

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(75) 215 final.

Brussels, 21 May 1975

Amended proposal

for a

COUNCIL DIRECTIVE

on the coordination of laws, regulations and administrative provisions
relating to co-insurance

(Presented by the Commission to the Council pursuant to the second paragraph
of article 149, of the EEC Treaty)

COM(75) 215 final.

COMMISSION OF THE EUROPEAN COMMUNITIES

NEW PAGES 3 AND 12

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APPLIES TO THE EN-
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Brussels, 6 June 1975

Amended proposal
for a
COUNCIL DIRECTIVE

on the coordination of laws, regulations and
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surance

(presented by the Commission to the Council
pursuant to the second paragraph of article
149 of the EEC Treaty)

COM(75) 215 final/2

EXPLANATORY MEMORANDUM

On the basis of the opinions expressed by the European Parliament and the Economic and Social Committee concerning the Proposal for a Council Directive on the liberalization of co-insurance operations and the coordination of laws, regulations and administrative provisions relating to co-insurance and following the judgement given by the Court of Justice of the European Communities on 3 December 1974 in Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid⁽¹⁾, the Commission is amending its original Proposal as set out in the text attached hereto.

Title of the Directive

On 3 December 1974 the Court of Justice had to give a preliminary ruling (Article 177 of the EEC Treaty) on the interpretation of the first paragraph of Article 59 and the third paragraph of Article 60 of the Treaty. It ruled as follows : "The first paragraph of Article 59 and the third paragraph of Article 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided."

The directives intended to liberalize services which are provided for in Article 63 (2) of the EEC Treaty have therefore become unnecessary. However, they are still important to the extent that they are intended to facilitate the provision of services through the coordination of national legislation. The words "liberalization of co-insurance operations" should therefore be deleted from the title of the Directive.

.../...

(1) OJ No C 52, 5 March 1975

1st citation

The Commission proposes that the reference to Article 63 (2) be deleted since, as was established by the Court of Justice, abolition of restrictions on freedom to provide services which is dealt with in that article is effective now that the transitional period is over.

2nd recital

This recital should be deleted since it mentions, on the one hand, restrictions on freedom to provide services, which has been superfluous since the Van Binsbergen judgement and, on the other, restrictions on freedom of establishment, which has been superfluous since the Court of Justice judgement of 21 June 1974 in the Reyners case, which established that the provisions of the Treaty concerning freedom of establishment have been directly applicable since the end of the transitional period.

New 2nd recital

However, in order to avoid legal uncertainty, it is necessary to specify in a new recital that following the judgement of the Court, restrictions which still exist in certain countries are prohibited by the Treaty itself and therefore need not be mentioned in the Directive.

3rd recital

The amendments made by the Commission to this recital also find justification in the principle embodied in the Van Binsbergen judgement.

5th recital

The European Parliament proposes that the 5th recital be deleted, since the idea it contains is not reflected in a provision of the Directive itself.

The Commission agrees with this proposal.

.../...

6th recital

The European Parliament proposes that the version of this recital and the first sentence of Article 7 contained in the original Commission Proposal, whereby the contract of co-insurance is to be governed by the law of the country where the leading insurer is established, be replaced by a provision according to which it is to be "governed by the law of the Member State where the policy holder is established, unless otherwise agreed in writing by the policy holder and the leading insurer".

The Commission agrees with this proposal.

The principle regarding choice of the law applicable, even as far as compulsory provisions are concerned, appears to be acceptable, since policy holders will have recourse to international co-insurance only for major risks. Consequently, the protection afforded by the law governing their contract will not be so vital for them, in most cases at least, as for policy holders in general.

Where the parties fail to exercise this option, it would appear that provision could be made that the law of the Member State in which the policy holder is established should apply. This would have the advantage of improving the position of the policy holder vis-à-vis the insurer although, in transactions of this sort policy holders are often quite large undertakings.

The law of the Member State in which the risk is situated could also be adopted, but application of such a rule poses complex problems in co-insurance because in co-insurance there is a greater possibility that the risk to be insured is situated in several Member States than in the case of normal insurance, in which case the law of the Member State in which the risk is situated seems to be preferable.

However, contrary to the Parliament proposal, the Commission considers that the expression "in which the policy holder is domiciled" is more satisfactory than "in which the policy holder is established". Moreover, it wishes that present practice, whereby the choice of law is not always the result of a written agreement between the parties but is sometimes made orally, should continue.

7th recital

This recital and Article 6 to which it relates must be deleted following the judgment in the Van Binsbergen case.

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Since freedom to provide services is supposed to have been a reality since the end of the transitional period, it is no longer acceptable for a Member State to reserve the underwriting of a percentage of a risk for insurers established in its territory. That amounts to forbidding insurers from one or more Member States to co-insure the whole (100%) of a risk situated in another Member State.

Any national restrictive provisions which provided for the underwriting of part of the risk to be reserved in this way would be contrary to the Treaty, Article 6, which provided for 25% of the risk to be reserved in this way in certain circumstances can therefore not be retained in the Directive.

Article 1

The new wording is more in line with the Van Binsbergen judgment.

Article 2, first paragraph

The Economic and Social Committee and the European Parliament express reservations concerning the definition of co-insurance proposed by the Commission ;

1. It is not always the insurer who instigates co-insurance, but sometimes an intermediary.
2. There is not always agreement between all the co-insurers. In some cases, the agreement is only between the leading insurer and each co-insurer.

The Commission acknowledges the truth of these remarks. Although it had favoured wording to the effect that the co-insurers acted in agreement with one of them, called the leading insurer, and that the contract was managed by the leading insurer, it can accept the text proposed by the two consultative bodies.

Article 2, second paragraph and Article 3, second paragraph

Following the above-mentioned judgment of the Court the second paragraph of Article 3 should be deleted for it is designed to remove restrictions on freedom to provide services and these have been prohibited since the end of the transitional period. However, in order to avoid legal uncertainty the definition of Community co-insurance in the second paragraph of Article 2 has been added to.

Article 2, third paragraph

The word "tariffs" is replaced by "premiums".

Article 4

Since co-insurance has been liberalized pursuant to the first paragraph of Article 59 of the Treaty, which is directly applicable, the Directive now contains only coordinating provisions.

However, liberalization is not automatic in the case of undertakings whose head office is outside the Community. Under the second paragraph of Article 59 of the EEC Treaty this must be decided by the Council acting on a proposal from the Commission. This being so, the reference to the rules of the Directive is no longer sufficient. A broader formula must be found.

Article 5

Article 5 must be deleted following the judgment in the Van Binsbergen case. A national law which requires the leading insurer to be established in the territory of a given Member State (whether this is the State where the risk is situated or that in which the policy holder has his domicile) is contrary to the first paragraph of Article 59 of the EEC Treaty, which the Court of Justice has ruled to be directly applicable, for such a provision would in fact prohibit an insurer established in one Member State from providing services as the leading insurer in respect of a risk situated or a policy holder domiciled in another Member State. This was virtually the situation in the action brought before the Court at Luxembourg. It is thus impossible to give preference to one or other of such national laws, and Article 5 must therefore be deleted.

Article 6

See under "seventh recital".

Article 7, first paragraph, first sentence

See under "sixth recital".

Article 7, first paragraph, second sentence

Both the Economic and Social Committee and the European Parliament wanted this sentence to be deleted. Indeed, matters concerning intermediaries and commission are not directly connected with co-insurance contracts and therefore should not be dealt with in the Directive. The Commission agrees with this proposal.

Article 7, second paragraph

The European Parliament, meeting in plenary session, adopted an amendment aimed at adding a second paragraph worded as follows :

"If the policy holder makes a claim against an insurance undertaking, the latter's liability shall not be confined to its share of the insurance contract".

Such a provision cannot be adopted for it is contrary to the very definition of co-insurance.

Article 13, first paragraph

At the request of the European Parliament, the Commission agrees to delete the word "market" for the sake of clarity. The Commission report provided for in this Article is to deal not only with the co-insurance market but also with rules concerning co-insurance.

Article 13, second paragraph

This paragraph no longer has any purpose since it deals with a subsequent stage in the liberalization of Community co-insurance.

Article 15

The European Parliament requests that Article 15 be amended to the effect that Member States are to be required to communicate to the Commission their proposals for new provisions and not only legislation already adopted.

The Commission cannot accept this proposal since it has decided to propose henceforth in all Directives adoption of this final wording which refers only to provisions already adopted.

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Amended proposal for a Council Directive on
the coordination of laws, regulations and
administrative provisions relating to co-insurance

Original proposal

New proposal

THE COUNCIL OF THE EUROPEAN
COMMUNITIES,

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Citations

Citations

1st citation

1st citation

Having regard to the Treaty
establishing the European Economic
Community, and in particular Article
57 (2), the second paragraph of
Article 59, Article 63 (2) and Ar-
ticle 66 thereof ;

Having regard to the Treaty establishing
the European Economic Community, and in
particular Article 57 (2), the second
paragraph of Article 59 and Article
66 thereof ; (reference to
Article 53 (2) deleted)

2nd citation

2nd, 3rd and 4th citations

Having regard to the proposal from
the Commission ;

(unchanged)

3rd citation

Having regard to the Opinion of the
European Parliament ;

4th citation

Having regard to the Opinion of the
Economic and Social Committee ;

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Original proposal

Recitals

1st recital

Whereas it is necessary to develop co-insurance between Member States with a view to increasing the capacity of the insurers of the Community to accept risks, by allowing insurers to call not only on co-insurers established in their country but also on those established in other Member States ;

2nd recital

Whereas the removal of restrictions in this matter is, as far as direct insurance operations other than life assurance are concerned, dependent on the achievement of freedom of establishment for these operations; whereas this liberalization has been achieved by the First Council Directive on the coordination of provisions relating to insurance other than life assurance and by the Directive abolishing restrictions on freedom of establishment ;

New proposal

Recitals

1st recital

(unchanged)

2nd recital

(deleted)

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Original proposal

New proposal

2nd recital (new)

Whereas pursuant to the Treaty all discrimination in respect of the provision of services which is based on the fact that an undertaking is not established in the Member State in which the services are provided, has been prohibited from the end of the transitional period; whereas this prohibition applies to services provided by any establishment in the Community, whether it is the head office of an undertaking or an agency or branch ;

3rd recital

Whereas the removal of restrictions on the freedom to transact Community co-insurance business must be accompanied by a minimum of coordination so as to prevent distortions in competition and inequality of treatment; whereas such coordination must not affect the existing arrangements in the Member States which recognize the freedom to provide services in the field of Community co-insurance;

3rd recital

Whereas, however, the effective pursuit of Community co-insurance business must be facilitated by a minimum of coordination so as to prevent distortions in competition and inequality of treatment and without affecting the arrangements existing in several Member States with regard to freedom to provide services;

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Original proposal

4th recital

Whereas the right to transact Community co-insurance business should be open to all insurance undertakings established in the various Member States, including agencies and branches established within the Community and belonging to undertakings whose head offices are outside the Community;

5th recital

Whereas it is necessary to require the leading insurer to assume responsibilities exceeding those of an intermediary between the person seeking insurance and the co-insurer or co-insurers ;

6th recital

Whereas the law applicable to the contract should be determined by the laws of the country in which the leading insurer is established ;

New proposal

4th recital

(unchanged)

5th recital

(deleted)

6th recital

Whereas the law applicable to the contract should be determined by the law of the Member State in which the policy holder is domiciled, unless otherwise agreed by the policy holder and the leading insurer ;

./o

Original proposalNew proposal7th recital6th recital

Whereas Member States should be permitted to reserve a minimum percentage of participation in the risk for the leading insurer and co-insurers established in the leading insurer's country ;whereas this percentage can be fixed for an initial period at 25% ;

(deleted)

8th recital6th recital

Whereas the leading insurer is better placed than the other co-insurers to evaluate claims and to fix the minimum amount of reserves for pending claims ;

(former 8th recital unchanged)

9th recital7th recital

Whereas work is in progress concerning the winding up of insurance undertakings ; whereas provision must nevertheless be made now to ensure that in the event of an insurance undertaking being wound up persons entitled under Community co-insurance contracts enjoy equality of treatment with those entitled in connection with the other insurance business of the undertaking, irrespective of their nationality ;

(former 9th recital unchanged)

10th recital8th recital

Whereas special cooperation should be provided for in the co-insurance field both, between the supervisory authorities of the Member States and between these authorities and the Commission ;

(former 10th recital unchanged)

Original proposal

HAS ADOPTED THIS DIRECTIVE:

Enacting terms

TITLE I General provisions

Article 1

This Directive has as its object the setting up of a system of Community rules on co-insurance in respect of the risks set out in the Annex to the First Council Directive of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, hereinafter called "the First Coordination Directive" with the exception of the risks classified under n.10 (motor vehicle liability) of point A of that Annex.

New proposal

HAS ADOPTED THIS DIRECTIVE:

Enacting terms

TITLE I General provisions

Article 1

This Directive applies to Community co-insurance operations in respect of the risks set out in the Annex to the First Council Directive of 24 July 1973 (the rest unchanged).

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Original proposal

Article 2, 1st paragraph

For the purpose of this Directive co-insurance means: the insuring by two or more insurance undertakings, hereinafter referred to as "co-insurers", acting at the instigation of one of them, called the leading insurer, and in agreement with each other but without joint and several liability, of a single risk under a single contract at a single premium and for a single period.

Article 2, 2nd paragraph

Co-insurance shall be called Community co-insurance where at least one of the co-insurers is established, within the meaning of the First Coordination Directive, in a Member State other than that of the leading insurer.

Article 2, 3rd paragraph

The conditions of insurance and the tariffs shall be determined by the leading insurer.

New proposal

Article 2, 1st paragraph

For the purpose of this Directive co-insurance means: the insuring by two or more insurance undertakings, hereinafter referred to as "co-insurers", of which one is called the "leading insurer", each for his own part, of a risk under a single contract at an overall premium and for the same period, which contract is performed under the aegis of the leading insurer.

Article 2, 2nd paragraph

Co-insurance shall be called Community co-insurance where at least one of the co-insurers is established, whether by means of his head office, an agency or a branch, within the meaning of the First Coordination Directive, in a Member State other than that of the leading insurer.

Article 2, 3rd paragraph

The conditions of insurance and the premiums shall be determined by the leading insurer.

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Original proposal

Article 3, 1st paragraph

The right of undertakings having their head office in a Member State and which are subject to and satisfy the requirements of the First Coordination Directive to participate in Community co-insurance shall not be made subject to any provisions other than those of this Directive.

Article 3, 2nd paragraph

This right shall exist both for such head offices and for their agencies and branches.

Article 4

This Directive shall apply to agencies and branches established within the Community belonging to undertakings whose head offices are subject to and comply with the rules of Title III of the First Coordination Directive.

TITLE II Conditions and procedures of Community co-insurance

Article 5

If the law in any country contains provisions concerning the place of establishment of the leading insurer, and if such provisions give rise to a conflict of laws, the law applicable shall be that which requires the leading insurer to be established in the country where the risk is situated.

New proposal

Article 3, 1st paragraph

(unchanged)

Article 3, 2nd paragraph

(deleted)

Article 4

Agencies and branches established within the Community belonging to undertakings whose head offices are outside the Community and which are subject to and comply with the rules of Title III of the First Coordination Directive shall be entitled to participate in Community co-insurance operations on the same terms as undertakings whose head offices are situated in the Community.

TITLE II Conditions and procedures of Community co-insurance

Article 5

(deleted)

Original proposal

New proposal

Article 6

Article 6

Any Member State may require that part of the risk, up to a maximum of 25%, be underwritten by the leading insurer and other co-insurers established in the country of the leading insurer.

(deleted)

Article 7

The contract of co-insurance shall be governed by the law of the country where the leading insurer is established. Matters concerning intermediaries and commission shall be subject to the provisions of the same law.

Article 5

The contract of co-insurance shall be governed by the law of the Member State in which the policy holder is domiciled, unless otherwise agreed by the policy holder and the leading insurer. (Second sentence deleted)

Article 8, 1st paragraph

The amount of technical reserves shall be determined by the different co-insurers according to the rules fixed by the State where they are established or, in default of such rules, according to the practices current in that State. However, the reserve for pending claims shall be at least equal to that determined by the leading insurer according to the rules or practices of the State where such leading insurer is established.

Article 6, 1st and 2nd paragraphs

(former Article 8 unchanged)

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Original proposal

Article 8, 2nd paragraph

The technical reserves established by the different co-insurers shall be represented by matching assets localized in the Member States where they are respectively established.

Moreover, greater flexibility in the rules on matching assets and their localization may be allowed by the Member States.

Article 9

Every Member States shall ensure that co-insurers established on its territory have available to them statistical data showing the extent of Community co-insurance operations and the countries concerned

Article 10

The supervisory authorities of the Member States shall cooperate closely for the purpose of implementing the provisions of this Directive and shall provide each other with all the information necessary to this end.

Article 11

In the event of an insurance undertaking being wound up commitments to the insured or to other persons entitled arising under community co-insurance contracts shall be honored in the same way as those arising under other insurance contracts and without distinction as to nationality.

New proposal

Article 7

(former Article 9 unchanged)

Article 8

(former Article 10 unchanged)

Article 9

(former Article 11 unchanged)

Original proposal

TITLE III Final provisions

Article 12

The Commission and the competent authorities of the Member States shall cooperate closely for the purpose of examining any difficulties which arise in implementing this Directive.

Article 13, 1st paragraph

The Commission shall submit to the Council, within six years of the date of notification of this Directive, a report on the development of the community co-insurance market.

Article 13, 2nd paragraph

The Commission shall also submit to the Council any proposal for a more complete liberalization of Community co-insurance in particular by the reduction of the percentage referred to in Article 6.

New proposal

TITLE III Final provisions

Article 10

(former Article 12 unchanged)

Article 11, 1st paragraph

The Commission shall submit to the Council within six years of the date of notification of this Directive, a report on the development of community co-insurance . (2 words deleted).

Article 11, 2nd paragraph

(deleted)

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Original proposal

Article 14, 1st paragraph

Member States shall within eighteen months following notification of this Directive, amend their national provisions so as to comply therewith and shall inform the Commission thereof.

Article 14, 2nd paragraph

The provisions so amended shall be applied within 24 months of the date of notification.

Article 15

Following notification of the Directive Member States shall ensure that the texts of the main provisions by way of law, regulations or administrative actions which they adopt in the field governed by this Directive are communicated to the Commission.

Article 16

This Directive is addressed to the Member States.

New proposal

Article 12

(former Article 14 unchanged)

Article 13

(former Article 15 unchanged)

Article 14

(former Article 16 unchanged)