Expert Group on European Insurance Contract Law

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DISCUSSION PAPER 2[1]: DIFFERENCES IN INSURANCE CONTRACT LAWS AND THE EXISTING EU LEGAL FRAMEWORK

1. THE EXISTING EU LEGAL FRAMEWORK

1.1 SUBSTANTIVE INSURANCE CONTRACT LAW AT EU LEVEL

Some rules of general contract law in EU legislation also apply to insurance contracts. They stem from different directives and cover selected areas, such as pre-contractual information, right of withdrawal, certain aspects relating to the form and conclusion of the contract and unfair contract terms control.

Specific insurance contract law provisions are set out in the European legislation in the area of insurance. It also addresses the above mentioned areas, but with a specific focus on insurance contracts. In addition, some insurance Directives cover a few additional areas, which are specifically relevant to insurance contracts, such as the content of the policy the required cover, and contractual information duties of the insurance undertaking.

1.1.1 RULES OF GENERAL CONTRACT LAW

The largest number of relevant rules concern B2C contracts. As a matter of principle, consumer protection rules are mandatory, as they aim to ensure an appropriate level of protection for consumers as the weaker party to a contract. In particular, the Distance Marketing of Financial Services Directive[2] and the Unfair Contract Terms Directive[3] contain general rules of consumer contract law, which also apply to insurance contracts. They cover certain aspects of pre-contractual information, right of withdrawal, form of the contract and unfair terms control.

[1] This paper does not reflect the view of the Commission as an institution.

[2] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC, Official Journal L 271 , 09.10.2002, p. 0016 – 0024 (Distance Marketing of Financial Services Directive).

[3] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal L 95, 21.4.1993, p. 29–34 (Unfair Contract Terms Directive).

The number of general contract law rules in the area of B2B contracts is more limited. The Directive on Electronic Commerce[4] applies both to B2C and B2B contracts. It addresses the contract law aspects relating to the conclusion of contracts. It ensures that the Member States' legal systems recognise the validity of contracts concluded by electronic means and provides for a set pre-contractual information requirements and a confirmation of the concluded contract. The Late Payments Directive[5] applies to B2B contracts only and contains certain provisions on unfair contract terms and practices relating to late payments.

1.1.2 SPECIFIC RULES OF INSURANCE CONTRACT LAW

Most of the specific rules in the area of insurance contract law cover both B2C and B2B contracts, even though not always to the same extent. While the rules on B2C contracts are usually of a mandatory nature, their applicability to B2B contracts is more nuanced. Many of the insurance contract law provisions may be derogated from in B2B contracts, or establish additional exceptions and options.[6] The relevant rules from the key insurance legislation are described below.

Solvency II[7] recasts and repeals thirteen existing directives[8] representing three generations of insurance legislation. Solvency II codifies a wide set of rules on insurance, including both general rules and specific rules for certain classes of insurance. Amongst a variety of other rules concerning the taking-up and pursuit of insurance business, supervision, right of establishment and provision of services, Solvency II also contains provisions on contract law. It codifies the contract law provisions in Section 4 on "Conditions of insurance, contracts and scales of premiums". Articles 183-186 contain general rules of insurance contract law, covering both non-life and life insurance contracts. These rules tackle mainly the areas of pre-contractual information, cooling-off periods, conclusion of the contract (partially), some requirements on the content of the policy and unfair contract terms control. Some more detailed rules under Solvency II exist for several specific classes of insurance, in particular legal

[4] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market Official Journal L 178 , 17.07.2000, p. 0001 – 0016, (Directive on Electronic Commerce).

[5] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), Official Journal L 048, 23.02.2011, p.001-0010, also applies to the marketing of insurance. It complements the sector-specific insurance legislation with general rules banning misleading and aggressive commercial practices (Late Payments Directive).

[6] See for instance Article 183(2), Article 184 (1) third sentence and Article 186 (2) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance, Official Journal J 335, 17.12.2009, p. 1–155.

[7] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance, Official Journal J 335, 17.12.2009, p. 1–155, (Solvency II).

[8] Article 310 of Solvency II repeals Directives 64/225/EEC, 73/239/EEC, 73/240/EEC, 76/580/EEC, 78/473/EEC, 84/641/EEC, 87/344/EEC, 88/357/EEC, 92/49/EEC, 98/78/EC, 2001/17/EC, 2002/83/EC and 2005/68/EC.

expenses insurance, health insurance and insurance against accidents at work. These rules have been taken over from previous directives dedicated specifically to these classes of insurance.

The area of third party motor liability insurance is covered partially by Solvency II, but also by the specific Motor Insurance Directive[9]. The latter Directive contains a few additional specific rules on the cover and content of the insurance policy.

The recast proposal for an Insurance Mediation Directive (IMD II) is relevant to the extent that it contains certain rules on the provision of pre-contractual information, disclosures and advice, which also have a relevance to the conclusion of insurance contracts.

1.2 HARMONISED CONFLICT OF LAWS RULES AT UNION LEVEL

The Rome I Regulation (Rome I)[10] on the law applicable to contractual obligations contains specific rules on insurance contracts. The existence of these specific rules is justified by the need to ensure an adequate level of protection for policy holders and by the particular nature of insurance contracts.

The scope of Article 7 of Rome I covers thus contracts of insurance for large risks, whether or not situated in a Member State, as well as mass risks which are located in a Member State of the EU. Mass risks which are not located in a Member State fall under the general rules of Rome I, i.e. Article 3, Article 4 and - for consumer contracts - Article 6.

The Rome I rules for insurance contracts can be illustrated as a gradation of three levels of protection. Respectively the freedom of choice of laws in cross-border transactions in insurance contracts varies at each level.

- First, the most far-reaching freedom of contract exists for insurance contracts for **large risks.** Large risks, as defined in the EU legislation,[11] are mostly relevant for B2B contracts, as they usually relate to large industrial and transport business operations. Pursuant to Article 7(2) of Rome I insurance contracts for large risks can be governed by the laws, chosen by the parties on the basis of the freedom of choice of law enshrined in Article 3 of Rome I.

[9] Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, Official Journal L 263/11, 7.10.2009, p. 0011 – 0031, (Motor Insurance Directive).

[10] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Official Journal L 177/6 of 4.7.2008, p. 0006 – 0016 (Rome I).

[11] Rome I refers to the definition of large risks in the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance, last amended by Directive 2005/68/EEC of the European Parliament and the of Council, Article 5(d), which has now been repealed by Solvency II. The concept of "large risk" is defined in Article 13(27) of Solvency II.

It is assumed that the policy holders insuring large risks are not in need of specific protection, as they have sufficient bargaining power, capacity and resources to negotiate the terms of the contract. Thus, the freedom of choice of applicable law ensured by Rome I for this type of contracts is the most extensive. When no choice is explicitly made, Rome I provides for the applicability of the law of the country of habitual residence of the insurer. While this provision ensures legal certainty for both parties, it favours more the insurer, as the providers are likely to be most familiar and comfortable with the law of the country where they operate.[12]

- Second, contracts which do not qualify as large risks, and are often referred to as **mass risks, are regulated more extensively under Article 7 (3) of Rome I**. Mass risks are covered to the extent that they are located in the EU. Both B2C and B2B contracts for different classes of insurance may fall within this category if they do not qualify as large risks.

While the choice of laws for mass risks is possible, it is limited to only several options, which aim to ensure protection of the policy holders. The main options are linked to the location of the risk or the policy holder: the Member State where the risk is situated at the time of conclusion of the contract or the law of the country where the policy holder has his habitual residence (or nationality, in case of life insurance). What is common is that the options of choice do not depend on the preferences of the insurer, but on the situation of the user. To the extent that the law applicable has not been chosen by the parties in accordance with the choice of law rules for mass risks such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. Thus, in respect of mass risks insurers wishing to insure customers residing or risks located in other countries, would need to deal with the contract laws of those countries.

This regime affords a higher level of protection to the policy holders. It recognises that customers insuring smaller risks are unlikely to have the resources to deal with foreign laws. Such customers are more likely to be familiar with the laws of the country where they reside or the risk is located.

- Third, the most limited degree of choice exists in the case of **mandatory insurance contracts**, namely when Member States impose an obligation to take out insurance. This limitation follows from a derogation from the general regime for insurance contracts (both for large and mass risks), set out in Article 7(4).

[12] Nevertheless, a flexibility arrangement is made by allowing the possibility to apply the law of another country with which the contract is manifestly more closely connected.

First, the insurance contract must comply with the specific provisions in the national law on mandatory insurance contracts. In this case the insurance contract may still be drafted on the basis of another law, e.g. the law where the risk is situated. However, in addition, it should comply with and if necessary be adapted to the mandatory requirements of the country imposing the obligation. Thus, insurance providers would have to analyse and ensure compliance with the law of the Member State imposing the mandatory insurance.

Second, Article 7(4)(b) allows an option to the Member State which enables them to derogate from Article 7(2) and (3) and impose the law of the Member State imposing an obligation to take out insurance as applicable law in respect of the mandatory insurance contract. Thus, insurance providers may have to re-draft the policy on the basis of another national law. This would potentially require an even broader knowledge of the national contract law of the country whose law applies.

Thus, the Rome I rules on mandatory insurance ensure the highest degree of protection in the case of mandatory insurance. This regime takes account not only of the policy holder's interest, but also of overriding public policy reasons which underpin the decision to impose a mandatory insurance cover in the first place. In order to safeguard these interests, all requirements set by the Member State imposing the obligation should be respected.

QUESTIONS ON SECTION I:

- With respect to large risks:

1. Do existing differences in national insurance contract laws affect the supply of insurance products for large risks?

2. Do insurers make use of the possibility to choose the applicable law on the basis of Article 7(2) Rome I? If so, which laws are most frequently chosen for large risks? Have there been any specific problems in this area?

3. Does the applicable legal framework affect the decision to start or expand the supply of insurance for large risks on a cross-border basis and if so, how? Does it impact on the choice of cross-border activity in the form of cross-border service provision or establishment?

- **With respect to mass risks:**

4. Do existing differences in national insurance contract laws affect the supply of insurance

products for mass risks?

5. Do insurers make use of the possibility under Article 7(3) Rome I to choose the law applicable to the contract? Which laws are most frequently chosen for mass risks? What is the rationale for the choice?

6. Does the limitation of the possibility to choose the applicable law create obstacles to the cross-border supply of mass risk insurance? How are these potential obstacles dealt with? Does this entail additional costs and time and if so, could you quantify these costs?

7. Does the applicable legal framework affect the decision to start or expand the supply of insurance for mass risk on a cross-border basis and if so, how? Does it impact on the choice of cross-border activity in the form of cross-border service provision or establishment?

8. Are contracts adapted to the requirements of each Member State where insurers operate? If so, could you quantify the time and resources needed for such adaptations?

- **With respect to mandatory insurance:**

9. Do existing differences in national insurance contract laws affect the supply of mandatory insurance products?

10. Does the limitation of the possibility to choose the applicable law create obstacles to the cross-border supply of mandatory risk insurance? How are these potential obstacles dealt with? Does this entail additional costs and time and if so, could you quantify these costs?

11. Does the applicable legal framework have an impact on the decision to start or expand cross-border activity in mandatory insurance and if so, how? Does it impact on the choice of cross-border activity in the form of cross-border service provision of services or establishment?

12. Are contracts adapted to the requirements of each Member State where insurers operate? If so, could you quantify the time and resources needed for such adaptations?

- **General question:**

13. Is the cross-border activity easier, the same or more complex in the case of large risks, mass risks or mandatory insurance? Please explain why.

2. INSURANCE CONTRACT LAWS AT NATIONAL LEVEL

The national insurance contract laws have converged to a large extent in the areas where harmonisation measures have been adopted at European level. However, the approximation of national laws in these areas has not resulted in uniform rules in all cases. This is largely due to the fact that relevant rules of European law represent a mix of provisions based on the principles of minimum and full harmonisation. For instance, the relevant directives in the area of general contract law include mainly minimum harmonisation provisions, but also some fully harmonised rules. Many of the specific rules in the area of insurance contract law stem from earlier insurance directives, which were largely based on the principles of minimum harmonisation. The national legislation and jurisprudence implementing three generations of EU directives, developed over course of decades, has been preserved by taking over most provisions as they had been previously formulated into Solvency II. As Member States had the freedom to adopt additional provisions or a higher level of protection, the national laws evolved differently in the areas harmonised at a minimum level.

On the other hand, a number of areas of insurance contract law have not been harmonised at all and are entirely regulated at a national level. Thus, Member State's rules in these areas differ, as they have developed independently. They include some key areas for insurance contracts, for instance: the pre-contractual disclosure duty of the applicant, aggravation of risk, reduction of risk, consequences of non-payment, adaptations clauses concerning the premiums, retroactive and preliminary cover, duration of the contract and prescription. In these areas it is likely that Member States' laws differ even to a greater extent.

In order to examine whether differences in insurance contract laws hinder cross border trade of insurance products, several areas of difference are listed below. The following comparative descriptions are necessarily superficial and only constitute the basis for discussion. In any case it is clear that the mere statement of a difference does not necessarily mean that this difference poses a problem and deters insurers from offering their products cross-border or makes it more difficult for them. It would therefore be necessary to assess which differences might be a problem or even an obstacle.

2.1. MANDATORY NATURE

Generally a large part of the rules on insurance contract law and general insurance contract law is mandatory or at least semi-mandatory to the benefit of the consumers. However, there are differences in Member States to which extent those rules are mandatory. In some Member States the

laws leave more room to derogate from the rules than in others. Some Member States leave the regulation of most contractual issues to the parties as they stress the freedom of contract principle and provide only a few (semi-)mandatory rules to ensure some basic protection of the policy holder, whereas other law systems foresee comprehensive, for the bigger part mandatory insurance contract related provisions. In these Member States the law stipulates that either all the provisions are mandatory unless otherwise stated or the provisions are default rules unless otherwise stated.

Concerning insurances for businesses there are less mandatory rules.

2.2. OFFER AND ACCEPTANCE

Rules differ on offer and acceptance. Most countries regard the applicant as the offeror and the insurer as offeree. In other Member States the offer comes from the insurer and the insured accepts it. Rules diverge on what happens if the insurer does not react within a certain period of time after the reception of the offer. In some Member States the insurer is obliged to pay damages, in others silence is presumed to be an acceptance. Again in others there are no such rules.

National contract laws also differ as to whether and when the offeror is bound by the offer. Whereas in some laws the offer is regarded as binding other Member States deny such legal effect unless it is explicitly stated. Consequently, the revocation is allowed without problems in the latter case, but not in the first case.

2.3. COOLING-OFF/WITHDRAWAL PERIOD

In order to protect them against hasty decisions consumers are allowed to withdraw from their insurance contracts under certain conditions. For insurance products which were sold at a distance[13] the rules are fully harmonised. If a life insurance was not sold at distance, policy holders have the possibility to cancel the contract within a period between 14 and 30 days after the conclusion of the contract[14]. The range of withdrawal periods in Member States varies between 14 and 30 days.

In all other cases - if the insurance contract was not concluded as a distance contract and it does not concern life insurance - rules on withdrawal are not harmonised. Some Member States foresee a

[13] Article 6 (1) 1 Distance Marketing of Financial Services Directive 2002/65/EC: If a non-life insurance was sold at a distance the consumer may withdraw within 14 days after the conclusion of the contract or after receiving the information. An exception is provided in Article 6 (2) for travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration. This period is extended to 30 calendar days in distance contracts relating to life insurance and personal pension operations.

[14] Article 35 Life Insurance Directive, Article 186 Solvency II

withdrawal right also in these cases, others do not. In some Member States the withdrawal period only starts to run if the consumer is informed about his right to withdraw. Some Member States even grant a right to withdraw in case of provisional cover, others do not.

2.4. FORM

Offer and acceptance are in general not subject to a legal form requirement. European legislation simply states concerning the life insurance policy holders that the information shall be provided in a clear and accurate manner in writing in an official language of the Member State of the commitment[15]. However, in some Member States a written insurance policy has to be issued in order for the insurance contract to become valid. In other Member States the insurer is obliged to submit such a policy to the insured person for evidence purposes. Is such a policy missing, the contract is nevertheless valid.

Furthermore it seems that some Member States' laws require a specific wording for the policy. As a consequence insurers cannot use one standard form if they want to offer their product on a pan-European basis.

2.5. PRE-CONTRACTUAL AND CONTRACTUAL INFORMATION DUTIES OF THE INSURER

In several directives pre-contractual information duties are regulated[16]. The insurance directives require that the insurer provides the applicant with certain information before entering into contract. Although these (occasionally overlapping) provisions are already very detailed and the Commission has recently proposed several complementary information requirements, they are minimum harmonisation provisions. Therefore Member States are allowed to set even stricter standards and to introduce additional information requirements. In addition some of those additional pre-contractual information requirements are unique to individual Member States - at least in the area of unit-linked life insurance products. It seems that Member States have sought to be more prescriptive in order to, for example, better guarantee consumer protection[17].

But the information requirements are not restricted to the pre-contractual phase. Also during the contractual insurance undertakings may have to provide information. At least in the area of life

[15] Art.185 (6) Solvency II

[16] E. g. Article 3 Distance Marketing of Financial Services Directive, Article 36 and Annex Life Insurance Directive, Article 43 Non-life Insurance Directive (Third non-life Directive (which has not been repealed by the Solvency II Directive)), Article 5, 6 Directive on Electronic Commerce, Article 183 -184 (for non-life insurance products) and Article 185 (life insurance contracts) of the Solvency II Directive,

[17] CEIOPS Report on National Measures regarding Disclosure Requirements and Professional Requirements for Unit-Linked Insurance Products, which are additional to the Minimum Requirements of the CLD and IMD, 2 July 2009, p. 5

insurance products there are minimum requirements[18]. It seems that in almost all the Member States the information duties have a broader scope than EU-legislation[19].

2.6. OBLIGATION TO ADVISE THE INSURED PERSON

At EU-level there are no obligations for insurance companies to advise the applicant.[20] Member States have adopted different regulatory approaches on the insurer's duty to advise the insured person on which type of insurance contracts would best fit the purposes. Some Member States foresee such a duty, others do not. In other countries this duty depends on certain circumstances, e. g. if the insurer had expressly stated a special need for insurance.

2.7. UNFAIRNESS CONTROL OF STANDARD TERMS AND CONDITIONS OF INSURANCE CONTRACTS

Because of the characteristics of the product "insurance" - the contract is the product – it seems that insurers avoid as far as possible a reference to default rules and provide standard terms and conditions in all Member States.

The unfairness control of standard terms and conditions is only in some areas regulated by directives[21] which furthermore only provide minimum harmonisation.

Member States have adopted different approaches. Some countries' laws provide a rather extensive unfairness control of standard terms and conditions of insurance contracts which allow courts to a large extent to annul unfair clauses. Many other jurisdictions are more reluctant in repealing terms and conditions in insurance contract: In many cases they do not consider standard contract terms as being unfair. Furthermore, in some Member States terms and conditions in B2B contracts are subject to unfairness control which could even be rather extensive, whereas other Member States do not see such a need for protecting businesses against unfair terms.

2.8. THE INSURED PERSON'S DUTY TO DISCLOSE

[18] Article 185 (5) Solvency II

[19] S. CEIOPS Report, p. 6

[20] The proposal for a recast of the Insurance Mediation Directive does not introduce such an obligation. It only determines what the intermediary has to respect if he advises his client.

[21] For B2C contracts the Unfair Contract Terms Directive and Article15 sub-para 2 Distance Marketing of Financial Services Directive apply. In B2B contracts Article 7 Late Payments Directive applies to unfair terms or practices with regard to the date or period of payment, the rate or interest for late payment or the compensation of recovery costs.

To assess the risk insurers very often need information about the circumstances surrounding the risk in order to decide whether they are ready to accept the contract. Since normally only the person requiring insurance disposes of the information, full and honest disclosure is crucial. Nevertheless legal systems of Member States approach this issue completely different. Although Member States seem to recognise a duty of the insured person to disclose information, the extent of these disclosure obligations varies from Member State to Member State.

Some Member States foresee a spontaneous duty to disclose any material information by the insured person, although there seem to be tendencies to abandon or at least to soften this duty by putting the burden of identifying the relevance of the information which needs to be disclosed on the insurer. In some Member States the duty of spontaneous disclosure is limited to information of evident importance for the assessment of the risk. In any case, the insured person does not have to disclose facts which are either known or presumed to be known by the insurer. In the laws of other Member States the duty to disclose depends on a questionnaire put forward by the insurer.

Some Member States allow that the insurance undertakings demand that the insured person undergoes medical examination in order to assess the insurance risk, determine the right to a benefit and the amount of this benefit. Other Member States do not allow this.

The legal consequences in case of violation of these disclosure duties also diverge: In some Member States the insured person loses all insurance cover even if the non-disclosure was innocent or had no relation to the insured event. Other Member States limit the sanction of losing insurance cover to cases of negligence or gross negligence. Furthermore they require a causal link between the non-disclosure and the insured event. Finally other Member States reduce the insured money proportionally and distinguish between the situation before and after the event. They differentiate also between innocent, negligent and fraudulent applicants.

In case of fraudulent breach the contract can be avoided. Whereas many Member States exclude the right of avoidance for mistake as in their view the rules on disclosure are in this respect *leges speciales*, others allow nevertheless avoidance for mistake.

2.9. AGGRAVATION OF THE RISK

In the course of the insurance contract the insured risk might aggravate. The insurer would possibly not have concluded the insurance contract at these conditions if he had known the relevant circumstances. An obligation to disclose the risk aggravation enables the insurer to adapt the contract to the changed circumstances.

In many Member States the insured person is obliged by law to disclose to the insurer the aggravation of the risk even after the conclusion of the contract. In this case he has to reveal the facts occurred at a later stage if he had had to disclose them at the time of the conclusion of the contract. However, there are also Member States which do not know such an obligation. The underlying reasoning for this approach is that it is up to the insurer to protect itself against any aggravation of risk by contractual terms.

The legal consequences of the breach of this duty are similar to the breach of the duty to disclose at the time of the conclusion of the contract.

2.10. REDUCTION OF THE RISK

Some Member States' laws grant a right to request a proportionate reduction of the premium for the remaining contract period if the risk has been reduced materially. Others restrict the right of the insured person to request reduction of the premium only in respect of risks which were assessed as special aggravating risks at the time of the conclusion of the contract and therefore justified an additional premium. Other countries' laws deny such a right.

According to some countries' laws the insured person is entitled to terminate the contract if he cannot get an agreement on the reduction of the premium.

2.11. CONSEQUENCES OF NON-PAYMENT OF THE PREMIUM

Many Member States do not subject the late or non-payment of insurance premium to the general rules on late payment, but foresee special rules. In many Member States the insurance cover only starts at the moment when the (first or single) premium has been paid. In some Member States this is stipulated by the law, in other Member States contractual clauses which have the same effect are allowed. However, many Member States establish some form of protection for the insured person before he loses his insurance cover. Some require a warning of the legal consequences of non-payment before the consequences realise. Other Member States' laws allow a "period of grace" for the actual payment by the insured person. If he pays in this period he gets insurance cover even in the period before the payment. However, even some of those Member States without such a period of grace require that the fact of the late payment has its origin in a fault.

In case of late payment of subsequent premiums in most Member States insurance cover is suspended. Normally the loss of insurance cover is linked to further conditions (such as notification of the consequences).

2.12. ADAPTION CLAUSES CONCERNING THE PREMIUMS

If the parties conclude an insurance contract of a long period the relevant factors might change, e. g. because of inflation. In this case the question is whether the insurer is entitled to adapt the premium accordingly. There are Member States where the insurer has to notify an increase of the premiums 3 months in advance. Other Member States' laws do not provide a special rule: They apply only the rules on unfair terms which do not exclude contract clauses which allow adjusting the price in principle. However, an increase of the premiums without the insured person's right to terminate the contract as well as an excessive increase is not allowed.

2.13. RETROACTIVE AND PRELIMINARY COVER

Although many Member States' laws allow policies providing for retroactive cover, some prohibit them as a general rule and allow only in specific areas exceptions or they do not allow retroactive cover at all.

2.14. DURATION OF INSURANCE CONTRACTS

Many Member State laws have built-in safeguards against excessively long insurance contract periods. They either limit the insurance period to a certain period of time or allow termination after a certain period. However, the period that is commonly fixed diverges from Member State to Member State.

In some Member States insurance contracts are concluded for a long term. In these countries insurers normally agree that they may adapt or terminate the contract if the risk changes. In order to protect the insured persons these countries allow the insured persons to terminate the contract after a certain period of time, which might vary considerably.

In other Member States' laws insurance contracts are normally concluded for a limited period of time, often one year. In some countries this is even required by the law. In these Member States the contract is prolonged unless the parties have agreed otherwise. However, as the insured persons might be interested in having a long term insurance contract in case of non-life products many of those Member States allow prolongation clauses.

2.15. TERMINATION

Parties normally want to be able to terminate insurance contracts of unlimited duration. Many Member States' laws foresee a right to terminate those contracts. Laws of other Member States do

not grant such a right. In this case the parties have to agree on the possibility to terminate insurance contracts of unlimited duration.

Member States' laws diverge also considerably as far as the periods of termination are concerned. In some Member States insurance contracts can be terminated without respecting any specific period. In other Member States a period of one, two, or even six months have to be respected.

The insurer might wish to reassess the risk in the case of the occurrence of an insured event and might wish to terminate the contract at least at the conditions which were valid until then. In many Member States the insurer is entitled to terminate the insurance contract after the occurrence of an insured event. However, in some Member States a clause providing termination of the contract after the insured event has occurred is regarded as unfair. Some Member States impose restrictions to the insurer's right to terminate the contract in this case. This concerns especially policies of personal insurance. In any case the insurer has to pay for the insured event. Termination is only possible for the future.

Furthermore national laws grant the right of termination in a number of other cases such as non-payment of premium, misinformation about the risk, death or insolvency of the policyholders. However, the national laws diverge as to which conditions have to be fulfilled for termination.

If the contract is terminated before the expiration of the term of insurance the question is what happens to the premiums. In some Member States the premium is only due pro rata tempore. In other Member States the whole premium remains payable, independently of who terminates.

In some countries the notice of termination has to respect certain form requirements. In other Member States there are no such form requirements.

2.16. NOTICE OF INSURED EVENT AND DUTY TO COOPERATE

The obligation to give notice of an insured event to the insurer on risk is generally recognised. The duty to give notice of the insured event is not limited to the policyholder. Under certain circumstances it may be incumbent upon third parties.

However, Member States' laws differ as to the time period allowed for notice. Some Member States require a notice as soon as possible or without undue delay. Other Member States clearly establish that the notice should be given within a fixed period which may vary between 24 hours and 8 days after the occurrence of the insured risk. In most Member States the details for the duty to notify can be agreed in the contract.

According to most Member States' laws the insurer is entitled to damages if the insured person has violated this duty and the insurer has consequently suffered a loss. Many Member States' laws limit contract clauses which provide for a release of the insurer's duty to perform in general, but restrict them to cases where the breach of the duty to give notice was objectively suited to seriously harm the interests of the insurer. Others release the insurer of his duties only in case of intentional or grossly negligent breaches of this duty.

Many Member States laws foresee a duty of the insured person to cooperate and especially to provide insurers with all relevant information and documents. In addition some countries require that the notice of the insured event has also to contain enough information to enable the insurer to investigate the damage, in some even evidence is required.

The sanctions in case of breach of this duty to cooperate are in some Member States similar to those in case of failure to notify the insured event.

2.17. PRESCRIPTION

In order to guarantee legal certainty rights can no longer be invoked when a certain period of time has passed. This concerns mainly the right of the insured person to require the insurer's performance.

In this context it has to be borne in mind that that the rights of performance of the insured persons are based on facts which the insurer normally may only check for in a limited time period. Therefore the prescription periods are rather short and range normally between one and three years in Member States.

In case of life insurances often this problem does not occur so that longer prescription periods apply which diverge also.

Concerning suspension of prescription and rules of renewal of prescription different rules apply.

QUESTIONS ON SECTION II:

1. Are there other differences in national insurance contract laws which are not listed and which also might create an obstacle to cross-border trade of insurance products?
2. Which of these differences in national insurance contract law create an obstacle and deter therefore insurance companies from offering their products cross-border or make it more difficult for them? Could you give concrete examples or explain the concrete nature of such

obstacles? If such obstacles entail additional costs, could you quantify them?

3. If there are such obstacles, do they impact on the choice of cross-border activity in the form of cross-border service or establishment?

4. Are B2B and B2C insurance contracts affected equally or are there differences? Could you give examples where they are affected equally and where they are not?

5. Does it make a difference whether the relevant provisions are mandatory or not? Does it make a difference whether large or mass risks are insured?

6. If these differences create an obstacle does this apply to all kinds of insurance categories or are certain kinds of insurance categories more affected than others? If the latter is the case, which ones? Could you give us concrete examples?

7. Which of these differences do in your opinion not influence cross-border trade?

Annex: Existing EU Legal Framework in the Area of Insurance Contract Law

Table 1: Existing EU Legal Framework for B2C insurance contracts

EU legislation in the area of insurance contract law	**Solvency II Directive**	**Motor Insurance Directive**	**Directive on Electronic Commerce**	**Distance Marketing of Financial Services Directive**	**Unfair Contract Terms Directive**
Pre-contractual information duty of the insurer	YES	NO	YES	YES	NO
Conclusion of contract	NO	NO	YES	NO	NO
Cooling-off/withdrawal period	YES (partially: only life)	NO	NO	YES	NO
Form	YES (partially: only legal expenses)	NO	YES (partially)	YES (partially)	NO
Content of contract/policy and required cover	YES (partially non-life; legal expenses.)	YES	NO	NO	NO
Contractual information duty of the insurer	YES (partially: only life)	NO	NO	NO	NO
Obligation to advise the insured person	NO	NO	NO	NO	NO
Unfair contract terms	YES (partially: only non-life)	NO	NO	YES (partially)	YES
The applicant's duty to disclose	NO	NO	NO	NO	NO
Aggravation of the risk	NO	NO	NO	NO	NO

Reduction of the risk	NO	NO	NO	NO	NO
Consequences of non-payment of the premium	NO	NO	NO	NO	NO
Adaption clauses concerning the premiums	NO	NO	NO	NO	YES
Retroactive and preliminary cover	NO	NO	NO	NO	NO
Duration of contract	NO	NO	NO	NO	NO
Termination	NO	NO	NO	NO	NO
Notice of insured event and insured's duty to cooperate	NO	NO	NO	NO	NO
Prescription	NO	NO	NO	NO	NO

Table 2: Existing EU Legal framework for B2B insurance contracts				
Contract law area	**Solvency II Directive**	**Motor Insurance Directive**	**Directive on Electronic Commerce**	**Late Payments Directive**
Pre-contractual information duty of the insurer	YES (partially)	NO	YES	NO
Conclusion of contract	NO	NO	YES (partially: Article 9 para. 1, max. harmonisation	NO
Cooling-off/withdrawal period	YES (partially: only life)	NO	NO	NO
Form	YES (partially: only legal expenses)	NO	YES (partially: Article9, 10 para. 3, min. harmonisation)	NO
Content of contract/policy and required cover	YES (partially on content: non-life, legal expenses)	YES (partially on required cover)	NO	NO
Contractual information duty of the insurer	YES (partially: only life)	NO	NO	NO
Obligation to advise the insured person	NO	NO	NO	NO
Unfair contract terms	YES (partially: only non-life)	NO	NO	YES (partially)
The applicant's duty to disclose	NO	NO	NO	NO
Aggravation of the risk	NO	NO	NO	NO
Reduction of the risk	NO	NO	NO	NO
Consequences of non-payment of the premium	NO	NO	NO	YES (partially)

Adaption clauses concerning the premiums	NO	NO	NO	NO
Retroactive and preliminary cover	NO	NO	NO	NO
Duration of contract	NO	NO	NO	NO
Termination	NO	NO	NO	NO
Notice of insured event and insured's duty to cooperate	NO	NO	NO	NO
Prescription	NO	NO	NO	NO