

COMMISSION OF THE EUROPEAN COMMUNITIES

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PROPOSAL FOR A COUNCIL DIRECTIVE AMENDING, PARTICULARLY AS REGARDS
MOTOR VEHICLE LIABILITY INSURANCE, FIRST COUNCIL DIRECTIVE
73/239/EEC, AND SECOND COUNCIL DIRECTIVE 88/357/EEC 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

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. Introduction and background

The primary object of this proposal for a directive is to include third party motor insurance (also referred to as motor vehicle liability insurance) within the framework established by the Second Council Directive 88/357/EEC 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/EEC¹. Directive 88/357/EEC, hereinafter referred to as the Second Directive, was adopted on 22 June 1988 and will enter into force in July 1990.

When the Second Directive was adopted the Commission recorded its intention to present a specific new proposal, covering freedom to provide services in third party motor insurance, as soon as possible.

This same proposal is also envisaged in the programme annexed to the White Paper on completing the internal market. The timetable, as amended, envisages that the Commission will adopt and present to the Council a proposal on freedom to provide services in motor liability insurance by the end of 1988.

The Second Directive amended certain provisions of the First Non-Life Insurance Establishment Directive (Directive 73/239/EEC - the "First Directive")².

The present proposal for a directive, which covers not only compulsory third party motor insurance but also optional motor insurance (essentially damage to or theft of the insured's own vehicle), amends certain provisions of both the First and Second Directives.

¹ OJ No L 172, 4.7.1988, p. 1.

² OJ No L 228, 16.8.1973, p. 3.

The content of the Second Directive itself reflects closely the judgments handed down by the Court of Justice in four insurance cases on 4 December 1986. Those judgments ended a long period of conflict concerning the whole question of freedom to provide insurance services.

Briefly, the Court had said the following :

- a requirement of establishment, in the context of the free cross-frontier provision of services, is the very negation of this Treaty-given freedom and is therefore contrary to Community law ;
- but insurance is in general a sensitive area, where the need for protection of the policyholder or insured person is such that, in the present state of Community law (that is, until we have further, more detailed, harmonization), the State where insurance services are being provided (that is, where the risk to be covered is situated) may impose on the insurer a requirement to be authorized ; this authorization may be linked to a requirement to respect a large part of that State's supervisory rules, including those relating to technical reserves and the general and special policy conditions ;
- but again, this need for protection is not the same in every case and there may be cases where it is not needed at all ; where this is so, there is no need for the authorization requirement and all that goes with it.

Following the Court's judgments work resumed on the proposal for a non-life insurance freedom of services directive. The result is the Second Directive of 22 June 1988.

The Second Directive provides for two separate regimes. For "large risks", regulation is carried out for the most part by the State where the insurer is established ("home country

control"), whereas for "mass risks" (the smaller policyholders) the State where the risk is situated may, subject to certain conditions, apply the authorization requirement and associated rather burdensome controls which the Court had envisaged.

From 1 January 1993 onwards, "large risks" will be :

- transport risks (without thresholds) ;
credit and suretyship risks (without thresholds, but subject to the conditions that the policyholder is carrying on a commercial activity) ;
- fire and general property damage, general civil liability and pecuniary loss, to the extent that the policyholder or the group of companies of which the policyholder is a member fulfils two out of the three following conditions :
 - 250 employees
 - turnover of 12.8 million ECU
 - balance sheet total of 6.4 million ECU.

During a transitional period running from the summer of 1990 to 31 December 1992 these thresholds will be roughly doubled. Furthermore, a much more extended transition, with various progressive stages, is provided for Spain, Portugal, Greece and Ireland.

Although the Court judgments of 4 December 1986 did not concern compulsory insurances the Second Directive does itself cover such insurances under the special provisions laid down in its Article 8. In particular it is stipulated in Article 8(2) that "When a Member State imposes an obligation to take out insurance, the contract shall not satisfy that obligation unless it is in accordance with the specific provisions relating to that insurance laid down by that Member State." The present proposal for a directive does not seek to amend the above provision.

The specific insurance class No 10, covering third party motor insurance, is however excluded from the scope of Title III of the Second Directive (provisions peculiar to the freedom to provide services) except for that part of class 10 relating solely to carrier's liability.

In view of the fact that in Italy motorboats are treated in the same way as motor vehicles as regards compulsory liability insurance, class 12 (marine liability) was also excluded from the scope of Title III of the Second Directive as regards Italian motorboat risks.

The inclusion of Class 10 in the freedom of services provisions of the Second Directive will also remove the need for the Italian motorboat exclusion.

The reason for the exclusion of third party motor insurance, which is compulsory in all the Member States by virtue of the first motor insurance Directive 72/166/EEC³, is that there are special considerations peculiar to this insurance class, justifying a separate proposal.

These relate :

1. to the operation of the national guarantee funds ;
2. to the operation of the green card system, and in particular of the Supplementary Agreement between the national motor insurers' bureaux ;
3. to the need to safeguard the interests of accident victims in their position as third party claimants.

This proposal for a directive deals with the above points, the solutions adopted being described in detail in the comments on the individual articles.

³ OJ No L 228, 16.8.1973, p. 3.

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Insurance class 3, covering loss of or damage to motor and other land vehicles, is covered by Title III of the Second Directive, but the definition of large risks set out in Article 5 of the Second Directive makes no reference to class 3. The present proposal remedies this.

Most importantly, the proposal brings third party motor insurance (class 10) within the scope of Title III of the Second Directive and at the same time draws the distinction between large risks and mass risks in this class.

Finally and in general terms, this Directive aims, in conformity with Articles 100 A (3) of the Treaty, at ensuring a high level of protection for consumers in the field of motor insurance.

II. Comments on the individual articles

Article 1

This is a definitions article. The definitions used are not new but are taken over from the Second Directive (of 1988) and from the first and second motor insurance Directives (of 1973 and 1984 respectively).

Article 2

The purpose of this article is to provide for the possibility of treating risks in both class 10 (motor vehicle liability) and class 3 (damage to or loss of land motor vehicles or other land vehicles) as large risks within the meaning of the definition inserted in Article 5 of the First Directive by Article 5 of the Second Directive.

To that end, Article 2 of the new proposal adds classes 3 and 10 to point (d) (iii) in Article 5 of the First Directive.

The quantitative criteria for distinguishing large risks laid down therein and the transitional provisions provided for in Article 27 of the Second Directive will thus apply to classes 3 and 10.

Article 3

By deleting the second and third indents in the second paragraph of Article 12(2) of the Second Directive, this article cancels the exclusion of class 10 (motor vehicle liability) and class 12 (as regards Italian motorboat risks) from the freedom to provide services provisions laid down in Title III of the Second Directive.

It will thus be possible for such risks to be covered by way of the provision of services subject to the relevant provisions of the Second Directive.

Article 4

This article substitutes a new text for that of Article 22(1) of the Second Directive, the said provision being concerned with the keeping of gross premium statistics for operations effected by way of provision of services broken down by the Member State where such services are provided and by group of insurance classes.

The new text introduced by Article 4 of the proposal includes a new group of classes entitled motor insurance, comprising classes 3 (damage to or loss of motor vehicles), 7 (goods in transit) and 10 (motor vehicle liability). Class 3 is accordingly deleted from the aviation, marine and transport group of classes.

Article 5

This article adds a new Article 12a to Title III of the Second Directive dealing with the special problems peculiar to compulsory third party motor insurance :

1. The operation of the Supplementary Green Card Agreement whereby, on the basis of Directive 72/166/EEC, green card checks were abolished.

The system instituted by this Agreement operates as follows. All motor liability insurers in each Member State belong to and finance the national bureau. This bureau gives a guarantee to other participating bureaux that it will accept financial liability for accidents caused in the territories covered by those other bureaux by a vehicle based in its own territory whether or not that vehicle was properly insured. The bureau of the country of the accident can thus compensate the victims of such an accident, confident that it will be reimbursed by the bureau of origin of the vehicle, and the authorities of the visited country have no need to check the insurance of visiting vehicles.

The system is best illustrated by a simplified example. The bureau in State A accepts responsibility for all vehicles bearing a normal State A registration plate. If a State A registered vehicle causes an accident in State B State B's bureau will compensate the victims knowing that it will be reimbursed by State A's bureau. The State B authorities can treat the State A plate as sufficient evidence of insurance.

Unless special arrangements were made, freedom of services in third party motor insurance would break this link between the country of the number plate and the insurer's membership of the bureau of that same country. State A's bureau, in the above example, would no longer be able to give an unconditional guarantee for all State A plates, having no certainty that any given vehicle was insured by one of its own member insurers, and having no financial commitment from a non-member insurer. Without the guarantee the bureaux of

other Member States would hesitate to compensate victims and the authorities would be obliged to reintroduce green card checks.

As it stated in its report to Parliament on the Jansen Petition⁴ (document PE. 78.221 of 7 April 1982), the Commission believes that an insurer covering by way of freedom to provide services the liability of a vehicle bearing the registration plate of a Member State can properly be obliged to join and participate in the financing of the bureau of that State.

The new Article 12a of the Second Directive therefore stipulates in its paragraph 2 that the Member State of provision of services shall require the "services" undertaking to become a member of and participate in the financing of its national motor insurers' bureau.

Clearly, and in line with existing practice, the membership contribution should be based on the premium income from this insurance class in the State in question or on the number of vehicles insured.

The new provision makes it clear that no other payment or contribution may be required. An annual membership fee or minimum contribution unrelated to the volume of business done in the Member State of provision of services would be an unacceptable obstacle to an undertaking covering a small number of risks or with a small premium income in this class.

⁴ Report on freedom to provide services in respect of motor vehicle insurance against civil liability.

2. Operation of the national guarantee funds

The Commission similarly concluded in doc. PE 78.221, referred to above, that it was reasonable for a Member State to require an insurer covering locally-registered vehicles by way of freedom to provide services to join and contribute to the financing of the local guarantee fund.

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Member States are required by Directive 84/5/EEC to have a guarantee fund to ensure that accident victims are not left without compensation in the event that the party responsible for an accident is uninsured or unidentified. The fund is financed in all Member States at least in part by a levy on motor insurance premiums.

It seems equitable to maintain the link between the country of the registration plate and the insurer's membership of that country's guarantee fund, the fund being the expression of the solidarity of a Member State's motoring population.

The new Article 12a introduced by Article 5 of the new proposal therefore requires, again in its paragraph 2, that the Member State of provision of services shall require the "services" undertaking to become a member of and participate in the financing of its national guarantee fund. Again, however, its financial contribution must be limited to a payment calculated, as for established members, solely on the basis of its premium income from the motor vehicle liability class in the State in question or the number of risks in that class covered there.

3. The safeguarding of the interests of third party victims

The reason for making third party motor insurance compulsory is to protect accident victims and their dependents by ensuring that compensation for their loss or injury will be financed at least up to a minimum level fixed by national law.

⁵ OJ No L 8, 11.1.1984, p. 17.

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In a freedom of service context the motorist may decide that it is in his interests to take out his liability insurance with a foreign-based insurer. The victim of an accident caused by that motorist, however, has no choice in the matter.

The victim of a road accident in Member State A caused by a vehicle registered in that same Member State will not be pleased to find that the liability insurer is far away in Member State B and that he has to pursue his claim with him there without being able to deal with somebody on the spot. (The situation does not arise if the vehicle causing the accident is itself registered in Member State B because then, under existing arrangements within the green card system, Member State A's motor insurers' bureaux will assume responsibility for claims settlement.)

In order to avoid placing third party claimants in a worse situation when dealing with a "services" insurer rather than with an "established" insurer the new Article 12a of the Second Directive added by Article 5 of the new proposal therefore allows the Member State of provision of services to require the undertaking providing services in this insurance class to nominate a claims settlement representative resident or established in that State and possessing the necessary powers to bind the undertaking.

It is further specified that the representative, who may be an employee of the insurance undertaking, must limit his activities on behalf of that undertaking to the handling and settlement of claims.

Article 5 lastly stipulates that the representative is not to be considered as an establishment of the insurance undertaking and that his nomination will not constitute the opening of a branch or agency of that undertaking.

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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 Commission¹,

In cooperation with the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Whereas in order to develop the internal insurance market 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/EEC⁴, hereinafter referred to as the "second Directive", made it easier for insurance undertakings having their head office in the Community to provide services in the Member States, thus making it possible for policyholders to have recourse not only to insurers established in their own country, but also to insurers which have their head office in the Community and are established in other Member States;

Whereas the scope of the provisions of the second Directive specifically concerning freedom to provide services excluded certain risks, the application to which of the said provisions was rendered inappropriate at that stage by the specific rules adopted by the Member States' authorities, owing to the nature and social implications of such provisions; whereas those exclusions were to be reexamined after the second Directive had been in force for a certain period;

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OJ No L 172, 4.7.1988, p.1.

Whereas one of the exclusions concerned motor vehicle liability insurance, other than carrier's liability ;

Whereas, however, when the second Directive was adopted the Commission gave an undertaking to present to the Council as soon as possible a proposal concerning freedom to provide services in the area of insurance against civil liability in respect of the use of motor vehicles (other than carrier's liability) ;

Whereas, subject to the provisions of the second Directive concerning compulsory insurance, it is appropriate to provide for the possibility of large risk treatment, within the meaning of Article 5 of the said Directive, for the said insurance class of motor vehicle liability ;

Whereas large risk treatment should also be envisaged for insurance covering damage to or loss of land motor vehicles and land vehicles other than motor vehicles ;

Whereas to ensure the continued proper functioning of the green card system and the agreements between the national motor insurers' bureaux it is appropriate to require insurance undertakings providing motor liability insurance in a Member State by way of provision of services to join and participate in the financing of the bureau of that Member State ;

Whereas it is also appropriate to require insurance undertakings providing motor liability insurance in a Member State by way of provision of services to join and participate in the financing of the guarantee fund set up in that Member State to pay compensation to the victims of uninsured or unidentified vehicles ;

Whereas in order to ensure that third party claimants are not prejudiced or put to greater inconvenience where the motor liability insurer is operating by way of the provision of services rather than by way of an establishment Member States shall require that insurance undertakings intending to provide services in this

insurance class shall nominate a claims settlement representative to be responsible for the processing and settlement of third party claims,

HAS ADOPTED THIS DIRECTIVE :

Article 1

For the purposes of this Directive :

- (a) "first Directive" means :
Directive 73/239/EEC⁵ ;
- (b) "second Directive" means :
Directive 88/357/EEC ;
- (c) "vehicle" means :
a vehicle as defined in Article 1(1) of Directive 72/166/EEC⁶ ;
- (d) "bureau" means :
a national insurers' bureau as defined in Article 1(3) of
Directive 72/166/EEC ;
- (e) "guarantee fund" means :
the body referred to in Article 1(4) of Directive 84/5/EEC⁷ .

Article 2

In Article 5(d) of the first Directive the phrase "risks classified under classes 8, 9, 13 and 16 of point A of the Annex" in the first paragraph of point (iii) is hereby replaced by the following :

"risks classified under classes 3, 8, 9, 10, 13 and 16 of point A of the Annex".

Article 3

The second and third indents in the second paragraph of Article 12(2) of the second Directive are hereby deleted.

⁵ OJ No L 228, 16.8.1973, p. 3.

⁶ OJ No L 103, 2.5.1972, p. 1.

⁷ OJ No L 8, 11.1.1984, p. 17.

Article 4

Article 22(1) of the second Directive is hereby replaced by the following :

" 1. Every establishment must inform its supervisory authority in respect of operations effected by way of provision of services of the amount of the premiums, without deduction of reinsurance, receivable by Member State and by group of classes. The groups of classes shall be defined as follows :

- accident and sickness (1 and 2),
- motor insurance (3, 7 and 10),
- 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 each Member State shall forward this information to the supervisory authorities of each of the Member States of provision of services."

Article 5

The following Article 12a is hereby inserted in Title III of the second Directive :

"Article 12a

1. This Article shall apply where an undertaking, through an establishment situated in a Member State, covers a risk classified under No 10 of point A of the Annex to the first Directive which is situated in another Member State.

2. The Member State of provision of services shall require the undertaking to become a member of and participate in the financing of its national bureau and its national guarantee fund.

The undertaking shall not, however, be required to make any payment or contribution to the bureau or fund of the Member State of provision of services in respect of risks covered by way of provision of services other than one calculated, on the same basis as for undertakings covering risks in class No 10 through an establishment in that State, by reference to its premium income from that class in that State or the number of risks in that class covered there.

3. The Member State of provision of services shall require the undertaking to ensure that persons pursuing claims arising out of events occurring in its territory are not placed in a less favourable situation as a result of the fact that the undertaking is covering a risk in class 10 by way of provision of services rather than through an establishment in that State.

In particular, the Member State of provision of services may require the undertaking to nominate a representative resident or established in its territory who shall be responsible for the handling of claims and possess sufficient powers to bind the undertaking in relation to third parties and to represent it in relations with the courts of that Member State.

The representative, who may be an employee of the undertaking, shall limit his activities on behalf of that undertaking to the handling and settlement of such claims.

Notwithstanding Article 3, the nomination of the representative shall not in itself constitute the opening of a branch or agency for the purpose of Article 6(2)(d) of the first Directive and the representative shall not be an establishment within the meaning of Article 2(c) of this Directive."

Article 6

Member States shall amend their national provisions to comply with this Directive within 8 months of the date of its notification and shall forthwith inform the Commission thereof.

The provisions amended in accordance with this Article shall be applied within 8 months of the date of the notification of the Directive.

Article 7

This Directive is addressed to the Member States.

Done at

For the Council
The President

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This Directive was notified to Member States on