

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(74) 641 Final

Brussels, 8 May 1974

PROPOSAL FOR A

Council Directive on the liberalization of co-insurance operations
and the co-ordination of laws, regulations and administrative
provisions relating to co-insurance

(submitted to the Council by the Commission)

COM(74) 641 Final

EXPLANATORY MEMORANDUMI. Reasons for and aims of the Directive

1. Co-insurance is an operation which enables several insurers acting in agreement but without joint and several liability to insure a risk on the conditions and in accordance with the tariffs laid down by one of them, who is known as the leading insurer.

At present the laws of certain Member States forbid insurers established abroad to take part in such operations. Other Member States, on the other hand, have no restrictions.

The aim of this Directive is to liberalize the provision of such services at Community level and at the same time to carry out the minimum of coordination that is necessary if such liberalization is to be achieved.

2. From the economic point of view, the need to carry out this liberalization arises from the constant increase in the number of units of production and the growth in the volume and value of the units produced. This tends to add to the risks which, increasingly, can no longer be covered simply by resorting to the domestic insurance market.

In these circumstances, and without calling in question the importance of the role played by re-insurance, the liberalization of co-insurance at Community level is likely to facilitate the covering of certain risks.

3. Although, in terms of practical importance, the liberalization of co-insurance can in no way be compared with the liberalization of insurance services, which will be the subject of special directives, for certain Member States this initial liberalization, however modest it may appear, will provide a valuable foretaste of more complete freedom.

The legal basis of this draft is provided by Article 57(2) which covers the coordination aspect and to which Article 66 refers, by Article 63(2) which concerns the liberalization of services and by the second paragraph of Article 59 which concerns agencies and branches established within the Community and belonging to undertakings whose head offices are outside the Community.

./.

II. Titles and Articles of the Directive

TITLE I : GENERAL PROVISIONS

- Art. 1 : Object of the Directive
- Art. 2 : Definitions
- Art. 3 : Liberalization of Community co-insurance
- Art. 4 : Third country undertakings

TITLE II : CONDITIONS AND PROCEDURES FOR COMMUNITY CO-INSURANCE

- Art. 5 : Country of establishment of leading insurer
- Art. 6 : Minimum underwriting
- Art. 7 : Law applicable to contract
- Art. 8 : Determination and representation of reserves
- Art. 9 : Statistical data
- Art. 10 : Collaboration between supervisory authorities
- Art. 11 : Winding-up

TITLE III : FINAL PROVISIONS

- Art. 12 : Collaboration between Commission and Member States
- Art. 13 : Revision clause
- Art. 14 : Time-limits for application
- Art. 15 : Communication of implementing provisions
- Art. 16 : Addressees of the Directive

III. Notes on the Titles and principal Articles

Title I

General provisions (Articles 1 to 4)

Only the following points call for special comments:

1. The definition in Article 2 was drawn up so as to take account of the practical aspects of co-insurance.

It was found that sometimes one object or event might be covered by several co-insurance contracts, the risk covered by each of these contracts being one part or aspect of the object or event to be insured. In such a case the conditions and the tariffs might vary from one contract to another. However, there is only one kind of condition and one tariff only per contract. Accordingly the rule was adopted whereby there must be a single contract.

2. Motor vehicle liability was expressly excluded from the draft's field of application because in most Member States the obligation to insure against this risk has been accompanied by the creation of special funds financed by a percentage of premiums collected.

In the context of the freedom to provide co-insurance services, the levying of these percentages from co-insurers established in a Member State other than that of the leading insurer would raise serious difficulties. Moreover, it was found that in practice motor vehicle liability rarely gave rise to the conclusion of co-insurance contracts.

Certain other risks listed in the Annex to the first Council Directive of 24 July 1973 also rarely gave rise to the conclusion of contracts of this nature.

However, it was not considered desirable to exclude them expressly from the application of the Directive since the introduction of too many exceptions should be avoided as far as possible as it might prejudice the future development of Community co-insurance.

3. The question of the field of application of the Directive arises also in connection with participation in Community co-insurance operations by head offices and by their agencies and branches.

The solution adopted is liberal in the sense that all undertakings established in the Community may engage in Community co-insurance operations (Article 3).

For legal and practical reasons, neither the exclusion of head offices where an agency or branch is established in the country of the leading insurer nor the exclusion of agencies and branches in favour of their head office established in a Member State other than that of the leading insurer can be contemplated.

Legally, it is inadmissible that the fact that an undertaking establishes itself in another Member State should deprive it of the right to benefit from the liberalization of services.

In practice, the First Coordination Directive provides for the harmonization of legislation as regards the conditions for the taking-up of the business of insurance, which means that at Community level undertakings are subject to an identical system of supervision.

Lastly, certain statistics show that such restrictions would have the effect of depriving the envisaged liberalization of much of its effectiveness, since most insurance companies have one or more agencies and branches in the various Member States. Therefore, in many cases head offices would be practically excluded from Community co-insurance, which is completely unjustified.

Moreover, the obligation to use only the services of the head office situated in a Member State other than that of the leading insurer to the exclusion of its agencies and branches established in other Member States appears equally unjustified by reason of the organization of the insurance market in certain Member States which can result in agencies and branches acquiring in the course of time vast experience in the covering of certain risks.

./.

4. As regards the problem of third countries, the existence of Title III of the First Coordination Directive, which contains certain provisions applicable to agencies or branches established within the Community and belonging to undertakings whose head offices are outside the Community, justifies recourse to the provisions of the second paragraph of Article 59 in order to authorize these agencies and branches to engage in Community co-insurance on the same terms as those whose head offices are established within the Community (Article 4).

Title III of that Directive contains proper safeguards in respect of the financial situation of these undertakings, which are subject to regular supervision by the national authorities.

On the other hand, Member States are for the moment free to continue to apply their own national legislation to their direct co-insurance business with undertakings established in third countries.

Title II

Conditions and procedures for Community co-insurance (Articles 5 to 11)

1. The Member State in which the leading insurer must be established is not laid down categorically in the Directive; this reflects the desire to take the existing situation into account.

For those Member States which apply precise and sometimes differing criteria in this connection, provision has simply been made for a rule designed to prevent any conflict of laws. If such a conflict arises, only the place where the risk is situated must be taken into consideration (Article 5).

2. To take account of the wishes of certain Member States, provision has been made in the Directive for reserving a given percentage of the risk for co-insurers established in the country of the leading insurer.

However, a maximum percentage has been laid down in order to prevent this device restricting excessively the scope of the Directive.

./.

The percentage adopted, 25 %, represents a reasonable margin which can be abolished subsequently in the light of experience (Article 6).

3. The law applicable to the insurance contract is that of the country where the leading insurer has his establishment (Article 7).

Purposely, mention is made merely of the law of the country of the leading insurer and not of its national law.

This means that, depending on the legislation applicable in the various Member States, this law may either enforce the application of national law or, on the contrary, leave the parties complete freedom of choice. This is a temporary resolution since freedom of choice will probably become the rule, as part of the harmonization which is in progress with a view to the liberalization of services.

4. The technical reserves are calculated in accordance with the rules applicable in the Member States of the co-insurers (Article 8).

The only restriction on this principle concerns reserves for pending claims, which must be at least equal to those determined by the leading insurer according to the rules of the country where he is established.

This provision is based on the assumption that in all probability the leading insurer is in the best position to evaluate the amount of such reserves.

5. Collaboration between the supervisory authorities is an important factor in the implementation of the Directive. Such collaboration calls for some knowledge of developments in the field of Community co-insurance.

This is why provision has been made for the competent authorities to ensure that the undertakings concerned have the necessary statistical data (Articles 9 and 10).

6. As regards winding-up, it was considered desirable, even before the directive on the subject which is now being drawn up was adopted, to assert the principle of equality of treatment, irrespective of nationality, for creditors deriving their rights from co-insurance business and from other direct insurance business. (Article 11).

Title III

Final provisions (arts. 12 to 16)

These provisions are contained in the directives already adopted in the insurance field and consequently, do not call for any special comment.

PROPOSAL
- 9 -

FOR A

Council Directive on the liberalization of co-insurance operations
and the co-ordination of laws, regulations and administrative
provisions relating to co-insurance

THE COUNCIL OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community,
and in particular Article 57(2), the second paragraph of Article 59,
Article 63(2) and Article 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 it is necessary to develop co-insurance between Member States
with a view to increasing the capacity of the insurers of the Community
to accept risks, by allowing insurers to call not only on co-insurers
established in their country but also on those established in other
Member States;

Whereas the removal of restrictions in this matter is, as far as direct
insurance operations other than life assurance are concerned, dependent
on the achievement of freedom of establishment for these operations;
whereas this liberalization has been achieved by the first Council Directive
(1) on the coordination of provisions relating to insurance other than
life assurance and by the Directive (2) abolishing restrictions on freedom
of establishment;

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

./.

(1) OJ No. L 228, 16 August 1973, p. 3.

(2) OJ No. L 228, 16 August 1973, p. 20.

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

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

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

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

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

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

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

HAS ADOPTED THIS DIRECTIVE:

./.

TITLE I : GENERAL PROVISIONS

ARTICLE 1

This Directive has as its object the setting up of a system of Community rules on co-insurance in respect of the risks set out in the Annex to the first Council Directive (1) of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, hereinafter called "the First Coordination Directive", with the exception of the risks classified under No. 10 (Motor vehicle liability), of point A of that Annex.

ARTICLE 2

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

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

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

ARTICLE 3

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

./.

(1) OJ No. L 228, 16 August 1973, p. 3.

ARTICLE 4

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

./.

TITLE II : CONDITIONS AND PROCEDURES OF COMMUNITY CO-INSURANCE

ARTICLE 5

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

ARTICLE 6

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

ARTICLE 7

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

ARTICLE 8

1. The amount of technical reserves shall be determined by the different co-insurers according to the rules fixed by the State where they are established or, in default of such rules, according to the practices current in that State. However, the reserve for pending claims shall be at least equal to that determined by the leading insurer according to the rules or practices of the State where such leading insurer is established.
2. The technical reserves established by the different co-insurers shall be represented by matching assets localized in the Member States where they are respectively established. However, greater flexibility in the rules on matching assets and their localization may be allowed by the Member States.

ARTICLE 9

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

ARTICLE 10

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

ARTICLE 11

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

TITLE III : FINAL PROVISIONS

ARTICLE 12

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

ARTICLE 13

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

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

ARTICLE 14

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

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

ARTICLE 15

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

ARTICLE 16

This Directive is addressed to the Member States.