COMMISSION OF THE EUROPEAN COMMUNITIES

COM(90) 348 final - SYN 291
Brussels, 31 August 1990

Proposal for a

THIRD COUNCIL DIRECTIVE

on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. INTRODUCTION - GENERAL CONSIDERATIONS

A) The completion of the internal market in insurance is now one of the Commission's priority objectives given the increasing importance of this boom industry and the work already done in other fields with a view to creating a single financial market.

In the direct non-life insurance sector, the Second Directive, Directive 88/357/EEC, has already made a significant contribution towards the formation of the internal market. That Directive lays down rules designed to facilitate freedom to provide services in respect of direct non-life insurance in the form of two separate sets of arrangements. The first, intended for large risks and based on the approach - as mapped out in the White Paper - of home country control, provides for application of the law of the country of establishment of the insurer covering the risk. The second set of arrangements concerns "mass risks" and is based on the application of the supervisory rules of the country in which the risk insured is located (host country control).

When the Second Directive was adopted, the Commission formally undertook to present at the earliest opportunity proposals which would permit the application of the principle of home country control to all direct non-life insurance business and its subjection to a single set of legal arrangements.

For the achievement of this third stage, which will result in the full completion of the internal market, the strategy adopted is that provided for in the White Paper:

(a) coordination of the essential rules on the prudential and financial supervision of direct non-life insurance business;

(b) mutual recognition, on the basis of such harmonization at Community level, of the authorizations granted to insurance undertakings and of the prudential supervision systems of the different Member States;

(c) the grant of a single authorization valid throughout the Community and supervision of an undertaking's entire business by its home Member State (home country control).

This strategy has already been used to complete the internal market in other areas of financial services. Such is the case with UCITS (Directive 85/611; OJ L 375, 31.12.1985), banking (Second Directive 89/646, OJ L 386, 30.12.1989) and investment services (OJ C 43, 22.2.1989), in which considerations of the protection of savers, investors and consumers are as much to the fore as they are in the insurance sector. It is therefore considered justified to apply to all financial institutions a regime based on the same principles.

Once this objective has been attained, the free movement of insurance products will be possible within the Community and it will afford every person seeking insurance the opportunity of turning to any Community insurer in order to find the cover best suited to his needs, while providing him with adequate protection.

The introduction of this regime into the direct non-life insurance sector involves substantial amendment of the rules currently in force under the First and Second Directives. Those Directives make no provision either for a single authorization system or for genuine home country control. Nor has any coordination been carried out as yet as regards the essential harmonization of prudential supervision rules concerning insurance companies' technical provisions.

This proposal for a Third Directive addresses these matters and amends the first two Directives so as to produce a cohesive system applicable to all direct non-life insurance business, whether it be transacted under conditions of establishment or under conditions of provision of services.

The structure of this proposal for a Directive is that already adopted by the Second Banking Directive and by the proposal for a Directive on investment services. It consists, therefore, of five titles:

TITLE I: Definitions and scope (Articles 1 - 3)

TITLE II: The taking-up of the business of insurance (Articles 4 - 7)

TITLE III: Harmonization of conditions governing pursuit of business (Articles 8 - 27)

TITLE IV: Provisions relating to freedom of establishment and freedom to provide services (Articles 28 - 41)

TITLE V: Final provisions (Articles 42 - 46)

B) Harmonization of the rules concerning the technical provisions of undertakings carrying on the business of direct non-life insurance

The introduction of a system of a single authorization and home country control calls for harmonization of Member States' rules on the definition and calculation of technical provisions and on the currency matching, valuation, diversification and localization of the assets covering the technical provisions.

As regards the definition and calculation of technical provisions, the Commission considers that the provisions of the proposal for a Council Directive on the annual accounts and consolidated accounts of insurance undertakings (OJ C 131 of 18.5.1987) already achieve such harmonization as is essential and necessary to permit mutual recognition and home country control.

As regards the assets covering the technical provisions, this proposal for a Directive lays down coordinated rules on their admissibility, diversification and valuation and on currency matching requirements.

The requirement that assets be located in the Member State in which business is carried on is deleted to take account of the measures adopted in the field of the liberalization of capital movements. For the same reason, the requirement that a minimum of assets be invested in specific categories can no longer be maintained.

- Law applicable to contracts and policy conditions

This proposal for a Directive does not undertake any harmonization of the substantive law applicable to contracts and policy conditions. The work carried out within the Council in this connection in recent years has shown that such harmonization is not essential to

achieve at this stage. The system proposed in this Directive is based on the rules laid down in the Second Directive on choice of law applicable to insurance contracts. This system makes it possible to ensure satisfactorily the requisite consumer protection because, in principle, the Member State in which the risk is situated can if it so wishes apply its own law to an insurance contract covering a mass risk.

On the other hand, the Commission considers that all large risks must, owing to their specific characteristics, enjoy complete freedom of choice of law. This approach is in keeping with the case law of the Court of Justice, which has held that there is no need for special protection in respect of the insurance of large risks. What is more, some Member States granted such freedom to all large risks when they incorporated the Second Directive into their law.

At the same time, the Commission considers that, in order that they might find the cover best suited to their specific needs, it is of the utmost importance that persons seeking insurance should have access to every insurance product lawfully marketed in the Community provided it does not conflict with legal provisions protecting the general good in force in the Member State in which the risk is situated.

As regards the verification of insurance policies and contract documents, the Commission considers that the systems to be used should be tailored to the requirements of a genuine single market. With this in mind, the Commission proposes that every system for the prior vetting of such documents should be abolished and replaced by ex post facto communication systems, which also make it possible to afford policy-holders the requisite degree of protection.

- Abolition of the prohibition of the simultaneous pursuit of business by way of right of establishment and by way of freedom to provide services

The Second Directive authorized, in the interests of protecting policy-holders, Member States to prohibit the simultaneous pursuit in their territory of insurance business by way of establishment and by way of freedom of services as far as the covering of mass risks is concerned. This option was justified by the situation which prevailed, when the Second Directive was adopted, with regard to the harmonization of the essential rules on technical provisions and the law governing insurance contracts and policy conditions.

This proposal for a Directive brings about the coordination considered necessary to afford policy-holders the requisite degree of protection. At the same time, and as with other financial services, it introduces into the insurance sector the system of a single authorization and prudential supervision of all business by the home Member State. The option is therefore abolished by this proposal for a Directive.

- Relations with third countries

This proposal contains no provisions on the treatment to be granted to insurance undertakings from third countries seeking authorization to do business in the Community. The relevant arrangements have already been introduced in the amended proposal for a Directive on freedom to provide services in motor insurance (COM(90)278 of 20.06.1990), on which the Council adopted a common position on 20 June of this year. The arrangements provided for in that proposal for a Directive apply to the whole direct non-life insurance sector.

- Exercise of implementing powers

This proposal for a Directive is silent about the procedure to be followed for the exercise of the implementing powers it confers on the Commission. The question is dealt with in a separate proposal for a Directive which will apply to all directives concerning life and non-life insurance providing for such implementing powers (COM(90)344 of 11.07.1990).

C) Three factors help explain the urgency of action at Community level along the lines of that proposed in this proposal for a Third Directive.

The first is a major political factor, the Single European Act. When this was signed, Member States expressed their firm political will to take, before 1 January 1993, the decisions needed to create a genuine internal market.

The second factor concerns the development of financial services and their increasing importance. Within the Community, this development has already led to adoption of the provisions needed to complete the internal market in the field of credit institutions and UCITS.

Such financial institutions will thus be able to propose throughout the Community products benefiting from a "European passport", thereby creating a distortion of competition to the detriment of those insurers with whom they enter, in the case of certain products, directly into competition.

The insurance industry is currently at a disadvantage compared with other financial services when it comes to facing the challenge of the single market. Insurance undertakings are to a large extent still obliged to operate in twelve isolated markets subject to different rules and procedures as regards the taking-up and pursuit of business, whether it be by way of establishment or by way of freedom of

(2)

services. This involves a variable degree of intervention in relation to insurance products and the freedom of insurers and those seeking insurance to enter into insurance contracts. This state of affairs can no longer be tolerated if the Community's commitments as far as attaining the objectives of the EEC Treaty is concerned are to be fulfilled.

The third factor is the judgments delivered by the Court of Justice on 4 December 1986. While sanctioning the application to insurance of freedom to provide services as a fundamental principle of the Treaty, the Court sought to reconcile the exercise of that freedom with the requirements of the protection of persons seeking insurance. It confirmed that, once the necessary coordination of insurance undertakings' technical provisions, the assets covering those provisions and policy conditions has been carried out, all seekers/consumers of insurance will enjoy an adequate and sufficient level of protection, and the entire business can then be made subject to a uniform regime based on the principle of home country control.

II) COMMENTARY ON THE ARTICLES

TITLE I

Definitions and scope

Article 1 - Definitions

This article contains definitions of certain terms used in the proposal for a Directive, the aim being to clarify their meaning and hence contribute to a better understanding of the Directive.

Article 2 - Scope

This article defines the scope of the proposal for a Directive. The scope coincides with that of the First Directive (Directive 73/239/EEC). In other words, it excludes life assurance in its entirety and the operations covered by Directive 79/267/EEC, mutuals with a clearly defined, restricted local basis which, by virtue of their legal status, fulfil specific conditions of security and offer specific financial guarantees, and bodies governed by public law enjoying a monopoly of the insurance of certain risks (Articles 2 - 4 of Directive 73/239/EEC).

Article 3 - Member States' insurance monopolies

This provision is designed to adapt the monopolies existing in certain Member States in respect of the insurance of certain risks to the requirements of a genuine integrated market.

It is inconceivable that, within the Community, part of its territory should escape, owing to the existence of exclusive rights in the transaction of certain classes of insurance, from the full application of the Treaty's provisions on right of establishment and freedom to provide services. The monopoly enjoyed by certain bodies in this respect must therefore be abolished in order that persons seeking insurance in that part of the Community may also be free to choose from among the insurance products offered to them by any Community insurer.

TITLE II

The taking-up of the business of insurance

AUTHORIZATION CONDITIONS

Articles 4 and 5 - The single authorization

These articles introduce the fundamental concept of the single insurance licence by amending Articles 6 and 7 of the First Directive. Article 6 as amended now specifies that the authorization to take up the business of direct insurance shall be granted by the competent authorities of the home Member State. This system still has as its premiss that an official authorization is a pre-condition for the taking-up and pursuit of insurance business. Article 7 has been amended to specify that that authorization shall be valid throughout the Community. This extended territorial scope will apply both to establishment and the provision of insurance services on a cross-border basis (paragraph 1). The role of the competent authorities of the home Member State (which has been defined in Article 1 as the Member State of establishment of the head office of the insurance company covering the risk) is consistent with the principle of home country supervisory control of the financial position of the company, including its insurance activities in the Member States which are undertaken by way of branching or services (see Article 8). The task of supervising the company's entire business falls to the insurer's home authorities, which are those that granted the authorization.

The authorization will continue to be given for a particular class of insurance as listed in point A of the Annex to the First Directive. The option for Member States to also grant authorization for a group of classes and auxiliary risks included in classes other than that of the principal risk has been maintained in this proposal (paragraph 2).

Also any undertaking seeking to extend its business to other classes will be required to request a new authorization in accordance with the procedure laid down in Article 6 of the First Directive (point b).

Article 5 of the proposal furthermore brings to an end the derogation for the Federal Republic of Germany which allowed it to prohibit the sumultaneous undertaking of health insurance with any other class of insurance. It is considered that this final specialization requirement is no longer justified in view of the fact that further coordination in the form of the insurance accounts Directive, the harmonization of technical provisions as set out in Title III, Chapter 2 of this proposal for a Directive and the coordinated standards on permissible assets, valuation, diversification and rules on currency matching will provide sufficient protection of insured persons.

Furthermore, the possibility for Member States to apply their legal provisions justified by the general good constitutes sufficient guarantee for those Member States granting authorization to private insurers offering private health insurance in substitution for the social health insurance system to require in certain cases that the conditions of insurance offered are at least as good as those of the social health insurance system (Artical 43a).

Article 6

The home Member State must require any company seeking authorization to fulfil the conditions laid down in Article 8 of the First Directive. That is to say to adopt a specific legal form, to which this proposal adds the legal form of the European Company, to limit its business activities to the business of insurance, submit a scheme of operations and possess a minimum guarantee fund. It is now proposed to bring the authorization requirements for undertakings engaging in mass risks into line with those for large risks as set out in the Second Directive.

An additional mandatory condition, which was facultative in the First Directive, has been added to the requirements, concerning adequate technical qualifications and soundness of the managers and directors of any company seeking authorization. These conditions are considered necessary to safeguard the general quality of business of an insurance company, as well as the day-to-day management running the company (paragraph 1).

An important step forward concerning authorization conditions is the proposal to abolish the possibility for Member States to require the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which the undertaking uses in its dealings with policy-holders (paragraph 3). Member States may only require non-systematic notification of such information in exercising their supervisory tasks but this may not amount to a prior condition for an undertaking to be able to carry on its activities. Two exceptions to this system are allowed. Firstly for premium rates which function as part of a general price control system. In this exceptional case it is proposed that prior notification or approval of proposed increases in those States will be allowed. Secondly, the technical and quality checks on staff and equipment of undertakings active in the field of tourist assistance, as introduced in the Second Directive, will continue to apply.

Article 6a

This provision replaces Article 9 of the First Directive and sets out the requirements for the scheme of operations. In accordance with the amended Article 8 of the First Directive, insurance undertakings seeking authorization will no longer need to state in their scheme of operations the tariffs which they propose to apply for each category of business they engage in.

Article 7

The ownership and control of an insurance undertaking by non-insurance interests is an issue of concern for the Community supervisors, especially in a period when highly complex group structures are a widespread phenomenon. Thus the risks of cross-financing and conflicts of interest are particularly evident in an environment of vast changes in the structure of financial systems. For these reasons the current proposal stipulates

that the competent authorities, before granting an authorization, should be informed of the indentity of shareholders and members holding a qualified participation in the proposed insurance undertaking as well as of the amount of such participations. This applies to direct or indirect shareholders or members and irrespective of whether they are physical or legal persons. This procedure enables the competent authority to appraise the suitability of the shareholders and members and if necessary to reject any particular group structures as improper at the moment of the setting-up of the institution. Closely linked with this provision is Article 14 of the present proposal which provides for an information procedure regarding the prospective acquisition of an insurance undertaking which is already in operation.

TITLE III

Harmonization of conditions governing pursuit of business

Chapter 1

Article 8 - Supervision of the business of insurance

The introduction of a system of a single official authorization granted by the competent authorities of the home Member State and valid throughout the Community calls for devolution of the power of supervision, and of the means to that end, on the competent authorities which granted the authorization so as to guarantee full compliance with the conditions governing the pursuit of business by the insurance undertaking, whether it be by way of establishment or by way of freedom of services.

Article 8 of this proposal for a Directive contains a new provision which replaces Article 13 of the First Directive. It specifies that the financial supervision of an insurance undertaking, including that of the activities it carries on either through branches or by way of freedom of services, is to be the responsibility of the competent authorities of the home Member State, that is to say, the authorities which granted the authorization to the undertaking.

In addition, this provision specifies what the financial supervision of the undertaking consists of: it includes verification of (a) the undertaking's solvency, (b) the establishment of sufficient technical provisions for the undertaking's entire business and (c) the matching of assets in accordance with the provisions existing in that respect in the home Member State, which are coordinated in this proposal for a Directive.
Lastly, the existence of sound administrative and accounting procedures and adequate internal control mechanisms is a guarantee of an orderly and healthy pursuit of insurance business. This proposal for a Directive therefore requires the home Member State to ensure that this need is satisfied.

Article 9 - On-the-spot monitoring of branches

This proposal for a Directive provides for the possibility for the authorities of the insurance undertaking's home Member State to carry out, after having first informed the authorities of the Member State of establishment, on-the-spot monitoring of the branches of the undertakings they have authorized, with a view to obtaining the information necessary to ensure the financial supervision of the undertakings whose entire business they supervise.

This provision also meets a need for consistency in the approach adopted by the Community for the completion of the internal market in financial services. The Second Banking Directive contains a similar provision (Article 15). The same applies to the proposal for a Directive on investment services in the securities field (Article 19).

Article 10 - Sanctions

This article introduces into the First Directive the obligation on the part of the Member States to impose adequate penalties on insurance undertakings or their directors and managers where they infringe the rules on supervision.

Article 11 - Transfers of portfolios

The Second Directive on direct insurance other than life assurance (88/357/EEC) contains a set of complex and detailed provisions on the transfer of portfolios tailored to the legal regimes introduced in respect of the taking-up and pursuit of the business of direct non-life insurance, both by way of establishment and by way of freedom of services. The introduction of a new, single legal regime for all insurance business, irrespective of the way in which it is pursued, means that the provisions on portfolio transfer have to be adjusted.

Articles 12 and 13 - Withdrawal of authorization and financial recovery measures

Article 12 adapts to the system of a single official authorization and supervision of all insurance business by the authorities of the insurer's home Member State the provisions of Article 20 of the First Directive concerning the powers of the competent authorities to adopt measures to ensure the solvency of an insurance undertaking.

This same aim of adaptation to the single official authorization system is pursued by Article 13, which amends Article 22 of the First Directive, on the conditions under which the authorization granted to the insurance undertaking may be withdrawn.

Article 14 - Supervision of major shareholders or members

This article introduces into the insurance sector specific provisions the purpose of which is to ensure that the prudent and sound management of an insurance undertaking is not called into question by the existence of major holdings.

(3)

To that end, Article 14 lays down an obligation to furnish information in two sets of circumstances. First of all, shareholders or members who propose to acquire, directly or indirectly, a qualifying holding in an insurance undertaking must first inform the competent authorities of the size of the intended holding. The same applies where natural or legal persons wish to increase their qualifying holding so that it exceeds certain thresholds or the insurance undertaking becomes their subsidiary (Article 14(1)). This obligation to furnish information is also provided for in the event of a reduction in or disposal of a qualifying holding causing it to fall below the thresholds laid down (Article 14(2)).

Moreover, in order to ensure the effectiveness of supervision, insurance undertakings must, on becoming aware of them, inform the competent authorities of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below the thresholds laid down. They must also inform the competent authorities each year of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown by the information received at annual general meetings or as a result of compliance with the specific rules to which companies listed on stock exchanges are subject (Article 14(3)).

If the competent authorities consider that the influence exercised by shareholders or members works to the detriment of the prudent and sound management of the insurance undertaking, the Member States may take a series of measures to put an end to that state of affairs (Article 14(4)). Those measures will also be taken where the obligation to furnish information in advance is not complied with or where the competent authorities have opposed the acquisition of the shareholding.

Chapter II

Article 15 - Home country control of technical provisions and investment

Paragraph 1 of this article introduces the principle of home country control for the definition and calculation of technical provisions.

Technical provisions will be required to be defined and calculated according to the rules laid down in Articles 21-26, 40 and 52-57 of Council Directive... on the annual accounts and consolidated accounts of insurance undertakings.
For non-life insurance, these technical provisions are:

(i) unearned premiums,

(ii) unexpired risks,

(iii) life insurance provisions,

(iv) provisions for outstanding claims (including combined provisions),

(v) provision for bonuses and rebates,

(vi) equalization provisions, if required by national law or regulation.

At the meetings held with national experts in November 1989 and January 1990 there was broad agreement on the Commission proposal that the harmonization of national regulations concerning the definition and calculation of technical provisions included in the proposed insurance accounts Directive is sufficient to allow mutual recognition and home country control in this respect.
This view is supported by the CEA.

Paragraph 2 of this article introduces the principle of home country control for the investment of technical provisions.
Technical provisions will be required to be invested according to the rules laid down in Articles 17-21 of this proposal for a Directive.

Those rules cover:

(i) a general principle for the investment of technical provisions,

(ii) the admissibility of investments,

(iii) the diversification of investments,

(iv) currency matching requirements.

Furthermore, paragraph 2 of this article extends the requirement of localization of assets in the country where the business is carried on to a localization within the European Community. This extension is to be seen both in the context of freedom of capital movements within the European Community, which is fully applicable to institutional investors, and in the context of the negative effects of national localization on the investment performance and regional diversification of insurance companies' investments.

Article 16

Article 23 of the Second Directive, which provides for home country control of technical provisions in the case of large risk business and host country control in the case of mass risk business, is deleted.

Article 17 - Investment of technical provisions

This article establishes a general principle for the investment of technical provisions, which is to be found in the current legislation of most Member States.
Articles 18(2) and 19(3) of this proposal for a Directive provide that, under special circumstances and on a case-by-case basis, the home Member State may allow exceptions to the rules on the admissibility and diversification of investments. These exceptions may, however, only be allowed when the home Member State is satisfied that the general requirement of Article 17 is fulfilled.

Article 18 - Admissible investments

This article contains a list of assets in which the home Member State may allow insurance undertakings to invest their technical provisions.

The list of admissible assets is to be regarded as a minimum requirement. This means that the home Member State is free to prohibit certain categories of investments included on the list, but only for insurance undertakings having their head office in its territory. In order to provide the list with a sufficient degree of flexibility, paragraph 2 of this article allows Member States to permit other categories of investments on a case-by-case basis and subject to Article 17 of this proposal for a Directive.

Article 19 - Diversification of investments

This article lays down a set of rules on the diversification of investments. Again, the diversification rules laid down in paragraph 1 are to be regarded as a minimum. Home Member States are thus free to impose lower maximum percentages for certain or all categories of investments, but only for insurance undertakings whose head office is in their territory. For some categories of investments, especially government bonds, there are no maximum percentages. For other categories, however, especially debt securities and other bonds issued by undertakings, secured loans to natural persons, transferable shares and other variable yield participations, units in UCITs, etc. paragraph 1 establishes a set of maximum percentages both for the category of investments and for units of any one undertaking, any one piece of real property, etc.
Paragraph 2 provides that no Member State may require insurance undertakings to invest in particular categories of investments, which is still common supervisory practice in some Member States, especially as regards government bonds.
The purpose of the final paragraph is to make the diversification rules sufficiently flexible by allowing the home Member State to permit higher percentages on a case-by-case basis and subject to Article 17.

Article 20 - Valuation of investments

This article states that, under certain conditions, Member States may allow hidden reserves resulting from the undervaluation of assets as cover for technical provisions. The purpose of this article is to allow Member States which currently require purchase price valuation of assets to put their undertakings on an equal competitive footing with undertakings of those Member States which allow or require the valuation of investments on the basis of current values.

Article 21 - Currency matching

This article amends the rules on currency matching laid down in the Second Directive by

(i) leaving the choice of covering technical provisions up to 20% by non-matching assets to insurance undertakings rather than to Member States (as provided in the Second Directive)

(ii) allowing Member States to provide that, when a commitment has to be covered by assets expressed in the currency of a Member State, the currency matching requirement is considered to be satisfied when the assets are expressed in ecus. The limit of 60% for ecu-denominated assets laid down in the Second Directive is deleted.

Article 22 - Subordinated loan capital

This article updates the list of assets recognized for the purpose of covering the solvency margin by including subordinated loan capital. The conditions under which subordinated loan capital may be recognized as own funds are identical to those laid down in the Council Directive 89/299/CEE (JO L.124 of 5.5.1989) on the own funds of credit institutions.

Article 23

This article amends Article 18 of the First Directive in order to bring it into line with the principle of home country control.

Chapter 3

Article 24 - Choice of law applicable to the contract

In the interests of protecting the consumer, Article 7 of the Second Directive restricted the freedom of choice of law applicable to the contract, leaving complete freedom of choice only in respect of "transport" risks.

For want of harmonization of contract law, which would not, as the work carried out within the Council in this field in recent years has shown, be essential to achieve at this stage, it is desirable in order to protect policy-holders in need of special protection, that is to say mass risks, to permit those Member States which so wish to apply their law to contracts relating to mass risks located in their territory.

On the other hand, the insurance of large risks concerns contracts linked to the international trade, the field in which the greatest freedom of choice must be left to the Member States.
It is along these lines that Article 7 of the Second Directive, which lays down the rules governing the choice of law applicable to non-life insurance contracts, is amended and simplified.

Article 25 - Legal provisions protecting the general good

The measures taken by a Member State to protect its consumers must, according to the case law of the Court of Justice, be in proportion to the objective pursued.
This article gives effect to that principle by specifying that any person seeking insurance can conclude a contract authorized by the law of a Member State provided the contract does not conflict with legal provisions protecting the general good in the Member State in which the risk is situated.

Article 26 - Abolition of the prior approval of premium scales and policies

Consumer protection also includes the right to the widest possible choice of innovative insurance products at the most reasonable prices. This right is given practical effect in regard to supervision by the abolition of any prior approval of premium scales and policies and by the replacement of such approval by a system better suited to the requirements of mutual recognition linked to the needs of the internal market.

The prior authorization system is tantamount to issuing a "quality label", and it is inconsistent with the logic of the single market to confer on the supervisory authority of a Member State the right to give its endorsement to, or withhold its endorsement from, products developed and already distributed in other Member States.

This holds true all the more in relation to the approval of premium scales: with the principle of the single licence, the supervisory authority of the home Member State vouches for the overall solvency of the undertaking and it is for that authority to ensure that the undertaking's financial policy does not jeopardize that solvency. This approach does not deny the supervisory authority of the State in which the risk is situated the right to protect its consumers: that authority can still prove ex post facto and non-systematically that such and such a clause of a contract freely entered into is not in keeping with a legal provision protecting the general good. This "shifting of the burden of proof" will have the effect of making insured persons more aware of their responsibilities vis-à-vis the products offered to them, and hence of increasing the real level of their protection.

Article 27 - Compulsory insurance

Compulsory insurance exists where the Member State imposing the obligation to take out insurance has a paramount interest to safeguard. This is the case, for example, with certain civil liability insurances, the insurance

being then a guarantee that a third party who is the victim of an accident will be compensated for any injury or damage sustained through no fault of his own.

Such considerations of the general good justify, by way of derogation from the principle laid down in Article 26, Member States retaining the possibility of requiring systematic notification of policies relating to compulsory insurance so that they may ascertain that products offered for sale in their territory indeed correspond to the substance of the obligation they have imposed.

TITLE IV

Provisions relating to freedom of establishment and freedom to provide services

Articles 28 and 29 - Freedom of establishment

Article 28 contains a set of detailed provisions amending Article 10 of the First Directive and organizing cooperation between the competent authorities of the Member States, based on home country control, in the context of freedom of establishment.

In this context it is stipulated that an insurance undertaking wishing to establish a branch in another Member State shall notify the authorities of its home country, providing at the same time the required information (e.g. scheme of operations, amount of the guarantee fund, state of the solvency margin, names and addresses of managers) (Article 10 paragraphs 1 - 3).

After examining the notification the competent authority may, if it has reason to doubt the viability of a project or the adequacy of the structures of the insurance undertaking, refuse to send the information to the prospective host authorities. In any case it should give reasons for its refusal to the institution within three months of receipt of the notification (Article 10(3)).

Article 29 repeals Article 11 of the First Directive, thereby abolishing the detailed requirements the scheme of operations should fulfil for setting up a branch in another Member State. These requirements are now limited to, notably, the types of business the branch intends to carry on and information on the structural organization of the branch.

Articles 30 - 32 - Freedom to provide services

These articles set out the procedure to be followed and cooperation between the home and host country authorities with regard to freedom to provide services. The relevant provisions of the Second Directive are amended and extended to cover not only "large risks" but all non-life insurance business and thus to set up a single regime for the whole business of insurance; those articles of the Second Directive which have become superfluous are to be deleted (Article 33).

Thus any insurer wishing to pursue non-life business by way of cross-border services must indicate to the home authorities the Member State in which it is intended to provide services and the business that will be pursued there (Article 14 of the Second Directive, as amended). The host country authorities will be provided with information regarding the undertaking's solvency margin, the classes of business the undertaking is allowed to transact and the nature of the risks it proposes to cover (Article 16 of the Second Directive as amended).

Article 33 - Technical adjustments, abolition of the prohibition of the simultaneous pursuit of business by way of establishment and by way of freedom of services

This proposal for a Directive is designed to achieve such coordination as is essential, necessary and sufficient to introduce a uniform system of supervision applicable to all direct non-life insurance business, irrespective of the way in which it is transacted, be it by establishment or by freedom of services. This calls for repeal of the exceptions laid down in Article 12(2) and (3) of the Second Directive concerning the scope of the provisions on the taking-up and pursuit of business by way of freedom to provide services.

For the same reasons, the option which Member States have of prohibiting the simultaneous pursuit of mass risk business by way of establishment and by way of freedom of services is also abolished (Article 13 of the Second Directive).

Article 15 of the Second Directive, which lays down the prior authorization arrangements governing the pursuit of mass risk business on a services basis, must also be repealed on identical grounds. Henceforth the only legal regime applicable to the taking-up of business under conditions of freedom to provide services, both for large risks and for mass risks, is that provided for in Articles 30 - 32 of this proposal.

Article 34 - Approval of contract documents used by the insurer

This article contains provisions concerning the means Member States may use to verify whether the policies and contract documents an insurer proposes to use in the course of his business comply with their legal provisions protecting the general good. The article takes up the principle laid down in Articles 8 and 28 of this proposal for a Directive. The Member State in which the risk is situated cannot, therefore, require prior approval of such documents as that would hinder considerably the free movement of products and the development of innovative products. For the purpose of monitoring compliance with those provisions, the Member State may require only non-systematic communication of policies and contract documents. These arrangements are better suited to the requirements of the single market and ensure an effective level of protection of policy-holders.

Article 35 - Sanctions

Article 19 of the Second Directive introduced rules on the adoption of measures and sanctions against insurance undertakings which infringe the provisions applicable to them when carrying on business by way of freedom to provide services.

The rules are based on the principles of devolution of the general power to adopt measures and sanctions on the home Member State and on collaboration between the different Member States concerned. The host Member State retains, however, the possibility of adopting directly measures against an undertaking operating in its territory in order to prevent or punish irregularities committed by that undertaking in its territory. The same applies where the measures taken by the home Member State are insufficient or non-existent.

Within the framework of a single authorization system steps must also be taken to ensure compliance with the rules applicable to insurance business, whether it be carried on by way of establishment or by way of freedom of services. It is therefore necessary to extend the arrangements provided for in Article 19 of the Second Directive to cover all business.

Article 36 - Advertising

This article allows any duly authorized insurance undertaking full access to all the normal means of mass-advertising of its services and products within the Community. This is fully in accordance with the case law of the Court of Justice, as expressed, for instance, in Cases 352/85, Bond van Adverteerders and 362/88, GB-INNO-BM.

Article 37 - Equality of treatment in the event of the winding-up of an insurance undertaking

This provision establishes the principle of equality of treatment of all insurance creditors in the event of the winding-up of an insurance undertaking without any distinction being made on grounds of the nationality of insured persons or beneficiaries or on grounds of the way in which insurance contracts are underwritten. The principle has already been incorporated in other insurance directives, notably the Second Directive.

Article 38 - Provision of information to the policy-holder

This article extends to contracts entered to into with a branch the arrangements for the provision of information to the policy-holder provided for in the Second Directive in respect of freedom to provide services.

As a result, any policy-holder will have to be informed, before any commitment is entered into, of the Member State in which the head office and, where appropriate, the branch of the undertaking with which the contract is to be concluded is established.

Article 39 - Statistical information

This article provides that every undertaking will have to furnish the supervisory authority of its home Member State with information on its turnover in each Member State, whether it be achieved through an establishment or under conditions of freedom to provide services.

The supervisory authorities of the Member States in whose territory the insurer in question operates may ask the supervisory authority of the home Member State to supply them with such information, which is essential if they are to have proper knowledge of the relative size of the various markets.

Article 40 - Participation in claims-settlement schemes

This article extends to business done by way of establishment the principle laid down in the Second Directive in respect of freedom of services according to which Member States retain the possibility of requiring any insurance undertaking operating in their territory to participate, on a non-discriminatory basis, in schemes designed to guarantee the payment of insurance claims by an insurer.

Article 41 - Taxation

This article extends to the establishment regime the system provided for in the Second Directive in respect of freedom to provide services.

This proposal for a Directive thus states that, subject to future harmonization, the principle to be applied in respect of indirect taxes and parafiscal charges is that of the territoriality of the tax, that is to say the application of the system of taxation of the Member State in which the risk is situated and for the benefit of that State.

Moreover, each State will apply to undertakings operating in its territory, whether by way of establishment or by way of freedom to provide services, its own national provisions concerning measures to ensure the collection of such taxes.

TITLE V

FINAL PROVISIONS

Article 42 - Implementing powers of the Commission

This provision indicates the articles of the First Directive and of this proposal for a Directive which may be adapted when the moment is right. The procedures for adapting those articles are set out in the Council Directive setting up a Committee on Insurance.

Article 43 - Safeguard clauses

This article contains a provision which states that this Directive does not affect rights acquired by authorized branches and in the field of freedom of services.

Article 43a - Health insurance as a substitute for social security

In many Member States residents are allowed, under certain conditions, to conclude a health insurance policy with a private insurer instead of being covered by the social health insurance system. Such private insurers not only seek to offer additional cover to the social system; in fact, their rôle constitutes an alternative to the social health insurance system and their cover may be set out in non-life or life assurance contracts.

The evident link between such contracts and the social health security system clearly justifies Member States to require from private insurers that the cover they offer is a least equal to that offered by the social system, as laid down in legislation which may vary between Member States. For example, a non-termination clause prohibiting an insurer to end a contract for reasons of age of the insured person or deterioration of his health condition is a provision which is in the general good and is essential for the protection of those that are not eligible for cover by social health insurance. Member States concerned may require from the insurer to create a special technical provision to counterbalance such a clause and meet its annuity character of cover based on constant premium or uniform appreciation.

Although such a requirement limits the possibilities for an insurer to offer his products throughout the whole Community, it is already guaranteed in particular by article 25 of the present proposal of directive which states that in order to be able to be marketed in a Member State, insurance contracts may "not conflict with legal provisions protecting the general good in the Member State in which the risk is situated".

However, taking into account the sensitivity and social repercussions of health insurance, it is necessary to allow Member States concerned specific means to verify that the guarantee offered by the social system is indeed respected by all insurance companies active in this field.

To this end it is proposed to assimilate health insurance which substitutes a social health insurance system to obligatory insurance. This assimilation is justified by the fact that in practice all residents of the Member States concerned are covered by health insurance, either via the social health system or through private insurance. In accordance with the provisons of article 27, concerning all obligatory insurance, the Member States in which the risk is situated may require that the general and special contractual conditions substituting the social health insurance cover be subject to prior systematical communication.

This possibility for supervisory authorities of a Member State to obtain on a systematical basis information on health insurance contracts marketed on their territory can be considered as limiting the freedom of establishment and provision of services. This limitation is necessary, having regard to its objective of protection of the insured persons, but also sufficient to further apply to this branch of insurance the general regime of the present proposal of directive based on the logical requirements of the internal market.

Consequently, supervisory authorities will have at their disposal on a systematic basis all the information necessary to verify that such contracts do not contain provisions providing the insured with a cover that does not at least equal the cover of the social security health system. It will also be possible to have avail, if necessary in case of urgency, to the measures provided for in article 35 of the directive. Under these conditions there is no longer any reason to submit insurers to a specialization requirement for health insurance or to general prior approval of contracts and to presume also that they are not themselves capable of respecting the rules of general good imposed upon them.

Article 43b - Right of appeal

This article provides for a right to apply to the Courts in respect of decisions taken by competent authorities in the field covered by the Directive.

Articles 44 - 46 - Implementation of the Directive

These articles contain the final provisions.
The date of entry into force should not be later than 31 December 1992.

Proposal for a

THIRD COUNCIL DIRECTIVE

on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) and 66 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

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

1. Whereas it is necessary to complete the internal market in direct insurance other than life assurance, from the point of view of both freedom of establishment and freedom to provide services, so as to make it easier for insurance undertakings whose head office is in the Community to cover risks situated in the Community;

2. Whereas the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC,[1] hereinafter called the "Second Directive", has contributed substantially to the formation of the internal market in direct insurance other than life assurance by already granting policy-holders who, by virtue of their status, their size or the nature of the risk to be insured, do not require special protection in the Member State in which the risk is situated complete freedom to avail themselves of the widest possible insurance market;

---

1 OJ No L 172, 4.7.1988, p. 1.

3. Whereas the Second Directive therefore represents an important stage in the merging of national markets into a single, integrated market; whereas it must be supplemented by other Community instruments with a view to enabling all policy-holders, irrespective of their status, their size or the nature of the risk to be insured, to have recourse to any insurer having his head office in the Community and carrying on business there, whether he conducts business by way of freedom of establishment or by way of freedom to provide services, while guaranteeing them adequate protection;

4. Whereas the approach adopted consists in bringing about such harmonization as is essential, necessary and sufficient to achieve mutual recognition of authorizations and prudential control systems, thereby making it possible to grant a single authorization valid throughout the Community and apply the principle of home country control;

5. Whereas, as a result, the taking-up and pursuit of the business of insurance is henceforth to be subject to the grant of a single official authorization issued by the authorities of the Member State in which the insurance undertaking has its head office; whereas such authorization enables the undertaking to carry on business everywhere in the Community, whether under conditions of freedom of establishment or under conditions of freedom to provide services; whereas the host Member State may no longer require insurance undertakings which have already been authorized in the home Member State and which wish to carry on insurance business there to seek a fresh authorization; whereas the First and Second Directives should therefore be amended along those lines;

6. Whereas responsibility for monitoring the financial health of the insurance undertaking, including its state of solvency, the establishment of sufficient technical provisions and the covering of those provisions by matching assets, henceforth lies with the competent authority of its home Member State;

7. Whereas the home Member State may lay down stricter rules than those provided for in Articles 7, 14, 18, 19(1) and (3) and 20 in respect of insurance undertakings authorized by its own competent authorities;

8. Whereas this Directive fits into the pattern of Community legislation already set by the first Council Directive 73/239/EEC,[2] as last amended by the Second Directive 88/357/EEC, and by Council Directive .../.../EEC of ..... on the annual accounts and consolidated accounts of insurance undertakings[3];

9. Whereas the competent authorities must therefore have at their disposal such means of supervision as are necessary to ensure the orderly pursuit of business by the insurance undertaking throughout the Community, whether it be carried on by way of freedom of establishment or by way of freedom to provide services; whereas, in particular, they must be able to introduce appropriate safeguards or impose sanctions aimed at preventing irregularities and infringements of the provisions on insurance supervision;

10. Whereas the creation of a single market without internal frontiers involves access to all insurance business other than life assurance throughout the Community and hence the possibility for any duly authorized insurer to cover any of the risks referred to in the Annex to the First Directive; whereas to that end it is necessary to abolish the monopoly enjoyed by certain bodies in certain Member States in respect of the coverage of certain risks;

---

2 OJ No L 228, 16.8.1973, p. 3.

3 OJ No L

11. Whereas it is necessary to adjust the provisions on transfers of portfolios to bring them into line with the single authorization system introduced by this Directive;

12. Whereas Directive ..... [on the annual accounts and consolidated accounts of insurance undertakings] has already brought about the necessary harmonization of the Member States' provisions on the formation of the technical provisions insurers are required to establish in order to cover their commitments; whereas this makes it possible to grant the benefits of mutual recognition of those provisions;

13. Whereas the rules concerning the valuation of the assets used to cover the technical provisions and their diversification, the rules on localization and currency matching rules must be coordinated in order to facilitate mutual recognition of Member States' provisions; whereas such coordination must take account of the measures adopted in the field of the liberalization of capital movements in Council Directive 88/361/EEC[4] and the work undertaken by the Community with a view to achieving Economic and Monetary Union;

14. Whereas, however, the home Member State may not require insurance undertakings to invest the assets covering their technical provisions in particular categories of assets, such a requirement being incompatible with the free movement of capital measures provided for in Directive 88/361/EEC;

15. Whereas owing to the coordination brought about by this Directive the opportunity given by Article 7(2)(c) of the First Directive to the Federal Republic of Germany to prohibit the simultaneous transaction of health insurance and other classes is no longer justified and must therefore be abolished;

---

4 OJ No L 178, 8.7.1988 p. 5.

16. Whereas the list of items of which the solvency margin required by the First Directive may be made up must be supplemented to take account of new financial instruments and of the facilities granted to other financial institutions for the constitution of their own funds;

17. Whereas within the framework of an integrated insurance market policy-holders who, by virtue of their status, their size or the nature of the risk to be insured, do not require special protection in the Member State in which the risk is situated should be granted complete freedom of choice of law applicable to the insurance contract;

18. Whereas it is neither necessary nor appropriate to harmonize contract law at present; whereas, for want of such harmonization, the opportunity afforded to the Member States of imposing the application of their law to insurance contracts covering risks situated in their territory is likely to provide sufficient safeguards for policy-holders who do require special protection;

19. Whereas within the framework of an internal market it is in the policy-holder's interest that he should have access to the widest possible range of insurance products available in the Community so that he can choose that which is best suited to his needs; whereas it is therefore for the Member State in which the risk is situated to ensure that there is nothing to prevent all the insurance products offered for sale in the Community from being marketed in its territory as long as they do not conflict with the legal provisions protecting the general good in force in that Member Statein which the risk is situated.

20. Whereas Member States must ensure that the insurance products and contract documents used for covering, whether by way of establishment or by way of freedom to provide services, risks located in their territory comply with such specific legal provisions protecting the general good as are applicable; whereas the systems of supervision to be employed must be in keeping with the requirements of an integrated market; whereas their employment may not, however, constitute a prior condition for carrying on insurance business; whereas from this standpoint systems of prior approval of policy conditions are unjustified; whereas it is necessary as a result to provide for other systems which are better suited to the requirements of a single market and which enable every Member State to guarantee policy-holders adequate protection;

20a. Whereas some Member States allow, under certain conditions, their residents to conclude health insurance contracts with private insurers instead of and replacing the cover provided for by the statutory social security system; whereas the nature and social effect of such contracts justify the supervisory authorities of the Member State where the risk is situated in applying to such insurance contracts the regime laid down for compulsory insurances and in thus requiring systematic notification of the general and special policy conditions for reasons of verification in order to ensure that such contracts offer at least the same guarantees as those provided for in the statutory social security system; whereas such verification should not be a precondition for the activity of offering insurance;

21. Whereas within the framework of a single market no Member State may continue to prohibit the simultaneous carrying-on of insurance business in its territory under conditions of establishment and under conditions of freedom to provide services; whereas the option given to Member States in this connection by the Second Directive should therefore be abolished;

22. Whereas provisions should be made for a system of penalties to be imposed when, in the Member State in which the risk is situated, the insurance undertaking does not comply with the provisions protecting the general good that are applicable to it;

23. Whereas some Member States do not subject insurance transactions to any form of indirect taxation, while the majority apply special taxes and other forms of contribution, including surcharges intended for compensation bodies; whereas the structure and rate of these taxes and contributions vary considerably between the Member States in which they are applied; whereas it is desirable to avoid a situation in which existing differences lead to distortions of competition in insurance services between Member States; whereas, pending subsequent harmonization, the application of the tax system and of other forms of contribution provided for by the Member State in which the risk is situated is likely to remedy such mischief and whereas it is for the Member States to establish the method of ensuring that such taxes and contributions are collected;

24. Whereas technical adjustments to the detailed rules laid down in this Directive may be necessary from time to time to take account of fresh developments in the insurance industry; whereas the Commission will make such adjustments as and when necessary, after consulting the Committee on Insurance set up by ....., in the exercise of the implementing powers conferred on it by the Treaty;

25. Whereas it is necessary to lay down specific provisions designed to ensure a smooth transition from the legal regime existing at the time of application of this Directive to the regime introduced by it, taking care not to place an additional workload on Member States' competent authorities,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

Definitions and scope

Article 1

For the purposes of this Directive:

(a) "First Directive" means Directive 73/239/EEC;

(b) "Second Directive" means Directive 88/357/EEC;

(c) "insurance undertaking" means an undertaking which has received official authorization in accordance with Article 6 of the First Directive;

(d) "branch" means an agency or branch of an insurance undertaking, having regard to Article 3 of the Second Directive;

(e) "home Member State" means the Member State in which the head office of the insurance undertaking covering the risk is situated;

(f) "Member State of the branch" means the Member State in which the branch covering the risk is situated;

(g) "Member State of provision of services" means the Member State in which the risk is situated, as defined in Article 2 (d) of the Second Directive, if it is covered by an undertaking or a branch situated in another Member State;

(h) "control" means the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Council Directive 83/349/EEC[1], or a similar relationship between any natural or legal person and an undertaking;

(i) "qualifying holding" means a direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the undertaking in which a holding subsists.

For the purposes of this definition, in the context of Articles 7 and 14 and of the other levels of holding referred to in Article 14, the voting rights referred to in Article 7 of Council Directive 88/627/EEC[2] shall be taken into consideration;

(j) "parent undertaking" means a parent undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;

(k) "subsidiary" means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC; any subsidiary of a subsidiary undertaking shall also be regarded as a subsidiary of the parent undertaking which is at the head of those undertakings.

Article 2

1. This Directive shall apply to the classes of insurance and undertakings referred to in Article 1 of the First Directive.

---

1 OJ No L 193, 18.7.1983, p.1.

2 OJ No L 348, 17.12.1988, p.62.

2. This Directive shall not apply to operations, undertakings or entities to which the First Directive does not apply, nor to the entities referred to in Article 4 of that Directive.

Article 3

Notwithstanding Article 2(2), Member States shall take every step to ensure that monopolies in respect of the taking-up of the business of certain classes of insurance, granted to entities established in their territory, are abolished by the date mentioned in Article 44, second paragraph of this Directive.

TITLE II

The taking-up of the business of insurance

Article 4

Article 6 of the First Directive is replaced by the following:

"Article 6

The taking-up of the business of direct insurance shall be subject to prior official authorization.

Such authorization shall be sought from the authorities of the home Member State by:

a) Any undertaking which establishes its head office in the territory of such state;

b) Any undertaking which, having received the authorization required under a) above, extends its business to other classes."

Article 5

Article 7 of the First Directive is replaced by the following:

"Article 7

1. An authorization shall be valid for the whole Community. It shall permit an undertaking to carry on business there, either by way of right of establishment or by way of freedom to provide services.

2. An authorization shall be granted for a particular class of insurance. It shall cover the entire class, unless the applicant wishes to cover only part of the risks pertaining to that class, as listed in point A of the Annex.

However:

(a) Member States may grant authorizations for the groups of classes indicated in point B of the Annex, attaching to them the appropriate denomination specified therein;

(b) an authorization granted for one class or a group of classes shall also be valid for the purpose of covering ancillary risks included in another class if the conditions specified in point C of the Annex are fulfilled."

Article 6

Article 8 of the First Directive is replaced by the following:

"Article 8

1. Each Member State shall require that any undertaking set up in its territory for which an authorization is sought shall:

(a) Adopt one of the following forms:

- In the case of Belgium: "société anonyme/naamloze vennootschap", "société en commandite par actions/commanditaire vennootschap op aandelen", "association d'assurance mutelle/onderlinge verzekeringmaatschappij", "société coopérative/coöperatieve vennootscap";

- In the case of Denmark: "aktieselskaber", "gensidige selskaber";

- In the case of the Federal Republic of Germany: "Aktiengesellschaft", "Versicherungsverein auf Gegenseitigkeit", "Öffentlich-rechtliches Wettbewerbs-versicherungsunternehmen";

- In the case of France: "société anonyme", "société d'assurance mutuelle";

- In the case of Ireland: incorporated companies limited by shares or by guarantee or unlimited;

- In the case of Italy: "società per azioni", "società cooperativa", "mutua di assicurazione";

- In the case of Luxembourg: "société anonyme", "société en commandite par actions", "association d'assurances mutuelles", "société coopérative";

- In the case of the Netherlands: "naamloze vennootschap", "onderlinge waarborgmaatschappij";

- In the case of the United Kingdom: "incorporated companies limited by shares or by guarantee or unlimited", "societies registered under the Industrial and Provident Societies Acts", "societies registered under the Friendly Societies Act", "the association of underwriters known as Lloyds".

- In the case of the Greece: "Ανώνυμη εταιρεία"- "Αλληλασφαλιστικός συνεταιρισμός".

- In the case of Spain: "sociedad anonima", "sociedad mutua", "sociedad cooperativa";

- In the case of Portugual: "sociedade anonima", "mutua de seguros".

Insurance undertakings may also adopt the form of a European company (SE), as provided for in Council Regulation .../EEC[1] and Council Directive .../EEC.[2]

Furthermore, Member States may set up, where appropriate, undertakings under any form of known public-law form provided that such institutions have as their object insurance operations in conditions equivalent to those under which private-law undertakings operate;

(b) Limit its business activities to the business of insurance and operations directly arising therefrom, to the exclusion of all other commercial business;

(c) Submit a scheme of operations in accordance with Article 9;

(d) Possess the minimum guarantee fund provided for in Article 17(2);

(e) Be run by technically qualified persons of good repute.

2. An undertaking seeking authorization to extend its business to other classes shall be required to submit a scheme of operations in accordance with Article 9.

It shall, furthermore, be required to show proof that it possesses the solvency margin provided for in Article 16 and, if with regard to such other classes Article 17(2) requires a higher minimum guarantee fund than before, that it possesses such minimum.

3. Nothing in this Directive shall prevent Member States from maintaining in force or introducing laws, regulations or administrative provisions requiring the approval of the memorandum and articles of association and the communication of any other documents necessary for the normal exercise of supervision.

Member States shall not, however, lay down provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums and forms and other printed documents which an undertaking intends to use in its dealings with policy-holders. They may require only non-systematic notification of those conditions and other documents for the purpose of verifying compliance with laws, regulations and administrative provisions in respect of insurance contracts, and this requirement may not constitute a prior conditions for an undertaking to be able to carry on its activities.

Member States may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of a general price control system.

Nothing in this Directive shall prevent Member States from subjecting undertakings requesting or having obtained authorization for class 18 in point A of the Annex to checks on their direct or indirect resources in staff and equipment, including the qualification of their medical teams and the quality of the equipment available to the undertakings to meet their commitments arising from this class of insurance.

4. The abovementioned provisions may not require that any application for authorization shall be dealt with in the light of the economic requirements of the market.

---

1 OJ No L

2 OJ No L ."

Article 6a

Article 9 of the First Directive is replaced by the following:

"Article 9

The scheme of operations referred to in Article 8(1)(c) shall contain the following particulars or proof concerning:

(a) the nature of the risks which the undertaking proposes to cover;

(b) the guiding principles as to reinsurance;

(c) the items constituting the minimum guarantee fund;

(d) estimates relating to the cost of installing the administrative services and the organization for securing business; the financial resources intended to meet such cost and, if the risks to be covered are classified under class 18 in point A of the Annex, the means at the undertaking's disposal for providing the assistance promised;

and, in addition, for the first three financial years:

(e) estimates relating to expenses of management other than costs of installation, and in particular current general expenses and commissions;

(f) estimates relating to premiums or contributions and to claims;

(g) a forecast balance sheet;

(h) estimates relating to the financial resources intended to cover underwriting liabilities and the solvency margin."

Article 7

The competent authorities of the home Member State shall not grant authorization for taking up the business of insurance before they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, who have qualifying holdings and of the amounts of those holdings.

Those same authorities shall refuse authorization if, taking into account the need to ensure the sound and prudent management of an insurance undertaking, they are not satisfied as to the suitability of the said shareholders or members.

TITLE III

Harmonization of conditions governing pursuit of business

Chapter 1

Article 8

Article 13 of the First Directive is replaced by the following:

"Article 13

1. The financial supervision of an insurance undertaking, including that of the activities it carries on either through branches or by way of freedom to provide services, shall be the sole responsibility of the home Member State.

2. The financial supervision shall include verification, with respect to the entire business of the insurance undertaking, of its state of solvency, the establishment of technical provisions and of the assets covering them, in accordance with the rules laid down or practices followed in the home Member State pursuant to Articles 15 to 23 of this Directive.

Where the undertakings in question are authorized to cover the risks classified under class 18 in point A of the Annex, the supervision shall extend also to monitoring the technical resources which the undertakings must have at their disposal in order to carry out the assistance operations they have undertaken to perform, where the law of the home Member State provides for the supervision of such resources.

3. The competent authorities of the home Member State shall require every insurance undertaking to have sound administrative and accounting procedures and adequate internal control mechanisms".

Article 9

Article 14 of the First Directive is replaced by the following:

"Article 14

Member States of establishment shall provide that, where an insurance undertaking authorized in another Member State carries on its activities through a branch, the competent authorities of the home Member State may, after having first informed the competent authorities of the Member State of the branch, carry out themselves or through the intermediary of persons they appoint for that purpose on-the-spot verification of the information necessary to ensure the financial supervision of the undertaking."

Article 10

The following Article 19a is inserted in the First Directive:

"Article 19a

Without prejudice to the procedures for the withdrawal of authorizations and the provisions of criminal law, Member States shall provide that their respective competent authorities may, as against insurance undertakings or those who effectively control the business of insurance undertakings which breach laws, regulations or administrative provisions concerning the supervision or pursuit of their activities, adopt or impose in respect of them penalties or measures aimed specifically at ending observed breaches or the causes of such breaches."

Article 11

1. Article 11 of the Second Directive is deleted.

2. Each Member State shall, under the conditions laid down by national law, authorize insurance undertakings whose head office is established in its territory to transfer all or part of their portfolios of contracts, whether concluded by way of freedom of establishment or by way of freedom to provide services, to an accepting office established in the Community, if the supervisory authorities of the home Member State of the accepting office certify that the latter possesses the necessary solvency margin after taking the transfer into account.

3. Where a branch proposes to transfer all or part of its portfolio of contracts, whether concluded by way of freedom of establishment or by way of freedom to provide services, the Member State of establishment shall be consulted.

4. In the circumstances referred to in paragraphs 2 and 3, the supervisory authorities of the home Member State of the transferring undertaking shall authorize the transfer after obtaining the agreement of the supervisory authorities of the Member States in which the risks are situated.

5. The supervisory authorities of the Member States consulted shall inform the competent authorities of the home Member State of the transferring insurance undertaking of their opinion within three months of receipt of the request for an opinion; if no response is forthcoming by the end of that period, the opinion of the authorities consulted shall be deemed to be favourable.

6. A transfer authorized in accordance with this Article shall be published, under the conditions laid down by national law, in the Member State in which the risk is situated. Such transfer shall be automatically valid against the policy-holders, the insured persons and any other person having rights and obligations arising out of the contracts transferred.

   This provision shall not affect the right of Member States to provide policy-holders with the option of cancelling the contract within a given period after the transfer."

Article 12

Article 20 of the First Directive is replaced by the following:

"Article 20

1. If an undertaking does not comply with the provisions of Article 15, the authority of its home Member State may prohibit the free disposal of assets after having informed the supervisory authorities of the Member States in which the risks are situated.

2. For the purposes of restoring the financial situation of an undertaking whose solvency margin has fallen below the minimum required under Article 16 (3), the surpervisory authority of the home Member State shall require a plan for the restoration of a sound financial position to be submitted for its approval.

3. If the solvency margin falls below the guarantee fund as defined in Article 17, the supervisory authority of the home Member State shall require the undertaking to submit a short-term finance scheme for its approval.
It may also restrict or prohibit the free disposal of the assets of the undertaking. It shall inform the authorities of other Member States in whose territories the undertaking carries on business of any measures and the latter shall, at the request of the former, take the same measures.

4. The competent supervisory authorities may further take all measures necessary to safeguard the interests of the insured in the cases provided for in (1) and (3).

5. Each Member State shall also take the measures necessary to be able to prohibit the free disposal of assets located in its territory at the request of the undertaking's home Member State."

Article 13

Article 22 of the First Directive is replaced by the following:

"Article 22

1. An authorization granted to an insurance undertaking by the competent authority of the home Member State may be withdrawn by that authority if the undertaking:

   (a) does not make use of the authorization within 12 months, expressly renounces the authorization or has ceased to engage in business for more than six months, unless the Member State concerned has made provision for the authorization to lapse in such cases;

   (b) no longer fulfils the conditions for admission;

   (c) has been unable, within the time allowed, to take the measures contained in the restoration plan or finance scheme referred to in Article 20;

   (d) fails seriously in its obligations under the regulations to which it is subject.

   In the event of withdrawal of the authorization, the supervisory authority of the home Member State shall notify such withdrawal to the supervisory authorities of the other Member States, which

shall take appropriate measures to prevent the undertaking from commencing new operations in their territory, whether by way of freedom of establishment or by way of freedom to provide services. The home Member State supervisory authority shall, in conjunction with those authorities, take all necessary measures to safeguard the interests of the insured and, in particular, shall restrict the free disposal of the assets of the undertaking in accordance with Article 20(1) and (3), second subparagraph.

2. Any decision to withdraw an authorization shall be supported by precise reasons and notified to the undertaking in question.

Each Member State shall make provision for a right to apply to the courts against such a decision."

Article 14

1. Member States shall require any natural or legal person who proposes to acquire, directly or indirectly, a qualifying holding in an insurance undertaking to inform the competent authorities of the home Member State, indicating the size of the intended holding. Such a person must likewise inform the competent authorities of the home Member State if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital held by him would reach or exceed 20%, 33% or 50% or so that the insurance undertaking would become his subsidiary.

The competent authorities of the home Member State shall have a maximum of three months from the date of the notification provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the insurance undertaking, they are not satisfied as to the suitability of the person referred to in the first subparagraph. If they do not oppose the plan referred to in the first subparagraph, they may fix a maximum period for its implementation.

2. Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in an insurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding. Such a person must likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital held by him would fall below 20%, 33% or 50% or so that the insurance undertaking would cease to be his subsidiary.

3. On becoming aware of them, insurance undertakings shall inform the competent authorities of the home Member State of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in paragraphs 1 and 2.

They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at the annual general meetings of shareholders and members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

4. Member States shall require that, where the influence exercised by the persons referred to in paragraph 1 is likely to operate to the detriment of the prudent and sound management of the insurance undertaking, the competent authorities of the home Member State shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, sanctions against directors and managers, or the suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information, as laid down in paragraph 1. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

CHAPTER 2

Article 15

Article 15 of the First Directive is replaced by the following:

"Article 15

1. The home Member State shall require every insurance undertaking to establish sufficient technical provisions in respect of its entire business.

   The amount of such technical provisions shall be determined according to the rules laid down in Articles 21 to 26, 40 and 52 to 57 of Council Directive.... on the annual accounts and consolidated accounts of insurance undertakings.( )

2. The home Member State shall require every insurance undertaking to cover the technical provisions in respect of its entire business by matching assets in accordance with Article 6 of the Second Directive. In respect of business written in the European Community, these assets must be localised in a Member State of the European Community. The home Member State may, however, permit relaxations in the rules on the localization of assets.

( ) OJ No "

Article 16

Article 23 of the Second Directive is deleted.

Article 17

Assets representing the technical provisions shall be invested having regard to the kind of business transacted, and the nature and duration of the assets, including possible future variations in their yield and value.

Article 18

1. The home Member State shall allow every insurance undertaking to cover the technical provisions from amongst the following categories of assets.

   (a) debt securities, bonds and other money market instruments issued by a State or local authority; loans to or guaranteed by a State or local authority;

   (b) debt securities, bonds and other money market instruments issued by undertakings; secured loans to or guaranteed by undertakings;

   (c) secured loans to natural persons other than those listed under (h);

(d) transferable shares and other transferable variable yield participations;

(e) units in undertakings for collective investments in transferable securities and other investment pools;

(f) hedging instruments, such as options, futures, swaps;

(g) land and buildings;

(h) loans guaranteed by mortgage on land, buildings, ships or aircraft;

(i) cash at bank and in hand, deposits with credit institutions;

(j) reinsurance amounts of technical provisions, determined in accordance with the stipulations of the underlying reinsurance contracts;

(k) deposits with and debts owed by ceding undertakings;

(l) debts owed by policy-holders and intermediaries arising out of direct and reinsurance operations, up to 30% of premiums earned in the financial year;

(m) accrued interest and rent and other prepayments and accrued income;

(n) deferred acquisition costs;

(o) amounts receivable as a result of salvage and subrogation;

(p) recognized tax recoveries;

(q) claims against guarantee funds;

(r) tangible fixed assets, other than land and buildings;

(s) reversionary interests.

2. Notwithstanding paragraph 1, in particular circumstances and at the insurance undertaking's request, the home Member State may, on the basis of a duly motivated decision, allow other categories of assets for the purpose of covering technical provisions, subject to Article 17.

Article 19

1. The home Member State shall require every insurance undertaking to invest no more than:

(a) 50% of the total of the technical provisions, net of reinsurance, in the category of assets listed in Article 18(1)(b);

(b) 50% of the total of the technical provisions, net of reinsurance, in the categories of assets listed in Article 18(1) (g) and (h), taken together;

(c) 80% of the total of the technical provisions, net of reinsurance, in the categories of assets listed in Article 18(1)(d),(e) and (f), taken together, of which no more than 10% shall comprise the category of assets listed in Article 18(1)(f) or unlisted transferable shares and other transferable variable yield participations taken together;

(d) 5% of the total of the technical provisions, net of reinsurance, in the category of assets listed in Article 18(1)(c);

(e) 10% of the total of the technical provisions, net of reinsurance, in any one piece of land or buildings, or a number of pieces of such buildings;

(f) 10% of the total of the technical provisions, net of reinsurance, in any one loan guaranteed by a mortgage on land, buildings, ships or aircraft;

(g) 10% of the total of the technical provisions, net of reinsurance, taken together in transferable shares, other transferable variable yield participations, debentures and other bonds of any one undertaking and loans to any one undertaking;

2. Member States shall not require insurance undertakings to invest in particular categories of assets or to localize their assets in a particular Member State.

3. Notwithstanding paragraph 1, in particular circumstances and at the insurance undertaking's request, the home Member State may, on the basis of a duly motivated decision, allow exceptions to the rules laid down in points (a) to (g) of paragraph 1 of this Article, subject to Article 17.

Article 20

At the request of, and upon proof being shown by, the insurance undertaking, the home Member State may allow any hidden reserves resulting from the undervaluation of assets as cover for technical provisions in so far as those hidden reserves are not of an exceptional nature.

If hidden reserves are recognized as cover for technical provisions, an adequate amount of latent taxes and selling expenses shall be deducted.

Article 21

Numbers 8 and 9 of Annex 1 to the Second Directive are replaced by the following:

"8. Insurance undertakings may hold non-matching assets to cover an amount not exceeding 20% of their commitments in a particular currency.

9. Each Member State may provide that, when under the preceding procedures a commitment has to be covered by assets expressed in the currency of a Member State, this requirement shall also be considered to be satisfied when the assets are expressed in ECU."

Article 22

Article 16(1) of the First Directive is replaced by the following:

"1. The home Member State shall require every insurance undertaking to establish an adequate solvency margin in respect of its entire business.

The solvency margin shall correspond to the assets of the undertaking free of any foreseeable liabilities, less any intangible items. In particular the following shall be considered:

- the paid-up share capital or, in the case of a mutual concern, the effective initial fund;

- one-half of the share capital or the initial fund which is not yet paid-up, once the paid-up part reaches 25% of this capital or fund;

- reserves (statutory reserves and free reserves) not corresponding to underwriting liabilities;

- any carry-forward of profits;

- in the case of a mutual or mutual-type association with variable contributions, any claim which it has against its members by way of a call for supplementary contribution, within the financial year, up to one-half of the difference between the maximum contributions and the contributions actually called in, and subject to an overriding limit of 50% of the margin;

- at the request of, and upon proof being shown by, the insurance undertaking, any hidden reserves resulting from undervaluation of assets, in so far as those hidden reserves are not of an exceptional nature;

- subordinated loan capital, up to an overriding limit of 25% of the margin, if the following criteria are met:

  . there must be a binding agreement by which, in the event of bankruptcy or liquidation of the insurance undertaking, the subordinated loan capital ranks after the claims of all other creditors and is not to be repaid until all other debts outstanding at that time have been settled;

  . only fully paid-up funds may be taken into account;

  . the original maturity must be of at least five years, after which the subordinated loan capital may be repaid; if its maturity is not fixed, it shall be repayable only subject to five years' notice unless it is no longer

considered as own funds or unless the prior consent of the home Member State is specifically required for early repayment. The home Member State may grant permission for the early repayment of such loans provided the request is made on the initiative of the issuer and the solvency of the insurance undertaking in question is not affected;

- the extent to which subordinated loan capital may rank as own funds must be gradually reduced during at least the last five years before the agreed repayment date;

- the loan agreement must not include any clause providing that in specified circumstances, other than the winding-up of the insurance undertaking, the debt will become repayable before the agreed repayment date."

Article 23

Article 18 of the First Directive is replaced by the following:

"Article 18

1. Member States shall not prescribe any rules as to the choice of the assets in excess of those representing the technical provisions referred to in Article 15..

2. Subject to Article 15(2), Article 20(1), (3) and (5) and the last subparagraph of Article 22(1), Member States shall not restrain the free disposal of the assets, whether movable or immovable property, forming part of the assets of authorized businesses.

3. Those provisions shall not preclude any measures which Member States, while safeguarding the interests of the insured, are entitled to take as owners, members or associates of the undertakings in question."

CHAPTER 3

Article 24

Article 7(1) of the Second Directive is replaced by the following:

"1. The law applicable to contracts of insurance referred to by this Directive and covering risks within the Member States shall be determined in accordance with the following provisions.

(a) Where a policy-holder has his habitual residence or central administration within the territory of the Member State in which the risk is situated, the law applicable to the insurance contract shall be the law of that Member State.

(b) Where the contract covers either a risk situated in a Member State other than the Member State in which the policy-holder has his habitual residence or central administration, or where the contract covers two or more risks situated in different Member States, the freedom of choice of the law applicable to the contract shall extend to the laws of those Member States and to the country in which the policy-holder has his habitual residence or central administration.

(c) Notwithstanding subparagraphs (a) and (b), where the Member States referred to in those subparagraphs grant greater freedom of choice of the law applicable to the contract, the parties may take advantage of that freedom.

(d) Notwithstanding subparagraphs (a) and (b), when the risks covered by the contract are limited to events occurring in a Member State other than the Member State in which the risk is situated, the parties may always choose the law of the former State.

(e) For the risks referred to in Article 5(d) of the First Directive, the parties to the contract may choose any law.

(f) The fact that, in the cases referred to in subparagraph (a) or (e), the parties have chosen a law shall not, where all the other elements relevant to the situation at the time of the choice are connected with one Member State only, prejudice the application of the mandatory rules of law of that Member State, which means the rules from which the law of that Member State allows no derogation by means of a contract.

(g) The choice referred to in the preceding subparagraphs must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. If this is not so, or if no choice has been made, the contract shall be governed by the law of the country, from amongst those considered in the relevant subparagraphs above, with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country, from amongst those considered in the relevant subparagraphs, may by way of exception be governed by the law of that other country. The contract shall be rebuttably presumed to be most closely connected with the Member State in which the risk is situated.

(h) Where a State includes several territorial units, each of which has its own rules of law concerning contractual obligations, each unit shall be considered a country for the purposes of identifying the law applicable under this Directive.

A Member State in which various territorial units have their own rules of law concerning contractual obligations shall not be bound to apply this Directive to conflicts between the laws of those units."

Article 25

The Member State in which the risk is situated shall not prevent the policy-holder from concluding a contract conforming with the rules of the home Member State, as long as it does not conflict with legal provisions protecting the general good in the Member State in which the risk is situated.

Article 26

Member States shall not lay down provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an insurance undertaking intends to use in its dealings with policy-holders. They may require only non-systematic notification

of those conditions and other documents for the purpose of verifying compliance with laws, regulations and administrative provisions in respect of insurance contracts, and this requirement may not constitute a prior condition for an undertaking to be able to cary on its activities.

Member States may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of a general price control system.

Article 27

1. Article 8(4)(b) of the Second Directive is deleted.

2. Notwithstanding any provision to the contrary, a Member State which imposes an obligation to take out insurance may require that the general and special conditions of the compulsory insurance be communicated to the supervisory authority of that Member State before being circulated.

TITLE IV

Provisions relating to freedom of establishment
and freedom to provide services

Article 28

Article 10 of the First Directive is replaced by the following:

"Article 10

1. An insurance undertaking wishing to establish a branch in another Member State shall notify the competent authorities of its home Member State.

2. The Member States shall require every insurance undertaking wishing to establish a branch in another Member State to provide the following information when effecting the notification referred to in paragraph 1:

   (a) the Member State in whose territory it plans to establish a branch;

   (b) a scheme of operations setting out inter alia the types of business envisaged and the structural organization of the branch ;

   (c) the address in the Member State of the branch from which documents may be obtained;

(d) The name of the person responsible for the management of the branch and possessing sufficient powers to bind the undertaking in relation to third parties and to represent it in relations with the authorities and courts of the host Member State. With regard to Lloyd's, in the event of any litigation in the Member State of establishment resulting from underwritten commitments, insured persons must not be more unfavourably treated than if the litigation had been brought against businesses of a more conventional type. The authorized agent must, therefore, possess sufficient powers to enable proceedings to be instituted against him and must in that capacity be able to bind the Lloyd's underwriters concerned.

3. Unless the competent authorities of the home Member State have reason to doubt the adequacy of the administrative structure or the financial situation of the insurance undertaking, taking into account the activities envisaged, they shall within three months of receipt of the information referred to in paragraph 2 communicate that information to the competent authorities of the Member State of the branch and shall inform the undertaking concerned accordingly.

The home Member State competent authorities shall also communicate the amount of the guarantee fund and solvency margin of the insurance undertaking, calculated in accordance with Articles 16 and 17.

Where the competent authorities of the home Member State refuse to communicate the information referred to in paragraph 2 to the competent authorities of the Member State of the branch they shall give reasons for their refusal to the undertaking concerned within three months of receipt of all the information. That refusal or failure to reply shall be subject to a right to apply to the courts in the home Member State.

4. Before the branch of an insurance undertaking commences its activities, the competent authorities of the Member State of the branch shall, within two months of receiving the information mentioned in paragraph 3, if necessary indicate the conditions under which, in the interest of the general good, those activities must be carried on in the Member State of establishment.

5. On receipt of a communication from the competent authorities of the Member State of the branch, or, if no communication is received from them, on expiry of the period provided for in paragraph 4, the branch may be established and commence its activities.

6. In the event of a change in any of the particulars communicated pursuant to paragraph 2(b), (c) or (d), an insurance undertaking shall give written notice of the change to the competent authorities of the home Member State and Member State of the branch at least one month before making the change so as to enable the competent authorities of the home Member State to take a decision pursuant to paragraph 3 and the competent authorities of the Member State of the branch to take a decision on the change pursuant to paragraph 4."

Article 29

Article 11 of the First Directive is deleted.

Article 30

Article 14 of the Second Directive is replaced by the following:

"Article 14

Any undertaking intending to carry on business for the first time by way of freedom to provide services shall first inform the competent authorities of the home Member State, indicating the Member State or Member States within the territory of which it contemplates providing services and the nature of the risks it proposes to cover".

Article 31

Article 16 of the Second Directive is replaced by the following:

"Article 16

1. The competent authorities of the home Member State shall communicate, within one month of the notification provided for in Article 14, to the Member State or Member States within the territory of which the undertaking intends to carry on business under conditions of freedom to provide services:

   (a) the amount of the solvency margin calculated in accordance with Articles 16 and 17 of the First Directive;

   (b) the classes which the undertaking has been authorized to transact;

   (c) the nature of the risks which the undertaking proposes to cover in the Member State of provision of services.

At the same time, they shall inform the undertaking concerned accordingly.

2. Where the competent authorities of the home Member State do not communicate the information referred to in paragraph 1 within the period laid down, they shall give the reasons for their refusal to the undertaking within that same period. The refusal shall be subject to a right to apply to the courts in the home Member State.

3. The undertaking may commence activities as from the certified date on which it is informed of the communication provided for in the first subparagraph of paragraph 1."

Article 32

Article 17 of the Second Directive is replaced by the following:

"Article 17

Any amendment which the undertaking intends to make to the information referred to in Article 14 shall be subject to the procedure provided for in Articles 14 and 16."

Article 33

Articles 12(2) and (3), 13 and 15 of the Second Directive are deleted.

Article 34

1. Article 18(1) of the Second Directive is deleted.

2. Member States of the branch or of provision of services shall not lay down provisions requiring the prior approval of general and special policy conditions, scales of premiums and forms and other printed documents which an undertaking intends to use. For the purpose of verifying compliance with their national provisions, they shall require of any undertaking wishing to carry on insurance business in their territory, whether by way of freedom of establishment or by way of freedom to provide services, only non-systematic notification of the conditions it proposes to use, although this requirement may not constitute a prior condition for an undertaking to carry on its activities.

3. Member States of the branch or of provision of services shall not retain or introduce prior notification or approval of proposed increases in premium rates except as part of a general price control system.

Article 35

1. Article 19 of the Second Directive is deleted.

2. Any undertaking carrying on business under conditions of freedom of establishment or freedom to provide services shall submit to the

competent authorities of the Member State of the branch and/or of the Member State of provision of services all documents requested of it for the purposes of this Article in so far as undertakings whose head office is in those Member States are also obliged to do so.

3. If the competent authorities of a Member State establish that an undertaking with a branch or providing services in its territory is not complying with the legal provisions applicable to it in that State, they shall require the undertaking concerned to put an end to the irregular situation.

4. If the undertaking in question fails to take the necessary steps, the competent authorities of the Member State concerned shall inform the competent authorities of the home Member State accordingly. The latter authorities shall, at the earliest opportunity, take all appropriate measures to ensure that the undertaking concerned puts an end to that irregular situation. The nature of those measures shall be communicated to the competent authorities of the Member State concerned.

5. If, despite the measures taken by the home Member State or because such measures prove inadequate or are lacking in that State, the undertaking persists in violating the legal provisions in force in the Member State concerned, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or punish further irregularities, including, in so far as is strictly necessary, the prevention of the further conclusion of new insurance contracts by that undertaking in its territory. Member States shall ensure that in their territories it is possible to serve the legal documents necessary for these measures on insurance undertakings.

6. The foregoing provisions shall not affect the power of the Member States concerned to take - in the case of urgency - appropriate measures to prevent or punish irregularities committed within their territories. This shall include the possibility of preventing insurance undertakings from continuing to conclude new insurance contracts within their territories.

7. If the undertaking which has committed the irregularity has an establishment or possesses property in the Member State concerned, the competent authorities of the latter may, in accordance with national legislation, apply the administrative penalties prescribed for that offence by way of enforcement against that establishment or property.

8. Any measure adopted pursuant to paragraphs 4 to 7 involving penalties or restrictions on the carrying-on of insurance business must be properly justified and communicated to the undertaking concerned. Provision shall be made for a right to apply in respect of any such measure to the courts in the Member State in which it was adopted.

9. Every two years the Commission shall submit to the Council a report summarizing the number and type of cases in which, in each Member State, decisions refusing authorization have been communicated under Article 28 or measures have been taken under paragraph 4. Member States shall cooperate with the Commission by providing it with the information required for the report.

Article 36

Nothing in this Directive shall prevent insurance undertakings with head offices in other Member States from advertising their services through all available means of communication in the Member State or Member State of provision of services, subject to any rules governing the form and content of such advertising adopted in the interest of the general good.

Article 37

1. Article 20 of the Second Directive is deleted.

2. In the event of an insurance undertaking being wound up, commitments arising from contracts underwritten through a branch or by way of freedom to provide services shall be met in the same way as those arising from that undertaking's other insurance contracts, without distinction of nationality as far as the insured and the beneficiaries are concerned.

Article 38

1. Article 21 of the Second Directive is deleted.

2. Where insurance is offered by way of freedom of establishment or by way of freedom to provide services, the policy-holder shall, before any commitment is entered into, be informed of the Member State in which the head office or branch with which the contract is to be concluded is established.

Any document issued to the policy-holder must contain the information referred to in the first subparagraph.

The requirements in the first two subparagraphs shall not apply to the risks referred to in Article 5(d) of the First Directive.

2. The contract or other document granting cover, together with the insurance proposal where it is binding upon the proposer, must specify the address of the head office, or, where appropriate, of the branch of the insurance undertaking which grants the cover.

Article 39

1. Article 22 of the Second Directive is deleted.

2. Every insurance undertaking shall inform the supervisory authority of its home Member State, separately in respect of operations effected by way of freedom of establishment and in respect of those effected by way of freedom to provide services, of the amount of the premiums, without deduction of reinsurance, receivable by Member State and by group of classes.

The groups of classes are defined as follows:

- accident and sickness (1 and 2);

- motor (3, 7 and 10, the figures for class 10 being given separately);

- fire and other damage to property (8 and 9);

- aviation, marine and transport (4, 5, 6, 7, 11 and 12);

- general liability (13);

- credit and suretyship (14 and 15);

- other classes (16, 17 and 18).

The supervisory authority of the home Member State shall forward this information to the supervisory authorities of each of the Member States concerned which so request.

Article 40

1. Article 24 of the Second Directive is deleted.

2. Nothing in this Directive shall prejudice the right of the Member States to require undertakings operating in their territories by way of freedom of establishment or by way of freedom to provide services to join and participate in any scheme designed to guarantee the payment of insurance claims to policy-holders and injured third parties, on the same terms as undertakings authorized there.

Article 41

1. Article 25 of the Second Directive is deleted.

2. Without prejudice to any subsequent harmonization, every insurance contract shall be subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State in which the risk is situated within the meaning of Article 2(d) of the Second Directive, and also, with regard to Spain, to the surcharges legally established in favour of the Spanish "Consorcio de Compensación de Seguros" for the fulfilment of its functions relating to the compensation of losses arising from extraordinary events occurring in that Member State.

   Notwithstanding the first indent of Article 2(d) of the Second Directive, and for the purposes of this paragraph, moveable property contained in a building situated in the territory of a Member State, except for goods in commercial transit, shall be a risk situated in that Member State, even if the building and its contents are not covered by the same insurance policy.

   The law applicable to the contract pursuant to Article 7 of the Second Directive shall not affect the fiscal arrangements applicable.

   Each Member State shall, subject to future harmonization, apply to those undertakings which carry on business in its territory, its own national provisions for measures to ensure the collection of indirect taxes and parafiscal charges due under the first subparagraph.

TITLE V

Final provisions

Article 42

1. The technical adjustments to be made to the First and Second Directives and to this Directive in the following areas shall be adopted in accordance with the procedure laid down in Article ... of Council Directive ... (Committee on Insurance):

   - amendments to the list set out in the Annex to the Directive, or adaptation of the terminology used in that list to take account of developments on insurance markets;

   - clarification of the items constituting the solvency margin listed in Article 16(1) of the First Directive to take account of the creation of new financial instruments;

   - alteration of the minimum guarantee fund provided for in Article 17(2) of the First Directive to take account of developments in the economic and financial field;

   - amendments to the list of admissible assets which may cover the technical provisions, set out in Article 18 of this Directive, and of the rules on the spreading of investments laid down in Article 19 of this Directive;

- changes to the exceptions to the matching principle, provided for in Annex 1 to the Second Directive, to take account of the development of new currency hedging instruments;

- clarification of the definitions in order to ensure uniform application of the First and Second Directives and of this Directive throughout the Community;

- consolidation of the First and Second Directives, and this Directive.

Article 43

1. Branches which have commenced their activities, in accordance with the provisions in force in their Member State of establishment, before the entry into force of the provisions adopted in implementation of this Directive shall be presumed to have been subject to the procedure laid down in Article 10(1) to (5) of the First Directive. They shall be governed, from the date of that entry into force, by Articles 15, 19(a), 20 and 22 of the First Directive and by Article 35 of this Directive.

2. Articles 30 and 31 shall not affect rights acquired by insurance undertakings transacting business by way of freedom to provide services before the entry into force of the provisions adopted in implementation of this Directive.

Article 43a

Notwithstanding any provision to the contrary, a Member State in which contracts covering the risks mentioned in class 2 of part A of the Annex to the first Directive may be concluded in place of cover under a statutory social security system, may apply to such contracts the regime laid down for compulsory insurances in Article 8 of the Second Directive, as amended by Article 27 of this Directive.

Article 43b

Member States shall ensure that decisions taken in respect of an insurance undertaking in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive may be subject to the right to apply to the Courts.

Article 44

Member States shall amend their national provisions to comply with this Directive not later than ... and shall forthwith inform the Commission thereof.

The provisions amended in accordance with the first subparagraph shall be applied not later than ...

These provisions shall make express reference to this Directive.

Article 45

Upon notification of this Directive, Member States shall communicate to the Commission the texts of the main laws, regulations or administrative provisions which they adopt in the field covered by this Directive.

Article 46

This Directive is addressed to the Member States.

Done at Brussels, For the Council

FICHE FINANCIERE

La présente proposition de troisième directive sur l'assurance directe autre que l'assurance sur la vie n'entraîne pas de coût pour le budget de la Communuaté.

COMPETITIVENESS AND EMPLOYMENT IMPACT STATEMENT

1. What is the main reason for introducing the measure?

The completion of the internal market in the direct non-life insurance sector in accordance with the principles laid down in the White Paper in order to create a true single market in this important financial service sector.

The first and second Directives have already gone a long way towards realizing this fundamental Community objective. The second Directive established the necessary conditions to enable Community insurance undertakings to cover under the freedom of services regime those risks located within the Community which do not involve a need for special protection ("large risks"). At the same time insurance buyers insuring these large risks can have access to the widest possible Community insurance market to find the cover most suited to their requirements. However, some coordination work at Community level is necessary to arrive at the same regime for insurance contracts entered into by other smaller consumer policyholders ("mass risks").

The regime that is proposed is based on that already used for the creation of the internal market for banking and investment services (Second Banking Directive and proposal for a Directive on investment services): introduction of a single licence system and of the concept of home-country control. When this new proposal for a Directive is adopted all direct non-life insurance will be subject to a single regime which will enable insurance undertakings to offer their products throughout the Community and insurance buyers to have access to the widest possible market in order to find the most appropriate product.

II. Features of the businesses in question - in particular:

Are many SME concerned?

yes, particularly as insurance buyers who will benefit from the completion of the single market;

Are there any regional concentrations?

eligible for regional aids in the Member States?

eligible under the European Regional Development Fund?

The measures put forward in the proposal for a Directive are unlikely to affect unevenly the Community's regions.

III. What direct obligations does this measure impose on businesses?

In line with the policy followed for other financial services this proposal for a Directive introduces in the direct non-life insurance sector the system of the single administrative authorization valid for all the undertaking's activities throughout the Community and of prudential supervision by the authorities of the Member State of origin (home country control).

This development will simplify considerably the present situation as regards the taking-up and pursuit of these activities, currently characterized by a multiplicity of authorizations and of controls according to the manner in which business is conducted.

Home country control regarding the obligation to hold sufficient technical reserves and their valuation and representation by matching assets localized in the Community will replace the multiplicity of regimes that exist at present by coordinated rules. The solidity of insurance undertakings will be strengthened and guaranteed and the protection of insurance policyholders will be reinforced as a result.

IV. What indirect obligations are local authorities likely to impose on businesses?

Within the limits laid down in the proposal for a Directive, the Member States' authorities may adopt rules to ensure that the measures they apply under the Directive are complied with. In particular, the Member State in which the insured risk is situated may require that its own legal rules designed to protect the public good are respected on its territory.

V. Are there any special measures in respect of SMEs?

The first Directive 73/239/EEC already set out a number of special arrangements for small or medium-sized insurance undertakings. Article 3 states that the Directive does not apply to certain small and medium-sized mutual undertakings. In addition the Directive allows the required minimum guarantee fund to be reduced by one quarter in the case of mutuals or mutual-type undertakings.

The proposal for a third Directive does not amend this treatment granted to certain insurance undertakings.

As regards insurance policyholders which can be considered as mass risks the proposal for a third Directive provides for rules to guarantee that they are afforded the necessary and adequate protection when they enter into insurance contracts.

VI. What is the likely effect on:

the competitiveness of businesses?

Community insurance undertakings will be subject to coordinated rules governing the taking-up and pursuit of the business of direct non-life insurance. As a result of the creation of a single market they will be able to offer their insurance products anywhere in the Community to any policyholder. An increase in competition between insurance undertakings can thus be anticipated.

SME buyers of insurance will benefit from a wider product range from which they will be able to choose the product most suited to their requirements in terms of cover and price proposed.

employment?

there will be no direct effect.

VII. Have both sides of industry been consulted?

opinions have been obtained from the European Insurance Committee (CEA), BEUC and from BIPAR, the International Bureau of Producers of Insurance and Reinsurance.

In general the comments have been positive (unions, employers).
The CEA supports the approach taken in this proposal for a Directive, notably as regards the coordination of technical reserves and of the rules concerning the representation, valuation and localization of the asse'e representing those reserves.

ISSN 0254-1475

COM(90) 348 final

DOCUMENTS

EN 18

Catalogue number : CB-CO-90-427-EN-C
ISBN 92-77-63831-1

PRICE	1 - 30 pages: 3.50 ECU	per additional 10 pages: 1.25 ECU

Office for Official Publications of the European Communities
L-2985 Luxembourg