

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(79) 355 final

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PROPOSAL FOR A COUNCIL DIRECTIVE
ON THE COORDINATION OF LAWS, REGULATIONS AND
ADMINISTRATIVE PROVISIONS RELATING TO INSURANCE CONTRACTS

(submitted to the Council by the Commission)

COM(79) 355 final

Explanatory Memorandum

The harmonization of contract law in connection with freedom to provide services and freedom of choice of applicable law has a twofold objective. Firstly, to guarantee the policyholder that whatever the choice of applicable law, he will receive identical protection as regards the essential points of the contract. Secondly, to eliminate as competition factors for undertakings the fundamental differences between national law. Such is the object of this directive.

The extent of harmonization has been deliberately restricted to what was considered necessary and adequate, at least initially, to attain these objectives. In this respect, the great majority of Government experts and the professional bodies consulted considered that the following points should be coordinated as a matter of priority: declaration of the risk, obligations of the policyholder during the contract period, payment of premiums, declaration of the claimable event, duration of the contract.

Soon, however, freedom of choice of applicable law will already be effective with regard to certain risks, which are defined in Article 4(2) of the second 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. The coordination proposed in the present directive must not be considered as automatically entailing freedom of choice of the law applicable to contracts covering mass risks or those risks in respect of which insurance is compulsory. Any extension of freedom of choice in the case of such risks must be dealt with in special directives laying down the exact conditions and limits of such extension.

Notes on Articles

Article 1 - Scope

The aim of the proposed coordination is to facilitate freedom to provide services with regard to insurance contracts relating to the classes listed in Point A of the annex to the first coordination directive on indemnity insurance, adopted on 24 July 1973. This coordination, which is being deliberately limited for the time being to certain matters that are considered particularly important from the point of view of the protection of the policyholder, is part of a move towards generally extending freedom of choice of the law applicable to the contract. It should again be pointed out that the extension of such freedom to mass risks will not take place automatically in line with the progress that is made in the field of coordination but will have to be dealt with in specific directives.

Having regard to the situation of the marine, aviation and transport insurance markets, the widely international nature of these classes and the freedom which has traditionally been enjoyed by the parties in concluding such contracts, it was not considered appropriate to make them subject to binding uniform provisions.

Having regard to the characteristics of credit and suretyship insurance contracts, it was considered that they could not be covered by the directive as it stands. These classes require detailed examination prior to separate coordination.

Article 2 - Insurance document

The policy is only an instrument of proof of the insurance contract but in this respect it is of very great importance.

The information which it must contain relates to the fundamental elements of the contract. It is admissible for documents to be issued in a simplified form, either pending the issue of the final policy, or in the case of contracts concluded for a short period and bearer policies.

To prevent these documents from giving rise to problems of interpretation, an agreement has been established between the language in which they are drafted, and the law applicable to the contract. Nevertheless, for his protection, the policyholder is entitled to receive a translation in a language which he is assumed to know (that of his normal place of residence) prior to the conclusion of the contract, it being understood that only the original version is authentic.

Article 3 - Declaration of risk

The existence of a questionnaire does not free the policyholder from his general obligation to declare the risk. The questionnaire is a tool for the insurer and a guide for the policyholder; its main effect is to establish a presumption that the circumstances to which the questions relate have an influence on the risk.

Where one of these circumstances, although existing at the outset, becomes known to the insurer only in the course of the contract, and no blame may be attributed to the policyholder, it is sufficient to allow the parties to rapidly reach an agreement on an appropriate amendment to their contract.

If it can be proved that the policyholder has not fulfilled his obligation as regards declaration, the insurer may terminate the contract, and any claim arising before the modification of the contract gives rise only to a proportional payment. On the other hand, if the policyholder has acted with the intention of deceiving the insurer, the latter is entitled to terminate the contract and retains the right to the premiums payable in respect of the current insurance period, while the policyholder for his part loses his right to cover.

The burden of proof of the existence of either of the last two situations lies on the insurer.

Article 4 - Increase of risk

Once the contract has been concluded, only changes in circumstances of which the insurer has requested notification have to be declared by the policyholder.

Otherwise, the consequences of such changes, and sanctions where declaration is not made, are based on those laid down in the preceding article relating to circumstances existing at the conclusion of the contract; in particular, the same time-limits and the same rules governing proof are applicable.

Articles 3 and 4 do not apply to the existence or emergence of circumstances excluded from the insurance cover, or the causes of withdrawal of cover, or where the risk has changed fundamentally.

Article 5 - Return of unjustified payments

This is a general provision which applies in any case referred to in the two preceding articles, except that of fraud, whoever has made the payment. It confirms the fact that the measures taken under the preceding articles are retrospective to the conclusion of the contract or the date of the increase in the risk, as the case may be.

Article 6 - Reduction of risk

This article complements Article 4 and gives the policyholder the right to receive a reduction in the premium corresponding to a reduction in the risk. It is laid down in the first paragraph that this rule does not apply where the risk diminishes as a result of a partial claim.

Article 7 - Payment of the premium

This article relates only to the consequences of failure to pay a premium due (annual premium during the current insurance period or at the time of automatic renewal of the contract).

The provision does not harmonize penalties for failure to pay, but merely lays down a minimum period of grace.

Article 8 - Reduction of loss

The costs of any measures taken by the policyholder to reduce the loss, provided that they were reasonable, are to be borne by the insurer in full, i.e. even beyond the sum insured or, where appropriate, according to the proportion imposed by an under-insurance or an excess.

The question of whether the measures are reasonable depends on the circumstances and is left to the courts to decide. Nevertheless, the first paragraph admits a dual presumption in favour of the policyholder in the event of instructions by the insurer or compliance with provisions of the contract.

If the policyholder fails to take reasonable steps to reduce the loss, and may be considered to have acted improperly, he is required to compensate the loss which the insurer suffers as a result although he can free himself of this obligation if he is able to prove that he was not at fault. He is deprived of his right to settlement of his claim only if it is proved that he acted with the intention of injuring the insurer.

Article 9

It is laid down in paragraph 1 that the policyholder must be granted a reasonable period in which to declare the claim. In view of the diversity of the risks covered, it is impossible to fix a single time-limit. National laws, moreover, remain free to determine what is a reasonable time-limit in certain classes of insurance. An indication of a time-limit in the policy cannot impose an unreasonably short time-limit on the policyholder (by virtue of Article 12): its validity must be determined by reference to the criterion laid down in paragraph 1. Apart from cases of fraudulent conduct (paragraph 4), an insurer who proves that the policyholder has not declared the claim or has not provided the necessary information is entitled only to compensation for the loss he has suffered as a result.

No penalty may be imposed on the policyholder where he was not acting improperly in failing to make the declaration (paragraph 3).

Article 10

This provision covers three procedures by which the contract may be terminated: immediate termination, which is as a rule the penalty for fraudulent conduct on the part of one of the parties (paragraph 2) - Article 3(4) of the directive gives an example of this; premature termination, which operates only in the cases listed exhaustively by the law (see, for example, Article 3(2) or in the policy (paragraph 1) and which is subject to the observance of a certain period of notice (paragraph 3(a)); finally, the expiry and cancellation of a contract which is automatically renewable (paragraph 3(b)). Contracts extending over more than three years may be terminated by the policyholder each year beyond the third year (paragraph 3(c)). Paragraph 3(d) contains a special provision covering contracts drawn up on an actuarial basis, termination of which by the insurer may be very damaging for the policyholder; the Member States may, for example, prohibit the insurer from terminating the contract in circumstances other than those referred to in Articles 3 and 4.

Article 11

This provision lays down the extent to which an insured person who is not the policyholder (i.e. another holder of the object insured) may invoke the provision of the directive or have them invoked against him. The protection of the rights of third parties, in particular injured third

parties need not be harmonized. The most suitable solution to this problem must be found in the adoption of a rule of private international law, but the present directive does not constitute a suitable setting for such a provision.

Article 12

Some delegations have expressed the desire that this directive should be considered minimal in all respects - i.e. not only the contracting parties but also the Member States should be able to change the content of the Directive to give increased protection to policyholders.

The arguments put forward to support this view have been two fold. Firstly it would be difficult to arrest the continuous development of contract law and, secondly, the adoption of the directive in its present form would lead some Member States to change their laws to make them less favourable to policyholders than they are at present. In reply to this, it could be stated that, firstly, the fact that the contracting parties are able to change the contract in favour of the policyholder is itself a not inconsiderable element of flexibility. Moreover, in every case where it was considered possible, the directive allows Member States to apply it in a more flexible manner vis-à-vis the policyholder, either by fixing a minimum time-limit (e.g. Article 7) or by an express provision in this respect (e.g. Article 19(2)).

The Commission, however, has rejected this view on grounds which appeared to it to be decisive. Many provisions have involved a choice between different systems which have nevertheless been justified by the Member States applying them by a desire to afford the best possible protection to the policyholder (e.g. principle of proportionality, Article 3(3)(c), as against the principle of causality). If Member States were free to change the solutions adopted in the directive, the situation would be as before and would therefore negate completely the harmonization work achieved. Member States would therefore be entitled once again to claim that there was no harmonization of the fundamental principles of contract law and thus maintain the present obstacles to the effective exercise of freedom to provide services. It should not be forgotten that the aim of this harmonization work, as has already been emphasized, is not only to afford essential and adequate protection to the policyholder on the basis of harmonized rules but also to prevent undertakings from being able to use the often considerable differences between various laws to make freedom of choice of applicable law an element of competition, which is inadmissible.

Articles 13, 14 and 15

These articles do not require any particular comment.

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) and 66 thereof;

Having regard to the proposal from the Commission;

Having regard to the opinion of the European Parliament;

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

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

Whereas the second Council Directive .../.../EEC of ... 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 granted the parties freedom to choose the law applicable to the contract, firstly in the case of risks classified as transport, primarily on account of their frequently international character, and secondly in the case of certain risks which are defined by precise criteria in respect of which there is less need of protection for insured persons;

Whereas, however, pending subsequent coordination of national rules governing insurance contracts, that Directive maintained in respect of other risks the principle of the application of the law in force in the State in which the risk is situated; whereas such coordination, by establishing a balance between the interests of the insurer on the one hand and the protection of the policyholder and the insured person on the other, is likely to enable freedom of choice to be extended and thus to facilitate the exercise of freedom to provide services;

Whereas it was considered advisable to exclude from the scope of the directive marine, aviation and transport insurance because of their widely international character and the freedom traditionally allowed to the parties in concluding such contracts; whereas the credit and suretyship insurance classes display peculiarities which, pending subsequent coordination, justify not making them subject to the provisions of this directive as they stand;

Whereas among the fundamental problems posed by legislation on insurance contracts are 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;

Whereas it is also necessary 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;

Whereas, as regards the problems regulated in this Directive, Member States may be authorized to adopt different solutions only where this is expressly provided for in the text of the Directive; whereas any other approach would call into question the objectives of the Directive; whereas however, there is nothing to prevent the parties from derogating from the provisions adopted pursuant to the Directive, provided that such derogation favour the policyholder, insured person or third party;

HAS ADOPTED THIS DIRECTIVE:

Article 1

The object of this Directive is to coordinate the fundamental laws, regulations and administrative provisions governing insurance contracts relating to one of the classes contained in point A of the Annex to Directive 73/239/EEC 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 assurance¹, with the exception of the classes contained in points 4 (railway rolling stock), 5 (aircraft), 6 (ships (sea, lake and river and canal vessels)), 7 (goods in transit), 11 (aircraft liability), 12 (liability for ships (sea, lake and river and canal vessels)), 14 (credit) and 15 (suretyship).

¹ OJ No L 228, 16.8.1973, p. 3.

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Article 2

1. Every insurance contract shall give rise to the issue to the policyholder of a document containing at least the following information:
 - (a) the name and address or head office of the contracting parties;
 - (b) the subject matter of the insurance and a description of the risks covered;
 - (c) the amount insured or the method of calculating it;
 - (d) the amount of the premium or contribution or the method of calculating it;
 - (e) the dates on which premiums or contributions fall due;
 - (f) the duration of the contract and the times at which cover commences and expires and, where it applies, the time of automatic renewal.
2. Pending the issue of such a document the policyholder shall be entitled to receive, at the earliest opportunity, a document which attests to the existence of an insurance contract and contains at least the information referred to in paragraph 1 (a), (b) and (c).
3. If, after the contract has been concluded any change occurs that affects the information referred to under paragraph 1 (a) to (f), the insurer shall furnish the policyholder with a document notifying such change.
4. If provisional cover is provided the policyholder shall receive a document which certifies that such cover has in fact been provided and which contains at least the information referred to in paragraph 1(a), (b), (c) and (f).
5. The documents referred to in the above paragraphs have only a probative value.
6. The contract shall be drafted in the language of the Member State whose law is applicable.

However, the policyholder shall be entitled to stipulate as a condition precedent to the conclusion of the contract that all documents relating to the conclusion, amendment and performance of the insurance contract be translated into the language of his habitual residence, provided such language is an official language of the Community.
7. Notwithstanding the provisions of this Article, the laws of the Member States may authorize a simplified form for insurance contracts concluded for a short period and for bearer policies.

Article 3

1. When concluding the contract, the policyholder shall declare to the insurer any circumstances of which he is aware which may influence the insurer's assessment or acceptance of the risk. The policyholder shall not be obliged to declare to the insurer circumstances which are already known to the latter or which are common knowledge. Any circumstance in respect of which the insurer has asked specific questions in writing shall, in the absence of proof to the contrary, be regarded as influencing the assessment and acceptance of the risk.

2. (a) If circumstances which were unknown to both parties when the contract was concluded come to light subsequently or if the policyholder has failed to fulfil the obligation referred to in paragraph 1, the insurer shall be entitled, within a period of two months from the date on which he becomes aware of the fact, to propose an amendment to the contract.
 - (b) (i) The policyholder shall be entitled to a period of fifteen days from the date on which he receives the proposal for an amendment in which to accept or reject it. If the policyholder rejects the proposal or fails to reply within the above time limit, the insurer may terminate the contract within a period of eight days by giving fifteen days' notice.
 - (ii) If the contract is terminated, the insurer shall refund to the policyholder the proportion of the premium of the period for which cover is not provided.
 - (iii) If a claim arises before the contract is amended or before termination of the contract has taken effect, the insurer shall provide the agreed cover.

3. If the policyholder has failed to fulfil the obligation referred to in paragraph 1 and may be considered to have acted improperly, the insurer may terminate the contract or propose an amendment to it.
 - (a) The insurer shall choose either to terminate the contract or to propose an amendment to it within two months from the date on which he becomes aware of such facts. Termination shall take effect fifteen days after the date on which the policyholder is notified thereof at his last known address.

If the insurer has proposed an amendment to the contract, the policyholder shall be entitled to accept or reject it within fifteen days from the date on which he receives the proposal for an amendment. If the policyholder refuses the proposal or fails to reply, the insurer may terminate the contract within eight days by giving fifteen days' notice.
 - (b) If the contract is terminated the insurer shall refund to the policyholder the proportion of the premium in respect of the period for which cover is not provided.
 - (c) If a claim arises before the contract is amended or before termination of the contract has taken effect, the insurer shall be liable to provide only such cover as is in accordance with the ratio between the premium paid and the premium that the policyholder should have paid if he had declared the risk correctly.

4. If the policyholder has failed to fulfil the obligation referred to in paragraph 1 with the intention of deceiving the insurer, the latter may terminate the contract.
 - (a) The insurer shall take such action within two months from the date on which he becomes aware of such facts.
 - (b) By way of damages, premiums paid shall be retained by the insurer who shall be entitled to the payment of all premiums due.
 - (c) The insurer shall not be liable in respect of any claim.
5. In the cases referred to in paragraphs 3 and 4, the burden of proof of fraudulent or improper conduct on the part of the policyholder shall rest on the insurer.

Article 4

1. From the time when the contract is concluded, the policyholder shall declare to the insurer any new circumstances or changes in circumstance of which the insurer has requested notification in the contract. Such declaration shall be made not later than the time when the risk increases where this is attributable to an intentional act of the policyholder; in all other cases, it must be made immediately the policyholder becomes aware of the increase.
2. The insurer may, within two months of the date on which he was notified of the increase of the risk, propose an amendment to the contract in accordance with the procedure laid down in Article 3(2)(b).
3. If the policyholder has failed to fulfil the obligation referred to in paragraph 1, such failure to give notice shall not give rise to any sanction where it relates to a new circumstance or change in circumstances which is not liable to appreciably and permanently increase the risk and lead to an increase in the premium.
4. If the policyholder has failed to fulfil the obligation referred to in paragraph 1, the insurer may, within two months of the date on which he becomes aware of such fact, propose an amendment to the contract in accordance with the procedure laid down in Article 3(2)(b).
5. If the policyholder has failed to fulfil the obligation referred to in paragraph 1 and may be considered to have acted improperly, Article 3(3) shall apply.
6. If the policyholder has failed to fulfil the obligation referred to in paragraph 1 with the intention of deceiving the insurer, the latter may terminate the contract.
 - (a) The insurer shall take such action within two months from the date on which he becomes aware of such fact;
 - (b) By way of damages, any premiums paid shall be retained by the insurer who shall be entitled to the payment of all premiums due.
 - (c) The insurer shall not be liable in respect of any claim arising after the increase of the risk.
7. In the cases referred to in paragraphs 5 and 6, the burden of proof of fraudulent or improper conduct on the part of the policyholder shall rest on the insurer.

Article 5

Any unjustified payment made pursuant to Articles 3 and 4 shall be refunded.

Article 6

If, while the contract is in force, the risk has diminished appreciably and permanently because of circumstances other than those covered by the contract, and if this justifies a reduction in the premium, the policyholder shall be entitled to terminate the contract without compensation if the insurer does not consent to reduce the premium proportionately.

The right to terminate the contract shall arise immediately the insurer refuses to reduce the premium or, where he fails to reply to the policyholder's proposal, after a period of fifteen days following such proposal.

Where the contract is terminated, the insurer shall refund to the policyholder a proportion of the premium corresponding to the period for which cover is not provided, less the administrative costs involved.

Article 7

Failure to pay a premium or part thereof shall be penalized only after a period of grace of at least fifteen days has elapsed from the date on which the policyholder is notified, in writing and after the date on which payment is due, of the penalty.

This provision shall not apply to any failure to pay the first premium or the single premium of an annual contract where the contract or the law provides that commencement of cover shall be conditional upon payment of such premium.

Article 8

1. If a claim arises, the policyholder shall take all reasonable steps to avoid or reduce the consequences. In particular, instructions from the insurer or compliance with specific provisions on this point contained in the contract shall be considered reasonable.
2. Any costs incurred by the policyholder in performing the obligation referred to in paragraph 1 shall be borne by the insurer.
3. If the insurer is required, under the contract, to pay in respect of only part of the loss, he shall be obliged to refund only a proportion of the costs referred to in the preceding paragraph unless the policyholder acted on his instructions.
4. If the policyholder fails to comply with the provision laid down in paragraph 1, and may be considered to have acted improperly, the insurer may claim compensation for the loss which he has suffered.
5. If the insurer proves that the policyholder's failure to fulfil the obligation laid down in paragraph 1 was intended to cause him loss or to deceive him, he shall be released from all liability to make payment in respect of the claim.

Article 9

1. If a claim arises, the policyholder shall declare it to the insurer in accordance with the conditions and time-limits laid down in the policy. The time-limit must be reasonable. Such time-limit may be fixed by national laws for certain classes of insurance.
2. The insurer may require the policyholder to provide all the necessary information and documents on the circumstances and consequences of the claim.
3. If the policyholder fails to fulfil the obligations referred to in paragraphs 1 and 2, and may be considered to have acted improperly, the insurer shall be entitled to claim compensation for the loss he has suffered.
4. If the insurer proves that the policyholder's failure to fulfil one of the obligations laid down in paragraphs 1 and 2 was intended to cause him loss or to deceive him, he shall be released from all liability to make payment in respect of the claim.

Article 10

1. The circumstances and conditions in which the contract may be denounced or terminated shall be set out in the contract either directly or by reference to the law.
2. The contract may be terminated without notice only where one of the parties has failed to fulfil one of its obligations with the intention of deceiving the other. The policyholder may also be granted a right under national law to terminate the contract without notice in other circumstances.
3. Without prejudice to the circumstances referred to in paragraph 2:
 - (a) premature termination on the part of the policyholder or the insurer shall not take effect until a period of fifteen days has elapsed from the date on which notice of termination is given, as the case may be, to the insurer or to the policyholder at his last known address.
 - (b) if provision is made in the contract for automatic renewal, such renewal shall take effect in each case for a period not exceeding one year, unless one of the parties gives notice of termination at least two months before the date of expiry of the current insurance period.
 - (c) if the contract is for a period of more than three years, the policyholder may terminate it at the end of the third year or of any subsequent year by giving at least two months' notice.
 - (d) as regards sickness insurance and contracts drawn up on the same basis as life assurance contracts, national law may, by way of derogation from subparagraphs (a) and (b), limit or prohibit termination of the contract by the insurer.

Article 11

If the insured person is not the policyholder, he shall have the same rights against the insurer as Article 8(2) grants to the policyholder. He shall be treated in the same way as the latter for the purposes of Articles 3(1), 4(1), 8(1) and 9(1) and (2) as regards the obligations referred to in those Articles where he has knowledge of the contract and is able to fulfil such obligations.

Article 12

The parties to the contract may agree on more favourable terms for the policyholder, insured person or injured third party than are provided for in this Directive.

Article 13

Member States shall bring into force the measures necessary to comply with this directive within eighteen months of its notification. They shall forthwith inform the Commission thereof.

Article 14

After notification of this Directive, Member States shall ensure that the Commission is informed, in sufficient time for it to submit its comments, of any new laws, regulations or administrative provisions which they intend to adopt. They shall also inform the other Member States thereof.

Article 15

This Directive is addressed to the Member States.