

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(79) 396 final.

Brussels, 19 July 1979

Proposal for a

COUNCIL DIRECTIVE

on the coordination of laws, regulations and administrative provisions
relating to legal expenses insurance

(submitted to the Council by the Commission)

COM(79) 396 final.

COMMISSION DES COMMUNAUTÉS EUROPÉENNES

C O R R I G E N D U M

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Ne concerne que les versions
française, allemande, italienne
et anglaise

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PROPOSITION DE DIRECTIVE DU CONSEIL
PORTANT COORDINATION DES DISPOSITIONS LEGISLATIVES,
REGLEMENTAIRES ET ADMINISTRATIVES CONCERNANT
L'ASSURANCE DE LA PROTECTION JURIDIQUE

(présentée par la Commission au Conseil)

COM(79) 396 final/2

Corrigendum au doc COM(79) 396 final du 19.7.1979

1. Proposition de directive du Conseil sur l'assurance de la protection juridique

Version française,

- p. 7, 4^o ligne, ajouter après les mots "s'accompagne logiquement":
"de la suppression"

- p. 12, article 3, point 3, avant dernière ligne, lire:
"rapports entre l'entreprise qui"...

- p. 13, article 6, 2^o ligne, lire "procédure arbitrale"

2. Proposal for a Council directive relating to legal expenses insurance
English version

- in the commentary on Article 3, on p. 5, delete the first indent,
beginning "the departments..."

- add at the end of p. 6:

Article 7 - Abolition of compulsory specialization

The system created by the Directive, under which composite and specialist undertakings may exist side by side, subject however to various provisions to avoid conflicts of interest, finds its logical counterpart in the abolition of any requirement that an insurer shall not carry on legal expenses insurance and other classes of insurance at the same time - a requirement which is in fact found in only one Member State.

The abolition of such a requirement is essential for the freedom of establishment in this class and therefore forms a fundamental part of the Directive.

- In the text of the directive, p. 5, article 3, add at the end of point 4:

"compensate the insured person for any resultant loss".

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3. Vorschlag für eine Richtlinie des Rates über die Rechtsschutzversicherung

Deutscher Text

- S. 7, Zeile 4, nach den Wörtern geht zwangsläufig mit "der Aufhebung des Kumulierungsverbots" lesen.

4. Proposta di Direttiva del Consiglio relativa all'assicurazione della difesa legale

versione italiana

- pagina 7, linea 4, aggiungere dopo le parole "connesso con" la parola "la soppressione del"...
- pagine 10, linea 7, aggiungere dopo "ad", le parole : "una società giuridicamente distinta".

Explanatory Memorandum

1. Legal expenses insurance ensures that the insured person is granted services and/or the reimbursement of costs incurred in recovering compensation for damage suffered, or defending himself in proceedings, or against a claim made against him. In most cases these costs consist of legal costs and lawyers' and experts' fees.

Legal expenses insurance is an indemnity insurance and constitutes Class No 17 of Annex A of the Directive of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance.

2. This class of insurance is subject to special circumstances.

Two types of insurance undertaking transact it at present: composite undertakings, which transact it at the same time as other classes, such as civil liability, fire or theft, and specialized undertakings which transact only legal expenses insurance.

Although there are in eight Member States both composite and specialized undertakings, i.e. a dualist system, in the Federal Republic of Germany, legal expenses insurance can be transacted only by an undertaking which is legally separate from that transacting any other class of insurance; this is class segregation.

3. Article 7(2)(c) of the directive of 24 July 1973 accepts this situation, but only provisionally; it lays down that coordination must be implemented. This is the object of this Directive.

The result is that the objectives of the Directive of 24 July 1973 have been only partially achieved in respect of legal expenses insurance.

A Community composite company is not allowed to establish itself in Germany to transact this class of insurance. It may do so only by setting up a specialized company.

On the other hand, a company specialized in this class of insurance may establish itself in any other Member State without changing its structure.

4. The following typical class of conflicts of interest may be cited by way of example:

(a) if a composite insurer covers both the party at fault against civil liability and the victim for legal expenses, he will have to act against himself and therefore is likely not to defend the victim adequately, precisely to avoid having to pay him too much compensation

(b) if a composite insurer covers the same person for civil liability and legal expenses, he is likely in the latter capacity not to defend his client correctly:

- if as the insurer against civil liability he can exercise a right to bring proceedings against his own client, for example, as a result of serious negligence on the part of the latter,
- if as the insurer against civil liability, he proposes a sharing of liability which the client refuses,
- if as the insurer against civil liability, he has to carry out himself the expert's assessment and compensate the damage suffered by his own client, on the basis of private law agreements between insurers; such agreements exist in France and Belgium and are proposed in other Community countries.

(c) If an insurer specializing in legal expenses insurance belongs to a business group which also includes a liability insurer, the conflict referred to above may also arise.

5. The specialization requirement was introduced in Germany to prevent conflicts of interest which might arise between the insurer and the insured person. This requirement seems, however, an excessive means of achieving this aim.

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The coordination introduced by this Directive makes it possible to give full effect to freedom of establishment while eliminating conflicts of interest. This coordination is achieved essentially by improving the present dualist system by requiring, for all insurance undertakings, freedom as to choice of lawyer for the insured person and an arbitration clause and, for composite undertakings, separate management and accounting and separation of contracts or at least of the guarantees accorded in a single contract.

A logical complement to this middle-course solution is the abolition of the prohibition of the simultaneous transaction of legal expenses insurance and other classes.

Comments

Article 1 - Purpose of the directive

Since one of the objectives of coordination is to eliminate all possible conflicts of interest, it was considered that this should be expressly mentioned.

Although in several Community countries, legal expenses insurance is generally connected with the use of a motor vehicle, which gives rise to conflicts on account of civil liability insurance, in some countries, particularly Germany and the Netherlands, legal expenses insurance has a broader scope and extends to many other fields, such as labour law or leases.

The proposed text opts for this broader objective. To do otherwise would be to run the risk of having to propose a new directive in a few years.

Nevertheless, it appears appropriate to exclude legal expenses insurance where it is linked to the insurance of marine civil liability, the problems of this sector being of a very different type and the usefulness of the Directive not being apparent as it is for motorists' civil liability.

Article 2 - Scope

To remove any uncertainty, the Directive gives a non-exhaustive list of the guarantees making up this class of insurance which are likely to give rise to conflicts of interest and to which the Directive applies.

Article 3 - Separate administration in composite undertakings

To prohibit composite undertakings from transacting legal expenses insurance, i.e. to make specialization a general requirement, would be a radical measure completely upsetting the structure of insurance companies. However, the possibility of conflicts of interest means that the present situation cannot be allowed to continue.

Thus, any composite undertaking at present transacting or extending its activity to legal expenses insurance must adopt the following provisions:

- the departments and persons that handle this insurance must be separate from those that handle other classes of insurance.
- the accounts relating to this class must be separate from those of other classes, so that the exact cost may be determined more precisely.
- legal expenses cover must be the subject of a separate contract or a separate section in a single policy, with an indication of the premium corresponding to such cover. This should enable policyholders to be better informed of their actual rights with regard to their insurers.

Moreover, Member States may, if they so choose, require composite undertakings to entrust the management of claims in the "legal expenses" class to a separate company, legally distinct. This system, tried and tested in the Netherlands under the name of "Schaderegelingskantoor", is likely to resolve conflicts of interest because it is precisely in the settlement of claims that they arise. It is with Germany in mind that it has been introduced into the Directive.

Finally, contracts entered into by composite undertakings which have not opted for this system must provide that the insurer advises the policyholder as soon as it appears that there may be a conflict of interest between them.

Article 4 - Specialized undertakings

If an undertaking specialized in legal expenses insurance has close links, financial or otherwise, with an undertaking transacting any other class of insurance, there is a likelihood of the same conflicts of interest as those arising at present within composite undertakings.

Thus the Directive lays down that persons who handle the administration of claims in one company cannot carry out the same activities in the other company.

Article 5 - Freedom as to choice of lawyer

Under legal expenses insurance contracts, the costs and fees of the lawyer responsible for defending the interests of the insured person are borne by the insurer.

It is inadvisable that this lawyer should be the usual lawyer of the insurance company, above all if it is a composite company. This would place the lawyer concerned in a difficult position.

Thus the Directive lays down that the insured person must be free to choose his own lawyer.

It should be added that if the insured person does not choose a lawyer, the Directive does not prevent the insurer from making such choice, but this should only be an additional measure.

Article 6 - Arbitration clause

Since a difference of opinions could arise between the legal expenses insurer and the client with regard to the action to be taken, for example the advisability of bringing proceedings, the Directive provides for an arbitration clause, which is already widespread in the Community, under which one or more persons, who are lawyers or arbitrators, are appointed by the two parties concerned, to determine what action should be taken.

In the interests of the insured person, it is laid down that at least half of the costs of this consultation procedure should be borne by the insurer; the Member States are free to lay down that a greater proportion must be borne by the insurer.

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Article 8 - Ancillary risks

It may happen that an insurer covers legal expenses as a risk ancillary to another risk within the meaning of point C of the Annex of the First Directive for the co-ordination of Non-Life Insurance. He is therefore not specifically authorised to carry on legal expenses insurance and so escapes from the present Directive.

To avoid the present Directive being deprived in this way of part of its effectiveness, it is necessary to state that risks within class 17 cannot be considered as ancillary to risks in other classes, as is already the case for classes 14 and 15.

It must nevertheless be recognised that a civil liability insurer very often finds himself in the position of defending his policyholder against an action brought by a third party, in which he is doing no more than performing a service arising directly from the obligation he has undertaken. Such an activity forms an integral part of the civil liability insurance and is not concerned with an ancillary risk.

But a policyholder may, as an additional precaution, also take out a legal expenses policy which covers such services along with others and which will come fully into effect in the event of a conflict of interests, since the policyholder will then benefit for example from the freedom to choose his own lawyer.

The following articles do not call for any special comment:

Article 9 : Time limits for implementation of the directive

Article 10 : Communication of provisions adopted.

Article 11 : Applicability.

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,
and in particular Article 57(2) 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 Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance¹ eliminated, in order to facilitate the taking-up and pursuit of such activities, certain differences existing between national laws;

Whereas, however, Article 7(2)(c) of the said Directive 73/239/EEC provides that "Pending further coordination, which must be implemented within four years of notification of this Directive, the Federal Republic of Germany may maintain the provision prohibiting the simultaneous undertaking in its territory of health insurance, credit and suretyship insurance or insurance in respect of recourse against third parties and legal defence, either with one another or with other classes"; whereas there exist therefore at present barriers to the establishment under effective conditions of competition of agencies and branches transacting legal expenses insurance ; whereas it is essential to remedy this situation;

Whereas, in order to protect policyholders, steps should be taken to prevent any conflict of interests between a person with legal expenses cover and his insurer arising out of the fact that the latter is covering him in respect of any other class of insurance referred to in the Annex to the above-mentioned Directive or is covering another person;

Whereas the system of compulsory specialisation at present applied by one Member State, the Federal Republic of Germany, precludes the majority of such conflicts; whereas however it does not appear necessary, in order to obtain this result, to extend that system to the entire Community, which would require the splitting up of composite undertakings;

¹ OJ No L 228 of 16.8.1973, p. 3

Whereas the desired result can equally well be achieved by requiring such composite undertakings to adopt a separate management comprising in particular separate accounting and a separation of contracts or of the cover provided under a single contract; whereas the management of claims in respect of legal expenses cover by an entity having separate legal personality is also an appropriate way of precluding the risk of a conflict of interests;

Whereas, in order to attain this same objective, specialized undertakings must also comply with certain provisions ; whereas members of their staff who deal with the management of claims ought not to carry on at the same time a similar activity in an undertaking transacting another class of insurance;

Whereas, the conflict of interests which may arise between an insurer and an insured person implies that the latter must be free to choose his lawyer;

Whereas, conflicts may nevertheless arise between insurer and insured; whereas it is important that they be settled in the fairest and speediest manner possible ; whereas it is appropriate therefore that provision be made in legal expenses insurance policies for an arbitration or equivalent procedure;

Whereas the second paragraph of point C of the above-mentioned directive 73/239/EEC provides that the risks included in classes 14 and 15 in point A may not be regarded as risks ancillary to other classes;

Whereas an insurance undertaking should not be able to cover legal expenses as a risk ancillary to another risk without having obtained an authorization in respect of the legal expenses risk; whereas a reference to class 17 should therefore be inserted in point C of the said Annex,

HAS ADOPTED THIS DIRECTIVE:

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Article 1

The purpose of this Directive is to coordinate the provisions laid down by law, regulation or administrative action concerning legal expenses insurance as referred to in paragraph 17 of point A of the Annex to Council Directive 73/239/EEC, hereinafter called "First Co-ordination Directive", in order to eliminate any possible conflicts of interest between a person with legal expenses cover and his insurer arising out of the fact that the latter is covering him in respect of any other class of insurance referred to in that Annex or is covering another person.

This Directive does not apply to legal expenses insurance where such insurance is linked with that in respect of liability arising out of the use of ships, vessels or boats on the sea, as referred to in paragraph 12 of point A of the Annex referred to above.

(1) OJ No L 228 of 16.8.1973, p. 3.

Article 2

This Directive shall apply to those various elements in a contract of legal expenses insurance whereby the insurer provides services or bears costs for the purpose, in particular, of:

- securing compensation for the loss, damage or injury suffered by the insured person, whether by settlement out of court or through civil or criminal proceedings;
- defending the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against him otherwise than through such proceedings.

Article 3

1. All undertakings which transact at the same time legal expenses insurance and insurance in one or more other classes set out in the First Co-ordination Directive shall manage legal expenses insurance separately from the other classes of insurance.
2. The separate management shall be organized in such a way that the simultaneous transaction of legal expenses insurance and one or more of the other classes set out in the First Co-ordination Directive shall not prejudice the interests of the insured person with regard to the cover of legal expenses.

This shall mean in particular that :

- separate accounts shall be kept in respect of the legal expenses business;
 - legal expenses cover shall be the subject of a contract separate from that drawn up for the other classes of insurance or shall be dealt with in a separate section of a single policy in which the nature of the legal expenses cover and the amount of the relevant premium shall be specified.
3. Furthermore, Member States may require undertakings which transact or wish to transact within their territory at the same time legal expenses insurance and insurance in one or more other classes set out in the First Co-ordination Directive to entrust the management of claims in respect of legal expenses insurance to an entity having separate legal personality. This company shall be mentioned in the contract or separate section referred to in the second indent of paragraph 2. Member States which make use of this option shall so inform the Commission and the other Member States.

Article 4 of this Directive shall apply by analogy to the relations between the undertaking which transacts both legal expenses and other insurance and the company which is entrusted with the management of claims.

4. Every contract of legal expenses insurance entered into by an undertaking which transacts such insurance and one or more other classes of insurance, but does not entrust the management of claims in respect of its legal expenses business to an entity having separate legal personality, shall provide that where the person enjoying legal expenses cover calls upon the insurer to meet obligations in respect thereof, the latter shall advise him of any factor liable to bring about a conflict of interests between them and shall at the same time give him the possibility of entrusting the defence of his interests to a lawyer of his choice. Any insurer not fulfilling this obligation shall

Article 4

Where an undertaking transacting only legal expenses insurance has financial, commercial or administrative links with an undertaking which transacts one or more of the other classes of insurance set out in the First Co-ordination Directive, no member of the management of the indoor or outdoor staff of either company who is concerned with the management of claims or with legal advice in respect thereof may at the same time carry on a similar activity in the other company.

On each occasion when it is necessary to instruct a lawyer to represent or defend the interests of a person with legal expenses cover, the latter must be free to choose his lawyer. The insured person shall not have the capacity to surrender this right by contract.

Article 6

Member States shall adopt all appropriate measures to ensure that legal expenses insurance policies provide for an arbitration or equivalent procedure whereby, where there is a difference of opinion between a legal expenses insurer and his client as to what action should be taken, the dispute shall be resolved by one or more persons who shall be lawyers or arbitrators.

The insured person shall not be required to bear more than one half of the costs resulting from such procedure.

Article 7

Member States shall abolish all provisions which prohibit an insurer from carrying on within their territory legal expenses insurance and other classes of insurance at the same time.

Article 8

The second paragraph of point C of the Annex to the First Co-ordination Directive shall be replaced by the following text :

"However, the risks included in classes 14, 15 and 17 in point A of this Annex may not be regarded as risks ancillary to other classes."

Article 9

Member States shall amend their national provisions so as to comply with this Directive within 12 months of its notification and shall forthwith inform the Commission thereof.

The provisions thus amended shall be applied within 18 months of the date of notification.

Article 10

Following notification of this Directive, Member States shall communicate to the Commission the texts of the main provisions of the laws, regulations or administrative provisions adopted by them in the field covered by this Directive.

Article 11

This Directive is addressed to the Member States.