

# RegCORE Client Alert

## EIOPA publishes annual report on sanctions under the Insurance Distribution Directive during 2021

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## Insurance Supervision

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#### QuickTake

On 22 December 2022 the European Insurance and Occupational Pensions Authority (**EIOPA**) published its 3<sup>rd</sup> Annual Report (the **Report**)<sup>1</sup> on the administrative sanctions and other measures taken by national competent authorities (**NCA**s) during 2021 under the EU's Insurance Distribution Directive (**IDD**).<sup>2</sup> The Report shows that NCAs in 18 reporting Member States of the EU-27 imposed 1,621 sanctions in total (compared to 1,942 in 2020 and 1,923 in the 2018-2019 reporting period).

As in previous reporting periods, the vast majority (over 70%) of sanctions were for breaches of the professional and organisational requirements set out in Article 10 IDD with a material increase also recorded for breaches of the IDD's consumer disclosure requirements. EIOPA clarifies in its Report that "...the imposition of sanctions is just one element of the toolbox available to NCAs after carrying out supervisory activities. Sanctions are an essential tool to dissuade misconduct, but, given that they are generally targeted at individual companies or individuals, other informal measures can also be an efficient and effective means to address broader market failures." The Report also clarifies that breaches relating to individual firms occurred in multiple EU Member States but given that differences in the supervisory and sanctioning approaches between EU Member States remain, breaches in one Member State may result in a sanction but a different measure may be applied by an NCA in another Member State.

This Client Alert summarises the findings of the Report and the key considerations for insurance undertakings and insurance intermediaries (collectively **firms**) over the next supervisory cycles.

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<sup>1</sup> Available [here](#).

<sup>2</sup> The IDD, which began to apply in 2018, is designed to improve EU regulation in the insurance market in an efficient way. It aims to ensure a level playing field among all participants involved in the sale of insurance products, strengthen policyholder protection and make it easier for firms to trade cross-border. In addition, to ensure cross-sectoral consistency, some parts of the IDD are aligned with equivalent provisions in the MiFID II Directive (2014/65/EU). The IDD takes the form of a directive and not a regulation to enable national implementing measures to be adjusted to any "specificities" of the particular market and legal system in each member state. Although it has significantly raised the minimum standards of the Insurance Mediation Directive that the IDD replaced, the IDD is a minimum harmonising directive. This means that Member States can go further than the minimum provisions in the IDD if they choose to do so, provided any such provisions are consistent with EU law.

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## EIOPA's key findings in its Report

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The Report assesses, in 60 pages of quantitative data and accompanying commentary, the NCAs' sanctioning activities during 2021 directed to firms under their supervision. The Report does not provide details on individual actions of NCAs in respect of individual firms and respective breaches.

Given that the NCAs are all in the process of returning to a more normalised supervisory engagement process following the COVID-19 pandemic, the extent and level of fines, notably for breaches of retail client protections in addition to the ongoing focus on general conduct of business and governance compliance by relevant firms, might increase beyond what are, certainly when compared to other areas of the EU's Single Market for financial services and supervisory enforcement activity, low levels of fines being levied. This may also be accentuated by the EU's forthcoming Retail Investment Strategy to which EIOPA has contributed with technical proposals on a number of topics. As a result, EU-27 based firms as well as those permitted to operate into the EU-27 from abroad may wish to forward plan their options in light of such increased supervisory scrutiny concerning their compliance with the IDD and other applicable standards.

It should be noted that EIOPA has wide-ranging supervisory and information gathering powers, which to a certain extent are similar to those of its sister European Supervisory Authorities, the European Securities and Markets Authority and the European Banking Authority (**ESMA**). EIOPA is for example allowed to initiate its own thematic reviews of market participants as a whole, which in turn may influence its rulemaking powers.

Equally, EIOPA can request that individual NCAs take supervisory action with respect to firms directly supervised by that NCA. EIOPA can equally coordinate common supervisory actions of (multiple) NCAs (**CSAs**) with respect to individual or multiple types of firms and regulated activity. ESMA has been particularly active in the use of CSAs and while EIOPA has not yet used that supervisory tool, it continues to press forward its priority on building supervisory convergence and a common supervisory culture both in its multi-annual work programmes<sup>3</sup> as well as specific publications, most recently in March 2022.<sup>4</sup>

While EIOPA's developments on convergence are welcome, the Report notes that under the IDD at present no harmonised sanctions regime exists at present. The IDD sets out essential requirements that sanctions need to satisfy, but certain substantive and, in particular procedural aspects of the sanctioning regime remain subject to national law and thus fragmentation. In particular, the IDD as a minimum harmonisation Directive requires Member States to ensure that NCAs have the power to impose sanctions.

The IDD does not oblige NCAs to impose sanctions in all cases of a failure to comply with the national provisions implementing IDD. Instead, Member States are subject to a general principle that the use of sanctions shall be 'effective, proportionate and dissuasive' and this in turn may be subject to national law measures. The Report should be read with that context in mind both for its findings as well as EIOPA implying (rather diplomatically in the drafting) that the European Commission may wish to consider to, through use of legislative means, to establish greater uniformity in the IDD (where possible given the limitations that apply as "only" a minimum harmonisation as opposed to a maximum harmonisation Directive or Regulation) and specifically with respect to sanction powers. With that in mind, it remains to be seen whether EIOPA could, at its own initiative and independent of future further EU legislative rulemaking on the IDD and/or sanctioning, publish its own supervisory guidelines on say own-site inspections and/or setting administrative pecuniary penalties similar to efforts implemented by the European Central Bank in the context of its Banking Union regulatory duties.<sup>5</sup> At present EIOPA has not expressed any clear commitment that it might do so.

According to the Report, administrative pecuniary sanctions (i.e., fines) were the most employed option just under 50% of the time during 2021. This was followed by the withdrawal of intermediaries' registration (around a third of cases). In 2020, a comparable percentage of these sanctions were applied. In contrast, during the 2018–2019 review period, a higher percentage of sanctions—around 50% of cases—were administrative pecuniary sanctions, while a high percentage of sanctions were withdrawals of intermediaries' registration.

Administrative pecuniary sanctions were utilised in 2021 in response to a number of distinct types of violations. The total aggregate value of administrative pecuniary sanctions amounted to a mere EUR 351,175 in total value of fines which is a drop from EUR 793,571 in 2020 and EUR 945,710 during the 2018-2019 review period.

Withdrawals of registration were used most frequently in response to violations of the IDD's registration requirements (Article 3 IDD breaches), professional and organisational requirements (Article 10 IDD breaches) and provisions for out-of-court dispute resolution (Article 15 IDD breaches). They were also used

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<sup>3</sup> See coverage on these developments from PwC Legal's EU RegCORE.

<sup>4</sup> See details available [here](#).

<sup>5</sup> See details on those efforts covered [here](#) and [here](#).

in response to violations of the IDD's duty on distributors to act honestly, fairly, and professionally in accordance with the best interests of their clients (Article 17(1) IDD breaches).

Concerning breaches resulting in sanctions, the Report reveals that most of the sanctions referred to breaches related to Article 10 (Professional and organisational requirements) of the IDD, as follows:

<b>IDD relevant provision (Article 10)</b>	<b>Number of sanctioned breaches in 2021</b>
Article 10(1) – appropriate knowledge and ability	77
Article 10(2) – continuing professional training and development	666
Article 10(3) – good repute	61
Article 10(4) – professional indemnity insurance	426
Article 10 – other requirements	57

The Report's findings evidence that most breaches leading to administrative pecuniary sanctions related in 2021 to professional training and development failures as well as firms failing to maintain professional indemnity insurance – which is quite worrying given this is a basic requirement of the IDD.

This trend can also be contrasted with breaches of the following compliance formalities in particular with respect to failings affecting retail clients:

<b>IDD relevant provision</b>	<b>Number of sanctioned breaches in 2021</b>
Article 3 – Registration	201
Breaches of:	
<ul style="list-style-type: none"> <li>• Articles 14 (Complaints);</li> <li>• Article 15 (Out-of-court redress); and</li> <li>• Article 16 (Restriction on use of intermediaries).</li> </ul>	13
Breaches of:	
<ul style="list-style-type: none"> <li>• Article 17 (General principle);</li> <li>• Article 18 (General information provided by the insurance intermediary or insurance undertaking);</li> <li>• Article 19 (Conflicts of interest and transparency);</li> <li>• Article 20 (Advice and standards for sales where no advice is given);</li> <li>• Article 23 (Information conditions);</li> <li>• Article 25 (Product oversight and governance requirements); and</li> <li>• Implementing Regulation 2017/1469 and Delegated Regulation 2017/2358.</li> </ul>	280
Breaches of:	
<ul style="list-style-type: none"> <li>• Article 27 (Prevention of conflicts of interest);</li> <li>• Article 28 (Conflicts of interest);</li> <li>• Article 29 (Information to customers); and</li> <li>• Article 30 (Assessment of suitability and appropriateness and reporting to customers)</li> </ul>	32
Article 33 (Breaches and sanctions and other measures)	2

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## Outlook ahead

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The Report provides some market-specific insights about the methodology used by NCAs to evaluate compliance with the requirements of the national framework transposing the IDD. EIOPA however does not, in this Report, comment on the NCAs approach(es) to applying that methodology.

Even if the Report evidences a decrease in the level of fines during 2021, the Report's findings and concern expressed on the types of failures should not be discounted in particular as these are for core IDD compliance obligations. Of the breaches assessed, those that most led to the imposition of fines were primarily related to a failure of firms' compliance with Article 10 of the IDD (Professional and organisational requirements).

The Report states that EIOPA expects that NCAs will not refrain from applying severe measures like orders to halt and desist or the removal of registration. In light of this, EIOPA and the NCAs will in addition to stepping up supervisory scrutiny as they return to much more normal post-COVID-19 operations and the end of the IDD's transitional phase-in period may make use of much stricter sanctioning measures during the next supervisory cycles.

Firms will want to ensure that they are able to evidence on how they comply with respective IDD provisions as well as having robust and resilient compliance and risk management frameworks in place in order to be able to identify, mitigate and manage shortcomings in a prompt manner and prevent future supervisory dialogue and/or enforcement action may have an adverse effect on firms' operations and prospects.

# About us

PwC Legal is assisting a number of financial services firms and market participants in forward planning for changes stemming from these developments.

If you would like to discuss any of the developments mentioned above, or how they may affect your business more generally, please contact any of our key contacts or PwC Legal's RegCORE Team via [de\\_regcore@pwc.com](mailto:de_regcore@pwc.com) or our [website](#).

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