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A3-0288/90



R E P O R T

of the Committee on Legal Affairs and Citizens' Rights

on the proposals from the Commission to the Council for:

- I. a decision on the conclusion of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance
(COM(89) 436 - C3-0145/89 - SYN 220)
- II. a directive on the implementation of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance
(COM(89) 436 - C3-0146/89 - SYN 221)
- III. a regulation laying down particular provisions for the application of Articles 36 and 37a of the Agreement between the Swiss Confederation and the European Economic Community on direct insurance other than life assurance
(COM(89) 436 - C3-0146/89 - SYN 220)

Rapporteur: Mr Willi ROTHLEY

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PE 141.106/fin.

Or. FR

A Series: Reports - B Series: Motions for Resolutions, Oral Questions - C Series: Documents received from other Institutions (e.g. Consultations)



= Consultation procedure requiring a single reading



= Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment



= Cooperation procedure (first reading)



= Parliamentary assent which requires the votes of a majority of the current Members of Parliament

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By letter of 25 September 1989 the President of the Council consulted the European Parliament, pursuant to Articles 57 and 235 of the EEC Treaty, on the proposals from the Commission to the Council on the conclusion and implementation within the European Economic Community of an Agreement between the EEC and the Swiss Confederation on direct insurance other than life assurance.

At the sitting of 9 October 1989 the President of Parliament announced that he had referred these proposals to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on External Economic Relations for their opinions.

At its meeting of 19 and 20 March 1990 the Committee on Legal Affairs and Citizens' Rights decided to ask the President of Parliament to refer the proposals to the Committee on Institutional Affairs for a further opinion. At the sitting of 14 May 1990 the President of Parliament announced that he had complied with this request.

At its meeting of 10 November 1989 the Committee on Legal Affairs and Citizens' Rights had appointed Mr Rothley rapporteur.

At its meeting from 27 to 29 June 1990 it decided, on a proposal from the rapporteur, to defer further consideration of the draft report pending the opinion of the Committee on Institutional Affairs.

At its meetings of 19 and 20 March, 27 to 29 June, 15 and 16 October and 30 and 31 October 1990 it considered the Commission proposals and draft report.

At the last meeting it adopted the draft legislative resolution by 9 votes to 1, with 1 abstention.

The following were present for the vote: Stauffenberg, chairman; Rothley, second vice-chairman and rapporteur; Anastassopoulos, Fontaine, Garcia Amigo, Gollnisch, Grund, Janssen van Raay, Marques Mendes, Mebrak-Zaidi, Medina Ortega, Schlechter and Wijsenbeek.

The report was tabled on 7 November 1990.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.

A

DRAFT LEGISLATIVE RESOLUTION

embodying the opinion of the European Parliament on the proposals from the Commission for

- a Council decision on the conclusion of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance,
- a Council directive on the implementation of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance,
- a Council regulation laying down particular provisions for the application of Articles 36 and 37a of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance.

The European Parliament,

- having regard to the Commission proposals to the Council (COM(89) 0436 final - SYN 220, COM(89) 0436 final - SYN 221 and COM(89) 0436 final - SYN 222¹
 - having been consulted by the Council pursuant to Articles 57 and 235 of the EEC Treaty (C3-0145/89, C3-0146/89 and C3-0147/89),
 - having regard to the revised draft Agreement initialled by the Commission¹,
 - having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinions of the Committee on Economic and Monetary Affairs and Industrial Policy, the Committee on External Economic Relations and the Committee on Institutional Affairs (A3-0288/90),
1. Rejects the proposal for a Council decision on the conclusion of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance and opposes the entry into force of the agreement in the Community Member States;
 2. Rejects, also, the Commission proposals for the adoption of provisions to implement the Agreement within the European Economic Community;
 3. Instructs its President to forward this opinion to the Council and Commission and to the governments of the Member States and of the Swiss Confederation.

¹ OJ No. C 53, 5.3.1990, pp 1 and 5

EXPLANATORY STATEMENT

1. This report concerns three Commission proposals relating to a revised draft Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance, which was initialled by the chief negotiators of the Commission and Switzerland on 26 July 1989 (COM(89) 436 final - SYN 220-222). Title III of the first non-life insurance establishment Directive (Directive 73/239/EEC of 24 July 1973, OJ No. L 228, 16.8.1973, p. 3) lays down minimum conditions which must be met when an insurance undertaking having its head office in a third country wishes to establish a branch or agency in the Community. Member States remain free to impose additional requirements. The basis for the above Agreement is Article 29 of this Directive, which empowers the Community 'to negotiate Agreements with third countries providing for different treatment on the basis of reciprocity and on condition that insured parties in the Community are adequately protected'².

2. The negotiations between Switzerland and the European Economic Community may be broken down into the following three phases:

(a) First phase (1976-1982)

This phase was concluded on 25 June 1982 with the initialling of a draft agreement by the Commission;

(b) Second phase (1983-1988)

It became apparent that the Community's legislative autonomy might be restricted as regards the matters covered by the draft Agreement. At its meeting of 16 June 1986, the Council therefore laid down a new set of negotiating directives for a second round of negotiations, which affected, in particular, what is now Article 39 of the draft Agreement. Each contracting party remains free to modify its internal legislation on matters covered by the Agreement but the other contracting party must be kept informed of its proposed modifications. 'The modified legislation, once adopted, is formally discussed within the Joint Committee which, by the time the modified legislation enters into force, must either decide to amend the Agreement, or decide that the changes are not incompatible with the Agreement, or adopt any other measure to safeguard the Agreement. If the Joint Committee cannot reach a decision within six months the Agreement lapses automatically when the modified legislation enters into force'³.

² See Commission explanatory statement, COM(89) 436 final, p. 1

³ COM(89) 436 final, p. 3

(c) Third and last phase

In this phase, the Commission was authorized to update the draft Agreement to take account of the following four Council directives amending the first non-life insurance establishment directive:

- 84/641/EEC (Tourist assistance);
- 87/343/EEC (Credit insurance);
- 87/344/EEC (Legal protection insurance);
- 88/357/EEC (Second directive on non-life insurance, excluding the provisions relating solely to freedom to provide services).

3. The Committee on Economic and Monetary Affairs and Industrial Policy (PE 136.353/fin.) and the Committee on External Economic Relations (PE) have already submitted their opinions in letter form. The Committee on Legal Affairs and Citizens' Rights also decided to obtain the opinion of the Committee on Institutional Affairs regarding the responsibilities of the Joint Committee.

4. The broad lines of the draft Agreement are as follows:

- insurance undertakings with their head office on the territory of one contracting party will be allowed to set up agencies or branches on the territory of the other on a harmonized and non-discretionary basis;
- furthermore, such agencies and branches will no longer need to hold a separate solvency margin;
- the draft Agreement relates only to freedom of establishment and is not concerned with the cross-frontier provision of services.

5. Given that the insurance industry of each contracting party is already represented on the market of the other, the Commission does not expect the Agreement to have a major economic impact in terms of increased competition. On the other hand, the Agreement is of great political importance in the context of the Community's external relations since it will be the Community's first international agreement in the services field and will provide 'a positive signal to the EFTA countries of the Community's determination to create a more structured relationship between the Community and EFTA in accordance with the conclusions of the EC-EFTA Ministerial Meeting held in Brussels on 20 March 1989'⁴.

6. The following technical and legal points should be taken into consideration:

- (a) The Committee on Economic and Monetary Affairs and Industrial Policy raises the question of the appropriate legal basis, and claims that since Article 29 of the first non-life insurance establishment Directive provides for such agreements there is no reason to consider Article 235 of the EEC Treaty as a legal basis for this Agreement. Although the committee's point is valid, it must nevertheless be said that there are no specific provisions in the EEC Treaty covering this particular type of

⁴ COM(89) 436 final, p. 4

agreement. It is therefore necessary to find a suitable legal basis in the EEC Treaty, which in this case must be Article 235. Article 29 of the above-mentioned directive may be considered as a basis for agreements with third countries in the field of direct insurance, but not for agreements in the general field of establishment and provision of services.

- (b) Article 7.3 of the draft Agreement stipulates that each contracting party 'shall make the opening in its territory of an agency or branch of an undertaking whose head office is situated outside the territories to which this Agreement applies, as laid down in Article 43, subject to authorization by the supervisory authority'. This article, in conjunction with the other provisions of the second section of the draft (Articles 7 to 14) and Protocol No. 4 to the draft Agreement, might be seen as an indirect infringement of the reciprocity rule since this Agreement could give non-Community undertakings which already have agencies or branches in Switzerland indirect access to the EEC market. This would not be the case if the relevant provisions were properly interpreted since the authorization to be issued by the supervisory authority applies exclusively to the territory of each contracting party. There should therefore no longer be any reason for these agencies or branches to set up business in the territory of the other contracting party.
- (c) Article 39 lays down provisions concerning the evolution of the domestic legislation of the contracting parties. Regarding the decisions of the Joint Committee, Article 39.7 stipulates that, if upon the expiry of the period provided for in paragraph 39.4 (12 months from the date of adoption of the amended legislation) notification of the completion of the ratification formality has not taken place, the decisions of the Joint Committee shall be implemented provisionally pending their ratification or approval by the contracting parties. As this provisional application does not seem to guarantee the conditions of legal certainty laid down in Article 39.4, it could be amended to ensure that the interests of the insured party are respected.
- (d) Other provisions in Commission proposals which Parliament has amended include Article 10.1(d) on the designation of an authorized agent to represent the undertaking in relations with the authorities and courts of a contracting party. It should be noted that in a recent Commission proposal (motor vehicle insurance) this type of representation was made subject to certain conditions (e.g. the availability of reserves). However, as regards motor vehicle insurance, which is dealt with in Annex 1, the provisions of the draft Agreement should be brought into line with Parliament's opinions.
- (e) Finally, Annex No. 4 of the draft Agreement introduces special provisions for certain Member States of the Community, namely Denmark, Germany, Luxembourg and the United Kingdom.

7. In the light of the foregoing, your rapporteur wishes to make the following remarks on the Agreement, which necessarily include a number of criticisms:

- (a) As the Agreement in question is an international agreement between the European Community and a third country, the European Parliament is consulted by the Council only at a late stage in the process (according to information received from the Commission, the Agreement was signed by the Council and the Swiss Government in October 1989). There is no point in blaming the Commission or Council for this flaw, which is a direct result of the system established by the Treaties; however, once again the opportunity must be seized to assert that consulting Parliament is meaningless unless it concerns the negotiating mandate conferred on the Commission. As things stand, given the institutional system resulting from the relevant provisions of the EEC Treaty, Parliament can under no circumstances exert any influence on shaping the contents of the Agreement, nor can it modify its provisions. It can only act indirectly and, hence, play a very incomplete or even marginal role by proposing amendments to the texts implementing the Agreement in the Community legal system.
- (b) Your rapporteur fully agrees with the Commission in welcoming the conclusion of this Agreement which will provide 'a positive signal to the EFTA countries of the Community's determination to create a more structured relationship between the Community and EFTA in accordance with the conclusions of the EC-EFTA Ministerial Meeting held in Brussels on 20 March 1989'⁵.

However, he might become justifiably wary if he were subsequently to realize, in the developing relationship between the Community and EFTA, that what the Commission calls 'a more structured relationship' was in fact an arrangement very similar to an association agreement within the meaning of Article 238 of the EEC Treaty. In that case, the policy of concluding a specific number of sectoral agreements with the EFTA countries, which would not formally constitute association agreements under Article 238 but would undoubtedly prepare the way for such agreements, would deprive Parliament of one of its fundamental rights.

- (c) The question of the operation and responsibilities of the Joint Committee, established by Article 37 of the Agreement, raises a number of problems, particularly in the light of the tasks assigned to it under Article 39.

Article 39 stipulates that the Joint Committee may, in certain circumstances, revise the provisions of the Agreement so as to integrate therein the amendments made to the national or Community legislation in question (see paragraph 2(b) and paragraph 6(c) above). This power extends to all matters covered by the Agreement, and hence primarily to the activities of classes of insurance listed in Annex 1 of the Agreement and in the annex to Directive 73/239/EEC (except for the section headed 'Assistance', which appears only in Annex 1 of the Agreement). However, the wording of Article 39 does not make it clear

⁵ See COM(89) 436 final, p. 4, and paragraph 5 above

what Community procedure is to be used to bring about a development in 'domestic law', in this case 'Community' law.

8. For the above reasons, and as Parliament has had an opportunity to table amendments only to the text incorporating the Agreement into Community law (i.e. the proposal for a directive and the proposal for a regulation), which are clearly of secondary importance by comparison with the Agreement itself, the Committee on Legal Affairs and Citizens' Rights has decided, on a proposal from its rapporteur, to recommend to Parliament that it reject the three proposals submitted by the Commission.

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS
AND INDUSTRIAL POLICY

Letter from the Chairman of the committee to Mr von Stauffenberg, Chairman of the Committee on Legal Affairs and Citizens' Rights

Subject : The Commission proposals for :

- (a) a COUNCIL DECISION on the conclusion of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance (COM(89) 436 final - SYN 220)
- (b) a COUNCIL DIRECTIVE on the implementation of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance (COM(89) 436 final - SYN 221)
- (c) a COUNCIL REGULATION (EEC) laying down particular provisions for the application of Articles 36 and 37a of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance (COM(89) 436 final - SYN 222)

Dear Mr von Stauffenberg,

The committee considered the above Commission proposals at its meeting of 31 January 1990.

The Agreement allows insurance undertakings with their head office in the territory of one contracting party to set up agencies and branches in the other. Under the Agreement, such agencies and branches will no longer need to hold a separate solvency margin, thus releasing considerable amounts of capital and facilitating more favourable premiums. The Agreement does not apply to the cross-frontier provision of services.

Article 29 of Directive 73/239/EEC of 24 July 1973 - the first Directive on establishment for indemnity insurance - empowers the Community to conclude agreements with third countries. The committee responsible should therefore consider whether Article 29 of the first Directive on establishment, read in conjunction with Article 57 of the EEC Treaty, can be invoked as the legal basis for the Agreement. The reference to Article 235 of the EEC Treaty would then be unnecessary, since existing Community law would give the Community the powers required for the Agreement.

With regard to substance, the Committee on Economic and Monetary Affairs and Industrial Policy welcomes the Agreement negotiated by the Commission, since it represents a first step towards the realization of a single European economic area and the creation of a formal partnership with individual member countries of the European Free Trade Association (EFTA).

Yours sincerely,

(sgd) BEUMER

The following took part in the vote: Beumer, Chairman; Bernard-Reymond, Cassidy, de Donnea, Ernst de la Graete, Herman, Martinez (for Megret), Porto (for Visentini), Read, Riskaer Pedersen, Rogalla, Siso Cruellas, Stevens and van der Waal (for Lataillade).

OPINION

of the Committee on External Economic Relations

Letter from the Chairman of the committee to Graf Stauffenberg, Chairman of the Committee on Legal Affairs and Citizens' Rights

Brussels, 21 February 1990

Subject: Proposal for a Council decision on the conclusion of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance (COM(89) 436 final - SYN 220 - C3-145/89)

Dear Mr Stauffenberg,

At its meeting of 21-22 February 1990, the Committee on External Economic Relations considered the proposal for a Council decision on the conclusion of the Agreement between the Swiss Confederation and the European Economic Community concerning direct insurance other than life assurance, on which it was asked for its opinion on 23 September 1989.

The first non-life insurance establishment Directive⁶ lays down minimum conditions which must be met when an insurance undertaking having its head office in a third country wishes to establish a branch or agency in the Community. Member States remain free to impose additional requirements.

Article 29 of the Directive, however, gives the Community the possibility to negotiate treatment on the basis of reciprocity and on condition that insured parties in the Community are adequately protected.

After a very long period of preparatory work - lasting almost 16 years - the Commission, assisted by an ad hoc committee of the Member States, held two formal negotiating sessions with the Swiss authorities on 15 and 16 February and 9 and 10 March 1989 leading to the present agreement, which was initialled by the negotiators from the Commission and Switzerland on 26 July 1989.

The legal basis selected - Articles 57 and 235 - which requires consultation of the EP appears perfectly adequate.

With regard to the substance, the draft Agreement allows insurance undertakings with their head office in one Contracting Party to set up agencies or branches in the other on a harmonized and non-discretionary basis. The draft agreement relates only to freedom of establishment and is not concerned with the cross-frontier provision of services.

In fact, given that the insurance industry of each Contracting Party is already represented on the market of the other (albeit under chaotic conditions) the Agreement is not expected to have a major economic impact in terms of increased competition.

⁶ Directive 73/239/EEC, 24 July 1973, OJ No. L 228, 16.8.1973, p. 3

On the other hand, this will be the Community's first international agreement in the services field and will be of particular relevance to the Community's relations with the EFTA countries, indicating the Community's determination to create a more structured relationship with EFTA.

The Committee on External Economic Relations, which attaches great importance to relationships of this nature, can only welcome the conclusion of this agreement, which should herald a considerable increase in European cohesion with a view to the establishment of the large European economic area.

At its meeting of 20-21 February 1990, the Committee on External Economic Relations therefore decided unanimously to deliver a favourable opinion.

Yours sincerely,

Willy DE CLERCQ

The following took part in the vote:

De Clercq (Chairman); Cano Pinto (Vice-Chairman); Moorhouse (Vice-Chairman); Hindley, Marck (deputizing for Lemmer), Moretti, Peijs, Porto, Randzio-Plath, Sonneveld (deputizing for Gallenzi), Titley and de Vries.

OPINION

**(Rule 120 of the Rules of Procedure)
of the Committee on Institutional Affairs**

Draftsman: Mrs Adelaide AGILETTA

At its meeting of 22 and 23 May 1990, the Committee on Institutional Affairs appointed Mrs Aglietta draftsman.

At its meeting of 26 and 27 September 1990 it considered the proposed agreement and the draft opinion.

At the latter meeting it adopted the draft opinion unanimously.

The following were present at the vote: Oreja, chairman; Prag, vice-chairman; Aglietta, draftsman; Bandrés Molet, Bieroco, Colombo, Giscard d'Estaing, Musso, Penders, Raffarin, Tomlinson and Valverde.

From an institutional point of view the Agreement between the European Community and the Swiss Confederation on direct insurance other than life insurance is controversial in three respects, which may prove to be unacceptable.

(a) The Agreement is based on Articles 57 and 235 of the EEC Treaty, which means that it must be approved through cooperation procedure, at the end of which, however, the Council takes a unanimous decision. There are two major disadvantages to this:

- cooperation procedure per se is an unsuitable means of approving international agreements; it cannot give rise to any 'compromise' between Parliament and Council and, at this stage of the procedure for signing the Agreement, Parliament may only accept it or reject it: if, at second reading, Parliament were to reject the Agreement by an absolute majority, the Council could only approve it unanimously;
- the latter aspect of the procedure is in any case nullified by the reference to Article 235 which provides for the Council to act unanimously.

The procedure which has been established therefore rules out any real power being exercised by Parliament and, furthermore, is totally inappropriate, given the subject-matter of the decision in question.

Moreover, Article 57 is a sufficient legal basis - in the light of the decisions of the Court of Justice - for signing this agreement. The 'Vademecum' drawn up by the Commission stressed the need to ensure that the establishment of a dual legal basis - except where this is expressly ruled out by the Treaty - does not lead to procedural confusion.

The reference to Article 235 should therefore be deleted.

(b) Article 39 of the Agreement confers considerable powers on the Joint Committee, which is responsible for monitoring the implementation of the Agreement. In particular, this article empowers the Joint Committee to take action and adjust the provisions of the Agreement if one of the two parties should amend its domestic legislation. While it is true that the Agreement provides that, in accordance with the two parties' respective regulations, certain decisions should be submitted to the competent bodies for ratification, nevertheless:

- the decisions of the Joint Committee may enter into force provisionally before ratification;
- under cooperation procedure to ratify such decisions, the European Parliament is reduced merely to accepting or rejecting regulations which might require in-depth consideration; furthermore, the situation is exacerbated by the fact that these decisions could call into question the substance of laws already adopted.

(c) The implementing regulation on the setting up of the Joint Committee stipulates that the Community's position in this Committee shall be determined by the Council. The situation is thus made extremely serious, as this procedure has the effect of:

- unduly strengthening the legislative power of the Council beyond what is stipulated in the Treaties,
- quite simply excluding Parliament from procedures whose conclusions it will be obliged to accept or reject, even though the EEC Treaty provides for quite different powers.

All this is exacerbated by the fact that there is mistrust between the executive (in this case the Council, with help from the Commission) and legislative bodies.

The problems mentioned in (a) could be solved in the first instance by deleting the reference to Article 235, which is starting to be abused in order to 'water down' cooperation procedure, and then by implementing the amendments to the Treaty called for by Parliament.

The problems mentioned in (b) and (c), however, require specific solutions, otherwise Parliament will be forced to reject the Agreement. One solution might be to amend the rules of procedure relating to the Joint Committee, by stipulating that the Community's position in respect of legislative matters shall be determined by the Council in cooperation with Parliament; in respect of non-legislative matters, the Community's position should be determined by the Commission.

Conclusions

The Committee on Institutional Affairs:

- (a) confirms that the system of signing external agreements with the Community is inconsistent from an institutional point of view, in that it provides for inappropriate procedures or makes it possible to restrict those powers which Parliament actually has; this is often exacerbated by the unjustified use of Article 235 of the EEC Treaty or other articles which provide for the Council to act unanimously; in the case in question, the reference to Article 235 should be deleted;
- (b) confirms the need to reform this system on the basis of the documents adopted or in the process of being drawn up by the European Parliament, in particular the report on parliamentary assent by the draftsman of this opinion;
- (c) calls for the rules of procedure relating to the Joint Committee to be amended - otherwise there is a risk that Parliament will decide to reject the agreement - in such a way as to ensure that, as regards legislative matters, the European Community and the Council decide through cooperation procedure the position to be adopted by the Community within the Joint Committee; in the case of non-legislative matters, this decision should be taken by the Commission.