Opinion

of the German Insurance Association

on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to ensure against such liability

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On 24 May 2018, the European Commission published its proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability.

The German Insurance Association and the association Verkehrsopferhilfe e.V. welcome the EU Commission's efforts in providing even better protection for victims of traffic accidents and strengthening policyholders' rights.

However, the German insurance industry sees the need for an adjustment of certain proposals. This concerns

- the scope of the Motor Insurance Directive (MID), (Art. 1 No. 1a),
- the minimum amounts of cover (Art. 9),
- the protection of victims in the event of an insolvency of an MTPL insurer (Art. 10a) and
- statements relating to the third party liability claims (Art. 16).

1. The scope of the MID (Art. 1 No. 1a)

Vehicles used only on private property do not fall within the scope of the MID. However, vehicles used on public roads and places are subject to compulsory insurance, and this compulsory insurance also covers the use on private property.

a) The extension of the scope of the MID is inappropriate and leads to unintended results

The EU Commission's proposal aims to specify the scope of the MID due to three recent rulings of the European Court of Justice, which are based on the wording of the MID regulations. Art. 1 No. 1a defines the term "use of a vehicle" in order to take account of ECJ rulings. We welcome the clarification. However, we consider the EU Commission's proposal to be too extensive. The implementation of the proposed scope would lead to problems in many markets, including the German market, for example when dealing with (temporarily) non-registered vehicles and newly produced vehicles.

According to the EU Commission, in the future the MID should apply to every use of a vehicle that corresponds to its normal function as a means of transport (as opposed to special purpose motor vehicles such as working machines). It does not matter whether the vehicle is used on public or private property.

In our view, such an extension of the scope is not appropriate in all respects and provides neither legal certainty nor the necessary clarity. It would also result in a situation where "newly produced" and non-registered new vehicles, for example at loading stations of car manufacturers, will fall within the scope of the MID and thus require MTPL insurance. On the one hand, this would mean that every newly produced vehicle would have to be specifically and identifiably covered by a compulsory MTPL insurance contract; at least it would have to be apparent by suitable means on the vehicle itself that it has an MTPL insurance. Such proof would not be possible via a general registration number of the vehicle since these vehicles are not registered vehicles. Further, it is not necessary from the perspective of road traffic accident victims to include newly produced vehicles into the scope of the MID. The loading stations are closed private premises operated by automobile manufacturers or logistics companies. There is no public transport in these areas. Besides, such vehicles are subject to the operator's/manufacturer's commercial third party liability insurance, so that even against this background it is not clear why such vehicles should be subject to the MID.

The proposed wording would also mean that non-registered vehicles located exclusively on private property and not allowed to participate in public road traffic, would be subject to compulsory liability insurance. This would mean, for example, that temporarily deregistered vehicles or motorcycles that are not used due to seasonal weather conditions, and stored on private property (e.g. in a garage), would have to be insured by the consumer. In addition to the detrimental financial effect for the consumer, it would not be possible for the state authorities to monitor the compliance with the compulsory insurance obligation, since they have no right to enter private property and thus could not control the extent to which the insurance obligation would be fulfilled. The result would be an increased number of unduly uninsured vehicles on private property.

The proposed extension of the scope of the MID would also lead to a situation where MTPL insurance covers the participants in motorsport races. However, this does not seem adequate.

The MID cannot be aimed at protecting participants in motorsport races and burdening the community of insureds with the costs of this (sports) risk. This is already provided in Annex I Art. 4 para. 2 in conjunction with Art. 6 para. 1 of the Strasbourg Convention (Federal Law Gazette, 1965, part 2, pages 281-296), which requires the organiser of racing events to provide proof of special event insurance coverage for this special risk to receive the necessary state approval for the motor race. This ensures that possible damages are covered by the event insurance and at the same time, that the community of MTPL policyholders are not burdened with this excessive "sports risk".

In paragraph 93 of his opinion under the Case C-80/17, the Advocate General of the European Court of Justice stressed the importance of registration in determining the 'use of the vehicle' giving rise to an obligation to insure. Ultimately, the implementation of the EU Commission's proposal would mean that every vehicle would require not only MTPL insurance but also the registration. This would hardly be feasible. Such regulation is highly impractical and unnecessary.

b) Extension of the scope of an existing MTPL insurance to private property would be appreciated

A solution would be appreciated which entails that an existing MTPL insurance would also cover the damage in cases where the insured vehicle is involved on private property. This specification of the scope of an existing MTPL insurance would - while avoiding the legal uncertainties and

impracticability described above - take full account of the protection of road traffic accident victims.

For editorial reasons, it is proposed to specify Art. 3 sentence 1 of the German version of the codified MID as follows:

> *"Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance."*
>
> *[German version: „Jeder Mitgliedstaat trifft vorbehaltlich der Anwendung des Art. 5 alle geeigneten Maßnahmen, um sicherzustellen, dass die Haftpflicht aus der Verwendung von Fahrzeugen mit gewöhnlichem Standort im Inland durch eine Versicherung gedeckt ist.“]*

The proposed amendment would result in the German version being in conformity with the English version of Art. 3 sentence 1 of the codified MID. The English text already contains this addition and would only have to be supplemented editorially by one word (see underlining):

> *“Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of any use of vehicles normally based in its territory is covered by insurance.”*

2. The minimum amounts of cover (Art. 9)

For reasons of legal clarity, the uniform use of the term "claim" in the codified MID should be maintained.

The proposed version of Art. 9 paragraph 1a) provides for minimum amounts in the case of personal injury per *accident*, whereas under Art. 9 paragraph 1b) the minimum amounts in the case of damage to property are based on the *claim*.

The different terms could raise questions and lead to different interpretations. According to the reasons given by the EU Commission, the aim of the adjustment is the uniform amount and increase of the minimum amounts of cover throughout Europe. This can be easily guaranteed with the currently used term *claim*.

3. The protection of victims in the event of an insolvency of an MTPL insurer (Art. 10a)

The Directive should ensure that the market bears the financial risk of insolvency, where the supervisory authority is responsible for taking action.

The proposal does not achieve this objective.

It must be clarified that the 3-months period under Art. 10a para. 1 only applies in the event of an insolvency and does not apply to cases where - in a purely domestic case - the policyholder does not receive a reply from the (solvent) insurance company.

With the introduction of Article 10a, the European Commission clearly intends to extend the scope of the Directive to the insolvency of an MTPL insurer (see also No. 1 of the introduction). The aim is to cover both purely domestic and cross-border road traffic accidents.

Unfortunately, the proposal does not achieve this objective.

a) Clarification that the 3-months period only applies to insolvent insurers (Art. 10a para. 1)

The Member States shall be obliged to establish bodies to pay compensation if either the insurance undertaking is subject to bankruptcy proceedings (Art. 10a para. 1 No. 1a), the insurance undertaking is subject to a winding-up procedure (Art. 10a para. 1 No. 1b), or if neither the insurance undertaking nor its claims representative has provided a reasoned reply within three months (Art. 10a para. 1 No. 1c).

As the three options are mentioned alternatively, no link is established between the (imminent) insolvency and the absence of a reply. Consequently, it would not matter for the competence of the newly created "insolvency body" whether the insurer who does not provide a reasoned reply is subject to insolvency proceedings or not.

As a result, the victim who claims against a (solvent) insurance company, and does not receive an – in his view - reasoned reply within 3 months, could turn to the new compensation body. This result will certainly not have been pursued by the current proposal.

Since the European Commission only sees a need for regulation for cases of insolvency, the word "and" should be inserted between Art 10a para. 1b) and Art. 10a para. 1c) to prevent this unintended result. This would ensure that the injured party could turn to the "insolvency body" if an insurer under insolvency proceedings has not provided a reasoned reply within three months.

b) Wrongly situated regulation - applies to cross-border accidents

Art. 10a para. 1c) refers not only to the insurance undertaking but also to its claims representative. Since claims representatives only play a role with regard to cross-border road traffic accidents (Art. 21), the new rule shall apparently also cover cross-border road traffic accidents. However, Article 10 of the MID regulates the competence of the guarantee funds exclusively in the event of national accidents. Therefore, the reference to international road traffic accidents in Article 10a is confusing. In our view, this matter should be dealt with in Art. 24:

If in the cases referred to in Article 24, the foreign insurer is no longer available, either during the settlement or at the moment of the notification, because the insolvency measures have been imposed on this insurer, the responsibility for the settlement should lie exclusively with the compensation body in the country of residence of the victim. This applies all the

more as Art. 10a para. 1 No 1c) refers to the reasoned reply, which is not legally defined but has been left to the interpretation of the compensation bodies since more than 15 years.

In return, the compensation body shall be granted with a right of recourse against the body that is defined as the debtor in Art. 10a para. 4.

c) The unclear provision in Art. 10a para. 2 leads to disadvantage for the victim

The first of the three options mentioned in Art. 10a para. 2 is contradictory. If the victim, who presents his claim directly against the insurer/claims representative, may not turn to the body responsible for the settlement, he will never be in a position to complain about the absence of a reasoned reply.

d) Provision of a simple reply within two months is not expedient (Art. 10a para. 3)

Pursuant to Art. 10a para. 3 the body referred to in para. 1 shall give a reply to the claim within two months. The advantage for the victim is not obvious as the reply can consist of a simple acknowledgement of receipt. A reasoned reply is not expressly required. Moreover, there are no consequences foreseen in case of exceeding the deadline.

On the other hand, it is not clear why the newly established body should have a deadline of two months, whereas the Directive provides for a deadline of three months for all other bodies responsible for handling claims for the first time. In particular, in cases where the insurer no longer reacts to claims for compensation due to insolvency or, in the case of cross-border accidents, the insurer no longer has an appointed claims representative, the new body to be set up or the compensation body is the first to deal with the claim. Consequently, the period of three months should also apply here for the initial handling.

e) Ensuring the right of recourse against the body in the country of establishment (Art. 10a para. 4)

Art. 10a para. 4 provides that the body which compensated the injured party at his place of residence has a right of recourse against the body in the Member State of the establishment of the insurer which issued the insurance policy.

The Commission Staff Working Document SWD (2018) 247, which is only available in English, states on p. 30 that

> *“(…) Option 3, sub-option A: Home Member State Approach: Under this sub-option, the Directive would stipulate that the body that bears the final responsibility is in the Member State of the establishment of the insurer providing policies on a freedom of services or freedom of establishment basis (Home Member State). The insurer would be required to contribute to the guarantee fund of the Home Member State in case of its potential insolvency (…)”*

On page 33 of the working document it is said:

> *"(…) Therefore, Option 3 Sub-option A is the preferred option (...)”*

Apparently – and correctly - the intention was–to regulate that in both the Freedom of Services (FOS) and the Freedom of Establishment (FOE) cases, the market in which the insurer has its statutory seat - and where it is subject to national supervision - shall pay for the damage.

This is not achieved by the current wording of Article 10a para. 4 which focuses solely on the Member State of the establishment. However, only in the case of FOS this is the state to whose supervision the insurer is subject. In case of FOE, the establishment pursuant to Art. 13 Solvency II Directive is the state in which the license is granted.

The wording should make it clear that in the end the market, where the supervisory authorities are responsible for the supervision of the insurer and possible sovereign measures, bears the financial risk of insolvency.

f) Ensuring subsidiarity by autonomous agreements of the bodies concerned (Art. 10a para. 7)

Art. 10a para. 7 provides that questions of cooperation or recourse between the bodies involved in claims settlement will be dealt with by means of a delegated legal act under Art. 28b.

Up to now, such issues have been governed by autonomous agreements between the bodies concerned (e.g. Art. 24 para. 3).

It is neither clear why the Commission wishes to deviate from this practice, nor is it necessary.

4. Statements relating to third party liability claims (Art. 16)

It should be made clear that the content of the claims history statement relates only to cross-border situations and not to domestic claims history statements.

It does not make sense to include the value of the liability claims asserted by third parties in the claims history statement.

An obligation to publish the corporate policy regarding the way in which the claims history is taken into account when calculating the premium, is rejected.

Such a far-reaching form is disproportionate and not necessary in a heterogeneous European insurance market. It is not possible to reflect all market requirements.

The vast majority of cross-border bonus/malus transfer is carried out without any problems. We know by inquiries that difficulties in the implementation are only of an individual nature. For example, in the case of frequent changes of the insurer, only the confirmation for the most recent insurance period is submitted, or the original form is not submitted. In general, these deficiencies are remedied in dialogue with the insurance company.

a) No extension to purely domestic changes of the insurer

The European claims history statement aims to simplify the cross-border change of insurer in the sense of a best practice approach in the European internal market, and to create a minimum standard. This is because currently there is no further common denominator for the various and very differently structured bonus-malus systems in Europe.

Article 16 should be clarified by adding that the claims history statement referred to in the proposal relates only to cross-border situations and does not affect the national provisions of the Member States on (domestic) claims history statements.

In Article 16, the sentence added in the second subparagraph should be supplemented as follows:

> "*They shall do so using the form of the claims history statement when changing the insurer cross-border."*

It is sufficient to provide a simple minimum standard for the relatively small number of cross-border changes of insurers and, if necessary, to give preference to individual additional information. Providing a large number of mandatory information which is not available in every country, or of no importance there (for example, the value of the damage), is not expedient and - from a practical point of view - also not feasible. Each insurer can automatically supplement the European claims history statement according to its experience with further information which would otherwise have to be provided to the policyholder individually.

The proposed extension would entail high IT costs and thus additional high expenses without providing the consumer any advantage.

b) Value of the asserted liability claims in the claims history statement is not workable and unsuitable.

Up to now, it was sufficient to indicate the number of claims and the dates thereof. This understanding was also reflected in the *"Insurance Europe Guidelines on information for motor insurance claims history declarations for cross-border use"*.

The newly proposed inclusion of the value of the asserted liability claims of third parties in the claims history statement, however, is neither necessary nor practical. Depending on the tariff model, this data is taken into account differently. It is already unclear what the term "value" means. Is it the value in the sense of a "burden on the contract" or should the claims expenditure (i.e. payment and reserve) be quantified? It is often not possible to give a binding figure for open claims. This is the case, for example, in the event of personal injury or ongoing legal proceedings, where the final claims expenditure may only be certain in years and in some cases even in decades.

c) No disclosure of trade secrets

We reject the obligation in the proposed directive to publish an insurer's corporate policy regarding the way in which claims history is taken into account when calculating premiums. The calculation basis is a trade secret. Insurers face intense competition to the consumers' benefit. The claims history is only one of many factors that can, but need not, be used to determine prices. Insurers must - and may - also be free to calculate the rates without taking the claims history into account - for example on the basis of current driving behaviour using telematics. The Commission's proposal leads neither to greater transparency nor to benefits for consumers.

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