To: Mr. Peter Truels Nielsen
Social Attaché
Permanent Representation of Denmark
Rue d'Arlon 73
B-1040, Bruxelles

Our reference: LIF-DSC-12-014

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

Brussels, 14 March 2012

Dear Mr Nielsen,

We understand that you have suggested a revised version of Recital 15 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") dated 2 March 2012. Insurance Europe welcomes your efforts to enhance legal certainty for insurers, especially in light of the European Court of Justice's (ECJ) ruling on the Test-Achats case of 1 March 2011.

It is of the utmost importance for insurers to **avoid any risk of a similar ECJ judgment resulting in a ban on the use of age or disability in insurance**. Such a ban would ultimately lead to the end of the insurance business model as it currently exists, to the detriment of consumers through higher insurance premiums, and reduced choice of providers and products on the market.

The insurance industry therefore needs **absolute legal certainty** confirming the ability of insurers to continue using age and disability in the assessment of risk and insurance pricing.

The latest proposal is going in the right direction, as it acknowledges that a differentiated treatment on the grounds of age or disability does not constitute discrimination, subject to certain conditions. However, the proposed Recital 15 still raises several concerns. Furthermore, Article 2(7) – as reworded by the previous Polish EU Presidency - requires further amendments in order to bring more legal certainty.

Therefore, we suggest further improving the legal certainty of both Recital 15 and Article 2(7), which could be achieved with our rewording proposals in Annex 2 hereto. The existing Article 2(7) of the Directive 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 on disability;
- the limitation of the use of information sources for accurate risk assessment and pricing, which would have a detrimental impact on consumers;

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- the introduction of new obligations for financial service providers to disclose information on the reasons justifying a differentiated treatment, which could pose competition issues for insurers and be burdensome without bringing the expected benefits to consumers;
- the reference to the "medical condition underlying the disability", as the fundamental right being protected under EU law refers to "disability".

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

We remain at your disposal, should you wish to discuss this further or should you need any further information on this dossier.

Yours sincerely,

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Head of Single Market and Social Affairs

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Annex 1: Insurance Europe's comments on the revised Anti-discrimination Directive proposal of 2 March 2012

Although the Presidency's intention is to improve the legal certainty of Recital 15 on financial services against the background of the ECJ Test-Achats case, Insurance Europe considers that its revised wording of Recital 15 does not entirely meet that objective and needs further improvement. Furthermore, Article 2(7) as proposed by the previous Polish EU Presidency contributes to reduce the risk of spill-over from the ECJ Test-Achats ruling to age and disability. However, some further rewording to this Article is also needed to ensure a higher level of legal certainty as well as an accurate, fair and comprehensive risk assessment and insurance pricing process, to the benefit of consumers.

1. The Danish EU Presidency's latest proposal on Recital 15 requires additional changes

In its latest version, Recital 15 provides among others that proportionate differences of treatment based on age or disability do not constitute discrimination, subject to certain conditions. This proposed wording improves legal certainty for financial services providers to a certain extent, as it now states as a principle that differentiation does not constitute discrimination, which was not the case with its previous version.

However, the revised version of Recital 15 raises the following concerns:

- **The concept of comparability**

The concept of comparability has been introduced in Recital 15. However, so as to bring further legal certainty, we suggest 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 our rewording proposal for Recital 15 in Annex 2 here below).

- **Disability should not be linked with the underlying health condition**

As further explained here below (see paragraph 3.3), disability and the underlying health condition should not be linked as this creates legal uncertainty and is not accurate. Regarding the latter point more specifically, in some cases insurers have to rely on disability as such where it is relevant for the risk to be insured, while not linked to any underlying health condition.

- **Recital 15 should be made consistent with Article 2(7)**

In the latest version of Recital 15, differences of treatment should be based on a sound actuarial risk assessment. This is not in line with the latest version of Article 2(7), which refers to a risk assessment based on actuarial principles and relevant and reliable statistical data, as well as – for disability – on relevant and reliable medical knowledge. Moreover, this would reduce considerably the basis on which insurers may differentiate, and thus their ability to achieve a precise risk assessment. Recital 15 and Article 2(7) should be drafted equally in this regard and in any case, both wordings need to be revised as further explained under paragraph 3.2 here below.

Insurance Europe's further comments on Recital 15 relate to the unchanged sentences of its previous version and are therefore further developed in our comments here below, which also relate to Article 2(7). Insurance Europe advocates in particular the deletion of the two last sentences of Recital 15.

2. The current wording of Article 2(7) increases legal certainty

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.

3. Outstanding issues

Insurance Europe suggests further the following amendments to the rewording proposal of Recital 15 and to Article 2(7):

3.1 The structure of the Anti-discrimination proposal should be revised

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

We think 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.

- **There should be no split between age and disability**

The new Article 2(7) reintroduces a split between age and disability, which had previously been proposed by the Spanish EU Presidency. When assessing risks, insurance companies rely on the combination of several risk factors.

3.2. Insurance Europe is against any limitation as to the information sources of risk assessment and pricing

- **Need for various and alternative information sources**

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 not sufficient quantitative information, ie statistical information on the health state, is available. Such information for instance does not exist on the more than 5.000 rare diseases which are 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.

The prognosis of age-related risk can be enhanced if medical knowledge is taken into account in the assessment of risk 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. In this respect, these sources and methods have to be considered as alternative and not cumulative conditions for the risk assessment process.

- **No hierarchy between information sources**

Similarly, a hierarchy in the sources of information in the risk assessment and pricing process of insurers is maintained for disability in relation to medical knowledge in the new wording of Article 2(7) ("*…where such data are not available or sufficient*"). This creates a checklist that insurers would need to comply with.

Separating the use of medical knowledge even in the presence of statistical data is inappropriate. Statistics need to be interpreted and in many cases - well beyond the 5,000 rare diseases - statistics on biomedical aspects are often not sufficiently significant to be used for insurance purposes (long-term prediction) without the medical knowledge and interpretation. The use of data on biomedical aspects without the appropriate medical interpretation and thus medical knowledge is precarious.

Therefore, Insurance Europe believes that there should be no hierarchy in the information sources in the new Article 3 (new). Insurers need to rely on quantitative data as well as on qualitative information to assess the risk. 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 use of inappropriate or unclear terms increases legal uncertainty**

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 or introduced 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 match 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. Furthermore and more specifically:

- 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 impossible 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.

3.3 The "underlying health condition" should be deleted

We believe that the concept of linking the disability and the "underlying health condition" should be removed, with the words "*health condition underlying the disability*" deleted 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.

3.4 Insurance Europe is concerned at any obligation for financial services providers to provide information on the reasons justifying a differentiated treatment

The last paragraph of Article 2(7), combined with Recital 15, sets on financial services providers an obligation to provide broader public information that justifies their decision to apply differences of treatment proportionally. Pursuant to Recital 15, this information should be made accessible to consumers and relevant judicial complaints bodies, in advance or upon request, and should be useful and understandable to a general public. The wording of the proposal is unclear, which creates legal uncertainty.

Regarding more specifically information and data allowing them to conduct the assessment of risks as accurately as possible (eg mortality and morbidity research), insurance companies invest heavily in such information and data as they are in intense competition. An obligation to disclose this information to the general public, in particular in advance, would stop any innovative efforts in this field since this information would become available to competitors for free. In that sense, an obligation to publish this information would

infringe insurance companies' intellectual property rights. For customers, the publication of information used in risk assessment has no added value since they cannot derive concrete insurance tariffs from this information, which is overly technical and complex.

Furthermore, due to the enormous and possibly infinite combination of different risk factors and circumstances which may be encountered in the assessment of an individual risk, it is impossible to inform "in advance" of the proportionality or source of the evidence behind any theoretical final outcome of a not yet received application. We would therefore strongly urge to remove these unnecessary and unhelpful provisions from Recital 15 and Article 2(7).

<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*."