facto" manufacturers, as to do otherwise would cause the guidelines to impose requirements on insurance undertakings to supervise intermediaries who are involved in the design and manufacture of a product. As regards the distribution of products to the identified target market, the guidelines should not impose any duty on manufacturers to supervise or be held responsible for the actions of distributors who sell outside of the target market. This is particularly relevant in the case of independent intermediaries, where it is generally not possible for manufacturers to interfere in their business. The manufacturer should thus define the target market, while leaving the necessary flexibility to the distributor where the product is suitable/appropriate for the customer. Distributors would therefore remain responsible for meeting the required standards for distribution and determining whether such sales remain suitable/appropriate. With regard to the general responsibilities of distributors and manufacturers, each should bear their own responsibility to ensure that the end-customer demographic of the product is as per the original design and researched target market for the product. Manufacturers are responsible for identifying the target market, while distributors should obtain all necessary information on the product approval process and target	

	market from the manufacturer and provide sale information to the manufacturer.	
Question 4	With regard to the role of the administrative, management or supervisory body, it should be left to be determined at a national level who exactly should be responsible for the different steps required in order to take account of differing national structures. For example, the reference to the 'supervisory body' would prove problematic in two-tier board systems, where it is a non-executive body with a mere supervisory function and consequently does not have any operative tasks to carry out. Indeed, in the explanatory text of EIOPA's Guidelines on System of Governance (EIOPA-BoS-14/253), it is acknowledged that the meaning of the term "administrative, management or supervisory body" in a two-tier board system will depend on the respective responsibilities and duties, and recommends that when transposing Solvency II, each member state should consider its own specificities and attribute responsibilities and duties to the appropriate board, if necessary. A similar qualification should be added to these guidelines.	
Question 5	Guidelines 4 and 5 for distributors refer to obtaining all necessary information on the target market and the product from the manufacturer. In addition, in guideline 10 for manufacturers, EIOPA states that manufacturers should ensure that distribution channels act in compliance with the objectives of its POG arrangements. However, it is difficult to see how this can work in practice for independent intermediaries. While we agree that manufacturers should provide their distributors with all the information necessary about the product, this guideline may not always easily apply in the case of independent intermediaries, where manufacturers have less or no control over how or to whom their products are sold. The reference in guideline 10 to guiding towards	

	target markets would therefore be a problem in many markets as it is generally not possible for manufacturers to interfere in the business of independent intermediaries, and no distinction between independent and tied intermediaries is provided for in the guideline. EIOPA should take into account the specific characteristics of different distribution channels. The guidelines should be careful not to prevent consumers from having the freedom to choose the distribution channel they deem most appropriate for their needs, which is particularly important given the wide variety of distribution models across Europe. The focus should therefore be more on ensuring that the distributor understands the target market.	
Question 6	Insurance Europe strongly believes that explicit recognition should be introduced in the guidelines to acknowledge that it remains possible generally to sell products outside of the intended target market. A rigid determination of a target market at the level of product design would lead to the exclusion of numerous customers from suitable insurance coverage, if – for different reasons – they do not form part of the target group, despite the fact that the product still meets their individual need for protection. For example, with regard to product testing, EIOPA suggests to consider whether it should be possible to close an all-risk policy for an old car. Consider, for instance, a partial comprehensive insurance for a car, providing coverage against glass breakage. Whether or not this product remains useful when the car gets older and decreases in value depends on the customer. Customers with a high yearly mileage or who drive on difficult terrain are more likely to have a glass breakage and need an all-risk policy. So it would not be possible or desirable to determine at product or target market level whether it is possible to purchase these kinds of policies for an old car. This could even lead to problems of discrimination and refusal to sell. The distributor has to be able to deviate from the pre-set target group if this is reasonable in a	

	particular case. The approach taken by the EBA in its guidelines is to allow distributors to sell products outside of the target market defined by the manufacturer provided they are able to justify doing so. Moreover, in ESMA's technical advice to the EC on MiFID 2 (ESMA /2014/1569), it acknowledges that "some products may be distributed to clients outside the manufacturer's target market. Distributors remain responsible for meeting the required standards for distribution and it may be that such sales remain suitable/appropriate". We believe that this approach should also be applicable to these guidelines to ensure a consistent and coherent approach. The manufacturer should thus define the target market, while leaving the necessary flexibility to the distributor where the product is suitable/appropriate for the customer. For the same reasons, there should be no reference to a negative target market, which is not only a concept that is difficult to understand but one which could prove too exhaustive or even impossible to fulfil in practice. In addition, Insurance Europe has concerns regarding the overly-expansive nature of guideline 6 for distributors. This provides that the distributor's distribution strategy should not "contrast" with the distribution strategy identified by the manufacturer. However, the term "contrast" in this context may be confusing. The word "conflict" is therefore a better choice. Furthermore, guideline 10 for manufacturers does not require the insurer to specify its distribution strategy to the distributor. In fact, the manufacturer's distribution strategy may include the insurer's decisions with regard to use or non-use of competing distributors which would be inappropriate information to supply to a selected distributor. Moreover, the manufacturer's guidelines do not require a distribution strategy as such, rendering guideline 6 for distributors confusing.	

	In any case, where such a strategy is followed, it would only make sense for independent intermediaries, rather than tied agents who follow the strategy determined by the insurance undertaking. Accordingly, guideline 6 is overly broad and should be reformed to provide that "where the distributor sets up or follows a distribution strategy, *the distributor's strategy should not conflict with distribution to the* target market identified by the manufacturer of the insurance product". Furthermore, manufacturers should not be obliged to disclose their whole distribution strategy to distributors, but only the relevant parts.	
Question 7	In relation to guideline 7 on the regular review of product distribution arrangments (and guideline 8 for manufacturers on product monitoring), we agree that review and monitoring mechanisms should be in place for responding to any signals received from the market that the product may no longer meet the interests, objectives and characteristics of the identified target market. However, we are concerned over the requirement for on-going monitoring. Instead, this would be better phrased as a requirement for the manufacturer to have in place a strategy for responding appropriately to feedback from the target market, which is also consistent with guideline 8 for distributors on the provision of sale information to the manufacturer.	
Question 8		
Question 9	Insurance Europe is concerned that the documentation requirements contained in guideline 9 (and the equivalent provision in guideline 12 for manufacturers) will create a significant administrative burden for distributors and manufacturers.	