Svensk Försäkring

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Yttrande

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Förslag till Europaparlamentets och rådets direktiv om ändring av direktiv 2011/83/EU med avseende på distansförsäljning av finansiella tjänster till konsumenter och om upphävande av direktiv 2002/65/EG; Ju2022/02279

Svensk Försäkring står bakom Insurance Europes svar på EU-kommissionens konsultation om det rubricerade direktivförslaget, se bilaga, och vill därutöver komplettera det yttrandet enligt följande.

Direktivet bör vara subsidiärt i förhållande till sektorspecifik reglering

För Svensk Försäkring är det viktigt att konsumenterna har tillgång till god information för att fatta välgrundade beslut. Kraven på att lämna information till konsumenter i olika EU-regelverk har emellertid ökat på försäkringsområdet och därmed informationsmängden.

Vid sidan av direktivet om distansförsäljning av finansiella tjänster till konsumenter (direktiv 2002/65/EG) finns en mängd regler för att se till att konsumenter har tillgång till information. På EU-nivå finns t.ex. regler om förköpsinformation i det s.k. Solvens II -direktivet (direktiv 2009/138/EG) och i direktivet om försäkringsdistribution (direktiv 2016/97). Dessa EU-bestämmelser har bl.a. genomförts i försäkringsrörelselagen, i lagen om försäkringsdistribution och i Finansinspektionens föreskrifter. På EU-nivå finns också Priips-förordningen, det vill säga EU-förordningen om faktablad för paketerade och försäkringsbaserade investeringsprodukter för icke-professionella investerare, som innebär att krav på faktablad gäller för de vanligaste sparlivprodukterna på den svenska marknaden. Till detta kommer reglering som har sin grund i nationell rätt, t.ex. informationskrav i försäkringsavtalslagen.

Alltför mycket och detaljerad information riskerar att försvåra för konsumenterna. En överlappande och svåröverskådlig reglering är också till nackdel såväl för konsumenterna, som bör ha rimliga möjligheter att ta del av gällande regler, som för företagen. Vi är mot denna bakgrund positiva till förslagets ambition att förenkla regelverket och anpassa det till de förändringar som har skett sedan distansförsäljningsdirektivet antogs 2002.

Vid försäljning och annan distribution av försäkringar säkerställs konsumentskyddet numera även av det ovan nämnda EU-direktivet om försäkringsdistribution som bl.a. innehåller informationskrav och uppföranderegler (se kap. V i direktivet). Det regelverket är generellt tillämpligt och gäller alltså även vid distansförsäljning av försäkringar. När den sektorspecifika regleringen är tillämplig kan det därför ifrågasättas om en särskild konsumentskyddsreglering för distansförsäljning verkligen behövs på försäkringsområdet.

Enligt förslaget ska den särskilda EU-regleringen för distansförsäljning av finansiella tjänster emellertid finnas kvar som en ny del i det s.k. konsumenträttighetsdirektivet (direktiv 2011/38/EU) som reglerar annan distansförsäljning. För att undvika överlappning och dubbelreglering bör det under alla omständigheter tydligt framgå att konsumenträttighetsdirektivet i nu aktuell del är subsidiärt i förhållande till annan reglering samt – så långt möjligt – i vilka delar det då inte behöver tillämpas. Detta gäller t.ex. förhållande till bestämmelserna om förköpsinformation (art 16 a och art 16 d) och i förhållande till ångerrätten där det också finns sektorspecifik reglering (se bestämmelserna om uppsägning i art 186 i Solvens II direktivet; jfr 11 kap. 5 § försäkringsavtalslagen). Utgångspunkten bör vara att den sektorspecifika regleringen ska gälla om en fråga, t.ex. frågan om förköpsinformation, finns reglerad där. Den sektorspecifika regleringen bör alltså ha företräde även om bestämmelserna om frågan i den regleringen och i konsumenträttighetsdirektivet inte har identiskt innehåll.

Tillämpningsområdet

Vid det svenska genomförandet av det nu gällande direktivet har utgångspunkten varit att dess tillämpningsområde är begränsat till individuella avtal mellan en näringsidkare och en konsument. Direktivets bestämmelser har alltså inte ansetts tillämpliga på kollektivavtalsbunden försäkring och obligatorisk gruppförsäkring samt endast i viss utsträckning på frivillig gruppförsäkring (se prop. 2004/05:13 s. 38, 147 och 148).

Svensk Försäkring vill understryka att det är mycket betydelsefullt att denna skiljelinje mellan individuell och kollektiv försäkring upprätthålls även fortsättningsvis. Kollektiva försäkringar skiljer sig i viktiga avseenden från individuella. Vid gruppförsäkringar förhandlar en gruppföreträdare – det kan t.ex. handla om en arbetsgivare, ett fackförbund eller en idrottsklubb – fram standardiserade villkor för medlemmar i en grupp. Kollektivavtalsbundna försäkringar baseras på kollektivavtal mellan arbetsmarknadens parter. Vidare administreras kollektiva försäkringar på annat sätt än individuella. Dessa särskilda förhållanden påverkar bl.a. behovet av information och hur den lämnas. De kollektiva försäkringarnas särart återspeglas i försäkringsavtalslagen. För kollektiv försäkring finns t.ex. andra regler för hur avtal ingås och om informationsgivning jämfört med individuell försäkring.

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EC consultation on the Distance marketing directive - Insurance Europe submission

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Introductory remarks

Insurance Europe is generally **supportive** of the European Commission's intention to repeal the Directive on Distance Marketing of Consumer Financial Products 2002/65/EC (DMD) and to introduce a new section on distance marketing of financial services in the Consumer Rights Directive 2011/83/EU (CRD) regarding financial services contracts entered at a distance. However, it would be preferable to transfer the remaining provisions of the DMD to sector-specific legal acts (eg for the insurance industry to the Insurance Distribution Directive). This would do better justice to the various financial service sectors, which are currently grouped together without differentiation in the DMD.

The provisions in the DMD have, to a large extent, been replaced and made redundant by provisions in more recent product specific and horizontal EU legislative acts, such the IDD, the Packaged retail investment and insurance products (PRIIPs) Regulation and the Solvency II Directive. Like the DMD, these legal acts specify the pre-contractual information that must be provided to the consumer regarding the product and the supplier.

The IDD, for instance, also contains provisions on the need for customer needs to be considered (IDD Article 20). According to the IDD, the insurance contract proposed shall be consistent with the customer's insurance demands and needs. The idea of these provisions is to make sure that the customer is not sold "whatever insurance" and that the products are sold only for a real need. These existing provisions already provide a comprehensive protection for the customer and hence, the added value of this proposal from the customer protection point of view is not clear or is at least questionable. Clarification in the recitals (e.g. recital 13) could achieve legal certainty that the precontractual information requirements in the IDD prevail over the information requirements in the proposed Articles 16a and 16d. It is worth noting that the precontractual information requirements of the CRD apply only to **consumers** whereas in the IDD they apply to **customers**. Thus, if the precontractual information requirements of the IDD do not prevail, we will end up having to apply two sets of information requirement depending on whether the distribution is aimed at consumers or customers.

These other sectoral texts apply regardless of whether the contract is concluded online or not. Compared to the DMD, the most recent product specific EU-legislation is better adapted to the sector.

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Insurance Europe has particularly taken note of the fact that the proposal aims to ensure consistency with current rules in financial services. It is **positive** that the Directive explicitly states that, if any provision in the new Chapter IIIa conflicts with a provision of another EU legislative act governing specific sectors, the provision of that other act shall prevail. Insurance Europe considers this specifically relevant regarding pre-contractual information, the withdrawal right and regarding the provision on adequate explanations. In this respect, the industry understands the proposed provisions in Chapter IIIa will mainly function as a safety net in situations where, for instance, there are no provisions on the specific subject (eg no pre-contractual information or right of withdrawal provisions) in the product specific EU legislation. Therefore, Insurance Europe understands that these new provisions apply to insurance only to a very limited extent, such as, for instance, regarding withdrawal rights for non-life insurance contracts. At the same time, the wording of the proposed provisions remains vague. It needs to be clarified that the provisions on subsidiarity apply as soon as another EU act stipulates sectoral precontractual information requirements (regardless of the content). It should be made clear that it is not a precondition that the other act covers the same information as mentioned in this Directive. To achieve legal certainty it should be clarified in the recitals that the distribution of products through an ancillary insurance intermediary who is exempted from the application of IDD is not subject to the information requirements of the proposal.

Subsidiarity

The **wording on subsidiarity** should be as clear as possible to avoid legal uncertainty in the future. In the industry's view, it would therefore be preferable to list particularly obvious (priority) sectoral legal acts, such as the Solvency II Directive or the IDD, in the respective subsidiarity provision – Articles 16a, 16b, 16d (last paragraph in each case) – itself as examples. This would further increase the binding nature compared to the partial designation currently provided for in Recital 13 of the draft. It would also contribute to greater legal certainty if all subsidiarity provisions consistently excluded the application of the respective preceding paragraphs (eg Article 16a (1) to (5)). This would prevent ambiguities about the scope of a priority application. The wording in Article 16d (4) could be used as a model of this.

The withdrawal button

With respect to the specific elements of the proposal, Insurance Europe notes that the proposed Article 16 b (5) regarding the provision of a **withdrawal button** will make it easier for the consumer to exercise the withdrawal right, when contracts are concluded by electronic means. However, Insurance Europe would like to draw attention to the fact that such a withdrawal button can also have a negative impact on consumer protection in the sense that the suggested withdrawal button can increase the risk of consumers being uninsured. Naturally, this can have a major financial impact on the uninsured, and at the same time the issue of whether there is adequate insurance coverage is of vital importance to possible victims. Especially with regard to compulsory insurance coverage, this can be cause for concern, since compulsory insurance has a purpose of safeguarding victims. Compulsory liability insurance for motor vehicles is an example of a situation where uninsured drivers already pose an issue. In Finland, for instance, there is no right of withdrawal for non-life insurance products since, according to the national law, the customer has the right to terminate the insurance contract at any time which basically means the same thing as right of withdrawal.

In addition, Insurance Europe notes that **withdrawal** from a purchase of insurance coverage can be considered an equally complex and difficult decision as the purchase itself. For this reason, a requirement of a withdrawal button should be replaced by a provision allowing the consumer to withdraw from a contract "by electronic means". Failing this, an option of withdrawing from the agreement in person by telephone should be included so that the consumer has the option of consulting the insurer and receive advice in connection to the withdrawal if needed.

The planned "**withdrawal button**" in Article 16b (5) of the CRD is, however, also accompanied by legal uncertainty - at least insofar as the regulation is relevant due to the subsidiarity provision. The draft provides that the withdrawal button must be placed "on the same electronic user interface" as the one used to conclude the distance contract. However, the draft itself does not define what is meant by an electronic user interface. In this respect, it is unclear whether the website or mobile app in its entirety or only a specific part of the application section can be used as a suitable location for the button. The latter would lead to practical implementation

difficulties. If, for example, a customer concludes an insurance contract online without creating a customer account, the website content is not permanently created. Only via technical detours — eg a link in an e-mail — it would be possible for the customer to return to the exact web page where the contract was concluded.

There is also some concern over the suggested provisions because they seem to allow for a practice whereby the customer could take advantage of the articles and use the right of withdrawal in situations where no damage has occurred during the withdrawal period. The customer could, for example, buy a continuous travel insurance (duration over a month) and withdraw the insurance after the trip if no damage has occurred.

Moreover, as to the proposed requirement for a **withdrawal button**, Insurance Europe would therefore like to point attention to the fact that it is likely to impose a significant administrative burden on the insurers, who will have to develop the IT-interface. The implementation of such requirements will consequently lead to significant costs to ease the exercising of a right that the consumer already has today. Currently, consumers are generally informed about the withdrawal right during the course of the purchase flow itself as well as in the Terms & Conditions.

For this reason, Insurance Europe questions the value for the consumer of the suggested withdrawal button when balanced against the mentioned concerns about consumer protection and the cost for development of the feature.

In any event, a requirement for a **withdrawal button** should give insurers flexibility to the widest extent possible in terms of placing the button somewhere that the consumer would find logical, such as on the customer portal where other documents relating to the contract can be found, even if the purchase itself is concluded in a different flow. This will ensure a unambiguous link between the consumer and the agreement from which the consumer wishes to withdraw.

At the same time, to ensure proper identification of the consumer — and of the insurance contract(s) from which the consumer wishes to withdraw — the button should lead to a page behind "log-on". From the proposed wording of the provision, it is unclear whether the providers have this flexibility.

Furthermore, it should be noted that it can be difficult for providers to ensure that the button is visible in the exact timeframe in which the consumer can withdraw from the agreement. This is partly due to different factors that determine the beginning of the 14-day withdrawal period, and partly because some insurance agreements are exempt from the withdrawal right.

Pre-contractual information

The provision planned in Article 16a (3) of the CRD, according to which the entrepreneur must provide **pre-contractual information** at least one day before the time at which the consumer is bound by any distance contract, is not practical and should therefore be deleted.

Both parties to the agreement benefit from the advantages provided by the online environment. It is important not only for insurers but also for consumers to take out insurance quickly and easily, and the introduction of such measures, which slow down the process of concluding agreements, may not, in effect, benefit anyone, quite the contrary.

The option of concluding an insurance contract at a distance is particularly attractive when the consumer needs insurance cover at short notice. This is typically the case with travel insurance, but also with motor vehicle insurance. In these situations, the customer actively contacts the insurer to conclude a contract quickly. In this respect, the planned one-day waiting period does not meet consumer requirements. On the contrary, prolonging the process of concluding the contract will rather be detrimental to the consumer.

In addition, existing provisions on the right of withdrawal offer the possibility of subsequently withdrawing from contracts that have already been concluded. The current withdrawal periods for distance contracts give the consumer sufficient time to study all the provisions in detail and, in case of disagreement, to simply withdraw

from the contracts. The proposal also states that it targets innovative distribution methods. However, the requirement to provide pre-contractual information at least one day in advance is an obstacle to possible innovation and simplification of product distribution. In addition, the online environment allows the documentation to be read anytime and anywhere, whereas with paper at the counter, time is very limited by the time of other clients and advisers themselves.

The requirement to provide the information at least one day before the consumer is bound by the contract would complicate the processes and require changes in the IT systems, since the insurance companies would have to wait one day before proceeding with the contract and since the insurance would not be able to charge for distance-sold services before the end of the day.

If not deleted, then it would be more appropriate and clearer to use the term "conclusion of the contract" instead of the term "time at which at which the consumer is bound by the contract". The use of two different terms in the same article (e.g. 16(a) 3.) is confusing and we are of the view that there is no reason to distinguish between those two moments (a consumer is bound by the contract from the conclusion of it).

We also wonder whether a company can always deviate from the condition regarding the time of communication, as long as it sends a reminder to remind the consumer of his right of withdrawal. For instance, would it be possible if the consumer explicitly agrees to deviate from the obligation of "at least one day" (knowing that the consumer remains protected by the right of withdrawal in any case)?

We are assuming that it could be deviated from this condition since Article 16b(1)(b) provides that the withdrawal period starts from "the day on which the consumer receives the contractual terms and conditions and the pre-contractual information, if that day is later than the day of conclusion of the contract". We also conclude from this provision that the condition of timing does not apply to the contractual terms and conditions themselves.
Insurance Europe welcomes the proposed Article 16a.4 that allows the layering of information, and already clarifies which type of information should remain in the first layer. Layering can make disclosures more engaging and put consumers in control of the amount and type of information they wish to receive.

Insurance Europe also believes that Article 5.2 of the DMD is important because it allows for the provision of information immediately after the conclusion of the contract, where needed. This does not appear to have been included in the CRD.

Penalties

In addition to the insertion of a new Chapter IIIa on financial services into the CRD, the proposal also introduces that some of the current provisions of the Directive also apply to financial services. This includes Articles 23 and 24 (1)-(4) on **maximum penalties** of the annual turnover in case of widespread cross-border infringements. Insurance Europe would point out that this mathematical way of calculating sanctions is contrary to some member states' legal traditions (eg in Denmark), where the severity of the specific offence should also be taken into account when imposing sanctions.

Provision of e-mail address

In respect of the proposed Article 16 a (1) to **provide an e-mail address,** the provision seems somewhat outdated in terms of data security and fraud prevention. Providing the mentioned e-mail address should only be a requirement if the insurer does not supply other means of electronic communication to the consumer. By way of example, Danish companies (including insurers) are currently working towards developing other means of safe electronic communications (through a password protected platform) to minimise the risk of fraud and to enhance data security. Providing e-mail addresses and thereby encouraging the consumers to communicate via e-mail would be contrary to such initiatives.

Adequate explanations

According to the proposal, the consumer must be provided with adequate explanations to make it possible for them to assess whether the proposed contract and possible ancillary services meet his/her needs and financial situation.

In our view, the types of information referred to in this provision are already those imposed under the IDD. Again, this provision states in point 4 that if another EU act contains specific rules on information, only that act applies. In our view, insofar as, for example the IDD, the Solvency II Directive, the PRIIPs Regulation or the PEPP Regulation regulates these obligations, only those provisions apply.

According to Article 16d (2), the requirements for the provision of adequate explanations would also apply to situations where online tools are used, such as chatbots. Typically, these online tools are used in advising the customers in different situations. The actual disclosure obligations are fulfilled before the contract is concluded in other channels, such as a mobile or online service. The practical implications of this suggestion are somewhat vague but extending the disclosure obligations mentioned in the article to online tools would, at worst, dilute the dialogue and advice with the client. The questions of the customers in the chats are also quite variable, so it is unclear what would in practise trigger the disclosure obligation under the article.

Furthermore, Insurance Europe considers the new requirement regarding human intervention (Article 16d (3)) problematic.

The industry would like to draw attention to the fact that the Article does not specify the time in which the human intervention should be arranged. According to recital 26, the consumer should always be able to obtain human intervention. It is, therefore, unclear whether the proposal requires 24/7 service (if chatbots are open 24/7, also the customer service advisers should be accordingly available 24/7). At worst, the proposal would limit the use of chatbots, reduce the quality of customer service and impose unjustified additional costs for the financial sector. It should be enough that the customers are provided with information about the available customer service channels and their opening hours which are determined by each company on the basis of their own business strategy, for example.

In practical terms, it is unclear how this obligation should be implemented. For instance, would a chatbot be sufficient to fulfil the obligation, or would a verbal intervention be necessary.

Online interfaces

According to Article 16e of the Commission proposal, member states shall adopt measures requiring that traders, when concluding financial services contracts at a distance, do not use the structure, design, function or manner of operation of their online interface in a way that could distort or impair consumers' ability to make a free, autonomous and informed decision or choice.

In general, the aim of the proposal is justified from a consumer protection point of view, but the wording of the article is too vague and broad. Insurance Europe has concerns that the additional requirements for online interfaces will make it unreasonably difficult to develop digital services for financial services. The wording needs to be clarified and limited to ensure that the proposal is proportionate and appropriate. It is not clear whether there is actual need for such an article taking into account the general provisions in the directive on unfair commercial practices.

Transposition

According to the Commission's proposal, the Directive should be implemented in two years after its adoption and the Regulation should apply immediately after the expiry of the transposition period.

There should be a sufficient transposition period included in the Directive, for example six months. The Directive requires changes to IT-systems, but also updates to the materials and processes.

Insurance Europe is the European insurance and reinsurance federation. Through its 36 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out over €1 000bn annually — or €2.8bn a day — in claims, directly employ more than 920 000 people and invest over €10.6trn in the economy.