

## Position paper

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## 1. Introduction and current situation

The SVV notes an increasing degree of compulsory insurance legislation in Switzerland, particularly with respect to liability insurance. At present some 40 mandatory schemes exist in Switzerland at a federal level, in addition to some 100 compulsory cantonal schemes, all of which lack a uniform system. The handling of cantonal in particular schemes results in rising costs. The administration of varying products in the insurers' portfolios is reaching its limits and is prone to error, because it is extremely complex and difficult to implement.

In its position made during the consultations for the total revision of the Swiss Insurance Contracts Act, the SVV acknowledged compulsory insurance as an instrument for situations in which it is meaningful. However, obligations to insure are undesirable at a cantonal level and even dilute the significance of compulsory insurance. What is hazardous in one canton is also hazardous in another. Hazards do not stop at cantonal borders. If hazards require compulsory insurance, regulation is justified at the federal level. Cantonal compulsory insurance results in legal uncertainty for the general public, e.g. varying provisions governing dog owners' obligation to insure. They hinder a single internal market and can distort competition.

An obligation to insure is not a prevention measure. Not a single loss is prevented by compulsory insurance. The effect of compulsory insurance is set in motion only after the loss has occurred. The demand for compulsory insurance must thus be oriented towards economic needs and not be driven by emotion.

In 2013, the SVV examined the principles of legislating compulsory insurance in its strategy and developed an independent position.

The European Centre of Tort and Insurance Law (ECTIL) Vienna has initiated a compulsory insurance project dealing precisely with this issue, examining the status quo of compulsory insurance from 9 national European perspectives. The project analyses this legal framework, considering in particular the aspect of insurability. The report will be published in September 2016 and also refers to the SVV strategy position.

The SVV proposes a process that permits, in an environment with ever-increasing mandatory insurance, a uniform determination of criteria and notice requirements for compulsory insurance. This would have the advantage for injured parties and policyholders (both are consumers of insurance deserving protection), as well as for legislators and insurers, of providing a systematic and consistent policy of compulsory insurance. At the same time, supervisory authorities would have uniform and controllable solutions at their disposal, allowing them to fulfil their supervisory role with reasonable effort.

The SVV sees no need to legislate the principles of a compulsory insurance in a framework law. Rather, it postulates that the question of compulsory insurance be examined in the context of the particular statute governing the underlying issue, and to possibly introduce new obligations to insure if the risk reaches the threshold pursuant to the attached evaluation grid.

The purpose of the present paper is

- to make the SVV's position on compulsory insurance apparent
- to assist legislators in drafting compulsory insurance in a uniform manner in line with insurance techniques
- where compulsory insurance is considered necessary, to model its content and framework in a consistent manner that is compatible with insurance techniques
- to ensure uniform requirements for insurance products pursuant to federal law, thus lowering development and administration costs
- to define the content of possible compulsory insurance as clearly but as flexibly as possible (e.g. extent of coverage in accordance with market usage)

## 2. Vision

- **The SVV welcomes compulsory insurance where it is meaningful**  
Whether compulsory insurance is meaningful is often a question of judgement. In order to exercise such judgement in a consistent manner and to apply a uniform standard, the SVV recommends to systemically weigh various criteria before a decision is made. Only if a certain threshold is reached, should compulsory insurance be even taken into consideration. For this purpose an evaluation grid (Appendix) was developed as an aid for judgement.
- **Compulsory insurance should be regulated pursuant to uniform principles and only at a federal level**  
The criteria of the proposed evaluation grid are not limited to a local/cantonal level. Hazards know no borders. Should only cantonal/regional risks be involved, there are other means of regulation (licences, requirements, etc.).
- **The SVV actively participates in the legislative process**  
The goal is to involve the insurers in the relevant legislative process from the outset. Consultations on governmental messages to parliament drafted without the participation of technical experts often result in parliamentary rejection and unnecessarily harm the reputation of all involved.

### **Strategy to implement the vision**

The SVV's vision is implemented with a **recommendation** including an **evaluation grid for compulsory insurance** and an **enumeration of insurance tools** to assist public authorities.

The **evaluation grid for compulsory insurance** is based on criteria (*inter alia* avoidability of exposure to the risk, number of potential victims, knowledge gap between victim and tortfeasor) and the severity of their manifestation. It enables the legislature to weigh specific criteria which indicate the necessity for compulsory insurance. If a certain threshold is reached, the issued is deemed to be "worthy of compulsory insurance". It is important to note that the criteria are not designed for cantonal or regional application, and in the event of a threshold of risk potential or hazard being reached, this obviously applies on a national level. Logically, the reaching of a threshold means that a solution at a federal level is required.

If this threshold is reached, the **indicated insurance tools** furthermore serve to raise the legislature's awareness of the possibilities and limits of insurability for determining the modalities of an obligation to insure in accordance with insurance principles.

## **3. Insurance tools**

In the following listing, the SVV describes the functions of various insurance tools, explains their mutual interdependencies and expresses its views on these issues.

### **3.1 Statutory lien pursuant to Art. 60 Insurance Contracts Act (VVG)**

The Swiss Insurance Contracts Act (VVG) contains a general lien. In cases where a direct cause of action is not justified (see below), the current rule of article 60 VVG is to be retained, whereby the injured party has a lien on the insured's insurance claim. This lien is to be maintained as it has proven to be effective and generally provides sufficient protection.

### **3.2. Direct cause of action**

It must be clearly stated that the issue of the direct cause of action is not to be mingled with the issue whether the insurer may raise the defences arising from the insurance contract against the injured party.

A direct cause of action is not to be included in every compulsory insurance; and if a direct cause of action does exist, this does necessarily entail the statutory waiver of defences.

Some forms of compulsory insurance (e.g. Road Traffic Act) already today provide for a direct cause of action. The victims' lobby considers this to be an element of increased protection for injured parties, because their legal standing is improved through the grant of the right to directly sue the insurer.

In settling the issue whether a direct cause of action is to be admitted in the context of a particular compulsory insurance, the following should be taken into consideration:

- National business locations must not be weakened by creating a competitive disadvantage to foreign competitors who are not subject to the same strict rules. Any increased economic burden will in the end have to be borne by local insureds and thus local consumers.
- The consequences of a possible direct cause of action, especially with respect to claims arising in an international commercial context, cannot be assessed.<sup>1</sup>
- A direct cause of action can restrict the insured's freedom of action, as the insured is circumvented during the settlement of the claim and can no longer determine whether to let the insurer settle the claim or to do so itself.
- A direct cause of action does not change anything with respect to substantive liability law and rules of evidence.

The insurance industry has on various occasions considered the issue of the direct cause of action. Both during the consultations on the total revision of tort law and in the discussion concerning the total revision of the Insurance Contracts Act, the SVV expressed its position that it is open to the possibility of direct causes of action in the area of compulsory insurance in certain circumstances. A direct cause of action is to be instituted only where meaningful, for example in the event of the liable party no longer existing (e.g. liquidated for bankruptcy or death, etc.). Furthermore, a direct cause of action may be justified on the basis of the proposed evaluation grid for compulsory insurance.

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<sup>1</sup>The direct cause of action enables foreign injured parties to sue Swiss insurers before foreign courts. (Art. 141 Federal Act on Private International Law; Art. 10 in conjunction with Art. 11 para. 1 Lugano Convention).

### 3.3. Statutory waiver of defences

Even if the injured party has a direct cause of action, the insurer may raise the defences available in law and contract. However, in certain statutes the legislature has restricted such defences for the victim's protection.

The SVV's position is that, in principle, it must be possible to raise all contractual defences available under the policy against the injured party. An exception is the deductible (to this issue see no. 3.6), as well as the defence of suspension of coverage due to the non-payment of premium. In the event of a contract termination for non-payment of premium, the insurer must, however, be able to discharge itself from the risk within a reasonable period.

Where a particularly founded need to protect potential victims exists (e.g. strict liability pursuant to the Road Traffic Act), the extent to which defences are restricted is to be specified. A heightened need for protection may not be generally assumed, but can be deduced from the evaluation grid for compulsory insurance.

### 3.4 Coverage

In principle, statutes or ordinances should, in accordance with insurance principles (calculability and insurability), simply require the conclusion of a „basic coverage in accordance with market usage”, without further specification. For certain lines the non-binding model conditions of national insurance associations can be used as a reference in determining the scope of a „basic coverage in accordance with market usage”.

The SVV is convinced that, on the one hand, this fulfils the purpose of compulsory insurance, while on the other, this promotes competition between insurance companies and drives innovation. This has a positive influence, also to the benefit of consumers (the consumer has an ambivalent presence on the market as both policyholder **and** as injured party).

Specific rules on the scope of cover or even the drafting of clauses in statutes and ordinances for inclusion in insurance contracts can result in individual insurance companies exiting the segment concerned, thus reducing competition in an unnecessary manner. This would serve no-one.

### **3.5. Insured sum and annual aggregate**

The SVV demands in principle that appropriate minimal sums insured are to be stipulated in statutes or ordinances. Insurance techniques do not permit unlimited coverage (this is also true for motor liability insurance pursuant to the Road Traffic Act!).

The minimal sum insured is to be limited not only per event, but also per year – with the exception of motor, marine and aviation liability.<sup>2</sup>

### **3.6 Deductible**

The stipulation of the deductible should be left to the parties' agreement. Thus their freedom of contract is maintained and the policyholder's financial strength can be taken into account. On the other hand, it should not be permissible to hold any deductible against the injured party (statutory waiver of defence).

### **3.7 Security, duty to insure and substitute institution**

Compulsory insurance should provide security for potential victims. If no insurance is available, the victim's protection is illusory.

The SVV has always pleaded that „security of another nature“ be permitted by compulsory insurance legislation as an alternative. Admittedly, this solution will hardly be practicable in most cases, as the persons subject to an obligation to insure are as a rule not in a position to post the required security. Moreover, a proper handling of the claim is not guaranteed in all cases. Alternatives to an insurance solution may nonetheless make sense in an individual situation and should generally remain possible (e.g. bank or other guarantees).

A substitute institution as an insurer of last resort is better suited to secure victims' claims if insurance protection is not available for any reason (back-up mechanism before the occurrence of a loss event). Such an institution, however, may not degenerate into a catchment for uninsurable risks or lead to an augmentation of careless risk assessment in licensing procedures.

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<sup>2</sup> Due to the homogeneous nature of the risk and a lack of long-tail exposure, the insurer's annual engagement in the field of motor, marine and aviation is manageable.

The SVV therefore considers a substitute institution as a possible solution under the following conditions:

Insurance protection may be obtained from a substitute institution, if the following criteria are fulfilled:

3 written rejections of

- the risk for which insurance is compulsory
- by liability insurers which write the risks that are the object of the obligation to insure

These criteria assume that such risks are insurable in principle. If risks are generally not insurable, another solution must be implemented by legislation. The substitute institution should thus only be applicable to **individual risks** for which no insurance protection can be found pursuant to the above criteria.

Public authorities should impose a prohibition of activities on bad individual risks. They should not be factually prevented from exercising a profession due to a refusal of insurance.

The SVV supports the position that the conclusion of liability insurance be deemed a professional duty, and should not be made a condition for the granting of licenses. Insurers neither wish to, nor can, take on the role of a supervisory or surveillance authority.

The SVV emphatically rejects ensuring liability insurance coverage by means of a duty to contract. Freedom to contract must be guaranteed absolutely.

With respect to organisation, a substitute institution should be instituted as an independent entity, financed by income from imposed premiums. The issue of such an institution's carrier, organisation and capitalisation remains to be clarified. Logically these questions must also be considered together with the issue of a deficiency guarantee.

### **3.8. Deficiency guarantee**

Compulsory insurance cannot fulfil its protection goal if the person under the duty to insure has not taken out liability insurance or if the contract has been terminated, e.g. due to non-payment of premiums. Even with elaborate control mechanisms, a failure cannot be avoided in all cases. The deficiency guarantee is an instrument for ensuring that the injured party is nonetheless compensated (back-up mechanism after the occurrence of a loss event).

The deficiency guarantee takes on the function of liability insurance, subject to the conditions required by law, in the following situations:

- Cessation or lack of a known tortfeasor’s liability insurance required by law for risks which are in principle insurable
- Exhausted annual aggregate

The deficiency guarantee provides the injured party with those indemnities which an insurer would have been bound to deliver under a properly concluded liability contract. A deficiency guarantee does not entail an enhanced position, but standardised security analogue usual market coverage.

As a clarification and *e contrario*, it can thus be stated that a deficiency guarantee does not apply in the following situations:

- Insufficient limits in an individual case (the minimal sum insured applies; cf. 3.5 above)
- Defences (this must be regulated in the context of a statutory waiver, if at all)
- Exclusions pursuant to the Insurance Contracts Act (grave negligence, etc. → object of a partial amendment of the Act)
- Deficiency guarantee in the event of an unknown tortfeasor (excepting motor liability, as this is broadly accepted and calculable)

A deficiency guarantee renders complicated and unreliable duties of notification superfluous.

The deficiency guarantee is an instrument to be restricted to losses caused and occurring in Switzerland.

The coverage is to be subsidiary, and to exclude recourse claims from property and casualty insurers as well as social security carriers. Moreover, the carrier of the deficiency guarantee is to be accorded a right of recourse against the tortfeasor. The latter should also be subject to criminal prosecution for neglecting to conclude liability insurance.

With respect to organisation, it must be noted that the deficiency guarantee cannot be undertaken by a single company, but must be given by a carrier to be defined, as is the case with the substitute institution.

As no premium can be calculated for the financing of the deficiency guarantee, financing is to be secured independent of premium calculations. As a measure of solidarity, the cost of the deficiency guarantee could be financed over all liability premiums (including policies not the

object of compulsory insurance).

To date only the Road Traffic Act and in part the Nuclear Liability Act contain deficiency guarantees. The Aviation Act bestows the authority on the federal government to introduce such a guarantee, but it has not done so.

### **3.9. Claims settlement regulations**

Regulations on claims settlement are a further instrument to protect injured parties. To date the legislature has only made use of this possibility in the Road Traffic Act (Art. 79 c). The SVV considers such interventions as an unnecessary measure for the protection of injured parties.

## **4. Supervisory instruments**

Individual statutes on compulsory liability insurance contain varying regulations on supervising enforcement. The spectrum of governmental measures to ensure fulfilment of the obligation to insure ranges thereby from forgoing all controls to a systematic and all-encompassing control system for individual vehicle liability insurance schemes. Regardless of how such supervision is implemented, it is essential that insurers are not misused to indirectly supervise the fulfilment of statutory obligations. Their mission is to advise insureds and to offer insurance services, and not to supervise enforcement.

A duty of notification could be an alternative to ensuring compliance with an obligation to insure. However, this is very costly and prone to error. The SVV opposes unnecessary, deficient and expensive administrative procedures and thus a general obligation to notify in the context of compulsory insurance.

A functioning system of notification is in place with respect to road traffic risks. Here it is necessary and meaningful, and also practicable.

If a deficiency guarantee is in place, the lack of an obligation to notify does not diminish the protection of the injured party. Criminal sanctions for non-compliance with the obligation to insure could possibly also be included as an enforcement measure in the individual statutes mandating insurance.

We consider the notification of termination by the policyholder or the insurer as the only practicable obligation to notify. All other legally relevant circumstances, such as the disappearance of the risk or cessation of activity, lie outside of the insurer's dominion, and their notification is not possible with the required degree of certainty.

Appendices:

Evaluation grid for compulsory insurance

Escalation levels for evaluation grid

**Appendices**

**Evaluation grid for compulsory insurance**

Evaluation grid for compulsory insurance						
	Points	0	5	10	20	
Weighting factor	Criteria	Evaluation				Score (weighted points)
2	Avoidable exposure	Easily avoidable	Avoidable in certain conditions	Hardly avoidable	Unavoidable	
1.5	Number of potential victims	Only one potential victim per event	Some potential victims per event	More than one potential victim per event	A large number of potential victims per event	
1	Loss potential - Bodily injury	Low to medium injury of the potential victim	Medium injury of the potential victim	Medium to severe injury the potential victim	Severe injury of the potential victims	
1	- Property damage and/or pure financial losses	Low to medium impact for the potential victim	Medium impact for the potential victim	Medium to severe impact for the potential victims	Severe impact for the potential victim	
1	Knowledge gap between tortfeasor and victim	No or negligible knowledge gap between tortfeasor and victim	Negligible to medium knowledge gap between tortfeasor and victim	Significant knowledge gap between tortfeasor and victim	Very large knowledge gap between tortfeasor and victim	
1	Risk evaluation skills of potential victims	Potential victim is fully able to assess potential risk	Potential victim can to a large extent assess potential risk	Potential victim cannot adequately assess the risk	Potential victim cannot assess the risk	
<b>Total score</b>						

**Escalation levels for evaluation grid**

