

## II

(Preparatory Acts)

## EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

413<sup>th</sup> PLENARY SESSION OF 15 AND 16 DECEMBER 2004

## Opinion of the European Economic and Social Committee on 'The European Insurance Contract'

(2005/C 157/01)

On 17 July 2003 the European Economic and Social Committee, acting under the second paragraph of Rule 29 of its Rules of Procedure, decided to draw up an opinion on 'The European insurance contract'.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 November 2004. The rapporteur was Mr Pegado Liz.

At its 413<sup>th</sup> plenary session of 15 and 16 December 2004 (meeting of 15 December), the European Economic and Social Committee adopted the following opinion by 137 votes to one, with two abstentions

### 1. Introduction and grounds

market caused by the current diversity in the legislation defining and regulating insurance contracts;

1.1 The fundamental principles regulating the drawing up and validity of insurance contracts vary in the different legal systems of the EU's Member States, despite the fact that they have common origins and very similar structures.

— identifying common principles in the different national systems governing insurance contracts and areas which could — from a technical and legal point of view — be harmonised;

1.2 Given that this is a key component in the operation of the single market because of the additional security it brings to commercial relations between insurance industry professionals and consumers, the differences in legislation covering essential aspects of insurance contracts in the various national legal systems are likely to create barriers to the completion of the single market and cause additional difficulties for the cross-border marketing of this financial instrument.

— considering possible solutions and proposing models, formulas or instruments which might need to be adopted in order to secure more suitable Community-level legislation to govern insurance contracts.

1.3 The present own-initiative opinion therefore aims to alert the competent national and Community bodies to the need and advisability of:

— cataloguing the issues and problems for consumers and for the completion and the smooth operation of the single

1.4 From the start of the preparatory work for this own-initiative opinion, it was deemed essential to secure the cooperation and involvement of members of the 'Restatement of European Insurance Contract Law' Group, headed and coordinated by Fritz Reichert-Facilides, Prof. Emeritus of Law at Innsbruck University; this group comprises eminent lawyers and specialists in insurance law from 15 European countries.

1.4.1 Consequently, there was considerable satisfaction at Prof. Reichert-Facilides' immediately acceptance of our invitation to act as expert for the rapporteur. To this end, he immediately put together an initial contribution (Position Paper I).

1.4.2 While Prof. Reichert-Facilides was in the process of drafting this opinion, he unexpectedly passed away.

1.4.3 His life-long interest in and considerable academic work on the subject of insurance, together with his draft 'Restatement', amply justify this reference here and a special mention of thanks for his remarkable commitment, in tribute to his memory.

1.4.4 This fully explains and warrants the quotation here of a substantial part of his 'Position Paper I'; this paper was prepared as an introduction to the work leading up to this opinion, and must have been one of the last pieces he wrote.

'1. The diversity of European insurance contract laws constitutes a serious impediment to a Single Insurance Market. This has been the Group's judgment from the beginning. It is moreover clearly emphasised by the EESC itself; thus in its Own-Initiative Opinion "Consumers in the insurance market" of 29 January 1998 (OJ C 95 of 30 March 1998, p. 72; cf. there, e.g., nos. 1.6. and 2.1.9. par. 2). In the meantime, the Commission itself seems to have converted to this insight (see Communication from the Commission to the European Parliament and the Council of 12 February 2003: A more coherent European Contract Law — An Action Plan, COM(2003) 68 final, OJ C 63 of 15 March 2003, p. 1; cited in the following as Action Plan; cf. there, e.g., nos. 27, 47/48, 74).

2. A harmonisation of laws in general and, of course, also of insurance contract laws, can only be done on the basis of solid comparative law research. The goal of our Group's work is a restatement solution. What is meant by "restatement"? The word is derived from "to restate", which is defined as "to express again or convincingly." In the legal sphere, "Restatement" is a technical term specific to the United States. It describes — as is well known "in the profession" — a condensed body of legal rules, derived from different but, in substance, similar sources, systematised and unified in the sense of a "best solution". The work is done on a private, not legislative basis, by the American Law Institute. The similarities in meaning of the sources stem, in the U.S., from the Common Law basis of the (different) private laws of the various States. In European insurance laws, comparably, similarities in substance are due to their subject: "insurance". This subject produces, as a result of its very nature, similar regulatory needs. Guidelines for finding a "best solution" for insurance contract law might be these. Firstly, due consideration must be given to the essential task of all insurance contract law: to provide a legal framework for effective risk bearing on the part of the insurer and thus to guarantee the good functioning of insurance business itself.

Secondly, it is essential that the conflicting interests of the parties are carefully balanced. As to this aspect, due recognition must be given to the modern trend to grant a relatively high degree of protection to the policyholder.

3. The Restatement as envisaged by our Group concentrates on mandatory rules (resp. semi-mandatory ones, for the benefit of the policyholder's side). Why that? It must be kept in mind that the "living law" of insurance contracts is primarily not found in statutes but in standard contract terms. Respecting this means not only acknowledging realities but also devoting oneself to the principle of freedom of contract. On the other hand, there remains the essential task for the legislator to limit this freedom. This has to be done for reasons of public policy and for those of protecting the policyholder (or such third persons for whose benefit the insurance is taken out). Particular attention has to be paid to contract clauses which may lead to a loss of insurance protection. The technical means to provide these aims is — throughout all European legal orders — the legislative creation of (semi)mandatory insurance contract law provisions. — The problems arising insofar in view of a Single Market are indicated by the Action Plan in these words: "... Member States have developed rules which may or may not be included in an insurance contract. To the extent that these rules differ they might affect the products which are offered across borders." And indeed: Real promotion of an internal insurance market requires harmonisation/unification of those limitations of insurance contract freedom, — with the consequence that all (standard) contracts abiding by such uniform norms may be offered, competingly, throughout all European countries and thus provide for an undivided market situation. This is exactly the goal which the work of the Project is heading at.

4. The work's comparative law preparation (as indicated supra sub no.2) is strived for, as far as our Project Group is concerned, by its mere composition. Experts of 16 legal orders of insurance contract (within and outside the EU) are included.

5. The question poses itself whether the Restatement should substitute the existing national rules or provide for an additional (at the time being: 16<sup>th</sup>) model especially for transformer contracts. The problem is put forth by the Action Plan which opens discussion for a so-called Optional Instrument. The issue shall presently not be further dealt with.

6. Comparative work in insurance contract law must be done with close attention towards general contract law. The Project Group is bound to that by especially constantly observing and considering the so-called Lando/Beale principles. Moreover, it cooperates closely with the "Study Group on a European Civil Code" (Professors von Bar and Beale). Within this organisation, the Group is entrusted with the responsibility especially for insurance contract law'.

1.5 Various meetings have been held in preparation for this opinion, with representatives from the European Commission involved in the insurance sector and completion of the single market, the CEA (The European Federation of National Insurance Associations) and BEUC (the European Consumers' Organisation); this has allowed us to collect ideas, reactions and suggestions regarding the subject in hand.

1.6 It was also decided to put together a questionnaire, to be addressed to a wide range of national and Community bodies — both public and private — representing the principal stakeholders. At the same time a hearing will be held with the main representatives of the interest groups involved (insurers, manufacturing companies and other professionals and consumers), together with legal experts and academics from different backgrounds and legal systems.

1.7 This opinion outlines the main thrust of the replies to the questionnaire, together with the reactions and suggestions from the hearing held on 16 April 2004.

## 2. Some precedents

2.1 This is not a new issue for the EESC. The European Economic and Social Committee has already issued an opinion on 'Consumers in the insurance market' <sup>(1)</sup>; this drew attention to the 'Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts' <sup>(2)</sup>, which sought above all to harmonise some of the basic rules and regulations pertaining to insurance contract law; the Committee opinion also deplored that fact that hitherto the Commission had not taken another look at this issue, 'even though it is the prevailing opinion among both insurance operators and consumer organisations that a whole series of obstacles hampering completion of the single market in this field can be traced back to the absence of Community legislation on insurance contracts (a minimum level of harmonisation of substantive law)' <sup>(3)</sup>.

2.1.1 Further on in the opinion, the Committee highlighted the first of a number of acknowledged general obstacles to the effective implementation of the single insurance market as being 'the total lack of harmonisation at the level of substantive law, in other words, a minimum level of regulation on insurance contract law in the European Union' <sup>(4)</sup>.

2.1.2 Moreover, the Committee drew attention to the fact that 'there is no legal framework at Community level defining rules for a minimum level of transparency in insurance contracts in general, including non-life insurance or, more specifically, describing unfair general contractual clauses in insurance, or even laying down general principles of good faith or contract balance in the field of insurance' <sup>(5)</sup>.

<sup>(1)</sup> Rapporteur: Mr Manuel Ataíde Ferreira (OJ C 95 of 30.3.98).

<sup>(2)</sup> COM(79) 355 final, in OJ C 190, of 28.7.79, amended by COM(80) 854 final, in OJ C 355 of 31.12.80: the EESC and EP opinions are to be found in, OJ C 146 of 16.6.80 and C 265 of 13.10.80 respectively. These texts will be examined in point 5 of this opinion.

<sup>(3)</sup> See footnote 1, point 2.1.9.

<sup>(4)</sup> See footnote 1, point 2.3.1.1.1.

<sup>(5)</sup> See footnote 1, point 3.4.

2.1.3 It pointed out more specifically that: 'the different ways in which each Member State has regulated these questions — or, alternatively, the lack of regulation — leaves an entire market, where competition is far from perfect and those acting for one side tend to work together to the detriment of the other, to its own devices. This means that a huge number of different solutions exist to what are identical situations within the single market, particularly with regard to cross-border transactions, which are becoming ever simpler with the arrival of the information society' <sup>(6)</sup>.

2.1.4 After analysing the areas which it felt could be and ought to be harmonised, the Opinion concluded by alerting the Commission and the Member States to 'the advisability of re-examining the Commission's 1979 draft Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts in the light of the principle of subsidiarity' <sup>(7)</sup>; the Committee urged the Commission to spare no effort in defining Community-level common minimum requirements for insurance contracts (draft directive) <sup>(8)</sup>.

2.2 Moreover, consumer organisations and insurance professionals' associations have long been pointing to the need for further harmonisation of legislation on insurance contracts.

2.2.1 As early as 1986, the European Consumer Law Group was drawing attention to the need for 'some harmonisation of the laws on insurance contracts in the Community', and pinpointed the aspects of insurance contractual relations which it felt ought to be harmonised <sup>(9)</sup>.

<sup>(6)</sup> See footnote 1, point 3.6.1.

<sup>(7)</sup> See footnote 1, point 4.3.6.

<sup>(8)</sup> It was considered that the directive should include the following aspects:

- minimum pre-contract information;
- a list of key terms and their meanings;
- a list of typical unfair terms in insurance contracts;
- the minimum compulsory content of any insurance contract;
- all the contractual obligations common to any insurance contract;
- the basic principles and rules of any insurance contract;
- a provisional compensation scheme for third party liability insurance;
- compulsory link between premiums and the value of risks, in particular by means of automatic depreciation of insured objects in line with their age and a corresponding reduction in premiums;
- establishment of harmonised minimum cooling-off periods within which consumers may withdraw from a contract;
- requirement for policies to be legible and understandable and for the general and special conditions to be made available during the pre-contract stage and before signature.

See footnote 1, point 4.5. This line has been taken up again and reiterated in various EESC opinion, such as in the recent opinion on the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC and Directive 2000/26/EC on insurance against civil liability in respect of the use of motor vehicles, for which the Rapporteur was Mr Levaux (point 4.3.) OJ C 95, of 23.4.2003.

<sup>(9)</sup> 'ECLG-Consumer Insurance', in Journal of Consumer Policy (1986), pp. 205-228

2.2.2 The BEUC, for its part, has since at least 1994 been pointing out the advisability of setting up a 'basic legal framework' to deal with key aspects of insurance contracts which might constitute 'a common minimum legal basis'.

2.2.3 A similar view was expressed in December 1998 by a variety of organisations representing consumers.

2.2.4 The European Federation of National Insurance Associations (CEA), in its recent comments on the Commission's Communication on a more coherent European contract law, firstly emphasised that the Commission was right to suggest that *'the diversity of national regulations governing insurance contracts concluded with consumers acts as a brake on the development of cross-border transactions in the insurance sector'*, and then pointed out that *'concerning the so-called "harmonised" *acquis communautaire*, the number and complexity of provisions contained in the various texts covered by contract law in the insurance sector pose real problems'*.

2.2.4.1 After listing a whole series of situations where there was a pointless overlap of identical or unjustifiably different provisions in the various community texts applicable, it concluded by expressing its support for *'this proposal to improve the *acquis communautaire*'* provided there was a proper prior cost/benefit analysis and full consultation with interested parties, focusing on barriers to the single market <sup>(10)</sup>.

2.3 For its part, the Commission, in its Communications on *'European Contract Law'* <sup>(11)</sup> and *'A more coherent European Contract Law — An Action Plan'* <sup>(12)</sup> has highlighted in this connection that, according to several of the bodies consulted, insurance contracts represent one area in the sphere of financial services which raises more problems because of the *'diversity of national regulations'* in application. For this reason, consideration should be given to the possibility that *'further convergence of such measures may be needed in order to balance the need for greater uniformity of national rules with the need to maintain product innovation and choice'*, and even to making this a priority in *'a follow-up action to the Better Regulation Action Plan'* <sup>(13)</sup>.

2.4 Lastly, the European Parliament, in its Resolution on the Commission's Communication on the above-mentioned Action Plan, regretting *'the lack of early action to produce optional instruments in certain sectors, such as consumer transactions and insurance, where substantial benefits could accrue both to assist the good functioning of the internal market and to increase intra-Community transactions and trade,'* considers that *'in order to facilitate cross-border*

*trade within the internal market, it should be an early priority to proceed with the establishment of an optional instrument in certain sectors, particularly those of consumer contracts and insurance contracts, and therefore calls on the Commission as a matter of priority, whilst having regard to a high level of consumer protection and the integration of the appropriate mandatory provisions, to produce an opt-in instrument in the areas of consumer contracts and contracts of insurance'* <sup>(14)</sup>.

### 3. Replies to the questionnaire and the hearing of 16 April 2004

3.1 The questionnaire, which was sent in good time to a number of bodies, elicited a total of 27 replies from both national regulatory authorities in several countries and representatives of insurance companies, industry, trade and consumers.

3.1.1 Replies were received from Austria, Belgium, Finland, France, Germany, Liechtenstein, Lithuania, Malta, Norway, Poland, Slovakia, Slovenia and Sweden.

3.1.2 The members of the Restatement of European Insurance Contract Law Project Group sent a single joint reply.

3.2 A clear and unequivocal majority felt that:

- a) the lack of mandatory rules of insurance law constitutes a barrier to cross-border provision of insurance services, and numerous instances of this are cited;
- b) this situation prevents customers seeking insurance from obtaining coverage from foreign insurers, with innumerable examples being given;
- c) this fact is an obstacle to insurance intermediaries providing their services across borders, and a number of examples are quoted;
- d) harmonisation of mandatory rules of insurance contract law would help insurers, customers and insurance intermediaries to increase cross-border insurance transactions;
- e) the Commission Directive of 1979-80 is still a good basis for discussion of this matter, if reformulated in new terms and according to different parameters, for which some respondents gave examples and suggestions.

3.3 The hearing was attended by 46 representatives of 36 institutions from 17 countries.

<sup>(10)</sup> CEA note of 4 June 2003.

<sup>(11)</sup> COM(2001) 398 final of 11.7.2001 (OJ C 255 of 13.9.2001)

<sup>(12)</sup> COM(2003) 68 final of 12.2.2003

<sup>(13)</sup> Action Plan – point 74. Also see points 27, 47 and 48 of the same document

<sup>(14)</sup> Doc. A5-0256/2003, adopted at the EP session on 2.9.2003, points 11 and 14.

3.4 The general thrust of the replies to the questionnaire, together with the discussions during the hearing, point to an overall consensus, which may be summarised as follows:

3.4.1 There are striking differences between national legal arrangements where the regulation of insurance contracts is concerned;

3.4.2 There is a significant lack of harmonisation regarding insurance law at EU level, with repercussions for the completion of the internal market in this field;

3.4.3 A degree of harmonisation is desirable/necessary, especially for small and medium-sized insurers (individual consumers and SMEs), in order to avoid inequalities and discrimination (mass risk);

3.4.4 A step-by-step approach should be taken to harmonising insurance contract law and excessive rigidity should be avoided, since harmonisation is not an end in itself but rather a means of achieving the single market and as such, should comply with the principles of necessity and proportionality;

3.4.5 The primary objective of harmonisation must be:

- mandatory rules
- the general part of insurance contract law.

3.4.6 The form of the model contract resulting from harmonisation could be 'optional', but all its terms and components must be mandatory for the parties as soon as it is adopted.

3.4.7 The Community instrument employed to adopt the model should be a regulation, in order to ensure complete harmonisation.

3.4.8 The proposals contained in the Commission's 1979-80 directive, as amended to reflect the suggestions of the EP and the EESC, could provide a starting-point for drafting the regulation, but they need to be thoroughly overhauled in the light of intervening developments in insurance law.

3.4.9 Harmonisation, as outlined above, could stimulate cross-border insurance and contribute to the further development of the single market in this field.

3.4.10 Treaty Article 95 could provide the legal basis for such an initiative.

3.5 Some respondents and participants added that:

3.5.1 Harmonisation should be 'optional' and limited to the definition of fundamental concepts.

3.5.2 Harmonisation should apply only to cross-border contracts and only to natural persons.

3.5.3 Harmonisation is not a panacea for the underdevelopment of the single market in insurance.

3.5.4 Particular attention must be given to mutual insurance and welfare and social security bodies on account of their specific features.

#### 4. The need for a Community-level initiative

##### 4.1 *The internal market and insurance*

##### 4.1.1 General observations on the relationship of the internal market and insurance

4.1.1.1 The European internal market comprises an area without internal borders allowing the free movement of goods, persons, services and capital (Art. 14 (2) EC-Treaty). 'Insurance' falls within the scope of the freedom to provide services (Art. (49 — 55) EC-Treaty) or the right of establishment depending on the circumstances of the case. Insurers providing their services across borders or establishing themselves in another Member State bring national insurance products into competition with their own policies.

4.1.1.2 As a result, the variety of choices to potential policyholders becomes larger. Ideally, positive selection by customers seeking insurance should be the 'invisible' hand steering the internal insurance market.

4.1.1.3 Further freedoms are affected by insurance matters: the free transfer of premiums and insurance proceeds is guaranteed (see Art. 56 EC-Treaty). Furthermore, policyholders making use of their freedom under Article 18 of the EC Treaty should not face adverse effects on their policies when changing their habitual residence from one jurisdiction to another.

##### 4.1.2 Status of insurance law harmonisation and insurance contract law

4.1.2.1 This wide range of relations between insurance (law) and the freedoms of the EC Treaty have led the EC to harmonise important sectors of insurance law for the (proper) functioning of the internal market. Legislation on insurance supervision is substantially harmonised throughout the EC and the EEA by means of the so called 'three generations' of directives in the field of insurance.

4.1.2.2 On the basis of these achievements a system of single licensing and home country control has been introduced — as it was already envisaged by the ECJ in its decision of 4 December 1986<sup>(15)</sup>. In the field of insurance contract law, harmonisation is more or less restricted to issues of private international and international procedural law<sup>(16)</sup>.

4.1.2.3 Substantive insurance contract law has only been harmonised in specific sectors and within those sectors only on specific issues. There is, for example, a considerable body of harmonised law in the field of motor vehicle liability insurance<sup>(17)</sup>. Common rules are also known in the field of legal expenses insurance<sup>(18)</sup>.

4.1.2.4 However, the vast majority of rules of substantive insurance contract law, i.e. the general part providing for rules applicable to all branches of insurance, is still subject to national legislation. This observation inevitably raises the question of whether or not harmonisation of insurance contract law is required in order to allow a proper functioning of the internal insurance market. The answer must be in the affirmative if divergences in national insurance contract laws form a barrier to the internal market.

<sup>(15)</sup> ECJ of 4 Dec. 1986 ECR 1986, 3755 (Commission / Germany).

<sup>(16)</sup> International procedural law: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; OJ 2001 No. L 12/1 (latest amendment OJ 2002 No. L 225/13), Art. 8 - 14; private international law: Convention on the Law Applicable to Contractual Obligations of 19 June 1980, OJ 1980 No. L 166, i.p. Art. 1 par. 3, 4; Directives' law: Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC; OJ 1988 No. L 172/1 (latest amendment OJ 1992 No. L 228/1), i.p. Art. 2 lit c, d; art. 3, 5, 7 and 8; Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive); OJ 1992 No. L 228/1 (latest amendment OJ 2003 No. L 35/1), i.p. Art. 1 lit. a, b; Art. 27, 28, 30, 31; Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance; OJ 2002 No. L 345/1; i.p. Art. 32, 33; as to the private international law of the directives see *Reichert-Facilides/d'Oliveira* (eds.), *International Insurance Contract Law in the EC*, Deventer 1993; *Reichert-Facilides* (Hg.), *Aspekte des internationalen Versicherungsvertragsrechts im EWR*, Tübingen 1994.

<sup>(17)</sup> Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability; OJ 1972 No. L 103/1 (latest amendment OJ 1984 No. L 8/17); Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles; OJ 1984 No. L 8/17 (latest amendment OJ 1990 No. L 129/33); Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles; OJ 1990 No. L 129/33; Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive); OJ 2000 No. L 181/65; a fifth directive was proposed by the Commission on 7 June 2002, COM (2002) 244 final = OJ 2002 No. C 227 E/387.

<sup>(18)</sup> Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance; OJ 1987 No. L 185/77.

## 4.2 Insurance contract law as a barrier to the functioning of the internal insurance market

### 4.2.1 Present situation: an incomplete internal insurance market

4.2.1.1 There is empirical data indicating that the measures taken by the EC so far<sup>(19)</sup> have substantially enhanced but have not yet completed the functioning of the internal insurance market<sup>(20)</sup>. This holds true for example for the freedom to provide services in the field of mass risk insurance which is guaranteed by Article 49 et seq. of the EC Treaty and envisaged by the directives on insurance law but — in reality — not substantially used by either the insurance industry or customers.

### 4.2.2 General background of today's situation

4.2.2.1 The present situation described above may be explained by looking at its general legal background. A key factor is the fact that insurance is frequently called a 'legal product'. This means that the product sold by an insurance company is the insurance contract itself shaped by party autonomy and the (mandatory) law applicable to the contract.

4.2.2.2 Certainly there is no need to worry about the proper functioning of the internal market as far as there is party autonomy in the field of insurance contract law allowing parties to shape insurance products in line with their mutual preferences.

4.2.2.3 However, insurance is to a large extent governed by mandatory rules<sup>(21)</sup>. Some of these rules are at the same time internationally mandatory.

<sup>(19)</sup> Mentioned sub 4.1.2.

<sup>(20)</sup> See Eurostat.

<sup>(21)</sup> Such rules can be called absolutely mandatory whenever parties may not deviate therefrom by way of agreement. They may be called semi-mandatory whenever parties may (only) agree on terms more favourable to the customer than the legal rules.

4.2.2.4 In effect the product of a particular insurer is to a considerable degree shaped by the law applicable to the insurance contract. This is why differences in national insurance laws may form a barrier to the internal market. The action plan of the Commission on a more coherent European contract law openly acknowledges this fact<sup>(22)</sup>. This will be explained below by looking at the perspective of the insurer (point 4.2.3), the policyholder (point 4.2.4) and the insurance intermediaries (point 4.2.5).

#### 4.2.3 The perspective of the insurer

4.2.3.1 Insurers are the producers of insurance coverage. The design of their policies is based on a risk calculation which takes into consideration the legal environment in which a policy is sold. An insurer who is able to sell a product under one and the same legal order throughout the Community may pool risks covered in the EC without distortions stemming from differences in national insurance laws. As a result differences of insurance law would not form a barrier to the freedoms of the insurer.

4.2.3.2 On the contrary, if the law applicable to a policy changes depending on where the policy is sold, the differing legal environment in each Member State will influence the risk calculation and therefore affect the functioning of the 'law of large numbers' on which the business of insurance is based.

4.2.3.3 As a result, insurers selling their services across borders would have to submit their policies to different design and calculations depending on the law applicable. This would form a severe barrier to the functioning of the internal market.

4.2.3.4 A short look at the Community's rules on private international law in the insurance sector shows that an insurer is in fact forced to adjust policies to the legal environment of the Member State where they are sold. According to Article 7 (1) (a) and (h) of the Second Non-Life Insurance Directive<sup>(23)</sup> it is the law of the Member State in which the risk is situated and according to Article 32 (1) (1) of the Directive on Life Assurance<sup>(24)</sup> the Member State of the commitment which applies to the insurance contract. The place where the risk is situated or the place of the commitment is in most cases determined by the habitual residence of the policyholder<sup>(25)</sup>.

<sup>(22)</sup> OJ 2003 No. C 63/1 (9 sub no. 47, 48: 'The same problems occur particularly with insurance contracts'.

<sup>(23)</sup> Full quotation see supra, note 20.

<sup>(24)</sup> Full quotation see supra, note 20.

<sup>(25)</sup> See Art. 2 lit. d Second Non-Life Insurance Directive; art. 1 par. 1 lit. g) Directive on Life Assurance.

4.2.3.5 The insurer may avoid this result by choosing the law applicable to the insurance contract (most likely the law of its own seat) by way of agreement with the policyholder. However, this option is substantially limited by the rules of private international law in the directives on insurance. In non-life insurance the directives grant free choice of law only for insurance contracts covering large risks<sup>(26)</sup>. Member States — i.e. the Member State where the risk is situated — are granted discretion to expand the scope of party autonomy<sup>(27)</sup>. In all other cases the directives grant party autonomy only to a limited degree<sup>(28)</sup> and thereby do not avoid the described problems of insurers selling their insurance contracts across borders. In the field of life assurance the Member State of the commitment may grant party autonomy<sup>(29)</sup>. Otherwise parties only enjoy a very limited choice of law<sup>(30)</sup>.

4.2.3.6 These observations on the situation of European international insurance contract law clearly show that in the insurance of mass risks the insurer has to adapt its product in most cases to the legal environment of the habitual residence of the policyholder.<sup>(31)</sup> This burden is further increased by the fact that the policyholder may change the place of habitual residence after the conclusion of the contract<sup>(32)</sup>.

4.2.3.7 The only exception in European international insurance contract law is the insurance of large risks in non-life insurance. Here insurer and policyholder may choose the law applicable. However, even in cases of large risk insurances a

<sup>(26)</sup> Art. 7 par. 1 lit. f Second Non-Life Insurance Directive (as amended by Art. 27 Third Non-Life Insurance Directive; as to the definition of large risks see Art. 5 (d) (i) First Non-Life Insurance Directive.

<sup>(27)</sup> See Art. 7 par. 1 lit a and d Second Non-Life Insurance Directive.

<sup>(28)</sup> See Art. 7 par. 1 lit b, c, e

<sup>(29)</sup> See Art. 32 par. 1 sent. 2 Directive on Life Assurance.

<sup>(30)</sup> See Art. 32 par. 2 Directive on Life Assurance.

<sup>(31)</sup> See the action plan of the EC Commission OJ 2003 No. 63/1 (9 sub 48: 'The wording of a single policy that could be marketed on the same terms in different European markets has proved impossible in practice'.

<sup>(32)</sup> Even though such change would not affect the law applicable in general, (internationally) mandatory rules at the place of the new habitual residence may be imposed by the courts of this Member State: By virtue of Art. 9 1) b) Regulation on Jurisdiction and Recognition and Enforcement of Judgements the policyholder is entitled to bring an action against the insurer in the Member State of its (new) residence. The courts of this Member State may impose mandatory rules according to Art. 7 2) 2) Second Non-Life Insurance Directive and Art. 32 4) 1 Directive on Life Assurance (mandatory rules of the *lex fori*).

court of the Member State in which the policyholder has its residence (holding jurisdiction under Article 9 1) b) of the Brussels I Regulation<sup>(33)</sup>) may impose its mandatory rules<sup>(34)</sup>.

4.2.3.8 It follows that insurers will be very hesitant to provide cross border services at least when it comes to the insurance of mass risks. It may be argued that a shift in the private international legal regime could solve the issue. Indeed, it would seem that the above-mentioned barriers would disappear if parties enjoyed free choice of law and — in the absence of such a choice — the law applicable was determined by the place of establishment of the insurer. However, such a shift in private international law would substantially jeopardise basic notions of policyholder and consumer protection in private international law: it would grant free choice of law in the insurance sector even in business-to-consumer situations in which a consumer would be protected by Article 5 of the Rome Convention in other sectors. At the same time it would not fully solve the problem: courts of the Member State in which the policyholder has his or her residence would still apply their own internationally mandatory rules. Above all policyholders would be very hesitant to shop abroad knowing that they would lose the protection of their home law and would be submitted to unknown foreign insurance law<sup>(35)</sup>.

#### 4.2.4 The perspective of the policyholder

4.2.4.1 Under the current private international legal regime policyholders may be very open to ask for foreign insurance coverage. Knowing that they will (in most cases) be protected by the law of the Member State of their residency, they will be open to cross-border acquisition of insurance. However, policyholders will not be able to acquire foreign products even if they want them: the applicability of their home country's law always changes the acquired policies into contracts more or less determined by the law of their own home country. And if they nevertheless want to buy foreign insurance products they will face foreign insurers that are very hesitant to grant such coverage.

4.2.4.2 As shown this hesitation could probably be avoided by a shift in the rules of international insurance contract law<sup>(36)</sup>. However, such a change in private international law would replace the hesitation of the insurer to grant coverage by an at least equally strong hesitation on the part of the policy-

<sup>(33)</sup> See supra note 20.

<sup>(34)</sup> This result may be avoided by the insurer by installing a jurisdiction clause admissible under Art. 13). 5) in connection with Art. 14 (i.e. no. 5) Regulation on Jurisdiction and Recognition and Enforcement of Judgements and granting exclusive jurisdiction to the courts of the Member State where the insurer is seated. Overall the perspective of the insurer is much more promising when it comes to the insurance of large risks.

<sup>(35)</sup> See infra sub 4.2.4.

<sup>(36)</sup> See supra 4.2.3.

holder to seek foreign coverage. Consequently, an internal insurance market cannot be expected to form itself.

4.2.4.3 Another aspect has to be added. Within the internal market a policyholder enjoys free movement (see i.p. Article 18 of the EC Treaty). However, a change of place of habitual residence may have adverse effects on the policyholder's insurance situation. First of all, the courts of the Member State a policyholder moves into may impose new internationally mandatory rules that influence the insurance policy acquired at the former place of residence. Secondly, the laws on mandatory insurance may require a coverage different to the one the policyholder has acquired in the former place of residence. Thirdly, a policyholder may want to have risks situated in different Member States covered under one single insurance policy.

4.2.4.4 The current legal situation does not fully allow such Euro-policies, instead so called 'umbrella contracts' are formed which are in effect as many contracts as there are Member States concerned. What is missing therefore is the possibility of a portable policy for what has been described as the 'Euromobile' policyholder<sup>(37)</sup> who lives and works in different parts of the EC during his or her lifetime.

#### 4.2.5 The perspective of insurance intermediaries

4.2.5.1 Intermediaries play a major role in distributing insurance contracts. They form a key element in the establishment of an internal insurance market. This is particularly true for insurance brokers. By using their freedom to provide services — guaranteed by Articles 49–55 of the EC Treaty and enforced by the Directive on insurance intermediaries<sup>(38)</sup> — intermediaries substantially contribute to the creation and the functioning of the internal insurance market. In the field of mass risk insurance especially it is more likely to be a broker that will try to place a risk in a foreign insurance market than the customer himself.

4.2.5.2 However, any data on a foreign insurance market and its products is not likely to have significant meaning to a broker lacking knowledge of local law. Since products found in a foreign insurance market are designed with a view to local law the broker may not assume that contents and price of the policy will remain the same in the legal environment of its (foreign) customer. Brokers cannot therefore avail themselves

<sup>(37)</sup> Basedow, Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik, in: Reichert-Facilides/Schyder (Hg.), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, ZSR 2000 (Beiheft 34) 13 – 30 (page 20).

<sup>(38)</sup> Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation; OJ L 9 of 15.1.2003, p. 3.



easily of foreign insurance markets for placing mass risks but have to negotiate contracts individually. This is likely to cause prohibitive transaction costs and thereby prevent the functioning of the internal insurance market.

#### 4.2.6 Similar concerns for insurance marketed through branch offices

4.2.6.1 It is quite frequently mentioned that insurance by its very nature requires some geographical closeness of the insurer to the customer. In the future this observation may show that cross-border sales will not be as frequent in the insurance sector as in other businesses (e.g. the sale of books via internet etc.). For reasons of customer relations, insurers might prefer to operate in other Member States through branch offices or daughter companies.

4.2.6.2 Representatives of such a view do not argue against harmonisation of insurance contract law in principle. Rather, they try to show that the impact will be limited to a certain share of insurance contracts that will actually be marketed across borders or to customers that are in fact mobile and switch their place of residence between different Member States.

4.2.6.3 The actual impact, however, will be more substantial. If insurance contracts are sold in other Member States through branch offices ('establishments') or even a through a daughter company, the same problems for customers, intermediaries, and insurers appear. Insurers have to adapt their products to local conditions including the local legal environment. As a result they have to redesign their products. Therefore, a policy designed in one Member State cannot be sold in another Member State through a branch office without substantial modifications due to a different (legal) environment. Intermediaries and customers face the problem that they will simply not find foreign insurance products in their markets.

4.2.6.4 Harmonisation of insurance contract laws would substantially reduce the costs of product design in the internal market. Insurers establishing themselves in another Member State could restrict themselves to providing the customer with advice through their agents, claims settlement through their competent regional offices etc. Even if insurers operated through daughter companies, insurance groups could share the effort and costs of product design.

4.2.6.5 As a result, customers would effectively profit from the internal market. In an internal market based on harmonised insurance contract law, innovations in the insurance sector could more easily cross borders. European customers would enjoy access to insurance products of foreign design.

### 4.3 Harmonisation of insurance contract law and EU enlargement

4.3.1 On 1 May 2004, 10 new Member States joined the EC, eight of which are countries in transition. Their insurance laws had to be brought in line with the *acquis communautaire* as a prerequisite for joining the EC <sup>(39)</sup>. As a prerequisite for the functioning of the insurance markets in these countries, modern legislation on insurance contract law is indispensable. While some new countries have enacted modern legislation, others still need to take action.

4.3.2 Harmonisation of insurance contract law would therefore appear to serve the interests of an enlarged internal market for insurance by helping the new Member States to modernise their laws and avoid new disparities between national systems. It would be helpful for the EC Commission to notify the respective countries as soon as possible when it plans to harmonise insurance contract law.

## 5. The Commission's 1979 proposal for a directive

5.1 As mentioned above, the Commission presented an initial proposal for a directive in 1979, aimed at coordinating the laws, regulations and administrative provisions relating to insurance contracts <sup>(40)</sup>. This proposal was drafted in the wake of the *General Programme for the elimination of restrictions on the freedom to provide services*, which — in matters pertaining to direct insurance — provided for the coordination of legal and administrative instruments governing insurance contracts 'to the extent that their disparity [resulted] in prejudice to policyholders and third parties' <sup>(41)</sup>.

5.2 The proposal deemed the coordination required by the Directives in force at that time to be inadequate; it also felt that it was not enough for the Treaty to ban discriminatory treatment regarding the provision of services, if the company concerned was not established in the Member State where the service was provided.

<sup>(39)</sup> See Heiss, 'Expanding the Insurance Acquis to Accession Candidates: From the Europe Agreements to Full Membership', in: Heiss (ed.), 'An Internal Insurance Market in an Enlarged European Union', Karlsruhe, 2002, 11 – 22.

<sup>(40)</sup> COM(79) 355 final of 10 July 1979, 190/2 of 28 July 1979

<sup>(41)</sup> OJ of 15.1.1962, Tit. V, Ca).

5.2.1 To this end, it felt that it would be suitable to regulate 'certain general questions relating in particular to the existence of cover depending on the payment of the premium, the duration of the contract, and the position of insured persons who are not policyholders', as well as the 'consequences resulting firstly from the conduct of the policyholder at the time of the conclusion and in the course of the contract concerning the declaration of the risk and of the claim, and secondly his attitude with regard to the measures to be taken in the event of a claim'.

5.2.2 The proposal also considered that 'Member States may be authorised to adopt different solutions only where this is expressly provided for in the text of the Directive'; any other approach would call into question the aims pursued by the proposal. This would thus have been an important step towards full harmonisation in this area <sup>(42)</sup>.

5.3 The Committee, in its unanimously approved opinion on this proposal <sup>(43)</sup>, made the following key points:

- a) the Commission had limited its approach to the coordination of points it deemed to be essential, although the Committee felt that other aspects would also have to be harmonised subsequently;
- b) the Committee regretted that the Directive failed to draw any distinction between mass risks and commercial, industrial and other risks;
- c) it suggested that sickness insurance also be excluded from the scope of the Directive;

<sup>(42)</sup> The text indicated that, inter alia, the following areas would be harmonised:

- a) the formal structure of the insurance policy;
- b) the right to a declaration of guarantee when the contract is concluded, together with the minimum formal requirements pertaining to this;
- c) the language in which the contract is concluded;
- d) the rules covering the insured person's declarations when the contract is concluded, concerning circumstances which may influence the insurer's assessment and acceptance of the risk, and the consequences should the insured person fail to, or deliberately not, do so;
- e) the rules covering the insured person's declarations after the contract has been concluded regarding facts or circumstances which may result in an increase in the risk, together with the consequences of failing to fulfil the obligation to do so;
- f) the rules regarding the burden of proof where there has been failure to fulfil the abovementioned obligations;
- g) the rules governing premiums in the event of a decrease in the risk;
- h) the consequences of failure to pay an insurance premium or a part thereof;
- i) the obligations of the policyholder should a claim arise;
- j) the rules on terminating the insurance contract; and
- k) the possibility of derogation from the provisions of the directive for the parties to the contract, where this would be more favourable to the policyholder, insured person or injured third party.

The proposed Directive would apply to all direct insurance other than life assurance, excepting that relating to:

- a) railway rolling stock;
- b) aircraft;
- c) sea, lake and river and canal vessels;
- d) goods in transit;
- e) liability for aircraft and for sea, lake and river and canal vessels;
- f) credit and suretyship, paying attention to the particular features inherent to these branches of insurance.

<sup>(43)</sup> Rapporteur: De Bruyn, OJ C 146 of 16.6.1980

d) it regretted the fact that the Directive did not cover policies subscribed by insurers established in a Member State, but covering risks situated in non-Member States or policies subscribed by policyholders domiciled outside the Community;

e) the Committee called for specific rules to be drawn up to provide adequate protection for policyholders, be they individuals or small businesses, particularly to cover:

- 1) a cooling-off period and the right of withdrawal;
- 2) unfair clauses;
- 3) express mention of exclusions and deadlines;
- 4) adequate information prior to a contract's conclusion.

f) it called for the right of recourse of injured third parties to be covered by an ad hoc directive or dealt with in the next phase of coordination.

5.4 The Committee then carried out a critical analysis of each one of the articles in the proposal; its comments in that connection are still worth taking into consideration in any new initiative in this sphere.

5.5 The European Parliament also issued its views on this proposal <sup>(44)</sup> at the time. Amongst other things, it considered that 'harmonisation would guarantee a similar standard of protection to policyholders whatever the choice of law'.

5.5.1 In particular, the Parliament proposed a number of amendments, especially regarding: the scope of the Directive (dispensing with exclusions); the key elements of insurance contracts; obligation on the policyholder to make declarations regarding certain circumstances; the consequences of this for maintaining the insurance contract, in relation to either the initial circumstances or changes while the contract is in force; the proof to be provided by the policyholder should a claim arise; and the conditions under which a contract may be terminated.

5.5.2 The intention behind the Parliament's comments is clearly to stress 'there should be an equitable balance between the interests of insurer and insured'.

<sup>(44)</sup> OJ C 265 of 13.10.1980

5.6 Following these comments, the Commission had the opportunity to draft a new, amended proposal<sup>(45)</sup> which took on board the various suggestions and proposals made by the Committee and the Parliament. Here for the first time, it drew attention to the fact that *'the coordination of laws relating to insurance contracts would facilitate the provision of services in a Member States by those providing them in another Member State'*. This was one of the first mentions of the aim of achieving a single market in financial services<sup>(46)</sup>.

5.6.1 This Commission proposal for a directive was set to enter into force on 1 July 1983. However, it was not adopted in the end, due a lack of political will on the part of Member States.

5.7 *What is the present day relevance of the Commission's 1979/1980 proposal?*

5.7.1 Replies to the questionnaire sent out in this connection and the public hearing held on 16 April 2004 have indicated a general consensus that this proposal, albeit dating from twenty years ago, should be given serious consideration as a still-valid contribution to, and a good starting point for, a new initiative in this area.

5.7.2 Nevertheless, it has also been pointed out that current requirements for harmonising insurance contracts go far beyond the 1980 proposal, and the rules to be proposed must be the result of a debate on an in-depth study of comparative law.

## 6. Forms of harmonisation

6.1 *Finding best solutions by using a comparative legal method*

6.1.1 Any attempt to harmonise European insurance contract law should be preceded by preparatory comparative law work. Such work is well under way on an academic level. In fact, a comparative work has already been completed in the area of general contract law with the presentation of the Principles of European Contract Law. In the field of insurance contract law, a substantial body of results from comparative legal research work has been and will be published<sup>(47)</sup>. In 1999 the late Professor Reichert-Facilides founded a Project Group, 'Restatement of European Insurance Contract Law'. The members of this group are experts in the field of insurance law and represent various legal orders (within and outside the EC).

<sup>(45)</sup> COM(80) 854 final of 15.12.1980 – OJ C 355 of 31.12.1980

<sup>(46)</sup> In particular, the Commission's new proposal referred to:

- a) exclusion of sickness insurance, as suggested by the Committee;
- b) greater details of the procedures for terminating a contract, attaching too much importance to the possibility of retaining amended contracts, rather than quite simply revoking them; and
- c) better wording of the rules on the burden of proof.

<sup>(47)</sup> See *Basedow/Fock* (ed.), *Europäisches Versicherungsvertragsrecht*, Tübingen, Volumes I and II 2002, Volume III 2003; *Reichert-Facilides* (ed.), *Insurance Contracts*, in: *International Encyclopedia of Comparative Law* (forthcoming).

6.1.2 Guidelines for finding a 'best solution' for insurance contract law might be the following: Firstly, due consideration must be given to the essential task of all insurance contract law — to provide a legal framework for effective risk bearing on the part of the insurer and thus to guarantee the proper functioning of insurance business itself. Secondly, it is essential that the conflicting interests of the parties are carefully balanced. With regard to this aspect, due recognition must be given to the modern trend to grant a relatively high degree of protection to the policyholder.

6.1.3 On the basis of these observations efforts to improve the internal insurance market should focus on mandatory rules. These rules are an indispensable framework for the autonomous contracting of the parties and at the same time form a barrier to the internal insurance market as long as they are not harmonised. As a result, regulatory needs in the field of insurance are compatible with the harmonisation requirements of an internal insurance market.

6.2 *Harmonisation measures must afford a high level of policyholder protection*

6.2.1 Insurance contract laws — at least their semi-mandatory provisions — aim at protecting the weaker party and may be called consumer laws from a functional point of view. However, traditionally policyholder protection is of broader scope than general consumer law: together with private customers small businesses are protected when taking insurance.

6.2.2 When harmonising European consumer law the EC is bound to afford consumers a high level of protection (see e.g. Article 95 (3) of the EC Treaty). This concept is also applied to legislative acts based on other articles of the EC Treaty granting the EC legislative authority (in the field of insurance law, usually Article 47 (2) in connection with Article 55 of the EC Treaty). As a result, a measure harmonising insurance contract law would provide for a high level of policyholder protection.

6.3 *Minimum standards or full harmonisation?*

6.3.1 The analysis of current problems with the internal insurance market clearly indicates that full harmonisation of insurance contract law is required. Minimum harmonisation would allow Member States to apply a higher standard of protection, as allowed under European law, and thereby create new barriers to the internal insurance market.

6.3.2 Minimum standards would not be a detriment to the functioning of the internal market, if the current regime of private international law was replaced by rules leading to the application of the law of the state in which the insurer is established. In this way, every insurer would produce its product under its own national law (affording at least a European minimum standard of protection) and be able to sell the product on the basis of the application of a law of the 'home country' in all other Member States. The policyholder could rely on obtaining minimum standards of protection in spite of being subject to foreign law.

6.3.3 However, such a shift in the private international law regime is neither likely nor desirable. First of all, such a change would deprive consumers of insurance services of the consumer protection provided by Article 5 of the Rome Convention, which protects the 'passive' consumer even in areas where substantive consumer law is harmonised. Secondly, mandatory rules of the law of the residence of the policyholder would be imposed by courts; barriers to the functioning of the internal market would therefore always remain. Thirdly, it has to be mentioned that according to the Regulation on Jurisdiction and Recognition and Enforcement of Judgements an insurer can sue its policyholder only in the courts of the policyholder's residence (see Article 12 (1)) with very few exceptions) and a policyholder is very likely to choose the same forum according to Article 9 (1) b) for its own actions.

6.3.4 Therefore, a shift in the private international law regime would create a situation where the courts holding jurisdiction would in most cases have to apply foreign law. This would make litigation in insurance matters more burdensome and costly even if insurance law itself were to be harmonised. Therefore this approach cannot be recommended. The private international law regime should in principle stay as it is and insurance contract law should be fully harmonised. This statement, however, does not deny the possibility of improving the current private international legal regime; e.g. as long as insurance contract law is not harmonised, a 'Euromobile' citizen could be allowed to choose between the law of the place of his residence and the law of his nationality.

#### 6.4 *Does the internal insurance market need harmonisation of general contract law?*

6.4.1 Insurance contract law is systematically embedded into general contract law. This observation raises the question of whether insurance contract law harmonisation can only achieve its goals if all the law of contracts (or at least its general part) is harmonised or may be achieved independently. The latter appears to be true.

6.4.2 As mentioned above, it is the mandatory rules that form a hindrance to the internal insurance market and should therefore be subject to harmonisation. Contract law in general, however, is by its very nature non-mandatory. Some mandatory rules exist. These rules do not appear to be so fundamentally different within the legal orders of the Member States that non-harmonisation would disturb the functioning of the internal insurance market and neither do they have a predominant influence on the insurance product as such.

6.4.3 Exceptions might be observed. However, such exceptions can be dealt with within the harmonisation of the insurance sector. One example of such rules is in fact already dealt with by the directive on unfair contract terms in consumer contracts<sup>(48)</sup>, which also applies to consumer insurance policies<sup>(49)</sup>. An insurance contract act at a European level would only have to have the scope of its application extended to all mass risks in order to satisfy the internal insurance market.

6.4.4 These arguments do not intend to argue against harmonisation of contract law in general. They leave this question to the sole discretion of the EC institutions. In fact, harmonisation of general contract law would make the task of harmonising insurance contract law easier. The arguments presented only try to demonstrate that harmonisation of insurance contract law can reach its goals on its own.

#### 6.5 *Establishment of an optional instrument or harmonisation of national insurance contract laws?*

##### 6.5.1 The difference between harmonisation of national laws and an optional instrument

6.5.1.1 The action plan for a more coherent European Contract Law has highlighted the possibility of introducing an optional instrument instead of harmonisation or unification of national contract laws. The main difference between the two approaches lies in the fact that an optional instrument would leave national contract laws untouched whenever the parties to a contract do not either opt in or opt out of the instrument, depending on whether this instrument used an opt in or opt out approach. In this way parallel legal orders (the European and the national ones) are created and parties are allowed to choose between these regimes.

<sup>(48)</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; OJ 1993 No. L 95/29.

<sup>(49)</sup> A particular list on unfair clauses specific to the insurance sector could be inserted if necessary; see the ESC own-initiative Opinion on Consumers in the insurance market (CES 116/98 from 29.1.98) and the Study coordinated by the Centre de Droit de la Consommation from the University of Montpellier, on behalf of the Commission (Contract AO-2600/93/009263) on unfair clauses in certain branches of insurance and similarly to what as been proposed very recently by the Commission for consumer credit (COM(2002) 443 final).

6.5.1.2 On the contrary, harmonisation or unification of national contract laws would replace traditional concepts of national contract law by a European solution. Parties would not have the choice of opting for their national or the European model.

## 6.5.2 Advantages and disadvantages of the two approaches

6.5.2.1 From the perspective of the internal insurance market both solutions share an obvious advantage: they do remove legal barriers to the marketing of policies across Europe and make it possible for a policyholder to move freely within the Community without adverse effects of differences in insurance contract law on his policy. This is why either one of these approaches is preferable to today's situation and the choice between them is ultimately a matter of policy not of principle.

6.5.2.2 Harmonisation of national insurance contract law could prove more burdensome than the enactment of an optional instrument. Since it would lead to a replacement of national 'traditions' by a European solution, the national legal elite (practitioners as well as academics) might be hesitant to follow a call for harmonisation.

6.5.2.3 An ambivalent factor is the correlation between the intensity of the interference with national law and the speediness of reaching results for the internal market. Since an optional instrument would not abolish national laws, it may be viewed as a soft approach and therefore appear to be more readily acceptable to the markets. On the other hand there is the fear that an optional instrument could make the actors of the single market (e.g. insurance companies and brokers) reluctant to take the lead, with every actor waiting for the other to go ahead and trying to profit from the (negative) experiences of their competitors. Or would the optional instrument be seen as a window of opportunity everybody wanted to open first, i.e. through Internet insurance selling? Certainly, harmonisation would lead to immediate results because no actor could avoid its application. On the other hand, the intervention might be felt as very, or even too, strong.

6.5.2.4 A technical concern about an optional instrument relates to the fact that it cannot fully replace harmonisation. This can easily be demonstrated by looking at motor vehicle liability insurance. Harmonisation of the law of motor vehicle

liability insurance is of major importance to the essential mobility of EC citizens because it affords indispensable protection to victims of accidents. It is obvious that the protection of the victim must not depend on the choice of the parties to an insurance contract in favour of a European instrument. An optional instrument could therefore not replace harmonisation of national motor vehicle liability insurance law.

6.5.2.5 Finally, the question is put forward of whether an optional instrument would achieve efficient results in an area like insurance law which is characterised by an imbalance between the parties. Would parties make an efficient choice or would the choice be made unilaterally by the insurers through opt in and opt out clauses in their general terms of insurance?

6.5.2.6 Whether the goal of a European Insurance Contract Act is achieved through harmonisation of national laws or through the establishment of an optional instrument is not a primary concern. The question does, however, need careful consideration.

## 6.6 Elaboration of EU-wide general terms of insurance?

6.6.1 Finally it might be asked whether harmonisation of laws may be replaced by the elaboration of EU-wide general terms of insurance. Indeed, the concerns about insurers who have to take into consideration every single law of each Member State would be reduced (though not entirely laid to rest) if this effort was taken collectively and with the support of the EC institutions.

6.6.2 Nevertheless, the approach cannot be welcomed. First of all, EU-wide general terms can take into consideration differences of national law but still require separate risk calculation and may be of disadvantage to a mobile citizen in the EU.

6.6.3 Moreover the approach would lead to the establishment of model terms having adverse effects on competition in insurance markets. It should be remembered that one of the major steps in creating a single insurance market was the abolition of any right of Member States to systematically control the general terms of insurance before they are introduced in the market.<sup>(50)</sup> Such control leads to a lack of diversity of insurance products, a reduced choice for the customers and thereby reduced competition. The elaboration of EU-wide general terms of insurance structurally bears a similar risk.

<sup>(50)</sup> See Art. 29 Third Directive on Non-Life Insurance; Art. 34 Directive on Life Assurance.

## 7. Areas of harmonisation

7.1 It has been shown above that it is the mandatory rules of insurance contract law which have to be harmonised. A further question is whether all areas of insurance contract law or only particular ones need to be harmonised.

7.2 Insurance law is commonly divided into a general part, containing rules that apply to all insurance contracts, and the law of specific branches of insurance. The question arises of whether the internal insurance market would require harmonisation of the general rules, the specific rules for particular branches or both.

7.3 In theory, both are needed: general rules as well as branch-specific rules of insurance law affect the product and thereby impede the functioning of the internal insurance market, e.g. rules on promissory warranties, which can be found regularly in the general part, are of influence on the ratio of risk and premium as much as specific rules on, e.g., life assurance regulating this specific insurance. Therefore, harmonisation should in principle not distinguish between the two sets of rules.

7.4 Harmonisation might however be achieved in several steps. If so, a list of priorities has to be drawn up. Here it would seem appropriate to harmonise the general part first. Many branches of insurance are not subject to specific and mandatory<sup>(51)</sup> rules but only to general rules under current national insurance contract law regimes. Therefore, what is most urgent is the harmonisation of the general rules of insurance contract law in as far as they are mandatory. This harmonisation would immediately allow the creation of an internal insurance market in all branches not covered by specific and mandatory legal rules. Once this task has been achieved, however, regulated branches, such as life and health insurance, should also be covered.

7.5 The kind of rules which could be harmonised in this first stage could be as follows:

- a) pre-contractual duties, mainly information;
- b) formation of the contract;
- c) insurance policy, nature, effects and formal requirements;
- d) duration of the contract, renewal and termination;
- e) insurance intermediaries;
- f) aggravation of risk;
- g) insurance premium;
- h) insured event;

<sup>(51)</sup> Many provisions on specific branches that can be found in national statutes on insurance contract law are non-mandatory and therefore in itself no obstacle to the internal market.

- i) insurance on account of third party.

## 8. Conclusions and recommendations

8.1 Insurance today represents an essential service in trade relations between professionals and between them and consumers.

8.2 Some of the fundamental principles governing the conclusion and validity of insurance contracts in general differ between the national legal systems of the EU Member States.

8.3 This state of affairs constitutes a barrier to the cross-border marketing of this financial instrument and, in consequence, hampers completion of the internal market in this area.

8.4 A degree of harmonisation of the mandatory rules of what is known as the 'general part' of insurance law could contribute decisively to removing an entire series of obstacles and difficulties facing insurance companies, insurance intermediaries, insured persons and policyholders, whether professionals or individual customers, in carrying out cross-border insurance transactions.

8.5 This point of view is shared unanimously by all the interested parties who were consulted or who spoke at the hearing on this subject.

8.6 It is felt that a gradual approach to harmonisation should be taken, aiming initially at the possible adoption of an optional model insurance contract all of whose terms and components, however, would be mandatory.

8.7 The preparations must take account of the proposals made in the Commission's 1979-80 directive, in the light of the comments and analyses made by the interested parties, civil society representatives and Member State regulatory bodies, and paying due attention to the changes the sector has undergone in the meantime.

8.8 The Community instrument to be used should be a regulation, taking Treaty Article 95 as the legal basis.

8.9 On the basis of the comments made in the present opinion, the EESC urges the Commission to reopen this dossier and begin examining comparative law and national practices in the area of insurance contracts, in order to confirm that it is necessary, advisable and possible to continue with efforts to harmonise insurance contract law at Community level.

8.10 Such efforts must take account of what has already been achieved by academic researchers in this field.

8.11 The EESC recommends to the Commission that such work be made known and submitted for public discussion by means in particular of a green paper, the essential base for preparing what is considered to be the most appropriate Community instrument.

8.12 The EESC is aware that only with a clear political willingness on the part of the Member States to promote the initia-

tive to harmonise insurance contract law, can this major contribution to the completion of the internal market in financial services be realised.

8.13 The EESC calls upon the European Parliament to join in this initiative and to give it the appropriate degree of priority on its political agenda by restating its support for the objective of harmonising mandatory rules of the general part of insurance contract law.

Brussels, 15 December 2004.

The President  
of the European Economic and Social Committee  
Anne-Marie SIGMUND

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## Opinion of the European Economic and Social Committee on 'Tourism and sport: the future challenges for Europe'

(2005/C 157/02)

On 29 January 2004, the European Economic and Social Committee, in accordance with Rule 29(2) of its Rules of Procedure, decided to draw up an opinion on 'Tourism and sport: the future challenges for Europe'.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 November 2004. The rapporteur was Mr Pesci.

At its 413th plenary session (meeting of 15 December 2004), the European Economic and Social Committee adopted the following opinion by 144 votes to 1 with 2 abstentions.

### Preface

The development of people, towns and communities is enhanced by the exchange and sharing of positive values based on respect for others and encouraging mutual understanding, tolerance, hospitality and mutual willingness to exchange experience gained and plans for the future.

In an increasingly fast-moving society characterised by far-reaching social, geopolitical and technological change, in which material progress must be matched, at least, by the development of values, it would appear essential to seize all opportunities, both large and small, to reinforce and disseminate these values.

The tourism and sport sectors are natural vehicles for reinforcing and disseminating values. They are social and cultural activities in their own right as well as economic activities, and are closely linked, sharing a number of basic values — intellectual curiosity, openness to change and learning and the principle of a level playing field.

Tourism and sport can also contribute to the achievement of the objectives of the Lisbon strategy, which seeks to make Europe the most competitive knowledge-based economy in the world by 2010. Indeed, the increasing economic impact of these sectors is a driving force for the economies of the EU countries.

The adoption of the draft Constitutional Treaty, which, for the first time, recognises tourism as falling within the EU's jurisdiction, should make this contribution even more important. The EESC sees this as an initial, fundamental step towards a European development, support and coordination policy for tourism and welcomes the inclusion in the aforementioned constitutional text of the article on sport.

### 1. Introduction

1.1 Tourism and sport are two sectors which are going to make an increasingly significant contribution to Europe's economic prosperity and social well-being in the future. Their key role is universally recognised throughout the world.