

Outsourcing in the insurance distribution arena: some thoughts from the Spanish perspective

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It is widely understood that the European Union (EU) Insurance Distribution Directive (IDD) was an important step in consolidating and harmonising the rules on the distribution of insurance products across the EU. It broadens both their objective and subjective scopes, and seeks to establish technological neutrality and support for establishing a level playing field for all market participants. Nevertheless, EU insurance distribution rules still have some way to go to achieve full legal uniformity and greater legal certainty. Among other issues, outsourcing and its interaction with insurance distribution remains one of the most controversial.

While Solvency II rules introduced specific provisions which regulated outsourcing for insurance undertakings, the IDD is completely silent on outsourcing by insurance distributors. At the level of insurance undertakings, this legal gap is easily filled by the Solvency II rules, because, as with other insurance distribution rules, insurance undertakings must be governed by the Solvency II rules (eg, when conducting cross-border activities). However, insurance intermediaries have no such advantage, and they are bound by national regulations concerning the outsourcing of functions. This has both advantages and disadvantages.

In the specific case of Spain, the regulations historically covered outsourcing by insurance intermediaries, that is, with a provision on 'sub-agents' in 1992. In 2006, this was expanded to the 'external auxiliaries' concept. After several years of back-and-forth by the Spanish insurance supervisory authority (DGSFP), the figure of the external auxiliary evolved according to the scope of its activity for the insurance intermediary. In 2015, the regulations changed and began to refer to them as 'external collaborators'. It must be noted that sub-agents, external auxiliaries or external collaborators are concepts which are not contemplated in the IDD. This is a potential source of problems for a number of players.

External collaborators are currently regulated by Article 137 of Spanish Royal Decree-law 3/2020, on urgent measures transposing into Spanish law various EU Directives in the area of public procurement in certain sectors, including private insurance and pension plans and funds (RDL 3/2020). An external collaborator is not considered an insurance distributor under Spanish law, but its function is relevant since it is entitled to carry out auxiliary activities on behalf of an insurance intermediary, thereby fortifying, expanding and making any distribution scheme more efficient. Consequently, an external collaborator enters into a service agreement with an insurance intermediary, but not an insurance undertaking and receives fees in exchange for providing its services.

Under Article 137 of RDL 3/2020, an external collaborator would be performing an insurance distribution activity on behalf of an insurance intermediary but would not itself be considered an insurance intermediary. An external collaborator would have to carry out its activity under the direction, administrative and professional civil liability regime, and financial capacity regime of an insurance intermediary.

The new wording of Article 137 of RDL 3/2020 seems to expand the scope of action of the external collaborator when compared to the previous figure of the external auxiliary, as this provision establishes that external collaborators may carry out distribution activities on behalf of insurance intermediaries. This suggests that, although they are not insurance intermediaries (because they depend on the insurance intermediary in all circumstances), external collaborators may indeed carry out the activity of insurance distribution. And this conclusion is reaffirmed when the same provision states that 'the activity of distribution exercised through external collaborators shall not undermine the duty to provide the client with all the information required' by RDL 3/2020, that is, once again it is made clear that an external collaborator will carry out the distribution activity, even though it is not an insurance intermediary. Therefore, the main distinction between an external collaborator and an insurance intermediary will now be dependence or subordination in carrying out the activity (which could be referred to as 'functional dependence') and, ultimately, the existence of a regime of professional, administrative and financial civil liability of a vicarious nature.

✖ In short, the Spanish legislature has addressed the figure of the external collaborator to regulate outsourcing when the functions are within the definition of insurance distribution. When outsourcing is carried out outside the scope of insurance distribution, there is no specific regulation of any kind. Although this regulatory regime has had some success and has been generally well-received in Spain, the fact is that the lack of harmonisation at the IDD level raises different problems. One of them, for instance, consists of determining whether an external collaborator is allowed to carry out insurance distribution activities in other EU countries on behalf of the insurance intermediary for whom it acts.

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It could be argued that an external collaborator shall be subject to the administrative regime of the insurance intermediary, that is, its scope of action shall be limited to that provided for in the licence of the insurance intermediary on whose behalf it is acting. Therefore, since an insurance intermediary is entitled to distribute insurance products on a cross-border basis, the external

collaborator can operate under that scope of action, only being subject to the limitations that are applicable to the insurance intermediary from a regulatory point of view. Accordingly, the external collaborator may also operate on a cross-border basis under the responsibility of an insurance intermediary.

However, this interpretation, which is perfectly admissible from the Spanish regulation, may not be accepted by a supervisor in another Member State given the lack of EU harmonisation. There are two issues in particular, which need to be taken into account.

First, the fact that an external collaborator carries out the activity of insurance distribution may be considered inadmissible, as this activity is reserved for insurance distributors, a status which an external collaborator does not have. Even if it is considered that an external collaborator does not distribute insurance products independently, but rather on behalf of an insurance intermediary, some Member States may not welcome the distribution of insurance by a person who has no administrative registration (no licence is needed) and does not have the status of an insurance distributor.

Second, although the subject's activity must initially be approved by the insurance supervisory authority of the home Member State and must be subject to the law of that State, host Member States can set limitations that effectively prevent the distribution of insurance by an external collaborator through the General Good Provisions.

It is therefore of vital importance that a common regulatory regime be implemented across the EU, to allow insurance intermediaries to outsource their functions without any risks or legal uncertainty. Level 3 measures would be very welcome if EIOPA takes the lead. These implicit or explicit limitations sometimes prevent many business models from being uniformly implemented in all Member States. This is not only detrimental to the insurance intermediaries themselves who usually have to bear higher operating costs, but also to customers, who are treated differently depending on the Member State in which they are located.



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