

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(78) 63 final

Brussels, 16 February 1978

Amendment to the proposal
for a second Council Directive

on the coordination of laws, regulations and administrative
provisions relating to direct insurance other than life assur-
ance and laying down provisions to facilitate the effective
exercise of freedom to provide services

(submitted to the Council by the Commission pursuant to the
second paragraph of Article 149 of the EEC Treaty)

COM(78) 63 final

Explanatory memorandum

The Commission hereby submits a revised text of its proposal for a Council Directive 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, on the basis of the opinions submitted by the European Parliament and the Economic and Social Committee on that proposal.

The two most significant amendments relate to the contract law applicable and the position of undertakings from non-member States.

1. Contract law (Articles 4, 5, 9 and 10 (1))

In the Commission's proposal, a distinction was drawn with regard to the applicable contract law between major risks, mass risks and risks subject to compulsory insurance. As regards the former, the "choice of law by the parties" principle was to apply without exception, and as regards the latter, the law of the place where the risk was situated was to apply without exception. Criticism had been levelled mainly at the provision laid down in respect of mass risks, which provided for an unrestricted choice of law by the parties. The European Parliament in particular pointed out that Article 5 was bound, in practice, to lead to enormous difficulties ("mixture of law"), would lead to legal uncertainty, and could, in certain circumstances, impair the considerable degree of consumer protection to which policyholders should be entitled in view of the complexity of the subject matter. The Commission has duly recognized these misgivings and has afforded the same treatment to mass risks as to risks subject to compulsory insurance. This has resulted in amendments to Articles 4 and 6 and to the deletion of Article 5.

2. Undertakings in non-member States (Article 15)

When preparing the original proposal, the Commission worked on the principle that the legal or economic distinction to be made between

a legally independent subsidiary company and a mere branch was not sufficiently great to justify their being treated differently. Accordingly, if a company established in the Community with capital from outside the Community were to be afforded the same treatment as all other companies, this must also apply to a branch, i.e. the latter would also have to be allowed to avail itself of the freedom to provide services.

As is conceded both to the Economic and Social Committee and to the Parliament, the principle of reciprocity is not secured under this arrangement. In order to give individual Member States an opportunity to achieve their aims here, Article 15 provides in the amended version that exercise of freedom to provide services by agencies and branches of undertakings established in non-member States is to be subject to the existence of an agreement concluded pursuant to Article 29 of the first coordinating Directive.

The remaining amendments are mainly those intended to improve the wording or clarify certain points. In this connection, one may refer to a large extent to the relevant comments in the opinions of the Economic and Social Committee ¹ and the European Parliament ². In the case of points marked "provisionally unchanged", the Commission acknowledges in principle the need for an amendment as requested by the Economic and Social Committee or by the European Parliament, but would like to await the outcome of the discussions in the Council, which have already been in progress for some time. Amendments have been made at the following individual points:

1. Sixth recital: see the above comments on Articles 4 and 5
2. 14th recital: see the above comments on Article 15
3. Second sentence of Article 1 (b): see point 3.1.3 of the opinion of the Economic and Social Committee (hereinafter called ESC) and point 14 of the preamble to the opinion of the European Parliament (hereinafter called EP)
4. Fifth indent of Article 2 (d): see point 3.2.3 ESC
5. New text of Article 4 (2) (a) = old text of Article 6 (1) (a):

¹OJ No C 204 of 30 August 1976.

see point 3.5.4.5 ESC

6. Second indent of Article 4 (2) (c) = old text of second indent of Article 6 (1) (b): see point 3.5.4.2 ESC and point 20 EP
7. Article 8 (2) (c): see point 3.6.2 ESC
8. Article 13 (2): see point 3.10 ESC
9. Article 14: see point 3.11.2 ESC.

With these amendments, the Commission has accepted the proposals of the Parliament in full and those of the Economic and Social Committee for the main part. The sole proposed amendment not taken into consideration was that requested by the Economic and Social Committee with regard to Article 11, requiring that in addition to the obligations to inform the policy-holder already laid down in Article 11, the latter be informed at the time of concluding the contract of the "advantages and disadvantages" of concluding a contract with an insurance undertaking established in another country. It is generally superfluous to insist that the advantages be pointed out and it seems unlikely that the insurer could be expected to fully describe the disadvantages.

amendment

to the proposal for a second Council Directive 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.

Original proposal

New proposal

The Council of the European Communities

Citations unchanged

Recitals 1-5 unchanged

Sixth recital

Sixth recital

Whereas the first step in coordination can be taken straight away by determining on a Community basis those mandatory provisions which the Member States may continue to apply in respect of risks situated on their territory; whereas, with this end in view, only certain of those provisions should continue to be mandatory all others becoming open to coordination.

deleted

Seventh recital

Seventh recital

Whereas more complete coordination shall occur in the shortest possible time; whereas however the choice of the law applicable to contracts can be freed immediately without restriction by the complete elimination of the "essential" character of the said dispositions, on the one hand in

Whereas a process of coordination should be carried out as quickly as possible; whereas pending such coordination it is appropriate that the law of the State in which the risk is situated should apply; whereas, however, the freedom to choose the applicable law may be exercised immediately and without

the case of risks classified as transport, credit and caution primarily on account of their frequently international nature, and on the other hand in the case of certain large risks, defined by precise quantitative criteria, in which there is less evident need of protection for the insured.

restriction in the case of transport, credit and suretyship insurance on account of their often international nature, and in the case of certain major risks defined according to quantitative criteria, in respect of which there is less evident need of protection for the consumer.

Eighth to thirteenth recitals unchanged

Fourteenth recital

Whereas agencies or branches established within the Community and belonging to undertakings whose head offices are outside the Community are the subject of the provisions of title III of the first coordinating Directive; whereas in this respect they are subject to harmonized conditions with regard to entitlement to and exercise of freedom to provide services; whereas in these conditions it appears normal to enable these agencies and branches to benefit from the provisions of this Directive;

Fourteenth recital

Whereas the Directive should apply to agencies or branches established within the Community which belong to undertakings whose head offices are outside the Community only if the States in which their head offices are situated have concluded an agreement with the Community, under conditions of reciprocity, pursuant to Article 29 of the first coordinating Directive, so that the principle of equality of treatment is guaranteed at Community level;

Fifteenth recital unchanged

Original proposal

HAS ADOPTED THIS DIRECTIVE:

Title I

General provisions

Article 1

The object of this Directive is:

(a) to supplement 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;

(b) to lay down provisions to facilitate the effective exercise of freedom to provide services by the undertakings and in respect of the classes of insurance covered by that coordinating Directive.

New proposal

HAS ADOPTED THIS DIRECTIVE:

Title I

General provisions

Article 1

(a) unchanged

(b) unchanged

This Directive shall not affect the situation under public law as regards insurance by the institutions referred to in Article 4 of the first coordinating directive and the risks covered by them.

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Article 2

For the purposes of this Directive:

(a) first coordinating Directive

means the first Council Directive referred to in Article 1 (a);

(b) undertaking

means any undertaking which has received official authorization under Article 6(2)(a) or (b) of that Directive;

(c) freedom to provide services

means the covering by an undertaking of a risk situated in another Member State;

(d) Member State in which the risk is situated means:

- the Member State in which the insured property is situated, where the insurance covers immovable property or movable property which, because of its situation, is connected with the immovable property and used for the same purpose, together with any objects contained therein,

Article 2

(a) unchanged

(b) unchanged

(c) unchanged

(d) unchanged

unchanged

- the Member States in which insured movable property other than that specified in the preceding indent is situated, where because of the purpose for which the property is intended or used the location thereof is neither provisional not temporary, unchanged
- the Member State in which the contract was concluded, where the insurance covers persons, or objects other than those referred to in the preceding indents, and was taken out for a short period or from an automatic machine, unchanged
- the Member State of registration, where the insurance covers land vehicles, - the Member State of registration where the insurance covers land vehicles including railway rolling stock, aircraft or sea, lake, river and canal vessels, and, where the vehicle is not registered, the Member State in which the policy-holder habitually resides, provided that he is the owner of the vehicle in question, has custody of it or has a financial interest therein.
- the Member State in which the policy-holder habitually resides in so far as he is the owner of the vehicle in question, has a financial interest deleted

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therein or operates the said vehicle, deleted
or, failing this, the Member State
in which the vehicle is registered,
where the insurance covers railway
rolling stock, aircraft or sea,
lake, river and canal vessels,

- the Member State in which the policy- unchanged
holder habitually resides where any
other form of insurance is involved,
including insurance in respect of
'goods in transit';

(e) supervisory authority means: unchanged

- in the case of the head office, the
authority responsible for granting
the authorization referred to in
Article 6 (2) (a) of the first
coordinating Directive or for
supervising private insurance
business,

- in the case of agencies and branches, unchanged
the authority responsible for
granting the authorization referred
to in Article 6 (2) (b) of that
Directive or for supervising private
insurance business.

These authorities are hereafter called
the supervisory authorities of the
authorizing State;

(f) unit of account

unchanged

means the European unit of account (EUA) as defined by Council Decision 75/250/EEC of 21 April 1975.

Wherever reference is made in this Directive to the unit of account, the corresponding amount in national currency to be applied shall be that of the last working day of the preceding year.

Title II

Provisions supplementing the first coordinating Directive

Article 3

1. Member States shall take all steps necessary to ensure that at least the following principles are observed in calculating the technical reserves :

(a) Unearned premiums are to be calculated, in principal, on a time basis. The calculation may, however, be made by methods of approximation if these lead to practically the same results as individual calculations.

The gross premiums shall be taken as the basis for the calculation. The resulting unearned premiums should then in principle be re-

Title II

Provisions supplementing the first coordinating Directive

Article 3

unchanged

duced by the pro rata commissions and other representatives' charges (agency costs). Member States will determine what is meant by deductible agency costs;

(b) A reserve for potential losses from current contracts is to be formed if, on the basis of the trend of claims, having regard to their frequency and average amount in the financial year, future insurance payment will probably exceed the corresponding net premiums;

(c) For the purposes of calculating the loss reserves, the future gross expenditure on claims is to be estimated individually on the basis of known outstanding claims.

Member States may permit flat-rate methods of calculation, instead of individual calculation if:

- the number of similar outstanding claims is so great that the flat-rate method leads to a result which is not significantly different from that obtained by individual calculation, or

- the nature of the risks listed under numbers 3, 4, 5, 6, 7, 11 and 12 of point A of the Annex to the first coordinating Directive does not permit individual calculation.

Reserves for late claims are to be formed for claims which have occurred but which have not yet been notified to the insurer; these shall be calculated on the basis of values gained from past experience, having regard to the probable trend of claims;

(d) As regards the risks listed under numbers 4, 5, 6, 7, 11 and 12 in point A of the Annex to the first coordinating Directive, amounts representing premiums and loss reserves may be consolidated in one amount.

2. Systems based on an "account over a period not exceeding three years" shall be considered as equivalent to the system described in the preceding paragraph for unearned premiums and outstanding claims.

3. Undertakings shall set up an equalization reserve for the credit, hail and frost classes and for the risks of storm and natural forces other than storm, where such risks are included in the hail and frost classes.

The equalization reserve shall each year receive 75 % of any technical surplus remaining for that financial year. However, in the case of credit insurance, the amount involved may not exceed 12 % of the net premiums for the same financial year.

This transfer shall no longer be obligatory when the reserves have reached:

- in the case of credit insurance, 150 % of the highest annual amount of net premiums paid in during the last five financial years, and
- in the case of all other classes of insurance, 200 % of the amount of net premiums paid in during the last financial year.

Any technical deficit which may occur in the course of a given financial year in these classes of insurance shall be charged to the reserve.

4. The reserves referred to in this Article shall be disregarded for purposes of calculating the solvency margin and shall be under exemption from any liability to tax.

Article 4

1. Insurance contracts concluded in the classes covered by the first coordinating Directive shall be governed by the law of the parties' choice. Where the risk is situated within the Community the choice must be made from among the laws in force in the Member States.

Article 4

1. Pending coordination of the law governing contracts of insurance, which must occur within three years from the date of notification of the present Directive, insurance contracts shall be governed by the law of the country in which the risk is situated.

The parties shall be free to choose the law of a third country if the risk in question is one of those listed under numbers 4, 5, 6, 7, 11, 12, 14 and 15 in point A of the Annex to the first coordinating Directive, where there is a definite connection between the laws of that country and the risk insured or the insured person.

unchanged

2. In the absence of a choice of law to be applied or where the choice made is contrary to the provisions of paragraph 1, the contract shall be governed by the internal law of the Member States in which the risk is situated.

2. However, the law agreed between the parties shall apply:

(a) to the risks listed

under numbers 14 and 15 in point A of the Annex to the first coordinating Directive;

(b) to contracts covering risks listed under numbers 4, 5, 6, 7, 11 and 12 in point A of the Annex to the first coordinating Directive,

- where the policy-holder has the status of a trader, and

- where the risk to be covered relates to his business activity;

(c) to contracts covering risks listed under numbers 8, 9, 13 and 16 in point A of the Annex to the first coordinating Directive,

- where these risks are the subject of a contract concluded for his own account and/or for the account of a third party by a legal or natural person who owns

part or all of the interest insured and who, under the law applying to him, has the status of a trader, and

- where the amount insured in respect of risks listed under number 8 in point A of the Annex to the first coordinating Directive is not less than 7 m EUA, or where the aggregate amount insured in respect of risks listed under numbers 8, 9 and 16 is not less than 10 m EUA;

(d) Unchanged

3. The figures given in (2)(c), second indent, shall be reviewed, and if necessary adapted, at the latest within three years from the date of notification of the present Directive in the light of progress achieved in the coordination of legislation provided for in paragraph 1 above.

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Article 5

1. Pending their further coordination, which shall occur within a maximum period of three years from the date of notification of the present Directive, and in cases where the law chosen by the parties is other than that of the Member State where the risk is situated, only those "essential" dispositions of the law applicable in that State may be applied ; those essential dispositions can cover :

- the declaration of the risk by the policy-holder, either when the policy is taken out or during the period of the contract, and penalties,
 - the payment of the premium and the consequences of non-payment,
 - the obligations of the policy-holder on the occurrence of a claimable event, and penalties,
 - the circumstances in which the contract may be annulled,
 - the right of third parties,
- shall, pending their subsequent coordination, remain applicable.

2. The restrictions imposed by the preceding paragraph on the freedom to choose the law governing the contract shall not apply to contracts covering risks referred to in Article 6 provided that the conditions laid down in that Article are met.

3. Member States under whose legislation or case law the provisions referred to in paragraph 1 are mandatory shall forward the

Article 5

deleted

List of those provisions to the Commission within 18 months of the notification of the Directive. The Commission shall forward that list to the other Member States.

Article 6

1. The following is added to Articles 8 (3) and 10 (3) of the first coordinating Directive :

However, Member States may not apply provisions which require general and special policy conditions and tariffs to be approved :

(a) in respect of risks listed under numbers 4, 5, 6, 7, 11, 12, 14, and 15 in point A of the Annex to the first coordination Directive :

- where the policy-holder has the status of a trader, and
- where the risk to be covered relates to his business activity ;

(b) in respect of risks listed under numbers 8, 9, 13 and 16 in point A of the Annex to the first coordinating Directive :

Article 6

By way of derogation from Articles 8(3) and 10(3) of the first coordinating Directive, Member States may not, in respect of the risks listed in Article 4(2), apply provisions which require general and special policy conditions and tariffs to be approved.

deleted

deleted

- where these risks are the subject of a contract concluded for his own account and/or for account of a third party by a legal or natural person who owns all or part of the interest insured and who, under the law applying to him, has the status of a trader ; and
- where the amount insured in respect of risks listed under number 8 in point A of the Annex to the first coordinating Directive is not less than 7 million units of account or where the aggregate amount insured in respect of risks listed under numbers 8, 9 and 16 is not less than 10 million units of account.'

deleted

2. The figures given in point (b) second sentence, shall be reviewed and if necessary adapted, at the latest within three years from the date of notification of the present Directive, in the light of progress achieved in the coordination of legislation provided for in Article 5(1).

Article 7

Every Member States shall take all steps necessary to ensure that the authorities responsible for supervising insurance undertakings are able :

(a) to supervise all the activities of insurance undertakings and to ensure that :

- the laws, regulations and administrative provisions concerning insurance are complied with,
- the schemes of operations referred to in Article 8 (1)(c) and 10(1)(c) of the first coordinating Directive are properly executed, and
- insured persons are protected against abuses ;

(b) to carry out the checks and to take the measures necessary for this purpose, and in particular :

- to require undertakings to transmit all relevant documents,
- to examine the administration of undertakings in situ,
- to be vested with sufficient powers of constraint to ensure that Decisions are properly enforced.

Article 7

unchanged

Title III

Provisions to facilitate the effective exercise of freedom to provide services

Article 8

1. Any undertaking wishing to extend its business, by way of the exercise of freedom to provide services, to the territory of another Member State shall seek authorisation for that purpose from the supervisory authority of the authorising Member State.

2. The undertaking shall supply the following information :

(a) the Member State on whose territory it intends to provide services ;

(b) the nature of the risks which it intends to insure on the territory of that State ;

(c) the general and special conditions of the policies which it intends to use and the tariffs which it intends to apply provided the legislation of the Member State referred to in (a) requires those conditions and tariffs to be approved.

3. The authorisation referred to in paragraph 1 shall be granted after consultation with the supervisory authority of the State on whose territory the undertaking intends to provide services.

Title III

Provisions to facilitate the effective exercise of freedom to provide services

Article 8

unchanged

unchanged

(c) the general and special policy conditions and tariffs on which it intends to base its contracts where the law of the Member State referred to in (a) requires those conditions and tariffs to be submitted to the supervisory authority.

unchanged.

The supervisory authority of the authorising Member State shall send a copy of the application of the undertaking concerned, together with the information specified in paragraph 2, to the supervisory authority of the State on whose territory the undertaking is intending to provide services.

The latter's comments must be forwarded to the supervisory authority of the authorising State within six weeks of the forwarding of the application for authorisation.

Article 9

1. Subject to the provisions of this Directive, the undertaking must comply with the rules in force in the Member State in which the risk is situated which concern :

- compulsory insurance,
- the mandatory provisions concerning the insurance contract mentioned in Article 5(1),
- tariffs and the general and special conditions of insurance policies,

- fair trading

Article 9

1. unchanged

- unchanged

- provisions existing in the country in which the risk is situated concerning the law on insurance contracts, with the exception of the cases mentioned in Article 4 (2),

- unchanged

- the constitutional, public-law and administrative provisions binding on everyone in the country in which the risk is situated,

- unchanged

2. If the supervisory authority of the Member State in which the risk is situated is aware that these provisions are being violated by an undertaking exercising freedom to provide services on its territory, it shall submit its complaint to the supervisory authority of the authorising State and shall propose suitable measures for putting an end to the situation. 2. unchanged
3. The supervisory authority of the authorising State shall take all appropriate measures, which may extend to withdrawal of the authorisation referred to in Article 8, to put an end to the infringement of which it has thus been notified. It shall inform the supervisory authority of the Member State in which the risk is situated thereof. 3. unchanged
4. If, in spite of the measures thus taken by the authorising State, the undertaking persists in seriously violating the provisions referred to in paragraph 1, the Member State in which the risk is situated may, after having informed the supervisory authority of the authorising State thereof, take any appropriate measures which are strictly necessary to put an end to the situation. 4. provisionally unchanged.

Article 10

1. Subject to Article 13 and notwithstanding Articles 4 and 5, contracts concluded by way of the exercise of freedom to provide services and covering risks insurance of which is compulsory in the Member State in which the risk is situated must comply with the legislation in force in that Member State.

This provision shall not apply to the risks referred to in Article 6.

2. Where the Member State in which the risk is situated requires proof that the obligation to take out insurance has been complied with, it shall accept for this purpose the certificate issued by the insurance undertaking availing itself of freedom to provide services.

3. Where, in the Member State in which the risk is situated, the insurer has to notify certain competent authorities when cover ceases to be provided, the termination of cover can be invoked against injured third parties only one month after the date on which the competent authorities receive such notification from the insurance undertaking.

Article 10

(1) (12 words deleted)

Contracts concluded by way of the exercise of freedom to provide services and covering risks insurance of which is compulsory in the Member State in which the risk is situated must comply with the legislation in force in that Member State.

This provision shall not apply to the risks referred to in Article 4(2).

2. unchanged.

3. unchanged.

Article 11

unchanged.

Where contracts are concluded by way of the exercise of freedom to provide services, the policy-holder must be informed before the contract is signed that the insurer is not established in the country in which the risk is situated. Furthermore, the policy must specify the address of the competent supervisory authority and the address of the office of the insurer to whom the policy-holder may submit his claims.

Article 12

unchanged.

1. The supervisory authority of the Member State in which the head office is situated shall require that office to keep for each class of insurance and for each Member State, a special trading account in respect of all business transacted by way of the exercise of freedom to provide services, including that transacted by its agencies and branches. This account, the form of which is set out in the Annex, must show premiums, claims and technical reserves.

2. The supervisory authority of the Member State in which the head office is situated shall, if the supervisory authority of the Member State in which the risk is situated so requests, forward to the latter a copy of the special trading account.

2. unchanged.

3. For undertakings keeping their accounts in accordance with the system provided for in Article 3(2), the trading account may be restricted to the net premiums received, less commission, and the claims paid during the calendar year, set out according to classes of insurance and countries of origin.

3. unchanged.

Article 13

1. The technical reserves relating to contracts concluded by way of the exercise of freedom to provide services shall be subject to the rules laid down by the authorising State or, failing such rules, shall be in accordance with established practice in that State.

Article 13

1. unchanged.

2. These reserves may be located in the Community without territorial restriction. They must in all cases be covered by equivalent and matching assets.

2. These technical reserves may, without restriction, be located within the Community. They must in all cases be covered by equivalent and matching assets.

Article 14

Without prejudice to subsequent harmonisation of indirect taxes on insurance, all insurance contracts concluded by way of the exercise of freedom to provide services shall be subject solely to the

Article 14

Pending the subsequent harmonisation of indirect taxes on insurance

relevant taxation in force in the Member State in which the risk is situated.

Article 15

The provisions of this Directive shall apply to agencies and branches established within the Community and belonging to undertakings whose head office is outside the Community which are subject to and which satisfy the provisions of Title III of the first coordinating Directive.

Article 15

The provisions of this Directive shall apply to agencies and branches established within the Community and belonging to undertakings whose head office is outside the Community, where the third countries concerned have concluded an agreement with the Community under the conditions specified in Article 29 of the first coordinating Directive.

Title IV

Title IV

Final provisions.

unchanged.