To: Mr. Peter Truels Nielsen
Social Attaché
Permanent Representation of Denmark
Rue d'Arlon 73
1040 Brussels

Our reference: LIF-DSC-12-026

Subject: Insurance Europe's comments on the revised Anti-Discrimination Directive proposal 28 March 2012

Brussels, 6 April 2012

Dear Mr. Nielsen,

We would like to comment on the revisions, which we understand you have suggested on 28 March 2012, to Recital 15 and Article 2(7) of the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (the "Anti-discrimination proposal").

It is of utmost importance for insurers to avoid any risk of a European Court of Justice (ECJ) ruling similar to the ruling in the Test-Achats case of 1 March 2011, resulting in a ban on the use of age or disability in insurance. Such a ban would ultimately lead to the end of the current insurance business model, to the detriment of consumers through higher insurance premiums, and reduced choice of providers and products on the market.

Absolute legal certainty is thus required to confirm that insurers are able to continue using age and disability in the assessment of risk and insurance pricing.

Therefore, Insurance Europe welcomes your efforts to enhance legal certainty and appreciates that several of your current proposals address the concerns we expressed in our letter of 14 March 2012.

However, Insurance Europe believes that additional amendments are still required both to Recital 15 and Article 2(7) to ensure higher legal certainty. The existing Article 2(7) of the proposal in particular should be replaced by a separate Article 3 (new) specific to insurance so as to ensure that the provision cannot be considered as a derogation and to further limit the risk of contamination from the ECJ ruling on gender to the age and disability factors. Moreover, we have concerns about:

- the proposed split between the provisions on age and disability denying the usual practice of combining risk factors for risk and price assessment

- the reference to the "medical condition underlying the disability" which has not been eliminated in Recital 15 though the fundamental right being protected under EU law refers to "disability"

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- the obligation for financial service providers to disclose information on the reasons explaining differentiated treatment without bringing the expected benefits to consumers and creating uncertainty regarding the recipients of such information

- the limitation on the use of information sources for accurate risk assessment and pricing having a detrimental impact on consumers

- the maintenance of the term "*proportionate differences of treatment*" because in – very rare – circumstances it is impossible for insurers to provide insurance coverage

- the preservation and introduction of legally uncertain and subjective terms creating legal uncertainty to the detriment of consumers

Again, we share your view that it is essential to further enhance legal certainty and to avoid any risk of contamination in the context of the ECJ ruling on gender. We therefore enclose Insurance Europe's comments at Annex 1 which address in detail the points outlined above as well as our rewording proposal for Recital 15 and Article 3 (new) attached at Annex 2.

We remain at your disposal, should you wish to discuss this further or if you require any further information.

Yours sincerely,

William Vidonja
Head of Single Market and Social Affairs

Annex 1: Insurance Europe's comments on the revised Anti-discrimination proposal of 28 March 2012

Insurance Europe considers that the Danish EU Presidency's revisions of Recital 15 and Article 2(7), both applicable to financial services, further improve legal certainty against the background of the ECJ Test-Achats ruling and contribute to the reduction of spill-over risk from this judgement to age and disability.

However, further rewording and restructuring is needed to achieve the required level of legal certainty; especially the introduction of a separate Article 3(new) specific to insurance replacing the current Article 2(7) to ensure it cannot be considered as a derogation and to further limit the risk of contamination from the ECJ gender ruling to age and disability (see section 2 below).

This rewording and restructuring is essential to meet the objective of legal certainty as well as achieving an accurate, fair and comprehensive risk assessment and insurance pricing process, each to the benefit of consumers.

1. Recital 15: includes some welcome amendments but further revisions are required

Insurance Europe strongly supports the amendments made in the previous version of Recital 15 which provide that proportionate differences of treatment based on age or disability do not constitute discrimination, subject to certain conditions. The principle that differentiation does not constitute discrimination increases legal certainty for financial service providers. However, to ensure the required level of legal certainty, the following concerns should also be addressed:

1.1 There should be no split between age and disability

The new Recital 15 aligns its structure with the one of Article 2(7), ie it introduces a split between age (Recital 15) and disability (Recital 15(a)).

Insurance Europe strongly suggests returning to the previous structure of Recital 15 and amending the current structure of Article 2(7) so age and disability are addressed in one single paragraph in both provisions. When assessing risks, insurance companies indeed rely on the combination of several risk factors and do not assess each factor separately. The proposal should thus reflect reality and address both risk factors in one single paragraph.

1.2 Disability should not be linked to the underlying health condition

Insurance Europe welcomes that the current proposal no longer links disability to the underlying health condition and welcomes the deletion of any reference to the "underlying health condition" in Article 2(7).

However, one reference to the underlying health condition remains in Recital 15(a): "*Risk factors related to disability, and in particular to a disability's underlying health condition, are used in the provision of insurance, banking and other financial services (…).*"

To ensure consistency and legal certainty, this remaining reference should be deleted. As mentioned previously in Insurance Europe's letter of 14 March, a linkage between disability and the underlying health condition creates legal uncertainty and is inaccurate for the following reasons:

- The health condition is not mentioned in the EU Charter of fundamental Rights or in EU primary law; there would therefore be no legal ground for its inclusion in the directive.

- The concept of "*underlying health condition*" is undefined and unclear, and would therefore create further legal uncertainty and lead to diverging interpretations across member states.

- The ECJ itself has drawn a clear distinction between "*disability*" and "*sickness*", ruling that "*sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 [establishing a general framework for equal treatment in employment and occupation] prohibits discrimination*" (judgment of 11 July 2006, case C-13/05).

- Disability may have to be taken into account in risk assessment – independently from the underlying health condition – where disability is relevant for the risk to be insured. Also, it is worth noting that there are many circumstances where disabilities do not have an underlying health condition.

1.3 <u>There should be no obligation to provide information explaining differentiated treatment</u>

The current proposal introduces a new Recital 15(b) amending the obligation to provide information to customers and relevant judicial and complaints bodies; this obligation is also addressed in the last paragraph of Article 2(7).

Recital 15(b) stipulates that financial service providers, upon request, shall provide information to customers and relevant judicial and complaints bodies on the reasons explaining differences of treatment based on age or disability. According to Recital 15(b), the information provided should be useful and understandable to a general public and it should explain differences in individual risk for the service in question.

Insurance Europe maintains its request to delete this unnecessary and unhelpful provision included in Recital 15(b) and Article 2(7):

- **The obligation to disclose information to customers has no added value.** Risk assessment information has no added value for customers; they cannot derive concrete insurance tariffs from this information which is overly technical and complex.

- **The obligation to disclose information to relevant judicial and complaints bodies creates legal uncertainty.** Given the lack of a definition for "*relevant judicial and complaints bodies*" there is uncertainty as to who can request the disclosure of risk assessment information and in relation to what type of proceedings.

If the provision is nevertheless not removed, Insurance Europe supports maintaining the Danish EU Presidency's amendments:

- information shall only be provided upon request and not in advance

- differences of treatment shall be "*explained*" rather than "*justified*"

- no obligation to disclose sensitive data. However, this exception has not been included in the current Article 2(7) creating inconsistency between Recital 15(b) and Article 2(7). The two provisions should be aligned. Also, as the wording "*sensitive data*" is not clear, if the obligation to disclose information is maintained, Insurance Europe recommends using the terminology "*sensitive data and information*" to improve clarity so all bases of risk assessment are captured.

If the provision is not removed, as a minimum, the following additional amendments should also be adopted:

- limit complaints bodies to "*financial complaints bodies*". As mentioned above, risk assessment information is overly technical and complex; disclosure to general complaints bodies would thus not have any added value.

- Limit the obligation to an individual's request in relation to his/her individual case. Third parties should not get access to individualised information unrelated to the file in question which would infringe data protection rules. If the provision is maintained, Insurance Europe therefore suggests rewording the relevant section of Recital 15(b) and Article 7(2) as follows: *"(…) upon request and only in relation to the individual case in question (…)"*

1.4 The concept of comparability should be in line with the ECJ ruling

The concept of comparability has been introduced in the previous version of Recital 15 and is maintained in the current one. However, so as to bring further legal certainty, Insurance Europe suggests referring to the concept of comparability as developed by the ECJ, ie the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (see Insurance Europe's rewording proposal for Recital 15 in Annex 2).

1.5 There should be no limitation or hierarchy for sources of risk assessment and pricing

Insurance Europe welcomes the following amendments made by the Danish EU Presidency and supports maintaining these:

- The deletion of the phrase "*where such data are not available or sufficient*" in Recital 15(a) and Article 2(7) allowing financial service providers to use medical knowledge for the assessment of disability risks even if actuarial principles and statistical data are available.

- The alignment of Recital 15/15(a) and Article 2(7) so both provisions include identical wording "*actuarial principles and relevant and reliable statistical data*" which was previously not included in Recital 15/15(a).

All other Insurance Europe concerns regarding the sources of information for risk assessment and pricing, as previously communicated on 14 March, remain. There is indeed a need for various and alternative information sources in risk assessment which requires the following amendments to the current proposal:

Insurance Europe strongly supports the use of **medical knowledge** without restrictions **for both age and disability**. Otherwise, insurers will be prevented from assessing and pricing risks accurately. This can be illustrated by an example from life insurance: it is evident that the survival prospects of a person in a given age depend on the individual's health state. However, very often insufficient quantitative information, ie statistical information on the health state, is available. Such information, for instance, does not exist for the more than 5 000 rare diseases known today. Moreover, (sufficient) quantitative information, ie statistical data, is not always available for the provision of insurance coverage for certain age groups. Insurers always have to assess the risk as a whole. The same information sources are therefore needed for age and disability. Restrictions would lead to a substantial increase in premium levels, lower coverage rates in private insurance or even to the withdrawal of products from the market, which will reduce consumer choice.

Medical knowledge is a relevant source of information in the risk assessment and pricing process of insurance companies. Insurers should therefore be allowed to use it alike actuarial principles and statistical data, for both disability and age.

The **prognosis of age-related risk can be enhanced if medical knowledge is taken into account** in the risk assessment based on age - in combination with statistics if available - as shown in the following examples: the age at the start of a chronic disease is relevant for the prognosis. For instance, in the case of a diabetes mellitus, even if the therapy is excellent, complications will arise after several decades. Therefore, a 20 year old with diabetes mellitus will probably have complications during the life of the insurance contract, while a 60 year old will not.

Furthermore, the use of "and" in the phrase "*actuarial principles **and** accurate and reliable statistical data*" implies that the insurers must always use both. This is not always feasible, as sometimes insurers are unable to rely on - or use - both, especially when developing new products or where the data does not currently exist.

Whatever factor is used in assessing or pricing risks (eg age or disability), private insurers need to rely on a **wide range of relevant sources and methods** such as actuarial and statistical data, actuarial principles, medical reports, medical research or medical experience in order to be able to make a comprehensive risk assessment and an adequate pricing. A risk is only insurable if it is measurable on the basis of either one or several of the above mentioned information sources and methods, depending on their appropriateness or availability. These sources and methods, therefore, have to be considered as alternative and not cumulative conditions for the risk assessment process.

1.6 Inappropriate or unclear terms should not be used

The current proposal still contains inappropriate and unclear legal terms creating inaccuracy and legal uncertainty to the detriment of consumers.

Firstly, the term "*determining*" used to qualify the age and disability factors in the risk assessment process is **inappropriate**, as it may lead to a too restrictive interpretation by the courts, thereby limiting the ability of insurers to use age or disability in risk assessment. "*Determining*" should therefore be replaced by "*relevant*", which is less restrictive.

Secondly, several **unclear legal terms** have been maintained in Recital 15 and Article 2(7), such as "*reliable*", "*reasonable*", "*useful and understandable to a general public*", "*proportionate*" or "*sufficient*". The use of these terms creates legal uncertainty as they are not defined, are vague and thus do not meet the need for legal certainty. On the contrary, it is likely that more cases will be brought to the ECJ for further clarification. We therefore suggest deleting these terms, especially:

- The term "*proportionate*" ("… *proportionate differences in treatment*…") could be interpreted as a prohibition to refuse access to an insurance product. However, although insurers strive to insure as many people as possible in a very competitive environment and thanks to innovation, there is a limited number of cases where consumers remain unable to insure, eg if it is impossible to quantify the risk, or if the risk is so high that the required price would be too high. The word "*proportionate*" should therefore be deleted.

- The "*relevant and reliable statistical data*": there is a risk that some member states interpret them restrictively, ie that only national sources could be used. This would be a problem in particular for small member states, because of the low volume of business of insurance companies and the relatively small population percentage that is insured. Indeed, insurers - alike national health

authorities - in those countries usually resort to sources outside the country to obtain information or analysis. They rely to a very large extent on European statistics which are adjusted on the basis of corporate-specific experience to meet local standards.

- The terms "*certain financial services*": the new proposal refers to "*certain*" financial services rather than "financial services" in Recital 15/15(a). The use of the term "*certain*" indicates that some financial services are excluded, however this group is not defined which creates legal uncertainty as to whether the provision is applicable to all financial service providers. Insurance Europe suggests deleting "*certain*".

2. Article 2(7): rewording is required to achieve legal certainty

As mentioned in Insurance Europe's letter of 14 March, Insurance Europe strongly supports maintaining the following amendments that were made by the previous Polish EU Presidency, as they help reduce the risk of an ECJ ruling similar to the one on Test-Achats, which would result in a ban on the use of age or disability in insurance:

- The deletion of the introductory words "*Notwithstanding paragraph 2*", which denoted a derogation similar to that of the 2004/113/EC Gender Directive, and was sanctioned by the ECJ;

- The removal of the member state option, as the latter increased the risk of legal challenge before the courts, especially when combined with a derogation to the prohibition principle;

- The replacement of "*shall not be considered discrimination*" by "*do not constitute discrimination*". It is indeed highly important to clarify that differentiation according to risk exposure does not constitute unfair discrimination. Fair differentiation allows similar situations to be treated similarly and different situations to be treated differently. It is a necessary pre-condition for the functioning of private insurance. Thanks to medical progress, growing experience and risk differentiation, increased possibilities to ensure different kinds of risks have been extended over time, allowing insurers to cover ever more consumers. This should be preserved, to the benefit of all consumers.

A prohibition to differentiate on the grounds of age or disability which are relevant factors in the assessment of risk, would lead those individuals most at risk to purchase the cover and those with a low or average risk to refrain from seeking cover. The insurance provider would no longer be in a position to correlate the individual's demand for insurance with his/her risk of loss in the insurance premium or benefit. Such adverse selection may lead to unaffordable prices and to the withdrawal of insurance products, to the detriment of consumers.

To ensure legal certainty, some further amendments are required. The following concerns discussed in relation to Recital 15 are also applicable to Article 2(7):

- there should be **no split between age and disability** (see section 1.1)

- there should be **no obligation to disclose information** explaining differentiated treatment. However, if the obligation is maintained, as a minimum Article 2(7) should also include the exception that sensitive data (and information) should not be disclosed, complaints bodies should be restricted to financial complaints bodies, and the obligation should be limited to an individual's request in relation to his/her individual case (see section 1.3)

- there should be **no limitation or hierarchy for sources** of risk assessment and pricing (see section 1.5)

- there should be **no use of inappropriate and unclear terms** (see section 1.6)

Insurance Europe further suggests the following amendments to Article 2(7):

- **Article 2(7) should be replaced by a new Article 3 specific to insurance**

  As mentioned previously, Insurance Europe believes that legal certainty should be further enhanced by creating a separate Article 3 (new) on differentiation in insurance. Maintaining Article 2(7) as such means that differentiation in risk assessment immediately follows the definition of discrimination in Articles 2(1) and 2(2), which themselves refer to the prohibition principle set in Article 1. It is, therefore, preferable to make a clear distinction between the prohibition to discriminate and the definition of discrimination on the one hand, and the statement according to which differentiation in insurance on the grounds of age or disability in risk assessment does not constitute discrimination on the other hand.

- **Article 3(new) should also include the terminology "*to assess the individual risk and to determine premiums and benefits*"**

  Insurance Europe supports the revised wording of Recital 15/15(a) which now reflects the importance of both risk and price assessment: "*to assess the individual risk and to determine premiums and benefits*".

  To avoid inconsistency between Recital 15/15(a) and Article 3(new) as well as legal uncertainty, the same wording should be used in Article 3(new) "*if age/disability is a determining factor in the assessment of risk or the determination of premiums and benefits for the service in question*".

<u>Annex 2</u>: Insurance Europe's rewording proposals

We believe that Recital 15 should be reworded as follows:

- **Recital 15:**

"*In the provision of insurance and other related financial services, insurers must be able to assign the insureds to certain risk categories in order to calculate appropriate premiums and benefits that reflect the individual's probability of risk.*
Actuarial and risk factors related to age or disability are used in the provision of insurance to assess the individual risk and to determine premiums and benefits. Furthermore, the European Court of Justice has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified. Therefore, a different treatment on the grounds of age or disability does not constitute discrimination where such factors are relevant for the assessment of risk."

We further recommend that Article 2(7) of the proposal be replaced by a new Article 3 specific to insurance, which states that using age or disability in the provision of insurance does not constitute discrimination, as follows:

- **Article 3 (new):**

"*In the provision of insurance, differences in treatment, including differences in premiums and benefits in respect of an insured or a category of insureds on the grounds of age or disability, do not constitute discrimination for the purposes of this Directive where, in respect of the risks in question to be insured, age or disability is a relevant factor in the assessment of such risks and the use of these factors is based on actuarial principles, statistical data or medical knowledge*."