

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(82) 43 final

Brussels, 8 February 1982

Amended proposal for a

COUNCIL DIRECTIVE

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

(submitted by the Commission to the Council pursuant
to the second paragraph of Article 149 of the EEC Treaty)

COM(82) 43 final

Explanatory Memorandum

On the basis of the opinions delivered by the European Parliament¹ and the Economic and Social Committee² on the proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance³, the Commission makes the amendments embodied in the attached text to its original proposal.

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- 1 - OJ N° C 260, 12 October 1981.
 - 2 - OJ N° C 348, 31 December 1980.
 - 3 - OJ N° C 198, 7 August 1979.

Since the European Parliament has approved the general approach underlying the Commission's proposal while the Economic and Social Committee has suggested an alternative approach, it is appropriate to draw attention to the fact that the twofold objective of the proposal is to secure complete exercise of the freedom of establishment in respect of legal expenses insurance in Germany in whose territory composite insurance undertakings are prevented from providing this class of insurance, and to preclude as far as possible any conflict of interests between an insured person with legal expenses cover and his insurer.

The Economic and Social Committee has requested that all composite undertakings providing legal expenses cover be required to entrust the management of claims in respect of legal expenses to a legally separate undertaking.

This solution, which was formally rejected by the European Parliament, would necessitate a substantial alteration of the structure of composite undertakings.

While it would preclude certain conflicts of interests, it would give rise to others. It is unjustified, particularly since the Commission's proposal contains various provisions which very satisfactorily achieve the aim of precluding conflicts of interest, notably by requiring the insurer to allow the insured person freedom in the choice of a lawyer. These provisions are of such a nature as to improve considerably the position of insured persons in several Community countries.

The Commission adheres, therefore, to the general approach underlying its initial proposal and cannot comply with the Economic and Social Committee's request.

Since the management of legal expenses claims by a legally separate undertaking can, however, also constitute a valid means of precluding conflicts of interest, as far as is possible, the original text allowing Member States to impose that system has been maintained.

Article 1, first paragraph

According to the existing text of the Article action should be taken to eliminate any possible conflict of interests. Since none of the many solutions considered enables this objective to be fully realised, the Commission proposes specifying that any such conflict should be precluded as far as possible and, adopting the suggestion of the ESC, adds that should such a conflict arise, it must be made possible for it to be resolved.

Article 1, second paragraph

The Commission accepts the minor alteration of this paragraph requested by the European Parliament.

Article 2, new second paragraph

The addition of this paragraph is justified in that where an insurer who provides an insured person with both liability and legal expenses cover provides services or bears the cost of defending the insured person in proceedings other than criminal proceedings against a claim made by a third party on the basis of civil liability, the insurer acts on the basis of the civil liability cover. This type of situation consequently falls outside the scope of the Directive.

This was requested by the ESC.

Article 3 (2)

In order both to inform the insured person of his rights and to further clarify the respective costs of the cover provided by the insurer, the original proposal provides that if the legal expenses cover is not the subject of a contract separate from that drawn up for the other classes of insurance, it must be dealt with in a separate section in which the nature of the cover and the amount of the relevant premium are specified.

The importance of this reference to the premium is such that it cannot be deleted, as requested by the European Parliament.

Article 3 (3) - initial version

Since it is more logical to deal in Article 3 only with composite undertakings which themselves manage legal expenses claims, the two subparagraphs of this paragraph relating to the office responsible for settling claims have been separated and become the first paragraph of Article 4 and the second paragraph of Article 5 respectively.

Article 3(3) - new version

The effect of the wording of the initial version was that the insured person was frequently notified too late of the possibility of a conflict of interests, when the conflict already existed. The new text adds that the insurer must advise the insured person of the possibility of such a conflict when the insurance contract is concluded.

Article 4, first paragraph

Since the word "company" might create misunderstanding it has been replaced by the more appropriate word "undertaking".

Article 5 - new

The original Article 4 introduced a means of precluding conflicts of interest in the case of specialist undertakings. This now becomes the first paragraph of Article 5.

The second subparagraph of Article 3(3) extended this rule to the relations between an undertaking transacting legal expenses and other insurance and the legally separate undertaking entrusted with the management of claims. In the interests of clarity this article becomes the second paragraph of Article 5.

Article 6, first paragraph

Since the freedom of choice of lawyer is a fundamental provision of the Directive, the Commission cannot accept the slightly restrictive wording proposed by the ESC.

The Commission cannot accept either the Committee's proposal to restrict geographically the freedom of choice of lawyer.

Although the object of this proposal is to prevent the cost of legal expenses insurance rising excessively, it is nevertheless incompatible with the principle of freedom to provide services enjoyed by lawyers within the Community.

Member States can pursue this objective of moderating costs by introducing specific provisions, notably relating to scales of charges.

The first paragraph of Article 6 is identical therefore with the original Article 5.

Article 6, second paragraph - new

While the role and independence of the lawyer can be fundamental to defending the interests of the insured person, the role and independence of the expert can be so equally. Steps must be taken therefore to prevent the expert or at least the second expert from being chosen by the insurer only.

This is dealt with in the new second paragraph of Article 6 in which the Commission incorporates the opinion of the European Parliament. The latter's request that 50% at least of such costs be borne by the insurer has not been met, however, since such costs are generally borne by the insurer in full.

Article 8 - new

The Commission has accepted, with slight alterations, the European Parliament's proposal to establish or adapt a body responsible for supervising compliance with the provisions of the Directive.

The amendments proposed in respect of the operative part entail corresponding amendments to the recitals.

Amended proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance.

(Submitted by the Commission to the Council pursuant to the second paragraph of Article 149 of the EEC Treaty).

Original Proposal

New proposal

The Council of the European Communities

CITATIONS

First citation

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

Second citation

Having regard to the proposal from the Commission,

Third citation

Having regard to the opinion of the European Parliament,

Fourth citation

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

RECITALS

First recital

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 assurance⁽¹⁾, eliminated, in order to facilitate the taking-up and pursuit of such activities, certain differences existing between national laws;

CITATIONS

First, second, third and fourth citations

(unchanged)

RECITALS

First recital

(unchanged)

(1) OJ N° L 228, 16.8.1973, p.3

Second recital

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;

Third recital

Whereas, in order to protect insured persons, 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 abovementioned Directive or is covering another person;

Fourth recital

Whereas the system of compulsory specialization 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;

Second recital

(unchanged)

Third recital

Whereas, in order to protect insured persons, steps should be taken to preclude, as far as possible, 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 abovementioned Directive or is covering another person and, should such a conflict arise, to enable it to be resolved;

Fourth recital

Whereas contracts under which the insurer provides services or bears the cost of defending the insured person in connection with civil liability actions should, however, be excluded from the scope of the Directive;

Fifth recital

(former fourth recital unchanged)

Fifth recital

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;

Sixth recital

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;

Seventh recital

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;

Eighth recital

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;

Ninth recital

Whereas the second paragraph of point C of the Annex to the abovementioned 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,

Sixth recital

(former fifth recital unchanged)

Seventh recital

(former sixth recital unchanged)

Eighth recital

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 and an independent expert or second expert;

Ninth recital

(former eighth recital unchanged)

Tenth recital

(former ninth recital unchanged)

HAS ADOPTED THIS DIRECTIVE :

Article 1, first paragraph

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 Coordination 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.

Article 1, second paragraph

This Directive shall 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.

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.

HAS ADOPTED THIS DIRECTIVE :

Article 1, first paragraph

The purpose of this Directive is to coordinate the provisions laid down by law, regulations 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 the "First Coordination Directive", in order to facilitate the effective exercise of freedom of establishment and preclude as far as possible any conflict of interest between a person with legal expenses cover and his insurer arising out of the fact that the latter is covering another person, and, should such a conflict arise, to enable it to be resolved.

Article 1, second paragraph

This Directive shall not apply to legal expenses insurance where such insurance concerns disputes or risks arising out of, or in connection with, the use of sea-going vessels.

Article 2

This Directive shall apply to those various elements in a contract of legal expenses insurance whereby the insurer primarily provides services or bears costs (the rest unchanged)

(new second paragraph)

The Directive shall not, however, apply to cover provided by an insurer providing liability cover, within the limits of that cover, for the purpose of defending the insured person in civil 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 Coordination Directive shall manage legal expenses insurance separately from the other classes of insurance.

Article 3(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 Coordination 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.

Article 3 (3), first subparagraph

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 Coordination Directive to entrust the management of claims in respect of legal expenses insurance to an undertaking having separate legal personality. That 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 3(1)

(unchanged)

Article 3(2)

(unchanged)

- separate accounts shall be kept in respect of legal expenses business,

- legal expenses cover shall be the subject of a contract separate (the rest unchanged)

(This paragraph, slightly amended, becomes the first paragraph of Article 4)

Article 3(3), second subparagraph

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.

Article 3(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 compensate the insured person for any resultant loss.

(This paragraph, slightly amended, becomes the second paragraph of Article 5)

Article 3(3)

(former Article 3(4) as amended)

Every contract of legal expenses insurance entered into by an undertaking which transacts such insurance and one or more other classes of insurance shall provide that :

- the insurer shall advise the insured person with legal expenses cover, on the signing of the contract, of the possibility of a conflict of interests between them;
- where the insured person calls upon the insurer to meet his obligations the latter shall afford him the opportunity of entrusting the defence of his interests to a lawyer of his choice.

Any insurer not fulfilling this obligation shall compensate the insured person for any resultant loss.

Article 4, first paragraph

(former Article 3(3), first subparagraph as amended)

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 Coordination Directive to entrust the management of claims in respect of legal expenses insurance to an undertaking having separate legal personality. That undertaking shall be mentioned in the separate contract or separate section referred to in the second indent of Article 3(2).

Member States which make use of this option shall so inform the Commission and the other Member States.

Article 4, second paragraph

Article 3(3) shall not apply to undertakings which entrust such management to an undertaking having separate legal personality.

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 Coordination 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.

Article 5, first paragraph

(former Article 4 unchanged)

Article 5, second paragraph, new

This provision shall apply by analogy to the relationships referred to in the first paragraph of Article 4, between an undertaking which transacts at the same time legal expenses insurance and insurance in one or more other classes and an undertaking having separate legal personality to which it entrusts the management of claims in respect of legal expenses insurance.

Article 5

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, first paragraph

Every time that occasion arises to instruct a lawyer either to represent or to defend the interests of a person with legal expenses cover, or both, 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, second paragraph, new.

Lawyer means any person entitled to pursue his professional activities under one of the denominations laid down in Directive 77/249/EEC intended to facilitate the effective exercise by lawyers of freedom to provide services⁽¹⁾.

(1) OJ N° L 78 of 16.3.1977, p.17

Article 6, third paragraph, new

Furthermore, where recourse is had to an expert, the insured person shall be free to choose the expert or a second expert.

Article 6, first paragraph

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.

Article 6, second paragraph

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

Article 7, first paragraph

(former Article 6, first paragraph)

Article 7, second paragraph, new

(former Article 6, second paragraph, as amended)

The costs resulting from such procedure shall be fixed by those persons, lawyers or arbitrators, and the insured person shall not be required to bear more than one half of such costs.

Article 8, new

The Member States shall be responsible for the establishment or adaptation and the effective operation of a supervisory body on which insurers and insured persons are represented. That body shall supervise compliance with the provisions contained in this Directive. It shall grant authorisations, impose fines on insurance undertakings, where necessary, and receive complaints from insured persons, without prejudice to the authority of national judicial bodies.

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 9

(former Article 7 unchanged)

Article 8

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

Article 10

(former Article 8 unchanged)

"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.

Article 11

Member States shall amend their national provisions so as to comply with this Directive before 1 July 1984 and shall forthwith inform the Commission thereof. The provisions thus amended shall be applied before 1 January 1985.

Article 12

(former Article 10 unchanged)

Article 13

(former Article 11 unchanged)