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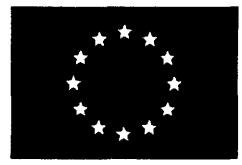

DIRECTORATE GENERAL FOR RESEARCH

WORKING PAPERS

EUROPEANISATION OF THE INSURANCE INDUSTRY IN THE INTERNAL MARKET AFTER 1992

- LIFE ASSURANCE -

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EUROPEANISATION OF THE INSURANCE INDUSTRY IN THE INTERNAL MARKET AFTER 1992

- Life Assurance -

Contents

Europeanisation of the Insurance Industry in the Internal Market after 1992

- Life Assurance -

I. The range of problems

1. The Commission emphasises in its proposal for a 3rd Directive on the coordination of the legal and administrative provisions for direct insurance (life assurance) dated 22.3.1991:

> **"The completion of the internal market in insurance represents a primary goal of the Commission in view of the importance of this strongly expanding sector, particularly in life assurance, and the work already carried out in other financial service fields with regard to the creation of a single financial market."**[1]

Such priority treatment for liberalisation, as the Commission puts it, is new; previously the life assurance sector brought up the rear so far as the sought-after liberalisation of economic activities in the Community was concerned.

Thus liberalisation in some other financial services sectors had been completed years before:

- Collective investment undertakings for transferable securities (CIUTS)(Dir 85/611, O.J. L 375 of 31.12.1985)
- Banking sector (2.Dir 89/646; O.J. L 386 of 30.12.1989)[2]
- Transactions in securities (O.J. C 43 of 22.2.1989)

The consequence of this partial liberalisation of the financial services market of the EC is a distortion of competition to the detriment of the life assurance enterprises, "which compete directly with other providers of financial services for certain products".[3] For the insurance enterprises are at present still forced to operate in twelve closed markets, which are subject to different regulations as regards the commencement and pursuit of such activities in terms of both freedom of establishment and freedom of services.
It is essential to overcome such differences in legal systems and regulations in individual Member States in order to create an integrated European insurance market.

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1 Commission of the EC, COM (91) 57 final-SYN 329, p. 2.
2 See most recently in this connection Schneider, NJW 1991, 1985 ff.
3 COM (91) 57 final-SYN 329, p. 12.

An indication of the importance of the insurance market and the concentration of life assurance enterprises is given in the following tables:

Insurance density and premiums per head of the population

Country	Premiums as a % of GDP(1)	Premiums per head of the population (US dollars) Total	Non-Life	Life	Information: Taxes & Social Security contributions as a % of GNP
			1970		
USA	6.84	330.6	208.3	122.3	29.2
Canada	4.66	184.6	103.4	81.2	---
FR Germany	4.09	123.3	75.2	48.1	32.9
Belgium	3.38	90.7	65.3	25.4	35.2
France	3.27	88.9*	69.3	19.6	35.1
Great Britain	5.42	92.2*	30.4	61.8	37.0
Italy	2.00	34.8	26.8	8.0	26.1
Netherlands	4.91	120.0*	67.2	52.8	37.6
Switzerland	4.63	160.5	83.5	77.0	23.8
Japan	3.90	75.8	27.3	48.5	19.7
			1989		
USA	8.78	1,817.1	1,062.2	754.9	29.2
Canada	5.20	1,116.9	571.1	545.8	---
FR Germany	5.81	1,241.7	771.1	470.6	38.1
Belgium	4.06	705.8	494.2	211.7	42.8
France	6.00	1,126.6	525.8	600.9	43.9
Great Britain	9.38	1,335.7	485.2	850.5	36.5
Italy	2.50	406.4	306.2	100.1	38.4
Netherlands	7.67	1,281.1	677.1	604.0	46.1
Switzerland	8.43	2,375.6	1,018.8	1,356.8	31.9
Japan	9.71	2,150.0	---		31.3 (2)

* estimated
(1) 1970: Premiums as a % of GNP
(2) 1988
Source: Swiss Reinsurance Company, sigma, Federal Ministry of Finance, Financial Report 1991

Market shares of the largest life assurance companies in 12 countries

	Weighted Market shares in 1987 of the		
	3 largest	10 largest	15 largest
Country	First insurers in %		
Switzerland	58.7	89.0	96.9
Japan	46.9	84.0	95.5
Sweden (1,2)	51.0	90.0	95.1
Austria	39.4	75.2	86.8
Italy	51.2	78.2	85.3
Spain (3)	53.6	77.7	84.4
Netherlands(2)	45.8	73.9	79.5
France (2)	38.9	66.1	74.6
Canada (4)	29.3	62.4	74.1
FR Germany	26.3	48.5	59.7
Great Britain	23.5	47.0	59.0
USA (5)	15.1	27.8	33.8
Average (6)	30.2	54.4	63.3

* legally independent entities (in Great Britain financial groups/groups of companies)
(1) Total business (2) 1986 (3) incl.single premiums
(4) without annuities (5) Life/sickness
(6) weighted with world shares of the respective countries

Source: Swiss Reinsurance Company, sigma

2. In the insurance industry the following significant differences in legal systems emerge:[4]

- different conditions under which insurance activities are licensed, especially those relating to the provision of own capital which must also be geared to transfrontier activities;

- different standards of supervision in respect of current business;

[4] Roth, EuR 1986, 340 (349).

- differences in the development of the protection of customers' interests, particularly with regard to the monitoring of policy terms (GIP);[5]

- differences in insurance systems (keyword: separation of branches)

II. The Liberalisation targets

The way in which such differences may be overcome is first sketched out by the EEC Treaty, which has been amplified by the Single European Act (SEA) of 28.2.1986.

As early as 1957 the six Founder Member States of the EEC undertook in the Treaty of Rome to create conditions resembling an internal market in the territory of the Community by certain dates. The central point of this undertaking is the creation of full freedom of establishment and services within the meaning of Arts. 52 ff and 59 ff of the EEC Treaty. The relevant legal provisions were to be coordinated for this purpose.[6]

The creation of freedom of establishment and services in the sphere of direct insurance (life assurance) is necessary "in order to make it possible for insurance enterprises having their principal place of business in the Community to enter into commitments within the Community".[7]

1. Freedom of establishment

Under the terms of Art. 52 Para. 2 of the EEC Treaty freedom of establishment covers the pursuit of independent gainful employment by an insurer belonging to one Member State on the territory of another Member State either in person or by means of subsidiary companies, branch establishments or agencies. Under those terms it is necessary for there to be a transfer or expansion of activity in another Member State that is intended to be final or permanent. This definition of freedom of establishment is fully applicable to the direct insurance sector (life assurance).

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[5] But cf. Schintowski, NJW 1987, 521 (525 Fn.51).
[6] On this point see Richter, Internationales Versicherungsvertragsrecht, p. 116.
[7] COM (91) 57 final-SYN 329, p. 38.

2. Freedom of services

The unambiguous definition of the concept of freedom of services in connection with direct insurance (life assurance) presents difficulties.

Freedom of services basically covers independent, gainful employment, provided that it extends across borders, is only temporary and is not comprehended within the free movement of goods and capital or the freedom of domicile on the part of employees. The crucial factor is that the provider of the service and the recipient are resident in different Member States.[8]

In order to determine whether insurance services also come under the concept of freedom of services within the meaning of Art. 59 of the EEC Treaty, one must ascertain where the insurer performs his service; if he performs it where the enterprise's principal place of business is situated, there is no scope for freedom of services; if, however, he performs the service in the country in which the risk is incurred or in which the activity takes place, then the service must be judged by Art. 60 Para.1 of the EEC Treaty. An activity within the meaning of Art. 60 Para. 1 of the EEC Treaty is considered to mean any action carried out in another Member State for the purposes of performing the service. Included therein, therefore, are all insurance activities that are carried on for the purposes of taking out or implementing insurance policies.

Moreover, the scope of Art. 59 ff of the EEC Treaty also covers the area of so-called "negative freedom of services", which is characterised by the fact that the recipient of the service approaches the insurer whose principal place of business is situated in another Member State.[9]

Freedom of services is differentiated from freedom of establishment by entailing an only temporary, occasional expansion of an activity normally carried on within the frontiers of the country where the principal place of business is situated into the territory of another Member State "without one of the possible forms of establishment in another Member State thereby obtaining de jure or de facto".[10]

In any event, freedom of services ends where the foreign insurer in the course of business uses the services of an agency or an authorised representative within the

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[8] Cf. CJEC Judgement of 4.12.1986, NJW 1987, 572 (573).

[9] On this point see Völker, Die passive Dienstleistungsfreiheit im europäischen Gemeinschaftsrecht.

[10] V.d.Burg, Versicherungswirtschaft 1968, p. 14.

country.

Accordingly, the Court of Justice of the European Communities (CJEC) has drawn attention in its landmark judgement of 4.12.1986 to the fact that the sphere of freedom of services performs a backup function with respect to that of freedom of establishment in so far as an insurance enterprise can rely on freedom of services under the terms of Arts. 59, 60 of the EEC Treaty only if the business activities of the insurer are not already subsumed under the provisions of freedom of establishment. The EC Court of Justice argued as follows:

> "In this respect it has to be admitted that an insurance enterprise of another Member State that maintains a constant presence in the Member State concerned is subject to the provisions of the Treaty on the right of establishment. (....)In view of the definition in Art. 60, Para. 1 of the EEC Treaty referred to, therefore, such an insurance enterprise cannot rely on Arts. 59 and 60 of the EEC Treaty with regard to its activities in the Member State concerned."[11]

Services in the sphere of direct insurance (life assurance) are consequently all services

- which are performed by an insurance enterprise that is a licensed institution with its principal place of business in a Member State
- for a policy holder or an insured person who is resident in another Member State,
- for the purpose of taking out, administering or implementing insurance policies,
- in so far as they do not come within the rules of the right of establishment (Art. 52 ff of the EEC Treaty).[12]

3. The liberalisation precept of the EEC Treaty

The targets for creating the free circulation of services in the sphere of direct insurance (life assurance) are already set out in the EEC Treaty. Thus Art. 59 Para. 1 of the EEC Treaty provides that the restrictions on the free circulation of services within the Community should be gradually abolished.

In the sphere of direct insurance this liberalisation precept in Art. 59 Para. 1 of the EEC Treaty is subject to the special provisions of Art. 61 Para. 2 of the EEC

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[11] CJEC Judgement of 4.12.1986, NJW 1987, 572 (573).
[12] Cf. Richter, Internationales Versicherungsvertragsrecht, p. 124.

Treaty. Under this, liberalisation of the insurance enterprises' services that are associated with capital movements is to be introduced in line with the gradual liberalisation of capital movements.[13] Even if up to now no consensus has been reached about the scope of Art. 61 Para. 2, this is questionable to the extent that those services in the sphere of the insurance industry that come under the concept of capital movements within the meaning of Art. 61 Para. 2 of the EEC Treaty are already liberalised to a great extent. In particular, the disbursement of insurance services falls within "List A" of the Liberalisation Directive of 11.5.1960.[14]

III. Developments in achieving free circulation of services

The road towards abolishing the restrictions on the free circulation of services in the sphere of direct insurance on which Art. 59 of the EEC Treaty focuses, in so far as it refers to a "gradual" abolition, is not, however, finally defined in concrete terms by the EEC Treaty. Art. 63 Paras. 1 and 2 of the EEC Treaty do, however, commit the EC Council to institute at the outset before the end of the first stage of liberalisation of services a "General Programme for the removal of restrictions on the free circulation of services within the Community", the implementation of which should require the EC Council to issue directives subsequently.

1. General Programmes

As early as 1962 the Council proposed two "General Programmes".[15] Under these it was intended that freedom both of establishment and of services - linked chronologically with the twelve-year transitional period expiring on 31.12.1969 - should be achieved in the insurance industry at two-yearly intervals. The following target dates emerged from the "General Programmes":

1964 Freedom of establishment and services in the reinsurance sector

1966 Freedom of establishment in the indemnity insurance sector

1968 Freedom of establishment in the life assurance sector

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[13] Cf. also CJEC Judgement of 4.12.1986, NJW 1987, 572 (573).

[14] O.J. 1960, 921 ff; cf. on this point Roth, EuR 1986, 340 (341 Fn.5).

[15] General Programme for the Removal of Restrictions on Freedom of Establishment of 18.12.1961 (O.J. of 15.1.1962, 32 ff.) and General Programme for the Removal of Restrictions on the Free Circulation of services of 18.12.1961 (O.J. of 15.1.1962, 36 ff.).

1968 Freedom of services in the indemnity insurance sector

1970 Freedom of services in the life assurance sector

The sphere of direct insurance (life assurance) was then intended to be liberalised in two stages, 1968 and 1970, in accordance with the targets set by the EEC Treaty.[16] Such a time frame, which was put forward as a target by Art. 8 Para. 1 of the EEC Treaty was, however, insufficient to solve the complicated harmonisation and liberalisation problems in the insurance industry. The timetable was too crowded. The difficulties[17] were primarily due to the fact that work on the liberalisation was aimed at a far-reaching alignment of substantive law.

2. The change in the conception of harmonisation

After the end of the transitional period and after the Community had realised that they had set too ambitious a goal, the Seventies saw a change in the Commission's conception of harmonisation. Harmonisation based on extensive alignment of substantive law was in future to be replaced by the postulate of equivalence and the principle of mutual trust between the Member States.[18] Alignment of substantive law was therefore to be kept in future to an absolutely necessary minimum.[19]

In line with this change in conception a start was made on liberalising direct insurance in 1973 - 11 years after the adoption of the "General Programmes" - and this was achieved on a very small scale.

3. The First Coordination Directive (Indemnity Insurance)

The First Coordination Directive relating to the sphere of direct insurance (indemnity insurance) was issued in

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[16] Cf. Schintowski, NJW 1987, 520 Fn.9.

[17] On the difficulties in detail, Roth, EuR 1986, 340 (352/353): "The difficulties outlined here (...) suggest that harmonisation is tantamount to squaring the circle: creation of conditions resembling a single market by avoiding distortions of competition without any excessive encroachment on national traditions and idiosyncrasies, together with a legislative procedure in which the principle of unanimity prevails de jure and de facto; not to speak of the complexity of the legal problems themselves, the difficulties involved in the quest for convincing solutions to factual questions, the alternatives presented in the field of legal policy (keyword: deregulation), but also the development of adequate solutions for harmonisation (keyword: total and partial alignment, degree of alignment).".

[18] On this point see Michaelis, Wirtschaftsdienst 1990/IX, p. 483 ff.; also Müller-Graff, EuR 1989, 107 ff.

[19] Roth, EuR 1986, 340 (344).

1973.[20] The Directive resulted in a minimal alignment of national supervisory laws.

> "In order to facilitate the commencement and practice of such insurance activities, it is necessary to eliminate specific differences between the supervisory laws of the Member States, whilst insisting on the maintenance of appropriate protection for policy holders and third parties in all Member States; to this end the provisions affecting the financial guarantees required by the insurance enterprises must especially be coordinated."[21]

In the process the supervisory criteria relating to current business were still not standardised. In particular, the criteria for forming actuarial reserves and provision of security for them (cover) were still left to Member States.

4. The First Coordination Directive (Life Assurance)

Consideration was given to direct insurance (life assurance) in 1979 with the First Coordination Directive.[22] This Directive was based - with differences relating to the required provision of own capital - on the regulation model of the first Coordination Directive for indemnity insurance.

In this way the need for licensing and the terms under which the commencement of insurance activities and the setting up of a branch establishment would be approved were standardised. Particular emphasis should be placed here on the regulations concerning the provision of own capital - solvency margin and guarantee fund - abolition of an examination of needs, submission of an activity plan, formation of actuarial reserves.

At the same time in the case of the examination of solvency the supervisory competence regarding the activities of branch establishments was transferred from the country where the activities were carried out to the country where the principal place of business was situated.

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[20] Directive of 24.7.1973 (O.J. L 228/3 of 1973) - First Directive of the Council on the Coordination of the Legal and Administrative Provisions regarding the Commencement and Practice of Direct Insurance (except for life assurance).

[21] Directive of 16.8.1973 (O.J. L 228/3).

[22] Directive of 3.5.1979 (O.J. L 63/1 of 1979) - First Directive of the Council on the Coordination of the Legal and Administrative Provisions regarding the Commencement and Practice of Direct Insurance (Life Assurance).

The principle of separation of branches was confirmed in the light of the protection for policy holders. Thus Art. 14, Para. 1 of the Directive ran:

> "The separate administration under the terms of Art. 13, Para. 3 must be so organised that the activities falling within this Directive and the First Directive on coordinating indemnity insurance are kept separate, so that
>
> - the respective interests of life and indemnity policy holders are not impaired and, in particular, profits from life assurance benefit life assurance policy holders, as though the enterprise were exclusively carrying on life assurance business;
>
> - the financial minimum obligations, in particular the solvency margins, which are imposed on one of the activities either under this Directive or the First Directive on Coordination of Indemnity Insurance, are not borne by the other activities."

Special regulations for achieving freedom of services were almost entirely lacking, even though the standardisation of the provision of capital for enterprises contained in the Directive represented a significant prerequisite for the free circulation of services.[23]

5. The Co-insurance Directive

At the outset only the Co-insurance Directive [24] issued in 1978 contained elements for liberalising services. This Directive facilitated transfrontier co-insurance (primarily of major commercial risks) without licensing and establishment being required.[25]

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[23] Also Roth, EuR 1986, 340 (350).
[24] Directive of 30.5.1978 (O.J. L 151/25 of 1978) - Directive of the Council on the Coordination of the Legal and Administrative Provisions in the field of Co-insurance at the Community level.
[25] Cf. Schintowski, NJW 1987, 521 (522); Roth EuR 1986, 340 (350).

6. The Second Coordination Directive (Indemnity Insurance)

A further step towards liberalisation of the insurance business was taken in the form of the Second Directive on Direct Insurance (Indemnity Insurance)[26].

The Directive lays down the procedures intended to make the free circulation of services in direct insurance (indemnity insurance) easier, by introducing two different legal provisions with regard to the supervisory law. Thus the Directive distinguishes between "major risks" (Art. 5) and "mass risks".

So far as major risks are concerned, the Directive adheres to the approach of the so-called home country control instituted in the 1985 White Paper, and envisages the application of the supervisory law of the Member State whose insurer covers the risk.

In contrast mass risks under the Directive are subject to the so-called host country control; according to this the principle of the applicability of the supervisory law of the Member State in which the risk to be insured is located is held to apply (Art. 7 Para. 1).

This differentiation by quantitative and qualitative criteria and the resulting distinction between home country control and host country control is of course intended by the EC Council to be only an interim solution. The Council put it thus on 9.2.1988 in its Joint Point of View:[27]

> "In the light of the European Court of Justice's judgement according to which the protection that is afforded to the policy holder in the case of mass risks by virtue of the legal provisions of his country can be taken up by the latter solely within the framework of a harmonisation of an individual country's legal provisions, particularly with respect to actuarial reserves and their presentation, the Council found itself obliged in the interests of efficiency to envisage a pragmatic solution in relation to actuarial reserves, i.e.

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[26] Directive of 4.7.1988 (O.J. L 172/1) - Second Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (excluding Life Assurance) and Facilitation of the actual Practice of Free Circulation of Services and Amendment of the Directive 73/239/EEC.

[27] Doc.PE C2-65/88 of 2.6.1988, pp. 61/62.

- immediate application of the principle of "home country control" in the case of major risks;

- in the case of mass risks postponement of the start of the application of this principle until a later date when extensive harmonisation is achieved on the basis of a new proposal from the Commission."

The directive went on to define the competences and resources of the supervisory authorities and envisaged special provisions regarding access to the activities generated by the free circulation of services and of their practice and supervision. The Directive thereby established the principle of host country control or of home country control.

As a result, the Directive made a great contribution to achieving the single internal market in the insurance industry. For it allowed policy holders, who because of their characteristics, their importance or the type of risk to be covered (commercial risks/major risks not subject to supervision) need no special protection in the country in which the risk is located, unlimited freedom in the choice of suitable insurance in as wide an insurance market as possible.

On the other hand, the Directive was still based on the fact that in the case of mass risks policy holders can only be guaranteed appropriate protection by the supervisory law of the host country where the risk is located being applicable.[28]

7. The Second Coordination Directive (Life Assurance)

This concept, which takes as a starting point the individual policy holder's need for protection, has also taken over the Second Directive on direct insurance (life assurance).[29] It structures the free circulation of services for life assurance in the same way by two regulations:

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[28] Cf. DOC.PE. C2-65/88, p. 3.

[29] Directive of 8.11.1990 (O.J. L 330/50 of 29.11.1990) - Second Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (Life Assurance) and on Facilitation of the Actual Practice of the Free Circulation of Services (sic) on Amendment of the Directive 79/267/EEC.

- For policy holders who try to cover their risks by means of the free circulation of services in one of the Member States and approach a foreign insurer, the supervisory law of the Member State in which the insurer has his principal place of business applies.

- In contrast the supervisory law of the Member State in which the insurer performs his service applies if the insurer himself prompts the taking out of a policy.

In the process the Directive assumes that the policy holder who by himself moves out of the protection of his country by trying to cover his risk in an insurance enterprise domiciled in another Member State is not so worthy of protection as the one whom the foreign insurer approaches.[30]

The idea of gearing the achievement of - and hence too the restriction on - freedom of services to the need to protect the individual policy holder logically completes the concept of the direct applicability of freedom of services[31] (as one of the four basic freedoms in the EEC Treaty).[32] Restrictions on freedom of services are accordingly only involved if the public interest (protection of the policy holders' interests) so demands.[33]

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[30] Cf. Directive of 8.11.1990 (O.J. L 330/50 of 29.11.1990).
[31] CJEC 1974, 1299; CJEC 1974, 631 (649 ff.); CJEC 1979, 649.
[32] Cf. Schintowski, NJW 1987, 521 (525).
[33] CJEC Judgement of 4.12.1986, NJW 1987, 572 (574).

The EC Court of Justice in its ruling dated 4.12.1986[34] approved such a linking of the protection of the policy holders' interests with the permissible restriction on freedom of services by national supervisory laws. The application of the supervisory law of the host country where there is a need to protect the policy holder is accordingly compatible with the precept of lifting restrictions on freedom of services embodied in the EEC Treaty and directly applicable.

The Second Directive on direct insurance (life assurance) in this respect guarantees a careful balance between as much free competition as possible amongst insurance enterprises within the Community on the one hand and the necessary protection of the policy holder on the other.

8. The commitment to extending the principle of supervision in the country where the principal place of business is located.

The forces on the road to a final achievement of freedom of services for the insurance industry were displayed by the formal commitment entered into by the EC Commission in issuing the Second Directive for direct insurance (except for life assurance) to present as soon as possible proposals providing for the extension of the principle of supervision in the country where the principal place of business is located to the entire direct insurance business (except for life assurance) and its subordination to a uniform regulation.

9. The proposal for a Third Coordination Directive (Indemnity insurance)

The Commission complied with this commitment by presenting a proposal for a Third Directive for direct insurance (except for life assurance)[35]. The approach chosen for achieving freedom of services:

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[34] CJEC Judgement of 4.12.1986, NJW 1987, 521 ff.

[35] Directive of 27.7.1990 (O.J. C 244/28 of 28.9.1990) - Proposal for a Third Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (excluding Life Assurance) and on Amendment of the Directives 73/239/EEC and 88/357/EEC.

> "(...) lies in a basic, necessary and adequate harmonisation, in order to attain a mutual recognition of the licences and the systems of financial supervision which would permit the granting of a uniform licence valid within the entire Community and the application of the principle of supervision in the country where the principal place of business is located".[36]

The major features of the Directive are accordingly:

- the uniform licensing by the country where the principal place of business is located;
- the uniform supervisory responsibility of the country where the principal place of business is located for the financial solvency of the insurance enterprises.

In particular, the principle of uniform licensing by the country where the principal place of business is located corresponds to the argument of the EC Court of Justice in its judgement dated 4.12.1986, under which special national requirements for permission which cannot be justified on the grounds of public interest violate the precept of lifting restrictions on freedom of services within the meaning of Art. 59 of the EEC Treaty and are therefore in breach of Community law.[37]

The EC Court of Justice explained its reasoning in this connection:

> "(...) the obligation imposed on an insurer established in another Member State who is licensed by the supervisory authority of that State and subject to its supervision to have a secure branch establishment in the sovereign territory of the country of destination and to apply for a special licence from the supervisory authority of that state represent restrictions on the free circulation of services (...). These requirements can therefore only be regarded as compatible with Arts. 59 and 60 of the EEC Treaty if it is demonstrated that with regard to the activity concerned there are compelling public interest grounds which justify restrictions on the free circulation of services, that such an interest is not already safeguarded by the provisions of the country where the branch establishment is located and that the same result

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[36] Directive of 27.7.1990 5 O.J. C 244/28 of 28.9.1990.

[37] CJEC Judgement of 4.12.1986, NJW 1987, 572 (574).

cannot be achieved by less restrictive provisions".[38]

IV. The Proposal for a Third Coordination Directive (Life Assurance)

1. Essential Content of Proposal

In line with this conception in favour of which the Commission decided in the Second Directive for direct insurance (excluding life assurance) - not least because of the rulings of the EC Court of Justice and the view that a comprehensive alignment of substantive law is not possible - the Commission finally presented a proposal on 22.3.1991 for a Third Directive for direct insurance (life assurance).[39]

The essential key points of the Commission's proposal can be summarised as follows:

- the application of the principle of uniform, single licensing of the life assurance enterprise by the Member State in which the enterprise has its principal place of business ("single-licence" principle).[40] So EC life assurance enterprises and their branch establishments can offer and market the entire range of their authorised products in every other Member State after receiving a single licence from the national supervisory authority.

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[38] CJEC Judgement of 4.12.1986, NJW 1987, 572 (574) - the CJEC had to rule on the Insurance Supervision Law (VAG) as amended by the 14 t.h.Amending Law of 29.3.1983 (Fed. Law Gaz. I, 377).

[39] COM (91) 57 final-SYN 329 of 22.3.1991 - Third Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (Life Assurance) and on Amendment of the Directives 79/267/EEC and 90/619/EEC.

[40] Cf. Schulte-Noelle, Versicherungswirtschaft 46 (1991) 11, p. 1 (2).

At the same time the supervision over the entire business activities of a life assurance enterprise including its branch establishments devolves solely on the country where its principal place of business is located.
Supervision is here confined to financial supervision. It covers in particular the monitoring of solvency and of the formation of adequate actuarial provisions and investments - above all actuarial provisions - and their cover.

- so that the single-licence principle can be put into practice without forfeiting a minimum standard of consumer protection, the Commission's proposal envisages the coordination of the basic regulations affecting financial supervision of direct insurance activity in life assurance.
The main features of such a coordination are the alignment of the provisions of the Member States with respect to the definition and calculation of the actuarial provisions on the basis of actuarial principles, the alignment of regulations concerning the permissibility, valuation, spread and location of assets which cover the actuarial provisions as well as the matching of currencies.

- in order to put into practice the principle of uniform licensing and supervision by the country where the principal place of business is located, there was a further requirement to establish, on the basis of the alignment of financial supervision at the Community level, principle of mutual recognition of the licences of the life assurance enterprises and of the financial supervision of the various Member States.
As a result, the Commission turns to the harmonisation concept of the mutual recognition on a minimum standard which has held good and prevailed in conjunction with Art. 57 of the EEC Treaty, instead of adhering to the concept of sweeping alignment of substantive law.[41]

- a preventative and systematic supervision with regard to the products of the life assurance companies, as they are provided for in the German Insurance Supervision Law (VAG), will in future not be permitted under the Directive. Only post facto, unsystematic supervision is allowed.

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[41] Cf. on this point CJEC Judgement of 27.9.1989 - Ruling 130/88, EuZW 16/1990, p. 512 ff.

This entails the elimination of any prior examination of insurance contracts (General Insurance Terms) and of rates and their replacement by non-systematic post facto communications. Only the check on abuses for the protection of the policy holder is allowed and to this end the Directive provides for an actual system of inspection.[42] This system of inspection for guaranteeing a simple check on abuses by the supervisory authorities of the country where the business is conducted corresponds to the principle developed by the EC Court of Justice, under which freedom of services may only be restricted in the public interest.

- The proposal abandons harmonisation of consumer protection and supervisory systems in the calculation of rates, in particular regarding the maximum permissible calculable rate of interest, and the valuation of actuarial provisions.
  Such an abandonment results from the Commission's view that the substantive legal alignment of necessary provisions for insurance policies cannot be implemented.
  Apart from that the Commission regards a substantive harmonisation of essential areas of supervision as unnecessary either for the maintenance of consumer protection or for the creation of equal competitive conditions in the European life assurance market.

- Finally, the Commission's proposal abandons the demand for strict branch separation, which the First and Second Directive for direct insurance (life assurance) still envisaged.
  On the contrary, the proposal provides for the Member States to have the right to choose whether to maintain the principle of branch separation.[43]
  As a result the ban on the establishment of multi-branches/composite enterprises has been dropped.

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[42] Cf. on this point COM (91) 57 final-SYN 329, p. 8/9.
[43] on this point Meyer, in: Frey (Ed.), Versicherungswirtschaft in Gemeinsamen Markt, p. 119.

> However, this applies only "in so far as these enterprises set up a separate administration which makes it possible to show the results of life assurance and non-life assurance business clearly demarcated from one another and to observe the protection rules for both spheres of activity".[44]

2. Criticism of the Commission's Proposal (Life Assurance)

The Commission's abandonment of a substantive harmonisation of essential supervisory areas has attracted particular criticism. Thus the Verband der Lebensversicherungs-Unternehmen e.V. domiciled in the Federal Republic of Germany has adopted the following line on this issue:

> "This concept is unacceptable from the point of view of German life insurance, since in the absence of sufficient harmonisation it means a significant reduction in the level of consumer protection for life assurance. Only the harmonisation of significant supervisory rules would satisfy the principle enshrined in the Single European Act,[45] namely that a high level of consumer protection should be maintained in forming the Single European Market.(...)[46] Moreover,(the proposal in the Directive) ignores the principle established by the European Court of Justice in its Judgement dated 4.12.1986 in favour of the policy holders, namely that before the application of the principle of the country where the principal place of business is located essential supervisory areas must be harmonised."[47]

The criticism also runs to the effect that with its proposal for deregulating insurance supervision the Commission is neglecting consumer protection interests and as a result is not meeting the targets set by the EEC Treaty and the arguments of the EC Court of Justice.

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[44] COM (91) 57 final-SYN 329, pp.40/41.

[45] Cf. Art. 100a EEC Treaty.

[46] For an equally critical view see Schulte-Noelle, Versicherungswirtschaft 46 (1991) 11, p. 1 (3).

[47] Verband der Lebensversicherungs-Unternehmen e.V., position of 5.4.1991, p.2; and also Schulte-Noelle, Versicherungswirtschaft 46 (1991) 11, p.1.(3).

3. Free competition versus consumer protection

Consequently, the Commission's proposal for a Third Directive for direct insurance (life assurance) introduces, by favouring the achievement of the free circulation of services in the area of life assurance business too, a relaxation of the protection of policy holders' interests which is required in this very area.[48] The Commission has consciously chosen this way out of maintaining a balance between free competition and the protection offered to the consumer; it therefore holds the view that the aim of the policy holder being able to choose in future from among all the life assurance products available in the Community justifies the reduction of consumer protection prescribed in the national supervisory systems. The Commission here proceeds - differently from the situation with the Second Directive for direct insurance (life assurance) - from the ideal picture of the mature and critical consumer, whose need for protection is slight.

The 325 million EC inhabitants would then be able to choose from amongst 4,000 insurance enterprises in the Community.[49] Compared with the insurance market in Japan, in which 122 million people have merely a choice from amongst 54 insurance enterprises, this supply looks overwhelming.[50]

To be able to assess and accept this supply, without incurring disadvantages, remains, in the Commission's view, the future task of the customer. The latter must, in the absence of a prior check on products and rates to a uniformly high standard, "recognise and accurately assess essential distinctive features of different insurance products (....) and reliably evaluate the security of the services promised to him".[51]

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[48] Also critical on this point Brittan, in: Tijdschrift voor Economie en Management, Vol.XXXV, 4 (1990), p....(420).

[49] Cf. Stevenson, in: The Economist of 24.2.1990, p. 3 (Survey); cf. also the tables above pp. 4, 5.

[50] On the opportunities and dangers of the single internal market in the life assurance industry, cf. Jolivet, in: Eurepargne, No. 30, March 1990, p. 14 ff.; Giannella, in: Revue du Marché Commun et de l'Union Européenne, No. 344, Febr. 1991, p. 122 ff..

[51] Schulte-Noelle, Versicherungswirtschaft 46 (1991) 11, p. 1 (3).

Thus he must be able to filter out from the multitude of products especially those products that:

- offer no risk protection or inadequate risk protection and that as mere savings products with a high proportion invested in shares are of a speculative nature or

- provide for no participation or inadquate participation in the surplusses of the insurance enterprise or

- provide for no guaranteed revaluations or if so for very limited amounts

in order to avoid marked disadvantages - although such products will be able, as the Commission's proposal envisages, to be offered in future throughout the Community.[52]
In view of the specialised knowledge required for a correct selection in dealing with transfrontier life assurance products, the ideal picture sketched by the Commission of the mature policy holder who has little need of protection appears misleading.

4. Demands of the life assurance industry

For example the German life assurance industry, which points out that it would in no way have needed the implementation of deregulation of insurance supervision of the products themselves in order to achieve freedom of services in the life assurance market,[53] demands that the high standard for the necessary consumer protection is guaranteed by a harmonisation of the insurance supervision systems.

Accordingly, the harmonisation demanded should include, in particular, the following regulations:[54]

- Fixing of a upper limit for the accounting interest rate used in calculating rates so as to avoid unstable rates carrying a risk of losses of services for existing policy holders;

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[52] The Verband der Lebensversicherungs-Unternehmen e.V. draws attention to this in its Statement of Position of 5.4.1991, p. 3.
[53] Cf. for the Allianz Lebensversicherung AG, Schulte-Noelle, Versicherungswirtschaft 46 (1991) 11, p. 1 (3).

[54] Verband der Lebensversicherungs-Unternehmen e.V., Statement of Position of 4.5.1991, pp. 4/5 - according to information given by the Verband these demands are currently being updated.

- Application of the same interest rate as an accounting interest rate for the provision of cover so as to protect the long-term performability of the policies;

- Preventative, systematic presentation of the General Insurance Terms and rates so that the supervisory authority of the country where the principal place of business is located can monitor the matching of products to consumer demand;

- In the case of transfrontier insurance stronger powers of intervention for the supervisory authority in the customer's country on the basis of a requirement for systematic presentation;

- Maintenance of the principle of branch separation in order to spare life assurance customers the risk of reductions in services as a result of losses incurred by indemnity insurance.

V. Taking stock and prospects

To what extent such demands, in the face of the liberalisation of the insurance market by the Council's proposal for a Third Directive for direct insurance (life assurance) originate from a paternalist attitude on the part of German insurers towards the anticipated European competition, or to what extent they instead reflect a realistic assessment of the adverse changes in the life assurance market in the awareness of the sensitivity of the life assurance business, cannot yet be determined. The criticism should not in any event go unheeded, in view of the importance which life assurance has for the system of old-age pensions already established in the Federal Republic of Germany. Too emphatic a liberalisation can in this context result in severe disadvantages for the policy holders and hence for the social security system of the Federal Republic of Germany.[55]

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[55] On this point Dickinson, Changing international insurance markets: their implications for EEC insurance enterprises and governments, p. 71 ff.

It must therefore be assumed that the Commission's proposal will be a controversial discussion point for some time to come.[56]

One thing, however, is already certain: the liberalisation of the life assurance market can no longer be delayed. It is now just a question of the standard of inalienable consumer protection, in the last analysis, therefore, of the trustworthiness of life assurance as a part of private old-age pension provision.

Should the Commission's proposal be implemented and should the Federal Republic of Germany maintain its high level of consumer protection - guaranteed by the Insurance Policy Law (VAG) -, which would be permissible under the Commission's proposal, there would be over and above this the danger of discriminating against domestic life assurance enterprises. These enterprises, which are linked to the high level of domestic supervision, would have to offer their products on the domestic insurance market via foreign branches in order to avoid competitive disadvantages, whilst foreign competitors are subject to the - possibly less rigorous - supervisory system of their home country. In the light of the aim of the Commission's proposal to achieve freedom of services and thereby encourage unrestricted competition and to create equality of opportunity for enterprises in the Community, this result would be counterproductive.[57]

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[56] Far-reaching consequences are also entailed by the liberation of the insurance industry from the ban on cartels under European law as envisaged in the EC Commission's proposal of 18.12.1989 (Wirtschaft und Wettbewerb 1990, 222 ff). In consequence of this proposal insurance enterprises are to be allowed to take concerted action over a range of important business activities, especially over price and product policy. This despite the fact that Arts. 85 and 86 of the EEC Treaty, which are fully applicable to the insurance industry (CJEC Judgement of 27.1.1987, Wirtschaft und Wettbewerb 1987, 401), ordain a ban on cartels (cf. on this point Müller/Zweifel, in: Wirtschaft und Wettbewerb, 1990, 907 ff).

[57] Cf. on this point Schulte-Noelle, Versicherungswirtschaft 46 (1991) 11, p. 1(4).

Chronology of Liberalisation

- Documentation -

1. General

General Programme for the removal of restrictions on freedom of establishment
of 18.12.1961 (O.J. 1962, p. 36 ff.)

General Programme for the removal of restrictions on the free circulation of services
of 18.12.1961 (O.J. 1962, p. 32 ff.)

2. Direct Insurance (excluding Life Assurance)

First Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (exclusing Life Assurance)
of 24.7.1973 - 73/239/EEC - (O.J. L 228/3 of 16.8.1973)

Second Directive of the Council of 22.6.1988 on the Coordination of the Legal and Administrative Provisions for Direct Insurance (excluding Life Assurance) - 88/357/EEC - (O.J. L 172/1 of 4.7.1988)

- The Commission's proposal for a Second Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (excluding Life Assurance)
  (O.J. C 321/2 of 12.2.1976)

- Statement of Opinion of the European Parliament
  (O.J. C 36/14 of 13.2.1978)

- Statement of Opinion of the Economic and Social Committee
  (O.J. C 204/13 of 30.8.1976)

- Amended proposal
  (DOC.PE. C2-1/88 of 8.3.1988)

- Report on behalf of the Committee for Law and Civil Rights
  (DOC.PE. A2/-42/88 of 25.4.1988)

- Joint Point of View of the Council
  (DOC.PE. C2-65/88 of 2.6.1988)

- Second Reading/Recommendation of the Committee for Law and Civil Rights concerning the Joint Point of View of the Council
  (DOC.PE. A2-0100/88 of 2.6.1988)

- Resolution of the European Parliament of 15.6.1988
  (O.J. C 187/94 of 18.7.1988)

The Commission's Proposal for a Third Directive on the Coordination of the Legal and Administrative Provisions for Direct Insurance (excluding Life Assurance)
(O.J. C 244/28 of 28.9.1990)

- Reports on behalf of the Committee for Law and Civil Rights
  (DOC.PE. A3-0195/91, A3-0048/92)

- Legislative Decision of the European Parliament of 12.2.1992
  (Protocol of 12.2.1992, PE 158,953)

3. Direct Insurance (Life Assurance)

First Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (Life Assurance)
of 5.3.1979 - 79/267/EEC - (O.J. L 63/1 of 13.3.1979)

- Report on behalf of the Committee for Law and Civil Rights
  (DOC.PE. A3-015/90 of 29.1.1990)

- Joint Point of View of the Council
  (DOC.PE. C3-204/90 of 11.7.1990)

- Recommendation of the Committee for Law and Civil Rights regarding the Joint Point of View of the Council
  (DOC.PE. A3-0221/90 of 24.9.1990)

Second Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (Life Assurance)
of 8.11.1990 (O.J. L 330/50 of 29.11.1990)

- The Commission's proposal for a Second Directive of the Council
  (COM (88) 729 final-SYN 177 of 16.1.1989)

- The Commission's amended proposal
  (COM (90) 46 final-SYN 177 of 1.3.1990)

- The Commission's Communication to the European Parliament
  (SEC (90) 1385 final-SYN 177 of 6.7.1990)

- Report on behalf of the Committee for Law and Civil Rights
  (DOC.PE. A3-130/90 of 30.5.1990)

- Discussion in the European Parliament
  of 12.6.1990 (O.J. C 175/31 of 16.7.1990)

- Vote in the European Parliament of 13.6.1990 (O.J. C 175/68 of 16.7.1990)

- Joint Point of View of the Council (DOC.PE. C3-202/90 of 11.7.1990)

- Approval by the European Parliament of 13.6.1990 (O.J. C 175/101 of 16.7.1990)

- Recommendation of the Committee for Law and Civil Rights regarding the Joint Point of View of the Council (DOC.PE. A3-0249/90 of 12.10.1990)

- Vote in the European Parliament of 24.10.1990 (O.J. C 295/28 of 26.11.1990)

- Resolution of the European Parliament regarding the Joint Point of View of the Council of 24.10.1990 (O.J. C 295/81 of 26.11.1990)

The Commission's proposal for a Third Directive of the Council on the Coordination of the Legal and Administrative Provisions for Direct Insurance (Life Assurance) of 25.2.1991 (COM (91) 57 final-SYN 329 of 22.3.1991) (O.J. C 99/2 of 16.4.1991)

4. Other

Directive of the Council on the Coordination of the Legal and Administrative Provisions for Legal Costs Insurance - 87/344/EEC - (O.J. L 185/77 of 4.7.1987)

Directive of the Council on the Coordination of the Legal and Administrative Provisions for Credit Insurance - 87/343/EEC - (O.J. L 185/72 of 4.7.1987)

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