

Response to EC evaluation of EU rules on Distance Marketing of Financial Services (DMD)

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Referring to: EC evaluation of EU rules on Distance Marketing of Financial Services (DMD)

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Summary

Insurance Europe welcomes the European Commission's evaluation of the 2002 Directive concerning the distance-marketing of consumer financial services (Directive 2002/65/EC) (DMD). As part of this review, consideration should be given to whether the DMD remains necessary. If deemed so, the DMD needs to be updated to reflect that, since its introduction, product-specific EU legislation has been adopted and implemented, and to ensure that it is technology-neutral and future-proofed.

Concretely, the DMD, in its current state includes universal rules that have no link to the distribution channel of distance-marketing. It therefore creates legal uncertainty due to overlaps and duplications with newer product-specific EU legislation such as the Insurance Distribution Directive (Directive (EU) 2016/97) (IDD) and Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs). If the DMD is to be retained, it should be revised to exclusively cover rules that are specific to distance-marketing. Requirements that are not solely applicable to distance-marketing should be removed from the DMD to avoid overlaps or duplications with (current and future) product-specific EU legislation.

For the same reason, the DMD should clarify that where there is duplication in disclosure requirements between different legal texts, product-specific legislation must take precedence. Where similar disclosure requirements are made under product-specific legislation, the requirements of the DMD are deemed to have been met. This would avoid the risk of repetitive disclosure, which increases the volume of information to the detriment of consumers and their understanding of products.

The DMD should also be technology-neutral and future-proof. To this end, the DMD should explicitly permit information provision via websites or electronically. Moreover, the current volume of information obligations may in practice cause difficulty when viewed, say, on a smartphone.

Finally, there are specific provisions that create legal uncertainty and which should be clearly defined, such as what is understood by "fully completed performance" of a contract under Article 6.2.

On relevance

- **Q1 - Have the following developments changed the provision of distance retail financial services since 2002?** (internet, new devices, profiling, fintech, product-specific legislation, national or cross-border competition)
- **Q2 - How relevant/up to date do you consider the following parts and provisions of the Directive in the current context?** (scope, technology neutral approach, information provisions, withdrawal rights, unsolicited services or communications)

If retained, the DMD should only cover requirements specific to marketing at a distance

Since the DMD's adoption, various pieces of European sectoral, product-specific legislation, such as the Insurance Distribution Directive (IDD) for insurance products, apply to the sale of financial products, regardless of whether sales are made face-to-face or at a distance. Consequently, this raises the question whether a cross-sectoral directive specific to distance-selling should be preserved or whether the specific requirements related to distance-selling provided by the DMD should instead merely be integrated into product-specific European legislation. If the review of the DMD results in a preference for its retention, it should in no way result in the imposition of obligations for professionals that are overlapping with or duplicative to those provided by the European product-specific regulations (e.g. IDD) and cross-sectoral consumer protection regulations (such as the Unfair Commercial Practices Directive). Where the DMD provisions add value is in instances where, for example, consumers require immediate cover (this occurs in compulsory motor or rental insurance). Therefore, provisions specific to such situations, such as the ability to provide contractual terms and conditions immediately after the conclusion of the contract, are valuable.

The development in technological devices (such as smartphones) has meant that information increasingly needs to be made accessible on different media and in an appropriate format. This impacts the volume of information that should be required to be given to customers. The added value and necessity of information requirements should therefore not be overlooked when reviewing the DMD, in a bid to avoid information overload. The necessity of the information provided to customers should therefore be carefully considered, as should the interaction of different disclosure requirements arising from different EU legislation. This assessment should also be made in reference to the requirements set out in more recent, product-specific EU legislation, including the IDD. An effective approach to such an assessment would be to limit any revised DMD only to the requirements specific to distribution at a distance (e.g. retaining the provisions contained in: Article 3.1(2)(g) on specific additional costs charged to the consumers; Article 3.3 on voice telephony communications; Article 5(2) on the contractual terms and conditions and other information which must be disclosed immediately after the conclusion of the contract; and Article 6 on the protections offered to consumers on the right of withdrawal) and to exclude any requirements that are product-specific such as: Articles 3.1(2)(a)–(f) on financial services; Article 3.1(3)(b), (c), (e)–(g) on the distance contract; and Article 3.3(b) (except the last bullet on the right of withdrawal). Product-specific requirements should be addressed in the product-specific EU legislation, such as the IDD.

If the DMD is retained, product-specific legislation should take precedence over the DMD

Insurance Europe welcomes the study's recommendation that the EC looks at the interplay between the DMD and product-specific EU legislation. Also welcome would be clarification in the DMD to underline that where there is duplication in disclosure requirements between different legal texts, product-specific legislation must take precedence over the DMD. Further, the text of the DMD should clarify that where similar disclosure requirements are made under product-specific legislation, the requirements of the DMD are deemed to have been met. This would avoid the need for repetitive disclosure, which increases the volume of disclosure to the detriment of consumers and their understanding of products.

If retained, the DMD should not exacerbate information overload and duplication

As Insurance Europe has previously underlined to the [REFIT Platform](#) on the topic of information overload and duplication, several pieces of EU legislation applicable to insurance have been adopted to improve disclosures and increase the level of consumer protection. Unfortunately, these rules have been developed in silos, while in a real-life sales process they generally all apply in combination and on top of existing legislation. The combined effects of these EU rules lead to information overload and duplication, with a negative impact on

consumers' understanding of product features and on their ability to compare products effectively. They could also lead to ill-informed decisions and, potentially, when a claim is made, unhappy consumers. This would ultimately undermine consumers' confidence in the products concerned and the industry. Therefore, information overload should be addressed effectively and information duplications should be removed. For instance, Insurance Europe has researched the actual extent of obligations imposed in the online sale of Insurance Based Investment Product (IBIPs). Here, disclosure requirements have more than doubled from 79 (arising from the Insurance Mediation Directive, DMD, Life Directive, Data Protection Directive and E-commerce Directive) a few years ago to 161 (arising from Solvency II, IDD, PRIIPs, General Data Protection Directive, DMD and E-commerce Directive). By way of example, the PRIIPs Regulation contains general pre-contractual information requirements for the sale of IBIPs. The Solvency II Directive also contains pre-contractual information requirements for all insurance products, which means that the PRIIPs Regulation duplicates the requirements already contained in Solvency II.

Consumer protection rules should reflect consumer needs and technological advances

As Insurance Europe has previously underlined to the [REFIT Platform](#) on the topic of non-digital-friendly rules, the latest EU consumer protection rules in the field of insurance oblige insurers to provide pre-contractual information on paper, as a default requirement. Since many consumers now like to buy insurance online, where they expect the process to be simple and fast, this — coupled with the overload of information — could cause a real problem and lead to unhappy consumers as well as an unnecessary increase in costs stemming from the requirement to also provide consumer information on paper. Therefore, consumer protection rules should reflect the evolving demands of consumers and keep up with the technological developments that consumers want to use. The current rules should respond to the increasing demand for and use of online services. Refer for example to the response to Q3 below.

The impact of technology

Concerning profiling, this remains a new technological advance and is, as yet, not fully developed. Business models such as "insurance as a service" — where insurance forms part of a fully digitalised offer — are discussed, monitored and tested, but are still at a very early stage. In any case, insurers are fully aware that profiling must be done in accordance with the General Data Protection Regulation (GDPR) and the new product oversight and governance rules (POG) under the IDD.

As to new market players, such as fintech providers, the use of technology to improve and automate the delivery and use of financial services must remain subject to the same rules as those to which traditional players are subject in order to ensure a level playing field between providers. Insurers view digital ecosystems as having the potential to offer new and personalised services and insurance products to consumers. This could result in better tailored insurance policies offered at the right time and via the right distribution channel based on data and the use of available technology (artificial intelligence and machine learning).

■ Q3 - Are there any issues which the Directive currently does not address but you consider should be addressed? (please specify)

Insurance Europe identifies two areas of the DMD that should be revised in the review:

- The DMD does not currently clarify what is meant by the full completion of a contract under Article 6.2(c). To increase legal certainty, the provision should clarify that the settlement of a claim represents "full completion" of a contract.
- To underline the technological neutrality of the DMD, it should explicitly permit information provision via websites under Article 5. In contrast to the DMD, information provision is permitted via a website in the IDD and PRIIPs Regulation. In addition, as in the new PEPP Regulation (Article 24), it should be permitted: "... *to provide all documents and information electronically, provided that the PEPP customer is able to store such information in a way accessible for future reference and for a period of time adequate for the purposes of the information and that the tool allows the unchanged reproduction of the information stored.*"

On effectiveness

- **Q4 - How effective are the following aspects/features of the Directive at ensuring consumer protection and contributing to the completion of the single market?** (horizontal scope, level of harmonisation, technology neutral approach, information provisions, withdrawal rights, unsolicited services or communications)

The DMD was introduced, in part, to ensure the harmonisation of the mail-order sector as well as to provide consumer protection measures. However, with the adoption of the IDD and PRIIPs, the DMD has been overtaken by more targeted, product-specific legislative measures. The DMD includes universal rules that have no link to the distribution channel of distance-marketing, such as provisions on costs or price. The DMD is therefore in need of review to make its application limited to retail financial services via distance-marketing.

On efficiency

- **Q5 - How would you rate the costs resulting from the Directive?**
- **Q6 - To what extent are these costs generated by the Directive rather than by product-specific legislation?**

The costs generated by the DMD relate mainly to the development and maintenance of printed documents to meet its requirements, along with the installation costs of processes for fulfilling the statutory requirements (e.g. on pre-contractual information, cancellation of policies, etc.). For companies engaged in distance-selling, these costs relate to the processes of verifying compliance not only with the DMD but also product-specific EU legislation. Simplification of legislative requirements, by separating out requirements only relevant for products sold at a distance, would lower compliance costs. Some costs are generated mainly by the DMD (e.g. the right of withdrawal), while other costs would remain owing to obligations also set out in product-specific legislation. The costs attributable to the DMD are mainly incurred in the initial stages of establishing distance sales.

- **Q7 - How would you rate the following benefits of the Directive? (ie the rights)**
- **Q8 - To what extent are these benefits generated by the Directive rather than by product-specific legislation?**
- **Q9 - Overall, do the benefits of the Directive outweigh its costs?**

The benefits of the DMD arise mainly from the provisions specific to distance-marketing as a distribution channel. For other provisions not exclusive to that distribution channel, product-specific legislation should be the source of requirements to avoid unnecessary compliance costs, duplication and legal uncertainty. Product-specific legislation now achieves harmonisation on other matters not specific to the distance-marketing channel for the distribution of products.

- **Q10 - Are there any areas in the Directive where there is room for simplification or reduction of costs? Please specify.**

A reduction in costs would be achieved by removing the requirements of the DMD that are not solely applicable to the choice of a distribution channel at a distance. This is of particular significance in respect of the costs arising from information provision (see answer to Qs 1 and 2).

On coherence

- **Q11 - To what extent is the Directive coherent with other EU legislation** (*For each of the legal acts listed above, please specify in which respect(s) you consider it is coherent or not with the Directive*)

When contrasted with the IDD and PRIIPs Regulation, the DMD is out of date and dispensable insofar as it relates to the same themes, but not where it relates to the distribution channel of distance-marketing.

When contrasted with the Consumer Credit Directive, Mortgage Credit Directive, PRIIPs Regulation, IDD, e-commerce Directive and Solvency II Directive, the DMD raises legal uncertainty owing to duplications and overlaps on disclosure requirements.

■ **Q12 - Given that the Directive applies to different products, does it bring any additional value compared to product-specific legislation? Please give details for your answer**

As stated in response to earlier questions, the DMD adds benefit where its provisions concern distance-marketing as a distribution channel, while overlaps and duplications with other more recent EU legislation create legal uncertainties.

■ **Q13 - Are you aware of any contradictions/overlaps/inconsistencies/missing links between the Directive and national legislation? If so, what are they?**

Insurance Europe is not aware of discrepancies between the DMD and national legislation.

On EU added value

■ **Q14 - In your view, what is the added value delivered by the Directive and its implementation, over and above what could reasonably have been expected from national legislation in the Member States alone? (consumer protection, single market, legal clarity, addressing cross-border issues)**

Insurance Europe sees added value in European legislation where it aims for — and aids — the completion of the internal market, thereby necessitating a common legal framework within the EU. An added value of EU legislation is only achieved if there are no overlaps and duplications between different EU legislative measures. In the context of the DMD evaluation, there is extensive product-specific legislation that achieves added value in furthering the completion of the internal market and that incorporates important consumer-protection measures.

Other issues

■ **Q15 - Any other issues - Are there any other issues not covered by the above questions that you feel might require action at EU level? What would be your preferred solution to the identified issue?**

Insurance Europe also wishes to address the recommendations of the April 2019 [behavioural study](#) and its [annex](#) published by the EC in parallel to this evaluation. The objective of the study is to identify the impact of online practices by providers of retail financial services on consumers' decision-making and make recommendations.

A significant preliminary observation on the study is its limitations. It covers online practices relating to 10 distinct and distinguishable retail financial products, of which only one is insurance: travel insurance — a relatively simple product in terms of contractual variations.

Secondly, only two products were selected for behavioural experiments: current accounts and personal loans; products that are likely much more easily comparable than insurance. Insurance Europe therefore cautions against too readily drawing conclusions from the study that are extrapolated to "all types of retail financial products" including insurance — especially for more multifaceted or individualised insurance products.

Thirdly, in the coverage of the IDD in respect of travel insurance (pp78-80 of the annex to the study), there appear to be some oversights. Information about conflicts of interest and transparency of remuneration is missing. For instance, whether the intermediary is under a contractual obligation to conduct insurance distribution business exclusively with one or more insurance undertaking; the nature of the remuneration received in relation to the insurance contract; and whether the intermediary works on the basis of a fee or commission.

In the light of these preliminary observations, Insurance Europe reflects as follows on the recommendations from the study:

- **Recommendation 1 – to ensure existing legislation is rigorously enforced to maintain a level playing field and protect consumers:** Insurance Europe fully supports this recommendation, drawing attention to the anticipated benefits recent product-specific EU legislation (such as the IDD) will have. Caution should be exercised in reviews of existing EU legislation, such as this on the DMD, to avoid the imposition of duplicative requirements — or worse, conflicting requirements — being imposed on insurers. The role of national supervisory authorities is precisely to oversee that national markets comply with existing legal obligations. The system of national supervision works effectively for this purpose.
- **Recommendation 2 – improving the quality of information provided to consumers:** Insurance Europe fully supports the objective to ensure the quality of information provided to consumers and to be sensitive to their needs. However, it reiterates its concerns over duplicative or too much information provision to consumers, to avoid overburdening or confusing them. It therefore challenges the accuracy of the statement in the recommendation (p136) that "...it is often the quality of information provision, not the quantity, that results in informed decisions"; Insurance Europe contends that the quantity of information must not be excessive, since this would undermine the information, whatever its quality.

This is also why Insurance Europe welcomes the study's recommendation that the EC looks at the interplay between the DMD and product-specific EU legislation. Clarification would be welcomed to underline that where there is duplication in disclosure requirements between different legal texts, product-specific legislation must take precedence over the DMD. Further, it should be clarified that where disclosure requirements are made under product-specific legislation, the requirements of the DMD are deemed to have been met, to avoid the need for repetitive disclosure, which increases the volume of disclosure to the detriment of consumers and their understanding of products.

In terms of the recommendation that disclosure should be adapted to consumer devices, Insurance Europe would caution against such a requirement. It would add unnecessary — potentially disproportionate — costs to the disclosure process. However, legislation should allow for disclosure to be easily adapted to consumer devices.

In reference to the possible value of effecting comparisons of products, particularly for vulnerable consumers, Insurance Europe notes that although comparison websites are available in some markets, they are far from universal. Based on Insurance Europe member input, comparison websites raise genuine difficulties for consumers and providers alike. Are all products compared? What is compared? Are the products compared actually comparable? How should comparisons be kept up to date? Are all competitors fairly represented? Who is responsible for the comparisons? How are underlying algorithms developed? Who is liable? Some of these concerns are general, while others may be specific to insurance, particularly the concerns over the real comparability of products, because insurance products can be targeted and tailored to meet specific national (fiscal, legal) markets and are often the result of an assessment — and the interplay — of many factors, unlike other financial products such as current accounts or personal loans. These underlying concerns, coupled with the difficulty of knowing the actual group(s) of consumers included in the term "vulnerable consumers", mean that more analysis is required before firm conclusions on the actual value of the comparison of products can be drawn.

- **Recommendation 3 – taking measures to protect vulnerable consumers:** Insurance Europe underlines the difficulty over terminology: who is a vulnerable consumer? The term is applied to very different classes of consumers in different member states. In some member states it refers to low-income consumers or consumers in financial difficulty. In other member states, it refers to elderly

consumers. In others still, it refers to disabled consumers. Input from Insurance Europe members also indicates cultural differences in how to address challenges faced by different groups of vulnerable consumers; some member states take a holistic approach to all consumers while others differentiate to increase sensitivity towards certain groups of consumers.

In reference to the two specific suggestions made in the study (p138):

- Improving the quality of information: Insurance Europe fully supports the EU efforts already made — specifically for insurance products — to increase the clarity and availability of information on insurance products as set out in the IDD. The IDD and its impact on the market and consumers is due to be assessed by the EC in 2021 and this assessment should therefore be awaited before any further legislative measures are introduced.
- Developing simpler products: Insurance Europe reminds the EC that the European insurance market is a vibrant, competitive and innovative market that continuously innovates to offer both simple and more complex products to better meet consumers' evolving needs and demands. Developing standardised "simple" products may raise unachievable expectations among consumers and may be extremely challenging in practice.
- **Recommendation 4 - Ensure that the speed of the purchasing process does not lead to poor consumer decision-making:** Insurance Europe takes note of the care required in the online purchasing process to prevent poor outcomes. Consumer choice should not however be overlooked; in most markets, consumers are empowered to choose their preferred distribution channels, all of which have their distinct advantages and disadvantages depending on the consumers' needs and demands. The outcomes of the April 2019 behavioural study should therefore not be interpreted in a vacuum, omitting the choices consumers have in their selection of a (preferred) purchasing medium. Any assessment of how best to inform consumers in an effective way that adds value, must therefore not overlook the expectations and needs of consumers. Consumers who choose to buy insurance products online tend to do so to meet specific needs of expediency, ease and simplicity. The distribution channel is thus generally selected on purpose for the advantages deemed to be achieved. For other consumers, such factors may not be the most important in their choice of distribution channel; their selection factors should not trump those valued by consumers who opt for online insurance products.
- **Recommendation 5 – Increase transparency around personalisation and targeting:** There continues to be considerable interest from both insurers and consumers in the role, opportunities and risks of using technological tools, such as big data, to develop products. Insurance Europe is sensitive to the concerns that consumers have over a technological development that is not always fully — or correctly — understood. That is why Insurance Europe has sought to explain big data's impact and role in an easily accessible format: the [Insurance Europe Q&A on big data](#).

In it, the transparency rules applicable to the use of data — and thus big data — are explained, including:

- The EU General Data Protection Regulation (GDPR), has created a well-balanced legal framework for processing data that allows insurers and consumers to be well prepared for the big data environment. It provides insurers with the right level of guidance, allowing them to mitigate the potential risks brought by the use of big data. At the same time, consumers can now rely on strengthened and new rights to protect their personal data. The GDPR also addresses the fundamental issue of transparency in the use of personal data, providing a comprehensive system of information disclosure and effective protection. Consumers now have the right not to be subject to a decision solely based on automated processing, leaving them well positioned for the further development of automated decisions by insurers. While insurers use personal data, which falls under the GDPR, a significant amount of data used in the insurance business is anonymised, and as such does not affect individuals' privacy.

- The PRIIPs Regulation imposes the provision of a standardised disclosure format — the key information document (KID) — before a retail investor purchases a PRIIP. This allows consumers to compare the characteristics of different offers.
- The IDD regulates the distribution of all types of insurance products by all types of distributors, preventing any poor selling practices that the use of big data analytics in insurance could facilitate. Its provisions on product oversight and governance (POG), along with its delegated Regulation, regulate the design of new insurance products. These requirements aim to protect customers from an early stage in the insurance process.
- The DMD protects consumers from unsolicited products.
- The EU Gender Directive prohibits the differentiation of insurance premiums and benefits by gender.
- The proposed e-Privacy Regulation, currently under debate at EU level, will bring an additional layer of protection by guaranteeing the confidentiality of communications and shielding consumers from online tracking and unsolicited commercial communications.
- The Solvency II Directive means insurers have an effective system of governance that provides for sound and prudent management of their business (Article 41); to comply with prudential regulations for risk management, insurers have to base their pricing on reliable data.

In terms of product targeting of customers by insurers, the recent rules on customer targeting in the IDD are “bedding in”. The benefits will be assessed in the 2021 review of the IDD. Insurers, in the meantime, are under an obligation to ensure that the targeting of products to groups of customers is regularly reviewed, appropriate and up to date (refer IDD provisions on target market).

- **Recommendation 6 – Ensure that tools provided to consumers are fit for purpose and use:** Insurance Europe agrees that where insurers are making use of online tools to assist consumers in their decision-making, these should be fit for purpose and use. The value of financial education should not be overlooked in this context; where consumers do not use the tools available to them (as concluded in recommendation 6 of the study), better understanding of financial and insurance concepts would act as an additional “string to their bow” in their decision-making process. That is why Insurance Europe — and its members — dedicate significant effort to financial education initiatives (see “[InsureWisely](#)”, the [Consumer portal](#) and numerous national initiatives).
- **Recommendation 7 – Monitor technological developments and design technology neutral legislation:** Insurance Europe fully supports the attention given to ensuring legislation is technology-neutral. This is reflected in our response to the questions above and, more generally, in Insurance Europe positions on the use of and developments in technology, as well as positions on EU legislative texts aimed at insurance provision.

Insurance Europe emphasises that the EU regulatory and supervisory framework for insurance should be conducive to innovation. It should allow consumers, established companies and new market entrants/start-ups to benefit from the opportunities that digitalisation can offer. This is currently not the case. There are still regulatory barriers to providing insurance to consumers online, for example with the requirements to provide information on paper being introduced in the IDD. Such provisions prevent innovation and developments in online services, which consumers already expect to be easy to use and available. Policymaking and regulatory processes may themselves need to adapt to keep up with technological and market developments. Producing an ongoing stream of highly detailed technical rules and guidelines may overwhelm both policymakers and businesses with requirements that are obsolete by the time of their adoption. Our recommendations include the following:

- Insurance legislation, rules or guidelines should be digital-friendly, technologically neutral and sufficiently future-proof to be fit for the digital age and encourage digital innovation.
- Rather than automatically introducing new regulation for the digital age, EU and national policymakers should review how the application of existing rules and policy approaches

might be adapted to meet digital developments without incurring major regulatory change.

In response to the Study's recommendation 7, it should be noted that technological developments in the insurance sector are currently monitored by EIOPA (e.g. in its annual Consumer Trends Reports) and various EC/ EIOPA workstreams on the use of artificial intelligence, big data, cloud computing, etc. Any policy outcomes that may follow should give due consideration to continuing to enable insurers to be innovative in their use of technologic advances and to be able to evolve their product offerings while incorporating new technologies.

Insurance Europe is the European insurance and reinsurance federation. Through its 37 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. 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 generate premium income of more than €1 200bn, directly employ over 950 000 people and invest over €10 200bn in the economy.

Annex: IBIPs – EU disclosure requirements

